立法會
《2010 年公司(修訂)條例草案》及
《2010 年商業登記(修訂)條例草案》委員會

跟進二零一零年三月三十日第二次會議提出的事項

政府當局的回應

公司註冊及商業登記

1(a) 扼要而言，擬議的公司成立及商業登記制度("擬議制度")，在幾方面有別於現行以紙張為本的公司成立程序。首先，擬議制度讓公眾一星期七日，每日 24 小時都可在網上辦理成立公司及商業登記申請。其次，擬議制度讓公眾可一站式同時申請成立公司及商業登記。任何人提交成立公司申請，都會視作已同時申請商業登記。公司註冊處會向成功申請者一併發出商業登記證及公司註冊證書。這項一站式服務將同時適用於以紙張及以電子方式提交的申請。配合經簡化的公司名稱審批程序(即公司名稱可即時獲准註冊，但某些受限制的名稱[1]則除外)的實施，根據擬議制度在網上提交的成立公司及商業登記申請，一般情況下可在一天內處理完成，而在現行制度下，該兩項程序需要平均四個工作天才可完成。

在核實程序方面，公司註冊處現時不會核實那些提交成立公司申請或公司文件以作註冊的人的身分。根據擬議的電子成立公司及提交文件制度，公司註冊處將實施登記制，規定使用公司註冊處綜合資訊系統("綜合資訊系統")的人士須在綜合資訊系統上登記成為登記使用者。使用者辦理登記手續時，須向公司註冊處提交其香港身份證／護照的副

---

[1] 正如政府當局在其對二月二十三日第一次會議所提事項作出回應的文件(CB(1)1453/09-10(08)號)第 6 段所述，公司名稱可即時獲准註冊，但下述情況則除外：(a)名稱與登記冊上另一名稱相同；(b)名稱與根據任何條例成立或設立的法人團體的名稱相同；(c)名稱包含行政長官認為會構成刑事罪行或令人反感或違反公眾利益的字眼；(d)名稱包含可能令人覺得與政府有聯繫的字眼，例如"部門"、"政府"等；或(e)名稱與公司註冊處處長在《2010 年公司(修訂)條例》生效當日或之後，根據《公司條例》第 22 或 22A 條發出的指示所關乎的名稱相同。

本(適用於個人)、公司註冊編號(適用於在香港註冊的法人團體)或由有關公司成立為法團所在地方的當局簽發的公司註冊證書副本(適用於在香港以外地方註冊成立的法人團體)。登記使用者須利用密碼登入系統。

1(b) 在其他可資比較的司法管轄區，例如英國、新西蘭或新加坡，有關當局不會在公眾使用網上成立公司的程序中，查核或核實個別人士的身分或法人團體的地位。不過，據知居於新加坡外的外籍人士須僱用在新加坡的專業公司、服務局及集團公司秘書的服務，以辦理在新加坡成立公司的手續。

多重法定衍生訴訟

2(a) 正如議員所指，我們的意向是擴大法定衍生訴訟的適用範圍至有關連公司成員，建議超出*Waddington*[2] 案中的裁決。*Waddington* 處理的問題是一宗可由公司成員提起的訴訟，可否由控股公司成員提起。正如Lord Millett NPJ 於*Waddington*的判詞中(第 70 段)所說，那最終是提交訴訟地位(*locus standi*)的問題，而非股份所有權的問題(判詞相關段落摘錄於附件A，只有英文版)。就地位問題而言，法院要考慮的，是興訟人是否就所要求的濟助中有合理的權益，足以支持他透過提起法律行動來爭取。[3] 相同的問題亦適用於一間有關連公司的成員，在所要求的濟助中有否合理的權益。因此，雖然*Waddington*的背景是控股公司及附屬公司，但其判詞中對有關原則的陳述可支持超出裁決的建議。

現時的建議旨在加強保障小股東的權益，特別是那些在公司集團下的小股東。有關支持擴大法定衍生訴訟的適用範圍至有關連公司的成員的理據，載於政府當局就二月二十三日第一次會議上提出的事宜作出的回應(CB(1)1453/09-

[2] *Waddington Ltd. v Chan Chun Hoo.* [FACV No. 15 of 2007]

[3] 判詞第 74 段。

10(08))附件D第 2 至 9 段。現把有關文件摘錄於附件B，以供參考。

在作出建議時，我們考慮了其他司法管轄區的相關條文。我們現時的建議類似澳洲的情況，而範圍較新加坡狹窄，其包括「任何其他人士」，即只要法院認為申請者是合適人士。澳洲Australian Corporate Law Economic Reform Bill 1998 的摘要說明中指出「一個有關連法人團體的成員...亦屬[具地位的人士]，因為公司未能採取某些行動可能會對他們有負面影響，他們可能有合理的權益以申請展開[法定]衍生訴訟。」[4]

我們相信給予有關連公司成員地位的建議並不會導致出現瑣屑無聊或無理纏擾的衍生訴訟。《公司條例》第168BC(3)條有關法院許可的要求會對申請起過濾作用，而無論如何，其他已擴大法定衍生訴訟適用範圍的司法管轄區的經驗亦沒有顯示會出現訴訟泛濫的情況。

由財經事務及庫務局發表並於二零零九年十二月十七日至二零一零年三月十六日諮詢公眾的《公司條例草案》擬稿第一期諮詢文件，亦載有「多重」衍生訴訟的建議條文(《公司條例草案》擬稿第 14 部的摘要說明第 9 至 15 段摘錄於附件C)。在收到的公眾回應中，沒有對有關條文擬稿提出反對意見。

2(b) 澳洲、加拿大、新西蘭及新加坡的法例有關多重衍生訴訟的條文載於附件D1 至D4(只有英文版)。如上文所述，對《公司條例》中衍生訴訟條文的修訂建議，與澳洲《2001年法團法》的條文相似。

2(c) 我們的研究顯示，澳洲曾有案例在判詞中討論「多重」衍生訴訟。該案摘錄於附件E。

[4] 第 6.27 段。

2(d) 附件 B 第 7 段提出了一個例子情況，作為支持擴大法定衍生訴訟的適用範圍至附屬公司的股東的理據(即附屬公司為控股公司的負債提供保證這種情況)。如控股公司(主債務人)在沒有充分理由的情況下動用資產，從而增加提供保證者須按保證還款的風險，提供保證者(即附屬公司及其成員)在所要求的濟助中有非常實在及合理的權益，以支持附屬公司成員透過法律行動爭取。這個理據亦同樣適用於為屬同一集團的另一間公司的負債提供擔保或保證的情況。擴大法定衍生訴訟的適用範圍至有關連公司的成員，將讓小股東有權尋求許可，以糾正控股股東的違規行為，以免有關公司的資產耗盡，因而間接影響為該公司的負債提供保證的有關連公司的資產。

財經事務及庫務局
財經事務科
二零一零年四月

附件 **A**

Waddington Limited 訴Chan Chun Hoo Thomas

[FACV No.15 of 2007]

判詞摘錄

Multiple derivative actions

61. So far as the researches of Counsel have been able to discover, there has never been a reasoned decision of a higher court in any common law jurisdiction outside the United States which is determinative of this question. We must decide it as a matter of principle.

