Bills Committee on Companies (Corporate Rescue) Bill

Summary of 20 submissions and Administration's responses

Part A — General views on the Bill

	Views of organizations	Administration's responses
1.	***Hong Kong Democratic Foundation (HKDF)*** is against the proposals set out in the Bill - (a) HKDF doubts whether it is appropriate to have Government-mandated intervention in corporate failure at all; (b) It has serious reservations about the concept of provisional supervision and the director's responsibility for insolvency; and (c) The proposed provisional supervision process appears to be complex and would be difficult to render transparent to the parties involved. It would therefore provide an opportunity for the unscrupulous to manipulate or take advantage of the position.	On (a), the need for the proposed corporate rescue procedure has been thoroughly considered by the Law Reform Commission (LRC). Indeed it is after wide public consultation on the matter that the LRC has recommended a corporate rescue procedure for companies in financial difficulty. We have accepted the LRC's recommendation, having regard to the possible benefits of such a procedure to the shareholders, creditors and employees of a company in financial difficulty. On (b), provisional supervision is a main feature of the proposed corporate rescue procedure. During the provisional supervision, the provisional supervisor would be tasked to formulate an arrangement for agreement with the creditors of the company. As part of the package to provide for a statutory corporate rescue procedure and in order to encourage directors and senior management to take appropriate action when the company runs into an insolvent state, the Bill contains provisions on insolvent trading whereby upon the winding-up of a company, its directors and senior management may be made personally liable for the debts of a company which traded while insolvent. On (c), the Bill sets out the procedure in detail, with a view to ensuring transparency and guarding against any possible abuse. The duties of the

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		proposed provisional supervisor are also clearly set out in the Bill as he will play a key role in a corporate rescue exercise. We have attempted to follow closely the proposal put forward in the LRC report which, as indicated above, was the product of wide consultation.
2.	***Employers' Federation of Hong Kong (EFHK)*** supports the concept of corporate rescue but is concerned that the small and medium enterprises may not be able to make use of the procedure because of the relatively high financial burden incurred for the appointment of a provisional supervisor. EFHK stresses that the following two principles must be maintained throughout the corporate rescue process - (a) Preferential treatment for employees' outstanding wages and statutory entitlements; and (b) The Protection of Wages on Insolvency Fund should be operated within its current framework and objectives to provide ex-gratia payment to the affected employees, and not be used for any other purposes.	The extent to which the procedure may be used depends on the circumstances facing individual companies. It is important to make an early start and provide a system in law. On (a), the trust account arrangement in the Bill accords protection to outstanding arrears in wages and other statutory entitlements owed by a company to its employees. On (b), the provisions in the Bill would not affect the operation of the Protection of Wages on Insolvency Fund.
3.	***Labour Advisory Board (LAB)*** supports the present provisions of the Bill and, in particular, the spirit and concept of a corporate rescue scheme that could help financially troubled companies to turn around and continue operation after clearing all outstanding wages and other entitlements owed to employees.	We note the LAB's position.
4.	***Lingnan University (LU)*** is in principle supportive of the corporate rescue concept, which is not uncommon in common law jurisdictions.	The cross references in the Bill make it unnecessary to repeat the relevant provisions in the Companies Ordinance in the Bill.

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	Although the Bill is drafted in plain English and Chinese, there are too many sections that are "subject to" too many other sections in the Companies Ordinance (Cap. 32) as well as other ordinances. Even a lawyer may have difficulties in understanding the relevant legal concepts under certain sections.	
5.	***Protection of Wages on Insolvency Fund Board (PWIFB)*** supports in principle the spirit and concept of the proposed corporate rescue scheme. The scheme, if implemented, would help reserve jobs.	We note the PWIFB's position.
6.	***Consumer Council (CC)*** supports in principle the introduction of attempts to rescue companies in financial difficulty by means of provisional supervision by qualified persons. However, CC stresses the vulnerable position of consumers in dealing with companies subject to rescue, either because they are not aware of the attempted rescue or they do not fully appreciate the nature of provisional supervision. It is therefore important: (a) for the operation of corporate rescue to be widely publicized; (b) for adequate warning to be incorporated into notices of provisional supervision to be published to enable consumers to make an informed decision; and (c) to protect unwary consumers by prohibiting issue of prepaid coupons during moratorium, or by putting prepayments during provisional supervision into a trust account. The prepayments will be refunded to consumers if the corporate rescue fails.	On (a) and (b), the appointment of the provisional supervisor will be published in the Gazette as well as in newspapers. On (c), we do not consider it appropriate for the Bill to require the setting up of a trust account to cater for payments towards prepaid coupons.
7.	***The Chinese General Chamber of Commerce (CGCC)*** considers that the subject of corporate rescue merits more	We do not agree that further studies are required for the introduction of the proposed corporate rescue procedure, in

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	thorough studies. While the implementation of a corporate rescue procedure may provide companies in financial difficulty an opportunity to make voluntary arrangement, it might not be of effective use if their financial difficulties are caused by the overall poor economic condition. If the number of companies to be benefited is small, it is not cost-effective to introduce and enforce the legislation having regard to the substantial resources involved.	view of the work done and public consultation conducted by the LRC. The procedure does no more than gives companies in financial difficulty an additional means to turn around.
8.	***PricewaterhouseCoopers (PWC)*** is against the proposal that a company undergoing corporate rescue must clear all arrears of wages, severance pay and other statutory entitlements of its employees as if it were a going concern.	The rationale behind the settlement of outstanding arrears in wages and other statutory entitlements owed to employees is clearly set out in the discussion paper for the meeting of 5 February 2001 of the LegCo Panel on Financial Affairs.
9.	***Hong Kong Exchanges and Clearing Limited (HKEx)*** is in support of the corporate rescue procedure as it provides a mechanism whereby arrangements could be made to assist business to survive, in whole or in part, as a going concern than simply for it to be wound up.	We note the HKEx's position.
10.	***CCIF Corporate Advisory Services Limited (CCIF)*** is against the proposals on insolvent trading and expresses concern about the effect of the proposals on responsible people as defined under the Bill.	The purpose of the provisions relating to insolvent trading is to encourage responsible persons of a company to face the fact that the company was slipping into insolvency at an early date and cause them to address the situation rather than continuing to trade on regardless of the consequences.
11.	***The Law Society of Hong Kong (LSHK)*** points out that the need for a corporate rescue procedure has long been recognized as a deficiency in Hong Kong's corporate insolvency law. The Bill goes someway towards meeting this	The extent to which the procedure will be used will depend on the circumstances facing companies in financial difficulty in the future.

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	need. However, in view of the requirement for a company to settle the wages and statutory liabilities owed to employees before the corporate rescue procedure commences, there is doubt that the procedure, if implemented, will in practice be widely used.	
12.	***The Chinese Manufacturers' Association of Hong Kong (CMAHK)*** considers that the Bill may provide a more favourable solution to both the debtors and the creditors, and to an extent, part of the workforce of the company can be retained and their employment ensured.	We note the CMAHK's position.
13.	***The Hong Kong Association of Banks (HKAB)*** supports any initiative that promotes a corporate rescue culture but is concerned that the Bill makes the process of corporate rescue more difficult to effect. In various aspects there are flaws both at the technical and conceptual level, such as to call into question its workability. In its submission on the Companies (Amendment) Bill 2000, HKAB had made a number of recommendations in an effort to improving the proposed provisions both from the point of view of workability and protection of creditors' interest. However, few, if any, of the key recommendations have been adopted in the current Bill. In the circumstances, HKAB does not feel able to support the Bill. HKAB also considers that there will be an additional cost burden on the Government in having to provide the necessary resources to administer and adjudicate the process.	When the Bill was drafted, we had regard to the comments in the HKAB's previous submission to the Bills Committee set up to scrutinise the Companies (Amendment) Bill 2000 (which contained the provisions relating to corporate rescue). The present Bill has taken on board certain recommendations made by the HKAB in the submission, e.g. introducing the legislative proposals under a separate ordinance; a secured creditor's rights may not be affected by a voluntary arrangement without his consent; and to provide the provisional supervisor with investigatory power. Any additional resources, if required by the Government in connection with the enactment of the Bill, will be absorbed through internal redeployment.

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14.	***The Hong Kong Association of Restricted License Banks and Deposit-taking Companies*** is in agreement with and support of the position of HKAB.	Ditto
15.	***Hong Kong Society of Accountants (HKSA)*** expresses concern about a number of provisions of the Bill, in particular those relating to payment of employees entitlements, personal liabilities of the provisional supervisor and insolvent trading.	See our responses in Part B below.
16.	***The University of Hong Kong (HKU)*** is mainly concerned about the crucial issue of the treatment of employees' wages and other entitlements, and proposes two alternative options.	See our responses in Part B below.
17.	***Hong Kong Coalition of Services Industries (HKCSI)*** considers that the main obstacle to the proposed corporate rescue procedure has been the settlement of employees' outstanding claims. HKCSI is disappointed that the Bill offers no satisfactory solution.	See our responses in Item 8 above.
18.	***Federation of Hong Kong Industries (FHKI)*** is in full support of the establishment of a statutory corporate rescue procedure, but is against the proposed amendments to make directors and senior management of a company personally liable for debts incurred whilst a company is insolvent.	See our responses in Item 10 above.
19.	***Hong Kong Bar Association (HKBA)*** is concerned about a number of issues, e.g. no criterion set out for the invocation of the statutory mechanism for the appointment of a provisional supervisor; the effect of moratorium; what is to happen if the voluntary arrangement fails to be implemented, etc.	See our responses in Part B below.

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20.	***The Hong Kong Institute of Directors (HKID)*** is concerned about the impact of the actual application of the Bill. It is concerned: (a) whether the Bill, once passed, will be perceived as Government intervention in the business environment in Hong Kong which has been praised for the freedom of its business environment with minimal intervention by the Government. By defining "insolvency" and the consequential liabilities of the directors and senior management for insolvent trading, the Bill effectively poses boundaries for the actions of business operators; (b) that the introduction of the Bill will effectively change the current market-driven process which allows for voluntary arrangement between a company which is insolvent and its creditors with the assistance of professional parties; (c) that the Bill may lead to frequent or even premature appointment of provisional supervisors by directors and senior management. The consequence of this abusive use of the legislation may eventually create a lack of business confidence as news of companies being put under provisional supervision and redundancy of employees continue to emerge in the market; and (d) that other common ways to rescue a company may lose ground in light of the time involved as well as the uncertainty of whether such effort can guarantee the company to remain solvent for 12 months or more. These are all serious considerations that must be addressed by the business community, market practitioners and	On (a), (b) and (d), the proposed corporate rescue procedure does no more than gives companies in financial difficulty an additional means to turn around. It is up to the relevant company to decide whether to initiate this statutory process. It does not involve Government intervention. As regards the HKID's comments on the provisions relating to insolvent trading, see our responses in Item 10 above. On (c), whether a provisional supervisor needs to be appointed depends on the circumstances facing a company. We do not see why directors may wish to prematurely appoint a provisional supervisor. There are sufficient safeguards in the Bill against such possible abuse.

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Part B — Views on specific provisions of the Bill

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Clause 2 — Interpretation	
HKID ***Clause 2(2)*** provides for the appointment of two or more qualified persons to be the provisional supervisor of a company. HKID considers the chance to require two or more provisional supervisors to be practically remote due to the fact that the qualified persons eligible for appointment are professionals approved by the Official Receiver. If such appointment should be required, it should be conditional upon the approval by the relevant creditors or, as the case may be, by the court.	The appointment of more than one provisional supervisor is envisaged by the LRC. We do not see why such joint appointment require the approval of the creditors or the court. Note that section 235(1) of the Companies Ordinance also allows appointment of joint liquidators for the purpose of winding up a company.
Clause 3 — Application	
HKSA It is suggested that provision be made for the Financial Secretary to be able to apply the law to regulated institutions in particular cases. This could provide greater flexibility to deal with the rescue of a financial institution. For example, the sale of Barings Bank in the United Kingdom was conducted in the context of an administrative arrangement.	The proposed corporate rescue procedure will not apply to (a) 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. As these bodies are subject to regulation under the relevant pieces of legislation, we do not consider it necessary for the Financial Secretary to be given power to apply the proposed corporate rescue procedure to them in specific cases.

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Clause 4 — Appointment of panel, etc.	
HKSA ***Clause 4(3)*** provides that the Official Receiver shall revoke the appointment of a member of the panel who ceases to be a professional accountant or solicitor; is the subject of a bankruptcy order; is the subject of a disqualification order under Part IVA of the Companies Ordinance (Cap. 32); or is a patient within the meaning of section 2(1) of the Mental Health Ordinance (Cap. 136). HKSA considers it not clear what is intended to happen in the case of a person who is temporarily suspended from practising as a professional accountant or solicitor. It would provide for greater flexibility if it were to be stipulated that revocation of a person's membership on the panel could be permanent or for such period as the Official Receiver specifies.	Section 4(3)(a) of the Bill provides that the Official Receiver (OR) shall revoke the appointment of a member of the panel who ceases to be a professional accountant or a solicitor. If a person who is temporarily suspended from practising as a professional accountant or a solicitor and his membership on the panel has been revoked as a result, he may, if he so wishes, apply to the OR to reinstate his panel membership after the suspension ends.
Clause 5 — Persons qualified to be provisional supervisor	
CGCC Persons appointed to be the provisional supervisor of a company must be competent and impartial.	We agree that provisional supervisors must be competent and impartial. The Bill contains adequate provisions about the qualifications and appointment of provisional supervisors.
HKSA ***Clause 5(b)*** provides that no person shall be appointed to be the provisional supervisor of a company unless he provides such security, and in such form, as is prescribed in regulations made under clause 31. HKSA does not support the proposal to require security to be posted. No such requirement is specified in relation to schemes of arrangement under section 166 of the Companies Ordinance (Cap. 32) (***Please refer to Appendix 1***) or to creditors' voluntary winding-up. This will add to the cost of the procedure, diminish its convenience and is contrary to the trend in	The security requirement aims to provide protection for the creditors as they are not involved in the appointment of the provisional supervisor. A similar requirement is placed on private sector liquidators in compulsory winding-ups by the court (see section 195 of the Companies Ordinance).

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other jurisdictions to move away from bonding. HKSA also points out the difficulties that some practitioners have found in obtaining bonds if they do not have a previous history with the bond suppliers, given that the market for such products in Hong Kong is very limited. It is also unclear how any such security would be determined given the wide variety of companies that in principle could enter into provisional supervision.	
Clause 6 — Persons who may appoint provisional supervisor	
CMAHK The Bill has excluded the possibility for the small shareholders of a listed company and creditors to apply for the moratorium and participate in the appointment of the provisional supervisor.	The LRC considers that individual shareholders or creditors of a company do not have sufficient knowledge of the financial position of the company to decide whether or not the proposed corporate rescue procedure should be initiated. The LRC recommends that the Bill should not provide for them to initiate the procedure. We have accepted the recommendation.
HKID Under ***clause 6(1)(a)***, directors or members of a company may, before the commencement of a winding up, appoint a qualified person to be the provisional supervisor. Under ***clause 6(2)(a)***, such an appointment may be made whether or not the company is able to pay its debts. HKID considers that there may be possibilities that directors or members of the company may abuse their power. The relevant provisions can be modified to cater for circumstances where the appointment of the provisional supervisor is made by the directors or members of the company, they should be required to demonstrate that there are reasonable grounds to believe that despite the fact that the company is able to pay its debts at the time of the appointment, the company will be insolvent or there is no reasonable prospect that the company could	We do not consider it appropriate to amend the relevant clauses as suggested by the HKID. The policy intent is that a solvent company in financial difficulty should be allowed to initiate the proposed corporate rescue procedure. This is to encourage the companies to recognise their financial difficulties and take remedial actions early. In any event, directors have the duty to act in the interest of the company and there are remedies against breaches in directors' duties.

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avoid becoming insolvent. HKID also notes that under ***clause 2 of Part 4 of Schedule 4***, the indemnity of the provisional supervisor shall have priority over the claims by secured or unsecured creditors. The Bill should provide for circumstances where the appointment of the provisional supervisor is initiated by the directors or members of the company, the consent from the creditors should be obtained.	As explained above, we do not consider it appropriate for the creditors to have the right to initiate the proposed corporate rescue procedure. Given this, there is little ground for the appointment of a provisional supervisor to be sanctioned by the creditors.
HKID also considers that in the case where there is a major secured creditor of the company, the consent from the major secured creditor should be obtained prior to the appointment of the provisional supervisor, thereby minimizing the costs for the company in the case where the major secured creditor of the company disagrees with the preparation of the proposal (***clause 19(2)(a)***).	Although the Bill does not require the appointment of a provisional supervisor to be sanctioned by the major secured creditor, the latter has the right to object, within 7 days of the commencement of the proposed corporate rescue procedure, to the provisional supervision and in which case the provisional supervision will cease. In practice, we expect the directors to have consulted the major secured creditor in advance.
Clause 7 — Purposes of proposal, etc.	
HKBA ***Clause 7(1)*** provides for the purposes to be achieved by a proposal of the provisional supervisor. Under ***clause 7(1)(b)***, the purpose is "the survival of the company, ***and*** the whole or any part of its undertaking, as a going concern". It would appear that "***and***" is used as a conjunction in this context. This may give rise to the question of whether disposing of the entire undertaking of the company for cash assists will satisfy clause 7(1)(b), since it may relate only to the survival of the company as opposed to its business. It would probably not do so, on the existing wording.	The section reflects our policy intent that the proposed corporate rescue procedure aims to rescue the company together with at least part of its undertaking.
It is not clear what yardstick is to be adopted in considering whether a proposal	The "more advantageous" satisfaction of the debts and liabilities of the company

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would achieve the purpose provided in ***clause 7(1)(c)***, i.e. "the more advantageous satisfaction, in whole or in part, of the debts and other liabilities of the company". In comparison to what scenario and from whose point of view should this be ***more advantageous***? (a) If it is intended that the relevant comparison is the position in a winding up, then similar wording to that in ***clause 7(1)(a)*** should be included. If not, the relevant comparison, whatever it may be, should be spelt out; and (b) If the point of view to be adopted is that of the creditors and not the company, it may be as well for this to be stated.	should be as compared with the situation where the company was put into liquidation. We will review the drafting to make this clear.
HKSA ***Clause 7(3)*** provides for a number of matters to be included in the terms of the voluntary arrangement proposed by the provisional supervisor. It should be made clear that these matters are not necessarily exhaustive. Consideration should be given to introducing a procedure similar to that in Australia where a proforma deed of company arrangement is specified.	The phrase "amongst other terms" in Clause 7(3) indicates that the list is not intended to be exhaustive. As the terms of a voluntary arrangement vary from case to case, the Bill aims to set out the essential features of such an arrangement. Moreover, the provisional supervisor and the creditors should have the latitude required to work out the detailed terms of the arrangement between them. Hence, we do not consider it necessary to introduce the proforma deed of company arrangement.
HKID ***Clause 7(3)(g)*** provides that the duties, powers and liabilities of the supervisor shall be stated in the proposal for a voluntary arrangement. HKID notes that in most cases, the supervisor of a voluntary arrangement would probably be the provisional supervisor. To promote independence and confidence, statutory requirements or guidelines should be laid down for the rate of charge of the supervisor of a voluntary arrangement as	As the supervisor will be appointed by the creditors, we consider it more appropriate for the creditors to decide on matters such as the remuneration, duties etc of the supervisor.

