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

**Summary of written submissions and the Administration's response on Schedule 4 of the Bill**

**(as at 11 February 2004)**

| Clause No. of Schedule 4 / Subject | Name of organizations/individuals | Major views on the Bill | Administration's response |
|---|---|---|---|
| General comments | The Stock Exchange of Hong Kong Limited (SEHK) | 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.<br><br>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 this 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. | Noted. |

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| General comments<br>*(Cont'd)* | Linklaters | From a corporate governance perspective, extending the enhanced remedies available under the Companies Ordinance (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. | As regards the extra-territoriality of the proposals in Schedule 4, 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. |

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| General comments *(Cont'd)* | The Chinese General Chamber of Commerce (CGCC) | 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. | To deter any frivolous statutory derivative action, we have included in the Bill appropriate safeguards. For example, proposed section 168BD provides for the court to strike out a statutory derivative action if it is, among other things, not taken in the best interests of a company or not taken in good faith. |
| | The Hong Kong Institute of Company Secretaries | The institute endorses the proposals under sections 3, 4 and 6 of Schedule 4. | Noted. |
| | The Hong Kong Chinese Enterprises Association | The Association does not have any substantive objection to the proposed amendments. | Noted. |

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| Clause 3 - *Inspection of specified corporations' records by members* | Office of the Privacy Commissioner for Personal Data, Hong Kong (PCO) | 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. | Noted. |
| | Linklaters<br><br>Hong Kong Small and Medium Enterprises Association | **Proposed section 152FA** may be criticised for having gone too far in terms of the "records" which a shareholder may seek to inspect.<br><br>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. | 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. |

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| Clause 3 - *Inspection of specified corporations' records by members* *(Cont'd)* | Linklaters<br>Hong Kong Small and Medium Enterprises Association *(Cont'd)* | **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 may be preferable to 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). | 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. |

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| Clause 3 - *Inspection of specified corporations' records by members*<br>*(Cont'd)* | Linklaters | Regarding the circumstances in which the applicant may disclose the information or document obtained 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.<br><br>Linklaters also suggests that the exception contained in **proposed section 152FC(1)(a)** should include civil proceedings in addition to criminal proceedings. | 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. |

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| Clause 3 - *Inspection of specified corporations' records by members*<br>*(Cont'd)* | Linklaters<br>*(Cont'd)* | | 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 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. |

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| Clause 3 - *Inspection of specified corporations' records by members*<br>*(Cont'd)* | Hong Kong Society of Accountants | In order to safeguard against improper use or disclosure of information (which may be commercially sensitive) obtained under **section 152FA**, it should state explicitly in the Bill that such information should be used or disclosed only in relation to the purpose for which it is sought, unless the court orders otherwise. | The proposed section 152FA(3) provides that the court may make an order limiting the use that an applicant or a person who inspects the records of a specified corporation may make use of the information or document obtained as a result of the inspection. The proposed section 152FC also provides that subject to certain exceptions, no information or document obtained as a result of the inspection shall be disclosed to any other person without the previous consent in writing of the specified corporation. Hence, we do not consider it necessary to amend the Bill further to state explicitly that the information or document obtained as a result of the inspection should be used or disclosed only in relation to the purpose for which it is sought unless the court orders otherwise. |

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| Clause 3 - *Inspection of specified corporations' records by members*<br>*(Cont'd)* | Hong Kong Society of Accountants<br>*(Cont'd)* | Whilst the requirement under the **proposed section 152FA** that the court needs to be satisfied that the application is made in good faith and for a proper use should help to deter abuses, a minimum shareholding requirement should also be considered to provide a further safeguard against any misuse of the provisions. | The proposed section 152FA(2) provides that the court may only make an order under the proposed section 152FA(1) if it is satisfied that –<br>(a) the application is made in good faith; and<br>(b) the inspection applied for is for a proper purpose having regard to the interests of both the relevant specified corporation and the applicant.<br>We consider that this section should be able to protect a company against an unscrupulous shareholder accessing the company's records for frivolous or other improper reasons under the proposed section 152FA(1). |
| | | For consistency, reference to "any records" in the **proposed section 152FB** relating to ancillary orders should be amended to "any records of the corporation". | From the drafting point of view, we do not consider it necessary to state again in the proposed section 152FB that the records are the "records of the specified corporation", since that section has stated that the records are those that the inspector "is authorized to inspect". The proposed section 152FA(1)(a) has already stated clearly that the court may only authorize inspection of records "of the specified corporation". |

