

Bills Committee on Companies Bill

**Comparison Table for Part 19 –
Investigations and Enquiries**

PURPOSE

To facilitate clause-by-clause examination of Part 19 (Investigations and Enquiries) of the Companies Bill (“CB”), this paper provides a comparison table, at Annex, on the provisions in Part 19 and relevant provisions in the Companies Ordinance (Cap. 32) (“CO”) or the company laws of comparable jurisdictions, where applicable. Transitional and saving arrangements for Part 19 are set out in sections 134 to 140 of Schedule 10.

PART 19 OF THE CB

2. The major proposals and policy issues concerning Part 19 are set out in Annex B to LegCo Paper No. CB(1)2439/10-11(06), which was considered by Members at the meeting of 28 June 2011. Members did not raise any specific issues for the Administration to follow up.

ADVICE SOUGHT

3. Members are invited to note the contents of the paper and provide their views.

**Financial Services and the Treasury Bureau
Companies Registry
3 February 2012**

Comparison Table for Part 19

This table includes provisions in the third (i.e. “Derivation”) column that indicate the corresponding or original section in the Companies Ordinance (CO) of the clause concerned in the Companies Bill (CB), where applicable. Where reference has been made to the relevant statutory provision(s) in other jurisdictions, such provision(s) is/ are also cited in that column. We use the term “Existing law” to mean that the clause is restating an existing section in the CO as set out in the “Derivation” column without change in substance, although the actual wording may be different from the existing section as improvements are made to the drafting language and style.

A list of abbreviations used is as follows –

BO: Banking Ordinance (Cap 155)

CO: Companies Ordinance (Cap 32)

FRCO: Financial Reporting Council Ordinance (Cap 588)

SFO: Securities and Futures Ordinance (Cap 571)

UKCA 1985: United Kingdom Companies Act 1985

Clause	Contents	Derivation	Position in CO	Position in CB
Division 1: Preliminary				
826	Interpretation	CO s.145(5) c.f. s.1 in Part 1 of Schedule 1 to the SFO and s.2(1) of the FRCO	Under the CO, an agent of a company includes a banker, solicitor or auditor of the company.	Existing law, with the following modifications – (i) definitions of “authorized institution”, “books”, “document”, “information”, “officer” and “record” based on similar definitions in the SFO/ FRCO are added; and (ii) definitions of “associated body corporate”, “delegate” and “inspector” are added to improve drafting.

Clause	Contents	Derivation	Position in CO	Position in CB
Division 2: Investigation of Company's Affairs by Inspectors Division				
Subdivision 1: Preliminary				
827	Interpretation		No corresponding provision under the CO.	New provision is added to improve drafting.
Subdivision 2: Appointment by Financial Secretary of Inspectors to Investigate Company's Affairs				
828	Appointment of inspector on application by company or members	CO ss.142 and 143(1)(b)	<p>(i) In the CO, an application made by the members is governed by s.142 while an application made by the company through special resolution is governed by s.143(1)(b).</p> <p>(ii) The Financial Secretary (FS) is empowered to exercise discretion to appoint an inspector upon –</p> <p>(a) under s.142, an application by (I) 100 or more members of a company (i.e. a Hong Kong company¹) having a share capital; or (II) by members of a company having a share</p>	<p>Existing law, with the following modifications –</p> <p>(i) All scenarios of applications (i.e. by the members or by the company) to FS are now regrouped under one section.</p> <p>(ii) Apart from members of a Hong Kong company (see (ii)(a) under “Position of CO”), under the CB, members of a registered non-Hong Kong company may also apply to the FS for appointing an inspector if the relevant threshold for the number of members/issued shares is met.</p> <p>(iii) Under the CB a company may apply (by way of special resolution) to the FS. Company means a Hong Kong company or</p>

¹ Under section 2 of the CO, a “company” means a company formed and registered under the CO, i.e. a Hong Kong company.

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>capital holding not less than one-tenth of the shares issued; or (III) by one-tenth or more in number of members of a company not having a share capital; and</p> <p>(b) under s.143, an application by the company² (by way of special resolution). Company includes a non-Hong Kong company (whether registered or not).</p> <p>(iii) The application must be supported by such evidence as the FS may require for the purpose of showing that the applicants have good reason for requiring the investigation.</p> <p>(iv) The FS may, before appointing an inspector, require the applicant to give security for payment of the costs of the investigation.</p>	<p>a registered non-Hong Kong company (but excludes a company not registered in Hong Kong).</p> <p>(iv) It is expressly provided that appointment of an inspector would be guided by public interest.</p>

² The meaning of “company” is extended by section 146A to include bodies corporate incorporated outside of Hong Kong currently or previously having a place of business in Hong Kong.

Clause	Contents	Derivation	Position in CO	Position in CB
829	Appointment of inspector on Court's or Financial Secretary's initiative	CO ss.143(1)(a), (c) and (2) and 146A	<p>(i) The FS is bound to appoint an inspector where the Court declares that the company's affairs ought to be investigated by an inspector appointed by the FS.</p> <p>(ii) The FS may appoint an inspector where it appears to him that –</p> <p>(a) the business of the company is conducted with intent to defraud creditors, for any fraudulent/ unlawful purpose; or in a manner oppressive to its members;</p> <p>(b) there is fraud, misfeasance or other misconduct towards the company or its members; or</p> <p>(c) the members are not given all reasonable information.</p> <p>(iii) The powers of the FS are exercisable notwithstanding that the company is in the course of voluntary winding-up.</p>	<p>Existing law, with the following modifications –</p> <p>(i) The word “oppressive” in s.143(1)(c)(i) is replaced by “unfairly prejudicial” to align with the wording in Part 14 (“<i>Remedies for Protection of Companies’ or Members’ Interests</i>”) of the CB.</p> <p>(ii) “Members not given all reasonable information” is no longer a ground for appointment of inspector as members will have right to inspect company records under Part 14.</p> <p>(iii) It is expressly provided that the appointment of an inspector will be guided by public interest.</p>
830	Notice of appointment	CO s.151	Upon the appointment of an inspector, the inspector shall forward to the	Existing law, with a new requirement that the notice of appointment should be delivered to the

