

**By Fax (Fax No: 2527 3909) and By Post**

5 May 2004

Financial Services Branch  
Financial Services and The Treasury Bureau  
18<sup>th</sup> Floor  
Admiralty Centre Tower 1  
18 Harcourt Road  
Hong Kong

Attn: Ms Shirley Lam

Dear Ms. Lam,

**Consultation Paper on Statutory Derivative Action  
in the Companies (Amendment) Bill 2003**

We have the following points to make in response to your letter of 22 April.

Regarding the introduction of a leave requirement, given that the purpose of the SDA is to enable greater access to justice for minority shareholders, we remain of the view that there are enough disincentives militating against minority shareholders exercising the SDA without adding a leave requirement. It was a key element of the SCCLR proposal that there should be no leave requirement. However, if the decision has been taken to accede to those requesting that a leave requirement be imposed, this should be as low as possible since the utility of the SDA will be inversely proportional to the number of hurdles specified in the leave requirement. We suggest that the leave requirement do no more than track the normal rules for striking out any action e.g. proceedings have not been brought in good faith as in proposed section 168BD(2)(b). In our view, the CSAs to proposed section 168BB(3) could end up producing a "trial within a trial" which could defeat the object of the SDA as proposed by the SCCLR.

We note the policy view of the Administration that "it is not necessary to restrict the types of action that could be brought as derivative actions". However, we see merit in the original scope as proposed by the SCCLR because an unlimited scope for the SDA would enable a minority shareholder to take action against any third party for a wrong done against a company arising out of contract or tort. The focus should be upon wrongs committed against the company arising out of fraud, negligence, default in relation to any legislation and breach

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of fiduciary or statutory duty by those controlling the company as suggested by the SCCLR. If the scope is limited the leave threshold can also be low, particularly given the disincentive to sue because the shareholder will not recover damages personally.

Yours faithfully,

Keith Lui  
Commission Secretary

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