

**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 draft mark-up version (as at 1 June 2004) of those provisions relating to inspection order, unfair prejudice remedy, derivative action and injunction 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 and by various deputations. The reasons for the amendments are set out in the footnotes.

Financial Services Branch  
Financial Services and the Treasury Bureau  
June 2004

SCHEDULE 4

[ss. 2 & 4]

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.<sup>1</sup>

(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

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<sup>1</sup> 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 5 members.<sup>2</sup>

(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.<sup>3</sup>

(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.<sup>4</sup>

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<sup>2</sup> See Footnote (1).

<sup>3</sup> 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.

<sup>4</sup> 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;~~i-~~

~~(c) an order requiring the applicant to pay the expenses reasonably incurred by the specified corporation in the inspection; and<sup>5</sup>~~

~~(d) an order permitting the applicant or the 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 such person as is specified in the order.<sup>6</sup>~~

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

~~(1) Subject to section 152FE, no information or document obtained~~

<sup>5</sup> 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.

<sup>6</sup> 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.

~~as a result of an inspection under section 152FA shall, without 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 the 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 the other members applying as applicant or to the applicant, unless the disclosure is -

- (a) required with a view to the institution of, or

otherwise for the purposes of, any criminal proceedings;<sup>7</sup>

(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.<sup>8</sup>

(2) Subject to section 152FE and subsection (1), the applicant or the 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).<sup>9</sup>

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

#### **~~152FD. Saving for solicitors~~**

~~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.~~

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> See Footnote (8).



**152FD. Legal professional privilege**

Nothing in sections 152FA and 152FB, or any order made under any of those sections, shall authorize a person to inspect any records containing information that is subject to legal professional privilege.<sup>11</sup>

**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~~<sup>12</sup>, shall authorize the collection, ~~retention and retention 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~~

<sup>10</sup> 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.

<sup>11</sup> In response to Members' comments, these amendments aim to make it clear that no person shall be authorized to inspect any record that contains information that is subject to legal professional privilege.

<sup>12</sup> Amendments consequential to Footnote (9).

~~"subsection (1)";~~

~~(b) by adding "(including the member who made the petition)"~~  
~~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 of 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 and interest on those damages as the court may think fit to any members (including the member who presented the petition) of the specified corporation, whose interests have been unfairly

prejudiced by the act or conduct.<sup>13</sup>

~~“(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 this section.

<sup>13</sup> 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).

~~(2C) If on any petition made 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 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 then members (including the past member who made the petition) of the specified corporation, whose interests were unfairly prejudiced by the relevant act or conduct.~~

(2C) If on any petition 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 presented the petition), whether or not such conduct consists of an isolated act or a series of acts, the court may order payment by any person of such damages and interest on those damages as the court may think fit to any then members (including the past member who presented the petition) of the specified corporation, whose interests were unfairly prejudiced

by the act or conduct.<sup>14 15</sup>

(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 common law<sup>16</sup> .

~~(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.”~~<sup>17</sup>

<sup>14</sup> In response to the suggestion made by Mr Winston Poon, SC, these amendments aim to replace “made” with “presented”.

<sup>15</sup> 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).

<sup>16</sup> 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 specified corporation is entitled to recover under common law.

<sup>17</sup> 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.

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

~~“(5C) For the purposes of this section, “then members” (當其時成員) 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.”~~<sup>18</sup>

(7) Where before the commencement of section 4 of Schedule 4 to the Companies (Amendment) Ordinance 2004 ( of 2004), a petition has been presented for an order under section 168A of the pre-amended Ordinance, that section of the pre-amended Ordinance shall continue to apply in relation to such a petition as if section 4 of Schedule 4 to the Companies (Amendment) Ordinance 2004 had

<sup>18</sup> 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”.

not been enacted.

