

General comments**Bills Committee on Companies (Amendment) Bill 2003****Summary of deputations' views
(as at 15 October 2003)**

Subject	Name of organizations/individuals	Major views on the Bill
General comments on the Bill	Standing Committee on Company Law Reform	No further comment as the proposed amendments in the Bill are originated mostly from the Standing Committee on Company Law Reform.
	Estate Agents Authority	No comment on the Bill as the proposed amendments do not relate to the practice of the estate agency trade.
	The DTC Association (The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies)	No comment on the Bill.
	The Hong Kong Mortgage Corporation Limited (HKMCL)	Being one of the members of the Hong Kong Capital Markets Association (HKCMA), HKMCL's submission will be coordinated and delivered through CMA.

General comments

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General comments on the Bill <i>(Cont'd)</i>	The Association of International Accountants Hong Kong Kwun Tong Industries and Commerce Association Limited/ The Hong Kong & Overseas Chinese Association of Commerce Limited	While largely agreeable to the amendments proposed in the Bill, the Associations are concerned about the burden of compliance and the possibility of additional costs due to the amended Companies Ordinance (the Ordinance).
	Consumer Council (CC) The Stock Exchange of Hong Kong Limited (SEHK)	CC and SEHK generally support the main objectives of the proposals in the Bill and other initiatives taken by the Administration to enhance corporate governance in Hong Kong.
	The Hong Kong Chinese Enterprises Association (HKCEA)	HKCEA considers that the Bill betters the balance of promoting the market development and safeguarding investors' interests. The Bill also helps improving corporate governance in Hong Kong.
	The Chinese General Chamber of Commerce (CGCC)	CGCC in principle agrees to the need to strengthen the local corporate governance regime and to improve the relevant legislation. However, the possible impacts of corporate governance initiatives on small and medium enterprises (SMEs) should be carefully considered. As SMEs have limited resources, the cost of compliance with some statutory requirements may be too high for them. CGCC suggests that some corporate governance initiatives may be implemented on large corporations first and be gradually extended to SMEs if the results of such initiatives are satisfactory.

Section No. of Schedule 1 / Subject	Name of organization/individual	Major views on the Bill
General comments on Schedule 1	Linklaters	Linklaters welcome the proposals in Schedule 1 which will be beneficial in clarifying the legislative framework in particular in relation to exemptions from the prospectus regime.
	The Hong Kong Institute of Company Secretaries (HKICS)	HKICS considers that streamlining the prospectus regime is necessary to enhance the regulatory environment to attract more financial product issuers to Hong Kong.
	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	Overall speaking, in respect of the prospectus regime in Hong Kong, the amendments proposed in the Bill are a step in the right direction.
Section 1 - <i>Interpretation</i>	HKICS	The issue of when an "offer to the public" arises deserves further examination. For reference, in the case of <i>Australian Central Credit Union v Corporate Affairs Commission (1985)</i> , the Australian High Court ruled that there was no need to issue a prospectus on the grounds that (i) there was a subsisting special relationship between the offeror and members of a group and (ii) there was a rational connection between the common characteristics of members of a group and the offer made to them.
	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	Regarding the proposed new definition of "prospectus", Ms CHAN opines that the word "company" should not be used in the definition. It would be preferable to use the phrase "body corporate or corporation" in lieu of the word "company". If the phrase is adopted, then the sentence "(including a company incorporated outside Hong Kong, and whether or not it has established a place of business in Hong Kong)" can be removed from the definition of "prospectus", while section 2(3) of the Ordinance can be amended by adding "whether or not it has established a place of business in Hong Kong".

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<p>Sections 3 and 24 - <i>SFC's powers of exemption and amendment</i></p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong</p>	<p>Under the Bill, the Securities and Futures Commission (SFC) is given much wider powers of exemption and amendment, including an additional ground for exemption under proposed section 38A: that the exemption will not prejudice the interest of the investing public. <i>(In her submission, Ms CHAN gives an example to illustrate SFC's broadened exemption power and set out in a table the many more requirements that may be exempted by SFC under the Bill.)</i></p> <p>Section 360 of the Ordinance is proposed to be amended to give SFC the power to amend the Third, Seventeenth, Eighteenth, Nineteenth, Twentieth, Twenty-first and Twenty-second Schedules (effectively all the substantive provisions relating to the prospectus regime) by order published in the Gazette, again with no limit on the scope of amendment.</p> <p>The question is whether it is worth the time and effort analysing, debating and fine tuning the relevant statutory provisions when they could be waived or amended without the approval of the Legislative Council.</p>
<p>Sections 4 and 17 - <i>Sale, etc. of shares or debentures acquired pursuant to offer specified in Part I of the Seventeenth Schedule</i></p>	<p>Linklaters</p>	<p>Linklaters has the following concerns in respect of the proposed sections 38AA and 342AB-</p> <ul style="list-style-type: none"> (a) the proposed provisions overlap with the existing section 41(2) of the Companies Ordinance. Linklaters is not aware of any pressing mischief which needs to be addressed by the new provisions, nor any misconduct that is not already caught by the existing section 41(2); (b) Linklaters is not aware of any similar provisions in other common law jurisdictions; (c) Linklaters is concerned that the proposed provisions are somewhat novel imposing restrictions, punishable by a fine, on a purchaser of securities; (d) the intended scope of the proposed provisions is not clear; and (e) it is unclear how the restriction interacts with the Seventeenth Schedule exemptions that are available with respect to a primary offer.