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| Clause No. of Schedule 4 / Subject | Name of organizations/individuals | Major views on the Bill | Administration's response |
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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice* | School of Business, Hong Kong Baptist University | 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.<br><br>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)**.<br><br>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. | 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 facts[1]. 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 member[2]. Whether damages would actually be awarded would depend on the facts of the case and whether the court considers it appropriate. |

[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.

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | School of Business, Hong Kong Baptist University<br>*(Cont'd)* | | 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. |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | School of Business, Hong Kong Baptist University (SB, HKBU)<br>*(Cont'd)* | | 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 remedy only in respect of the harm inflicted directly upon him[3]. (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. |

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

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice* *(Cont'd)* | School of Business, Hong Kong Baptist University (SB, HKBU) *(Cont'd)* | While understanding that **section 168A(2A)** is proposed on the recommendation of the Standing Committee on Company Law Reform (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)**. | 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. |
| | Consumer Council (CC) | 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. | Noted. |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister | <u>Extension to "non-Hong Kong companies"</u><br>The combined effect of the proposed amendment is to extend the **section 168A** remedy to any "non-Hong Kong company", which is presently referred to throughout **Parts X and XI** of the Ordinance as "oversea company".<br>Instead of amending **section 168A** which is to be found in **Part IV** of the Ordinance, it would be more consistent as a matter of format and for ease of reference to insert a new section making available the **section 168A** remedy to "non-Hong Kong companies" into relevant Parts applicable to **foreign corporations.**<br>**Part X** of the Ordinance (sections 326 to 331A) is dedicated to the winding up of "unregistered companies" which embraces oversea companies. **Section 327(1)** expressly incorporates all the provisions of Part V for the winding up of Hong Kong registered companies. As the present **section 168A** remedy is an alternative to the compulsory winding up of Hong Kong registered companies, a new provision constituting an alternative remedy to the winding up of unregistered companies (including oversea companies) should be introduced into the end of **Part X**. | The SCCLR makes a number of proposals to enhance shareholder remedies in its Consultation Paper on Proposals made in Phase I of the Corporate Governance Review. One of these proposals is to allow members of oversea companies to seek unfair prejudice remedy under the existing section 168A of the Companies Ordinance (CO) and submissions received during the consultation indicate support for such a proposal. On the basis of the SCCLR's recommendation, we propose to expand the scope of section 168A to cover oversea companies.<br>We agree that it appears logical to dovetail the scope of sections 168A and 327 in view of their connection and thus, extend the application of section 168A further to unregistered companies. We are, however, mindful of the situation in the UK where it has been the case since 1980 that while the winding up provisions apply to unregistered companies, the unfair prejudice remedy provisions do not. We are uncertain about the rationale behind this arrangement. Given the lack of practical experience about the possible implications of extending the unfair prejudice provisions to unregistered |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | Extension to "non-Hong Kong companies" *(Cont'd)*<br>It is not logical to extend the application of **section 168A** remedy only to oversea (or non-Hong Kong) companies but not to the other forms of entities such as foreign corporations without a local place of business which also fall within the meaning of "unregistered companies" in **section 326**. It is common knowledge that there are numerous off-shore asset holding companies held by Hong Kong residents or Hong Kong registered or oversea companies without a place of business in Hong Kong.<br>Furthermore, the winding up of a company might not benefit its minority shareholders since the break-up value of the assets might be small or the only available purchasers might be the very majority whose oppression had driven the minority to seek redress. Accordingly, it does not make sense for the legislature to provide an aggrieved member with the extreme remedy of destroying an unregistered company by means of **section 327** but deny him a less drastic relief which may well be to his and other innocent shareholders' benefits. | companies, we suggest consulting the SCCLR and relevant stakeholders before taking a decision and that this issue should preferably be dealt with in the next exercise of amending the CO.