(8) For the purpose of subsection (7), "pre-amended Ordinance" (修訂前的本條例) means the Companies Ordinance (Cap. 32) that was in force immediately before it was amended by section 4 of Schedule 4 to the Companies (Amendment) Ordinance 2004 ( of 2004).<sup>19</sup> \_

## **5. Part IVAA added**

The following is added immediately after section 168B –

### **"PART IVAA**

#### **STATUTORY DERIVATIVE ACTION** **BRINGING OR INTERVENING IN PROCEEDINGS ON** **BEHALF OF SPECIFIED CORPORATION**

### **168BA. Definition**

In this Part, unless the context otherwise requires, "proceedings" (法律程序) means any proceedings (other than criminal proceedings) within the jurisdiction of the court.

### **168BAA. Application**

(1) This Part applies to –

(a) the bringing of proceedings in respect of misfeasance committed against a specified corporation.

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<sup>19</sup> A transitional provision is added to make it clear that petitions presented under existing section 168A before the commencement of the Bill will be dealt with in accordance with existing section 168A.



(b) the bringing of proceedings in respect of any matter where the proceedings are brought as a result of a specified corporation's failure to bring such proceedings by reason of misfeasance committed against the specified corporation, and

(c) the intervention in proceedings in respect of any matter where the intervention is brought as a result of a specified corporation's failure to diligently continue, discontinue or defend those proceedings by reason of misfeasance committed against the specified corporation,

where in relation to the proceedings brought or intervened in, the cause of action or right to continue, discontinue or defend those proceedings, as the case may be, is vested in the specified corporation and relief, if any, is sought on behalf of the specified corporation.

(2) In this section, "misfeasance" (不當行為) means fraud, negligence, default in compliance with any enactment or rule of law, or breach of duty.<sup>20 21</sup>

**168BB. Members may bring or intervene in proceedings**

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<sup>20</sup> Having regard to the views of various organizations on this issue, we propose, as agreed by the Bills Committee, to restrict the scope of the statutory derivative actions to those proceedings in respect of or arising out of any fraud, negligence, default in relation to any law or rules, breach of duty committed against the specified corporation.

<sup>21</sup> In response to the Hong Kong Bar Association's comments, we have clarified that the scope of derivative actions should be restricted to those proceedings brought or intervened in, where the cause of action or right to continue, discontinue or defend those proceedings, as the case may be, is vested in a specified corporation and relief, if any,

~~—(1) A member of a specified corporation may —~~

~~(a) without leave of the court, bring proceedings before the court on behalf of the specified corporation; or~~

~~(b) with the leave of the court granted under subsection (3), intervene in any proceedings before the court to which the specified corporation is a party for the purposes of continuing, discontinuing or defending those proceedings on behalf of the specified corporation.~~

(1) A member of a specified corporation may, with the leave of the court granted under subsection (3) -

(a) bring proceedings before the court on behalf of the specified corporation; or

(b) intervene in any proceedings before the court to which the specified corporation is a party for the purposes of continuing, discontinuing or defending those proceedings on behalf of the specified corporation.<sup>22</sup>

(2) Any proceedings brought under subsection (1) (a) on behalf of a specified corporation shall be brought in the name of the specified corporation.

~~(3) The court may, on the application of a member of a specified corporation, grant leave for the purpose of subsection (1)(b) if it is satisfied that –~~

- ~~(a) the intended intervention is in the best interests of the relevant specified corporation;~~
- ~~(b) the member is acting in good faith in the application for leave to intervene in the proceedings; and~~
- ~~(c) except where leave is granted by the court under section 168BC(4), the member has served a written notice on the specified corporation in accordance with section 168BC.~~

(3) The court may, on the application of a member of a specified corporation, grant leave for the purpose of subsection (1) if the court is satisfied that –

- (a) it appears to be prima facie in the interest of the specified corporation that leave be granted to the applicant;
- (b) the applicant is acting in good faith;
- (c) if the applicant is applying for leave to bring proceedings under subsection (1)(a), there is a serious question to be tried and the

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<sup>22</sup> In response to Members' suggestion, these amendments aim to impose a leave requirement for commencing a statutory derivative action.

specified corporation has not itself brought the proceedings;

- (d) if the applicant is applying for leave to intervene in proceedings under subsection (1)(b), the specified corporation has not diligently continued or defended or discontinued those proceedings; and
- (e) except where leave is granted by the court under section 168BC(4), the member has served a written notice on the specified corporation in accordance with section 168BC.<sup>23</sup>

(4) Subject to other provisions in this Part, ~~T~~this Part shall not affect any common law right of a member of a specified corporation to bring proceedings on behalf of the specified corporation, or intervene in any proceedings to which the specified corporation is a party.