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well as their duties, powers and liabilities, as in the case of the provisional supervisor which has been set out in the Bill.	
Clause 8 — Filing of documents	
HKBA There does not appear to be any criterion set out in the Bill for the invocation of the statutory mechanism for the appointment of a provisional supervisor. HKBA notes that: (a) ***Clause 8*** provides that once the documents specified in Schedule 2 are filed, the appointment of the provisional supervisor takes effect. However, those documents do not require the company to be in any particular condition except that it has a trust account containing sufficient money to pay employees' claims; and (b) ***Clause 6(2)(a)*** provides that the appointment of the provisional supervisor of a company may be made whether or not the company is able to pay its debts. It is clear that it is not necessary for the company to be insolvent. Thus, the directors and shareholders of the company are given very wide discretion to call into play the statutory procedure of provisional supervision, with the moratorium and other consequences that flow from it.	Whether a provisional supervisor needs to be appointed depends on the circumstances facing a company in financial difficulty. We do not see why directors or the company may wish to appoint a provisional supervisor even if this is not justified. There are sufficient safeguards in the Bill against such possible abuse.
Clause 8 and Schedule 2 — Settlement of outstanding wages and other entitlements owed to employees	
LAB and PWIFB Under ***clause 8 and Schedule 2***, the appointment of a provisional supervisor of the company should not come into effect unless and until, among others, an affidavit	We note the LAB's and PWIFB's positions.

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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 Employment Ordinance (Cap. 57) 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 procedure. LAB and PWIFB support these provisions.	
<u>LAB, PWIFB and CGCC</u> LAB, PWIFB and CGCC note that some members of the Bills Committee on Companies (Amendment) Bill 2000 were concerned that the Bill did not provide a flexibility to allow employees to trade in their claims for, say, shares of the company. Their views are as follows: (a) LAB and PWIFB consider that the proposed flexible arrangements would in fact impair the interests of employees concerned, reduce the level of protection accorded to them under existing labour legislation and, furthermore, impose additional liabilities on the Protection of Wages on Insolvency Fund. PWIFB also considers that the proposed arrangements would change the mandate of the Fund; and (b) CGCC considers the proposed flexible arrangements inappropriate.	We note the LAB's, PWIFB's and CGCC's positions.
<u>PWC</u> PWC puts forward the following arguments against the requirement of payment of employees entitlements before the commencement of the corporate rescue procedure:	The proposed corporate rescue procedure is just a means through which a company in financial difficulty may turn around. We acknowledge that the procedure may not be applicable to all companies as the extent to which the procedure may be initiated

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(a) How can a company in such dire financial difficulties find the money to meet employees liabilities, especially if the amount owed to employees is significant or there are many employees? (b) Where the company has a large number of staff or a number of highly paid staff, the requirement to meet employees liabilities in full will greatly restrict the ability of a company to implement the corporate rescue procedure; (c) It is unlikely that a bank would be willing to lend money to a company which is contemplating provisional supervision if the money would go straight to the employees; (d) It appears that the proposed provisions will encourage directors to prejudice the position of unsecured creditors by taking more credit from them in order to give employees a greater priority than they may otherwise have on insolvency; (e) The requirement would mean that many companies would not be able to use the corporate rescue procedure and would be placed in liquidation. The employees' ultimate goal of keeping their jobs is likely to be lost; and (f) The requirement will result in a major inconsistency between the treatment of employees under provisional supervision and any other form of insolvency.	depends on the circumstances facing individual companies, such as the money owed to their employees, the ability to borrow money from banks (see (a) to (c) and (e)). On (d), we do not see why directors will be encouraged to prejudice the position of unsecured creditors in the way suggested. Creditors will no doubt be careful in lending money to the company. On (f), we do not consider the comparison appropriate, as a company undergoing corporate rescue is still a going concern. The reasons for setting up the trust account are set out in the discussion paper for the meeting of 5 February 2001 of the LegCo Panel on Financial Affairs.
LSHK The fact that outstanding wages would have to be provided for in a trust account means that cash has to be available at the outset. This would involve the need for	Ditto

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creditor advances before embarking the corporate rescue procedure. This is likely to operate as a disincentive to use the procedure in many cases.	
HKSA The provisions requiring all liabilities owed to employees, including contingent liabilities, to be provided for by means of a trust fund, if not in cash, will create a substantial obstacle to the success of the corporate rescue procedure. The procedure is expected to be of assistance only to a very small number of companies that have few employees and/or cash rich. HKSA stresses that it is aware of no comparable corporate rescue procedure overseas that provides guaranteed benefits for employees in this way. Banks are unlikely to be willing to provide additional funding if the funds will be used primarily to discharge liabilities owed to employees by the company.	Ditto. Also see our responses in Item 8 above.
HKSA is also concerned that if a proposed provisional supervision collapses due to insufficient support from creditors or for other reasons, and the company proceeds into liquidation, employees will be in a much better position than they would have been had the company gone into liquidation straight away, while all other unsecured creditors will be worse off. This may have the implication that the provisional supervisor may find himself dealing with employees who are uncooperative because they may benefit more by seeing the provisional supervision fails.	We do not see why employees have any incentive not to cooperate with the provisional supervisor, bearing in mind that payments from the trust account have to be effected as soon as practicable after the commencement of the provisional supervision (not triggered by the winding up of the company). It would be in the best interest of employees if they cooperate so that the company can turn around and their jobs retained.
Moreover, there are no provisions that would subordinate the claims of directors, or their family members or associates, who are employees of the company, to other creditors. This would make the arrangements open to abuse by unscrupulous directors.	We are considering the justification for and feasibility of the HKSA's proposal.

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Consideration should be given to capping the trust fund in individual cases to either the ceiling of payments under the Protection of Wages on Insolvency Fund or the limits specified in section 265 of the Companies Ordinance (Cap. 32) (***Please refer to Appendix 2***).	See our comments on proposals relating to treatment of wages and other statutory entitlements owed by a company to its employees.
HKU HKU points out that the general objections against the proposal on settlement of employees entitlements are twofold: (a) that payments must be made before a company can initiate provisional supervision; and (b) that the amounts involved are without any limit. HKU proposes two alternative options: ***Option A*** (a) A concept of "***employees' protected debts***" should be introduced. It would be defined to track the various amounts which may presently be claimed from the Protection of Wages on Insolvency Fund upon a compulsory liquidation; (b) Every proposal by a provisional supervisor for a voluntary arrangement (to be put forward within the initial 30-day moratorium to the creditors' meeting) must contain a provision to the effect that any outstanding employees' protected debts will be immediately paid by the company in cash upon the voluntary arrangement coming into effect; and (c) The legislation should expressly provide that the court may not extend the moratorium beyond the initial 30-day period, unless the provisional supervisor undertakes that within 14 days of the court granting the extension, all the employees' protected debts will be paid off in cash by the	On the proposal to cap employees' entitlements, see our comments on proposals relating to treatment of wages and other statutory entitlements owed by a company to its employees. Under both options, payment of the outstanding sums will be delayed as they would be paid when the voluntary arrangement comes into effect or 14 days after the court grants the application to extend the moratorium. Employees would also have difficulty in enforcing the undertaking that the provisional supervisor made to the court, not to mention the costs and time involved. The proposals do not cater for the situation where the corporate rescue exercise fails and the company goes into liquidation.

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company. ***Option B*** is different from Option A in that the concept of employees' protected debts is replaced by "***relevant employee debts***" which mean "all debts and liabilities" arising under the Employment Ordinance (i.e. following the basic approach adopted in the Bill). The advantage of Option B over the proposed provisions of the Bill is that a company is not required to find the necessary funds to pay off its employees before going into provisional supervision. Yet the workers would still have to be paid all debts and liabilities if the provisional supervision were to go beyond the initial 30-day moratorium. One technical point is that ***Schedule 2*** makes reference to wages owing by virtue of the Employment Ordinance. But there is in fact no provision in that Ordinance which makes wages a statutory entitlement.	We agree with this comment and will consider how to amend the relevant section.
<u>HKCSI</u> HKCSI supports the Law Reform Commission's proposal to use the Protection of Wages on Insolvency Fund to meet the outstanding claims of those laid off by a company undergoing provisional supervision. Employees affected by provisional supervision should be compensated in a manner as if the company was insolvent. However, the current proposal, by insisting on settlement of arrears of wages, will enable the employees to get much more than they could have if the company goes into liquidation, thus further reducing the ability of the company to retain enough cash for restructuring.	See our responses in Item 8 above.
<u>HKBA</u> ***Clause 3(d)(i)(B) and 3(d)(ii) of Schedule 2*** refer to all debts and liabilities owing, by virtue of the Employment Ordinance (Cap. 57), by the company to its former	

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employees before the relevant date (including those employees whose contracts of employment will be terminated on or after the relevant date). HKBA raises the following questions:	
(a) It does not appear to cover debts and liabilities ***which will accrue and becoming owing*** because of the termination of the employment by reason of the company going into provisional supervision;	This scenario is covered. The phrase "those employees whose contracts of employment will be terminated on or after the relevant day" covers those employees who have been notified, before the start of the proposed corporate rescue procedure, that their employment contracts will be terminated on a date on or after the start of the procedure.
(b) It is unclear why former employees should include "***those employees whose contracts of employment will be terminated on or after the relevant date***" since such employees would appear to be existing employees; and	Ditto.
(c) It is unclear why ***former employees*** are to be protected in relation to all debts and liabilities owing by virtue of the Employment Ordinance, whereas ***existing employees*** are only to be protected in relation to wages.	As the employment contracts of former employees are terminated, they should be entitled to payment of outstanding wages and other statutory benefits such as severance pay. Existing employees' contracts, however, will continue and hence they are not entitled to the other statutory benefits.
Clause 9 and Schedule 1— Notification	
HKSA The requirements for issuing notices under the Bill are less extensive than those under the Companies (Amendment) Bill 2000. Under ***Schedule 1***, the notice of appointment of provisional supervisor shall be published in the Gazette and local newspapers, and other notices under the Bill shall be published in the Gazette. HKSA proposes that the provisional supervisor should in addition be required to write to all creditors.	The provisional supervisor is required under section 21(1) to give notice of the relevant meeting of creditors (together with the report to creditors and the statement of affairs) to each relevant creditor of the company whose name and address appear in the statement of affairs or are otherwise known to the provisional supervisor. We do not consider it necessary to require the provisional supervisor to write to all creditors at the outset.

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Clause 10 and Schedule 4, Parts 1 and 2 — Duties and powers, etc. of provisional supervisor	
HKDF There are conflicts in the role of the provisional supervisor: (a) the risk of collusion between the provisional supervisor and the directors of the company; (b) the risk of collusion between the provisional supervisor and certain creditors of the company; and (c) the possibility of the provisional supervisor abusing his position for his own benefits. If the concept of provisional supervision is proceeded with, there should be at least a code of conduct for such work and some form of enforcement by a relevant professional body. Statutory remedies should be available for parties who are able to demonstrate abuse and statutory penalties for the provisional supervisor in breach of his duties.	Provisional supervisors are selected from a panel of practitioners operated by the OR. They are accountants or legal professionals with good experience in corporate rescue and insolvency matters. Provisional supervisors also owe a fiduciary duty to all the parties concerned in the provisional supervision to act in good faith and is also bound by law to act in the best interest of the company. If he fails to meet the requirement, he may be liable personally for any resulting damages. Under the Bill, any voluntary arrangement proposal put forward by the provisional supervisor needs the approval of the majority of the creditors before it can be implemented. If the creditors are not satisfied with the performance of the provisional supervisor, they can apply to court for his removal.
LU There is no mechanism in place to monitor the work of the provisional supervisor to ensure that he will not abuse the extensive powers given. The Official Receiver should have a role to play in appropriate circumstances.	Ditto.
CMAHK In addition to the proposed duties and power of the provisional supervisor, he should also be given the power and resources to investigate any fraud, dishonesty, incompetence, misconduct or irregularity in the management of the affairs of the debtors, and present a statement of such investigation to the creditors' meeting and the court for relevant action.	Unlike liquidators, the provisional supervisor's main duty is to draw up a voluntary arrangement for creditors' consideration as quickly as possible. Whilst he will investigate any voidable transactions entered into by a company and report the outcome to the creditors, we do not consider it practical to require him to investigate fraud, dishonesty, etc of the directors, given the tight time frame he has to work within. If he comes across any

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	such malpractice, he may refer it to the law enforcement agencies for follow-up.
HKSA ***Clauses 1 and 2 of Part 1 of Schedule 4*** provide that the provisional supervisor has to take into custody or under control all the property to which the company is or appears to be entitled, and to investigate and assess the business, property, affairs and financial circumstances of the company. However, the provisional supervisor does not have the specific powers available to liquidators under the Companies Ordinance (Cap. 32) to call for an examination of persons who may have relevant information or to require the delivery up of company property.	Under section 17, the provisional supervisor has the power to call upon specific persons to supply information and to attend interviews about the business, property, affairs or financial circumstances as he may reasonably request. Any person failing to comply with the requirement is liable to a fine and daily penalty. The power under section 17 is wide enough.
HKU ***Clause 2 of Part 1 of Schedule 4*** is not clear as to what is intended. HKU proposes that it be amended, as follows: "2. Investigate and assess the business, property, affairs and financial circumstances of the company (including any possible claim that ***might have been*** taken by a liquidator of the company under any of the sections 264B, 266 to 266B, 275, 276 or 295A to 295G of the Companies Ordinance (Cap. 32) ***had the company been put into creditors' voluntary winding up on the relevant date***."	We agree with the HKU's comment.
HKID ***Clauses 1 and 2 of Part 2 of Schedule 4*** provide that the provisional supervisor has the power to appoint any agent or employ any person to do any business and to dismiss the agent or employee, and the power to appoint a solicitor, professional accountant or other professionally qualified person to assist in the discharge of duties and the exercise of powers and to dismiss	Given the requirements in the Bill about the qualifications and appointment of provisional supervisors and the tight timeframe against which they need to work, we do not consider the HKID's proposals appropriate or practical. We believe provisional supervisors should have the discretion to appoint their agents as they see fit.

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the solicitor, professional accountant or other professionally qualified person. As the costs of the provisional supervisor, including the appointment of any of its agents, will be borne by the company, HKID considers it appropriate to require the provisional supervisor to demonstrate the reasons for and benefits of appointing such agents or employees and the approval from the relevant creditors should also be obtained prior to such appointment as the ultimate purpose of the provisional supervisor is to preserve the property of the company for the creditors of the company as a whole. The introduction of a general mandate for the provisional supervisor to act within a predetermined amount can also facilitate such procedures and provide for a compromise between the provisional supervisor and the relevant creditors.	
Clause 11 — Moratorium	
LU During the moratorium, there will be a stay of all proceedings against the company. However, this does not apply to a petition under section 168A of the Companies Ordinance (Cap. 32) (***Please refer to Appendix 3***). There is not much the provisional supervisor could do, pending the making of an order by the court.	The LRC has recommended that the minority shareholders' rights under section 168A should not be affected by a provisional supervision on the ground that individual shareholders are not given the right to initiate provisional supervision and should have alternative remedies to winding-up. We have accepted this recommendation.
CMAHK Given that the provisional supervisor has the power to exclude any class or classes of creditors from the moratorium, there is an opportunity that the provisional supervisor will make compromised arrangements with certain secured creditors at the expense of all other parties. Such power of the provisional supervisor should be limited and any decision or arrangement made with the excluded creditors should first be approved by the court.	We do not consider appropriate to require a provisional supervisor to seek the approval of the court for his decision on excluding certain creditors from a voluntary arrangement proposal. To do so would unnecessarily constrain the provisional supervisor's flexibility in discharging his duties. After all, the provisional supervisor is under duty to act in the best interest of the company.

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While major secured creditors can be exempted from the moratorium, minor creditors should also be given the right to appoint a representative to discuss with the provisional supervisor collectively with regard to their claims and loan arrangements.	The Bill contains no provision prohibiting minor creditors from discussing with the provisional supervisor collectively.
<u>HKSA</u> HKSA suggests that the moratorium be applied to the commencement of any actions in respect of directors' liabilities under a personal guarantee. Such actions are included in the equivalent procedure in Australia. This would give directors a greater incentive to consider provisional supervision.	We see no justification for the moratorium to be extended to cover actions not taken against the company.
Clause 11(6) provides that the appointment of the provisional liquidator or liquidator of the company shall be terminated upon the appointment of the provisional supervisor, subject to clause 19(2)(b) (i.e. a major secured creditor does not agree with the provisional supervisor proceeding to prepare the proposal) and clause 22(6) (i.e. a meeting of creditors rejects the proposal). These provisions, as drafted, may give rise to uncertainty over whether, for example, the provisional liquidator or liquidator could argue that certain dispositions made by the provisional supervisor were void or voidable (see section 182 of the Companies Ordinance (Cap. 32) (***Please refer to <u>Appendix 4</u>***)).	We will review the drafting of the relevant sections in the light of the HKSA's comment.
<u>HKBA</u> As the moratorium prevents the presentation of a winding up petition against the company (***Clause 11(2)(a)***), there is a danger that the moratorium will have the effect of delaying the application of avoidance provisions in insolvency laws, e.g. provisions avoiding unfair preferences, which only apply to transactions within a certain period before winding up. Such a	We will consider how the relevant sections should be amended to address the HKBA's concern.