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<i>Section 5 - Advertisements concerning prospectus</i>	HKICS	<p>It might be worthwhile for the Stock Exchange of Hong Kong (SEHK) to take charge of a forthcoming issue at the outset by SEHK's publicising it in the form of an advertisement, the cost of which can be recovered from the issuer.</p> <p>The details publicised may include such matters as the name of the issuer and its directors and those of the sponsors and underwriters, the proposed size of the offer, and relevant dates.</p>
<i>Section 11 - Interpretation of provisions relating to prospectuses</i>	The Hong Kong Chinese Enterprises Association (HKCEA)	<p>Regarding the meaning of "untrue statement" for the purposes determining civil and criminal liabilities for misstatements in prospectuses under sections 40 and 40A of the Ordinance, section 11 of Schedule 1 of the Bill amends the Ordinance such that "untrue statement" in relation to any prospectus will include any "material omission" from the prospectus.</p> <p>HKCEA proposes that, for determining whether an omission is a "material omission", a disclosure standard or guidelines on what constitutes a "material omission" should be set out in the Ordinance.</p> <p>Further elaboration on the current provision in section 3 of the Third Schedule is also required.</p>

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<p>Sections 7 and 19 - <i>Registration of prospectus</i></p>	<p>Office of the Privacy Commissioner for Personal Data, Hong Kong (PCO)</p>	<p><u><i>Submission dated 16 September 2003</i></u></p> <p>Under the existing section 17 of the Third Schedule of the Ordinance, the dates of, parties to and general nature of every material contract shall be specified and included in the prospectus. The proposed sections 38D(3A) and 342C(3A) of the Ordinance further require the companies concerned to make available for public inspection such contract or memorandum for not less than 14 days from the date of publication of the prospectus. PCO considers that:</p> <p>(a) without limiting the contents of such contract or memorandum that may be disclosed, it appears that the amount of information to be made available for public inspection can potentially be more than that covered by the section 17 of the Third Schedule; and</p> <p>(b) the express purpose for disclosing and making them available for public inspection and that the personal data collected as a result are subject to the observance and compliance with the requirements of the Personal Data (Privacy) Ordinance should be clearly stated in the Bill.</p> <p><u><i>Submission dated 14 October 2003</i></u></p> <p>PCO acknowledges the existing requirements under sections 38D(3)(b)(i) and 342C(3)(b)(i) of the Ordinance, but considers that the proposed amendments obliging a company to make available for public inspection material contracts or memorandum of the terms of such contracts at its registered office in Hong Kong provide an additional channel for inspection akin to a public register. PCO therefore considers that the provision of a purpose statement specifying the use of the personal data in the proposed legislation would be appropriate and effective to quell uncertainty over their permitted use.</p>

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Section 13 - <i>Construction of references to offering shares or debentures to the public</i>	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	<p>It is proposed to add to section 48A of the Ordinance a new subsection (3) to declare that <i>"the provisions of the Seventeenth Schedule shall not be construed to prejudice the generality of this section"</i>. The drafting of the subsection defeats the whole purpose of introducing the Seventeenth Schedule, which is to provide certainty that offers falling within that schedule will not be subject to the prospectus regime under the Ordinance.</p> <p>Ms CHAN believes that subsection (3) should only refer to subsection (2) and not the entire section 48A. The effect of such a formulation is that an offer which does not fall within one of the heads in the Seventeenth Schedule may nonetheless be construed as not being an offer to the public, if the offer satisfies the criteria set out in subsection (2), for example, that it is a domestic concern between the persons making and receiving the offer.</p>
Section 25 - <i>Matters to be Specified in Prospectus and Reports to be set out therein</i>	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	<p>The Bill proposes to add at the end of section 3 of the Third Schedule: <i>"taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them"</i>. It is not clear as to what <i>"the nature of the company"</i> means.</p> <p>In all likelihood the proposed qualifications to the overall standard will be relied on by issuers or their advisors to argue for a lower level of disclosure when faced with allegations that the amount of information in a prospectus is inadequate or insufficiently clear. The more fundamental question is: Are such additional qualifications necessary or in the interests of the public?</p>
	HKICS	HKICS advocates the use of plain language in both English and Chinese to render the document "user friendly", thereby achieving the objective of providing simple and clear information to allow the investing public to make informed investment decision.

