

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

**List of issues requiring follow-up actions by the Administration  
on Schedule 4 of the Bill  
(*position as at 13 April 2004*)**

Inspection of records

Date of meeting	Issue	Outcome
2 October 2003	To consider whether provisions should be added to make it clear that the requirement to disclose information or documents according to an order for inspection made by the court under the <b>proposed section 152FA</b> should override any contractual agreement on non-disclosure, and to exempt the specified corporation concerned from the contractual or common law liabilities arising from the disclosure.	LC Paper No. CB(1)798/03-04(06) ( <i>issued on 16 and 26 January 2004</i> )
29 January 2004	To provide information on the following matters -  (a) the meaning of "proper purpose having regard to the interests of both the relevant specified corporation and the applicant" under <b>proposed section 152FA(2)(b)</b> ; and  (b) precedent cases in Australia and other jurisdictions, if any, to illustrate the meaning of "proper purpose" under <b>proposed section 152FA(2)(b)</b> .	LC Paper No. CB(1)934 /03-04(01) ( <i>issued on 4 February 2004</i> )
5 February 2004	(a) To provide the former version of section 247A(1) of the Australian Corporations Act 2001, and if possible, to advise whether there have been significant changes in the number of applications for inspection of records since enactment of the Australian Corporations Act 2001 or its earlier versions;  (b) To clarify the policy intent of the proposed provisions on "Order for inspection", and to consider whether the drafting of <b>proposed section 152FA(2)(b)</b> should be revised to accurately reflect the policy intent;	LC Paper No. CB(1)1041/03-04(01) ( <i>issued on 19 February 2004</i> )

Inspection of records (Cont'd)

Date of meeting	Issue	Outcome
5 February 2004 (Cont'd)	<p>(c) To consider stipulating a minimum shareholding requirement or a minimum number of shareholders requirement for a member or members of a specified corporation to make an application to the court for inspection of the records of the specified corporation;</p> <p>(d) To consider whether apart from <b>proposed sections 152FD and 152FE</b>, any additional provision is required to provide saving for bankers along the line of existing <b>section 152F</b>;</p> <p>(e) To consider whether the drafting of <b>proposed section 152FC(1)</b> needs to be revised to accurately reflect the policy intent, and in this connection, to provide examples to illustrate the respective situations falling under <b>section 152FC(1)(a)</b> and <b>section 152FC(1)(c)</b>;</p> <p>(f) To consider how the drafting of <b>proposed section 152FA</b> 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; and</p> <p>(g) To consider adding an offence provision for improper use of information under <b>proposed section 152FA</b>.</p>	LC Paper No. CB(1)1041/03-04(01) (issued on 19 February 2004)

Inspection of records (Cont'd)

Date of meeting	Issue	Outcome
20 February 2004	<p>(a) To further consider the need to provide saving for bankers with regard to documents relating to the affairs of the customers of bankers, bearing in mind that the existing part in the Companies Ordinance on "Inspection of Companies' Books and Papers", under which <b>proposed sections 152FA to 152FE</b> will subsume, already contains a saving provision, i.e. <b>section 152F(2)</b>, for bankers; and</p> <p>(b) To further clarify the intended scenarios as provided under subsection (a) to (c) under <b>section 152FC(1)</b> where information obtained by means of an inspection order may be disclosed by an inspector and to review whether the current drafting of the subsections is of adequate clarity, bearing in mind that the court is empowered to make an order to limit the use of the information under <b>proposed section 152FA(3)</b> and improper disclosure is an offence under <b>proposed section 152FC(2)</b>.</p>	<p>LC Paper No. CB(1)1251/03-04(01) (issued on 10 March 2004)</p>
28 February 2004	<p>(a) On the proposal to impose a minimum shareholding requirement or a minimum number of shareholders requirement for making an application for an order to inspect records of a specified corporation, the draft Committee Stage amendments (CSAs) to <b>proposed section 152FA</b> should be revised to the effect that -</p> <p>(i) the court may make an order for inspection on application by -</p> <p>(I) any number of member(s) 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 any general meetings of the specified corporation; or</p> <p>(II) not less than a specified number of members (for example, 5 members) holding shares in the specified corporation; or</p>	<p>Draft Committee Stage amendments (LC Paper No. CB(1)1251/03-04(02) issued on 10 March 2004)</p>

Inspection of records (Cont'd)