Clause	Contents	Derivation	Position in CO	Position in CB
	as inspector to be delivered to Registrar		Registrar of Companies (the Registrar) a notice of such appointment.	Registrar “within a reasonable time after the appointment”.
Subdivision 3: Financial Secretary’s Powers to Give Directions to Inspectors				
831	General power of Financial Secretary to give directions regarding investigation	c.f. UKCA 1985 s.446A(1) and (4)	No corresponding provision in the CO.	New provision to provide a general power to the FS to give directions to an inspector.
832	Financial Secretary may give directions regarding subject matter of investigation etc.	c.f. UKCA 1985 s.446A(2), (3) and (5)	No corresponding provision in the CO.	New provision to provide specific powers to the FS to give directions on the terms or subject matter of the investigation, the matters to be considered, the steps to be taken and the content of the inspector’s report.
833	Financial Secretary may give	c.f. UKCA 1985 s.446B(1)	No corresponding provision in the CO.	New provision to provide specific powers to the FS to give directions to terminate or suspend an

Clause	Contents	Derivation	Position in CO	Position in CB
	directions to terminate or suspend investigation	and (2)		investigation.
Subdivision 4: Inspectors' Powers				
834	Inspector may require production of records and documents etc.	CO ss.145(1), (1A) and (2) and 150(b)	<p>(i) An inspector has power to require officers and agents of the company and other persons in possession of the relevant documents and information, to produce books and documents to him.</p> <p>(ii) The inspector may also require those persons to attend before him and give reasonable assistance to him. In addition, he may examine those persons on oath.</p>	<p>Existing law, with the following modifications –</p> <p>(i) The expression “books and documents” is replaced by “record or document” to align with similar provisions in the SFO/ FRCO.</p> <p>(ii) <u>Subclause (1)(b)</u>: a new power is added to require the preservation of records and documents.</p> <p>(iii) The inspector’s power under this clause is expressly extended to the company itself.</p> <p>(iv) Application to associated body corporate is moved to clause 837.</p>
		c.f. SFO s.183(1)(d) and FRCO s.28(1)(c)	No corresponding provision in the CO.	<u>Subclause (1)(d)</u> : an express power is added to require the answering of questions based on similar provisions in the SFO/ FRCO.
		c.f. SFO	The banker of a company, which is	<u>Subclause (3)</u> : a new provision based on similar

Clause	Contents	Derivation	Position in CO	Position in CB
		s.183(4) and FRCO s.28(5)	investigated by in inspector, is not required to disclose to the inspector any information about the banker's customers other than that company.	provisions in the SFO/ FRCO is added to require the inspector to give a certification of necessity if a requirement is to be imposed on a financial institution.
835	Inspector may require production of director's accounts	CO s.145B	The inspector has power to require a director to produce documents relating to his bank accounts connected with payments of emolument or particular transactions not shown in accounts (contrary to section 161 or 161B respectively) or other misconduct.	Existing law.
836	Provisions supplementary to sections 834 and 835: powers to require explanation etc.	c.f. SFO ss.179(2)(a) (i), and 183(1)(b), (2) and (3) c.f. FRCO ss.27(2)(a), and 28(2), (3) and (4)	Under the CO, there is only a general power to require reasonable assistance. See clause 834 above.	New provision. The inspector has an express power to make copies and record the details of the records or documents produced to him, to require a person to provide information or explanation in respect of the records or documents and to require the person to verify by statutory declaration any answer or explanation given to the inspector.
837	Inspector may exercise powers in relation to	CO s.144	The inspector may also investigate companies within the same group or under the same control.	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
	associated body corporate			
838	Delegation of powers by inspector	CO s.145A	The inspector may delegate in writing his powers to another person.	Existing law.
Subdivision 5: Resignation, Removal and Replacement of Inspectors				
839	Resignation of inspector	c.f. UKCA 1985 s.446C(1)	No corresponding provision in the CO.	New provision to provide that an inspector may resign by notice in writing to the FS.
840	Revocation of appointment of inspector by the Financial Secretary	c.f. UKCA 1985 s.446C(2)	No corresponding provision in the CO.	New provision to provide that the FS may revoke the appointment of an inspector by notice in writing to the inspector.
841	Appointment of replacement inspector	c.f. UKCA 1985 s.446D(1) and (2)	No corresponding provision in the CO.	New provision to provide that if an inspector dies or resigns, or an inspector's appointment is revoked, the FS may appoint another person to continue the investigation.
842	Former	c.f. UKCA	No corresponding provision in the CO.	New provision to provide that, where an

Clause	Contents	Derivation	Position in CO	Position in CB
	inspector must hand over documents etc.	1985 s.446E(1) to (4) and (6)		inspector resigns or has his appointment revoked or the investigation is terminated, the FS can direct him to hand over documents that he has obtained or generated or to provide any information that he acquired during the course of his investigation to the FS, the new inspector or another person specified by the FS.
Subdivision 6: Reports by Inspectors				
843	Interim report to be made by inspector etc.	CO s.146(1) and (4)		Existing provisions, with the following modifications –
c.f. UKCA 1985 s.446B(3)		(i) Under s.146(1), the inspector may, and if so directed by the FS, shall, make an interim report to the FS.	(i) <u>Subclause (2)</u> : it is expressly provided that if the investigation is terminated, the inspector need not prepare an interim report.	
c.f. cl.844 below (for alignment with provisions on final report made by inspector		(ii) No corresponding provision in the CO.	(ii) <u>Subclause (3)</u> : it is expressly provided that the interim report must be delivered to the FS within the time directed by the FS or if there is no such direction made, within a reasonable time. (iii) <u>Subclause (4)</u> : an inspector must, within a reasonable time after the delivery of an interim report to the FS, deliver to the Registrar a notice of that fact in the	