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Proposed Seventeenth and Eighteenth Schedules <i>Legending requirements in Prospectus</i>	Linklaters	Linklaters has the following concerns relating to the requirement that any exemption (except for one exemption) in the Seventeenth Schedule can be relied on only if the legending requirements are met - (a) the extent to which the legends really provide any degree of investor protection is questionable, in particular in the context of the exempted offers; (b) the requirement may result in certain offers losing the right to rely on one of the exemptions as a result of the omission of the legend, in particular in the context of international offerings; and (c) Linklaters is not aware of any other common law jurisdiction that specifically requires a legend to be used in order to benefit from such exemptions.

Section No. of Schedule 1 / Subject	Name of organization/individual	Major views on the Bill
<p>Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance</i></p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong</p>	<p>Section 3 of Part 1 of the Seventeenth Schedule provides that an offer is exempt if the total consideration payable for the securities offered does not exceed HK\$5 million. This seems to be a relatively high threshold given that the net proceeds raised by some companies listed in Hong Kong on their IPOs were in the region of HK\$20 million. The corresponding threshold in the UK Financial Services and Markets Act 2000 ("FSMA") is 40,000 Euros.</p> <p>Section 4 of Part 1 provides that an offer is exempt if the minimum denomination of, or the minimum consideration payable by any person for, the securities being offered is not less than HK\$500,000. It is interesting to note that the equivalent to this minimum threshold under FSMA is also 40,000 Euros.</p> <p>As a matter of drafting, it is better to specify that the threshold is HK\$xxx "or its equivalent in another currency", as it is possible that foreign currencies may be raised in a securities offering in Hong Kong. Alternatively, a new subsection may be added to section 2 of the Ordinance to the effect that, unless the context requires otherwise, all references in the Ordinance to amounts in HK dollars include its equivalent in another currency.</p> <p>Rather complicated wording is used for section 7 of Part 1 and it is not clear whether the section is intended to cover other situations apart from an offer of free shares to shareholders of a company. The equivalent exemption in FSMA simply refers to an offer where "the securities are shares and are offered free of charge to all or any of the holders of shares in the issuer".</p>

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<p>Proposed Seventeenth Schedule - <i>Offers specified for the purposes of paragraph (b)(ii) of the definition of "Prospectus" in section 2(1) of the Ordinance (cont'd)</i></p>	<p>Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong <i>(cont'd)</i></p>	<p>Section 8 of Part 1 effectively provides that an offer made to employees and former employees of a company is exempt. However, the exemption is expressed (<i>see section 6 of Part 4</i>) to cover "consultants" and "former consultants" who provide services to the issuer (or another group company) pursuant to a contract for services. This is potentially a very wide extension and may lead to difficulties in interpretation. First, what services are "commonly" rendered by an employee is a subject matter for debate. Secondly, it is likely that the legal entity which the issuer instructs and contracts with is a company or a partnership, and it is not clear whether the term "consultant" used in the Bill would cover all the directors and officers of the company or, as the case may be, all the partners and associates of the firm or only those individuals personally involved in providing the services.</p> <p>There are valid reasons for drawing a distinction between employees and independent contractors, and the distinction is incorporated in different laws and regulations. Furthermore, most of the commercial arguments for including "consultants" would be equally applicable to, say, major suppliers and customers of the issuer.</p> <p>Section 11(a)(ii) of Part 1 provides that an offer to exchange debentures in the same company which does not result in an increase in the aggregate principal amount outstanding is exempt. There is no exemption in relation to debentures in the equivalent head in FSMA. (<i>In her submission, Ms Alice CHAN gives two examples to illustrate the dangers of the exemption to the investing public.</i>) The equivalent exemption in FSMA to the exemption in section 11 of Part 1 applies to shares and "investments of a specified kind relating to shares", and "specified" in this context means specified in an order made by the Treasury.</p>

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<i>Proposed Twenty- first Schedule - Provisions in accordance with which a prospectus may consist of more than one document</i>	Linklaters	The requirement under Part 1 section 8 that the programme prospectus be updated every 12 months is desirable, but this requirement should be sufficiently flexible to cater for the fact that there may be 13 or 14 months between the dates on which a company's annual reports are published.

