

**Bills Committee on
Companies (Amendment) Bill 2003
Schedule 4 – Amendments to the Companies Ordinance
relating to Shareholder Remedies
Clause-by-clause examination**

At **Annex** is a further revised draft mark-up version of those provisions relating to inspection order and unfair prejudice remedy in Schedule 4 of the Companies (Amendment) Bill 2003 to which the Administration would like to propose amendments, having taken into account views expressed at previous meetings of the Bills Committee. The reasons for the amendments are set out in the footnotes.

Financial Services Branch
Financial Services and the Treasury Bureau
March 2004

AMENDMENTS TO THE COMPANIES ORDINANCE
RELATING TO SHAREHOLDERS' REMEDIES**1. Interpretation**

(1) Section 2(1) of the Companies Ordinance (Cap. 32) is amended by adding -

"specified corporation" (指明法團) means a company or a non-Hong Kong company;"

(2) Section 2 is amended by adding -

"(8A) In sections 152FA, 152FB and 152FD, the expression "record" (紀錄) includes book and paper."

2. Proceedings on inspector's report

Section 147(2)(b) is amended -

(a) by adding "where the body is a specified corporation," before "that";

(b) by repealing "body corporate" and substituting "specified corporation".

3. Sections added

The following is added immediately after section 152F -

**"Inspection of Specified Corporations'
Records by Members****~~152FA. Order for inspection~~**

~~(1) Subject to sections 152FD and 152FE, on application by a~~

~~member (in this section referred to as "applicant") of a specified corporation, the court may make an order—~~

~~(a) authorizing the applicant to inspect any records of the specified corporation; or~~

~~(b) authorizing a person (whether or not a member of the specified corporation) other than the applicant to inspect any such records on behalf of the applicant.~~

~~(2) The court may only make an order under subsection (1) 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.~~

~~(3) If the court makes an order under subsection (1), it shall, after taking into account the facts and circumstances of the application, consider whether it is necessary to make an order limiting the use that the following persons may make of the information or document obtained as a result of the inspection of any records pursuant to the order made under that subsection—~~

~~(a) the applicant; and~~

~~(b) where the court authorizes a person other than the applicant to inspect the records, the person who inspects the records,~~

~~and where the court considers it necessary to do so, it may make such an order on such terms and conditions as it thinks fit.~~

~~(4) Any person who is authorized by the court to inspect the records of a specified corporation may make copies of the records unless the court orders otherwise.~~

152FA. Order for inspection

(1) Subject to sections 152FD and 152FE, on application by such number of members of a specified corporation as is specified in subsection (2) (in this section referred to as "applicant"), the court may make an order -

- (a) authorizing the applicant or any one or more of such members applying as applicant to inspect any records of the specified corporation; or
- (b) authorizing a person (whether or not a member of the specified corporation) other than the applicant to inspect any such records on behalf of the applicant.¹

(2) For the purposes of subsection (1), an application may 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 the application a right to vote at a general meeting of the specified

¹ In response to Members' suggestion, these amendments aim to impose a minimum shareholding requirement or a minimum number of shareholders requirement for making an application for an order to inspect the records of a specified corporation under the proposed section 152FA.

corporation;

- (b) any number of members holding shares in the specified corporation on which there has been paid up an aggregate sum of not less than \$100,000; or
- (c) not less than five members.²

(3) The court may only make an order under subsection (1) if it is satisfied that -

- (a) the application is made in good faith; and
- (b) the inspection applied for is for a proper purpose.³

(4) Any person who is authorized by the court to inspect the records of a specified corporation may make copies of the records unless the court orders otherwise.

(5) A person who complies with an order made under this section or section 152FB to produce records for inspection shall not be liable for any civil liability or claim whatever to any person by reason only of that compliance.⁴

² See Footnote (1).

³ In response to Members' suggestion, these amendments aim to delete the phrase "having regard to the interests of both the relevant specified corporation and the applicant" to more accurately reflect our policy intent, and make the wording of the proposed section 152FA(2)(b) (now section 152FA(3)(b)) consistent with the equivalent provision in the Australian Corporations Act 2001.

⁴ In response to Members' comments, these amendments aim to make it clear that a person will not incur any civil liability from his disclosure of information in compliance with an inspection order.

152FB. Ancillary orders

Subject to sections 152FD and 152FE, if the court makes an order under section 152FA, it may make any other orders it considers appropriate, including -

(a) an order requiring the specified corporation that is subject to the order made under section 152FA or any of its officers to produce any records to the person who is authorized to inspect the records;
~~and~~

(b) an order specifying the records that may be inspected by that person;~~;~~

~~(c) an order requiring the applicant to pay the expenses reasonably incurred by the specified corporation in the inspection; and⁵~~

~~(d) an order permitting the applicant or a person who is authorized to inspect the records of a specified corporation under section 152FA to disclose any information or document obtained as a result of an inspection under that section to other person.⁶~~

~~**152FC. Disclosure of information or document
obtained as a result of inspection**~~

~~(1) Subject to section 152FE, no information or document obtained as a result of an inspection under section 152FA shall, without~~

⁵ In response to Members' suggestion, these amendments aim to make it clear that the court may require an applicant to pay the expenses reasonably incurred by a specified corporation in the inspection.

