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LEGISLATIVE COUNCIL BRIEF

COMPANIES (CORPORATE RESCUE) BILL

INTRODUCTION

At the meeting of the Executive Council on 15 May 2001, the Council **ADVISED** and the Chief Executive **ORDERED** that the Companies (Corporate Rescue) Bill at Annex A, should be introduced into the Legislative Council.

BACKGROUND AND ARGUMENT

Need for Corporate Rescue Procedure

2. At present, companies liable to be wound up under the Companies Ordinance (the Ordinance) may agree to an arrangement with their creditors in a non-statutory manner or pursuant to section 166 of the Ordinance, which provides for the manner in which a company may do so, subject to the sanction of the court. However, the section does not protect the company from its creditors' actions to wind up the company, which may terminate an arrangement being formulated.

3. To address this, the Law Reform Commission (LRC) has recommended a corporate rescue procedure for companies in financial difficulty. The recommendation aims to impose a moratorium during which a company is protected from creditors' action and put under the control of a provisional supervisor (an independent professional third party) whose task is to formulate an arrangement for agreement with its creditors. A summary of the LRC's recommendation is at Annex B.

4. The corporate rescue procedure, if introduced, would give companies in financial difficulty an opportunity to try to turn around. Employment that would otherwise disappear might be preserved, at least to some extent. The legislative proposals to implement this recommendation formed part of the Companies (Amendment) Bill 2000, which was

introduced into the Legislative Council on 19 January 2000.

5. During the Bills Committee stage, the Bills Committee, having regard to time constraints and the complexity of the legislative proposals, recommended that these proposals be excised from the Bill and deferred for re-submission to the Legislative Council at a later stage. The Bills Committee was generally supportive of a corporate rescue procedure. However, some of its Members expressed doubts on the requirement placed upon a financially troubled company to set aside sufficient funds to settle all arrears of wages, severance pay and other statutory entitlements of its employees as if it were a going concern. They were concerned that the Bill did not provide the flexibility to allow employees to trade in their claims for, say, shares of the company.

6. As suggested by the Bills Committee, the Administration has consulted the Labour Advisory Board (LAB) on its proposal to provide some flexibility to the requirement to settle all arrears due and owing by the company to its employees. We have also consulted the Protection of Wages on Insolvency Fund (PWIF) Board on this matter. Having regard to the objection by the LAB and the PWIF Board, we have decided not to pursue the flexibility proposal put forward by the Bills Committee. We have revised the legislative proposals in the light of their views and those from the professional bodies and trade organisations received after the publication of the Bill in 2000.

Main Features of Corporate Rescue Procedure

Application

7. The corporate rescue procedure which may be initiated by a company or its directors or liquidators will apply to local and oversea companies formed/registered under the Ordinance, except –

(a) as recommended by the LRC, the authorized institutions regulated by the Hong Kong Monetary Authority under the Banking Ordinance; and

(b) insurance companies and registered entities in the securities and futures industry regulated by law which empowers the regulator to assume control of the regulated entity or oblige the entity to act in a certain manner in case the entity has financial difficulty.

Moratorium

8. The moratorium starts as soon as the appointment of the provisional supervisor comes into effect (i.e. the provisional supervision starts). The moratorium period is 30 days initially and may be extended for up to six months by the court upon the provisional supervisor's application. Any further extensions must be approved by creditors at a relevant meeting (and the court's approval is not required).

9. During the moratorium, there will be a stay of all proceedings (such as an application to the court to wind up the company, appointment of a receiver of the assets of the company) against the company. The only exceptions are the proceedings of the Insider Dealing Tribunal and the Securities and Futures Commission in the exercise of its regulatory powers under the relevant provisions of the Securities and Futures Commission Ordinance and Leveraged Foreign Exchange Trading Ordinance.