Section No. of Schedule 2 / Subject	Name of organizations/individuals	Major views on the Bill
General comments on Schedule 2	The Stock Exchange of Hong Kong Limited (SEHK)	<p>SEHK supports the amendments to introduce the concepts from the United Kingdom (UK) of an "undertaking" and control by virtue of "the right to exercise of a dominant influence over another undertaking".</p> <p>SEHK will propose further amendments to its Listing Rules particularly in the area of notifiable transactions upon implementation of the Bill.</p>
	The Chinese General Chamber of Commerce (CGCC)	<p>CGCC supports the proposal to modify the term of "subsidiary" in the Ordinance to more closely align with international practices. CGCC anticipates that the modification will not have significant effect on Hong Kong companies. However as there are differences in the accounting practices between Hong Kong and the Mainland, some Mainland companies may have difficulties in preparing their group accounts in accordance with the new statutory requirement.</p>
	The Hong Kong Chinese Enterprises Association Linklaters The Hong Kong Capital Markets Association (HKCMA)	<p>The proposed amendments to extend the meaning of "subsidiary" for the purposes of preparing group accounts to include "subsidiary undertaking" and "the right to exercise a dominant influence over another undertaking" would likely have a negative effect on the development of the asset securitisation market in Hong Kong. The consolidation of special purpose entities (SPEs) brought about by the extended definition of "subsidiary" would undermine the incentive for asset securitisation.</p>
	HKCMA	<p>HKCMA is concerned that the combined effects of adopting the SSAP32¹, IAS² (in its current evolving format) and the proposed amendments to the Companies Ordinance will greatly hamper the development of the securitisation market in Hong Kong, in a manner that would be disadvantageous to companies that account under HKGAAP (Hong Kong Generally Accepted Accounting Principles) against those that account under, for example, United States GAAP.</p>

¹ SSAP32 denotes the Hong Kong Society of Accountant's statement of Standard Accounting Practice for Consolidated Financial Statements and Accounting for Investments in Subsidiaries.

² IAS denotes International Accounting Standards.

Section No. of Schedule 2 / Subject	Name of organizations/individuals	Major views on the Bill
<p>General comments on Schedule 2 (<i>Cont'd</i>)</p>	<p>HKCMA (<i>Cont'd</i>)</p>	<p>The relevant IAS (IAS27, IAS39 and SIC 12) are currently being reviewed and may be modified further to accommodate the concerns of financial services industry professionals. Should the International Accounting Standards Board (IASB) significantly amend IAS to address issues pertaining to the consolidation of special purpose entities, HKSA would most likely follow, and that may require another change to the definition of "subsidiary" under the Companies Ordinance.</p> <p>It is also probable that the proposed amendments to the Companies Ordinance may not ultimately be entirely in accordance with the results of the convergence review of current international accounting standards being undertaken by the Financial Accounting Standards Board (FASB) in the United States and the IASB. If there is a change of approach as a result of the review (scheduled for completion by January 2005), Hong Kong's legislation may become outdated, possibly even before it has come into effect.</p> <p>Premature application of the proposed legislative amendments and the resultant consolidation of securitisation SPEs may also have the inadvertent effect of misleading investors and analysts into thinking that a company that has securitised assets (the Originator) has more assets at its disposal than it actually does.</p> <p>HKCMA requests that the consultation and consideration period for the proposed amendments be extended until at least such time as there is further clarity on the position of the IASB in relation to the proposed amendments to IAS27, IAS39 and other relevant standards.</p>

Section No. of Schedule 2 / Subject	Name of organizations/individuals	Major views on the Bill
General comments on Schedule 2 <i>(Cont'd)</i>	Linklaters	In the light of the current of flux in relation to the accounts consolidation treatment of special purpose entities formed for the purpose of securitization, a better alternative at this stage is to provide a clear "carve out" in the Schedule 2 amendments to exclude their application to securitization transactions and special purpose entities specifically.
Section 1 - <i>Section added (Construction of references to parent company, etc.)</i> Proposed Twenty-third Schedule - <i>Parent and subsidiary undertakings</i>	Ms Alice CHAN, Lecturer of Department of Professional Legal Education, University of Hong Kong	<p>By virtue of proposed new section 2B(3), all references to a "subsidiary" in the Third Schedule (<i>Matters to be Specified in Prospectus and Reports to be set out therein</i>) will be deemed to include a subsidiary undertaking.</p> <p>Under the Bill, there are three scenarios (<i>as specified in section 2 of Twenty-third Schedule</i>) whereby an entity will be deemed to be a "subsidiary undertaking" of another entity. Ms CHAN is of the view that one uniform test, namely the criteria under section 2(1)(b) of the Twenty-third Schedule, should apply to both bodies corporate and non-bodies corporate. Under UK Companies Act the same test is applicable irrespective of the legal nature of the entity.</p> <p>With respect to sections 2(1)(b)(ii) and (iii) of the Twenty-third Schedule, the requirement that the parent undertaking be a "member" of the subsidiary undertaking is a potential loophole. The drafting of the relevant provisions should be tightened instead of simply transplanting the corresponding wording from the UK statute. (<i>In her submission, Ms CHAN quoted some related comments from Gore-Browne on Companies, a leading UK company law textbook.</i>)</p>

