

**Bills Committee on  
Companies (Amendment) Bill 2003**

**Follow-up actions arising from the discussion  
at the meeting on 5 February 2004**

**Introduction**

This paper sets out the outcome of the follow-up actions arising from the discussion at the meeting on 5 February 2004.

**Section 247A(1) of the Australian Corporations Act 2001**

2. The former version of section 247A(1) of the Australian Corporations Act 2001 is section 265B of the Australian Companies Act 1981. This section was added to the Australian Companies Act 1981 in 1985 by means of section 77 of the Companies and Securities Legislation (Miscellaneous Amendments) Act 1985 (copy at [Annex](#)). We cannot locate information on the changes in the number of applications for inspection of records since the enactment of the Australian Corporations Act 2001 or Australian Companies Act 1981.

**Proposed section 152FA(2)**

3. Proposed section 152FA(2) provides that the court may only make an order if it is satisfied that -

- (a) the application is made in good faith; and
- (b) the inspection applied for is for a proper purpose having regard to the interests of both the relevant specified corporation and the applicant.

Our policy intent for the proposed section 152FA(2)(b) is that the court would need to have regard to relevant facts and circumstances of an application for an inspection order, including the interests of a company and an applicant when deciding whether the inspection applied for is for a proper purpose.

4. In the light of the comments made by Members, we are prepared to delete the phrase “having regard to the interests of both the relevant specified corporation and the applicant” if the deletion is agreeable to the Bills Committee so that local court may more readily draw reference from Australian jurisprudence in the absence of any case law in Hong Kong in determining what constitutes a proper purpose for an inspection order.

**Minimum shareholding requirement etc for making an application for an inspection order**

5. Given that the court may only make an inspection order if it is satisfied that the “proper purpose” and “good faith” requirements are satisfied, we do not consider it necessary to add a minimum shareholding requirement for making an application for an inspection order. That said, in the light of Members’ comments, we are prepared to add a new provision along the lines in the existing section 115A of the Companies Ordinance relating to circulation of members’ resolution after the proposed section 152FA(2)(b) to the effect that an application for an inspection order can only be made by –

- (a) any number of members representing not less than one-fortieth of the total voting rights of all members having at the date of making the application a right to vote at a general meeting; or
- (b) not less than 50 members holding shares in the company on which there has been paid up an average sum, per member, of not less than \$2000.

## **Saving for bankers**

6. Existing section 152F(2) provides that the Financial Secretary shall not require, under existing section 152A, production by a person carrying on the business of banking (banker) of a document relating to the affairs of a customer of his unless -

- (a) it appears to the Financial Secretary that it is necessary to do so for the purpose of investigating the affairs of the first-mentioned person (i.e. the banker); or
- (b) the customer is a person on whom a requirement has been imposed by virtue of section 152A.

Members asked us to consider whether any additional provision along the lines of existing section 152F was required to provide saving for bankers. On item (a) above, if a banker is the company which is the subject of an application for an inspection order under the proposed section 152FA, the court should not make an inspection order covering the banker's document which is related to the affairs of its customers unless the court is satisfied that the inspection applied for is for a proper purpose. It does not appear to us that there is any substantive difference between the phrase "the court is satisfied that the inspection applied for is for a proper purpose" and the provision under the first limb of section 152F(2) i.e. item (a) above. Hence, there is no need to add a new provision along the lines in item (a) above.

7. On item (b) above, while the court may make an inspection order under the proposed section 152FA authorizing a member or his representative to inspect records of a company, the order itself does not allow the member or representative to request another party other than the company e.g. a banker to produce its own records relating to the company. Hence, we do not see a need to add a new provision along the lines in item (b) above.

**Proposed section 152FC(1)(a) and section 152FC(1)(c)**

8. The proposed section 152FC(1) provides that subject to the proposed section 152FE (relating to protection of personal data), no information or document obtained as a result of the inspection under the proposed section 152FA shall, without the previous consent in writing of the relevant specified corporation, be disclosed to any other person, save for the scenarios in its subsections (a), (b) and (c). Our policy intent for this section is to list out the scenarios where information obtained by means of an inspection order may be disclosed by an inspector. There is however nothing in this section that authorizes any authority to compel the inspector to provide any information. Where an authority intends to compel an inspector to disclose any documents or information, it must always be specifically authorized to do so by some other legal provisions. The proposed section 152FC does not provide for such an authority.