Date of meeting	Issue	Outcome
<p>28 February 2004 (Cont'd)</p>	<p>(III) any number of member(s) holding shares in the specified corporation at a total par value of not less than, say, \$100,000.</p> <p>The Administration is requested to provide some practical information for members' reference in considering the appropriate number of member(s) and total sum mentioned in (II) and (III) above;</p> <p>(ii) instead of simply giving consent in writing for an application, all the member(s) mentioned in (i) above should be the joint applicants of an order for inspection;</p> <p>(b) To revise the new <b>section 152FA(5)</b> by-</p> <p>(i) replacing the words "a confidentiality agreement" by "an agreement"; and</p> <p>(ii) replacing the words "releasing the records" by "disclosing the information contained in the records to be inspected under the order".</p>	<p>Draft Committee Stage amendments (LC Paper No. CB(1)1251/03-04(02) issued on 10 March 2004)</p>
	<p>(c) (i) To check whether there are provisions in the existing banking laws in Hong Kong governing the disclosure of information relating to the affairs of the customers of banks, and in light of these provisions, if any, to review the propriety of the proposed saving provision for bankers under <b>proposed section 152FD(2)</b>.</p> <p>(ii) To check the equivalent provisions, if any, in other jurisdictions on the protection of customer information.</p> <p>(d) To revise <b>proposed section 152FE</b> if the court may make any order under <b>proposed section 152FD</b>.</p>	<p>LC Paper No. CB(1)1251/03-04(01) (issued on 10 March 2004)</p>

Inspection of records (Cont'd)

<b>Date of meeting</b>	<b>Issue</b>	<b>Outcome</b>
19 March 2004	(a) To revise the drafting of <b>proposed section 152FC(1)</b> as the term "any other applicants" in this section is not consistent with the term "any one or more of such members applying as applicant" in <b>proposed section 152FA(1)(a)</b> .	Revised draft Committee Stage amendments ( <i>LC Paper No. CB(1)1369/03-04 (03)</i> )
	(b) To add a provision under <b>proposed section 152FB</b> to make it clear that the court may make an order regarding the disclosure of information or documents obtained as a result of the inspection.	
	(c) To check whether there are provisions in the Securities and Futures Ordinance (Cap. 571) (SFO) governing the disclosure of information relating to the affairs of the clients of "intermediaries" ("intermediaries" as defined in SFO), and in the light of any such provisions, to consider the propriety of providing saving for the intermediaries apart from solicitors and bankers, or confining the saving provision for solicitors only.	Administration reported at the meeting held on 25 March 2004 that there is no provision in SFO governing the disclosure of information.

Unfair Prejudice Remedies

Date of meeting	Issue	Outcome
12 February 2004	<p>(a) To clarify the policy intent and the relevant common law principles with regard to the manner in which the relief provided under <b>proposed new sections 168A(2A) to (2C)</b> should be awarded in the following circumstances -</p> <ul style="list-style-type: none"> <li>(i) the member presenting the petition has suffered a loss but the company has not suffered a loss in respect of the same affair of unfair prejudice;</li> <li>(ii) the loss of the member presenting the petition is merely reflective of the specified corporation's loss; and</li> <li>(iii) the loss of the member presenting the petition is additional to that suffered by the specified corporation.</li> </ul> <p>Examples of real-life situations and/or court cases should be provided for illustration. The concern of how to prevent the award of the respective losses being overlapped should be addressed;</p> <p>(b) To elaborate the examples of "personal wrongs" that may initiate an action on unfair prejudice as quoted in paragraph 16.10 of the "Consultation Paper on Proposals made in Phase I of the Corporate Governance Review" of the Standing Committee on Company Law Reform;</p> <p>(c) To clarify whether under <b>proposed new sections 168A(2A) to (2C)</b>, the court may award damages and any interest on the damages to those members who have not petitioned to the court but whose interests as a member of the specified corporation are unfairly prejudiced by the same affair as in the case of the member who has petitioned to the court;</p>	<p>LC Paper No. CB(1)1108/03-04(01) <i>(issued on 25 February 2004)</i></p>

Unfair Prejudice Remedies (Cont'd)