Exemptions from Application of Moratorium

10. The moratorium should not apply to eligible financial contracts (for example, currency or interest rate swap agreements, or agreements to buy or sell securities). These dealings occur in certain closed markets, such as the central clearing and settlement system of the Stock Exchange. To impose a moratorium on such contracts could involve unravelling innumerable other contracts which would cause chaos in the market concerned.

11. Nor should the moratorium apply to debts and liabilities incurred by the company after the initiation of the corporate rescue procedure so that the company can continue with its normal business during the provisional supervision by maintaining the necessary credit facilities with its business partners. Any resumptions by Government pursuant to a Government lease or otherwise should also be exempted from the moratorium.

Provisional Supervisor

12. Once appointed, the provisional supervisor will effectively take charge of the company. To inspire confidence, he must be independent, acting with integrity and possess the necessary expertise. He will be selected from a panel of practitioners to be operated by the Official Receiver (OR) and comprising solicitors and professional accountants. The OR may also approve other suitably qualified independent persons as provisional

supervisors.

13. The provisional supervisor will manage and control the company, acting as the agent of the company when exercising his powers. He may retain or dismiss directors of the company, make alternative arrangements for any creditor and exclude such creditor from the moratorium, and will be personally liable for any contract he enters into when performing his functions. He will be indemnified out of the assets of the company.

14. In response to the views from the professional bodies (see paragraph 6 above), we agree that the provisional supervisor should have the power to investigate voidable transactions made prior to the start of the corporate rescue procedure. The provisional supervisor will be required to report the outcome of such investigation to a meeting of creditors so as to help the creditors to reach an informed decision on whether to proceed with a voluntary arrangement or a creditor's voluntary winding up.

Provisional Supervision

15. Unless objected to by a major secured creditor of a company (in which case the provisional supervision would cease), the provisional supervisor would ascertain the financial position of the company and decide whether a proposal can be made for a voluntary arrangement. If so, he will call a meeting of creditors to consider it and upon the creditors' approval of the proposal, the provisional supervision will cease and the voluntary arrangement take effect immediately thereafter. If not, he will report it to the meeting of creditors which should resolve to terminate the provisional supervision and that the company be wound up as a creditors' voluntary winding up.

16. The original approach as recommended by the LRC was that a company had to notify its major secured creditor of the proposed corporate rescue. The latter had the right to object to the initiation of the procedure and upon receipt of such objection by the provisional supervisor, the provisional supervision would end. The LRC has not proposed to accord the same treatment to minor secured creditors, who will be bound by the terms of the voluntary arrangement that may eventually be drawn up at the end of the procedure.

17. We have received views from the professional bodies and trade organisations that this approach represents a major departure from the long established and respected secured lending practice, i.e. secured creditors, be

they large or small, cannot be forced to accept any "hair-cut" of debts without their consent. We are mindful of the impact of such approach on the existing secured lending practice, the lending institutions and the business community, and consider it necessary to modify the approach to provide that the rights of all secured creditors may not be affected by the voluntary arrangement except with their consent. If a proposal is not acceptable to a secured creditor (be he major or minor), he may choose to opt out of the voluntary arrangement and rely on his own security.

18. We have also modified the approach to provide that a member of a company who claims substantial prejudice may apply to the court for a determination on the resolution of the creditors on a proposal for a voluntary arrangement. Such modification aims to protect the interest of the member in view of the binding effect of the terms of the voluntary arrangement on the member.

Insolvent Trading

19. In relation to the introduction of a corporate rescue procedure and in order to encourage directors and senior management to act on insolvency earlier rather than later, they should be made personally liable for the debts of a company which traded while insolvent. This will encourage them to face the fact that a company was slipping into insolvency at an early date and to address the situation.

Outstanding Wages and Other Entitlements Owed to Employees who are Laid Off by a Company in Provisional Supervision

20. The treatment of outstanding wages and other entitlements owed to employees has been a sensitive subject. As mentioned in paragraph 6 above, the Bills Committee in considering the Companies (Amendment) Bill 2000 has suggested that the Administration should consult the LAB on its proposal to provide some flexibility to the requirement to settle all arrears due and owing by the company to its employees. Flexibility could be in the form of a deferral of payment or payment in lieu of cash (e.g. shares under a trade-in agreement) in respect of the wages and other entitlements accrued owing immediately prior to the commencement of the corporate rescue procedure.