(4A) The court may dismiss an application for leave under subsection (3) if the applicant has, in the exercise of any common law right -

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<sup>23</sup>

Having regard to the views of various organizations on this issue, we agree to introduce, as proposed by the Bills Committee, a leave requirement, and to lower the thresholds for granting leave: (a) it appears to be prima facie in the interests of the specified corporation that the proceedings be brought, continued, discontinued or defended; (b) the applicant is acting in good faith; (c) if the applicant is applying for leave to bring proceedings on behalf of the specified corporation, there is a serious question to be tried and the specified corporation does not bring the proceedings; (d) if the applicant is applying for leave to intervene in proceedings on behalf of the specified corporation, the specified corporation does not diligently continue, discontinue or defend the proceedings; (e) except where leave is granted by the court, the member has served a written notice on the specified corporation.

(a) brought proceedings on behalf of the specified corporation in respect of the same cause or matter; or  
(b) intervened in the proceedings in question to which the specified corporation is a party.<sup>24</sup>

(5) For the avoidance of doubt, this section does not prevent a member of a specified corporation from bringing proceedings in respect of the specified corporation, or intervening in any proceedings to which the specified corporation is a party, on his own behalf in respect of his personal right.

#### **168BC. Service of written notice**

(1) Subject to subsection (4), a member of a specified corporation shall serve a written notice on the specified corporation at least 14 days before he ~~brings or applies for leave to intervene in proceedings under section 168BB~~ applies for leave under section 168BB(3)<sup>25</sup> in respect of the specified corporation.

(2) Service of a written notice under this section shall be effected by leaving it at -

- (a) in the case of a company, its registered office;
- (b) in the case of a non-Hong Kong company, the address of its authorized representative that is

<sup>24</sup>

Having regard to the views of various organizations on this issue, we propose to empower the court to deal with the co-existence or duplicity of a statutory derivative action and a common law derivative action: (a) add a new section to empower the court to dismiss an application for leave to commence a statutory derivative action if a common law derivative action has been commenced by the same member in respect of the same subject matter; (b) add a new section to empower the court to prevent a member from continuing with a common law derivative action if leave has been granted to the same member to commence a statutory derivative action in respect of the same subject matter; and (c) add a new section to empower the court to make any order and give any direction it considers appropriate in relation to items (a) and (b) above

registered under section 333.

(3) A written notice under this section shall state -

- (a) the intention of the member to ~~bring or apply for leave to intervene in proceedings under section 168BB apply for leave under section 168BB(3)~~<sup>26</sup> in respect of the specified corporation; and
- (b) the reasons for his intention.

(4) The court may grant leave to dispense with the service of a written notice required by this section.

168BCA. Court's power to strike out proceedings brought or intervention in proceedings by members under common law

(1) Where leave has been granted to a member of a specified corporation under section 168BB(3) and the member, in the exercise of any common law right, subsequently brings proceedings on behalf of the specified corporation in respect of the same cause or matter, or subsequently intervenes in the proceedings in question to which the specified corporation is a party, the court may -

- (a) order to be struck out or amended any pleading or the indorsement of any writ in the proceedings brought under the common law, or the intervention under the common law, or anything in such pleading or indorsement; and

<sup>25</sup> See Footnote (22).

<sup>26</sup> See Footnote (22).

(b) order the proceedings brought under the common law, or the intervention under the common law, to be stayed or dismissed or judgment to be entered accordingly.

(2) This section is in addition to and does not derogate from any power of the court conferred by any enactment or rule of law<sup>27</sup>.