Clause	Contents	Derivation	Position in CO	Position in CB
		etc.) c.f. UKCA 1985 s.437(1A)	(iii) Under s.146(4), the inspector may provide to the FS information arising from the investigation only if it is shown that a criminal offence has been committed or civil proceedings ought to be instituted in the public interest.	specified form. (iv) <u>Subclause (5)(a)</u> : the inspector may provide to the FS any information arising from the investigation. (v) <u>Subclause (5)(b)</u> : the inspector must give the FS information as directed by the FS.
844	Final report to be made by inspector etc.	CO ss.146(1) and 151 c.f. UKCA 1985 s.446B(4) (in relation to sub-clause (2))	(i) Under s.146(1), the inspector shall, on the conclusion of the investigation, make a final report to the FS. It does not specify the time that the report must be delivered to the FS. (ii) Under s.151, an inspector must deliver to the Registrar a notice in the specified form after the delivery of a final report to the FS. It does not specify the time that the notice must be delivered to the Registrar.	Existing provisions, with the following modifications – (i) <u>Subclause (2)</u> : it is expressly provided that if the investigation is terminated, the inspector must still prepare the final report if (a) the FS directs him to do so; or (b) as ordered by the Court. (ii) <u>Subclause (3)</u> : it is expressly provided that the final report must be delivered to the FS within the time directed by the FS or if there is no such direction made, within a reasonable time. (iii) <u>Subclause (4)</u> : an inspector must, within a reasonable time after the delivery of a final report to the FS, deliver to the Registrar a notice of that fact in the specified form.

Clause	Contents	Derivation	Position in CO	Position in CB
845	Interim report or final report may cover affairs of associated body corporate	CO s.144	The inspector shall report on the affairs of companies within the same group or under the same control that he has investigated (please see clause 837) so far as he thinks the results of his investigation on them are relevant.	Existing law.
846	Inspector must send report to affected persons etc.	c.f. FRCO s.35(4)	No corresponding provision in the CO.	<p>(i) New provision to require an inspector, before sending a draft report to the FS, to send a copy of the draft report to any person who would be adversely affected on the publication or disclosure of the report and give the person an opportunity of being heard.</p> <p>(ii) <u>Subclause (2)</u>: it is expressly provided that the inspector may cause any passage in the report to be concealed and may require the person to keep the copy of the report confidential.</p>
847	Financial Secretary to file copies of inspector's report with	CO s.146(3)(a) (iv)	The FS shall, where the inspector is appointed in pursuance of an order of the Court, file a copy of the report in the Court.	Existing law, except that a new provision is added in subclause (2) so that the FS, before filing a copy of the report with the Court, may specify the period and manner in which access to the report is to be restricted.

Clause	Contents	Derivation	Position in CO	Position in CB
	Court			
848	Financial Secretary may send copies of inspector's report to applicants of investigation etc.	CO s.146(3)(a) (i) to (iii) c.f. UKCA 1985 437(3)(a) and (b) (in relation to subclause (1))	(i) The inspector must forward a copy of the report to the company under investigation. If the FS appoints an inspector because of an application made by the members, the FS must forward a copy of the report to the members. (ii) The FS may also send a copy of the report to the members or affected creditors.	Existing law, with the following modifications – (i) <u>Subclause (1)</u> : the FS has discretion as to whether to send a copy of the report to the company or persons as specified whereas under CO this was mandatory. The entities to which FS may send a copy of the report is widened to include auditors ((1)(b)(ii)), a person whose conduct is mentioned in the report ((1)(b)(iii)) and any person whose financial interests appear to be affected ((1)(b)(v)). (ii) <u>Subclause (2)</u> : it is expressly provided that the FS may cause any passage in the report to be concealed or require the person to keep the copy of the report confidential.
849	Publication of inspector's report	CO s.146(3)(b) and (c)	The FS may publish the whole or any part of the report and may deliver a copy of the published report (or part of the report) to the Registrar. The duty to deliver a copy to the Registrar is mandatory if the report has been published.	Existing law, with the following modifications – (i) it is clarified that the report should be delivered to the Companies Registry "as soon as practicable" after publication; and (ii) it is clarified that "publish" includes "distribute, make available and disseminate".

Clause	Contents	Derivation	Position in CO	Position in CB
850	Inspector's report to be evidence	CO s.149 c.f. FRCO ss.35(7) and 47(7)	The report is admissible in any legal proceedings only as evidence of the opinion of the inspector except in an application to disqualify a director where it is admissible as evidence of the facts stated therein.	Existing law, but modified such that the inspector's report shall be admissible as evidence of facts stated in the report in any civil proceedings.
Subdivision 7: Miscellaneous				
851	Offences for failing to comply with requirements under Subdivision 4 etc.	CO s.145 (3A) c.f. SFO ss.184(1) to (4), and 185(3)(b) c.f. FRCO s.31(1), (2), (3), (5), (6)(b), (8), (9), (10), (11), (12) and (13)	(i) Under the CO, criminal sanctions are imposed for non-compliance with a request made by the FS or an authorised person for the inspection of books and papers, but there is no such sanction for non-compliance with a request made by an inspector. (ii) Under s.145(3A), a person is not excused from "answering a question" on the ground of self-incrimination, but it is not clear whether a person would be excused from complying with a requirement other than "answering a question" on the ground of self-incrimination.	New provisions, based on similar provisions in the SFO/ FRCO – (i) new offences are added for failing to comply with a requirement imposed by an inspector. The levels of penalty of the offences depend on the <i>mens rea</i> , and will be lower if the offence is committed "without reasonable excuse" and higher if committed "with intent to defraud"; (ii) new offences are added for furnishing false information/ documents to an inspector. The levels of penalty of the offences depend on the <i>mens rea</i> , and will be lower if the offence is committed "knowingly or recklessly" and higher if committed "with intent to defraud"; (iii) a person is not excused from complying