9. Under the proposed section 152FC(1)(a), disclosure of information which is obtained by means of an inspection order will not be in contravention of the section if the information is required with a view to the institution of, or otherwise for the purposes of, any criminal proceedings, or any investigation carried out in Hong Kong in accordance with law. The phrase “investigation in accordance with law” can be any investigation of any kind of criminal offence by law enforcement agency, such as the Police; or any investigation empowered under an Ordinance e.g. Securities and Futures Ordinance. An example of how this subsection works would be that an inspector during inspection discovered that an illegal activity was going on in the company, and that unless the information was disclosed to the relevant authority, no criminal proceedings or investigation could be instituted. If the inspector then disclosed the information, he would not be subject to criminal liability under the proposed section 152FC. The relevant authority might take the initiative to invite the inspector to provide information, but this is outside the scope of this subsection. Unless the authority has the necessary power under law to compel disclosure, there is no need for the inspector to comply with the request.

10. As regards the proposed section 152FC(1)(c), its main purpose is to save the disclosure of the information obtained by means of an inspection order from being a contravention of the section, if such a disclosure is in accordance with law or a requirement made under law. In other words, the disclosure is made pursuant to a stipulation in law or in a requirement made under law e.g. a court order. There are many incidences in various legislative provisions which provide for disclosure of information. One such example is section 25A of the Organized and Serious Crimes

Ordinance (relating to disclosure of knowledge or suspicion that property represents proceeds, etc. of indictable offence).

**Proposed section 152FA(1)**

11. We agree with Members' suggestion that the proposed section 152FA should be revised to make it clear that the information obtained should be used only in relation to the purpose for which it is sought, unless the court orders otherwise. The proposed Committee Stage Amendments (CSAs) will be sent to Members for comments once available.

**Misuse of information**

12. We agree with Members' suggestion that an offence provision for improper user of information obtained by means of an inspection order made under the proposed section 152FA should be added. The proposed CSAs will be sent to Members for comments once available.

Financial Services Branch  
Financial Services and the Treasury Bureau  
February 2004

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**COMPANIES AND SECURITIES LEGISLATION (MISCELLANEOUS AMENDMENTS)  
ACT 1985 No.  
192 of 1985 - SECT 77**

**SECT**

77. After section 265A of the Principal Act the following Division is inserted in Part V:

**"Division 6 - Inspection of Records**

**Inspection of records**

**"265B. (1) Where -**

(a) a member of a company applies to the Court for an order authorising a registered company auditor, or a duly qualified legal practitioner, acting on behalf of the member to inspect books of the company; and

(b) the Court is satisfied that the member is acting in good faith and that the inspection is to be made for a proper purpose,  
the Court may -

(c) make an order authorising a registered company auditor, or a duly qualified legal practitioner, acting on behalf of the member, at such time as is specified in the order, to inspect and to make copies of, or take extracts from, the books of the company or such of the books of the company as are specified in the order; and

(d) make such other order or orders (if any) as it thinks fit including, without limiting the generality of the foregoing, an order relating to the use that may be made of the information disclosed to the member by the registered company auditor or the duly qualified legal practitioner as a result of the inspection.

"(2) The right of a member of a company to apply for an order under sub-section (1) is in addition to and not in derogation of any right in relation to the inspection of books of a company that a member of a company has under any other law.

**Disclosure of information**

"265C. A registered company auditor, or a duly qualified legal practitioner, who inspects books of a company pursuant to an order of the Court under section 265B shall not disclose to a person other than -

(a) the member of the company on whose application the order was made;  
or

(b) an employee, or a member or acting member, of the Commission,  
information acquired in the course of the inspection."

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**COMPANIES AND SECURITIES LEGISLATION (MISCELLANEOUS AMENDMENTS)**  
**ACT 1985 No.**  
**192 of 1985 - SECT 29**  
**Principal Act**

**SECT**

29. The Companies Act 1981\*2\* Is in this Part referred to as the Principal Act.

\*2\*No. 89, 1981, as amended. For previous amendments, see No. 153, 1981; Nos. 26 and 80, 1982; No. 108, 1983; and No. 13, 1984.

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