62. Such actions have been entertained in England, but in none of them has the plaintiff's right to bring the action been challenged. *Wallersteiner v. Moir* (No.2) (*supra*)itself was such a case. The plaintiff brought two claims, one to recover damages for the company of which he was a member and the other to recover damages for its subsidiary. This fact did not escape the attention of the Court of Appeal, which observed that if damages were recoverable they would be payable in the one case to the company and in the other to the subsidiary. But the plaintiff's right to maintain the action on behalf of the subsidiary was not contested or considered. It seems unlikely that the point escaped the notice of the experienced counsel who conducted the case. It is more probable that they considered that it was unlikely to find favour with Lord Denning. For my part I think he would have given it short shrift.

63. Similar actions have been brought in England since then, but in every case the right to bring the action has been assumed without argument: see *Halle v. Trax*[2000] BCC 1020; *Trumann Investment Group v. Societe GeneralSA* [2002] EWHC 2621; and *Airey v. Cordell*[2006] EWHC 2728. In each of these cases, leave was granted to continue the action, but despite the wording of the rule in force at the relevant time,

no point was taken that the plaintiff was not a member of the company in which the cause of action was vested.

64. The only case in which the question whether a multiple derivative action may be maintained has been decided in a common law jurisdiction outside the United States is *Ruralcorp Consulting Pty Ltd v. Pynery Pty Ltd*(1996) 21 ACSR 161 ("Ruralcorp"), a decision of the Senior Master of the state of Victoria. He ruled that it may not. I shall have to return to this decision later.

65. The multiple derivative action has been recognised in many states of the United States, but the legal basis on which the action is maintainable has varied from state to state and from time to time. Many of the grounds upon which the action has been rationalised would not be accepted in either England or Hong Kong. In some cases the subsidiary has been treated as a mere instrument, agent or *alter ego* of the parent company; in others the corporate structure has been described as a fiction or "specious and illusory device" allowing the court to pierce the corporate veil. In the absence of special circumstances it is not permissible to adopt such an approach in Hong Kong. In *Melvin Brown v. Richard Tenney* 532 N.E. 2d 230 (Ill. 1988), the Supreme Court of Illinois analysed the double derivative action as really consisting of two actions, one by the shareholders against the directors of the parent company for breach of their fiduciary duty in failing to bring an action against the wrongdoers, and the other to vindicate a right vested in the subsidiary. The analysis assumes that a director of a company owes fiduciary duties to the shareholders, which appears be the case in Illinois but is not the law in England or Hong Kong.

66. While the United States cases are therefore of little assistance in deciding whether a multiple derivative action is maintainable in Hong Kong, they are helpful in demonstrating that it should be. In Melvin Brown v. Richard Tenney (supra) the Appellate Court of Illinois observed that in the absence of such an action the additional layer in the corporate structure would:

"… prevent the righting of many wrongs and would insulate the wrongdoer from judicial intervention."

In *Holmes v. Camp*(1917) 219 N.Y. 359, the Supreme Court of New York said that :

"The free use of holding companies which has grown up in recent years would prevent the righting of many wrongs if an action like the present might not be maintained by a stockholder of a holding company."

If this was true of New York in 1917 it is certainly no less true of Hong Kong in 2008.

67. But it is not necessary to travel to the United States to appreciate the need for a multiple derivative action to be maintainable. Lord Denning's justification of the derivative action in *Wallersteiner v. Moir* (No.2)(*supra*) applies as well to the case where the wrongdoers, who through their control of the parent company also control its subsidiaries, defraud a subsidiary or sub-subsidiary as it is to the case where they defraud the parent company itself. In either case wrongdoer control precludes action by the company in which the cause of action is vested; and yet

"In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress."

68. In my opinion it is not for the plaintiff to demonstrate that a multiple derivative action is maintainable in Hong Kong but for the appellant to show why it is not.

69. This the appellant has set out to do. His reasons for disallowing the action may be summarised as follows :

(1) The action contravenes fundamental principles of company law and in particular the principles (i) that a company is a separate legal person from its shareholders and (ii) that save in exceptional circumstances which are not alleged in the present case directors owe fiduciary duties to the company alone and not to its shareholders, let alone to the shareholders of its parent company.

(2) A multiple derivative action is in truth two derivative actions, one by the shareholders on behalf of the parent company against the subsidiary for its failure to sue the wrongdoers and the other by the parent company on behalf of the subsidiary against the wrongdoers. But neither action is maintainable, first because the subsidiary owes no duty to its parent company to bring proceedings against the wrongdoers, and secondly because the parent company is in control of the subsidiary and does not need the intervention of its shareholders to enable it to bring such proceedings.

(3) It is well established that only a shareholder can bring a derivative action on behalf of the company of which he is a member. A shareholder in a parent company has no title or interest in and is a stranger to the shares of its subsidiaries. He has no rights in relation to the conduct of the affairs of the subsidiaries or in relation to the manner in which the directors of a subsidiary manage or dispose of its assets.

(4) It is untrue to say that, absent the multiple derivative action, a wrong would be without redress. It is true that in the 19th Century when the derivative action was first developed there was no alternative remedy. But for many years now minority shareholders have had a statutory means of obtaining redress if the affairs of the company are being conducted in a manner prejudicial to their interests. The current provision in England is s.459 of the Companies Act 1985, replacing earlier provisions contained in the Companies Acts of 1948 and 1980. Legislation in Hong Kong has broadly reflected the position in England: for the current provision see s.168A of the Companies Ordinance.

(5) Legislation expressly authorising multiple derivative actions has been introduced in recent years in Australia, New Zealand, Canada and Singapore. Its introduction in Hong Kong should be left to the legislature. It should not be created by the courts, which lack the ability to resolve the many questions which would arise.

70. The first objection is seriously weakened by the fact that other commonwealth countries have all legislated to introduce multiple derivative actions without finding it necessary to make any significant changes to company law to accommodate them. Both the first and second objections depend on the same analysis of the multiple derivative action as two or more derivative actions which have been consolidated into one, as its name implies. But as I indicated at the outset the description, though convenient, is deceptive. The action is a single action on behalf of the company in which the cause of action is vested. The only question is whether the action, which may be brought by a member of the company, may be brought by a member of its parent or ultimate holding company. This is simply a question of *locus standi*.