Clause	Contents	Derivation	Position in CO	Position in CB
				<p>with “a requirement” imposed by the inspector only on the ground of self-incrimination; and</p> <p>(iv) no criminal prosecution should be instituted against a person for non-compliance if the inspector has already applied to the Court to punish the person for the same non-compliance.</p>
852	Inspector may apply to Court to inquire into failure to comply with requirements under Subdivision 4	CO s.145(3)	(i) The inspector may apply to the Court to punish a person who failed to comply with a requirement made by an inspector as if the person had been guilty of contempt of the Court.	<p>Existing law, with the following modifications based on similar provisions in the SFO/ FRCO –</p> <p>(i) The court may make an order against the person only if the person has failed to comply with the requirement “without reasonable excuse”. Persons knowingly involved in the failure may also be guilty of contempt.</p>
		c.f. SFO s.185(1)(a) and FRCO s.32(2)(a)	(ii) No corresponding provision in the CO.	(ii) <u>Subclause (2)(a)</u> : it is expressly provided that the Court may order the person to comply with the requirement imposed by the inspector.
		c.f. SFO s.185(3)(a) and FRCO	(iii) No corresponding provision in the CO.	(iii) <u>Subclause (3)</u> : no proceedings under this clause should be instituted to punish a person if criminal prosecution has already been instituted for the same

Clause	Contents	Derivation	Position in CO	Position in CB
		s.32(4)		non-compliance.
853	Use of incriminating evidence in proceedings	CO s.145(3A) and (3AA) c.f. SFO s.187 c.f. FRCO s.30	A person is not excused from answering a question put to him by an inspector on the ground that the answer might tend to incriminate him but, where such person claims, before answering the question, that the answer might tend to incriminate him, neither the question nor the answer shall be admissible in evidence against him in criminal proceedings (except proceedings for perjury or for an offence under Crimes Ordinance s.36).	Existing law, with the following modifications based on similar provisions in the SFO/ FRCO – (i) the inspector is required to remind the person of the limitation on the use of self-incriminating evidence obtained by the inspector’s requirements; and (ii) in addition to the answer given by a person, any information or explanation provided which is self-incriminating in nature will generally not be admissible in criminal proceedings against the person (with the exception of the offences in (iii)); (iii) the exception under which the self-incriminating answer, information or explanation can be admitted as evidence in criminal proceedings is widened to include offences prosecuted under clause 851(4), (5) or (6), and all offences under Part V of Crimes Ordinance.
854	Expenses of investigation	CO s.148(1), (2) and (4) c.f. UKCA 1985	(i) S.148(1) provides that the expenses of an investigation shall be paid by the Government. The following persons may also be liable for the	Existing law, with the following modifications – (i) The references to the proceedings under s.147(3) of the CO (civil proceedings brought by the FS in the name of the

Clause	Contents	Derivation	Position in CO	Position in CB
		s.439(1) (in relation to subclause (8))	<p>expenses as the Court or FS may direct –</p> <p>(a) a person convicted on a prosecution instituted as a result of the investigation;</p> <p>(b) a body corporate under s.147(3) (see clause 867 below);</p> <p>(c) a body corporate dealt with by the report; and</p> <p>(d) the applicants of the investigation.</p> <p>(ii) S.148(4) provides for indemnification and contribution of the investigation expenses by the above categories of persons but does not spell out the details.</p> <p>(iii) Under s.148(2), the inspector's report may also include recommendations as to the extent to which expenses of the inspection should be repaid by the applicants of the investigation and the body corporate dealt with by the report.</p>	<p>relevant body corporate due to public interest) are removed as the provisions will not be re-enacted in the CB (see clause 867 below).</p> <p>(ii) <u>Subclauses (3) and (4)</u>: it is expressly provided that the Court and the FS may direct that 2 or more persons liable to repay the expenses to the Government be jointly liable or jointly and severally liable for such expenses. The Court will also have an express power to order a person liable due to a criminal conviction to indemnify those who applied for the investigation and the body corporate dealt with by the inspector's report.</p> <p>(iii) <u>Subclause (5)</u>: the inspector's report may also include recommendations as to the extent to which expenses of the investigation should be repaid by a convicted person, in addition to recommendations relating to the applicants of the investigation and the body corporate dealt with by the report.</p> <p>(iv) <u>Subclause (7)</u>: the recommendation as to the extent of the expenses liable by a person should not be disclosed to the Court</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				<p>until the criminal proceedings against the person are completed. The recommendation does not bind the Court and the FS.</p> <p>(v) <u>Subclause (8)</u>: expenses of an investigation may include general staff costs and overhead expenses of the Government; it may also include insurance premium for an inspector as determined by the FS.</p> <p>(vi) <u>Subclause (9)</u>: any amount that is repayable to the Government shall be recoverable as a civil debt due to the Government.</p>
Division 3: Enquiry into Company's Affairs by Financial Secretary				
855	Interpretation		No corresponding provision in the CO.	New provision added to improve drafting.
856	Circumstances under which Financial Secretary may enquire into company's affairs	CO s.152A(1)	<p>(i) The FS may enquire into a company's affairs if application has been made to the FS to appoint an inspector or it appears to the FS that there is a good reason for doing so.</p> <p>(ii) In the CO, the criterion for a non Hong Kong company for</p>	<p>Existing law, except that –</p> <p>(i) the provision expressly states that the FS may enquire into a company's affairs if it is satisfied that doing so would assist the FS in deciding whether to appoint an inspector;</p> <p>(ii) the criterion for non Hong Kong</p>