<br>It is suggested in the submission that instead of amending existing section 168A, a new section making available the unfair prejudice remedy to oversea companies should be inserted into those Parts applicable to foreign corporations (i.e. Parts X and XI) since these two parts cover exclusively unincorporated associations and foreign corporations, including oversea companies. While this suggestion is merely a matter of format and does not change the legal effect of the proposed amendments, we wonder whether the approach of scattering the proposed amendments in different Parts of the CO is user-friendly, particularly because Part X is applicable to unregistered companies which cover other types of associations (such as partnerships) as well. Readers may be misled in believing that the unfair prejudice remedy is also available to those associations (assuming that section 168A is not amended in the context of the Bill to extend its application to unregistered companies). Furthermore, since the |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | | existing section 168A is well known to the practitioners as being the provision for an alternative remedy to winding up in cases of unfair prejudice, readers may find it more convenient if we put all amendments in section 168A as they could have a full picture of the scope of application of the provision by reading one provision.<br>We consider that providing in Parts X and XI cross-references to the unfair prejudice remedy would not be user-friendly as it will require a reader to flip back more than a hundred sections to find out the details of the remedy. |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | "Made" the petition<br>In accordance with legal usage, the phrases "made the petition", "making a petition" and "a petition… is made" under **section 168A** should be replaced by "presented the petition", "presenting a petition" and "a petition… is presented".<br><br>Proposed sub-section (2A) of section 168A<br>The amendment, in contradistinction to similar statutory provisions in many other countries, enables the Court to award damages to a member whose interests have been unfairly prejudiced. Whilst we express no opinion on the propriety of awarding damages under a section 168A petition which seems to go against the authorities, it is essential, if the **proposed sub-section 168A(2A)** is to be introduced into section 168A, that safeguards be written into the sub-section so that when the prejudicial conduct arises as a result of breach of duties owed to the company, the petitioner would not be entitled to recover by way of damages which should properly belong to the company. | For the sake of consistency with the wording in the existing provisions of the CO, we agree that the phrase "made the petition" or "making a petition" or " a petition …… is made" should be replaced by "presented the petition" or "presenting a petition" or "a petition ….. is presented".<br>In the context of the Phase I of the CGR, the SCCLR recommends that existing section 168A should be amended to make it clear that the court has power to award damages by way of a remedy to members in circumstances of unfair prejudice. The rationale behind this recommendation is that despite the width of existing section 168A(2), it is not clear if this section would allow the court to make an order for damages to be awarded to members and that in relation to listed companies, it is not clear that the remedies available under this section are necessarily adequate since it may not be practicable in all circumstances, for instance, for the court to require a buy-out of minority shareholders. |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | <u>Proposed sub-section (2A) of section 168A</u> *(Cont'd)*<br>If the above position is not made clear in the proposed sub-section, it may be constructed as having the effect of overriding the common law position in which case there will either be double recovery or the unfairly prejudiced member will benefit at the expense of the creditors of the company.<br>*(The statement of the recent House of Lords decision in Johnson v Gore Wood & Co [2002] 2 AC 1 is cited in the submission to illustrate the abovementioned common law principle.)* | On the basis of the SCCLR's recommendation, we propose to add sections 168A(2A) and 168A(2C) to make it clear that the court may award damages by way of a remedy, in addition to other remedies, to members in circumstances of unfair prejudice. The proposal on its own would not result in a violation of the common law principle that a member cannot sue for a loss which is merely reflective of the company's loss as it would not vary the nature of the claim, create new cause of action, or confuse the distinction between personal claim and derivative claim.<br>That said, we are considering if there is a need to add a doubt avoidance provision to make it clear that the proposed sections 168A(2A) and 168A(2C) shall not have the effect of entitling a member to damages when the company itself has a claim for damages in respect of the same matter. |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | <u>Proposed sub-section (2B) of section 168A</u><br>There should be a limitation period for a past member to seek relief under **section 168A**. The limitation period may be assimilated to that in respect of breach of trust subject to provisions for latent damage. | At present, there is no limitation period for a present member seeking relief under existing section 168A. That said, matters such as long delay in bringing proceedings, change of position in the meantime and injustice in seeking to remedy matters which occurred long ago are matters which the court could take into account in proceedings brought under section 168A. We consider that the same treatment should be accorded to a past member seeking relief under section 168A. |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | <u>Proposed sub-section (2D) of section 168A</u><br>The Courts always have discretion to make any order as to costs in any proceedings. Thus, there is no discernable necessity for introducing a new sub-section enabling the Court to award costs in favour of a petitioner.<br>The criteria laid down in paragraphs (a) and (b) of the proposed sub-section are lower than the existing threshold for awarding costs in favour of an unsuccessful litigant. The creation of **section 168A(2D)** may well result in proliferation of **section 168A** petitions, as a member of the general public reading the sub-section may be misled into believing that once the statutory criteria have been satisfied, he will automatically be entitled to the costs of the proceedings irrespective of the outcome. | We are now looking into the matters further and will let you have our substantive response later on. |