71. This is the question raised by the third objection, and it lies at the heart of the case. There are numerous dicta in the cases to the effect that only a shareholder may bring a derivative action to enforce a right vested in the company. But most of them are merely *obiter*. Where they have formed the ground for decision, they have to be understood in their context. In every case where the status of the plaintiff has been determinative, the question was whether a former shareholder or a person who was an equitable but not the legal owner of the shares in question could maintain the action: for former shareholders see *Birch v. Sullivan*[1957] 1 WLR 1247 at p.1249 (England); *Dynevor Pty Ltd v. The Proprietors, Centrepoint Building Units Plan* No.4327[1995] QCA 166 (Queensland); *Keaney v. Sullivan*[2007] IEHC 8 at p.19 and *O'Neill v. Ryan*[1993] ILRM 557(Ireland): for equitable owners see *Maas v. McIntosh*(1928) 28 SR (NSW) 441; *Hooker Investments Ltd v. Email Ltd* (1986) 110 ACLR 443 at p.435

(New South Wales). The focus in all these cases was on the character of the plaintiff's shareholding; he must be a current and legal shareholder. The present case is concerned with a different question: the identity of the company of which he must be such a shareholder.

72. The only case in which the question whether a shareholder may maintain a multiple derivative action to enforce the rights of a subsidiary of the company of which he is a member has fallen for decision is *Ruralcorp*(*supra*). The Senior Master gave two grounds for his conclusion that he may not. The first was that the plaintiff was "a stranger" to the company, and "strangers" are not entitled to bring a derivative action. By "stranger", however, the Senior Master meant no more than a person who was not a shareholder, so his statement was not a reason for his conclusion but merely an assertion of it.

73. His second ground, scarcely more convincing than the first, was that equitable owners of shares in a company had no standing to bring a derivative action, and the want of standing of persons who had no legal or equitable interest in the shares was *a fortiori*. But the reason why persons with only an equitable interest in a company's shares cannot bring a derivative action on its behalf is that a company does not recognise or give effect to equitable interests. Such persons are not named in the company's register of members, and their existence let alone their identity is not discoverable from the share register. But the identity of the shareholders of a company's parent company is readily ascertainable by an inspection of the relevant share registers.

74. As I have said, the question is simply a question of the plaintiff's standing to sue. This would have been obvious when the procedure was for the proposed plaintiff to apply to the court for leave to use the company's name. On a question of standing, the court must ask itself whether the plaintiff has a legitimate interest in the relief claimed sufficient to justify him in bringing proceedings to obtain it. The answer in the case of person wishing to bring a multiple derivative action is plainly "yes". Any depletion of a subsidiary's assets causes indirect loss to its parent company and its shareholders. In either case the loss is merely reflective loss mirroring the loss directly sustained by the subsidiary and as such it is not recoverable by the parent company or its shareholders for the reasons stated in *Johnson v. Gore Wood* (*supra*). But this is a matter of legal policy. It is not because the law does not recognise the loss as a real loss; it is because if creditors are not to be prejudiced the loss must be recouped by the subsidiary and not recovered by its shareholders. It is impossible to understand how a person who has sustained a real albeit reflective loss

which is legally recoverable only by a subsidiary can be said to have no legitimate or sufficient interest to bring proceedings on behalf of the subsidiary.

75. This is not to allow economic interests to prevail over legal rights. The reflective loss which a shareholder suffers if the assets of his company are depleted is recognised by the law even if it is not directly recoverable by him. In the same way the reflective loss which a shareholder suffers if the assets of his company's subsidiary are depleted is recognised loss even if it is not directly recoverable by him. The very same reasons which justify the single derivative action also justify the multiple derivative action. To put the same point another way, if wrongdoers must not be allowed to defraud a parent company with impunity, they must not be allowed to defraud its subsidiary with impunity.

76. The appellant submitted that the plaintiffs in a single derivative action are allowed to bring the proceedings not because they have suffered a reflective loss but because the right to bring such proceedings is an incident of their shareholding. There are two answers to this. In the first place it begs the question, for if shareholders are allowed to bring a multiple derivative action then the right to bring it will be another incident of their shareholding. In the second place, it is necessary to ask why the shareholder's right to bring a derivative action is an incident of his shareholding, and the reason is that he is regarded as having a legitimate and sufficient interest in the relief claimed in the proceedings.

77. The fourth objection is easily disposed of. Shareholders may bring proceedings under s.168A of the Companies Ordinance if the affairs of a subsidiary are being conducted in a manner which is prejudicial to their interests; and for this purpose the affairs of the subsidiary can also be regarded as the affairs of the parent company: see *Re Citybranch Ltd* [2005] 1 WLR 3505. But while there is some overlap between such proceedings and the derivative action they serve essentially different functions. Unfair prejudice proceedings are concerned to bring mismanagement to an end; derivative actions are concerned to provide a remedy for misconduct: see *Re Charnley Davies Ltd* (No.2)[1990] BCLC 760; *Re Chime Corp Ltd*(2004) 7 HKCFAR546. While the court may have jurisdiction in the strict sense on a petition under s.168A to order payment of compensation to the company, the derivative action is the proper vehicle for obtaining such relief where the plaintiff's complaint is of misconduct rather than mismanagement: see *Re Chime Corp Ltd* at p.571.

78. Two other aspects of s.168BA merit consideration. First, while s.168A(2)(a)(ii) enables the court to direct the petitioner to bring a derivative action, it is far from

clear that it can direct him to bring a multiple derivative action; and as at present advised I do not think that it can. Secondly, under s.168A the court may order the minority shareholder to be bought out, and where he has a small shareholding, as the plaintiff has in the present case, that is a course which the Court may well take. There is no reason why a plaintiff who does not want to be bought out should be compelled to invoke a process which may lead to that result.

79. The last objection must also be rejected. Australia, New Zealand, Canada and Singapore have all introduced legislation to require the plaintiff to obtain the leave of the court before instituting or continuing derivative actions, and have taken the opportunity to permit multiple derivative actions where the cause of action is vested in a "related" or "affiliated" company of the company of which the plaintiff is a member. The various statutes have different threshold tests, different approaches to deciding whether the proposed action is in the interests of the company, and different procedures. But it is noticeable that in prescribing such requirements none of the statutes draws any distinction between the single derivative action and the multiple derivative action; and in truth there is no conceivable reason why the procedural and other requirements of the two kinds of action should differ.

80. We have no power to extend the provisions of s.168BC to multiple derivative actions by analogy. We must leave such actions to continue to be governed by the common law, while expressing the hope that the legislature may in due course extend the section to cover them, and perhaps at the same time take the opportunity to consider whether it is really sensible to maintain two parallel regimes with different threshold tests, one requiring leave and the other not.