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>appointing an inspector is “currently or previously having a place of business in Hong Kong” while the criterion for a non Hong Kong company for initiating an enquiry is “currently or previously carrying on business in Hong Kong.”</p>	<p>companies to be subject to an investigation and an enquiry is aligned to become “companies having a place of business in Hong Kong”.</p>
857	<p>Financial Secretary may require production of records and documents etc.</p>	<p>CO ss.152A(1) to (3) and 152F(2) c.f. SFO s.179(6) and FRCO s.25(4) (in relation to subclause (3))</p>	<p>(i) The FS may require a company and any person who appears to be in possession of the company’s books and papers to produce those documents and to provide an explanation of them.</p> <p>(ii) The FS shall not require the production by a bank of a document relating to the affairs of its customer unless either the FS is investigating the bank or the customer is a person on whom a requirement has been imposed by the FS.</p>	<p>Existing law, with the following modifications –</p> <p>(i) The expression “books and papers” is replaced by “record or document” to align with similar provisions in the SFO/ FRCO.</p> <p>(ii) <u>Subclause (3)</u>: the FS is required to give a certification of necessity if a requirement is to be imposed on a financial institution based on similar provision in the SFO/ FRCO.</p> <p>(iii) <u>Subclause (4)</u>: if a financial institution produces a record or document relating to the affairs of its customer, the FS may also require that customer to provide explanation in respect of the record or document.</p>
858	Financial	CO	The FS may authorize another person to	Existing law.

Clause	Contents	Derivation	Position in CO	Position in CB
	Secretary may delegate powers under section 857	s.152A(1)	exercise the powers to require the production of documents and the giving of explanation on the documents.	
859	Offences for failing to comply with requirements under section 857 etc.	CO ss.152A(4), (5) and 152E c.f. SFO s.179(13) to (16) c.f. FRCO s.31(1) to (4), (6)(a), (7), (9), (11), (12) and (13)	<p>(i) Under s.152A(4), there is one offence for failing to comply with a requirement imposed by the FS and the maximum penalty is a fine at Level 5 and imprisonment for 6 months.</p> <p>(ii) Under s.152E, there is one offence for furnishing false information / documents to the FS, which is based on “knowingly or recklessly”, and the maximum penalty is a fine of \$1.5 million and imprisonment for 3 years.</p> <p>(iii) Under s.152A(5), a person is not excused from giving “an explanation or statement” on the ground of self-incrimination, but it</p>	<p>Existing law, with the following modifications based on similar provisions in the SFO/ FRCO –</p> <p>(i) new offences for failing to comply with a requirement imposed by the FS. The levels of penalty for the offences depend on the <i>mens rea</i>, and will be lower if the offence is committed “without reasonable excuse”³, and higher if committed “with intent to defraud”⁴;</p> <p>(ii) new offences for furnishing false information/ documents to the FS. The levels of penalty for the offences depend on the <i>mens rea</i>, and will be lower if the offence is committed “knowingly or recklessly”⁵ and higher if committed “with intent to defraud”⁶; and</p> <p>(iii) a person is not excused from complying</p>

³ The maximum penalty is a fine of \$200,000 and imprisonment for 1 year on indictment, and a fine at Level 5 and imprisonment of 6 months on summary conviction.

⁴ The maximum penalty is a fine of \$1 million and imprisonment for 7 years on indictment, and a fine at Level 6 and imprisonment of 6 months on summary conviction.

⁵ The maximum penalty is a fine of \$1 million and imprisonment for 2 years on indictment, and a fine at Level 6 and imprisonment of 6 months on summary conviction.

⁶ The maximum penalty is a fine of \$1 million and imprisonment for 7 years on indictment, and a fine at Level 5 and imprisonment of 6 months on summary conviction.

Clause	Contents	Derivation	Position in CO	Position in CB
			is not clear whether a person would be excused from complying with a requirement other than giving an explanation or statement on the ground of self-incrimination.	with “a requirement” imposed by the FS only on the ground of self-incrimination.
860	Use of incriminating evidence in proceedings	CO s.152A(5) and (6) c.f. SFO s.187 c.f. FRCO s.30	A person is not excused from providing explanation/ information on the ground that the explanation/ information might tend to incriminate him but, where such person claims, before providing the explanation/ information that the explanation/ information might tend to incriminate him, neither the requirement nor the explanation/ information shall be admissible in evidence against him in criminal proceedings (except for proceedings under Crime Ordinance s.36).	Existing law, modified on the basis of similar provisions in the SFO/ FRCO such that the FS is required to remind the person of the limitation on the use of self-incriminating evidence obtained due to a requirement of the FS. The exception under which the self-incriminating information or explanation can be admitted as evidence in criminal proceedings is widened to include offences prosecuted under clause 859(4), (5) or (6), perjury and all offences under Part V of the Crimes Ordinance
Division 4: Enquiry by Registrar				
861	Registrar may require production of records and documents		No corresponding provision in the CO.	<ul style="list-style-type: none"> (i) New provision mirroring similar provision for an enquiry by the FS (clause 857). (ii) It gives the Registrar a new power to require production of records or documents and to require information or