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delay may mean that certain transactions which would otherwise have been caught will fall outside such period. HKBA notes that ***clause 11(4)*** attempts to discount the moratorium for the calculation of time where time is limited for a "matter" to "proceed", but that provision as drafted is inapt to cover the avoidance provisions. While the problem is to a significant extent addressed by ***clause 22(5)(b)*** which deems the winding up consequent upon the rejection of the proposal by the relevant meeting of creditors to have commenced at the relevant date, the problem remains in the case where the provisional supervision is "nipped in the bud" by a major creditor under ***clause 19***.	
The moratorium also prevents the commencement of proceedings against the company while the moratorium is in effect. Although the provisions of ***clause 11(4)*** may be intended to prevent limitation periods from running during the period of the moratorium, the wording of that subclause may not be apt to cover such a situation, since an uncommenced action could well be regarded as not being a "matter" which can "proceed". Both these two words tend to suggest that their subject matter is already in existence. It may be desirable to make it clear whether or not the moratorium is to have any effect on limitation periods generally.	Ditto
Clause 12 — Cessation of moratorium	
CGCC The initial 30-day moratorium period is too short to complete the corporate rescue procedure.	Whilst the moratorium will initially run for 30 days, it can be extended up to six months, subject to the approval of the court. It can be further extended beyond the six-month period if the creditors so agree.
HKSA	

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HKSA is concerned how creditors will be notified of the cessation of the moratorium under ***clause 12(2)(c)*** (i.e. where the provisional supervisor's appointment is terminated by the court, or the provisional supervisor resigns, dies or ceases to be a qualified person) and what other procedures, if any, will then apply. It seems that directors will resume control over the company upon the cessation of the moratorium. Is it their responsibility to notify creditors of the position?	Section 20(9) provides that the person who appointed the provisional supervisor will arrange for a notice of cessation in the specified form to be published in the prescribed manner. The management of the company will be transferred back to the directors.
Clause 13 — Extension of moratorium, etc.	
HKAB On the proposal that the provisional supervisor may make an application to the court for an extension of the 30-day moratorium period, HKAB believes that the commercial issues surrounding a company and its creditors are best dealt with by the interested parties, leaving the court as the final arbiter in any dispute. The proposed amendments will be subject to abuse and serve to delay the liquidation of hopeless cases.	The LRC has carefully considered the issue of extension of the moratorium. Its view is that it is necessary for the provisional supervisor to apply to the court for such extension because the creditors' rights are suspended during the moratorium and the creditors must be assured that the provisional supervisor is diligently formulating a proposal to be put to them. A requirement that the provisional supervisor must justify the extension to the court would keep the provisional supervisor aware of his obligation and force him to re-assess the prospect of a voluntary arrangement on a regular basis. We have accepted this view.
HKSA ***Clause 13(4)*** provides that any creditor affected by the moratorium may make an application to the court to be exempted from the application of the moratorium on the ground that the moratorium is causing, or will cause, the creditor significant financial hardship. HKSA considers that this provision should be better placed in ***clause 11*** (Moratorium) than in clause 13 (Extension of moratorium, etc.). Apart from considering the factor of "significant financial hardship", the court	We agree with the HKSA's comment. We have accepted the LRC's recommendation that "significant financial

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should be able to order exemption if it is satisfied that a secured creditor's collateral is being seriously jeopardized. There is no requirement in this clause for the provisional supervisor to notify creditors of an application to extend the moratorium. A link should be made between ***clauses 13 and 21***.	hardship" should be the only ground for exemption. We do not consider it appropriate to require the provisional supervisor to notify the creditors of each application for extending the moratorium, given the tight timeframe against which the provisional supervisor works. In practice, we expect the creditors to approach the provisional supervisor to check the progress of the provisional supervision.
HKID ***Clause 13(5)*** provides that the court shall not under clause 13(2) extend the moratorium for any period beyond the period of 6 months immediately following the relevant date. HKID points out that a company that is insolvent usually requires an extensive period of time in coming to terms with its creditors under a voluntary arrangement. It therefore considers that the period of moratorium should be left for determination by and agreed between the company, the provisional supervisors and the relevant creditors.	The above response to the HKAB's comment is relevant. Section 22(2)(a) provides that the moratorium may be extended beyond the first six-month period if so agreed by a relevant meeting of creditors.
Clause 14 — Effect of moratorium on directors of company, etc.	
HKEx ***Clause 14(1)*** provides that during the moratorium, a director of the company shall not discharge a duty or exercise a power imposed or conferred on him in his capacity as such a director, and the provisional supervisor shall discharge such a duty and may exercise such a power. As there is no contractual relationship between the Stock Exchange of Hong Kong (SEHK) and the provisional supervisor, it is doubtful whether SEHK would be able to effectively apply the Listing Rules on the listed company. Under such circumstances, upon the appointment of a	The proposed moratorium in the Bill will not affect the SEHK's right to suspend the trading of a listed company's securities on the SEHK.

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provisional supervisor, trading of the listed company's securities on SEHK should be suspended. HKEx emphasizes that the right of SEHK to suspend the trading of a listed company's securities on SEHK should not in any way be curtailed by the corporate rescue procedure.	
HKSA The implications of a director acting in contravention of ***clause 14(1)(a)*** on the provisional supervisor's liability are unclear. It would not be reasonable if the provisional supervisor were ultimately held personally liable for the conduct of a director who was not acting under any delegated authority. It is not clear why the sanction, previously contained in clause 168ZI(2) of the Companies (Amendment) Bill 2000, against directors acting in contravention of the provision of ***clause 14(1)(a)*** of the current Bill has been dropped.	We will consider how the relevant sections should be amended to address the HKSA's concern.
HKBA In ***clause 14(1)(a)***, reference should be made to exercise of powers and functions by the board of directors instead of or as well as by an individual director. ***Clause 14(3)*** appears to deal with the situation in which the director would have actual authority to deal with the third party on behalf of the company. It would not appear to affect the position where the director has no actual authority to do the act in question, but has previously been held out by the company as having such authority. In such a situation, the ordinary principles of agency relating to ***apparent or ostensible authority*** would appear to apply, subject to the additional factor that someone who is aware (or deemed to be aware) of the provisional supervision will not be able to rely on any such apparent or	We do not consider it necessary to refer to the board of directors since section 14(1)(a) prohibits all the directors from discharging their duties or exercising their powers. We do not consider it necessary to amend the section as suggested by the HKBA as the ordinary principles of principal and agent would apply.

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ostensible authority. This may be a matter which could be spelt out.	
HKID The possible liability of the provisional supervisor and the company under ***clause 14(3)*** may effectively encourage the provisional supervisor to remove directors of the company (under ***clause 11 of Part 2 of Schedule 4***), who in reality, may be critical in the business of the company or its subsequent survival. HKID therefore proposes that the provisional supervisor's power to remove directors or officers to be made conditional upon the approval of the creditors and that the reasons for doing so can be demonstrated.	We do not agree with the HKID's proposal as it would unnecessarily restrict the provisional supervisor's power to remove directors. In practice, the provisional supervisor would not unnecessarily remove a director as directors' co-operation during the provisional supervision may affect the success of the provisional supervision.
Clause 16 — Liability for certain contracts of employment	
LSHK ***Clause 16*** is not particularly easy to interpret. In effect, liabilities under existing contracts of employment, even if not accepted by a provisional supervisor, are charged on and paid out of the property of the company in priority to all other liabilities apart from fixed charges. However, companies seeking provisional supervision are likely to be at the point where they are in effect insolvent and/or have little funds or assets. It may take weeks or months to assess their financial position. The inability to assess the existence and value of company assets for meeting the charge under clause 16 at an early stage may discourage the company from using the corporate rescue procedure.	Having regard to the tight timeframe within which the corporate rescue exercise has to be carried out, we envisage that a lot of preparations, including assessing the financial situation of the company and consulting creditors such as banks, would have been done prior to the formal start of the corporate rescue procedure.
Clause 16(2)(a) provides that where a contract of employment has not been accepted or terminated within 14 days immediately following the relevant date, then it shall be deemed to be terminated by the company. However, it would be unusual for banks or other creditors to be	Ditto.

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willing or able to make an assessment and commit to support the company within 14 days. As a result, the existing staff may not be retained.	
HKSA The imposition of personal liabilities on the provisional supervisor in respect of the entitlements of employees who are retained by him will affect his ability to act independently, impartially and in the best interests of all parties. He may terminate all employees at the outset and re-hire those vital to the continued operation of the company.	The relevant provisions aim to protect the interests of those creditors, including employees, who deal with the provisional supervisor during the provisional supervision. Those who do business with the provisional supervisor would want assurance that they would be paid for their goods and services in full. On the other hand, the provisional supervisor would be entitled to be indemnified out of the property of the company for all the debts for which he is liable as the provisional supervisor.
Clarification is needed as regards when and how a provisional supervisor's liabilities will end. Can the provisional supervisor later disclaim contracts that he has adopted or adopt them conditionally at the outset?	The provisional supervisor's liabilities, if personal, will remain with him unless they are discharged by the provisional supervisor or the company.
It is unclear how the provisional supervisor would be able to discharge his liabilities in situations where, for example, the creditors ultimately decide that they would prefer to put the company into liquidation. It is also unclear to what extent the provisional supervisor can transfer his personal liabilities to the supervisor of the voluntary arrangement. Even if he were able to do so, the same uncertainty would apply to the supervisor who has assumed those liabilities.	The provisional supervisor is personally liable for any contract adopted by him as provisional supervisor unless his liability is expressly excluded (but no such exclusion can apply to employment contracts). The personal liabilities of a provisional supervisor will not be transferred to the supervisor unless they are the same person. No further liability will be accrued to the provisional supervisor when he ceases to act as such.
Under ***Part 4 of Schedule 4***, the provisional supervisor shall be entitled to be indemnified out of the property of the company. The personal liability to which he may be subject could necessitate his retaining control over certain assets until he is sure that the liability has been discharged	On part 4 of schedule 4, it is the LRC's recommendation that the indemnity to the provisional supervisor should be secured by way of lien over the property of the company.

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or transferred. This may affect the success of the provisional supervision or voluntary arrangement or the dividend available to the creditors generally in the event of the company being wound up.	
The directors and their family members should not be treated in the same way as other employees, otherwise there will be scope for considerable abuse ("associates" under section 51B of the Bankruptcy Ordinance (Chapter 6) (***Please refer to Appendix 5***)).	We are considering the justification for and feasibility of the HKSA' proposal.
Clause 18 — Priority of funds provided as operating capital during moratorium	
HKSA It is not clear why it needs to be specified in ***clause 18(1)*** that relevant funds shall, in relation to the voluntary arrangement in respect of the company, have priority over the debts of the creditors of the company (apart from fixed charges). The terms of the voluntary arrangement are in principle matters for the creditors to agree. It is likely that creditors advancing relevant funds would in any case make this a condition of doing so.	We have accepted the LRC's recommendation that "super priority" lending to the company as operating capital during the provisional supervision should have priority to the debts of all creditors subject to the moratorium, apart from loans subject to a fixed charge. Hence, we do not intend to accord the same priority to floating charges.
It is also not clear why fixed charges should have priority over relevant funds in the winding-up of the company, but a floating charge should not.	See our responses above.
Clause 18(4) and (5), as drafted, seem to suggest that if a creditor is willing to advance further operating capital, then he must provide the entire amount of the minimum required operating capital specified by the provisional supervisor. Presumably, the point is that the total amount advanced by all willing creditors, whether relevant creditors or not, should be not less than the minimum required operating capital, and arguably all lending during the moratorium should benefit from	Under section 18, the total amount of funds advanced by all willing creditors, whether they are relevant creditors or not, should not be less than the minimum required operating capital. All creditors lending during the moratorium enjoy the same priority.

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a similar priority.	
Clause 19 — Right of major secured creditor to decide whether provisional supervisor proceeds with proposal	
HKSA ***Clause 19(2)*** provides that where a major secured creditor does not agree with the provisional supervisor proceeding to prepare the proposal, then the moratorium shall cease and the provisional supervisor shall vacate his office as soon as practicable. It is likely that a winding-up petition will be presented and a provisional liquidator appointed shortly afterwards. HKSA considers it not clear who will be responsible for what if both the provisional supervisor and provisional liquidator (assuming not the same person) are in office at the same time. The provisional supervisor may still have outstanding liabilities to settle and there is also the issue of the relative priorities of the costs of the winding-up, fees of the liquidator, etc. and the provisional supervisor's indemnity under Part 4 of Schedule 4 to consider. There needs to be a more distinct division between the end of provisional supervision procedures and the commencement of any subsequent procedures, and a more clearly-defined procedure for vacating the office of provisional supervisor.	If the provisional supervision ends as a result of a major secured creditor's objection, it should have lasted for less than 7 days. As such, there should not be any difficulty in the provisional supervisor to hand over the company back to its directors.
Generally, the time-frames are so tight that there is a reasonable likelihood of the various procedural steps crossing over one another. For example, the provisional supervisor could be gazetting his appointment almost at the same time as he is gazetting the cessation of the moratorium. This could lead to confusion amongst creditors.	In practice, a lot of preparations should have been done prior to the commencement of the provisional supervision. The LRC, in fact, anticipated that a company would have consulted the major secured creditor before going into provisional supervision and would have known that the major secured creditor would elect to participate. Consequently, the situation as envisaged by the HKSA is unlikely to happen.
Clause 19(3) provides that if a major secured creditor fails to give the	The intention is to allow the rescue procedure to move on quickly. As the

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provisional supervisor the "2nd notice" not later than 3 working days after he has received the "1st notice", or 7 days after the relevant date, whichever is the earlier, he is deemed to be bound by the moratorium and other provisions of the Bill. HKSA considers that the 7-day period could be too short a time, particularly when there is a long holiday shortly after the relevant date. It would be preferable to express all deadlines in terms of working days.	moratorium will last for 30 days initially, we consider it appropriate to give the major secured creditors seven days to elect whether to proceed with the provisional supervision. In practice, it is envisaged that the company would have been in touch with the major secured creditor before the formal rescue procedure is initiated.
Other than ***clause 19(4)*** there are no provisions in the Bill on voidable preferences. This could create problems. A company's directors may have engaged in transactions at an undervalue or given preferences to associated companies, etc. If the provisional supervisor is unable to take action to recover the assets involved, the provisional supervision may appear to be a less advantageous option to creditors.	The purpose of section 19(4) is to prevent any last minute charges by directors in favour of themselves or other controllers of the company. Provisional supervisors are duty-bound under Schedule 4 Part 1 Section 2 to investigate any voidable transactions entered into by the company as if the company had been put into liquidation on the commencement date of the provisional supervision. They have the duty to report their investigation results to the creditors before the relevant meeting of creditors. Given the time constraints, it may not be practical to require provisional supervisors to claim back anything transferred under voidable transactions. It is up to the creditors to decide whether to accept a proposal if there are significant voidable transactions before the start of the provisional supervision.
Consideration should also be given to whether there is a need for provisions on valuing unliquidated claims.	We do not consider it appropriate to put in a specific provision in the Bill on the valuing of unliquidated claims.
It would appear that the holder of a third or fourth charge over the company's property, who in practice would unlikely be able to enforce his security owing to the insufficiency of the company's assets, is covered by ***the definition of "major secured creditor" in clause 19(5)*** and	The definition of "major secured creditor" has been drawn up on the basis of the LRC's proposal, i.e. it is based on the extent of the company's assets charged to secure the liability and not on the extent of liability owed to the creditor. In practice, the likelihood of a secured creditor low in

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would therefore be able to stand in the way of a proposal for a voluntary arrangement. It is not clear how the situation could be resolved if the holder of the first or second charge agrees to the proposal.	the priority line objecting to a provisional supervision would be remote. This is so as he stands to get a better return through a provisional supervision, otherwise, he is most likely to be unable to get anything out of the security.
Clause 20 — Removal and resignation of provisional supervisor	
HKSA The acceptable grounds for a provisional supervisor resigning from his office, as set out in ***clause 20(3)***, are too limited and the procedures too inflexible, particularly when judged against the background of the provisional supervisor's personal liability for contracts that he may have adopted or entered into. Other reasons would include potential conflicts of interest arising, ill health, etc.	We have accepted the LRC's recommendation that a provisional supervisor should not be allowed to resign and walk away from the company easily, either during or at the end of the provisional supervision. The conditions laid down in section 20(3) should be able to cater for the situation such as conflict of interest and ill health.
Clause 20 gives rise to the following questions: — What are the respective personal liabilities of the provisional supervisor and the former provisional supervisor? Does the former provisional supervisor remain liable for the contracts that he has entered into even where the provisional supervisor may have acted negligently leading to the company's assets being insufficient to cover the former provisional supervisor's indemnities?	Any contract which the provisional supervisor has assumed personal liability will continue to be personally liable by him after his ceasing to be the provisional supervisor until the liability is discharged either by him or the company.
— What are the respective priorities of the indemnities given to the provisional supervisor and the former provisional supervisor? Presumably, the former provisional supervisor should have a higher priority for liabilities disclosed at the time of the handover, but this is not provided for in the Bill. Is the former provisional supervisor able to retain control over some of the company's assets to enable him to satisfy his liabilities?	If the assets of the company are insufficient to cover the former and the current provisional supervisor's fees, in a similar situation in respect of fees for liquidators, the case law is that fees of both former and present liquidators would be paid on a pro rata basis.

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Consideration should be given to whether the creditors should have a general right to reject the provisional supervisor within a certain period without having to establish cause. HKSA suggests that within a short period of time of his appointment, the provisional supervisor should be required to convene a meeting of creditors to either affirm his appointment or replace him. The meeting could also, if it so determined, form a committee of creditors.	We do not consider that creditors of a company have sufficient knowledge of the company to decide whether or not a corporate rescue procedure should be initiated. Consequently, the creditors are not given the right to appoint a provisional supervisor. However, we anticipate that the company would have consulted the major secured creditor prior to the start of the rescue operation, including the choice of the prospective provisional supervisor. Moreover, a secured creditor may choose to opt out of the voluntary arrangement and rely on his own security. Under section 20(1), a relevant creditor who has the agreement in writing to do so of not less than 50% in value of all relevant creditors, may apply to the court to remove the provisional supervisor on cause shown. It is in the interest of the system and in the interests of creditors in general that the provisional supervisor should be protected from threats of removal unless the charges against him are substantial and serious in nature.
HKBA HKBA queries why there should be a requirement that the application for termination of the appointment of the provisional supervisor ***for cause shown*** be made by not less than 50% in value of all relevant creditors (***clause 20(1)(a)***). Presumably, if good cause is shown such as gross incompetence or bias, the provisional supervisor should not remain in office even if favoured by more than 50% in value of all relevant creditors.	The provisions aim to ensure that any removal application is supported by the majority of creditors, having regard to the possible effect of such an application on the provisional supervision.
Clause 21, Schedule 6 and Schedule 7 — Requirements for relevant meetings of creditors	
HKSA ***Clause 21(1)(b)*** provides that the provisional supervisor shall call a meeting of relevant creditors of the company where he is satisfied that he will be able to	We do not consider it necessary to require the provisional supervisor to hold the first meeting of creditors within a specified time. If the provisional supervisor cannot

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complete the proposal but not before the expiration of 6 months immediately following the relevant date. In other words, the provisional supervisor could defer a meeting of creditors until the end of the 6-month period. HKSA considers that the provisional supervisor should be required to hold the first meeting of creditors within a specified time.	work out a voluntary arrangement proposal within the initial period of 30 days of the moratorium and wishes to extend the moratorium, he will need to apply to the court. Once a voluntary arrangement proposal has been worked out, the provisional supervisor will convene a creditors' meeting.
Consideration should be given to specifically requiring the provisional supervisor to provide a liquidation analysis taking into account the assets of the company and the likelihood of recoveries.	Whether the report should be in the form of a liquidation analysis should best be left to the provisional supervisor to decide, taking into account the circumstances of individual cases.
Clause 2 of Schedule 7 provides that the relevant creditors present and voting at a relevant meeting of creditors shall form one class of voters only. HKSA is concerned whether separate meetings for different classes of creditors should be held to prevent oppression by a dominant group.	The LRC has recommended that the creditors should form one class at the relevant creditors' meeting because providing for separate classes of creditors would work against the concept of a cheap, quick and efficient system. We have accepted the LRC's recommendation.
Clause 1(f)(ii) and 1(g)(i) of Part 2 of Schedule 6 provides that where the provisional supervisor is unable to complete the proposal before the expiration of the 6-month moratorium or where he is satisfied that none of the relevant purposes of a voluntary arrangement can be achieved, he is only required to supply his statement, with reasons, upon request. HKSA considers it reasonable that a provisional supervisor should inform all creditors of the reasons of his decisions under these two circumstances.	We consider it more appropriate for the creditors to decide whether they wish to obtain the statement from the provisional supervisor on the reasons of the latter's decisions.
Clause 22 and Schedule 7 — Resolutions of relevant meetings of creditors, etc.	
<u>HKSA</u> The effect of ***clause 22(4)(a)*** is unclear. It	The "more than 50%" in value requirement

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appears that more than 50% in value of the relevant creditors are required to present in person or by proxy to vote for a resolution before it can be passed. However, the decisions of the meeting to wind the company up and appoint a liquidator have already been mandated under ***clause 22(4)(b)***, and under ***clause 7 of Schedule 7*** where there is no quorum or where the meeting fails to pass the resolutions.	is relevant to a resolution as to whom to appoint as the liquidator under section 22(4)(b)(ii).
Committees of creditors have been an integral part of the administration of insolvency cases. It should be made clear that the creditors can resolve to set up a committee to act on their behalf. It is only provided under ***clause 10 of Part 2 of Schedule 4*** that the provisional supervisor has the power to form a committee of relevant creditors.	We consider it more appropriate to give the provisional supervisor the discretion to decide if a creditors' committee is required.
The issue of related-party creditors needs to be looked at. A group of creditors related to each other could have sufficient voting power and ride roughshod over the interests of all other creditors. Specific measures have been introduced in other jurisdictions to deal with this problem.	Schedule 7, sections 23-25 provide that a resolution passed will not be valid unless more than 50% in value of all unconnected creditors have voted for it. This should address the HKSA's concern.
Referring to ***clause 18 of Schedule 7***, it may not be necessary to exclude section 265 of the Companies Ordinance (Cap. 32) (***Please refer to <u>Appendix 2</u>***) from the provision that the commencement of the creditors' voluntary winding up be backdated to the relevant date. Instead provision could be made for the provisional supervisor to obtain the sanction of the court for payments properly made under the provisional supervision scheme.	The reference to section 265 of the Companies Ordinance in Schedule 7, section 18 is to ensure that employees' or creditors' right to receive preferential payments under section 265 of the Companies Ordinance will not be affected by the back-dating of the commencement of winding up to the relevant date. We do not consider it necessary to ask the provisional supervisor to apply to the court as suggested by the HKSA.
<u>HKBA</u> The word "***and***" appearing at the end of the first line of ***clause 22(1)(a)(ii)(C), 22(2)(b)(ii) and 22(4)(b)(ii)*** appears to be superfluous.	We will review the drafting to address this point.