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Sections 2 and 4 - <i>Contents and form of accounts</i>	Linklaters	<p>Linklaters is concerned that the discretion for directors to exercise the "true and fair view override" under the proposed sections 124(4A) and 126(5) without more specific guidance or without the reference to "special circumstances" as in the case of their UK equivalents may create problems or uncertainties on how the discretion should be exercised.</p> <p>Linklaters suggests that the Hong Kong Society of Accountants should provide practical guidelines on the application of the "override" provisions, and that the proposed amendments in sections 2 and 4 of Schedule 2 should not become effective until such guidelines have been developed.</p>
Proposed Twenty-third Schedule - <i>Parent and subsidiary undertakings</i>	Linklaters	<p>On sections 2(1)(c) and 2(4) of the Twenty-third Schedule, it would be important to clarify whether more than one entity can exercise a "dominant influence" over another undertaking in the Hong Kong context, e.g. through joint control.</p> <p>"Control contracts" are not common in relation to UK companies in practice. They are more relevant to European companies. Hence, it seems that the meaning of "control contracts" under the Hong Kong provisions may need to be more specifically considered.</p>
	HKCMA	<p>On the proposal to add the <i>"right to exercise a dominant influence over another undertaking"</i> to the existing test of determining the existence of a parent/subsidiary relationship, HKCMA notes that this additional test goes further than the tests outlined under current HKGAAP and IAS, and may add further ambiguity to the treatment of SPEs.</p>

Section No. of Schedule 3 / Subject	Name of organizations/individuals	Major views on the Bill
General comments on Schedule 3	The Law Society of Hong Kong	<p>The proposal to remove the element of share transfer office from the definition of a "<i>place of business</i>" could have a significant impact on the amount of information available in respect of companies listed in Hong Kong where neither the place of business nor the place of incorporation is in Hong Kong. For example, most H share companies would no longer be required by the Ordinance to register under Part XI if the proposal is adopted.</p> <p>There is no requirement under the Listing Rules for a place of business to be established before a company can be listed in Hong Kong. A company can be listed if it appoints a service agent in Hong Kong and there is a place in Hong Kong for document inspection in certain circumstances. None of these would necessarily amount to a "<i>place of business</i>" under the new definition.</p> <p>Unless adequate arrangements are in place to ensure that the change would not result in less information being available in respect of companies listed in Hong Kong, the proposed changes should not be implemented.</p>
	The Hong Kong Chinese Enterprises Association (HKCEA) Linklaters	<p>The new definition of "<i>place of business</i>" will give rise to factual difficulties or disputes. The new definition only provides that it does not include a local representative office established or maintained by a bank with the approval of the Hong Kong Monetary Authority. No other guidance is given on the circumstances under which a "non-Hong Kong" company would be considered as having a "place of business" in Hong Kong.</p> <p>The new definition may give rise to difficulty or confusion on whether or not an H-share company listed in Hong Kong which does not have any operations in Hong Kong except for the maintenance of a branch share register as required under the Listing Rules would be regarded as having a place of business in Hong Kong.</p> <p>Section 744 of UK's Company Act defines a "<i>place of business</i>" as including "<i>a share transfer or share registration office</i>".</p>