Clause	Contents	Derivation	Position in CO	Position in CB
	etc.			explanations in respect of the records or documents, for the purposes of ascertaining whether any conduct that would constitute an offence under clause 738(7) or clause 883(1) relating to the giving of false or misleading information in documents delivered to the Registrar has taken place.
862	Registrar may delegate powers under section 861		No corresponding provision in the CO.	New provision mirroring similar provision for an enquiry by the FS (clause 858). It provides that the Registrar may delegate her powers to a public officer.
863	Offences for failing to comply with requirements under section 861 etc.		No corresponding provision in the CO.	New provision mainly mirroring similar provision for an enquiry by the FS (clause 859), except that the level of maximum penalty is lower given that the nature of the Registrar's enquiry is less serious. It provides for offences for failing to comply with a requirement imposed by the Registrar and offences for furnishing false information/ documents to the Registrar.
864	Use of incriminating evidence in		No corresponding provision in the CO.	New provision mirroring similar provision for an enquiry by the FS (clause 860). It sets out the limitations on the use of incriminating

Clause	Contents	Derivation	Position in CO	Position in CB
	proceedings			evidence obtained in an enquiry.
Division 5: Supplementary Provisions to Divisions 2, 3 and 4				
Subdivision 1: Supplementary Provisions Applicable to Divisions 2 and 3				
865	Magistrate's warrants	CO s.152B c.f. SFO s.191 c.f. FRCO s.34	<ul style="list-style-type: none"> (i) If an inspector or a person authorized by the FS suspects that there are on any premises any books or papers of which production ought to be made, as required by him, but has not been made, he may apply to the magistrate for a search warrant. (ii) The magistrate may issue a warrant authorizing any police officer, together with other persons to enter and search the premises, seize books or papers and take steps to preserve them and preventing interference with them. (iii) A search warrant shall continue in force for 1 month from the date of issue. (iv) Any books or papers seized may be retained for 3 months or for such 	<p>Existing law, with the following modifications based on similar provisions in the SFO/ FRCO –</p> <ul style="list-style-type: none"> (i) the expression “books or papers” is replaced by “record or document” to align with similar provisions in the SFO/ FRCO; (ii) an application for a warrant may be made even though no request for record or document has been made; (iii) the warrant need not be carried out by a police officer but may be carried out by such other person as authorized under the warrant; (iv) the warrant will last for 7 days instead of 1 month; (v) it is expressly stated that the warrant may be exercised against another person employed or engaged to provide a service on the premises;

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>longer period if necessary, for criminal proceedings.</p> <p>(v) A person who obstructs the exercise of a right of entry or search conferred by virtue of a warrant issued, or who obstructs the exercise of a right so conferred to take possession of any books or papers, shall be guilty of an offence.</p>	<p>(vi) the record or document seized may be kept for 6 months instead of 3 months, or for such longer period if necessary for criminal proceedings, proceedings under the CB or the Companies (Winding Up and Miscellaneous Provisions) Ordinance;</p> <p>(vii) the authorized person should give a receipt for any document or record seized;</p> <p>(viii) the authorized person must permit other entitled persons to inspect the document or record seized or take copies;</p> <p>(ix) s.102 (“Disposal of property connected with offences”) of the Criminal Procedure Ordinance (Cap 221) will apply to the record or document seized;</p> <p>(x) a new offence is added for failing to comply with a requirement of the authorized person under subclause (3) or a prohibition against interference under subclause (4), without any reasonable excuse; and</p> <p>(xi) the maximum penalty for obstructing the authorized person is raised from a fine at Level 5 and imprisonment for 6 months to a fine of \$1 million and imprisonment for</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				2 years (on indictment) or a fine of Level 6 and imprisonment for 6 months (on summary conviction), to align with similar offences under the SFO/ FRCO.
866	Officers must give assistance in prosecution instituted as a result of investigation etc.	CO s.147(1)	Officers, employees and agents of companies under investigation must give reasonable assistance to the Secretary of Justice in prosecution instituted as a result of the investigation. This does not require a person to give any assistance in connection with the prosecution if the person is a defendant in the proceedings.	Existing law except that the provision also expressly covers current and former employees.
867	Proceedings on specified materials	CO ss.147(2), 168J(1), and 350B(1), (3) and (7)	(i) S.147(2)(b) of the CO sets out the situations where the FS may petition the court for remedies if a specified corporation's affairs are or have been conducted in an unfairly prejudicial manner.	Existing law, with the following modifications – (i) <u>Subclause (3)</u> : The provision is modified to include proposed acts and omissions which would amount to unfair prejudice (c.f. cl.713(2)(b) in Part 14).
		c.f. SFO s.213(2)(e)	(ii) Under s.350B, where a person acts in breach of the CO or fails to act as required under the CO, the FS may apply to the Court for an order	(ii) In addition to an order restraining a person from doing or requiring a person to do a certain act, the Court is also empowered to declare a contract to be void or voidable

Clause	Contents	Derivation	Position in CO	Position in CB
			restraining the person from doing or requiring a person to do a certain act.	(c.f. cl.718(2)(c) in Part 14). This is based on a similar provision in the SFO.
		c.f. UK Insolvency Act 1986 s.124A(1)(a) c.f. UK Company Directors Disqualification Act 1986 s.8(1), (1A)(a)(i) and (b)(i)	(iii) Under ss.147(2) and 168J(1), the FS may only act on the “report” made by an inspector, or from information obtained under s.152A or s.152B, to petition for a winding-up order, a disqualification order or an order under s.168A (“Alternative remedy to winding up in cases of unfair prejudice”).	(iii) The FS may petition for winding-up of the company, apply for a disqualification order against a director or shadow director of the company or apply for remedies against unfair prejudice to members by relying on “specified materials”, which include any report made on, or any record, document or information obtained in the inspector’s investigation, instead of just the inspector’s report or information obtained under the FS’s enquiry in Division 3.
			(iv) Under s.147(3), if it appears to the FS that any civil proceedings ought in the public interest to be brought by a company, he may himself bring such proceedings in the name of and on behalf of the company. The power has never been exercised since its enactment in 1984, and its equivalent in the UK has also been repealed due to rare	(iv) The power of the FS to bring civil proceedings in the name of and on behalf of a body corporate under s.147(3) and (4) of the CO is repealed, as it is unlikely to be used and is no longer necessary, given that minority shareholders have been given more powers and protection in recent years.