21. In late 2000, we consulted the PWIF Board and the LAB on these forms of flexibility. While both bodies supported in principle the introduction of the corporate rescue procedure, they firmly objected to the

flexibility proposal. They held the view that such a proposal would erode the protection accorded to employees under the existing labour legislation, and alter fundamentally the nature and policy intent of the PWIF in that it would amount to using the PWIF to bail out companies in financial difficulties. They also pointed out that the proposal would have financial implications on the PWIF. The two bodies asked the Administration to adhere to the original proposal on settlement of arrears in wages as set out in the Companies (Amendment) Bill 2000. A summary of the outcome of our consultation with the two bodies is at Annex C.

22. We recognise that any statutory corporate rescue procedure must be workable, bearing in mind the needs of the company in difficulty, interests of creditors, and rights of employees. Having regard to the views of the PWIF Board and the LAB, we intend to adopt a pragmatic approach as originally designed, balancing the interests of all the relevant parties.

THE BILL

23. Clause 3 specifies the companies to which the Bill will apply. Clauses 4 and 5 empowers the OR to appoint a panel of professional accountants and solicitors eligible for appointment as provisional supervisors. The persons that may appoint a provisional supervisor are specified under clause 6.

24. The filing and notification requirements in respect of the notice of appointment of the provisional supervisor are set out in clauses 8 and 9. The notice has to include a 'consent to act' form duly signed by the provisional supervisor. The form will be prescribed by the OR who will require, amongst other matters, the level of remuneration of the provisional supervisor to be displayed prominently in the notice form for creditors to be so informed in the first instance. In addition, the notice will require the company to confirm that it has set aside sufficient money to settle the statutory liabilities owed to its former employees and any wages owed to its existing employees under the Employment Ordinance before the company goes into provisional supervision.

25. The effects of moratorium and the exemptions to it are set out in clause 11. The length, cessation and extension of the moratorium are governed by clauses 12 and 13. The duties and powers of the provisional supervisor are set out in Schedule 4. Powers of directors are to be suspended under clause 14 and the provisional supervisor will act as an

agent of the company.

26. Clauses 15 and 16 specify the liability of the provisional supervisor vis-à-vis contracts of goods and services and contracts of employment entered into before and after the rescue. Where the provisional supervisor accepts a pre-existing contract of employment, or enters into a new contract of employment, the wages and salaries thereby payable have priority over the provisional supervisor's remuneration. The provisional supervisor is indemnified out of the property of the company under Schedule 4 Part 4 for all debts for which he is liable.

27. Under Schedule 4 Part 5, the provisional supervisor is remunerated in accordance with a scale of fees approved by the OR. The court, on the application of the provisional supervisor, may vary the scale. Creditors may also object if they consider the fees to be excessive.

28. The provisional supervisor shall require specified persons to prepare a statement of affairs of the company as soon as practicable under clause 17. The procedures for the removal and resignation of the provisional supervisor are set out in clause 20.

29. The creation of "super" priority debt is in clause 18. Borrowings made by the company in provisional supervision will receive priority over all existing debts, with the exception of fixed charges. This is necessary because in all likelihood, a company under rescue would need to raise capital to fund its operations during the provisional supervision period.

30. Clause 19 sets out the procedures for major secured creditors of the company to decide whether or not the provisional supervisor may proceed to prepare the proposal. If the major secured refuses, the moratorium ceases and the provisional supervisor vacates his office. If the major secured creditor agrees to the drawing up of a proposal but the proposal is eventually rejected by the creditors, the company may either be wound up as a creditors' voluntary winding up, or if it was previously under court winding-up procedures, the stayed procedures would be re-activated.

