

**Responses to the submissions from Linklaters –
Schedule 4 relating to shareholders’ remedies**

Overview (paragraphs 1 –5)

We note the general support for the shareholder remedies proposals in Schedule 4. As regards the extra-territoriality of the proposals, the Legislative Council is competent to legislate extra-territorially as the Basic Law does not contain any prohibition in this regard. Furthermore, Hong Kong is justified to extend its jurisdiction to non-Hong Kong companies due to the existence of sufficient nexus in this context. If the application for derivative action is based on common law principles alone, then it is necessary to consider whether derivative action is possible under the law of the place of incorporation of the concerned company. If, however, there is an express statutory provision in Hong Kong enabling action to be brought against a foreign company, we consider that the explicit provision is likely to prevail over the law of the place of incorporation of the foreign country. Whether the judgment is enforceable in a foreign jurisdiction will depend on the law of that foreign jurisdiction.

Sections 1 to 3 of Schedule 4 – Inspection of Records

(a) Paragraph 7

2. While the term “records” is defined in very wide terms (which can cover electronic records such as electronic emails), the scope of an order for inspection granted by the court under the proposed section 152FA is not as extensive as that suggested in the submission. The effective control lies in the operative provision (i.e. the proposed section 152FA(1)) which refers to “records of the specified corporation”, not “records in the possession of the specified corporation”. Therefore, even though the court is satisfied that an application for an inspection order is made in good faith and the inspection applied for is for a proper purpose having regard to the interests of both the relevant specified corporation and the applicant, it can authorize an inspection of the records of a specified corporation only.

(b) Paragraph 8

3. We do not agree that the proposed section 152FA(2) would impose on the court an unenviable task of balancing the diverging interests of a specified corporation and an applicant in order to ascertain whether an application for an inspection order is for a proper purpose.

First, the interests of a specified corporation and an applicant for an inspection order are not necessarily divergent. While a wrongdoer may be in control of the specified corporation, it does not necessarily mean that the interests of the wrongdoer and those of the specified corporation are in alignment. In advancing his own interests, the applicant may well be advancing the interests of the specified corporation at the same time. Second, the court will be assisted by the Australian jurisprudence in the absence of any case law in Hong Kong in determining what constitutes a proper purpose.

(c) Paragraph 9

4. Section 247A(1) of the Australian Corporations Act 2001 provides that the court may, on application by a member of a company, make an order for inspection of the records of the company if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose. The phrase “proper purpose” is however not limited to a purpose in connection with a derivative section. By virtue of section 247A(5), such limitation is applicable to an application for an inspection order by a person under section 247A(3)¹ in relation to a derivative action.

(d) Paragraph 10

5. We do not consider it appropriate to extend the exceptions in the proposed section 152FC to cover civil proceedings. First, there is no need to extend the exceptions to cover civil proceedings involving an applicant for an inspection order who, upon granting of the order, is authorized to inspect the records of a specified corporation. If the information is required by a party other than the applicant for the purpose of civil proceedings, then that party should seek disclosure of the documents relevant to his proceedings in the course of discovery in his own action. In any event, there is no justification to create a statutory enabling provision to facilitate someone to seek discovery outside his own action.

6. Neither do we see a need to extend the exceptions to allow for information or documents to be disclosed to an applicant’s solicitors or barristers for the purpose of seeking legal advice or other professionals. Under the proposed section 152FA(3), the court is

¹ Under section 247A(3), a person who applies for, or is granted, or who is eligible to apply for leave to commence a statutory derivative action may also apply to the court for an order to inspect the books of a corporation. This is in addition to the restricted right of inspection given to members of a corporation under section 247A(1).

already empowered to limit the use of information obtained by means of an inspection order. Hence, the court can deal with the disclosure of information or documents obtained to the applicant's solicitor or barristers or other professionals under this section.

Section 5 of Schedule 4 – Derivative action (paragraph 13)

7. The proposed section 168BE(2) provides that the court may, after having regard to certain 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 to make in respect of a derivative action etc. Whether or not the members were acting for proper purposes having regard to the interests of the specified corporation when they approved or ratified the conduct is one of the matters the court should have regard. We consider that it would however go too far to construe the proposed section 168BE(2)(c) as imposing on a company's members a statutory duty to act in the best interests of the company when exercising their voting rights.

Section 6 of Schedule 4 – Derivative action (paragraph 15)

8. We are considering whether there is a need to replace the term "company" with "specified corporation" as suggested in the submission.

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Financial Services and the Treasury Bureau
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