Clause	Contents	Derivation	Position in CO	Position in CB
			use.	
868	Preservation of secrecy	CO s.152C(1) c.f. SFO s.378(1)(b), (c) and (15) c.f. FRCO s.51(1) and (13) c.f. BO s.120(1)(b) and (c) and (2)	S.152C provides for the confidentiality of information or documents relating to a company obtained under s.152A (enquiry by the FS) or s.152B (documents seized by search warrant) ⁷ , but the section does not cover information obtained by an inspector.	(i) Existing law, with modifications based on SFO, FRCO and the BO. (ii) The new confidentiality and statutory “gateway” provisions in the CB (cls.868 to 870) are based on similar provisions in the SFO/ FRCO/ BO. The new provisions – (a) are applicable to both the investigation by an inspector and enquiry by the FS; (b) clarify that disclosure is allowed if it is made in the performance of any function under the CB or the Companies (Winding Up and Miscellaneous Provisions) Ordinance, or for carrying into effect the provisions of them; and (c) impose confidentiality obligations on “specified persons”, who are the persons involved in the investigation/ enquiry or persons who receive a

⁷ Section 152C of the CO sets out that no information or document relating to a company obtained under s.152A or s.152B shall, without the previous consent in writing of the company, be published or disclosed, except to a specified authority (e.g. the FS), unless the publication or disclosure is required with a view to the institution of, or otherwise for the purposes of, any criminal proceedings. Any person who publishes or discloses any information or document in contravention of the above shall be guilty of an offence and liable to imprisonment and a fine.

Clause	Contents	Derivation	Position in CO	Position in CB
				draft investigation report, rather than “any person”.
869	Permitted disclosure and restrictions	CO s.152C(1) and (3) c.f. SFO s.378(2), (3), (5), (7), (9) and (12) c.f. FRCO s.51(2) to (8) and (12) c.f. BO s.120(5), (5A), (5B) and (5C)	Under s.152C, permitted disclosure is limited to (a) disclosure with the company’s consent; (b) disclosure for the purpose of criminal proceedings; and (c) disclosure to an inspector, the FS or a person acting under his authority.	Existing law modified. The CB sets out clearly the situations under which disclosure may be made and the conditions relevant to the disclosure – (i) <u>Subclause (1)</u> sets out the disclosures which may be made unconditionally (e.g. disclosure for the purpose of seeking legal advice or pursuant to a Court order). (ii) <u>Subclauses (2), (3) and (7)</u> set out the disclosures which may be made by the FS and the conditions relevant to such disclosures (e.g. a disclosure to another regulatory or law enforcement agency). (iii) <u>Subclauses (4) to (6)</u> set out the details of the confidentiality obligations applicable to a person who obtained information due to a permitted disclosure mentioned above.
870	Offences on breach of secrecy	CO s.152C (2) c.f. SFO s.378(10)	S.152C(2) imposes a confidentiality obligation on “any person”. A breach of the confidentiality obligation is a criminal offence.	Existing law, except that the level of maximum penalty for non-compliance with the confidentiality obligation in the CO is a fine of \$150,000 and imprisonment for 2 years on indictment; and to a fine of Level 5 and

Clause	Contents	Derivation	Position in CO	Position in CB
		and (11) c.f. FRCO s.51(9) to (11) c.f. BO s.120(6)		imprisonment for 6 months on summary conviction. The penalty level for the relevant offences in the CB is raised to a fine of \$1 million and imprisonment for 2 years on indictment; and to a fine of Level 6 and imprisonment for 6 months on summary conviction to align with similar offences under the SFO/ FRCO.
Subdivision 2: Supplementary Provisions Applicable to Divisions 2, 3 and 4				
871	Interpretation		No corresponding provision in the CO.	New provision added to improve drafting.
872	Protection in relation to certain disclosures	c.f. UKCA 1985 s.448A	No corresponding provision in the CO.	New provision to provide protection (by granting immunity from liability for disclosure) to persons who volunteered information to facilitate an investigation of a company's affairs or enquiry into a company's affairs.
873	Protection of informers etc.	c.f. FRCO s.52	No corresponding provision in the CO.	New provision to give additional protection by expressly stating that the identity of an informer should be kept anonymous in civil, criminal or tribunal proceedings. It also sets out exceptional circumstances under which identity of an informer may be disclosed.
874	Legal	CO ss.150(a)	(i) In an investigation by an inspector,	Existing law, with the following modifications