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It is unclear why reference is made to "subsection (1)(a)(ii)" in ***clause 22(5)***, but to "subsection (1)(a)(ii)(A)" in ***clause 22(6)***. The latter reference should not be so limited.	Agreed.
Clause 23 and Schedule 7 — Effectiveness of resolutions, etc.	
LU ***Clause 23(1)*** provides that a relevant meeting of creditors shall not approve a proposal or modification which affects the right of a secured creditor of the company except with the consent in writing of the creditor concerned. LU is of the view that it requires a unanimous consent, which may not be easily obtainable.	The Bill does not require a voluntary arrangement to be approved by a unanimous vote of all the creditors though it preserves the rights of a secured creditor to deal with his security. It is possible for a secured creditor to stay out of a voluntary arrangement that has been approved by other creditors.
HKSA There is no provision under the Bill for approval of a proposal by shareholders, as opposed to that under the Companies (Amendment) Bill 2000. Shareholders are not permitted to attend a relevant meeting of creditors, even though under clause ***25(1)(b)(iii)***, the terms of the voluntary arrangement shall bind shareholders of the company, amongst others. There may be situations in which shareholders inject new capital or amendments need to be made to the company's articles, etc. Shareholders should therefore have a greater say in approving a proposal, as with a restructuring exercise under section 166 of the Companies Ordinance (Cap. 32) (***Please refer to Appendix 1***), than is provided under ***clause 23(3)*** that if they are aggrieved by a resolution passed by a relevant meeting of creditors, they may apply to the court on the ground that the resolution substantially prejudices their rights as members of the company. Consideration should also be given to extend the right provided under ***clause***	Instead of providing that a proposal needs to be approved by shareholders, we consider it more appropriate to give them a right to apply to the court on the ground that the resolution passed by the relevant meeting of creditors has substantially prejudiced his rights in their capacity as shareholders (see section 23(3)). If a proposal involves shareholders making injection into the company through new classes of shares, the shareholders should be in a position to discuss the issues with the provisional supervisor during the formulation of the proposal. Schedule 7, section 23 provides that "a resolution is invalid if more than 50% in

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23(3) to an aggrieved creditor, given the lack of any provisions on related-party creditors.	value of those creditors who are not connected with the company have voted against it". The provision will protect unconnected creditors against connected creditors acting together against the interests of the unconnected ones.
HKBA Under ***clause 23(3)***, a member of the company may challenge a resolution of a relevant meeting of creditors. It is unclear why provision is made only for a member to make such a challenge. Under the equivalent provision in the United Kingdom (***section 6(1) and (2) of the Insolvency Act 1986***), a creditor, among other persons, may apply to the court to challenge. Moreover, such an application under section 6 of the Insolvency Act 1986 may be made not only on the ground that the arrangement unfairly prejudices his interests, but also where there has been some material irregularity at or in relation to the meetings.	See our responses above. We do not consider it necessary to give creditors a similar right because they have the right to attend and vote at the relevant meeting of creditors.
Clause 25 — Implementation of relevant creditors' resolutions	
HKSA ***Clause 25(1)(a)*** provides that where the proposal has been approved by a resolution passed at a relevant meeting of creditors, the appointment of the provisional supervisor shall terminate except for the purpose of concluding the meeting and matters incidental thereto. HKSA considers the reference to "matters incidental thereto" too vague. It should be specified, for example, that the minutes of the meeting should be recorded and signed off within a specified period and thereafter retained for a specified period.	We consider the term "matters incidental thereto" appropriate for the purpose of the section as it is difficult to specify all the matters involved.
Referring to ***clause 25(1)(b)***, HKSA considers that the terms of the voluntary arrangement should be binding on all	This is already the case under the Bill. A notice published in the prescribed manner is constructive notice to all creditors to

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creditors, whether or not they have received the notice under clause 21(2) or (3), provided that the provisional supervisor acted in good faith.	which the notice relates (see section 2(4)).
Clause 26 — Effect of voluntary arrangement	
HKID While HKID agrees that the provisions in ***clause 26(1)(a) to (e)*** will enable the voluntary arrangement to be implemented without any interference while in effect, it considers that provisions should be included in the Bill to allow the parties to be bound by the voluntary arrangement to apply to the court for exemption upon the occurrence of certain events such as the change in circumstances from the date of the approval of the voluntary arrangement.	To allow creditors bound by a voluntary arrangement to apply to the court for exemption during the voluntary arrangement would lead to uncertainty about the voluntary arrangement. If creditors in a particular case wish to have this right, this could be included as a term of the voluntary arrangement.
HKBA An important question not addressed by the Bill is what is to happen if the voluntary arrangement fails to be implemented. Does the arrangement end according to its own terms (***clause 26(2)***) or is the arrangement somehow treated as having been repudiated by the company? Complex questions may arise in this respect, in particular where a winding up of the company is superimposed. For example, if the voluntary arrangement in relation to a company provides for instalment repayments in five years of the debts of the creditors bound by the voluntary arrangement, and the company defaults after two years and the company is wound up upon the petition of a post-arrangement creditor, what are the relative rights of the creditors? Are there two groups of creditors (bound and not bound by the voluntary arrangement)? If certain assets or income have been earmarked for the purpose of repayment of the creditors bound by the arrangement, are there upon	What should happen to the company if the voluntary arrangement fails should be governed by the terms of the voluntary arrangement. Section 26(2) states that the voluntary arrangement shall cease to have effect in the events specified in the arrangement. A supervisor may apply to the court to wind up the company (see section 27(3)(c)). The making of a winding-up order does not bring an end to the voluntary arrangement unless the order is made upon the petition of the supervisor following a decision to abandon the voluntary arrangement. Where the voluntary arrangement establishes a scheme fund or asset to be held by the supervisor on trust for the voluntary arrangement creditors, a winding-up does not determine or revoke the trust and the assets in the fund do not become assets in the liquidation. Where the supervisor petitioned for winding-up of the company, the trust would be regarded as terminated and the supervisor has to hand over the assets to the liquidator free from the trust.

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winding up two pools of assets, one subject to the arrangement and one not? Will the voluntary arrangement cease to have effect by virtue of ***clause 26(2)***? These are but some of the difficult questions that have arisen in the United Kingdom in their implementation of not dissimilar legislation in the Insolvency Act 1986 and which have given rise to much litigation.	
Clause 27 — Supervisor of voluntary arrangement	
HKSA If the person appointed to be the supervisor of the voluntary arrangement is a different person from the provisional supervisor, the former should attend and give consent to supervising the voluntary arrangement at a relevant meeting of creditors where the proposal is passed.	In practice, the supervisor to be appointed should have been consulted before the relevant meeting of creditors.
"Domestic premises" under ***clause 27(3)(b)*** should be defined to limit the term to premises being used for domestic purposes.	"Domestic premises" include the premises used for domestic purposes.
Clause 27(3)(c) provides that where the supervisor of the voluntary arrangement is satisfied that the arrangement is not being adhered to, he may present a petition to the court for the winding up of the company. There ought to be a requirement to notify creditors where a supervisor files a petition under this subclause.	All petitions to wind up companies will have to be gazetted. We do not consider it necessary to require the supervisor to notify individual creditors of his petition.
Clause 27(5) provides that the court may permit a deviation from the voluntary arrangement if, but only if, the court is satisfied that the deviation would not affect the substance of the arrangement. HKSA considers this provision too inflexible. If a deviation of substance, which may be beneficial to creditors, is agreed by creditors, why should the court not be permitted to sanction it?	An application to the court under section 27(5) for a direction to deviate from the arrangement will only be necessary if no creditors' agreement can be reached. In the circumstances, we do not consider it appropriate to give the court the power to force upon the creditors a deviation from the arrangement which may substantially affect the substance of the original arrangement.

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Clause 28 — Vacation of office, etc. of supervisor	
HKSA The provision of ***clause 28*** does not deal with the issue of the respective liabilities of the original supervisor and his successor. The issue of a supervisor's liabilities and indemnities is not addressed.	The liabilities and indemnities of a supervisor and his successor should be governed by the terms of the voluntary arrangement (see section 7(3)(g) and (h)).
Clause 29 — Notification	
HKSA ***Clause 29*** provides that where the supervisor of the voluntary arrangement has been replaced or the voluntary arrangement has ceased to have effect, the supervisor shall file a notice with the Official Receiver, the Registrar and the High Court Registry. HKSA considers that notification should also be given individually to all known creditors.	We will consider requiring the supervisor to give notice to all known creditors bound by the voluntary arrangement.
Clause 31 — Regulations	
HKSA Regulations should be drafted at an early stage given their importance to the implementation of the overall procedure. Consideration should also be given to including specific regulation-making powers to provide for procedures relating to voluntary arrangements. There is no specific reference to regulations relating to the security to be provided by a provisional supervisor or a supervisor. It is not advisable to rely on the very general regulation-making powers under ***clause 31(2)(h) and (i)*** to deal with substantial issues that are clearly envisaged by the Bill.	We agree that regulations should be drafted at an early stage. Section 5(b) as read with section 31(1) provide sufficient power to make regulations regarding the security to be provided by a provisional supervisor. We need not add a new sub-section under section 31.
Schedule 4, Part 3 — Power of delegation of provisional supervisor	
LU Since the provisional supervisor may delegate in writing to any person any of his	We do not consider it necessary to pre-set the qualifications of the persons to whom a

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duties and powers imposed or conferred on him under the Ordinance, there should be a section on the qualifications of the delegate.	provisional supervisor may delegate his duties and powers under the Bill as the provisional supervisor would, notwithstanding the delegation, be the person ultimately responsible for the acts of such persons.
HKSA Consideration should be given to providing for the imposition of sanctions on persons to whom the provisional supervisor has delegated authority who knowingly act outside the scope of their delegated powers and contrary to the interests of the company.	We will consider the justification for the HKSA's proposal.
Schedule 4, Part 4 — Indemnity of provisional supervisor	
HKSA It is not clear why it needs to be specified that the provisional supervisor will not be entitled to be indemnified for contracts, debts and other liabilities, and his remuneration and all reasonable fees, costs and charges which are attributable to misconduct or negligence on the part of the provisional supervisor. HKSA considers that the inclusion of such a statement could invite disputes. It has already been stated that the indemnity relates to ***reasonable*** fees, etc. Presumably it would be hard to argue that misconduct and negligence should be covered by the scope of what is regarded as reasonable.	We do not consider it appropriate for a provisional supervisor to be entitled to be indemnified by the company for costs, debts, liabilities etc occasioned by his own misconduct or negligence.
Schedule 4, Part 5 — Remuneration of provisional supervisor	
CGCC A monitoring mechanism should be put in place to ensure that the fees charged by the provisional supervisor are not excessive. The monitoring mechanism should be subject to review.	The Bill contains adequate provisions about the qualifications and appointment of provisional supervisors as well as the monitoring of their work. As regards the remuneration of provisional supervisors, it will be determined in accordance with a scale of fees approved in writing by the OR. Provisional supervisors may not

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	charge fees higher than the approved scale of fees unless with the court's sanction. Creditors may apply to the court to reduce the remuneration.
CMAHK The administrative costs involved in the appointment of the provisional supervisor and the remuneration paid to him should be at a reasonable level and be approved by the court before the official appointment.	Ditto.
HKSA Provision should be made for the creditors to approve variations in fees from the scale of fees approved by the Official Receiver, subject to appeal to a remuneration panel (along the lines proposed by the Law Reform Commission, see Chapter 4 of the "Report on the Winding-up Provisions of the Companies Ordinance", July 1999) (***Please refer to Appendix 6***). There would be no need for the court to get involved unless there was a further appeal in respect of the decision of the panel on a point of law.	Creditors may, under Schedule 7, section 17, pass a resolution at the relevant meeting of creditors for the provisional supervisor of the company to be remunerated at a rate higher than the approved scale of fees. No court application is required. In addition, the Bill does not prohibit the provisional supervisor from charging his fee at a rate lower than the approved scale of fees.
Under ***clause 3 of Part 5 of Schedule 4***, the court shall not grant an application for higher fees by the provisional supervisor unless it is satisfied that the grant is warranted because of the factors stated therein. Under ***clause 5*** of the same part, however, the court is not required to take into account any specific factors in determining an application made by a relevant creditor for reducing the remuneration of the provisional supervisor. HKSA considers that before considering any reduction in fees, the court should be required to take into account the actual work done by the provisional supervisor.	We expect the court to have regard all relevant factors including the work done by the provisional supervisor when considering whether an application for reducing fees under Schedule 4, Part 5, section 4 should be approved.
Schedule 4, Part 6 — Supplementary provisions applicable to and in relation to provisional supervisor in consequence of discharging his duties and exercising his powers	

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HKID ***Clause 3 of Part 6 of Schedule 4*** provides that where a person deals with the provisional supervisor of the company in good faith and for good consideration and thereby changes his position or acts to his detriment based on the dealing, the provisional supervisor and the company shall be bound by the provisional supervisor's actions whether or not the provisional supervisor was acting within his powers. HKID considers that this provision exposes the company to possible liabilities for the acts of the provisional supervisor, whether or not it relates to the discharge of his duties as the provisional supervisor. HKID therefore proposes that the provision be modified to cover only those actions taken by the provisional supervisor in his capacity as the provisional supervisor and in discharging his duty or exercising such power as the provisional supervisor, as well as actions that are not attributable to misconduct or negligence on the part of the provisional supervisor.	Schedule 4, Part 6(3) aims to ensure that any person dealing with the provisional supervisor in good faith and for good consideration should be protected. This is a reasonable provision and we are not in favour of the HKID's proposal.
Schedule 5 — Contracts or other agreements to which section 11(2) of this Ordinance shall not apply	
HKEx HKEx is in support of the exclusion of the contracts and agreements in ***Schedule 5*** from the application of the corporate rescue procedure. It proposes that the contracts and agreements in Schedule 5 be extended to include any security provided to secure the liabilities of the company under an agreement or contract referred to in any of items 1 to 11 of Schedule 5.	We agree that the moratorium should not apply to any security provided to secure the liabilities of a corporate investor participant of the Hong Kong Securities Clearing Company Limited under an eligible financial contract.
Schedule 7, clauses 7 and 8 — Appointment of liquidator by the provisional supervisor	
HKSA Under ***clause 7(b)(ii) of Schedule 7***, where at a relevant meeting of creditors the meeting fails to appoint a liquidator of the	Under Schedule 7, sections 7(b)(ii) and 7(d)(i), where at the relevant meeting there is no quorum or where the meeting fails to

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company, the provisional supervisor shall appoint a liquidator (which may be himself) as soon as practicable not later than 7 days after the date of the meeting. Where the provisional supervisor fails to comply with this requirement, he shall be, under ***clause 8 of Schedule 7,*** deemed to have appointed himself as the liquidator of the company. HKSA considers this provision odd. A provisional supervisor who has breached the provisions of the Bill should be subject to sanction. If the only purpose of the provision is to ensure that the office of the liquidator is filled quickly, then it would be simpler to state in ***clause 7(b)(ii) of Schedule 7*** that the provisional supervisor will be the liquidator unless he appoints another suitable person within a specified time-frame.	appoint a liquidator, the provisional supervisor is required to appoint a liquidator within 7 days. Under section 8, if the provisional supervisor fails to appoint a liquidator within the period specified, he shall be deemed to have appointed himself as the liquidator. The purpose of this arrangement is to ensure that if a provisional supervision fails, a liquidator is appointed as soon as possible and before the provisional supervisor vacates his office.
If it is felt that there is an increased possibility of conflicts arising from the appointment of the provisional supervisor as liquidator, then it could be specified that the provisional supervisor will assume the office of liquidator only if he has tried in good faith to appoint someone else but has been unable to do so. If he has not acted in good faith, then sanctions should be provided for. Another option would be to require the approval of creditors for the appointment of the provisional supervisor as liquidator. This is the requirement in Australia.	Schedule 7, section 7(d) will come into play only if there is no quorum for a relevant meeting of creditors or if the meeting fails to resolve for the winding-up of the company or for the appointment of a liquidator. The suggestion to require "the approval of creditors before the provisional supervisor could become the liquidator" is therefore inappropriate.
Schedule 7, clause 18 — Remuneration of liquidator	
<u>HKSA</u> Under ***clause 18(b)(ii) of Schedule 7***, where the liquidator is appointed by the provisional supervisor, the remuneration of the liquidator as liquidator shall be at the same rate as the remuneration the provisional supervisor was receiving as provisional supervisor immediately before the provisional supervisor vacated his	Schedule 7, section 18(b)(ii) will come into play only where the liquidator is a self appointed one under Schedule 7, section 7(d), or by operation of law under section 8. If the law does not expressly state how his remuneration should be charged, there will be no standard against which he can charge his fees.