~~**168BD. Court's power to strike out proceedings brought by members**~~

~~(1) On application by any party to any proceedings brought by a member of a specified corporation under section 168BB(1), the court may, on any of the grounds mentioned in subsection (2), at any time after the proceedings were brought—~~

~~(a) order to be struck out or amended any pleading or the indorsement of any writ in the proceedings brought by the member, or anything in such pleading or indorsement; and~~

~~(b) order the proceedings brought by the member to be stayed or dismissed or judgment to be entered accordingly.~~

~~(2) The grounds referred to in subsection (1) are—~~

~~(a) the bringing of proceedings under section 168BB(1) is not in the best interests of the relevant specified corporation;~~

~~(b) the proceedings have not been brought by the relevant member of the specified corporation in~~

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<sup>27</sup> See footnote (24).

~~good faith;~~

~~(c) except where leave is granted by the court under section 168BC(4), the written notice required to be served on the relevant specified corporation under section 168BC has not been served on it or has not been served in accordance with section 168BC; or~~

~~(d) leave granted under section 168BC(4) has been set aside by the court.~~

~~(3) This section is in addition to and does not derogate from any power of the court conferred by any enactment or rule of law.~~<sup>28</sup>

#### **168BE. Effect of approval or ratification**

(1) The approval or ratification by the members of a specified corporation of any conduct shall not have the effect of -

- (a) preventing a member of the specified corporation from bringing or intervening in any proceedings under section 168BB(1), or from applying for leave under section 168BB(3);
- (b) requiring the court to ~~strike out the proceedings brought by the member, or~~<sup>29</sup> refuse to grant leave under section 168BB(3); or
- (c) requiring the court to determine the proceedings brought or intervened in by the member in favour

<sup>28</sup> See Footnote (22). After the introduction of the leave requirement, the striking out mechanism can be deleted.



of the defendant.

(2) Notwithstanding subsection (1), the court may, after having regard to the following matters in respect of the members of a specified corporation who approved or ratified the relevant conduct, take into account the approval or ratification in deciding what judgment or order (including any order as to damages) to make in respect of any proceedings brought or intervened in by a member of the specified corporation under section 168BB(1), or in respect of an application for leave made under section 168BB(3) –

- (a) the extent of the members' independence of the conduct when they approved or ratified it;
- (b) how well-informed about the conduct they were when deciding whether or not to approve or ratify it; and
- (c) whether or not they were acting for proper purposes having regard to the interests of the specified corporation when they approved or ratified it.

#### **168BF. General powers of court**

(1) The court may, at any time,<sup>30</sup> make any order and give any direction it considers appropriate in respect of any proceedings brought or intervened in by a member of a specified corporation under section 168BB(1), or in respect of an application for leave made under section 168BB(3), including –

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<sup>29</sup> See Footnote (28).

- (a) interim orders pending the determination of the proceedings or application;
- (b) directions concerning the conduct of the proceedings or application, ~~including requiring mediation~~<sup>31</sup>;
- (c) an order directing the specified corporation, or an officer of the specified corporation, to do, or not to do, any act (including the provision by the specified corporation or the officer of such information or assistance as the court may think fit for the purpose of the proceedings or application)<sup>32</sup>; and
- (d) an order appointing an independent person to investigate and report to the court on –
  - (i) the financial position of the specified corporation;
  - (ii) the facts or circumstances that gave rise to the proceedings; or
  - (iii) the costs incurred by the parties to the proceedings, and by the member who brought or intervened in the proceedings, or made the application.

(2) Where the court makes an order under subsection (1)(d), it

<sup>30</sup> These amendments aim to improve the clarity of the proposed section 168BF(1).

<sup>31</sup> In response to the suggestion made by Mr Winston Poon, SC, these amendments aim to delete the phrase “including requiring mediation”.

may make any other orders it considers appropriate for the purposes of that subsection.

(3) Where the court orders the appointment of an independent person under subsection (1)(d), the court may, at any time -

(a) order any or all of the following persons to be liable for any expenses arising out of the investigation -

(i) the specified corporation;

(ii) the parties to the proceedings or application<sup>33</sup>;

(iii) the member who brought or intervened in the proceedings, or made the application; and

(b) review, vary or revoke an order made pursuant to paragraph (a).