⁶ In response to Members' suggestion, these amendments aim to make it clear that the court may make an order regarding the disclosure of information or document obtained as a result of an inspection.

~~the previous consent in writing of the relevant specified corporation, be disclosed to any other person, unless the disclosure is—~~

- ~~(a) 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;~~
- ~~(b) permitted in accordance with an order made under section 152FA or 152FB; or~~
- ~~(c) permitted in accordance with law or a requirement made under law.~~

~~(2) A person who contravenes this section shall be guilty of an offence and liable to imprisonment and a fine.~~

152FC. Disclosure or use of information or document obtained as a result of inspection

(1) Subject to section 152FE, the applicant or a person who is authorized to inspect the records of a specified corporation under section 152FA shall not, without the previous consent in writing of the specified corporation, disclose any information or document obtained as a result of an inspection under section 152FA to any other person, except to other members applying as applicant or the applicant, unless the disclosure is –

- (a) required with a view to the institution of, or otherwise for the purposes of, any criminal

proceedings;⁷

(b) permitted in accordance with an order made under section 152FA or 152FB; or

(c) permitted in accordance with law or a requirement made under law.⁸

(2) Subject to section 152FE and subsection (1), the applicant or a person who is authorized to inspect the records of a specified corporation under section 152FA shall not, unless the court otherwise orders, use any information or document obtained as a result of an inspection under section 152FA for purposes other than the proper purpose referred to in section 152FA(3)(b).⁹

(3) A person who contravenes this section shall be guilty of an offence and liable to imprisonment and a fine.¹⁰

152FD. Saving for solicitors and bankers

(1) Nothing in sections 152FA and 152FB, or any order made under any of those sections, shall authorize a person to inspect any records containing a privileged communication made by or to a solicitor in that capacity.

⁷ In response to Members' comments, these amendments aim to delete the exception whereby the information or document obtained as a result of an inspection may be disclosed with a view to or for the purpose of any investigation carried out in Hong Kong in accordance with law.

⁸ In response to Members' comments on the Hong Kong Society of Accountants' proposal, these amendments aim to make it clear that the information or document obtained as a result of an inspection should be used only in relation to the purpose for which it was sought unless the court orders otherwise.

⁹ See Footnote (8).

(2) Nothing in sections 152FA and 152FB, or any order made under any of those sections, shall authorize a person to inspect the records of a specified corporation carrying on the business of banking that relate to the affairs of its customers.¹¹

152FE. Protection of personal data

Nothing in sections 152FA, 152FB and 152FC, or any order made under any of those sections ~~section 152FA or 152FB~~¹², shall authorize the collection, retention and or use of personal data in contravention of the Personal Data (Privacy) Ordinance (Cap. 486).".

4. Alternative remedy to winding up in cases of unfair prejudice

(1) Section 168A is amended -

- (a) by repealing "company" wherever it appears and substituting "specified corporation";
- (b) by repealing "company's" wherever it appears and substituting "specified corporation's".

~~(2) Section 168A(2) is amended -~~

~~(a) by repealing "this section" and substituting "subsection (1)";~~

~~(b) by adding "(including the member who made the petition)"~~

¹⁰ In response to Members' suggestion, these amendments aim to provide an offence provision for improper use of information or document obtained as a result of an inspector order.

¹¹ In response to Members' comments, these amendments aim to provide saving for bankers along the lines of existing section 152F.

¹² Amendments consequential to Footnote (8).

~~after "some part of the members".~~

~~(2) Section 168A(2) is repealed and the following substituted -~~

~~"(2) If on any petition under subsection (1) the court is of opinion that the specified corporation's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or some part of the members (including the member who presented the petition), whether or not such conduct consists of an isolated act or a series of acts -~~

~~(a) the court may, with a view to bringing to an end the matters complained of -~~

~~(i) make an order restraining the commission of any such act or the continuance of such conduct;~~

~~(ii) order that such proceedings as the court may think fit shall be brought in the name of the specified corporation against such person and on such terms as the court may so order;~~

~~(iii) appoint a receiver or manager of the whole or a part of a specified corporation's property or business and may specify the powers and duties of the receiver~~

or manager and fix his remuneration; and

(iv) make such other order as it thinks fit, whether for regulating the conduct of the specified corporation's affairs in future, or for the purchase of the shares of any members of the specified corporation by other members of the specified corporation or by the specified corporation and, in the case of a purchase by the specified corporation, for the reduction accordingly of the specified corporation's capital, or otherwise; and

(b) the court may order payment by such person of such damages as the court may so order, and any interest at such rates as the court may think fit on those damages to any members (including the member who presented the petition) of the specified corporation, whose interests have been unfairly prejudiced by the relevant act or conduct.¹³

¹³ In response to Members' suggestion, these amendments aim to combine the proposed section 168A(2A) and existing section 168A(2) into one section and delete the phrase "whether or not with a view to bringing to an end the matters complained of" in the proposed section 168A(2A).