31. The requirements and procedures for the creditors' meetings to consider the proposal by the provisional supervisor are in clauses 21 to 24. Clause 23 provides that a proposal approved by a meeting of creditors may not affect the right of a secured creditor of the company except with his consent. Where a proposal is approved by the creditors, a voluntary arrangement will follow and the procedures for such an arrangement are in

clauses 25 to 29. Clause 34 and Schedule 8 make consequential amendments, in particular to the Companies Ordinance.

32. Clause 8 of Schedule 8 adds new sections 295A to 295G to the Ordinance to implement the proposals on insolvent trading. Section 295B empowers the liquidator of a company to make an application to the court to seek declaration that a "responsible person", i.e. a director or a member of senior management, is liable for insolvent trading. The grounds on which the court may declare a responsible person liable for insolvent trading are set out in new section 295C. New section 295E provides that where the court makes a declaration of insolvent trading in respect of a responsible person or former responsible person, it may order that person to pay compensation to the company.

PUBLIC CONSULTATION

33. The LRC Sub-Committee on Insolvency carried out a public consultation on the concept of corporate rescue in 1995. A consultation exercise on certain proposals of the LRC (in relation to the treatment of outstanding wages and other entitlements owed to employees) was conducted by Financial Services Bureau in 1998 with 26 major business/professional and employer/employee bodies. The consultation exercise and the results were reported on two occasions to the Legislative Council Panel on Financial Affairs in February and June 1999 respectively.

34. The Standing Committee on Company Law Reform (SCCLR) expressed support for the introduction of a statutory corporate rescue at one of its meetings in 1996. Subsequently, at the meeting on 14 December 1999, the SCCLR examined the draft provisions on corporate rescue and insolvent trading. Concern was expressed over a possible conflict of interest that might arise if a provisional supervisor is allowed to become the liquidator of the company should creditors resolve to wind up that company. However, we believe it makes commercial sense to leave the choice of liquidator to the creditors themselves if they consider that the provisional supervisor is the most appropriate person to become the liquidator of the company in the circumstances. A provisional supervisor turned liquidator would save time and money as he would by then have grasped a fair amount of knowledge of the affairs of the company to quickly proceed with the winding up.

35. We consulted the LAB and the PWIF Board in late 2000 on the

Bills Committee's suggestion that flexibility should be added to the trust account arrangement. The outcome of such consultation was reported to the Legislative Council Panel on Financial Affairs in February 2001.

BASIC LAW IMPLICATIONS

36. The Department of Justice advises that the Bill is consistent with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

37. The Department of Justice advises that the Bill is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

38. The Hong Kong Special Administrative Region Government will be bound by the moratorium when it is acting in its capacity as creditor of the company.

FINANCIAL AND STAFFING IMPLICATIONS

39. With the introduction of the new statutory corporate rescue procedure, the Official Receiver's Office will need to maintain a panel of provisional supervisors which may generate additional workload to the department. Any additional resources required will be absorbed by the OR through internal re-deployment and from within the global allocation of the Secretary for Financial Services. Other proposals in the Bill have no financial or staffing implications for Government.

ECONOMIC IMPLICATIONS

40. The corporate rescue procedure would help financially ailing but potentially viable business to survive as a going concern, in whole or in part. It would be beneficial to the company's shareholders and creditors who might in due course get a better return from the success of the rescue than from the outcome of a winding up. It would also be beneficial to the

company's employees as well as suppliers and contractors for that portion of employment and purchases that might be retained by the rescue. The procedure should be particularly helpful in reducing the stress to the economy when a greater number of companies with viable business for the longer term face more immediate, but probably relatively short term, financial difficulties in a cyclical economic downturn.