Section No. of Schedule 3 / Subject	Name of organizations/individuals	Major views on the Bill
General comments Schedule 3 (Cont'd)	HKCEA Linklaters (Cont'd)	<p>HKCEA recommends that some guidelines on the meaning of a "<i>place of business</i>" should be included in the Ordinance, and reference to "<i>share transfer or share registration office</i>" should be included in the definition.</p> <p>Linklaters considers that the reasons for amending the definition of "<i>place of business</i>" should be clearly spelt out to enable a clear understanding of the scope of application of Part XI.</p>
	The Hong Kong Institute of Company Secretaries (HKICS)	HKICS is in favour of the proposals in Schedule 3.
Section 14 – <i>Section 91 of the Ordinance substituted (Application of Part III to non-Hong Kong companies)</i>	The Hong Kong Association of Banks (HKAB)	<p>Under proposed section 91(2) regarding the application of section 80 to charges on property in Hong Kong that are created by a non-Hong Kong company, where the property was not in Hong Kong at the time when those charges were so created, the requirement of delivering the charges to the Registrar "<i>within 5 weeks after the date of its creation</i>" will be substituted by "<i>within 5 weeks after the date when it is brought into Hong Kong</i>". HKAB seeks clarification on the following areas:</p> <p>(a) definition of "brought into Hong Kong";</p> <p>(b) whether it is necessary to provide evidence/supporting documents to the Companies Registry for registering the charge;</p> <p>(c) Currently it is common that "date of document" is interpreted as "date of creation" and the filing period shall count 5 weeks from the date of document. After the Bill is enacted, the filing date will count from the date when the property is "brought into Hong Kong". The Companies Registry should clarify whether it will accept filing for those charges that were created by a non-Hong Kong company where the property is not yet in Hong Kong at the time of the charge; and</p>

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Section 14 – <i>Section 91 of the Ordinance substituted (Application of Part III to non-Hong Kong companies) (Cont'd)</i>	HKAB <i>(Cont'd)</i>	(d) It may be more practical to require filing of the charge once it is created for monitoring purposes and ease of operation, as it would be rather difficult to monitor as to when the property is "brought into Hong Kong". If the proposed amendments are to be revised to improve clarity, HKAB requests to be consulted on the draft wording of the revised version.

Section No. of Schedule 3 / Subject	Name of organizations/individuals	Major views on the Bill
<p>Section 7 - <i>Incorporation form</i></p> <p>Section 20 - <i>Register of directors and secretaries</i></p> <p>Section 26 - <i>Documents, etc. to be delivered to Registrar by companies that establish places of business in Hong Kong</i></p> <p>Section 31 - <i>Annual return to be made by non-Hong Kong company</i></p> <p>Section 35 – <i>Section substituted (Notice of commencement of liquidation and of appointment of liquidator)</i></p>	<p>Office of the Privacy Commissioner for Personal Data, Hong Kong (PCO)</p>	<p><u>Submission date 16 September 2003</u></p> <p>The Bill proposes that relevant personal data shall be submitted under specified forms under the proposed sections 14A, 158(4) and (5), 333(2)(d) 333(2)(e), 334(3)(g) and 337A(1)(d)(iv). PCO recommends that the data subjects should be explicitly informed of the matters mentioned in the Data Protection Principle (DPP) 1(3) such as the purpose for collection of the data, the classes of persons to whom such data may be transferred and the right to access to and request for correction of data. The notification may take the form of a Personal Information Collection Statement (PICS) being incorporated into the specified forms for collection of the personal data, if such administrative measures are not yet in place.</p> <p><u>Submission dated 15 October 2003</u></p> <p>Noting that the Administration will implement administrative measures for the provision of PICS, PCO adds that a data user should take all reasonably practicable steps to ensure that the notification is sufficiently brought to the attention of the data subjects and in this respect, the prominence and location for display of such notice are relevant factors for consideration.</p>

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<p>Section 23 - <i>Inspection, production and evidence of documents kept by Registrar</i></p>	<p>PCO</p>	<p><u>Submission dated 16 September 2003</u></p> <p>It is doubtful whether the documents available for public inspection may include personal particulars of persons other than directors, former directors and other officers covered by the proposed section 305(1A)(a). If such is the case, the purpose statement laid down in the proposed section 305(1A) may need to be reviewed to apply to all other categories of data subjects whose personal data are made available for public inspection by the Registrar.</p> <p>In order to ensure that members of the public shall not use the personal data collected for purposes other than the specified purposes, imposition of sanction upon breach as a means of effective enforcement is recommended.</p> <p><u>Submission dated 15 October 2003</u></p> <p>Noting the Administration's response, PCO opines that, for the sake of clarity, the purpose statement in proposed section 305(1A) should be clearly phrased to extend and cover persons who are not the directors (whether former or present) or other officers of a specified corporation but whose personal data may also be made available for public inspection under this proposed section.</p>
<p>Section 38 - <i>Section substituted (Notices to be sent when non-Hong Kong companies cease to have places of business in Hong Kong)</i></p>	<p>HKCEA Linklaters</p>	<p>The requirement under proposed section 339 for any non-Hong Kong company ceasing to have a place business in Hong Kong to give notice to the Registrar within 7 days may be onerous. HKCEA and Linklaters recommend to extend the notification period to 14 days.</p>