******

附件 **B**

跟進二零一零年三月三十日第二次會議提出的事項

政府當局回應中的附件 **D (CB(1)1453/09-10(08))**

摘錄

A. 支持擴大法定衍生訴訟的適用範圍至有關連公司的成員(特別是指明法團的附屬公司的成員)的理據

法定衍生訴訟條文

2. 《2004 年公司(修訂)條例》對《公司條例》作出修訂，訂立新的法定衍生訴訟程序。有關條文載於第 IVAA 部，而該部已在二零零五年七月十五日實施。

3. 法定衍生訴訟的條文准許香港公司或非香港公司(指明法團)的成員，就針對該指明法團而犯的「不當行爲」，代表該指明法團提起訴訟。根據《公司條例》第 168BB(2)條的定義，「不當行爲」指「欺詐、疏忽、在遵從任何成文法則或任何法律規則方面失責，或失職」。

4. 與一些海外司法管轄區[1]不同的是，只有指明法團的成員可根據《公司條例》第 168BC(1)條申請許可，以展開法定衍生訴訟或介入法律程序。這類訴訟通稱爲「簡單」的衍生訴訟。

***Waddington* 案**

5. 在*Waddington Ltd. 訴 Chan Chun Hoo*[2]一案，終審法院確認維持上訴法庭的判決，認爲根據普通法，母公司的股東可代表附屬公司或第二層或低層的附屬公司提起訴訟。這類訴訟通稱爲「多重」衍生訴訟。

6. Lord Millet NPJ在*Waddington*一案中說，准許提起多重衍生訴

[1] 例如澳洲、新西蘭、新加坡及加拿大。請參閱第 11 至 16 段。

[2] FACV No.15 of 2007。是次訴訟的令狀在法定衍生訴訟條文生效前發出。

訟的做法恰當，理由如下：

(a) 關於地位的問題，控股公司的股東擁有合法權益代表附屬公司申索濟助，因此有足夠理據提起訴訟以取得濟助。股東因附屬公司資產耗盡而蒙受真正的損失(雖屬非直接損失)，以其權益作爲理據已經足夠。[3]

(b) 如股東未獲給予地位以展開訴訟，則無法糾正針對附屬公司而干犯的違規行爲。換言之，准許展開普通衍生訴訟的理由同樣適用於多重衍生訴訟。[4]

終審法院在討論中所關切的是控股公司股東代表附屬公司或附屬公司的附屬公司提起訴訟。

7. 附屬公司的股東基於類似理由申請許可代表控股公司提起衍生訴訟的情況也許不常見，但仍可能會出現。舉例來說，一間控股公司的董事如果也是該控股公司僅有的股東的話，該等董事如挪用控股公司的資產，便可能無人可以向董事提起訴訟。控股公司資產耗盡對附屬公司造成的影響，未必與附屬公司資產耗盡對控股公司造成同樣具損害性的影響。不過，在某些情況下，附屬公司或會因控股公司資產耗盡而蒙受損害，例如當附屬公司爲控股公司的負債提供保證時。控股公司的債權人如向附屬公司追索，則附屬公司及其股東便會因控股公司董事/控權人的違規行爲而蒙受損害。

8. 上文第 6 段提出准許提起多重衍生訴訟的理由，亦可用以支持給予附屬公司股東地位，以便在上文第 7 段所述的情況下代表控股公司提起衍生訴訟。股東因控股公司資產耗盡而蒙受真正的損失，而另一方面又無法理基礎糾正控股公司董事/控權人的違規行爲。倘若情況是附屬公司的股東擬代表同屬該控股公司的另一間附屬公司提起訴訟，分析結果也是一樣。

9. 政府當局認爲，由於有關情況涉及違規者操控公司集團以致對集團股東造成損害，因此有充分論據支持把終審法院的理由引伸至給予有關連公司的成員地位。

*****

[3] 判詞第 74 段。
[4] 判詞第 66 及 67 段。

附件 C

公司條例草案擬稿第一期諮詢

二零零九年十二月十七日發出的諮詢文件

第 14 部的摘要說明(第 104 頁)

摘錄

(c) 准許有聯繫公司的成員代表公司提起法定衍生訴訟(“多重衍生訴訟”)

背景

9. 《公司條例》第IVAA部所載的法定衍生訴訟條文，准許公司的成員就針對其公司而犯的“不當行爲”，代表公司提起訴訟或介入法律程序。“不當行爲”指欺詐、疏忽，在遵從任何法例條文或法律規則方面失責，或失職。與一些可資比較的司法管轄區[3]不同的是，只有該公司的成員(不包括該公司的有關連公司的成員)可根據《公司條例》第168BC(1)條申請許可，以展開法定衍生訴訟。換言之，法定衍生訴訟條文只准許公司成員提起“簡單”的衍生訴訟，而非“多重”衍生訴訟。

10. 不過，在最近的*Waddington Ltd v Chan Chun Hoo and Others*一案[4]中，上訴法庭和終審法院都裁定，在香港可根據普通法進行“多重”衍生訴訟。准許成員提起簡單衍生訴訟的理由，亦可用以支持提起多重衍生訴訟，因爲若違規者同時控制母公司及其附屬公司，附屬公司就不能對違規者提起訴

[3] 舉例來說，澳洲訂有條文(須得到法院許可)，讓身爲“公司或有關連法團……成員”的人士提起法律程序(澳洲《法團法》第 236(1)(a)條)。新西蘭根據《1993 年公司法》第 165(1)(a)條也採取同一做法。在加拿大，提起衍生訴訟的申訴人可以是公司或其任何聯營公司的股東，並可代表公司或其任何附屬公司提出起訴(加拿大《1985 年商業法團法》第 238 及 239(1)條)。在新加坡，公司的直接成員及任何經法院酌情決定爲適當人選的人士，都可申請許可，代表有關公司提出起訴(新加坡《公司法》第 216A(1)條)。

[4] [2006] 2 HKLRD 896；(2008) 11 HKCFAR 370。

訟。給予母公司的成員地位以代表附屬公司提起訴訟，是適當的做法，因爲如不代表附屬公司提起訴訟，該成員就可能會蒙受真正損失。除了准許公司成員根據普通法提起多重衍生訴訟外，終審法院表示適宜修訂《公司條例》以納入“多重”衍生訴訟，因爲並無任何理據把這類訴訟豁除於法定制度之外[5]。

11. 在 *Waddington* 一案結案後，常委會建議擴大《公司條例》法定衍生訴訟條文的適用範圍，准許母公司的股東代表附屬公司或代表第二級或以下的附屬公司提起多重衍生訴訟。