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| Clause 4 - *Alternative remedy to winding up in cases of unfair prejudice*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | <u>Proposed sub-section (5C) of section 168A</u><br>The definition of "then members" in the **proposed section 168A(5C)** is ambiguous and superfluous. On the basis of the present wording, in order to qualify as a "then member", the period of membership of the claimant in the specified corporation must be *identical* to that of the petitioner who is a past member. On the contrary, the wording of the **proposed section 168A(2C)** will suggest that a present member may also obtain damages based on the petition of a past member.<br>As the proposed sub-section (2C) has already set out the criterion for the Court to compensate the "then members", a definition of "then members", whether in the form of the proposed sub-section (5C) or in any other form, is otiose. | We agree that this section should be deleted. |

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| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* | School of Business, Hong Kong Baptist University (SB, HKBU) | 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)**.<br><br>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. | 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. |

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| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | School of Business, Hong Kong Baptist University (SB, HKBU) *(Cont'd)* | | 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. |

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| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | School of Business, Hong Kong Baptist University (SB, HKBU) *(Cont'd)* | The Bill has explicitly reserved the common law derivation action *(see proposed section 168BB(4))*, but the abolition of common law action is more in line with the policy of the company law reform. In Australia, Part 2F.1Aof 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)). | 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. |

***Schedule 4***

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|---|---|---|---|
| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | Consumer Council (CC) | 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. | Noted. |

***Schedule 4***

| Clause No. of Schedule 4 / Subject | Name of organizations/individuals | Major views on the Bill | Administration's response |
|---|---|---|---|
| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | Linklaters | 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.<br><br>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)**. | 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. |
| | Hong Kong Society of Accountants (HKSA) | HKSA supports the proposed **section 168BG** which empowers the court to grant orders as to the costs incurred by a member of a company taking a derivative action. | Noted. |

| Clause No. of Schedule 4 / Subject | Name of organizations/individuals | Major views on the Bill | Administration's response |
|---|---|---|---|
| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)*<br><br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister | Sub-sections (1)(a) and (2) of proposed section 168BB<br><br>A derivative action is founded on an exception to the Foss v Harbottle rule in order to redress the injustice caused by this rule in the case when the wrongdoer himself is in control of the company thus preventing the company from commencing proceedings against the wrongdoer himself.<br><br>The **proposed section 168BB(1)(a)** appears to have abolished entirely the Foss v Harbottle rule by allowing any member of a company to bring proceedings on its behalf without any qualification or condition whatsoever. The fact that proceedings must be brought in the name of the corporation as stipulated in sub-section (2) is of no assistance. Hence, the entire **new Part IVAA** is defective unless **proposed section 168BB(1)(a)** is amended to reflect correctly the exception to the Foss v Harbottle rule. | In the context of the Phase I of the CGR, the SCCLR recognizes the difficulties associated with the application of the major exception to the rule in Foss v. Harbottle (i.e. "fraud on the minority" and "the wrongdoers in control of the company") e.g. difficulty in discerning from the case law clear principles under which a wrongdoing may be ratified by the majority shareholders and circumstances under which they may not. There are some other practical difficulties with, and disincentive to members commencing a derivative action in Hong Kong e.g. a member bringing the action is potentially liable for the costs of the action even though he has no corresponding right to the potential damages.<br><br>In view of the above difficulties, the SCCLR recommends that a statutory derivative action should be introduced whereby there will be no "trial within a trial" for the purpose of determining the standing of an applicant to commence a derivative action on behalf of a company, and ratification by general meeting would not be a bar to the commencement of the action. |