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office. HKSA queries the logic of this requirement and points out the inconsistency as this provision would not apply to a liquidator appointed by the creditors under ***clause 22***.	
Schedule 7, clauses 20, 21 and 22 — Appeal against the chairman's decision on a relevant creditor's entitlement to vote	
HKSA Under ***clause 20 of Schedule 7***, an appeal against the decision of the chairman of a relevant meeting of creditors on a relevant creditor's entitlement to vote may be made by application to the court by any relevant creditor of the company. Under ***clause 21(c) of Schedule 7***, the court may order another relevant meeting of creditors to be summoned or make such other order as it thinks just (including an order to extend the moratorium). HKSA considers it unclear how broad the court's power under clause 21(c) is intended to be, and that under what general circumstances the court could extend the moratorium under this provision.	The court will not make an order extending the moratorium unless another relevant meeting is ordered to be held.
Under ***clause 22 of Schedule 7***, the chairman of a relevant meeting of creditors is not personally liable for any costs incurred by any person in respect of an appeal under clause 20. HKSA considers that if the chairman's decision is reversed or varied by the court under clause 21(a), this would mean that his decision was unreasonable. Under these circumstances, why should the costs be the liability of the applicant? Is it the intention that costs cannot be awarded to the chairman personally?	Schedule 7, section 22 aims to protect the chairman in making free and unfettered decisions. Costs, in theory, can be awarded against the company in such an appeal.
Schedule 8, clause 8 — Insolvent trading	
HKDF The proposals to hold the directors and senior management of the company	The provisions relating to insolvent trading aim to encourage responsible persons of a

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responsible for the company's insolvency are unduly harsh and unreasonable. The effect of these proposals may deter conscientious persons from taking up directorships, especially non-executive directorships.	company to face the fact that the company was slipping into insolvency at an early date and cause them to address the situation rather than to trade on regardless of the consequences. Responsible persons should become subject to liability for insolvent trading once a company traded while insolvent and the responsible persons, in certain circumstances, failed to take any step to prevent the insolvent trading. Without the provision on presumption of continued insolvency in the Bill, the responsible persons may claim that the company was solvent at a particular date or for a certain period during the period between the date when insolvency is shown and the date of winding up, thereby denying liability for insolvent trading during this period. The Bill, however, provides for a statutory defence for a director of a company if he can demonstrate that he took every step to minimise the potential loss to the company's creditors as he ought to have taken. As regards the role of senior management of a company, we consider it necessary for senior management to be under a duty to warn the board of directors when a company is or is about to trade while insolvent. Provided that such warning is given in good time, senior management would be protected from liability for insolvent trading.
HKDF raises the following questions- (a) whether the presumptions of continuing insolvency and of insolvent trading where proper books of account have not been kept raise any difficulties in relation to the Bill of Rights; and	The Bill is consistent with the human rights provisions of the Basic Law.
(b) whether it is necessary to introduce a new definition of "director" in the insolvency legislation, or whether such legislation could simply refer to the	The existing definition of "director" in the Companies Ordinance is appropriate in this context.

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existing definition in the Companies Ordinance.	
PWIFB PWIFB considers that the proposed provisions relating to insolvent trading, if enacted, would be to the benefit of the workforce and would have a positive impact on the financial position of the Protection of Wages on Insolvency Fund.	We note the PWIFB's position.
CC CC supports the imposition of civil liabilities on directors and senior management of corporations responsible for insolvent trading, and considers that it is conducive to proper conduct of business.	We note the CC's position.
CCIF The proposed introduction of the insolvent trading provisions may, instead of promoting debt restructuring plans at an early stage, cause further insolvencies. The effect of these provisions may be too overbearing on directors and senior management and exert too much pressure on them at a financially critical time. It is not sure whether the presumption of insolvent trading will infringe the Bill of Rights. The broadening of the scope of a responsible person to cover senior management is harsh.	See our responses above. The Bill is consistent with the human rights provisions of the Basic Law. See our responses above.
HKSA The ***definition of "responsible person" in the new clause 295A of the Companies Ordinance*** is too broad, as it includes "a manager of the company who is involved to a substantial or material degree in directing the company's business or affairs". HKSA points out that the equivalent provisions in the United Kingdom do not extend to a level below directors, and that	The LRC has recommended that insolvent trading should apply to all directors whether they were validly appointed directors, persons who held themselves out to be directors though they had not been validly appointed, and shadow directors who all are responsible for the management of the company. We have accepted this recommendation. As regards the HKSA's

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when the Law Reform Commission made the recommendation to include non-director-level staff, it had in mind persons who are in effective control of the Hong Kong operations of an overseas company but who are not appointed as directors of the company. If this is so, the definition of "responsible person" should be limited to target them more specifically. HKSA also proposes that this part of the definition could be limited to senior management who have de facto control over the business or at least direct decision-making responsibility for the extension of credit to the company.	concern that a manager may not be aware that the company is in fact engaging in insolvent trading, the definition of "responsible person" in section 295A will cover those who are involved to a substantial or material degree in directing the business of the company, and who knows, or ought reasonably to know, the company's solvency position.
On the ***new clause 295C of the Companies Ordinance***, HKSA doubts whether some of the non-director-level persons caught by the definition of "responsible person" would be aware, or should be expected to be aware, of the form contained in the proposed Seventeenth Schedule to the Companies Ordinance. Under the ***new clause 295C(2)(a)(ii)***, the court shall not declare a responsible person liable for insolvent trading if that person satisfies the court that, before the insolvent trading occurred, he has issued a notice to the board of directors of the company stating that the company is engaging in, or is about to engage in, insolvent trading. HKSA does not regard this an adequate "escape route" to justify a potential declaration of liability for insolvent trading against middle management staff. HKSA also queries how a responsible person could have issued the notice "before the insolvent trading occurred", having regard to the fact that "insolvent trading" means the company incurs debts or liabilities after the company has become insolvent.	Senior management should know what is required of them under the law. Section 295C(2)(a)(ii) provides senior management with a statutory defence to an application under section 295B when the company has already been proved to have engaged in insolvent trading. The warning by the senior management should be made when the company is about to engage, in insolvent trading.
On the ***new clause 295E of the Companies Ordinance***, HKSA questions whether	The LRC has recommended that insolvent trading should be a civil remedy only

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compensation provisions alone would be a sufficient or meaningful deterrent against insolvent trading. In the longer term, consideration could be given to introducing criminal sanction.	because a provision that renders a person both civilly and criminally liable would probably result in the court being reluctant to apply anything other than a criminal test to the civil side of the provision which would make the provision difficult to prove as fraudulent trading is at present. We have accepted the LRC's recommendation.
The ***new clause 295G of the Companies Ordinance*** provides that the liquidator of the company shall not assign any cause of action for any insolvent trading engaged in by the company. Consideration could be given to allowing a liquidator to assign a cause of action for insolvent trading with the sanction of the court.	Assignment of cause of action for insolvent trading is considered inappropriate and was not recommended by the LRC.
HKU The ***new clause 295A(2) of the Companies Ordinance*** defines when a company goes into liquidation. It would appear that reference to section 228A should be added otherwise there might seem to be a gap (***Please refer to Appendix 7***).	Agreed.
HKU queries whether the provision of "and the responsible person failed to take any steps to prevent the insolvent trading" in the ***new clause 295C(1)(c) of the Companies Ordinance*** is appropriate. Referring to the relevant provision in Australia where the phrase "all reasonable steps" is used, HKU suggests that the original phrase be removed from subclause (1)(c) and that a new subclause (1)(d) be added, as follows: "(d) The responsible person failed to take all reasonable steps to prevent the insolvent trading."	We will review the drafting to clarify the position.
The ***new clause 295E of the Companies Ordinance*** deals with compensation and expressly allows it to be used to meeting the costs of the action. But there is	We do not consider it necessary as the court should have the discretion to decide on costs.

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nothing in the Bill about the costs if the action fails. HKU suggests that it be spelt out in the Bill that the costs of a failed action will be regarded as an expense of the liquidation.	
FHKI FHKI is against the proposed amendments to make directors and senior management of a company personally liable for all debts incurred whilst a company is insolvent. It requests that the relevant provisions be taken out from the Bill. It points out that: (a) the Companies Ordinance (Cap. 32) has already provided for "fraudulent trading" to impose personal liability on people for debts if they deliberately seek to defraud creditors through an insolvent company (***Please refer to Appendices 8 and 9***). This provision should be sufficient to protect creditors against fraud and it is unnecessary to impose additional liabilities on company directors and managers; and (b) the threat of personal liability for debts is so strong a deterrent that it might kill the entrepreneurial spirit of Hong Kong people. Moreover, in real business situations, it is not uncommon for a company to be "slipping into insolvency" if a bona fide business deal turns bad. Such insolvent trading is a fact of life and does not imply any wrongdoing on the part of directors and managers of a company. There is no ground for holding them personally liable for the debts so incurred.	See our responses above. We believe it is wrong for a company to continue to trade whilst it is insolvent at the expense of ordinary creditors.
HKID Under the ***new clauses 295C and 295D***, if the company is insolvent at any time within the 12 months preceding the date of the commencement of the winding up of the company, the responsible person or the	See our responses above.

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former responsible person will be deemed liable for insolvent trading and thus for compensation to the company at an amount determined by the court. HKID believes that these provisions will discourage the directors and senior management of the company to try to rescue the company at the edge of the company being insolvent by continue trading. Instead, the directors and senior management may be more willing to appoint a provisional supervisor despite the fact that the situation may be due to a temporary downturn in the market.	
Moreover, in order to improve solvency of the company, the directors and senior management may utilize various means to reduce cash flow pressure such as laying off the company's staff. This will defeat the purpose of preservation of jobs which is one of the primary purposes of the introduction of the Bill.	There may be loss of jobs in the short term, but in the long term, this will lead to a more responsible corporate culture and healthier business environment.
HKID therefore considers it appropriate to limit the scope of the provision in the ***new clause 295D*** to apply only if the company was insolvent at any time within 12 months preceding the date of commencement of the winding up of the company and remain insolvent throughout that period.	We do not agree with the HKID's proposal as it means that there should be no provision on presumption of continued insolvency in the Bill.
Other issues	
HKSA HKSA considers that ***any new ordinance needs to be self-contained***. It doubts whether simply applying the interpretation section of the Companies Ordinance to this Bill will be adequate to ensure that the new ordinance will stand alone. It also queries whether the various substantial provisions relating to insolvent trading should be regarded as consequential amendments to the Companies Ordinance.	We consider it appropriate to apply the interpretation section of the Companies Ordinance to the Bill; otherwise, it would be necessary to repeat that in the Bill. We have included the provisions on insolvent trading as part of the Bill because they complement the provisions on corporate rescue. As the provisions on insolvent trading apply to all company liquidations, we consider it more appropriate for them to be treated as consequential amendments to

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	the Companies Ordinance.
There is a general concern arising from several cases in the United Kingdom that a liquidator may not be able to recover the costs of legal actions in relation to insolvent trading out of the assets of the company. This uncertainty is likely to result in a reluctance on the part of liquidators to initiate such actions. HKSA therefore ***suggests that it be put beyond doubt in the Bill that a liquidator can recover his costs for such actions out of the assets of the company***.	We are considering the justification for the HKSA's proposal.
The trading of shares whilst a company is in provisional supervision is not conducive to achieving a successful restructuring. HKSA therefore ***suggests a statutory suspension of share trading during the procedure***.	We consider it more appropriate for the SEHK to decide whether share trading in relation to a listed company should be suspended.
There should be a provision along the lines of section 30E of the Bankruptcy Ordinance (Cap. 6) (***Please refer to Appendix 10***), to prevent utility companies from "pulling the plug" on a company in provisional supervision.	We are considering the justification for the HKSA's proposal.
HKU In the United Kingdom and under section 30E of the Bankruptcy Ordinance (Cap. 6) (***Please refer to Appendix 10***), special provision is made to prevent commercial blackmail by the utility companies in a rescue situation. HKU wonders why such a provision has not been included in respect of provisional supervision.	We are considering the justification for the HKU's proposal.

(4) For the purposes of this section "material change" (重大改變), in relation to the composition of the board of directors of a company, means any change whereby more than half of the number of directors of the company cease to be directors. *(Added 6 of 1984 s. 121)*

[*cf. 1929 c. 23 s. 151 U.K.*]

Avoidance of Provisions in Articles or Contracts relieving Officers from Liability

165. Provisions as to liability of officers and auditors

Subject as hereinafter provided, any provision, whether contained in the articles of a company or in any contract with a company or otherwise, for exempting any officer of the company, or any person employed by the company as auditor from, or indemnifying him against, any liability which by virtue of any rule of law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust of which he may be guilty in relation to the company shall be void:

Provided that—

(*a*) *(Repealed 6 of 1984 s. 122)*

(*b*) nothing in this section shall operate to deprive any person of any exemption or right to be indemnified in respect of anything done or omitted to be done by him while any such provision was in force; and

(*c*) notwithstanding anything in this section, a company may, in pursuance of any such provision as aforesaid, indemnify any such officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connexion with any application under section 358 in which relief is granted to him by the court.

(Amended 6 of 1984 s. 122)

[*cf. 1929 c. 23 s. 152 U.K.*]

Arrangements and Reconstructions

166. Power to compromise with creditors and members

(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the

(4) 就本條而言，"重大改變"(material change)就公司董事局的組合而言，指公司的過半數董事停任董事。 *(由1984年第6號第121條增補)*

〔*比照1929 c. 23 s. 151 U.K.*〕

廢止章程細則或合約內有關免除高級人員的法律責任的條文

165. 與高級人員及核數師的法律責任有關的條文

在不抵觸下述規定的情況下，公司的章程細則或公司所訂的合約或其他文件如載有任何條文，豁免該公司的任何高級人員或其所僱用的任何核數師承擔其因犯了疏忽、失責、失職或違反信託行為而憑藉任何法律規則所須承擔的法律責任，或彌償他因此而須承擔的該等法律責任，則該等條文乃屬無效：

但——

(*a*) *(由1984年第6號第122條廢除)*

(*b*) 本條並無剝奪任何人就其於該等條文生效時的任何作為或不作為所享有的豁免權或彌償權的效用；及

(*c*) 即使本條載有任何規定，公司可依據前述條文，彌償上述高級人員或核數師在獲判勝訴或獲判無罪的民事或刑事法律程序中進行辯護所招致的法律責任，或在與第358條所訂的申請有關並獲法院給予寬免的法律程序中所招致的法律責任。

(由1984年第6號第122條修訂)

〔*比照1929 c. 23 s. 152 U.K.*〕

債務償還安排及重整

166. 與債權人及成員妥協的權力

(1) 凡任何公司與其債權人或任何類別債權人擬作出一項妥協或債務償還安排，或該公司與其成員或任何類別成員擬作出一項妥協或債務償還安排，法院於該公司或

company or of any creditor or member of the company, or, in the case of a company being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs.

(2) If a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under subsection (2) shall have no effect until an office copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the memorandum of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3), the company and every officer of the company who is in default shall be liable to a fine for each copy in respect of which default is made. *(Amended 22 of 1950 Schedule; 6 of 1984 s. 259; 7 of 1990 s. 2)*

(5) In this section and in section 166A, the expression "company" (公司) means any company liable to be wound up under this Ordinance, and the expression "arrangement" (債務償還安排) includes a re-organization of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods. *(Amended 6 of 1984 s. 123)*

[*cf. 1929 c. 23 s. 153 U.K.*]

166A. Information as to compromises with creditors and members

(1) Where a meeting of creditors or any class of creditors or of members or any class of members is summoned under section 166 there shall—

(*a*) with every notice summoning the meeting which is sent to a creditor or member, be sent also a statement explaining the effect of the compromise or arrangement and in particular stating any material interests of the directors of the company, whether as directors or as members or as creditors of the company or otherwise, and the effect thereon of the compromise or arrangement, in so far as it is different from the effect on the like interests of other persons; and

其任何債權人或成員循簡易程序提出申請時，又或如該公司正在清盤，則於清盤人循簡易程序提出申請時，可命令該等債權人、該類別債權人、該公司的成員或該類別成員(視屬何情況而定)，按法院指示的方式召集一次會議。

(2) 如親自出席或委派代表出席上述會議並表決的人，代表該等債權人，該類別債權人，該等成員或該類別成員(視屬何情況而定)的四分之三(以價值計算)的大多數，同意任何妥協或債務償還安排，則該項妥協或債務償還安排如獲法院認許，即對所有債權人、該類別債權人、成員或該類別成員(視屬何情況而定)具有約束力，而且亦對該公司有約束力；如該公司正進行清盤，則對該公司的清盤人及分擔人亦具有約束力。

(3) 根據第(2)款作出的命令，在該項命令的正式文本已交付處長登記前並無效力，而每項此等命令的文本須附錄於該公司在該項命令作出後所發出的每份章程大綱；如該公司並無章程大綱，該等文本則須附錄於該公司在該項命令作出後所發出的有關組織該公司或界定該公司的組織的文書。

(4) 如公司因沒有遵從第(3)款的規定而構成失責，公司及其每名失責高級人員，均可就每份並無按第(3)款處理的文本被處罰款。 *(由1950年第22號附表修訂；由1984年第6號第259條修訂；由1990年第7號第2條修訂)*

(5) 在本條中及在第166A條中，"公司"(company)一詞指任何可根據本條例予以清盤的公司，而"債務償還安排"(arrangement)一詞乃包括該公司藉着將不同類別的股份合併、藉着將股份分為不同類別的股份或藉着此兩種方法而將股本重組。 *(由1984年第6號第123條修訂)*

〔*比照1929 c. 23 s. 153 U.K.*〕

166A. 與債權人及成員達成的妥協有關的資料

(1) 凡在根據第166條召集債權人會議、任何類別債權人會議、成員會議或任何類別成員會議時——

(*a*) 除將召集該會議的通知書送交債權人或成員外，亦須隨附一份陳述書，就該項妥協或債務償還安排的影響加以解釋，尤其述明該公司的董事(不論是否作為該公司的董事、成員、債權人或其他)任何具關鍵性的利害關係，以及該項妥協或債務償還安排對該等董事的利害關係的影響(如該影響乃與對其他人的類似利害關係所產生的影響不同者)；及

(c) provision requiring any person who is or was a party to the transaction to pay to the liquidator any sums paid to that person, by virtue of the transaction, by the company;
(d) provision requiring any person to surrender to the liquidator any property held by him as security for the purposes of the transaction; or
(e) provision directing accounts to be taken between any persons.
(Added 3 of 1997 s. 43)
[*cf. 1986 c. 45 s. 244 U.K.*]