12. *Waddington* 一案關乎在母公司與附屬公司方面的多重衍生訴訟，而常委會亦就這方面討論終審法院的論據。不過，相同的論據亦適用於某附屬公司的成員要求代表同一控權公司的另一附屬公司提起衍生訴訟的情況。

13. 按照常委會的建議，以及爲了使香港的法例更貼近可資比較司法管轄區的法例，我們建議擴大法定衍生訴訟條文的適用範圍，准許有關連公司的成員代表公司提起或介入訴訟。

<u>建議</u>

14. **第 14.13 條**會給予有聯繫公司[6]的成員地位，從而擴大法定衍生訴訟的範圍，以包括“多重”衍生訴訟。這會爲有聯繫公司的成員提供簡單而有效的機制，以代表公司展開法定衍生訴訟。這建議可以進一步加強保障少數股東的權益。

15. 爲加快實施上述修訂，准許展開多重法定衍生訴訟的建議會納入預定在二零一零年年初提交立法會的《公司(修訂)條例草案》。

*****

[5] 見終審法院常任法官李義判詞第 26 段。

[6] 某公司(包括在香港成立爲法團的公司及非香港公司)的“有聯繫公司”是指(a)該公司的附屬公司；(b)該公司的控權公司；或(c)該控權公司的附屬公司。

Part 2F.1A—Proceedings on behalf of a company by members and others

236 Bringing, or intervening in, proceedings on behalf of a company

(1) A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:

(a) the person is:

(i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or

(ii) an officer or former officer of the company; and

(b) the person is acting with leave granted under section 237.

(2) Proceedings brought on behalf of a company must be brought in the company's name.

(3) The right of a person at general law to bring, or intervene in, proceedings on behalf of a company is abolished.

Note 1: For the right to inspect company books, see subsections 247A(3) to (6).

Note 2: For the requirements to disclose proceedings and leave applications in the annual directors' report, see subsections 300(14) and (15).

Note 3: This section does not prevent a person bringing, or intervening in, proceedings on their own behalf in respect of a personal right.

237 Applying for and granting leave

(1) A person referred to in paragraph 236(1)(a) may apply to the Court for leave to bring, or to intervene in, proceedings.

(2) The Court must grant the application if it is satisfied that:

(a) it is probable that the company will not itself bring the proceedings, or properly take responsibility for them, or for the steps in them; and

(b) the applicant is acting in good faith; and

(c) it is in the best interests of the company that the applicant be granted leave; and

(d) if the applicant is applying for leave to bring proceedings—there is a serious question to be tried; and

(e) either:

(i) at least 14 days before making the application, the applicant gave written notice to the company of the intention to apply for leave and of the reasons for applying; or

(ii) it is appropriate to grant leave even though subparagraph (i) is not satisfied.

(3) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that:

(a) the proceedings are:

(i) by the company against a third party; or

(ii) by a third party against the company; and

(b) the company has decided:

(i) not to bring the proceedings; or

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in that decision:

(i) acted in good faith for a proper purpose; and

(ii) did not have a material personal interest in the decision; and

(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(iv) rationally believed that the decision was in the best interests of the company.

The director's belief that the decision was in the best interests of the company is a rational one unless the belief is one that no reasonable person in their position would hold.

(4) For the purposes of subsection (3):

(a) a person is a third party if:

(i) the company is a public company and the person is not a related party of the company; or

(ii) the company is not a public company and the person would not be a related party of the company if the company were a public company; and

(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

Note: ***Related party*** is defined in section 228.

Section 50

50 Related bodies corporate

Where a body corporate is:

(a) a holding company of another body corporate; or

(b) a subsidiary of another body corporate; or

(c) a subsidiary of a holding company of another body corporate;

the first-mentioned body and the other body are related to each other.

附件 D2

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Current version: in force since Apr 20, 2007

Canada Business Corporations Act

C-44

C-44

An Act respecting Canadian business corporations

SHORT TITLE

Short title

1. This Act may be cited as the *Canada Business Corporations Act*.

R.S., 1985, c. C-44, s. 1; 1994, c. 24, s. 1(F).

PART I

INTERPRETATION AND APPLICATION

INTERPRETATION

Definitions

2. (1) In this Act,

"affairs"
« affaires internes »

"affairs" means the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate;

"affiliate"
« groupe »

"affiliate" means an affiliated body corporate within the meaning of subsection (2);

"articles"
« statuts »

"articles" means the original or restated articles of incorporation, articles of amendment, articles of amalgamation, articles of continuance, articles of reorganization, articles of arrangement, articles of dissolution, articles of revival and includes any amendments thereto;

"associate"
« liens »

"squeeze-out transaction" means a transaction by a corporation that is not a distributing corporation that would require an amendment to its articles and would, directly or indirectly, result in the interest of a holder of shares of a class of the corporation being terminated without the consent of the holder, and without substituting an interest of equivalent value in shares issued by the corporation, which shares have equal or greater rights and privileges than the shares of the affected class;

"unanimous shareholder agreement"
« convention unanime des actionnaires »

"unanimous shareholder agreement" means an agreement described in subsection 146(1) or a declaration of a shareholder described in subsection 146(2).

Affiliated bodies corporate

(2) For the purposes of this Act,

(*a*) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person; and

(*b*) if two bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

Control

(3) For the purposes of this Act, a body corporate is controlled by a person or by two or more bodies corporate if

(*a*) securities of the body corporate to which are attached more than fifty per cent of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person or by or for the benefit of those bodies corporate; and

(*b*) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

Holding body corporate

(4) A body corporate is the holding body corporate of another if that other body corporate is its subsidiary.

Subsidiary body corporate

(5) A body corporate is a subsidiary of another body corporate if

(*a*) it is controlled by

(i) that other body corporate,

(ii) that other body corporate and one or more bodies corporate each of which is controlled by that other body corporate, or

(iii) two or more bodies corporate each of which is controlled by that other body corporate; or

(*b*) it is a subsidiary of a body corporate that is a subsidiary of that other body corporate.

Exemptions — on application by corporation

(6) On the application of a corporation, the Director may determine that the corporation is not or was not a distributing corporation if the Director is satisfied that the determination would not be prejudicial to the public interest.

Exemptions — classes of corporations

(7) The Director may determine that a class of corporations are not or were not distributing corporations if the Director is satisfied that the determination would not be prejudicial to the public interest.

Infants

(8) For the purposes of this Act, the word "infant" has the same meaning as in the applicable provincial law and, in the absence of any such law, has the same meaning as the word "child" in the United Nations Convention on the Rights of the Child, adopted in the United Nations General Assembly on November 20, 1989.

R.S., 1985, c. C-44, s. 2; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 6; 1992, c. 51, s. 30; 1994, c. 24, s. 2; 1998, c. 30, ss. 13(F), 15(E); 1999, c. 3, s. 16; 2000, c. 12, s.

