Hong Kong Institute of
Certified Public Accountants
香港會計師公會

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By email (hklrc@hkreform.gov.hk) and by post

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The Secretary
The Class Actions Sub-committee
The Law Reform Commission
20th Floor Harcourt House
39 Gloucester Road
Wanchai, Hong Kong

Dear Sir,

Consultation Paper on Class Actions

The Hong Kong Institute of Certified Public Accountants appreciates the opportunity to comment on the Consultation Paper on Class Actions ("the Paper") issued by the Law Reform Commission's Class Actions Sub-committee. Our views on it are outlined below.

While there may be potential advantages to introducing a class action regime, in terms of, for example, greater certainty than the existing ad hoc arrangements for representative actions, improved access to justice and a more efficient use of court time, as well as possible indirect benefits in terms of corporate conduct and governance, we note from the Paper that class action regimes are still not the norm in a number of jurisdictions with legal systems comparable with Hong Kong's, including the United Kingdom, New Zealand, Ireland, Singapore and South Africa.

We note also that recommendations for the introduction of formal procedures for class actions have been made in some of the above jurisdictions. However, it is not clear as yet what the outcome of these recommendations will be and, if legislation is introduced in these places, what form it will take and how the relevant jurisdictions will resolve some of the key issues discussed in the Paper, such as funding, whether to adopt an "opt in" or "opt out" procedure, whether to cover public law cases and measures against possible abuses.

While United States has a well-established class action procedure, there are serious concerns about the impact that a US-style procedure would have if introduced in Hong Kong. The differences between the US and Hong Kong legal systems, which the Paper suggests would make such a scenario unlikely, also highlights some of the difficult questions that would need to be resolved before Hong Kong could proceed. Once again the issue of the funding of class actions is prominent among these and, while the Paper outlines some options, it leaves open a number of important matters for further discussion. Funding is such a fundamental issue as to be inseparable from the basic question of whether a comprehensive scheme for multi-party litigation should be introduced in Hong Kong. If there is no consensus on, or satisfactory solution, to the question of how class actions are to be paid for, then having a procedure for class actions on the statute books would not be meaningful.

Against the above background, broadly the Institute's position is that Hong Kong should move forward with caution and, preferably, after class action legislation has been introduced in more jurisdictions, and the opportunity is available to assess how it is

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working elsewhere and which detailed aspects appear to work best and to be most suited to Hong Kong's circumstances.

Additionally, we consider that if class actions are to be introduced in Hong Kong, a step by step, sectoral approach should be adopted. In this regard, consumer cases appear to be more amenable to class actions and there is an existing source of funding for consumer litigation, in the Consumer Legal Action Fund ("CLAF"), which could potentially provide a means of funding for such cases.

Bearing in mind the above comments, the Institute's views on the main issues raised in the Paper are outlined below.

Recommendations 1 and 2
Introduction of a comprehensive regime for multi-party litigation

In principle, the underlying objectives of the proposal are reasonable, and we note the comparison between the full class action suit and the judicially expanded rules on representative proceedings. Nevertheless, it would be helpful to have some further practical evidence of the deficiencies in the present situation, and how these have prevented legitimate cases from proceeding that would be suitable for class actions.

We would agree with the Class Actions Sub-committee's view at paragraphs 9 of the preface and 8.153 of chapter 8 of the Paper that class actions may be particularly useful in relation to consumer cases given the nature of such cases.

As regards other areas, the accounting profession has reservations about expanding the scope of class actions more widely without a detailed and thorough consideration of the possible impact. The executive summary of the Paper (paragraph 35), comparing Hong Kong with the US, states: "As the local consumer market is substantially smaller than its US counterpart, however, it is likely that there will be fewer class actions and the size of the class in any action is likely to be smaller".

While this may be true of the consumer market, it is not necessarily true of the securities market. In 2009, Hong Kong raised more money through initial public offerings ("IPOs") than any other stock market in the world. The sums of money involved and the number of investors in new listings can be very substantial. One of the reasons for Hong Kong's success in this sector is because it serves as the window on the Mainland China market for the rest of the world. Investment in Hong Kong, therefore, is highly international.

The Institute is currently engaging stakeholders on proposals for professional liability reform with the ultimate aim of achieving a more equitable and manageable situation for auditors, particularly auditors of large listed companies, given the unlimited, unquantifiable and uninsurable liability risk that they currently face. We have made a number of submissions on this subject to the government over the past five or more years. Under the law of joint and several liability, as it stands, a party who may have made an inadvertent error, but is not the perpetrator of misconduct being complained of, and did not stand to gain from it, could nonetheless be held responsible for the entire damages awarded to a class or classes of plaintiffs. In addition, the auditing profession cannot avail itself of a proportionate liability regime.