265. Preferential payments

(1) In a winding up there shall be paid in priority to all other debts—
(a) *(Repealed 6 of 1984 s. 181)*
(b) any—
(i) payment from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap. 380) to any clerk or servant in respect of wages or salary or both in respect of services rendered to the company if such payment was made during a period of 4 months before the commencement of the winding up; and *(Amended 48 of 1987 s. 8)*
(ii) wages and salary (including commission provided that the amount thereof is fixed or ascertainable at the relevant date) of any clerk or servant in respect of services rendered to the company during the relevant period not exceeding, together with any payment under sub-paragraph (i), $3,000; *(Replaced 12 of 1985 s. 29)*
(c) any—
(i) payment from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap. 380) to any labourer or workman in respect of wages, whether payable for time or for piece work, in respect of services rendered to the company if such payment was made during a period of 4 months before the commencement of the winding up; and *(Amended 48 of 1987 s. 8)*
(ii) wages of any labourer or workman, whether payable for time or for piece work, in respect of services rendered to the company during the relevant period not exceeding, together with any payment under sub-paragraph (i), $3,000; *(Replaced 12 of 1985 s. 29)*

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(c) 規定任何屬或曾屬該項交易的當事一方的人向清盤人支付該公司憑藉該項交易而支付給該人的任何款項；
(d) 規定任何人向清盤人交出就該項交易而作為保證並由其持有的財產；或
(e) 規定任何人之間的帳項須予清算。
(由 1997 年第 3 號第 43 條增補)
[*比照 1986 c. 45 s. 244 U.K.*]

265. 優先付款

(1) 在任何清盤中，須在償付所有其他債項前優先償付以下各項——
(a) *(由 1984 年第 6 號第 181 條廢除)*
(b) 任何——
(i) 根據《破產欠薪保障條例》(第 380 章) 第 18 條，就任何文員或受僱人向公司提供服務而應得的工資及薪金或兩者之一，在清盤開始前 4 個月期間內，從破產欠薪保障基金撥付的款項；及 *(由 1987 年第 48 號第 8 條修訂)*
(ii) 任何文員或受僱人在有關期間內向公司提供服務而應得的工資及薪金 (包括佣金，但其款額在有關日期必須是固定或可確定的)，而連同根據第 (i) 節作出的任何付款，以不超過 $3,000 為限； *(由 1985 年第 12 號第 29 條代替)*
(c) 任何——
(i) 根據《破產欠薪保障條例》(第 380 章) 第 18 條，就任何勞工或工人向公司提供服務而應得的工資 (不論按時計或按件計)，在清盤開始前 4 個月期間內，從破產欠薪保障基金撥付的款項；及 *(由 1987 年第 48 號第 8 條修訂)*
(ii) 任何勞工或工人在有關期間內向公司提供服務而應得的工資 (不論按時計或按件計)，而連同根據第 (i) 節作出的任何付款，以不超過 $3,000 為限； *(由 1985 年第 12 號第 29 條代替)*

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(*ca*) any severance payment payable to an employee under the Employment Ordinance (Cap. 57), not exceeding in respect of each employee $6,000; *(Added 55 of 1974 s. 2)*

(*caa*) any long service payment payable to an employee under the Employment Ordinance (Cap. 57), not exceeding in respect of each employee $8,000; *(Added 77 of 1985 s. 2)*

(*cb*) any amount due in respect of compensation or liability for compensation under the Employees' Compensation Ordinance (Cap. 282) accrued before the relevant date and, where the compensation is a periodical payment, the amount due in respect thereof shall be taken to be the amount of the lump sum for which the periodical payment could, if redeemable, be redeemed on an application being made for that purpose under the Employees' Compensation Ordinance (Cap. 282), but this paragraph shall not apply to any amount due in respect of compensation or liability for compensation where the company has entered into a contract with a person carrying on accident insurance business in Hong Kong in respect of its liability under the Employees' Compensation Ordinance (Cap. 282) for personal injury by accident to the employee to whom the compensation or liability for compensation is due or where the company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company; *(Added 4 of 1977 s. 2. Amended 6 of 1984 s. 259)*

(*cc*) any wages in lieu of notice payable to an employee under the Employment Ordinance (Cap. 57), not exceeding in respect of each employee one month's wages or $2,000 whichever is the lesser; *(Added 4 of 1977 s. 2)*

(*cd*) all accrued holiday remuneration becoming payable to any clerk, servant, workman or labourer (or in the case of his death to any other person in his right) on the termination of his employment before or by the effect of the winding-up order or resolution; *(Added 6 of 1984 s. 181)*

(*ce*) any payment from the Employees Compensation Assistance Fund under Part IV of the Employees Compensation Assistance Ordinance (Cap. 365) representing an amount due by the company in respect of compensation or liability for compensation under the Employees' Compensation Ordinance (Cap. 282) accrued before the relevant date; *(Added 54 of 1991 s. 47)*

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(*ca*) 根據《僱傭條例》(第 57 章) 須支付予僱員的任何遣散費，以每名僱員不超過 $6,000 為限； *(由 1974 年第 55 號第 2 條增補)*

(*caa*) 根據《僱傭條例》(第 57 章) 須支付予僱員的任何長期服務金，以每名僱員不超過 $8,000 為限； *(由 1985 年第 77 號第 2 條增補)*

(*cb*) 就《僱員補償條例》(第 282 章) 所指的補償或支付補償的法律責任而欠下的任何款額，而該項補償或支付補償的法律責任是在有關日期前產生的；如該項補償屬按期付款，則就該項補償而欠下的款額，須視為在根據《僱員補償條例》(第 282 章) 提出的贖回該按期付款的申請中，可用作贖回該按期付款 (如屬可贖回者) 的整筆款額；但如公司須向某僱員支付補償或負有支付補償的法律責任，並已就公司根據《僱員補償條例》(第 282 章) 須對該僱員遭遇意外以致身體受傷負有的法律責任而與任何在香港經營意外保險業務的人訂立合約，或如公司僅為重組或為與其他公司合併而自動清盤，則本段不適用於就該項補償或支付補償的法律責任而須支付的款額； *(由 1977 年第 4 號第 2 條增補。由 1984 年第 6 號第 259 條修訂)*

(*cc*) 根據《僱傭條例》(第 57 章) 須支付予僱員的任何代通知金，以每名僱員不超過一個月薪金或 $2,000 為限，兩者以較小的數額為準： *(由 1977 年第 4 號第 2 條增補)*

(*cd*) 凡在清盤令作出前或清盤決議通過前，或因清盤令或清盤決議的效力，終止僱用任何文員、受僱人、工人或勞工，則指須支付予該人 (如該人去世，則須支付予享有其權利的任何其他人) 的所有累算的假日薪酬； *(由 1984 年第 6 號第 181 條增補)*

(*ce*) 根據《僱員補償援助條例》(第 365 章) 第 IV 部從僱員補償援助基金中撥付的款項，而該項付款代表公司就有關日期前根據《僱員補償條例》(第 282 章) 產生的補償或支付補償的法律責任而欠下的款額： *(由 1991 年第 54 號第 47 條增補)*

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(*cf*) any amount of unpaid contribution or any amount deemed to be unpaid contribution calculated in accordance with rules made under section 73(1)(*n*) of the Occupational Retirement Schemes Ordinance (Cap. 426) which should have been paid by the company being wound up in accordance with the terms of an occupational retirement scheme within the meaning of that Ordinance before the commencement of the winding up:

Provided that where such amount exceeds $50,000 in respect of an employee, 50% of such part of the amount that exceeds $50,000 shall not be paid in priority to all other debts under this subsection; *(Added 88 of 1992 s. 84)*

(*cg*) (without prejudice to any right or liability under a trust) any amount of salaries deducted by the company being wound up from its employees' salaries for the purpose of making contributions in respect of such employees to the funds of an occupational retirement scheme within the meaning of the Occupational Retirement Schemes Ordinance (Cap. 426) which have not been paid into such funds; *(Added 88 of 1992 s. 84)*

(*ch*) any amount of unpaid contribution under, or any amount of unpaid contribution calculated in accordance with, the Mandatory Provident Fund Schemes Ordinance (Cap. 485) which should have been paid by the company being wound up in accordance with the provisions of that Ordinance before the commencement of the winding up:

Provided that where such amount exceeds $50,000 in respect of an employee, 50% of such part of the amount that exceeds $50,000 shall not be paid in priority to all other debts under this subsection; *(Added 80 of 1995 s. 49)*

(*ci*) any amount deducted by the company being wound up from the relevant income of its relevant employees for the purpose of making contributions in respect of such relevant employees to the approved trustee of a registered scheme within the meaning of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) which have not been paid to that approved trustee; *(Added 80 of 1995 s. 49)*

(*cj*) any sum and interest thereon payable to the the Mandatory Provident Fund Schemes Authority under section 17(7) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485); *(Added 80 of 1995 s. 49)*

(*d*) all statutory debts due from the company to the Government at the relevant date and which became due and payable within 12 months next before that date; *(Replaced 6 of 1984 s. 181. Amended 23 of 1999 s. 3)*

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(*cf*) 按照《職業退休計劃條例》(第 426 章) 第 73(1)(*n*) 條之下訂立的規則而計算的任何未付供款的款額或當作未付供款的款額，而該款額是正進行清盤的公司按照該條例所指的職業退休計劃的條款而在清盤開始前應已支付的：

但如就某名僱員而須支付的該款額超過 $50,000，則佔超出額 50% 的款額不得根據本款優先於所有其他債項予以償付； *(由 1992 年第 88 號第 84 條增補)*

(*cg*) (在以不損害任何信託下的權利或法律責任為原則下) 正進行清盤的公司為向《職業退休計劃條例》(第 426 章) 所指的任何職業退休計劃的基金就該等僱員作出供款，而自其僱員薪金中扣除但又未曾撥付予該等基金的任何款額的薪金； *(由 1992 年第 88 號第 84 條增補)*

(*ch*) 在《強制性公積金計劃條例》(第 485 章) 下或按照該條例計算的款額，而該款額是正進行清盤的公司按照該條例的條文而在清盤開始前應已支付的：

但如就某名僱員而須支付的該款額超過 $50,000，則佔超出額 50% 的款額不得根據本款優先於任何其他債項予以償付； *(由 1995 年第 80 號第 49 條增補)*

(*ci*) 正進行清盤的公司為向《強制性公積金計劃條例》(第 485 章) 所指的註冊計劃的核准受託人就該等有關僱員作出供款，而自其有關僱員的有關入息中扣除但又未曾撥付予該核准受託人的任何款額； *(由 1995 年第 80 號第 49 條增補)*

(*cj*) 根據《強制性公積金計劃條例》(第 485 章) 須支付予強制性公積金計劃管理局的任何款項及其利息； *(由 1995 年第 80 號第 49 條增補。由 1998 年第 4 號第 2 條修訂)*

(*d*) 公司在有關日期欠下政府的所有法定債項，而該等債項是在緊接該日期前 12 個月內已到期應付的； *(由 1984 年第 6 號第 181 條代替。由 1999 年第 23 號第 3 條修訂)*

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(*da*) *(Repealed 30 of 1999 s. 18)**

(*db*) where the company being wound up is or was a bank and, at the commencement of the winding up, held deposits, the aggregate amount held on deposit, up to a maximum of $100,000, to each depositor, regardless of the number of his deposits; *(Added 83 of 1995 s. 16)*

(*e*) where the company being wound up is an insurer, any sum payable to a person in respect of any claim (other than a claim for a refund of premium) made under or in accordance with a contract of insurance (but not a contract of reinsurance) effected by the insurer as part of its general business carried on in or from Hong Kong, unless—

(i) such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place; or

(ii) the person to whom the sum is payable is entitled with respect to the claim to claim compensation under any scheme designed to secure compensation to persons in circumstances where the insurer becomes insolvent; *(Added 79 of 1988 s. 8)*

(*ea*) where the company being wound up is an insurer, any payment from the Employees Compensation Assistance Fund under Part IV of the Employees Compensation Assistance Ordinance (Cap. 365) representing a sum payable by the company to a person in respect of any claim (other than a claim for refund of premium) made under or in accordance with a contract of insurance issued for the purposes of Part IV of the Employees' Compensation Ordinance (Cap. 282) effected by the insurer as part of its general business carried on in or from Hong Kong; unless such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place; *(Added 54 of 1991 s. 47)*

* See Note 2 at the end of this Ordinance.

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(*da*) *(由 1999 年第 30 號第 18 條廢除)**

(*db*) 凡正進行清盤的公司現時或以往是一間銀行，並且在清盤開始時持有存款，則指向每個存戶支付最高為 $100,000 的存款總額，不論其有多少筆存款； *(由 1995 年第 83 號第 16 條增補)*

(*e*) 凡正進行清盤的公司是保險人，則指就任何根據或按照一份保險合約(但並非再保險合約)提出的申索(要求退回保費的申索除外)而須支付予某人的任何款項，而該份保險合約乃該保險人所達成，是其在香港或從香港經營的一般業務的一部分，但下述情況則屬例外——

(i) 根據該份合約或在通常業務運作中，該筆款項須在公司保有其資產的香港以外地方支付，而根據該地方的法律，在清盤之時，就該等資產而言，導致該筆款項須予支付的申索，相對於根據該份合約或在通常業務運作中須在任何其他地方支付的申索，是具有優先權的；或

(ii) 須獲支付該筆款項的人，有權就該項申索而根據任何旨在確保有關人士在該保險人無力償債的情況下可獲補償的計劃申索補償； *(由 1988 年第 79 號第 8 條增補)*

(*ea*) 凡正進行清盤的公司是保險人，則指根據《僱員補償援助條例》(第 365 章)第 IV 部從僱員補償援助基金中撥付的款項，該項付款代表公司就任何根據或按照一份為施行《僱員補償條例》(第 282 章)第 IV 部發出的保險合約而提出的申索(要求退回保費的申索除外)須支付予某人的款項，而該份保險合約乃該保險人所達成，是其在香港或從香港經營的一般業務的一部分；但如根據該份合約或在通常業務運作中，該筆款項須在公司保有其資產的香港以外地方支付，而根據該地方的法律，在清盤之時，就該等資產而言，導致該筆款項須予支付的申索，相對於根據該份合約或在通常業務運作中須在任何其他地方支付的申索，是具有優先權的； *(由 1991 年第 54 號第 47 條增補)*

* 見本條例末處的註 2。

[illegible] 香港特別行政區政府印務局局長印刷及發行

(*f*) where the company being wound up is an insurer, any sum payable (after offsetting the amount of any sums owing from the claimant) to a person in respect of any claim (other than a claim for a refund of premium) made under or in accordance with a contract of reinsurance effected by the insurer, as reinsurer, as part of its general business carried on in or from Hong Kong, unless such sum is, under the contract or in the ordinary course of business, payable in a place outside Hong Kong where assets of the company are maintained and under the law of that place the claim in respect of which the sum is payable is, in the event of a winding up, accorded priority with respect to those assets over claims which under the contract or in the ordinary course of business are payable at any other place. *(Added 79 of 1988 s. 8)*

(1A) Where the relevant date is on or after 1 June 1970 but before 1 April 1977, the sum of $6,000 shall be deemed to be substituted in each case for the sums of $3,000 referred to in paragraphs (*b*) and (*c*) respectively of subsection (1). *(Added 41 of 1970 s. 2. Amended 4 of 1977 s. 2)*

(1B) Where the relevant date is on or after the 1 April 1977, the sum of $8,000 shall be deemed to be substituted in each case for the sums of $3,000 referred to in paragraphs (*b*) and (*c*) respectively, and for the sum of $6,000 referred to in paragraph (*ca*), of subsection (1). *(Added 4 of 1977 s. 2)*

(2) Subject to subsection (1)(*b*) and (*c*), where any payment on account of wages or salary, or severance payment, or long service payment or wages in lieu of notice payable under the Employment Ordinance (Cap. 57), or accrued holiday remuneration, has been made to any clerk, servant, workman or labourer in the employment of a company out of money advanced by some person for that purpose, that person shall in a winding up have a right of priority in respect of the money so advanced and paid up to the amount by which the sum in respect of which that clerk, servant, workman or labourer would have been entitled to priority in the winding up has been diminished by reason of the payment having been made. *(Amended 6 of 1984 s. 181; 12 of 1985 s. 29(3); 77 of 1985 s. 2)*

(3) The debts specified in subsection (1)(*b*), (*c*), (*ca*), (*caa*), (*cb*), (*cc*), (*cd*), (*ce*), (*cf*), (*cg*), (*ch*), (*ci*) and (*cj*)— *(Amended 55 of 1974 s. 2; 4 of 1977 s. 2; 6 of 1984 s. 181; 77 of 1985 s. 2; 54 of 1991 s. 47; 88 of 1992 s. 84; 80 of 1995 s. 49)*

(*a*) shall have priority over the debts specified in subsection (1)(*d*);

(*b*) shall rank equally among themselves; and

(*c*) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. *(Replaced 41 of 1970 s. 2)*

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(*f*) 凡正進行清盤的公司是保險人，則指就任何根據或按照一份再保險合約提出的申索(要求退回保費的申索除外)，經抵銷申索人所欠的任何款項的數額後，須支付予某人的任何款項，而該份再保險合約乃該保險人以再保險人的身分所達成，是其在香港或從香港經營的一般業務的一部分，但如根據該份合約或在通常業務運作中，該筆款項須在公司保有其資產的香港以外地方支付，而根據該地方的法律，在清盤之時，就該等資產而言，導致該筆款項須予支付的申索，相對於根據該份合約或在通常業務運作中須在任何其他地方支付的申索，是具有優先權的。 *(由 1988 年第 79 號第 8 條增補)*

(1A) 如有關日期是 1970 年 6 月 1 日當日或在該日之後而又在 1977 年 4 月 1 日之前，則第 (1) 款 (*b*) 及 (*c*) 段分別提述的 $3,000，須當作以 $6,000 取代。 *(由 1970 年第 41 號第 2 條增補。由 1977 年第 4 號第 2 條修訂)*

(1B) 如有關日期是 1977 年 4 月 1 日當日或在該日之後，則第 (1) 款 (*b*) 及 (*c*) 段分別提述的 $3,000 及第 (1) 款 (*ca*) 段提述的 $6,000，均須當作以 $8,000 取代。 *(由 1977 年第 4 號第 2 條增補)*

(2) 在符合第 (1)(*b*) 及 (*c*) 款的規定下，凡曾就根據《僱傭條例》(第 57 章) 須支付的工資或薪金、遣散費、長期服務金或代通知金，或曾就累算的假日薪酬，從某人為有關目的而墊付的款項中，撥款支付公司所僱用的任何文員、受僱人、工人或勞工，則在清盤中，該人就如此墊付及撥付的款項具有優先權利，但以令該名文員、受僱人、工人或勞工在清盤中本應享有優先權的款額因上述撥款而減少之數為限。 *(由 1984 年第 6 號第 181 條修訂；由 1985 年第 12 號第 29(3) 條修訂；由 1985 年第 77 號第 2 條修訂)*

(3) 第 (1)(*b*)、(*c*)、(*ca*)、(*caa*)、(*cb*)、(*cc*)、(*cd*)、(*ce*)、(*cf*)、(*cg*)、(*ch*)、(*ci*) 及 (*cj*) 款所指明的債項—— *(由 1974 年第 55 號第 2 條修訂；由 1977 年第 4 號第 2 條修訂；由 1984 年第 6 號第 181 條修訂；由 1985 年第 77 號第 2 條修訂；由 1991 年第 54 號第 47 條修訂；由 1992 年第 88 號第 84 條修訂；由 1995 年第 80 號第 49 條修訂)*

