

25 May 2004

**By Fax (Fax No: 2528 3345) and By Post**

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**

Thank you for your letter of 20 May.

We are grateful that you have accepted one of the points made in our letter of 5 May 2004 regarding the need to limit the scope of the Statutory Derivative Action to wrongs committed against the company arising out of specified conduct only. We note that this is reflected in new section 168BAA.

The other point made in our previous letter was that by limiting the scope it would be much easier to have a low leave threshold. We note that the criterion that the action be "in the best interests of the corporation" has been replaced in revised section 168BB(3)(a) by a requirement that it appears to the court that there is a prima facie case. Whilst this is an improvement, we remain concerned that the requirement for a prima facie case still sets the threshold too high and may discourage use of this remedy. In our view the concerns that have been expressed about exposure to frivolous actions is a chimera and in any event has been addressed fully by the requirement that there be "a serious question to be tried" as in proposed section 168BB(3)(b)(ii). Although the prima facie criterion is apparently a leave requirement in Singapore, the fact that there has been a low take-up rate of the derivative action there may indicate that the bar is set too high. We ought not to replicate this here.

Yours faithfully,

Keith Lui  
Commission Secretary

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