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|---|---|---|---|
| Clause 5 Bill - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | Sub-section (1)(b) of proposed section 168BB<br>The employment of the words "any proceedings" in **proposed section 168BB(1)(b)** will permit a member to intervene in any form of proceedings to which the company is a party. As stated by the House of Lords, "A company is a legal entity separate and distinct from its shareholders.". Hence, not only does the idea in **proposed section 168BB(1)(b)** offend against the Foss v Harbottle rule, it also undermines the common law rule that a third party has no right to intervene in any proceedings to which he is not a party and in which he has no interest. The requirement of leave from the Court for intervention under **proposed section 168BB(3)** is not a mitigating factor. | On the basis of the SCCLR's recommendation and having due regard to the law providing for statutory derivative action in comparable jurisdictions like Australia, Singapore, sections 168BA to 168BI in the Bill are proposed. As in the law of the comparable jurisdictions, no reference is made to exceptions to the rule in Foss v Harbottle in the proposed sections as such exceptions are difficult, if not impossible, to be codified. In fact, it is precisely because of the difficulties and uncertainties of the exceptions that it was considered necessary to have statutory derivative action in those jurisdictions. That said, certain guiding principles like good faith, best interests of the company, effect of approval or ratification by members are proposed for the court to consider (either under the striking out mechanism in the proposed section 168BD or the leave mechanism under the proposed section 168BB(3)) when processing a statutory derivative action. |

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|---|---|---|---|
| Clause 5 Bill - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)*<br>*(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | | To address the concerns about the scope of the statutory derivative action and lack of sufficient safeguards therein, we are considering whether there is a need to -<br>(a) make it explicit in the proposed section 168BB(1) that the subject proceedings should be confined to those for the recovery of damages for fraud, negligence, default, breach of duty, or other misconduct, committed by a person who is or has been a director of the company (c.f. section 50 of the Australian Securities and Investments Commission Act 2001); and<br>(b) add a new provision along the lines in section 237(3) of the Australian Corporation Act 2001 to "define" the scope of "best interests" in the proposed sections 168BD and 168BB(3) whereby proceedings between a company and a third party would normally be excluded from the statutory derivative action. |

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| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | Proposed section 168BB(2)<br>The provision empowers members of a specified corporation to bring proceedings "in the name of the specified corporation". This is wholly different from the common law position in which the minority shareholder himself will be the plaintiff and the relevant corporation will be joined as a nominal defendant for the purposes of discovery of documents and other interlocutory matters. It is not expected that the Company will take any or any active part in the proceedings, particularly at the trial of the action.<br>One advantage of the common law position is that the company, which has to be represented by legal advisers independent of the plaintiff and the wrongdoer defendants, will have to comply with Order 24 of the Rules of High Court by producing all documents in its possession, custody or power which relate to the subject-matter of the claim. Moreover, as the minority shareholder is a party to the action, the Court will be able to award costs in favour of or against him. | Administration to respond. |

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|---|---|---|---|
| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister *(Cont'd)* | Proposed section 168BB(2) *(Cont'd)*<br>If proceedings are brought in the name of the company, the existing procedures for discovery and inspection of documents will be unworkable since the minority shareholder has neither possession nor custody of nor power to gain access to any of the corporate documents because, as a matter of law, a shareholder *per se* is not entitled to any corporate property, including its documents. The wrongdoer defendant, who may be a director or the majority shareholder or both, is not entitled to have access to the corporate documents for defending himself in the action. One wonders how a trial can be conducted without any relevant documents. | |

