

**Responses to the submission from the
Hong Kong Baptist University**

Proposed sections 168A(2A) and 168A(2C)

(a) Bullet points (1) and (2)

Section 168A is a statutory remedy (short of liquidation) against unfair prejudice. Its underlying premise is that members' interests should not be unfairly prejudiced. Where there is such an unfair prejudice, a petition for remedies under section 168A may be appropriate even if the basis of the claim is an unlawful act committed in relation to a company. The case *Re Tai Lap Investment Co Ltd* [1999] 1 HKLRD 384 quoted in the submission is an example of "corporate wrongs" being held to constitute unfair prejudice. This situation should not seem to be odd as there may be more than one legal dimension of the same set of facts¹. For example, in a case of breach of duty more generally, the same facts may give rise to a complaint both of breach of duty owed to a company, which is prosecuted by a company (or by a member suing derivatively, where that is allowed), and of unfair prejudice, which is prosecuted by a petitioning member². Whether damages would actually be awarded would depend on the facts of the case and whether the court considers it appropriate.

2. On the basis of the recommendation made by the Standing Committee on Company Law Reform (SCCLR) in the context of the Phase I of the Corporate Governance Review, we propose to add sections 168A(2A) and 168A(2C) to make it clear that the court can award damages by way of a remedy, in addition to other remedies, to members in circumstances of unfair prejudice. These proposals on their own would not result in a violation of the common law principle that a shareholder cannot sue for a loss which is merely reflective of the company's loss as they would not vary the nature of the claim, create new cause of action, or confuse the distinction between personal claim and derivative claim.

3. In other words, while personal action (e.g. a petition under section 168A) and derivative action may be joined if they arise out of the same event, the plaintiff in respect of the personal action may seek a

¹ Gower's Principles of Modern Company Law, Sixth Edition, Paul L. Davies, page 736.

² Gower's Principles of Modern Company Law, Sixth Edition, Paul L. Davies, page 736.

remedy only in respect of the harm inflicted directly upon him³. (The same principles are also laid down in the case *Johnson v Gore Wood* quoted in the submission, though that case is not directly related to a petition for unfair prejudice remedies.) For this reason, we do not consider that there is a need to prohibit a company from taking a legal action based on a cause of action in reliance of which a member has been awarded damages on the ground of unfair prejudice.

(b) Bullet point (3)

4. From the drafting point of view, there are two reasons for splitting proposed section 168A(2A) from the existing section 168A(2). First, the remedy under the proposed section 168A(2A) is a remedy in addition to those remedies under existing section 168A(2). It is a separate head of remedy available to the petitioners. Second, this would prevent existing section 168A(2) from being overburdened.

Proposed sections 168BB and 168BD

(a) First paragraph

5. The proposed section 168BB(1)(a) provides that a member of a specified corporation may without leave of the court bring proceedings before the court on behalf of the specified corporation. This “no leave” arrangement is to implement the SCCLR’s recommendation that there should not be “trial within a trial” for the purpose of determining the standing of an applicant to bring the proceedings. It is submitted by the SCCLR that there is, at present, no requirement in Hong Kong for a preliminary hearing to be held to determine the standing of the plaintiff in a derivative action. The proposal to require a member intending to take a derivative action to show why he should be allowed to do so is tantamount to a leave requirement imposed on such member and is against our policy intention to implement the SCCLR’s recommendation.

6. Furthermore, the effect of the proposed section 168BB should be looked into in a proper perspective. It provides for a striking-out mechanism, in addition to the one under the Rules of the High Court. It can serve as a useful balancing measure to allow defendant to put an end to a derivative action at an early stage if it is commenced in bad faith or not in the best interests of the company etc.

³ Gower’s Principles of Modern Company Law, Sixth Edition, Paul L. Davies, page 668.

(b) Second paragraph

7. We consider it desirable to retain the proposed section 168BB(4) which provides that the statutory derivative action provisions in the Bill shall not affect any common law right of a member of a specified corporation to bring a derivative action. Hong Kong is unique in the sense that there are a large number of companies incorporated outside Hong Kong but controlled by Hong Kong residents. The proposed statutory derivative action will apply to Hong Kong incorporated companies and non-Hong Kong companies. For companies incorporated outside Hong Kong, the law of the place of incorporation governs the right of a shareholder to bring a derivative action (See Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others [2002] 1 All ER 979). There may be different rules of internal management in the law of the place of incorporation compared with those applying to Hong Kong incorporated companies. To abolish the common law right in respect of non-Hong Kong companies might deprive shareholders of those companies of rights otherwise available to them.

Financial Services Branch
Financial Services and the Treasury Bureau
January 2004