Date of meeting	Issue	Outcome
<p>12 February 2004 (Cont'd)</p>	<p>(d) To clarify the relationship between the proposed new provisions on unfair prejudice and those on derivative action, and to clarify the policy intent as to whether a member may initiate action under both sets or either set of the new provisions in respect of the same affair of a specified corporation;</p> <p>(e) To explain the rationale for providing the additional form of relief (i.e. the court may award damages) in Hong Kong's legislation, bearing in mind that no such relief is provided in the legislation of the United Kingdom, Singapore and Australia. In this connection, information on how far this form of relief has been available under common law in the said jurisdictions should also be provided;</p> <p>(f) To consider whether the provision under <b>proposed new section 168A(2A)</b> should be subsumed under <b>section 168A(2)</b>;</p>	<p>LC Paper No. CB(1)1108/03-04(01) (issued on 25 February 2004)</p>
	<p>(g) To explain why the wordings "whether or not with a view to bringing an end the matters complained of", as distinct from the wordings "with a view to bringing an end the matters complained of", are used in <b>proposed new sections 168A(2A) and (2C)</b>;</p>	<p>LC Paper No. CB(1)1251/03-04(01) (issued on 10 March 2004)</p>
	<p>(h) With regard to whether there should be a limitation period for a past member seeking relief under <b>proposed sections 168A(2B) and (2C)</b>, the following issues should be addressed -</p> <p>(i) whether an action taken under the above proposed sections is subject to the Limitation Ordinance (Cap. 347);</p> <p>(ii) whether the court would have the discretion of applying the relevant common law principles in determining the case petitioned under the <b>proposed section 168A(2B)</b>; and</p>	<p>LC Paper No. CB(1)1108/03-04(01) (issued on 25 February 2004)</p>

Unfair Prejudice Remedies (Cont'd)

Date of meeting	Issue	Outcome
<p>12 February 2004 (Cont'd)</p>	<p>(iii)the rationale for extending the statutory unfair prejudice remedies to a past member of a specified corporation with the only qualification that the affairs being complained of should be in relation to the affairs of the specified corporation at the time when he was a member, bearing in mind that in the United Kingdom and Singapore the statutory remedies are not available to a past member and in Australia, the scope of "past member" is confined to a person who has ceased to be a member of the company if the application relates to the circumstances in which he ceased to be a member.</p> <p>(i) To provide court cases on excessive remuneration of directors for illustration of unfair prejudice remedies under <b>section 168A</b>; and</p> <p>(j) To provide a substantive response on whether <b>section 168A(2D)</b> should be deleted or revised.</p>	<p>LC Paper No. CB(1)1108/03-04(01) (issued on 25 February 2004)</p> <p>Draft Committee Stage amendments (LC Paper No. CB(1)1251/03-04(02) issued on 10 March 2004)</p>
<p>26 February 2004</p>	<p>(a) To consider whether the relief provided under proposed new <b>sections 168A(2A) to (2C)</b> should be confined to the personal loss of a member or part of the members(s) of a specified corporation and thus should not apply to any loss which is merely reflective of the specified corporation's loss; if so, to consider revising the proposed provisions to make clear this policy intent;</p> <p>(b) To reconsider whether the wordings "whether or not with a view to bringing to an end the matters complained of" should be used in the proposed new <b>sections 168A(2A) and (2C)</b>; if it is considered preferable to use these wordings, the intended situations to be catered for should be explained;</p>	<p>LC Paper No. CB(1)1251/03-04(01) (issued on 10 March 2004)</p>



Unfair Prejudice Remedies (Cont'd)

<b>Date of meeting</b>	<b>Issue</b>	<b>Outcome</b>
26 February 2004 (Cont'd)	(c) In connection with (b) above, to provide the relevant court case in Ireland;	LC Paper No. CB(1)1251/03-04(01) <i>(issued on 10 March 2004)</i>
	(d) To provide court cases in New Zealand for illustration of the application of the unfair prejudice remedy under the New Zealand Companies Act 1993 to former shareholders of a company; and  (e) To confirm whether there is any statutory limitation period for actions to seek unfair prejudice remedy in other jurisdictions where unfair prejudice remedy is available to past members of a company.	Post meeting note of minutes of meeting held on 19 March 2004 <i>(LC Paper No. CB(1)1441/03-04)</i>
19 March 2004	To add a doubt-avoidance provision to make it clear that the proposed provisions would not have the effect of entitling any member to recover by way of damages which should properly belong to the company under common law.	Revised Draft Committee Stage amendments LC Paper No. CB(1)1369/03-04(03) <i>(issued on 24 March 2004)</i>

Statutory derivative action

<b>Date of meeting</b>	<b>Issue</b>	<b>Outcome</b>
20 February 2004	(a) To consider introducing CSAs to the effect that a member of a specified corporation is required to apply to the court for leave for bringing proceedings on behalf of the specified corporation;  (b) On the scope of application of the proposed provisions on statutory derivative action, to provide examples to illustrate the types of derivative claims that are not allowed by the court under the current common law arrangement but would be allowed if the proposed provisions are enacted;  (c) As undertaken in the Administration's response to written submissions, to consider whether there is a need to -	LC Paper No. CB(1)1251/03-04(01) <i>(issued on 10 March 2004)</i>