(4) If an order made pursuant to subsection (3)(a), or the order as varied pursuant to subsection(3)(b), makes 2 or more persons liable for the relevant expenses, the court may also determine the nature and extent of the liability of each of those persons.

(5) The court may, at any time, make any order and give any direction it considers appropriate in relation to sections 168BB(4A) and 168BCA.<sup>34</sup>

<sup>32</sup> Having regard to the views of various organizations on this issue, we propose to amend the proposed section 168BF(1)(c) to make it clear that the court may make an order directing the specified corporation or its officers to provide information or assistance in relation to the statutory derivative action.

<sup>33</sup> In responses to Members' comments, these amendments aim to make it clear that "parties to the proceedings" include "parties to the application".

<sup>34</sup> See footnote (24).

**168BFA. Protection of personal data**

Nothing in section 168BF(1)(c), (d) and (2) shall authorize the collection, retention or use of personal data in contravention of the Personal Data (Privacy) Ordinance (Cap. 486).<sup>35</sup>

**~~168BG. Power of court to make orders  
as to costs~~**

~~—(1) The court may, at any time, make any orders it considers appropriate as to the liabilities of the following persons in relation to the costs of any proceedings brought or intervened in by a member of a specified corporation under section 168BB(1), or any proceedings on an application for leave made under section 168BB(3)—~~

- ~~(a) the specified corporation;~~
- ~~(b) the parties to the proceedings; and~~
- ~~(c) the member who brought or intervened in the proceedings, or made the application.~~

~~—(2) An order made under subsection (1) may require indemnification of costs, which may require indemnification, out of the assets of the relevant specified corporation, against the costs incurred or to be incurred by the member referred to in subsection (1)(c) in bringing or intervening in the proceedings, or making the application.~~

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<sup>35</sup>

In response to the comments made by the Office of the Privacy Commissioner for Personal Data, we propose to add a new provision along the lines in the proposed section 152FE to enhance the protection of the personal data obtained under the proposed section 168BF.

~~—(3) The court may only make an order as to costs under this section in favour of the member referred to in subsection (1)(c) if it is satisfied that the member was acting in good faith in, and had reasonable grounds for, bringing or intervening in the proceedings, or making the application.~~

**168BG. Power of court to make orders  
about costs**

(1) The court may, at any time (including on granting leave under section 168BB(3)), make any order it considers appropriate about the costs incurred or to be incurred by the following persons in relation to an application for leave made under section 168BB(3) or any proceedings brought or intervened in, or to be brought or intervened in, under section 168BB(1) –

(a) the member;

(b) the specified corporation; and

(c) any other parties to the application or proceedings. <sup>36</sup>

(2) An order made under subsection (1) may require the specified corporation to indemnify out of its assets against the costs incurred or to be incurred by the member in making the application or in bringing or intervening in the proceedings.

<sup>36</sup>

In response to Members' suggestion, these amendments aim to make it clear that the court may grant an order as to costs for proceedings brought or intervened in by a member of the specified corporation once the leave to commence the proceedings is obtained.

(3) The court may only make an order about costs (including the requirement as to indemnification) under this section in favour of the member if it is satisfied that the member was acting in good faith in, and had reasonable grounds for, bringing or intervening in the proceedings, or making the application<sup>37</sup>.

#### **168BH. Discontinuance or settlement**

Proceedings brought or intervened in by a member of a specified corporation under section 168BB(1) shall not be discontinued or settled without the leave of the court.

#### **168BI. Rules of court**

The Rules Committee constituted under section 55 of the High Court Ordinance (Cap. 4) may make rules of court for giving effect to this Part as appears to the Committee to be necessary or expedient."