(*a*) 相對於第 (1)(*d*) 款所指明的債項，具有優先權；

(*b*) 彼此具有同等順序攤還次序；及

(*c*) 須悉數償付，但如有關資產不足以應付該等債項，則須按相等比例減少該等債項的償付額。 *(由 1970 年第 41 號第 2 條代替)*

認可活頁版，由香港特別行政區政府印務局局長印刷及發行

(3A) The debts specified in subsection (1)(*d*) shall have priority over the debts specified in subsection (1)(*da*), (*db*), (*e*), (*ea*) and (*f*). *(Added 79 of 1988 s. 8. Amended 54 of 1991 s. 47; 10 of 1993 s. 2; 83 of 1995 s. 16)*

(3AAA) The debts specified in subsection (1)(*da*) shall have priority over the debts specified in subsection (1)(*db*), (*e*), (*ea*) and (*f*). *(Added 10 of 1993 s. 2. Amended 83 of 1995 s. 16)*

(3AAAA) The debts specified in subsection (1)(*db*)—

(*a*) shall have priority over the debts in subsection (1)(*e*), (*ea*) and (*f*);

(*b*) shall rank equally among themselves; and

(*c*) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. *(Added 83 of 1995 s. 16)*

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(3A) 第(1)(*d*)款所指明的債項，相對於第(1)(*da*)、(*db*)、(*e*)、(*ea*)及(*f*)款所指明的債項，具有優先權。 *(由 1988 年第 79 號第 8 條增補。由 1991 年第 54 號第 47 條修訂；由 1993 年第 10 號第 2 條修訂；由 1995 年第 83 號第 16 條修訂)*

(3AAA) 第(1)(*da*)款所指明的債項，相對於第(1)(*db*)、(*e*)、(*ea*)及(*f*)款所指明的債項，具有優先權。 *(由 1993 年第 10 號第 2 條增補。由 1995 年第 83 號第 16 條修訂)*

(3AAAA) 第(1)(*db*)款所指明的債項——

(*a*) 相對於第(1)(*e*)、(*ea*)及(*f*)款的債項，具有優先權；

(*b*) 彼此具有同等順序攤還次序；及

(*c*) 須悉數償付，但如有關資產不足以應付該等債項，則須按相等比例減少該等債項的償付額。 *(由 1995 年第 83 號第 16 條增補)*

經可證自版，由香港特別行政區政府印務局局長印刷及發行

(3AA) The debts specified in subsection (1)(*e*) and (*ea*)—

(*a*) shall have priority over the debts specified in subsection (1)(*f*);

(*b*) shall rank equally among themselves; and

(*c*) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. *(Added 79 of 1988 s. 8. Amended 54 of 1991 s. 47)*

(3AB) The debts specified in subsection (1)(*f*)—

(*a*) shall rank equally among themselves; and

(*b*) shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions among themselves. *(Added 79 of 1988 s. 8)*

(3B) The debts specified in subsection (1) shall, so far as the assets of the company available for payment of general creditors are insufficient to meet those debts, have priority over the claims of holders of debentures under any charge created as a floating charge by the company, and shall be paid accordingly out of any property comprised in or subject to the charge. *(Added 41 of 1970 s. 2. Amended 10 of 1987 s. 9)*

(4) Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the foregoing debts shall be discharged forthwith so far as the assets are sufficient to meet them.

(5) In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within 3 months next before the date of a winding-up order, the debts to which priority is given by this section shall be a first charge on the goods or effects so distrained on, or the proceeds of the sale thereof. *(Amended 41 of 1970 s. 2)*

(5A) Any money paid under a charge under subsection (5) shall be a debt due from the company to the landlord or other person having distrained, and such debt shall be discharged so far as the assets are sufficient to meet it after payment of the debts specified in subsection (1) but before payment of the other debts proved in the winding up. *(Added 41 of 1970 s. 2)*

(5B) Where in any winding up assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator have been recovered, the court may, on the application of the Official Receiver or the liquidator or any such creditor, make such order as it deems just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk run by them in so doing. *(Added 6 of 1984 s. 181)*

(5C) Any remuneration in respect of a period of holiday or of absence from work through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period. *(Added 6 of 1984 s. 181)*

(3AA) 第(1)(*e*)及(*ea*)款所指明的債項——

(*a*) 相對於第(1)(*f*)款所指明的債項，具有優先權；

(*b*) 彼此具有同等順序攤還次序；及

(*c*) 須悉數償付，但如有關資產不足以應付該等債項，則須按相等比例減少該等債項的償付額。 *(由1988年第79號第8條增補。由1991年第54號第47條修訂)*

(3AB) 第(1)(*f*)款所指明的債項——

(*a*) 彼此具有同等順序攤還次序；及

(*b*) 須悉數償付，但如有關資產不足以應付該等債項，則須按相等比例減少該等債項的償付額。 *(由1988年第79號第8條增補)*

(3B) 在公司可用於償付一般債權人的資產不足以應付第(1)款所指明的債項的範圍內，該等債項相對於債權證持有人根據公司以浮動押記形式設定的押記而提出的申索，具有優先權，並須據此而從該押記所包含的財產或受該押記規限的財產中獲得償付。 *(由1970年第41號第2條增補。由1987年第10號第9條修訂)*

(4) 在保留需用以支付清盤的費用及開支的款項後，以上各債項須在有關資產足以應付該等債項的範圍內，立即予以清償。

(5) 如業主或其他人在緊接清盤令日期前3個月內扣押或曾扣押公司的任何貨品或物品，則獲本條給予優先權的各債項，即為被如此扣押的貨品或物品或出售該等貨品或物品所得收益的第一押記。 *(由1970年第41號第2條修訂)*

(5A) 任何根據第(5)款所指押記而支付的款項，即為公司欠曾作出扣押的業主或其他人的債項，而在償付第(1)款所指明的各債項後，但在償付其他已在清盤中予以證明的債項前，須在有關資產足以應付該債項的範圍內，清償該債項。 *(由1970年第41號第2條增補)*

(5B) 凡在任何清盤中，有任何資產根據某些債權人就訟費所提供的彌償而已獲討回，或藉債權人付款或提供彌償而得到保護或得以保存，或如債權人曾就某等開支而向清盤人提供彌償，而該等開支已獲討回，則法院應破產管理署署長、清盤人或任何該等債權人的申請，可在派發該等資產及如此討回的開支款額方面，作出法院認為公正的命令，以使該等債權人較其他人佔優，作為他們作出上述行動時所冒風險的代價。 *(由1984年第6號第181條增補)*

(5C) 就某段假期或某段因病或其他好的因由缺勤的期間而應得的薪酬，須當作在該段假期或缺勤期間內向公司提供服務而應得的工資。 *(由1984年第6號第181條增補)*

(5D) The deposits given priority under subsection (1)(*db*) do not include the following—

(*a*) terms deposits where the current term agreed to by the depositor at the most recent time it was negotiated exceeds 5 years;

(*b*) deposits made after the date of publication of a notice in the Gazette under section 28(2)(*b*) of the Banking Ordinance (Cap. 155) that the company has been removed from the register and has ceased to be a bank. *(Added 83 of 1995 s. 16)*

(5E) The priority given under subsection (1)(*db*) does not apply to money held on deposit where a depositor, after a bank ceases carrying on banking business and whether or not winding up proceedings have commenced at that time, assigns to another person his rights to a portion of the money on deposit in the depositor's name, if the effect of such an assignment is to increase the amount of money that will be eligible for priority under subsection (1)(*db*). *(Added 83 of 1995 s. 16)*

(5F) Deposits given priority under subsection (1)(*db*) do not include deposits made in the name of—

(*a*) the Exchange Fund established under the Exchange Fund Ordinance (Cap. 66);

(*b*) a multilateral development bank as defined in paragraph 1 of the Third Schedule to the Banking Ordinance (Cap. 155);

(*c*) a holding company that holds all of the shares of the company being wound up, a subsidiary of the company being wound up or a subsidiary of the holding company;

(*d*) a person who, at the commencement of the winding up, was a director, controller or manager of—

(i) the company being wound up;

(ii) a subsidiary of the company being wound up;

(iii) a holding company that holds all of the shares of the company being wound up or a subsidiary of the holding company;

(*e*) an authorized institution as defined in the Banking Ordinance (Cap. 155). *(Added 83 of 1995 s. 16)*

(6) In this section—

"accrued holiday remuneration" (累算的假日薪酬) includes, in relation to any person, all sums which, by virtue either of his contract of employment or of any enactment (including any order made or direction given under any Ordinance), are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday had his employment with the company continued until he became entitled to be allowed the holiday;

"bank" (銀行) has the same meaning as in the Banking Ordinance (Cap. 155); *(Added 83 of 1995 s. 16)*

(5D) 根據第(1)(*db*)款獲給予優先權的存款，並不包括以下項目——

(*a*) 定期存款(如存戶在最近所議定的現行存款期超過5年)；

(*b*) 在根據《銀行業條例》(第155章)第28(2)(*b*)條於憲報刊登一項公告的日期後所作的存款，而該項公告為述明公司已自登記冊中刪去以及不再是一間銀行者。 *(由1995年第83號第16條增補)*

(5E) 根據第(1)(*db*)款獲給予的優先權，並不適用於符合以下情況的存款：於銀行停止經營銀行業務後(不論清盤的法律程序是否已在當時開始)，存戶將享有以其名義所作的部分存款的權利轉讓另一人，而如此轉讓的效果，乃增加有資格獲給予第(1)(*db*)款所訂的優先權的款項的數額。 *(由1995年第83號第16條增補)*

(5F) 根據第(1)(*db*)款獲給予優先權的存款，並不包括以下述名義所作的存款——

(*a*) 根據《外匯基金條例》(第66章)設立的外匯基金；

(*b*) 在《銀行業條例》(第155章)附表3第1段中所界定的多邊開發銀行；

(*c*) 持有正進行清盤的公司全部股份的控股公司、正進行清盤的公司的附屬公司或該控股公司的附屬公司；

(*d*) 在清盤開始時身為下述公司的董事、總監或經理的人——

(i) 正進行清盤的公司；

(ii) 正進行清盤的公司的附屬公司；

(iii) 持有正進行清盤的公司全部股份的控股公司，或該控股公司的附屬公司；

(*e*) 在《銀行業條例》(第155章)中所界定的認可機構。 *(由1995年第83號第16條增補)*

(6) 在本條中——

"一般業務"(general business)指《保險公司條例》(第41章)第2(1)條所界定的不屬長期業務的保險業務； *(由1988年第79號第8條增補)*

"工資"(wages)就任何人而言，包括憑藉該人的僱傭合約而須支付予該人作為農曆新年花紅的任何款項，但不包括任何累算的假日薪酬； *(由1984年第6號第181條代替)*

"controller" (總監) has the same meaning as in the Banking Ordinance (Cap. 155); *(Added 83 of 1995 s. 16)*

"deposit" (存款) and "depositor" (存戶) have the same meaning as in the Banking Ordinance (Cap. 155); *(Added 83 of 1995 s. 16)*

"Employees Compensation Assistance Fund" (僱員補償援助基金) means the fund established by section 7 of the Employees Compensation Assistance Ordinance (Cap. 365); *(Added 54 of 1991 s. 47)*

"general business" (一般業務) means insurance business not being long term business as defined in section 2(1) of the Insurance Companies Ordinance (Cap. 41); *(Added 79 of 1988 s. 8)*

"insurer" (保險人) means a person carrying on insurance business; *(Added 79 of 1988 s. 8)*

"manager" (經理) has the same meaning as in the Banking Ordinance (Cap. 155); *(Added 83 of 1995 s. 16)*

"Protection of Wages on Insolvency Fund" (破產欠薪保障基金) means the fund deemed to be established and continued in existence under section 6 of the Protection of Wages on Insolvency Ordinance (Cap. 380); *(Added 12 of 1985 s. 29(3))*

"the relevant date" (有關日期) means—

(*a*) in the case of a company ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator or, if no such appointment was made, the date of the winding-up order, unless in either case the company had commenced to be wound up voluntarily before that date; and

(*b*) in any case where paragraph (*a*) does not apply, the date of the commencement of the winding up;

"the relevant period" (有關期間) means—

(*a*) in a case where a company is being wound up by the court and the relevant date in the case of that company is a date other than the date of the commencement of the winding up, the period—

(i) beginning 4 months next before the commencement of the winding up and ending on the relevant date; or

(ii) beginning 4 months next before the last day of service within the meaning of section 16(4) of the Protection of Wages on Insolvency Ordinance (Cap. 380) of any clerk or servant or labourer or workman, as the case may be, who has made an application for an ex gratia payment under section 15(1) of that Ordinance, and ending on that last day of service, *(Replaced 68 of 1996 s. 5)*

whichever is the earlier;

(*b*) in any case where paragraph (*a*) does not apply, the period—

(i) of 4 months next before the relevant date; or

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"存款" (deposit) 及 "存戶" (depositor) 的涵義與《銀行業條例》(第 155 章) 中該等詞語的涵義相同； *(由 1995 年第 83 號第 16 條增補)*

"有關日期" (the relevant date)——

(*a*) 如屬被下令強制清盤的公司，指委任 (或首次委任) 臨時清盤人的日期，或如沒有作出該項委任，則指清盤令日期，但如公司在任何一種該等情況下，於該日期前已開始自動清盤，則屬例外；及

(*b*) 在 (*a*) 段並不適用的情況下，指清盤開始日期；

"有關期間" (the relevant period)——

(*a*) 如屬正由法院清盤的公司，而就該公司而言，有關日期並非清盤開始日期，則指——

(i) 由緊接清盤開始前 4 個月起計，至有關日期的一段期間；或

(ii) (如任何文員或受僱人或勞工或工人 (視屬何情況而定) 已根據《破產欠薪保障條例》(第 380 章) 第 15(1) 條申請特惠款項) 由緊接該條例第 16(4) 條所指的服務的最後一天之前 4 個月期間的首日起計，至該服務的最後一天止的一段期間， *(由 1996 年第 68 號第 5 條代替)*

兩者以較早的一段期間為準；

(*b*) 在 (*a*) 段並不適用的情況下，則指——

(i) 緊接有關日期前的一段 4 個月期間；或

(ii) (如任何文員或受僱人或勞工或工人 (視屬何情況而定) 已根據《破產欠薪保障條例》(第 380 章) 第 15(1) 條申請特惠款項) 由緊接該條例第 16(4) 條所指的服務的最後一天之前 4 個月期間的首日起計，至該服務的最後一天止的一段期間， *(由 1996 年第 68 號第 5 條代替)*

兩者以較早的一段期間為準； *(由 1987 年第 48 號第 8 條代替)*

"法定債項" (statutory debt) 指藉或根據任何條例的任何條文而決定法律責任及款額的債項； *(由 1999 年第 23 號第 3 條修訂)*

"保險人" (insurer) 指經營保險業務的人； *(由 1988 年第 79 號第 8 條增補)*

"破產欠薪保障基金" (Protection of Wages on Insolvency Fund) 指根據《破產欠薪保障條例》(第 380 章) 第 6 條當作已設立並繼續存在的基金； *(由 1985 年第 12 號第 29(3) 條增補)*

"累算的假日薪酬" (accrued holiday remuneration) 就任何人而言，包括假若該人繼續受僱於公司直至有權獲取某段假期為止，則憑藉該人的僱傭合約或憑藉任何成文法則 (包括根據任何條例作出的任何命令或指示)，按通常情況下須就該段假期而支付予該人的薪酬而須予支付的所有款項；

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(ii) beginning 4 months next before the last day of service within the meaning of section 16(4) of the Protection of Wages on Insolvency Ordinance (Cap. 380) of any clerk or servant or labourer or workman, as the case may be, who has made an application for an ex gratia payment under section 15(1) of that Ordinance, and ending on that last day of service, *(Replaced 68 of 1996 s. 5)*

whichever is the earlier; *(Replaced 48 of 1987 s. 8)*

"statutory debt" (法定債項) means a debt the liability for which and the amount of which are determined by or under any provision in any Ordinance; *(Amended 23 of 1999 s. 3)*

"wages" (工資) includes, in relation to any person, any sum which, by virtue of his contract of employment, is payable to him as a Lunar New Year bonus, but does not include any accrued holiday remuneration. *(Replaced 6 of 1984 s. 181)*

(7) The Companies (Amendment) Ordinance 1984 (6 of 1984) shall not apply in the case of a winding up where the relevant date occurred before the commencement* of that Ordinance, and, in such a case, the provisions relating to preferential payments which would have applied if that Ordinance had not been enacted shall be deemed to remain in full force. *(Added 6 of 1984 s. 181)*

(8) The Fourth Schedule to the Protection of Wages on Insolvency Ordinance 1985 (12 of 1985) shall not apply in the case of a winding up where the date of the commencement of the winding up occurred before the commencement† of that Ordinance, and, in such case, the provisions relating to preferential payments which would have applied if that Ordinance had not been enacted shall be deemed to remain in full force. *(Added 12 of 1985 s. 29(3))*

(9) The Companies (Amendment) (No. 3) Ordinance 1988 (79 of 1988) shall not apply in the case of a winding up where the date of the commencement of the winding up occurred before the commencement of that Ordinance, and, in such a case, the provisions relating to preferential payments which would have applied if that Ordinance had not been enacted shall be deemed to remain in full force. *(Added 79 of 1988 s. 8)*

(10) Section 5(*a*) of the Protection of Wages on Insolvency (Amendment) Ordinance 1996 (68 of 1996) ("the amending Ordinance") shall not apply in the

* Commencement date: 31 August 1984.
† Commencement date: 19 April 1985.