A similar situation would apply to reporting accountants in relation to IPOs. Under the Companies Ordinance, persons who acquire shares on the basis of an untrue statement in a prospectus, and who suffer loss or damage as a result, have a cause of action

against any expert who authorised the issue of the prospectus with that untrue statement purporting to be made by him. The ordinance also reverses the burden of proof in the case of such claims.

Without the issue of liability reform being addressed first, we believe that the introduction of class action suits would only exacerbate inequities in the existing regime.

We note, from Annex 3 of the Paper, that doubts about possible legal entrepreneurialism associated with class actions have been expressed by the court in Australia (*Mobil oil Australia Pty Ltd v The State of Victoria* (2002) 211 CLR 1 at 83). More pertinent still is the argument outlined by the Australian Law Reform Commission ("ALRC") about the potential impact of technical breaches by defendants, leading to disproportionately large claims (*Access to the Courts – II, Class Actions* (Discussion Paper No.11, 1979) at para. 23-31). While the ALRC also puts forward a counter-argument in the same paper, we find the counter-argument, namely, that if there is a problem, it is a problem with the substantive law by which defendants are held liable, which "has been developed in a legal system without the facility of class actions", to be less than helpful. The ALRC goes on to say: "The problem should not be faced necessarily by denying class actions. It may be preferable to alter the substantive law. The existence of defects in the substantive law is not a reason for denying class actions".

While the identification of the problem in the first instance appears to reinforce our concerns, we would differ with the ALRC as to the conclusion to be drawn. In our view defects in the substantive law should be addressed before bringing in changes that could well amplify existing problems.

Recommendation 3
Opt-in v opt-out scheme

While we understand the arguments that an opt-out scheme would provide greater efficiency and certainty, we believe that, on balance, it should not be assumed that a potential class member wishes to be represented in litigation. In addition, with an opt-out arrangement, there would be a disincentive for those who may have a vested interest in forming the largest numerical class possible to make particularly strenuous efforts to track down and notify potential class members, prior to the commencement of the action. Given the open question of how multi-party litigation is to be funded, there could also be financial implications for persons who are included as part of a class by default without their being aware of it, or because they inadvertently missed the opportunity to opt out.

Therefore, the Institute would favour an opt-in scheme as the default arrangement. As the Sub-committee suggests (albeit with an opt-out scheme as the recommended default position), in the interests of justice and the proper administration of justice, the court should have the discretion to order a different arrangement in particular cases.

Recommendations 4 – 6
Choice of plaintiff and avoidance of potential abuse
Handling of class actions involving parties from other jurisdictions

We generally agree with the recommendations. In the case of class actions involving parties from jurisdictions outside of Hong Kong, as we favour an opt-in scheme as the default arrangement generally, we would favour the same for non-Hong Kong-resident plaintiffs.

As regards public law cases, we would also consider an opt-in arrangement to be the most appropriate arrangement if class actions are extended to this area. If, as we propose, a step-by-step approach is adopted with, in the first instance, consideration being given to the introduction of multi-party litigation in consumer cases only, class actions may be of limited application as far as public law is concerned.

Recommendation 7
Funding models for the class action regime

Recommendation 7 acknowledges the importance of the question of funding: "It is generally accepted that if a suitable funding model for plaintiffs of limited means could not be found, little could be achieved by a class action regime".

This is a very complex area, as evidenced by the lengthy discussions on this aspect of class actions that have gone on in other jurisdictions, the diversity of views and the different proposals that have been put forward as possible solutions.

Under the circumstances, we would agree that a step-by-step approach, building on existing arrangements in specific sectors, such as the CLAF and the legal aid scheme system, would be the most appropriate way forward. It would be useful to sound out the Consumer Council, therefore, on whether it would be likely to initiate class actions using the CLAF were the remit of the fund to be expanded to cover these.

We also agree with the Sub-committee's view, at paragraph 8.124, of the Paper that opening the door to litigation funding companies in Hong Kong "would have considerable ramifications and should be treated with caution". The concern expressed in some quarters, including at least one Australian court, about the introduction of class actions giving rise to "entrepreneurial" lawyers, is equally, if not more, valid in relation to litigation funding companies, which may operate outside of any regulatory or professional disciplinary framework.

Recommendation 8
Detailed procedural proposals

We have no strong views on the detailed procedural proposals.

Yours faithfully,

Peter Tisman
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