Clause	Contents	Derivation	Position in CO	Position in CB
	professional privilege	and 152F(1) c.f. SFO s.380(4) and (5) c.f. FRCO s.56	<p>a solicitor is not compelled to disclose privileged communications except as to the name and address of the client.</p> <p>(ii) In an enquiry made by the FS, a solicitor is not compelled to disclose privileged communications.</p>	<p>based on similar provisions in the SFO/ FRCO –</p> <p>(i) it is expressly provided that in the case of an enquiry by the FS, the legal professional privilege does not affect any requirement to disclose the name and address of the client of a lawyer; and</p> <p>(ii) the provision is also applicable to an enquiry by the Registrar.</p>
875	Immunity	CO s. 145(3B) c.f. SFO s.380(1) and (3) c.f. FRCO s.54	Under s.145(3B), a person who complies with a requirement of an inspector investigating the affairs of a company does not incur any civil liability by reason only of that compliance.	<p>Existing law, with the following modifications based on similar provisions in the SFO/ FRCO –</p> <p>(i) under the CO, the immunity provision is only applicable to production of information under section 145 in respect of an investigation by an inspector, while under the CB, it will also be applicable to production of directors’ accounts required by inspectors under clause 835 (s.145B of the CO) as well as an enquiry by the FS or the Registrar; and</p> <p>(ii) a new provision is added such that a person will not incur any civil liability in respect of anything done, or omitted to be done, by the person in good faith in the performance, or purported performance, of</p>

Clause	Contents	Derivation	Position in CO	Position in CB
				any function under Part 19.
876	Production of information in information systems etc.	c.f. SFO s.189 c.f. FRCO s.57	No corresponding provision in the CO.	New provision to give express power to an inspector, the FS and the Registrar to require the production of electronic information in a specified format.
877	Lien claimed on records or documents	CO s. 152A(2) c.f. SFO s.188 c.f. FRCO s.58	In an enquiry made by the FS, the production of any documents in pursuance of a requirement to produce the document shall not affect any liens claimed on the document.	(i) Existing law, with modifications based on a similar provision in the SFO/ FRCO. (ii) Under the CO, the relevant provision only applies to an FS enquiry, while under the CB, it will also be applicable to an investigation by the inspector and enquiry by the Registrar. It is also clarified that the lien does not affect the requirement to produce the document and no fee shall be payable.
878	Destruction of documents	CO s. 152D c.f. SFO s.192 c.f. FRCO s.59	(i) A person commits an offence if he – (a) conceals, destroys, mutilates or falsifies documents relating to an enquiry by the FS under s.152A or an investigation by an inspector appointed due to an	Existing law, with the following modifications based on similar provisions in the SFO/ FRCO – (i) under the CO, the offence is only applicable to an enquiry by the FS under s.152A or an investigation by an inspector appointed due to an application by the members under s.142; while under the CB, it will be applicable to an

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>application by the members under s.142;</p> <p>(b) parts with, alters or makes an omission in such documents; or</p> <p>(c) sends such documents overseas.</p> <p>(ii) It shall be a defence if the person charged with the offence proves that he did not act with intent to defeat the purposes of the enquiry/ investigation.</p>	<p>investigation by an inspector generally (including an inspector appointed due to the initiative of the FS/ the Court or application by the members) and also to an enquiry by the FS or the Registrar;</p> <p>(ii) the prohibition on “alteration”, “omission” and “sending documents overseas” are removed as they could be covered by “falsification” and “concealment”;</p> <p>(iii) the defence of “no intention to defeat the purposes” of the enquiry/ investigation is removed as the <i>mens rea</i> will be specified as “with intent to conceal”; and</p> <p>(iv) the maximum penalty level (a fine of \$1.5 million and imprisonment for 3 years on indictment; and a fine of \$150,000 and imprisonment for 2 months on summary conviction) is lowered (to a fine of \$1 million and imprisonment for 2 years on indictment; and a fine of Level 6 and imprisonment for 6 months on summary conviction) to align with similar offences under the SFO/ FRCO .</p>
879	Inspection of records or	c.f. SFO s.190	No corresponding provision in the CO.	New provision to permit inspection of documents which are taken by an inspector, the

Clause	Contents	Derivation	Position in CO	Position in CB
	documents seized etc.	c.f. FRCO s.33		FS or the Registrar.
Division 6: Investigation of Company's Affairs by Persons Appointed by Company				
880	Appointment of person by company to investigate its affairs	CO s.152(1) to (3)	A company may, by special resolution, appoint a person to investigate its affairs. The appointed person may require the officer and agent of the company to produce documents. He may also examine on oath the officers and agents.	Existing law with modification that – <u>Subclause (2)(c)</u> : an express power is added to require the answering of questions based on similar provisions in the SFO/ FRCO. (c.f. clause 834 above.)
881	Court may inquire into failure of officer or agent to attend before appointed person etc.	CO s.152(4)	The appointed person may apply to the Court for an inquiry into a failure to comply with his requirement.	Existing law with modification that the person who has failed to comply with a requirement imposed on him is guilty only if he failed to comply “without reasonable excuse”. (c.f. clause 852 above.)
882	Report by appointed person	CO s.152(5) and (6)	(i) On the conclusion of the investigation, the appointed person shall report his opinion in such manner and to such persons as the company in general meeting may	Existing law, except that the references to seal are removed as seal of the company is optional under Part 3 of the CB.

Clause	Contents	Derivation	Position in CO	Position in CB
			<p>direct.</p> <p>(ii) A copy of the report, signed by the appointed person and sealed with the seal of the company, shall be admissible in any legal proceedings as evidence of the opinion of the appointed person.</p>	
Schedule 10: Transitional and Saving Provisions				
134 to 140	Transitional and Saving Arrangements for Part 19			<p>New provisions to provide for transitional and saving arrangements such that the relevant CO provisions will continue to apply where investigations or enquiries have yet to be completed upon the repeal of the CO. Such CO provisions include those relating to inspector's powers, expenses of investigation, report made and information obtained, books or papers required to be produced, application for a disqualification order against the director or shadow director of the company, etc.</p>