Statutory derivative action (*Cont'd*)

Date of meeting	Issue	Outcome
20 February 2004 ( <i>Cont'd</i> )	<p>(i) make it explicit in the <b>proposed section 168BB(1)</b> that the subject proceedings should be confined to those for the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed by a person who is or has been a director of the company (c.f. section 50 of the Australian Securities and Investments Commission Act 2001); and</p> <p>(ii) add a new provision along the lines in section 237(3) of the Australian Corporation Act 2001 to “define” the scope of “best interests” in the <b>proposed sections 168BD and 168BB(3)</b> whereby proceedings between a company and a third party would normally be excluded from the statutory derivative action.</p> <p>(d) To provide information on the provision in Australia which provides a rebuttable presumption that granting leave is not in the best interests of the company if certain conditions are established;</p>	LC Paper No. CB(1)1251/03-04(01) ( <i>issued on 10 March 2004</i> )
	<p>(e) On <b>proposed section 168BB(2)</b> empowering a member to bring proceedings "in the name of the specified corporation", to further consider the concerns of Mr Winston POON, SC et al. over the possible problems relating to inspection and discovery of documents. In this connection, to also explain the merits of the proposed arrangement as compared to the common law arrangement and to provide information on how the issues are addressed in Australia and Singapore;</p>	LC Paper No. CB(1)1369/03-04(01) ( <i>issued on 24 March 2004</i> )

Statutory derivative action (*Cont'd*)

<b>Date of meeting</b>	<b>Issue</b>	<b>Outcome</b>
20 February 2004 ( <i>Cont'd</i> )	<p>(f) With regard to the timing for determination of the costs of the derivative action, to provide information with court cases in Australia on the normal timing that the court makes an order as to the costs, whether at the stage of leave application or at the early stage of the proceedings on the derivative action or otherwise; and</p> <p>(g) To clarify the policy intent as to whether multiple interventions in the same derivative action by different members of a specified corporation would be permissible, and how the court is expected to deal with such interventions given the leave requirement for such interventions.</p>	LC Paper No. CB(1)1251/03-04(01) ( <i>issued on 10 March 2004</i> )
11 March 2004	<p>(a) To provide information on the situation (e.g. whether there has been proliferation of cases and/or substantial lengthening of proceedings in individual cases etc.) of the litigation in the United Kingdom after the imposition of the leave requirement for derivative actions taken by a member or members of a company.</p> <p>(b) To provide information on the past situation (e.g. the number of derivative action cases over a certain number of years, the types of companies and conduct involved etc.) of the litigation in Hong Kong involving derivative actions taken by a member or members of a company.</p> <p>(c) To advise, if the rebuttable presumption as provided under section 237(3) of the Australian Corporations Act 2001 is not adopted as a threshold condition for granting leave, there would still be sufficient safeguards under the other proposed provisions to protect lawful and reasonable commercial transactions of a company from being challenged through derivative actions.</p>	LC Paper No. CB(1)1369/03-04(01) ( <i>issued on 24 March 2004</i> )

Date of meeting	Issue	Outcome
25 March 2004	<p>The Bills Committee considered that as substantial changes had been made to the proposed provisions on statutory derivative action in the blue Bill, in particular the addition of the leave requirement, and concerns had been raised over some procedural issues of the proposed arrangement, further consultation with the Standing Committee on Company Law Reform and other relevant parties was required. The Bills Committee requested and the Administration agreed to undertake the consultation.</p> <p>The Bills Committee considered that it might also be appropriate to consult the Judiciary, as the Judiciary would probably need to draw up specific procedures to effect the proposed statutory derivative action. Subsequent to the meeting, the Administration has been asked to also consult the Judiciary.</p>	Reply awaited

Injunctions

Date of meeting	Issue	Outcome
28 February 2004	(a) To provide court cases in Australia to illustrate how the statutory provisions on injunctions in Australia have been applied.	LC Paper No. CB(1)1251/03-04(01) <i>(issued on 10 March 2004)</i>
	(b) To consider whether the court should be empowered to require an applicant for an injunction under <b>proposed section 350B</b> to give an undertaking as to damages when the court grant an interim injunction and/or an injunction.	LC Paper No. CB(1)1369/03-04(01) <i>(issued on 24 March 2004)</i>