PART XX

REMEDIES, OFFENCES AND PUNISHMENT

Definitions

238. In this Part,

"action"
« action »

"action" means an action under this Act;

"complainant"
« plaignant »

"complainant" means

(*a*) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(*b*) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(*c*) the Director, or

(*d*) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

1974-75-76, c. 33, s. 231.

Commencing derivative action

239. (1) Subject to subsection (2), a complainant may apply to a court for leave to bring an action in the name and on behalf of a corporation or any of its subsidiaries, or intervene in an action to which any such body corporate is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the body corporate.

Conditions precedent

(2) No action may be brought and no intervention in an action may be made under subsection (1) unless the court is satisfied that

(*a*) the complainant has given notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the court under subsection (1) not less than fourteen days before bringing the application, or as otherwise ordered by the court, if the directors of the corporation or its subsidiary do not bring, diligently prosecute or defend or discontinue the action;

(*b*) the complainant is acting in good faith; and

(*c*) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

R.S., 1985, c. C-44, s. 239; 2001, c. 14, s. 116.

New Zealand

Companies Act 1993

Derivative Actions

SECTION 165 DERIVATIVE ACTIONS

165(1) [Powers of Court] Subject to subsection (3) of this section, the Court may, on the application of a shareholder or director of a company, grant leave to that shareholder or director to—

(a) Bring proceedings in the name and on behalf of the company or any related company; or

(b) Intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or related company, as the case may be.

165(2) [Matters Court must consider] Without limiting subsection (1) of this section, in determining whether to grant leave under that subsection, the Court shall have regard to—

(a) The likelihood of the proceedings succeeding:

(b) The costs of the proceedings in relation to the relief likely to be obtained:

(c) Any action already taken by the company or related company to obtain relief:

(d) The interests of the company or related company in the proceedings being commenced, continued, defended, or discontinued, as the case may be.

165(3) [Rules for granting leave] Leave to bring proceedings or intervene in proceedings may be granted under subsection (1) of this section only if the Court is satisfied that either—

(a) The company or related company does not intend to bring, diligently continue or defend, or discontinue the proceedings, as the case may be; or

(b) It is in the interests of the company or related company that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole.

165(4) [Notice] Notice of the application must be served on the company or related company.

165(5) [Duty to inform Court] The company or related company—

(a) May appear and be heard; and

(b) Must inform the Court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.

165(6) [Restrictions on shareholders' power] Except as provided in this section, a shareholder is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or a related company.

2(3) **[Related companies]** In this Act, a company is related to another company if—

(a) The other company is its holding company or subsidiary; or

(b) More than half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, is held by the other company and companies related to that other company (whether directly or indirectly, but other than in a fiduciary capacity); or

(c) More than half of the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or

(d) The businesses of the companies have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable; or

(e) There is another company to which both companies are related;—

and "related company" has a corresponding meaning.

History: S 2(3) amended by No 24 of 2004, s 3, by replacing in para (b) "capital" with "capital,"; **effective 15 April 2004.**

Singapore

Companies Act 1994

216A Derivative or representative actions

(1) In this section and section 216B –

"company" means a company other than a company that is listed on the stock exchange in Singapore;

"complainant" means –

(a) any member of a company;

(b) the Minister, in the case of a declared company under Part IX; or

(c) any other person who, in the discretion of the Court, is a proper person to make an application under this section.

(2) Subject to subsection (3), a complainant may apply to the Court for leave to bring an action in the name and on behalf of the company or intervene in an action to which the company is a party for the purpose of prosecuting, defending or discontinuing the action on behalf of the company.

(3) No action may be brought and no intervention in an action may be made under subsection (2) unless the Court is satisfied that –

(a) the complainant has given 14 days' notice to the directors of the company of his intention to apply to the Court under subsection (2) if the directors of the company do not bring, diligently prosecute or defend or discontinue the action;

(b) the complainant is acting in good faith; and

(c) it appears to be prima facie in the interests of the company that the action be brought, prosecuted, defended or discontinued.

(4) Where a complainant on an application can establish to the satisfaction of the Court that it is not expedient to give notice as required in subsection (3)*(a)*, the Court may make such interim order as it thinks fit pending the complainant giving notice as required.

(5) In granting leave under this section, the Court may make such orders or interim orders as it thinks fit in the interests of justice, including (but not limited to) the following :

(a) an order authorising the complainant or any other person to control the

conduct of the action;

(b) an order giving directions for the conduct of the action; and

(c) an order requiring the company to pay reasonable legal fees and disbursements incurred by the complainant in connection with the action.

(6) Where the action has been commenced or is to be brought in the subordinate courts, an application for leave under subsection (2) shall be made in a District Court.

附件E

澳洲有關「多重」法定衍生訴訟的法庭判例

1. 由於我們對法定衍生訴訟的條文提出的修訂建議與澳洲《2001年法團法》的條文相似，因此澳洲的法庭判例是最爲相關的。澳洲《2001年法團法》第236(1)(a)(i)條及第237條述明，一間公司或一個有關連法團的成員或前成員或有權註冊爲成員的人士，可向法庭申請許可提起衍生訴訟。

2. 有關法定衍生訴訟的案例爲數不多。研究結果顯示，沒有任何案例中的申請人是附屬公司的股東代表其控股公司尋求許可展開訴訟。不過，在 *Goozee v Graphic World Group Holdings Pty Ltd* (2002) 42 ACSR 534 一案中，判詞內載有多重衍生訴訟的討論。

3. 在 *Goozee* 案中，一間控股公司的成員提出申請許可遭法庭駁回。法庭認爲：
   (a) 就法團被告人而言，原告人是第236(1)(a)條所指的公司成員及有關連法團的成員，因此可根據第237條尋求許可展開法律程序。
   (b) 根據所得證據，原告人未能證明：

      - 按照第237(2)(d)條的規定，有須予認真處理的問題須作審訊，就是關於控股公司聲稱附屬公司的事務曾被人以欺壓的方式處理。
      - 申請是按照第237(2)(b)條的規定真誠地行事。
      - 衍生訴訟是按照第237(2)(c)條的規定，以指認原告人，即第一被告人的最大利益爲依歸。

4. 判詞第12至22段討論到根據第236(1)(a)(i)條所指有關連法團的成員作爲申請人的地位。Barrett J. 在第22段述明，「代表每間公司進行起訴的原告人與公司的關係疏而遠（屬控股公司成員，有些情況更是隔了多重關係），這並不影響《法團法》賦予他們的地位，但卻可能影響申請的其他方面」。

5. 案件報告的相關摘要（包括上述第12至22段）載於**附錄**(只有英文版)。

170 FLR 451

Law Report Image (PDF)