~~—(3) Section 168A is amended by adding—~~

~~“(2A) If on any petition under subsection(1) the court is of opinion that the specified corporation’s affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of some part of the members (including the member who made the petition), whether or not such conduct consists of an isolated act or a series of acts, the court may, whether or not with a view to bringing to an end the matters complained of, order payment by such person of such damages, as the court may so order, and any interest at such rate as the court may think fit on those damages, to any members (including the member who made the petition) of the specified corporation, whose interests have been unfairly prejudiced by the relevant act or conduct.~~

(2B) Any past member of a specified corporation who complains that the affairs of the specified corporation were, at the time when he was a member of the specified corporation, conducted in a manner unfairly prejudicial to the interests of the then members generally or of some part of the then members (including himself), may make an application to the court by petition for an order under subsection (2C)¹⁴~~this section~~.

¹⁴ These amendments aim to make it clear that the court may order payment of damages and interests in relation to a complaint made under the proposed section 168A(2B).

(2C) If on any petition ~~made~~ presented¹⁵ by a past member under subsection (2B) the court is of opinion that the specified corporation's affairs were conducted in a manner unfairly prejudicial to the interests of the then members generally or of some part of the then members (including the past member who presented¹⁶ ~~made~~ the petition), whether or not such conduct consists of an isolated act or a series of acts, the court may ~~whether or not with a view to bringing to an end the matters complained of,~~¹⁷ order payment by such person of such damages, as the court may so order, and any interest at such rate as the court may think fit on those damages, to any then members (including the past member who presented¹⁸ ~~made~~ the petition) of the specified corporation, whose interests were unfairly prejudiced by the relevant act or conduct.

(2CA) For the avoidance of doubt, the damages that may be ordered by the court under subsections (2)(b) and (2C) does not entitle a member, past member or then member of a specified corporation to recover by way of damages any loss that is solely reflective of the loss suffered by the specified corporation which only the specified corporation is entitled to recover under the

¹⁵ In response to the suggestion made by Mr Winston Poon, SC, these amendments aim to replace “made” with “presented”.

¹⁶ See Footnote (15).

¹⁷ In response to Members' comments, these amendments aim to delete “whether or not with a view to bringing to an end the matters complained of” in the proposed section 168A(2C).

¹⁸ See Footnote (15).

common law.¹⁹

~~(2D) If the court is satisfied—~~

~~(a) that there is no evidence of bad faith on the part of a member of the specified corporation or the Financial Secretary, or a past member of the specified corporation, in making a petition under subsection (1) or (2B); and~~

~~(b) that the member or the Financial Secretary, or the past member, had reasonable grounds in making such petition,~~

~~the court may make an order as to costs in favour of the member or the Financial Secretary, or the past member.”~~²⁰

(4) Section 168A is amended by adding –

“(5A) The personal representative of a person who, at the date of the person’s death, was a past member of a specified corporation, may apply to the court under subsection (2B) for an order under this section and, accordingly, any reference in that subsection to a past member of a specified corporation shall be construed as including a reference to any such personal representative.

(5B) For the purposes of this section, a person shall not be treated as a past member of a specified corporation if he ceased to be a member of the specified corporation before the commencement

¹⁹ In response to the comments made by Mr Winston Poon, SC, these amendments aim to make it clear that the proposed sections 168A(2)(b) and 168A(2C) will not have the effect of entitling any member to recover by way of damages any loss which only the company is entitled to recover under common law.

²⁰ In response to the suggestion made by Mr Winston Poon, SC, these amendments aim to delete the proposed section 168A(2D) so that the court should continue to exercise its existing discretionary power to make any order as to costs of proceedings.

of section 4 of Schedule 4 to the Companies (Amendment) Ordinance 2003 (of 2003).

~~(5C) For the purposes of this section, "then members" (當時成員) means the persons who were members of a specified corporation, in respect of which a petition under subsection (2B) is made, at the time when the relevant applicant was a member of the specified corporation."~~²¹

7. Punishment of offences under this Ordinance

(1) The Twelfth Schedule is amended by adding -

"152FC(32)	Person	On	\$150,000	-
	disclosing <u>or</u>	indictment	and 2	
	<u>using</u>		years	
	information or	Summary	level 5	-".
	document		and 6	
	obtained as a		months	
	result of an			
	inspection			
	under section			
	152FA contrary			
	to section			
	152FC(1) <u>or (2)</u>			

²¹ In response to the suggestion made by Mr Winston Poon, SC, these amendments aim to delete the proposed section 168A(5C) which defines the phrase "then members".

(2) The Twelfth Schedule is amended, in the entry relating to section 168A(4), in the second column -

- (a) by repealing "Company" and substituting "Specified corporation";
- (b) by repealing "company's" and substituting "specified corporation's".