

C2/1/57/3(04) Pt.7

CC 1/108

10 May 2004

Secretary for Financial Services and the Treasury
Financial Services and the Treasury Bureau
18th 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**

Thank you for your letter of 22 April 2004 inviting the Consumer Council to provide views on the Committee Stage Amendments to the Companies (Amendment) Bill 2003, and on issues arising from the discussion by the Bills Committee in relation to the operation of the Statutory Derivative Action (SDA). The Council's comments are as follows:

Committee Stage Amendments

The Council sees a checking function to be served by the introduction of a leave requirement for a shareholder of a company to commence a SDA and agrees that the striking out mechanism originally proposed in section 268BD will thereby be rendered superfluous.

The Council shares the concern of the Bills Committee that the threshold "properly taking responsibility for proceedings" in section 168BD(3)(d) may be very difficult to prove. The Council think that "there is a serious question to be tried" in proposed section 168BB(3)(c) should constitute a good ground to support granting of leave not just to commence but also to intervene in proceedings and invites the Bills Committee to consider the same, especially since the best interest requirement already in place in section 168BB(3)(a) may well cover the situation envisaged in section 168BB(3)(d).

P.2/Issues.....

Issues arising from the discussion by the Bills Committee

With respect to issues in relation to the operation of the proposed SDA, the Council provides the following views for consideration of the Bills Committee.

Co-existence of CDA and SDA

The Council considers a SDA subject to a leave requirement should serve to make available an additional option so that a shareholder can have the choice of whether to resort to SDA or bring a CDA. However, co-existence should be allowed only up to the point when the form of action is settled on. Thereafter measures should be in place to prevent duplicity of proceedings on the same subject matter. The Council therefore supports the amendments to the Bill set out in paragraph 12 of the Consultation Paper.

Conduct of proceedings

The Council agrees with the Bills Committee that the powers proposed in the Bill should be sufficient to address the concerns with respect to the conduct of proceedings.

Scope of proceedings

The Council thinks that the criteria to be satisfied for leave to be granted as set out in section 168BB(3) will have restricting effect and it is not necessary to restrict the types of action that could be brought as derivative actions.

We are sorry for the short delay in preparation of this response and hope that the Bills Committee will find the views helpful in further scrutiny of the Bill.

Yours sincerely,

Mrs. CHAN WONG Shui
Chief Executive