LEGISLATIVE TIMETABLE

41. The legislative timetable is as follows –

Publication in the Gazette	18 May 2001
First Reading and commencement of Second Reading debate	23 May 2001
Resumption of Second Reading debate, committee stage and Third Reading	to be notified

PUBLICITY

42. A press release will be issued on 17 May 2001 and a spokesman will be available to handle media enquiries.

ENQUIRIES

43. For enquiries, please call Mr L W TING, Assistant Secretary for Financial Services (Companies) at 2527 5543.

Financial Services Bureau
Ref: C2/1/12/1C(2001)IX

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Introduction of a Statutory Corporate Rescue Procedure in Hong Kong – Report on Consultation on the Proposed Flexibility on the Settlement of Outstanding Wages and Other Entitlements

This paper summarises the results of the Administration's consultation exercise on the Bills Committee's proposal of providing flexibility to the requirement that before undergoing corporate rescue, a company should first settle all outstanding arrears in wages and other statutory entitlements owed to its employees.

Background

2. The Law Reform Commission (LRC) recommended in 1996 the introduction of a statutory corporate rescue procedure in Hong Kong whereby a moratorium on legal action would be provided to a company in financial difficulty. The moratorium would enable the company to appoint an independent third party, the ***provisional supervisor***, to try to work out a ***voluntary arrangement*** with the company's creditors. Such procedure would assist businesses in financial difficulties to turn round and continue to operate as going concerns.

Consultation on the Proposed Change in Use of the Protection of Wages on Insolvency Fund

3. In preparing the draft legislation to implement the LRC's recommendations, we noted that the LRC's recommendation to use the Protection of Wages on Insolvency Fund (PWIF) to meet the outstanding claims of those employees who are laid off by a company undergoing supervision would come into conflict with the provisions in the Employment Ordinance (the EO) (Cap. 57). As a result, we conducted a public consultation exercise on the issue in 1998.

4. At the end of the consultation exercise, a total of 26 submissions with divergent views were received. Nonetheless, representative bodies of those who would be most directly affected by the proposed rescue procedure, namely, employers and employees, were unanimously against any change to the use of the PWIF, notwithstanding their pledge of "in principle" support for the concept of the proposed procedure. Both the Labour Advisory Board (LAB) and the PWIF Board also expressed strong reservation on making use of the PWIF to bail out private businesses.

The Administration's Approach on the Settlement of Employees' Wages Owed by a Company Undergoing Corporate Rescue

5. Having regard to the strong objection to the proposed change to the use of the PWIF, we decided to depart from the LRC's recommendation and adopt the approach of requiring the company wishing to undergo corporate rescue to clear, if any, all arrears in wages, severance pay and other statutory entitlements due and owing by it to its employees before the corporate rescue procedure could be initiated.

6. In essence, we proposed that the appointment of a provisional supervisor of the company should not come into effect unless and until, among others, an affidavit has been filed with the Official Receiver and the court confirming that either the company has no debts and liabilities owing by virtue of the EO to its employees or former employees; or that the company has a ***trust account***, the exclusive purpose of which is to provide funds to pay all debts and liabilities due and owing by the company to its employees and former employees before the commencement of the corporate rescue process.

7. As regards employees who continued to be employed or were newly employed by the provisional supervisor after the commencement of the corporate rescue process, we proposed that the company as well as the provisional supervisor personally should be liable for such employees' wages and other statutory entitlements that the company might owe to them. Where a contract of employment was not accepted or was terminated by the provisional supervisor after the commencement of the corporate rescue process, any outstanding wages, salaries and other emoluments under the contract would be regarded as the liabilities of the company and would be charged on and paid out of the property of the company by the provisional supervisor.

The Companies (Amendment) Bill 2000

8. Legislative proposals based principally on the LRC's recommendations, together with the above modification, were introduced into the Legislative Council in January 2000 as part of the Companies (Amendment) Bill 2000 (the Bill).

9. During the Bills Committee stage, Members of the Bills Committee, having regard to time constraints and the complexity of the proposals, recommended that the draft provisions on corporate rescue be excised from the Bill and be deferred for re-submission to the Legislative

Council at a later stage.