### **6. Section added**

The following is added immediately after section 350A -

#### **"Injunctions**

#### **350B. Injunctions**

(1) Where a person ("the first-mentioned person") has, in

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<sup>37</sup> In response to Members' comments, these amendments aim to improve the clarity of the proposed sections 168BG(2) and (3).

relation to a specified corporation.<sup>38</sup> engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute –

- (a) a contravention of this Ordinance;
- (b) an attempt to contravene this Ordinance;
- (c) aiding, abetting, counselling or procuring another person to contravene this Ordinance;
- (d) inducing or attempting to induce, whether by threats, promises or otherwise, another person to contravene this Ordinance;
- (e) his being in any way, directly or indirectly, knowingly concerned in, or a party to, a contravention of this Ordinance by another person;
- (f) conspiring with others to contravene this Ordinance; or

- (g) ~~(g)~~ a breach of his fiduciary duties owed to the specified corporation in any capacity other than as a director of the specified corporation<sup>39 40</sup>;  
~~or a breach of his fiduciary duties or other duties owed to a company,~~
- (h) a breach his fiduciary and other duties as a director of the specified corporation (other than the duties that arise solely by virtue of a

<sup>38</sup> These amendments aim to restrict the scope of applicants under section 350B to members or creditors of a specified corporation.

<sup>39</sup> In response to the suggestion made by Linklaters, these amendments aim to replace “company” with “specified corporation”.

<sup>40</sup> These amendments aim to clarify the scope of “other duties” in section 350B(1)(g) to mean a director’s duties (other than fiduciary duties) owed to his specified corporation.

contract between him and the specified corporation)  
owed to the specified corporation,<sup>40</sup>

the court may, on the application of the Financial Secretary, or of any person a member or creditor of the specified corporation<sup>38</sup> whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the court considers appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the court it is desirable to do so, requiring the first-mentioned person to do any act or thing.

(2) The power of the court to grant an injunction restraining the first-mentioned person referred to in subsection (1) from engaging in the conduct mentioned in that subsection may be exercised –

- (a) whether or not it appears to the court that he intends to engage again, or to continue to engage, in that conduct;
- (b) whether or not he has previously engaged in that conduct; and
- (c) whether or not there is an imminent danger of substantial damage to any other person if he engages in that conduct.

(3) Where a person ("the first-mentioned person") has, in relation to a specified corporation,<sup>38</sup> refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an



act or thing that the first-mentioned person is required by this Ordinance to do, the court may, on the application of the Financial Secretary, or of a member or creditor of the specified corporation ~~any person~~<sup>38</sup> whose interests have been, are or would be affected by the refusal or failure to do that act or thing, grant an injunction, on such terms as the court considers appropriate, requiring the first-mentioned person to do that act or thing.

(4) The power of the court to grant an injunction requiring the first-mentioned person referred to in subsection (1) or (3) to do an act or thing may be exercised –

- (a) whether or not it appears to the court that he intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
- (b) whether or not he has previously refused or failed to do that act or thing; and
- (c) whether or not there is an imminent danger of substantial damage to any other person if he refuses or fails to do that act or thing.

(5) Where the court considers appropriate, it may grant an interim injunction on such terms and conditions as it thinks fit<sup>41</sup> pending determination of an application under subsection (1) or (3).

(6) The court may discharge or vary an injunction granted under subsection (1), (3) or (5).

(7) The court may, either in addition to or in substitution for

the grant of the injunction under subsection (1) or (3), order the first-mentioned person referred to in subsection (1) or (3) to pay damages to any other person."

(8) For the avoidance of doubt, the damages that may be ordered by the court under subsection (7) does not entitle a person to recover by way of damages any loss that is solely reflective of the loss suffered by a specified corporation which only the specified corporation is entitled to recover under the common law.<sup>42</sup>

## 7. Punishment of offences under this Ordinance

(1) The Twelfth Schedule is amended by adding -

"152FC( <del>32</del> )	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			

<sup>41</sup> In response to the Members' suggestion, these amendments aim to make it clear that the court may grant interim injunctions on such terms and conditions as it thinks fit.

<sup>42</sup> For the sake of consistency with the proposed section 168A(2CA), these amendments aim to make it clear that the proposed section 350B(7) will not have the effect of entitling any person to recover by way of damages any loss which only the specified corporation is entitled to recover under common law.

152FA contrary

to section

152FC(1) or

(2)<sup>43</sup>

(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".

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<sup>43</sup> Amendments consequential to footnote (10).