Section No. of Schedule 4 / Subject	Name of organizations/individuals	Major views on the Bill
General comments on Schedule 4	The Stock Exchange of Hong Kong Limited (SEHK)	<p>SEHK supports the proposed amendments enhancing shareholders' remedies, but points out the practical reality that it is not realistic to expect minority shareholders to launch civil actions against listed companies and majority shareholders given the barriers that they face in accessing the legal system, financing costs for civil actions, lack of information and ability to access information.</p> <p>Civil actions brought by SFC could also serve a useful purpose in seeking redress for shareholders, deterring corporate misconduct and enhancing corporate governance generally. In the connection, SEHK has submitted views to the Administration in response to the recent consultation on a proposal to empower SFC to initiate a derivative action on behalf of a company.</p>
	Linklaters	<p>From a corporate governance perspective, extending the enhanced remedies available under the Ordinance to shareholders of non-Hong Kong companies ought to be welcomed and might be long overdue. However, the extra-territorial nature of these amendments might be susceptible to objection in circumstances where the law of the place of incorporation of a non-Hong Kong company does not recognise or provide for similar shareholder rights/remedies.</p>
	The Chinese General Chamber of Commerce (CGCC)	<p>CGCC in principle supports the proposals on derivation action and unfair prejudice. CGCC is however concerned that companies may have to deal with increased litigation as a result of the new provision for statutory derivation action. Companies may also become more wary in considering the mode and scope of financing arrangements.</p>
	The Hong Kong Institute of Company Secretaries (HKICS)	<p>HKICS endorses the proposals under sections 3, 4 and 6 of Schedule 4.</p>
	The Hong Kong Chinese Enterprises Association (HKCEA)	<p>HKCEA does not have any substantive objection to the proposed amendments.</p>

Section No. of Schedule 4 / Subject	Name of organizations/individuals	Major views on the Bill
<p>Section 3 - <i>Inspection of specified corporations' records by members</i></p>	<p>Office of the Privacy Commissioner for Personal Data, Hong Kong (PCO)</p>	<p>PCO agrees to the proposed section 152FE which seeks to confine the enabling powers under sections 152FA, 152FB and 152FC for the Court to grant order for inspection of company records upon application by a member of the company.</p>
	<p>Linklaters</p>	<p>Proposed section 152FA may be criticised for having gone too far in terms of the "records" which a shareholder may seek to inspect.</p> <p>The non-exhaustive definition of "record" for the purposes of proposed sections 152FA, 152FB and 152FD would leave open the door to an order allowing for inspection of electronic records such as emails as well as other documents containing information of a confidential or price-sensitive nature not only pertaining to the relevant specified corporation but potentially other third parties.</p> <p>Proposed section 152FA(2) will involve the court ascertaining whether the application has been made in good faith and "for a proper purpose having regard to the interests of both the relevant specified corporation and the applicant". The second requirement would impose on the court the unenviable task of balancing the diverging interests in order to ascertain whether the inspection applied for is for a "proper purpose". It might be preferable to better define the ambit of what constitutes a "proper purpose" under proposed section 152FA along the lines of the equivalent provision under the Australian Corporations Act 2001 (Section 247A).</p> <p>Regarding the circumstances in which the applicant may disclose the information or document obtained through as a result of inspection, Linklaters suggests that a further provision be added to proposed section 152FC(1) to allow for the information or document to be disclosed to the applicant's solicitors or barristers for the purpose of seeking legal advice.</p> <p>Linklaters also suggests that the exception contained in proposed section 152FC(1)(a) should include civil proceedings in addition to criminal proceedings.</p>

Section No. of Schedule 4 / Subject	Name of organizations/individuals	Major views on the Bill
<p>Section 4 of Schedule 4 of the Bill - <i>Alternative remedy to winding up in cases of unfair prejudice</i></p>	<p>School of Business, Hong Kong Baptist University (SB, HKBU)</p>	<p>The proposed amendments to award damages to a petitioning shareholder for the reason that the company has suffered a wrong is inconsistent with the common law principle that a shareholder cannot sue for a loss which is merely reflective of the company's loss, unless the company has no claim or where the loss which the shareholder suffered is additional to, and different from, that suffered by the company.</p> <p>To allow a petitioning shareholder/past member to get compensation from the wrongdoers may also be prejudicial to the interests of the company's creditors. The court may simply decline to award damages, but this will limit the attractiveness of the proposed section 168A(2A)/168A(2C).</p> <p>The wording of the proposed section 168A(2A) does not seem to prohibit the company from taking a legal action based on a cause of action in reliance of which a shareholder has been awarded damages on the ground of unfair prejudice. It appears that the wrongdoers may be penalized twice by having to pay damages to the petitioner and later on to the company itself.</p> <p>While understanding that section 168A(2A) is proposed on the recommendation of the SCCLR that the powers in section 168A of the Ordinance should be amended to make it clear that the court has the power to award damages by way of a remedy to shareholders in circumstances of unfair prejudice, SB, HKBU queries why the proposed amendment is not made directly to the list of the court's powers under section 168(2).</p>
	<p>Consumer Council (CC)</p>	<p>CC supports the proposed amendments because this makes clear whether the unfair prejudice remedy should be available to shareholders for breach of directors' duties generally. All shareholders should have the opportunity to obtain effective redress for violation of their duties.</p>