The Bills Committee's Concern

10. Members of the Bills Committee were generally supportive of the proposed statutory corporate rescue procedure. However, some Members expressed doubts on the requirement placed upon a financially troubled company to set aside sufficient funds to settle all arrears of wages, severance pay and other statutory entitlements of its employees as if it were a going concern. They were concerned that the Bill did not provide flexibility in this regard and suggested that the Administration should consult the LAB on its proposal to provide some flexibility.

Flexibility Proposal on the Requirement to Settle all Arrears

11. The intention of setting aside sufficient funds to settle arrears of wages etc. was to protect the statutory rights conferred upon employees under the relevant provisions of the EO. In suggesting that more 'flexibility' should be built into the system, Members of the Bills Committee did not elaborate on how this should be done.

12. Based on the Bills Committee's comments, we developed a proposal to provide for such flexibility and sought the LAB's and PWIF Board's views. The main features of our proposal are set out below.

13. A company that initiates the corporate rescue process would have two types of employees –

(a) former employees whose employment is terminated before the commencement of the corporate rescue process; and

(b) continuing employees who would be retained by the company when the corporate rescue procedure starts.

Wages in arrears and other outstanding entitlements under the EO may apply to both types of employees. However, in view of their different disposition, they should be accorded different treatments.

Former Employees

14. Under the proposed corporate rescue process, a moratorium on legal action against the company will be put in place once the process is initiated. The moratorium would directly affect the claims of former employees to whom the company owes wages, etc. against the company for arrears of wages and other outstanding entitlements under the EO and their employment contracts. Moreover, when the moratorium is in effect, these employees would not enjoy the protection under the Protection of Wages on Insolvency Ordinance (Cap 380) (PWIO) since ex-gratia payments under the PWIF may only be made when a winding up petition has been presented against the company. Since these employees would no longer have any ties with the company undergoing corporate rescue, we consider that the employer should be required by law to settle, or to set aside an amount to meet, any wages in arrears and other outstanding entitlements due to his former employees before he could proceed with the corporate rescue process.

Continuing Employees

15. Continuing employees are expected to have continuing ties with the company. Hence, they would have a greater interest in the survival of the company. This group of employees may be entitled to –

(a) wages and other entitlements (excluding termination benefits which by definition would not be due and payable to continuing employees) that have been outstanding immediately prior to the commencement of the corporate rescue process; and/or

(b) wages and other entitlements accrued owing since the commencement of the process.

16. In respect of paragraph 15(b) above, the provisions in the corporate rescue legislation will provide that if the provisional supervisor or the company fails to pay the employees their wages accrued owing after the commencement of the corporate rescue process, the employees would be able to present a winding-up petition against the company and make the relevant claims under the PWIO. The moratorium imposed during the corporate rescue process does not apply to such outstanding wages.

Forms of Flexibility Proposed

17. Our proposal would only cover the amounts outstanding in paragraph 15(a) above. Two forms of flexibility have been put forward, namely, a deferral of payment, and payment in lieu of cash (e.g. shares under a trade-in agreement). The specific form would be a matter for the company to negotiate with its employees on an individual basis.

18. Under the deferral of payment arrangement, we proposed that the employer should be allowed to enter into agreement with his continuing employees to defer payment of their arrears in wages and other outstanding entitlements. If the company eventually manages to turn around, the employees would be able to receive the entire amount of wages and entitlements outstanding accumulated before the corporate rescue operation and the employees will be able to enjoy continued employment with a rescued company. Under the payment in lieu of cash arrangement, an employer can enter into agreement with its continuing employees to trade in arrears in wages through payment in considerations other than cash, e.g. by shares.