2002 WL 1654652 (NSWSC), 20 ACLC 1,502, 42 ACSR 534, 170 FLR 451, [2002] NSWSC 640
42 ACSR 534; 20 ACLC 1,502; 2002 WL 1654652; [2002] NSWSC 640

Goozee v Graphic World Holdings Pty Ltd
Barrett J

15 July 2002, 25 July 2002

Corporations - Derivative actions - Application for leave to commence action on behalf of a corporation - Whether plaintiffs had standing to make the application - Proposed action for relief against oppressive conduct of subsidiary companies - Whether criteria for leave satisfied - Whether a serious question to be tried - Whether sole shareholder can be a plaintiff seeking relief from oppression - Whether prospective proceedings brought in good faith - Whether prospective proceedings in the best interests of the corporation - Corporations Act 2001 (Cth), ss 232, 236(1)(a), 237(2)

The plaintiffs were shareholders in the first defendant. The second defendant was the majority shareholder of the first defendant. The other defendants were wholly-owned subsidiaries of the first defendant with whom they operated as a group in the printing industry. The plaintiffs, in the primary proceedings, sought declarations that the affairs of the first defendant were conducted oppressively and against the interests of its members pursuant to s 232 of the Corporations Act 2001 (Cth) (the Act). By interlocutory application the plaintiffs sought leave pursuant to s 237 of the Act to commence derivative proceedings on behalf of the first defendant against the other corporate defendants for orders under s 233 winding up these wholly owned subsidiary companies on grounds of oppression. **Section 236(1)(a)** of the Act provided that a person could bring proceedings on behalf of a company where he or she was a member of the company or a related body corporate. The grounds for oppression were that the defendants had adopted a policy of not declaring dividends despite substantial profits, and instead operated a "bonus pool" fund for distribution to employees at the discretion of the directors of the corporate defendants.

Held, dismissing the application for leave: (1) In relation to the corporate defendants the plaintiffs are members or members of a related body corporate within the meaning of **s 236(1)(a)** and therefore have standing to seek leave to commence proceedings under **s 237**.

(2) The Court must grant leave to a party to commence derivative proceedings if the party satisfies all the criteria set out in s 237(2), but otherwise will refuse leave.

RTP Holdings Pty Ltd v Roberts (2000) 36 ACSR 170; Jeans v Deangrove Pty Ltd [2001] NSWSC 84, applied.

(3) It is no bar to seeking leave under s 237 that the purported victim seeking relief under s 232 in derivative proceeding is the sole member of the company. A sole shareholder can be a complainant under s 232 because the statutory norms of conduct by reference to which that section operates has a

wholly objective content independent of the identity and will of the shareholder for the time being.

Wayde v NSW Rugby League Ltd (1985) 180 CLR 459; Reid v Bagot Well Pastoral Co Pty Ltd (1993) 61 SASR 165, followed. *452

(4) On the evidence available it is impossible to assess that any of the wholly owned subsidiaries of the first defendant had failed to pay dividends in accordance with "properly exercised commercial judgments". The plaintiffs have therefore failed to demonstrate that there is a serious question to be tried, as required by s 237(2)(d), in relation to a claim by the holding company that the affairs of the subsidiary have been conducted oppressively.

Re Sam Weller Ltd [1990] 1 Ch 682; Re D G Brims and Sons Pty Ltd (1995) 16 ACSR 559, applied.

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199, followed.

(5) Nor have the plaintiffs demonstrated that their applications in good faith as required under s 237(2)(b), because the lack of a serious question to be tried means they cannot reasonably believe that the holding company has a good cause of action under s 232, and the proposed derivative actions are intended as a means of persuading the other shareholders of the first defendant to procure payment of dividends, which is a collateral purpose amounting to an abuse of process.

Swansson v R A Pratt Properties Pty Ltd (2002) 42 ACSR 313, applied.

(6) Nor are the proposed derivative actions in the best interests of the putative plaintiff, the first defendant as is required by s 237(2)(c), as they are intended to result in its subsidiaries being wound up.

Application

This was an application under s 237 of the Corporations Act for leave to commence proceedings on behalf of the first defendant and others as derivative actions for relief under s 232 of the Act. The facts appeal sufficiently from the judgment of the Court.

C R Newlinds, for the plaintiffs.
M Einfeld, for the defendants.

Cur adv vult

25 July 2002

Barrett J.

Introduction

1 The present application, initiated by the plaintiffs' interlocutory process filed on 28 May 2002, is founded on Pt 2F.1A (ss 236-242) of the *Corporations Act 2001* (Cth), entitled "Proceedings on behalf of a company by members and others", which regulates the statutory derivative action procedure introduced by the *Corporate Law Economic Reform Program Act 1999* (Cth) with effect from 13 March 2000.

2 The plaintiffs seek, pursuant to s 237, leave to initiate proceedings on behalf of several companies. Their application for leave is best understood in the context of a description of the principal proceedings and the parties to them.

Parties and corporate structure

3 The first plaintiff (Mr Goozee) and the second plaintiff, his wife (Mrs Goozee), are two of the four shareholders in the first defendant (Graphic). The other two shareholders in Graphic are the second defendant (Mr Hoolahan) and a Mr Thomas who is not a party to the proceedings. Mr Goozee holds some 14.7 per cent of the shares in Graphic, Mrs Goozee holds some 2.11 per cent, Mr Thomas holds about 13.33 per cent and Mr Hoolahan holds the remaining *453 69.86 per cent. The constitution of Graphic is in evidence. It shows that the share capital is not divided into classes and that no distinctions are drawn between the shares held by the several shareholders.

4 Until Mr Goozee's recent departure, the board of directors of Graphic consisted of Mr Hoolahan, Mr Goozee, Mr Thomas and a non-shareholder, Mr Parker. Mr Hoolahan is the managing director and also acts as chairman at board meetings, although whether he holds a formal and ongoing appointment as chairman is

not shown by the evidence and is beside the point for present purposes. All the directors were employed in the group's business, together with other employees.

5 Graphic has several subsidiaries. It holds all the shares in the third defendant (Pyomon), the fourth defendant (Bentley), the fifth defendant (Keyset), the sixth defendant (Eroimount) and the seventh defendant (Toveheld). Two of these directly and wholly owned subsidiaries of Graphic themselves have directly and wholly owned subsidiaries: Bentley holds all the shares in the ninth defendant (Jem-K) and Eroimount holds all the shares in the 10th defendant (Art Etc). Art Etc, in turn, holds all the shares in each of the 11th defendant (Les Baddock), the 12th defendant (Baddock & Sons) and the 13th defendant (Trade Ruling). There is nothing to suggest that shares held are not also beneficially owned.