Section No. of Schedule 4 / Subject	Name of organizations/individuals	Major views on the Bill
Section 5 of Schedule 4 of the Bill - <i>Part IVA added (Bringing or intervening in proceeding on behalf of specified corporation)</i>	SB, HKBU	<p>A member of a company may bring a statutory derivative action on behalf of the company without leave under proposed section 168BB(1)(a), and it would be the task of any party to the statutory derivative action to prove to the court's satisfaction that the action should not proceed, based on the grounds stated under proposed section 168BD(2).</p> <p>SB, HKBU considers that in view of the proper plaintiff rule and the principle of company autonomy, the proposed amendments should ask the member who intends to take a legal action on behalf of the company to show why he should be so allowed, rather than putting the burden on the defendant of a statutory derivative action to persuade the court why the action should be halted.</p> <p>The Bill has explicitly reserved the common law derivation action (<i>see proposed section 168BB(4)</i>), but the abolition of common law action is more in line with the policy of the company law reform. In Australia, Part 2F.1A of the Corporations Act 2001 (Cth) establishes the statutory right of derivative action and abolishes “the right of a person at general law to bring, or intervene in, proceedings on behalf of a company” (s 236(3)).</p>
	CC	<p>CC supports the proposed provision of statutory derivative action as it will provide an effective mechanism by which shareholders can protect themselves. It will also remove uncertainties and provide a more effective means of enforcing directors' duties and other wrongdoing committed in relation to the company.</p>
	Linklaters	<p>Linklaters does not see the need for proposed section 168BE(2)(c). Sub-sections (a) and (b) of section 168BE(2) ought to be sufficient for the purposes of enabling the court to decide whether and what significance ought to be attributed to a purported ratification by members of the specified corporation of the conduct that is the subject of the derivative action. Linklaters is concerned that Sub-section (c) is potentially liable to be construed as imposing on shareholders a statutory duty to act in the best interests of the company when exercising their voting rights as shareholders. This would involve a radical development in the law of companies.</p>

Section No. of Schedule 4 / Subject	Name of organizations/individuals	Major views on the Bill
Section 5 of Schedule 4 of the Bill - <i>Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation) (Cont'd)</i>	Linklaters <i>(Cont'd)</i>	Linklaters agrees with the provisions contained in proposed section 168BH in requiring the leave of court to discontinue or settle a derivative action brought or intervened in under proposed section 168BB(1) .
Section 6 - <i>Injunctions</i>	Linklaters	If the amendments should extend also to companies incorporated outside Hong Kong but with a place of business in Hong Kong, the reference to "company" in proposed section 350B(1)(g) should be amended to "specified corporation".

Section No. of Schedule 5 / Subject	Name of organizations/individuals	Major views on the Bill
Part 3 of Schedule 5 - <i>Companies (Forms) Regulation</i>	The Hong Kong Institute of Company Secretaries (HKICS)	<p>The words "<i>professionally qualified</i>" should be inserted before "<i>company secretary</i>" in proposed Regulation 3(2)(a)(vi) and (b)(vi), if the term "company secretary" in the proposed Regulation is intended to mean a professionally qualified company secretary rather than a person who merely carries a functional title of "company secretary" in a company.</p> <p>The two categories of persons, "<i>an officer of the company</i>" and "<i>the authorized representative of the company</i>" should be excluded from the list of persons having certification rights under proposed Regulation 3(2), as opening up certification rights to a wider body without specifying any professional qualifications or standards would -</p> <p>(a) seriously dilute the value of the verification process; and</p> <p>(b) would render it pointless for the provision of other categories of persons who are either professional qualified or a government or court official.</p> <p>The words "<i>professionally qualified</i>" should also be inserted before "<i>company secretary</i>" in the proposed Regulation 6(2)(a)(vi) and (b)(v) for the reasons set out above.</p>