19. While the employees would be able to enjoy the potential gains from the two proposed flexibility agreements, there is also possible down side risk. A trade-in agreement would effectively discharge the employer's liability for payment of arrears in wages and other entitlements. If the corporate rescue exercise fails and the company goes into liquidation, the employees would not be eligible to make claim to the PWIF in respect of the amounts already traded in. As for the deferred payment arrangement, if the rescue operation eventually fails and the company has to be wound up, there is a real risk that an employee may not be able to recover the full amount of owed wages from the PWIF.[1]

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[1] Under the PWIO, employees who are owed wages by their insolvent employers may apply to the PWIF for ex-gratia payment to recover arrears of wages not exceeding $36,000 for arrears of wages accrued during a period of four months preceding the applicant's last day of service. Where an employee has agreed to defer payment of wages in order to help the employer to initiate a company rescue operation which, after a period in excess of four months, eventually failed, he will end up in a position whereby he would not able to recover through the PWIF arrears in wages accrued prior to the commencement of the rescue operation.

20. To provide the employees with an incentive to accept the two proposed forms of flexibility and thus facilitating the initiation of a rescue operation, we have also proposed certain amendments to the provisions of the PWIF Ordinance to afford the employees greater protection than under the existing provisions, e.g. to amend the PWIF Ordinance to make it possible for employees to claim the PWIF in respect of wages and other entitlements outstanding before the start of the corporate rescue exercise and more than four months from the last day of service or to amend the PWIF Ordinance to allow employees to make a claim in respect of the amounts traded in, if such flexibility agreements are entered into by them.[2] In this connection, the Education and Manpower Bureau has expressed concern that the proposed amendments especially the idea of allowing employees to make a claim to the PWIF in respect of the amounts traded in would be tantamount to employees using the protection under the PWIF to secure possible benefits from beleaguered employers. The PWIF was not set up for such a purpose and cannot be used in this manner without a change in its mandate. The proposed amendments would also have financial implications for the PWIF.

Consultation with the PWIF Board and the LAB

21. The PWIF Board and the LAB were consulted on the above two forms of flexibility together with the related legislative amendment proposals on 29 November 2000 and 15 December 2000 respectively. While they supported in principle the introduction of a statutory corporate rescue procedure in Hong Kong, both of them have objected to the flexibility proposal as set out in paragraphs 17 to 20 above. The major reasons of their objections are –

(a) The flexibility proposal would reduce the level of protection accorded to employees under the existing labour legislation which stipulates that, e.g., wage payment should not be made later than seven days upon the expiry of the wage period nor in any form other than in cash.

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[2] Under the proposal, for deferred payment agreements, if the corporate rescue exercise fails and the company goes into liquidation, the employees would still be entitled to make a claim to the PWIF in respect of wages and other entitlements outstanding before the start of the exercise and more than four months from the last day of service, subject to the existing ceiling of $36,000. For trade in agreements, continuing employees would be allowed to make a claim to the PWIF for the traded in amount in the event the company eventually goes into liquidation, but again subject to the existing ceiling of $36,000.

(b) The PWIF has been set up to provide prompt relief in the form of ex-gratia payment to employees of insolvent employers and not to bail out financially troubled companies. The proposal would alter fundamentally the nature and policy intent of the PWIF. The mandate of the PWIF should not be changed to accommodate the proposal.

(c) The proposal would have financial implications on the PWIF. Given the continued depletion of PWIF due to the upsurge of insolvency cases in recent years, the PWIF should not take on liabilities which would further increase its financial burden.

(d) The outstanding wages and other entitlements owed to the employees usually constitute only a small proportion of the total amount of debts of the companies concerned. Hence, in most cases, a company undergoing corporate rescue should be able to set aside sufficient funds for clearing its debts to the employees.

(e) Because of possible impairment of their interests, most employees would not accept deferred payment or payment other than cash. Consequently, even if the proposed flexibility arrangements were incorporated into the statutory procedure, they might not be able to achieve the purpose of relieving the financial burden of the company.

Both the PWIF Board and the LAB have asked the Administration to adhere to the original proposal on settlement of arrears in wages as set out in the Companies (Amendment) Bill 2000.