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| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | Proposed section 168BB(2) *(Cont'd)*<br>If a minority shareholder who brings the action on behalf of the company is not a party to the proceedings himself, the Court has no power to award or penalize him in costs.<br>By allowing the minority shareholder to be an additional plaintiff will not solve this conundrum either as it is part of the common law that all plaintiffs must be represented by the same firm of solicitors and counsel. It would be wrong for the solicitors as agent for the minority shareholder, who are also the solicitors for the company, to conduct a roving expedition in the company to search for the relevant documents.<br>Accordingly, if the **proposed section 168BB(2)** remains as it is, it appears that a new set of civil procedures will have to be invented for the sole purpose of this statutory cause of action. | |

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|---|---|---|---|
| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister *(Cont'd)* | Proposed section 168BC<br>The requirement of serving a written notice under **proposed section 168BC** is impractical in urgent cases when an injunction is required to restrain those in control from siphoning off assets of the corporation. The requirement may also invite the wrongdoers to attempt to strike out or set aside the notice so as to prevent the commencement of a statutory derivative action with the result of creating a trial within a trial. Thus the proposal goes totally against the underlying reason for the recommendation contained in paragraph 15.25(a) of the Consultation Paper of SCCLR that "there will be no 'trial within a trial'…". | To facilitate a member to commence a derivative action, we agree with the SCCLR's recommendation that there should be no "trial within trial" for the purpose of determining the standing of an applicant to commence the action (i.e. no leave is required for bringing a statutory derivative action). That said, there should also be sufficient safeguards to avoid any frivolous claims. The objective of the notice requirement is to give the concerned company an opportunity to consider its rights and course of action. For example, it may apply to the court under the proposed section 168BD to strike out the intended statutory derivative action if it considers that the action is brought in bad faith or not in the best interest of the company. Unlike the requirement of obtaining leave for commencing a derivative action, this striking out mechanism is only a safeguard which could be deployed when necessary. It is worth noting that this notice requirement in also found in the law providing for statutory derivative action in other comparable jurisdictions like Australia, Singapore. |

| Clause No. of Schedule 4 / Subject | Name of organizations/individuals | Major views on the Bill | Administration's response |
|---|---|---|---|
| Clause 5 - *Part IVAA added (Bringing or intervening in proceeding on behalf of specified corporation)* *(Cont'd)* | Mr Winston POON, SC<br>Mr Godfrey LAM, Barrister<br>Ms Linda CHAN, Barrister<br>*(Cont'd)* | | To cater for urgent cases where, for example, an injunction is needed to restrain those in control from siphoning off assets of a company, we have also proposed a new provision i.e. proposed section 168BC(4) whereby the court may grant leave to dispense with the notice requirement. |
| | | <u>Sub-section (1)(b) of proposed section 168BF</u><br>The proposed power conferred on the Court "requiring" parties to mediate under **proposed section 168BF(1)(b)**, which was never considered or proposed by SCCLR, will set a precedent which may have the effect of delay and wastage of costs. The mandatory power to mediate, which has extremely wide ramifications, should not be imposed on one form of action without proper consultation and consideration by the Law Reform Commission. | In the light of the comments made in the submission and for the sake of consistency with the approach adopted in other proceedings under the CO, we agree to delete the reference to “mediation” in the proposed section 168BF. |
| | | <u>Proposed section 168H</u><br>The word "settled" under **proposed section 168H** is ambiguous. Perhaps the word "compromise", which acquires a judicial definition, is more appropriate. | From the drafting point of view, the use of “settle” in relation to legal proceedings is proper (see Order 34 rule 8(2) of the Rules of High Court). |

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| Clause 6 - *Injunctions* | 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". | We are considering whether there is a need to replace the term “company” with “specified corporation” as suggested in the submission. |
| | Hong Kong Society of Accountants (HKSA) | HKSA supports the introduction of a power on the part of the court to grant injunctions against contravention of the Ordinance, breaches of fiduciary duties, etc, as incorporated in the proposed new **section 350B**. | Noted. |

Council Business Division 1
Legislative Council Secretariat
11 February 2004