6 The position may be more readily gathered from the following diagram in which all connecting lines (except those between the four individual shareholders and Graphic) denote both holding and beneficial ownership of all shares issued.

7 It is necessary to mention also the eighth defendant (Double Pay) which stands apart from the structure depicted in the diagram. The shares in Double *454 Pay are held as to 40 per cent by Mr Hoolahan, 24 per cent by Mr Goozee, 16 per cent by Mr Thomas and 20 per cent by Pyomon.

8 The several companies to which I have referred operate as a group and carry on business in the printing industry. There is no evidence about the separate operations of the individual companies or about their respective financial positions, except that Pyomon is the employer of the group's workforce and that, as a group, the companies have operated profitably for several years. Mr Googee was, until recently, an employee of Pyomon. As I have already noted, the three continuing directors are employees and there are also non-director employees.

The substantive proceedings

9 By their originating process filed on 28 May 2002, the plaintiffs seek as principal relief declarations that the affairs of Graphic and Double Pay, being the two companies in which they are shareholders, are being conducted in a manner that is oppressive or unfairly prejudicial to or unfairly discriminatory against the plaintiffs as members, or in a manner that is contrary to the interests of the members as a whole, these being claims based on s 232 of the Corporations Act. The plaintiffs also seek orders that Graphic, Pyomon, Bentley, Keyset, Eroimount, Toveheld, Double Pay, Jem-K, Art Etc, Les Baddock, Baddock & Sons and Trade Ruling - in other words, all of the companies in the corporate group - be wound up pursuant to s 233(1)(a).

10 As adjuncts to this, there are several claims for leave to initiate proceedings on behalf of Graphic and the other holding companies within the group. In each such proceeding, the plaintiffs would assert on the relevant holding company's behalf a claim for relief based on conduct caught by s 232 in the affairs of a subsidiary directly and wholly owned by that holding company. The relief claimed in each instance would be an order that the subsidiary be wound up.

11 The central allegation, therefore, is that conduct of the affairs of each company shown on the diagram is "contrary to the interests of the members as a whole" or "oppressive to, unfairly prejudicial to or discriminatory against, a member or members". I have used here the words found in s 232, including the plural "members". In the case of all but two of the companies concerned (the exceptions being Graphic and Double Pay), there is only one member. I shall come presently to the question how the statutory formulations apply in such a case.

The present application

12 By the interlocutory process presently before the Court, the plaintiffs seek, under Pt 2F.1A (or, more precisely, s 237), the leave to which I have referred, that is, leave to bring proceedings on behalf of Graphic and each other immediate holding company in the group depicted in the above diagram seeking the winding up of the holding company's wholly and directly owned subsidiary (or each of its wholly and directly owned subsidiaries) on the grounds of oppression, unfair prejudice or unfair discrimination in relation to the affairs of the subsidiary, or conduct in those affairs inconsistent with the interests of the members as a whole.

13 There is thus a claim by the plaintiffs, in relation to each such holding company (that is, Graphic, Bentley, Eroimount and Art Etc), that they should be allowed to act for it in pursuing a claim to an order for winding up in respect *455 of conduct in relation to the affairs of the company of which it is the sole member falling within the oppressive and related specifications.

14 According to the interlocutory process, the various winding up orders would be sought under s 233(1)(a).

Standing

15 The question of standing must be approached at two levels. First, there is the question of who has standing to invoke s 232 and to seek winding up orders under s 233(1)(a) in relation to a particular company because of conduct related to the affairs of that company. Secondly and where the person having such standing is itself a company, there is the question of who is competent to apply for authority to activate that company through Pt 2F.1A derivative action to seek such orders.

16 The first question must be approached by reference to s 234 which identifies the persons who may apply for an order under s 233 in relation to a company. Basically, the competent applicants are a present member of that company, a transmittee of shares in that company, certain past members of that company and a person identified in a particular way by ASIC.

17 In relation to the affairs of each company presently relevant (that is, each on the above diagram except Graphic itself), any claim for s 233 relief must therefore be made by the company shown as holding all the shares in that company. In each of five cases, the plaintiff must be Graphic, in a sixth case (Jem-K) it must be Bentley, in a seventh case (Art Etc) it must be Eroimount and in each of the remaining three cases (Les Baddock, Baddock & Sons and Trade Ruling) it must be Art Etc.

18 If each appropriate plaintiff company to which I have just referred is to be activated by the plaintiffs pursuant to leave granted under s 237, it must first appear that they stand in such a relationship to that plaintiff company as to entitle them to be applicants for such leave. This is the second of the issues about standing.

19 **Section 236(1)** is in the following terms:

> "A person may bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party for the purpose of taking responsibility on behalf of the company for those proceedings, or for a particular step in those proceedings (for example, compromising or settling them), if:
>
> (a) the person is:
>
> (i) a member, former member, or person entitled to be registered as a member, of the company or of a related body corporate; or
>
> (ii) an officer or former officer of the company; and
>
> (b) the person is acting with leave granted under section 237."

20 Under this provision, leave to sue on behalf of a particular company is not to be given to a person who does not occupy, in relation to that company, a position described in s **236(1)**(a)(i). I read the provision this way because it would be, I think, an odd and unintended result that the court should embark upon the s 237 inquiry in relation to a particular cause of action on the company's behalf asserted by a person who, even if leave were granted, would not be allowed by s 236 to pursue the company's claim based on the cause of action.***456***

21 The plaintiffs, being members of Graphic, occupy in relation to each of the other companies on the above diagrem a position contemplated by s **236(1)**(a)(i). Having regard to the definitions of "related body corporate" and "holding company" in s 9 and to the provisions in Div 6 of Pt 1.2, Graphic is a "related body corporate" of each of the other companies depicted. Each of the plaintiffs is accordingly, in relation to each of those other companies, "a member... of a related body corporate", being Graphic.

22 It follows that the court may, under s 237, grant leave to the plaintiffs to initiate proceedings based on s 232 on behalf of each potential plaintiff company mentioned at [17] above in respect of conduct in relation to the affairs of the company standing immediately beneath that plaintiff company in the diagram. The remoteness of the plaintiffs' position from each company on behalf of which they would sue (being members of its holding company, in some instances several places removed) does not affect the standing afforded to the plaintiffs by the Act, but it may affect other aspects of their application.

The causes of action to be asserted in the derivative actions

23 The cause of action the plaintiffs wish to see each of Graphic, Bentley, Eroimount and Art Etc pursue is based on the proposition that adoption and implementation of certain financial policies within the subsidiary (or each subsidiary) wholly owned by that plaintiff amounts to conduct in the affairs of that subsidiary within the purview of s 232. The identical cause of action is asserted directly by the plaintiffs, as members, in relation to the affairs of Graphic and Double Pay. The nature of their complaints may conveniently be