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"經理" (manager) 的涵義與《銀行業條例》(第 155 章) 中該詞的涵義相同； *(由 1995 年第 83 號第 16 條增補)*

"銀行" (bank) 的涵義與《銀行業條例》(第 155 章) 中該詞的涵義相同； *(由 1995 年第 83 號第 16 條增補)*

"僱員補償援助基金" (Employees Compensation Assistance Fund) 指藉《僱員補償援助條例》(第 365 章) 第 7 條設立的基金； *(由 1991 年第 54 號第 47 條增補)*

"總監" (controller) 的涵義與《銀行業條例》(第 155 章) 中該詞的涵義相同。 *(由 1995 年第 83 號第 16 條增補)*

(7) 凡在任何清盤中，有關日期是在《1984 年公司 (修訂) 條例》@(1984 年第 6 號) 生效 * 之前，則該條例不適用於該宗清盤，而在該情況下，假若該條例未曾制定則會適用的關於優先付款的條文，須當作仍然完全有效。 *(由 1984 年第 6 號第 181 條增補)*

(8) 凡在任何清盤中，清盤開始日期是在《1985 年破產欠薪保障條例》‡(1985 年第 12 號) 生效 † 之前，則該條例的附表 4 不適用於該宗清盤，而在該情況下，假若該條例未曾制定本會適用的關於優先付款的條文，須當作仍然完全有效。 *(由 1985 年第 12 號第 29(3) 條增補)*

(9) 凡在任何清盤中，清盤開始日期是在《1988 年公司 (修訂) (第 3 號) 條例》# (1988 年第 79 號) 生效之前，則該條例不適用於該宗清盤，而在該情況下，假若該條例未曾制定本會適用的關於優先付款的條文，須當作仍然完全有效。 *(由 1988 年第 79 號第 8 條增補)*

(10) 在任何與根據《破產欠薪保障條例》(第 380 章) 第 15(1) 條作出的申請有關的清盤中，如提出該申請的日期是在《1996 年破產欠薪保障 (修訂) 條例》(1996 年第 68

@ "《1984 年公司 (修訂) 條例》" 乃 "Companies (Amendment) Ordinance 1984" 之譯名。
* 生效日期： 1984 年 8 月 31 日。
‡ "《1985 年破產欠薪保障條例》" 乃 "Protection of Wages on Insolvency Ordinance 1985" 之譯名。
† 生效日期： 1985 年 4 月 19 日。
\# "《1988 年公司 (修訂) (第 3 號) 條例》" 乃 "Companies (Amendment) (No. 3) Ordinance 1988" 之譯名。

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case of a winding up to which an application under section 15(1) of the Protection of Wages on Insolvency Ordinance (Cap. 380) relates where such application is made before the commencement** of the amending Ordinance, and in such a case, the provisions relating to preferential payments which would have applied if the amending Ordinance had not been enacted shall be deemed to remain in full force. *(Added 68 of 1996 s. 5)*

[*cf. 1929 c. 23 s. 264 U.K.*]

Effect of Winding Up on antecedent and other Transactions

266. Fraudulent preference

(1) Any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company within 6 months before the commencement of its winding up which, had it been made or done by or against an individual within 6 months before the presentation of a bankruptcy petition on which he is adjudged bankrupt, would be deemed in his bankruptcy a fraudulent preference, shall in the event of the company being wound up be deemed a fraudulent preference of its creditors and be invalid accordingly:

Provided that, in relation to things made or done before the commencement* of the Companies (Amendment) Ordinance 1984 (6 of 1984), this subsection shall have effect with the substitution, for references to 6 months, of references to 3 months.

(2) Any conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void to all intents.

(Replaced 6 of 1984 s. 182)

[*cf. 1948 c. 38 s. 320 U.K.*]

266A. Liabilities and rights of certain fraudulently preferred persons

(1) Where anything made or done after the commencement* of the Companies (Amendment) Ordinance 1984 (6 of 1984) is void under section 266 as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, then (without prejudice to any rights or liabilities arising apart from this provision) the person preferred shall be

** Commencement date: 6 December 1996.
* Commencement date: 31 August 1984.

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號)("修訂條例")生效 ** 之前，則在該宗清盤中，修訂條例第 5(*a*) 條不適用，而在該情況下，假若修訂條例不曾制定則會適用的關於優先付款的條文，須當作仍然完全有效。 *(由 1996 年第 68 號第 5 條增補)*

[*比照 1929 c. 23 s. 264 U.K.*]

清盤對事前交易及其他交易的影響

266. 欺詐優惠

(1) 在公司清盤開始前 6 個月內，由公司作出或針對公司作出的任何轉易、按揭、貨品交付、付款、簽立或其他與財產有關的作為，假若是在某個別人士被判定破產的破產呈請提出前 6 個月內，由該名人士作出或針對該名人士作出，本會在其破產案中被當作為一項欺詐優惠者，則在公司清盤的情況下，須當作為一項給予公司債權人的欺詐優惠，並須據此而無效：

但就《1984 年公司(修訂)條例》†(1984 年第 6 號)生效 * 前作出的事情而言，本款具有效力，但須以提述 3 個月代替提述 6 個月。

(2) 公司就其所有財產向受託人作出以公司所有債權人為受益人的任何轉易或轉讓，在各方面而言均屬無效。

(由 1984 年第 6 號第 182 條代替)

[*比照 1948 c. 38 s. 320 U.K.*]

266A. 某些獲得欺詐優惠的人的法律責任及權利

(1) 凡在《1984 年公司(修訂)條例》†(1984 年第 6 號)生效 * 後作出的任何事情，根據第 266 條屬於給予某人的欺詐優惠而無效，而該人在已有按揭或押記作出以作為公司債項保證的財產中有權益，則在以不損害根據本條文以外的規定而產生的任

** 生效日期：1996 年 12 月 6 日。
† "《1984 年公司(修訂)條例》"乃 "Companies (Amendment) Ordinance 1984" 之譯名。
* 生效日期：1984 年 8 月 31 日。

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Minorities

168A. Alternative remedy to winding up in cases of unfair prejudice

(1) Any member of a company who complains that the affairs of the company are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of some part of the members (including himself) or, in a case falling within section 147(2)(*b*), the Financial Secretary, may make an application to the court by petition for an order under this section. *(Amended 72 of 1994 s. 8)*

(2) If on any petition under this section the court is of opinion that the company's affairs are being or have been conducted in a manner unfairly prejudicial to the interests of the members generally or of some part of the members, whether or not such conduct consists of an isolated act or a series of acts, the court may, with a view to bringing to an end the matters complained of— *(Amended 72 of 1994 s. 8)*

(*a*) make an order restraining the commission of any such act or the continuance of such conduct;

(*b*) order that such proceedings as the court may think fit shall be brought in the name of the company against such person and on such terms as the court may so order;

(*ba*) appoint a receiver or manager of the whole or a part of a company's property or business and may specify the powers and duties of the receiver or manager and fix his remuneration; *(Added 72 of 1994 s. 8)*

(*c*) make such other order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(3) Where an order under this section makes any alteration in or addition to the memorandum or articles of a company, then, notwithstanding anything in any other provision of this Ordinance but subject to the provisions of the order, the company shall not have power without the leave of the court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the provisions of this subsection, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company and the provisions of this Ordinance shall apply to the memorandum or articles as so altered or added to accordingly.

少數股東

168A. 在不公平損害的個案中採取清盤以外的補救方法

(1) 公司的任何成員如投訴公司的事務現時正以或曾以不公平地損害普遍成員或任何部分成員(包括其本人在內)的權益的方式處理，則可根據本條藉提出呈請向法院申請作出一項命令；如屬第 147(2)(*b*) 條所述範圍內的情況，則財政司司長可根據本條藉提出呈請向法院申請作出一項命令。 *(由 1994 年第 72 號第 8 條修訂；由 1997 年第 362 號法律公告修訂)*

(2) 法院在接獲任何根據本條提出的呈請後，如認為該公司的事務現時正以或曾以不公平地損害普遍成員或任何部分成員的權益的方式處理，不論如此處理方式包含一項單獨的作為或一連串作為，法院為了結所投訴的事項，可—— *(由 1994 年第 72 號第 8 條修訂)*

(*a*) 作出一項命令，禁制上述作為的進行或上述處理方式的延續；

(*b*) 命令以該公司的名義按法院所規定的條款，向法院所指定的人提出法院認為合適的法律程序；

(*ba*) 就公司的財產或業務的全部或部分，委任一名接管人或管理人，並可指明該接管人或管理人的權力及職責，及釐定其酬金； *(由 1994 年第 72 號第 8 條增補)*

(*c*) 作出其認為合適的其他命令，規管日後該公司事務的處理方式，或規定該公司的其他成員或該公司本身購買該公司的任何成員的股份；如屬出該公司本身購買該等股份的情況，則規定該公司相應地減少其資本，或作出其他命令。

(3) 凡根據本條作出的命令，對公司的章程大綱或章程細則作出任何修改或增補，則即使本條例的任何其他條文載有任何規定，在符合該項命令條文的規限下，該公司未經法院許可，無權對章程大綱或章程細則進一步作出任何與該項命令有所抵觸的修改或增補；但在符合本款的規定下，藉該項命令而作出的修改或增補，具有同樣效力，猶如藉該公司的決議妥為作出者一樣，而本條例的條文即據此而適用於經如此修改或增補的章程大綱或章程細則。

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(4) An office copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within 14 days after the making thereof, be delivered by the company to the Registrar for registration; and if a company makes default in complying with this subsection, the company and every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine. *(Amended 7 of 1990 s. 2)*

(5) The personal representative of a person who, at the date of his death, was a member of a company, or any trustee of, or person beneficially interested in, the shares of a company by virtue of the will or intestacy of any such person, may apply to the court under subsection (1) for an order under this section and, accordingly, any reference in that subsection to a member of a company shall be construed as including a reference to any such personal representative, trustee or person beneficially interested.

(6) Section 296 shall apply in relation to a petition under this section as it applies in relation to a winding-up petition.

(Added 51 of 1978 s. 6)
[*cf. 1948 c. 38 s. 210 U.K.*]

168B. Rights of company and minority shareholders in case of successful buy out by share repurchase

The Thirteenth Schedule shall apply where a company (in that Schedule referred to as the "repurchasing company") makes a general offer to purchase all of its shares, or all of its shares of a particular class.

(Added 77 of 1991 s. 7)

PART IVA

DISQUALIFICATION OF DIRECTORS

168C. Interpretation

(1) In this Part—

"company" (公司) means—

(*a*) a company within the meaning of section 2; or

(*b*) an unregistered company within the meaning of Part X (other than a partnership, whether limited or not or an association)—

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(4) 如根據本條作出的命令修改或增補某公司的章程大綱或章程細則，或准許修改或增補某公司的章程大綱或章程細則，該公司須於該項命令作出後 14 天內，將命令的正式文本交付處長登記；如公司因沒有遵從本款的規定而構成失責，公司及其每名失責高級人員均可處罰款，如持續失責，則可處按日計算的失責罰款。 *(由 1990 年第 7 號第 2 條修訂)*

(5) 任何人如在去世當日是某公司的成員，其遺產代理人、或任何憑藉該人的遺囑或因涉及該人的無遺囑遺產而成為該公司的股份的受託人或享有該公司股份的實益權益的人，可根據第 (1) 款向法院申請根據本條作出一項命令，而在該款中，凡提述公司的成員之處，須據此解釋為包括提述該名遺產代理人、受託人或享有實益權益的人。

(6) 第 296 條適用於根據本條提出的呈請，一如適用於清盤呈請。

(由 1978 年第 51 號第 6 條增補)
[*比照 1948 c. 38 s. 210 U.K.*]

168B. 在藉股份購回而成功全面收購的情況中公司及少數股東的權利

附表 13 適用於下述情況：公司 (在該附表內稱為"購回公司") 作出公開要約以全數購買本身的股份或全數購買本身某個類別的股份。

(由 1991 年第 77 號第 7 條增補)

第 IVA 部

董事資格的取消

168C. 釋義

(1) 在本部中——

"公司" (company) 指——

(*a*) 第 2 條所指的公司；或

(*b*) 符合以下描述的第 X 部所指的非註冊公司(屬或不屬有限合夥的合夥及社團除外)——

經政府當局准許，由香港特別行政區政府印務局局長印刷及發行

182. Avoidance of dispositions of property, &c. after commencement of winding up

In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.

[cf. 1929 c. 23 s. 173 U.K.]

183. Avoidance of attachments, &c.

Where any company is being wound up by the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents.

[cf. 1929 c. 23 s. 174 U.K.]

Commencement of Winding Up

184. Commencement of winding up by the court

(1) Where before the presentation of a petition for the winding up of a company by the court a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

[cf. 1929 c. 23 s. 175 U.K.]

Consequences of Winding-up Order

185. Copy of order to be delivered to Registrar

On the making of a winding-up order, a copy of the order shall forthwith be delivered by the company, or otherwise as may be prescribed, to the Registrar for registration.

(Replaced 6 of 1984 s. 133)

[cf. 1948 c. 38 s. 230 U.K.]

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182. 清盤開始後財產的產權處置等無效

在由法院作出的清盤中，清盤開始後就公司財產(包括據法權產)作出的任何產權處置，以及任何股份轉讓或公司成員地位的任何變更，除非法院另有命令，否則均屬無效。

[比照 1929 c. 23 s. 173 U.K.]

183. 扣押等無效

凡公司正由法院清盤，在清盤開始後針對公司的產業或物品而施行的任何扣押、暫押、財物扣押或執行程序，在各方面均屬無效。

[比照 1929 c. 23 s. 174 U.K.]

清盤的開始

184. 由法院作出的清盤的開始

(1) 凡在要求法院將公司清盤的呈請提出前，公司已通過決議自動清盤，公司的清盤須當作在決議通過時開始，而除非法院基於有關欺詐或錯誤的證明，認為適合作其他指示，否則所有已在自動清盤中進行的程序，均須當作已有效進行。

(2) 在任何其他情況下，由法院作出的公司清盤，須當作在清盤呈請提出時開始。

[比照 1929 c. 23 s. 175 U.K.]

清盤令的後果

185. 命令文本須交付處長

清盤令作出後，公司或訂明的其他人士須隨即將一份該命令的文本交付處長登記。

(由 1984 年第 6 號第 133 條代替)

[比照 1948 c. 38 s. 230 U.K.]

認可活頁版，由香港特別行政區政府印務局局長印刷及發行

(*a*) 已知悉有關的周圍情況及有關的法律程序；或

(*b*) 是該有關債務人的有聯繫人士，或是與該債務人訂立交易或獲該債務人給予該項不公平的優惠的人的有聯繫人士，

則除非有相反證明，否則就第 (2)(*a*) 或 (*b*) 款而言，須推定該項權益並非是真誠地取得或該利益並非是真誠地收取的。

(4) 按照一項根據第 49 或 50 條作出的命令而須向受託人支付的任何款項，須組成破產人的產業。

(5) 就第 (3)(*a*) 款而言，以下乃屬有關的周圍情況 (按情況所需而定)——

(*a*) 有關的債務人以低於一般價值而訂立交易的事實；或

(*b*) 構成有關的債務人給予該項不公平的優惠的有關情況。

(6) 就第 (3)(*a*) 款而言，如任何人知悉以下事實，即屬知悉有關的法律程序——

(*a*) 有關的債務人據之被判定破產的呈請已提出；或

(*b*) 有關的債務人已被判定破產。

(由 1996 年第 76 號第 36 條增補)

51B. "有聯繫人士" 的涵義

(1) 就第 49 至 51A 條而言，任何人是否為另一人的有聯繫人士此一問題，須按照本條決定。

(2) 任何人如是任何債務人的配偶，或是該債務人或其配偶的親屬，或是該債務人或其配偶的親屬的配偶，則該人即為該債務人的有聯繫人士。

(3) 與任何債務人組成合夥的任何人即為該債務人的有聯繫人士，亦是與其組成合夥的任何債務人的配偶或親屬的有聯繫人士。

(4) 任何人均為他所僱用的或僱用他的任何債務人的有聯繫人士，而就此而言，一間公司的任何董事或其他高級人員，須視為獲該公司僱用。

(5) 如某項信託的受益人包括任何債務人或該債務人的有聯繫人士，或包括一項可為該債務人或其任何有聯繫人士的利益而行使的權力，則任何屬該項信託的受託人的人，即為該債務人的有聯繫人士。

(6) 如任何債務人控制一間公司或該債務人及身為該債務人的有聯繫人士的人一起控制該公司，則該公司即為該債務人的有聯繫人士。

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(*a*) he had notice of the relevant surrounding circumstances and of the relevant proceedings; or

(*b*) he was an associate of either the debtor in question or the person with whom that debtor entered into the transaction or to whom that debtor gave the unfair preference,

then, unless the contrary is shown, it shall be presumed for the purposes of subsection (2)(*a*) or (*b*) that the interest was acquired or the benefit was received otherwise than in good faith.

(4) Any sums required to be paid to the trustee in accordance with an order under section 49 or 50 shall be comprised in the bankrupt's estate.

(5) For the purposes of subsection (3)(*a*), the relevant surrounding circumstances are (as the case may require)—

(*a*) the fact that the debtor in question entered into the transaction at an undervalue; or

(*b*) the circumstances which amounted to the giving of the unfair preference by the debtor in question.

(6) For the purposes of subsection (3)(*a*), a person has notice of the relevant proceedings if he has notice—

(*a*) of the fact that the petition on which the debtor in question is adjudged bankrupt has been presented; or

(*b*) of the fact that the debtor in question has been adjudged bankrupt.

(Added 76 of 1996 s. 36)

51B. Meaning of "associate"

(1) For the purposes of sections 49 to 51A, any question whether a person is an associate of another person shall be determined in accordance with this section.

(2) A person is an associate of a debtor if that person is the debtor's spouse, or is a relative, or the spouse of a relative of the debtor or his spouse.

(3) A person is an associate of a debtor with whom he is in partnership, and of the spouse or a relative of any debtor with whom he is in partnership.

(4) A person is an associate of a debtor whom he employs or by whom he is employed and for this purpose, any director or other officer of a company shall be treated as employed by that company.

(5) A person in his capacity as trustee of a trust is an associate of a debtor if the beneficiaries of the trust include, or the terms of the trust confer a power that may be exercised for the benefit of, that debtor or an associate of that debtor.

(6) A company is an associate of a debtor if that debtor has control of it or if that debtor and persons who are his associates together have control of it.

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(7) 就本條而言，任何人如是任何債務人的兄弟、姊妹、伯父、叔父、舅父、姑丈、姨丈、伯母、嬸母、舅母、姑母、姨母、姪、甥、姪女、甥女、直系祖先或直系後裔，該人即屬該債務人的親屬，而——

(*a*) 任何半血親關係須視為全血親關係，任何人的繼子女或領養子女則須視為其子女；及

(*b*) 非婚生子女須視為其母親與其據稱的父親的婚生子女，

此外，在本條中凡提述配偶之處，須包括前配偶。

(8) 就本條而言，如有以下情況，任何債務人須視為控制一間公司——

(*a*) 該公司的董事或控制該公司的另一間公司的董事(或該等董事中的任何董事)，習慣於按照該債務人的指示或指令行事，但任何債務人不得只因該等董事按他以專業人士身分提出的意見行事而被認為是控制一間公司；或

(*b*) 該債務人有權在該間公司的大會上或在控制該間公司的另一間公司的任何大會上行使三分之一或以上的表決權或控制三分之一或以上的表決權的行使，

此外，如 2 名或多於 2 名的人合起來符合上述兩項條件之一，則他們須視作控制該公司。

(9) 在本條中，"公司" (company) 包括不論是否在香港或其他地方成立的法人團體；此外，凡提述任何公司的董事及其他高級人員之處與提述在任何公司的任何大會上的表決權之處，在作必要的變通後具有效力。

(由 1996 年第 76 號第 36 條增補)

52. 與未獲解除破產的破產人的交易

(1) *(由 1996 年第 76 號第 37 條廢除)*

(2) 凡任何個人、公司或商號已確定：向該名個人或該公司或商號存款(不論是否與資本有關的存款)或與其有貸餘的人是一名未獲解除破產的破產人，該名個人、公司或商號有責任立即將該存款或貸餘的存在，告知破產管理署署長及破產案受託人，而除非根據法院命令或按照破產管理署署長或破產案受託人的指示，否則該名個人或該公司或商號不得從該存款或貸餘中作任何付款，亦不得就該存款或貸餘而作任何付款。

(7) For the purposes of this section, a person is a relative of a debtor if he is that debtor's brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant, treating—

(*a*) any relationship of the half blood as a relationship of the whole blood and the step child or adopted child of any person as his child; and

(*b*) an illegitimate child as the legitimate child of his mother and reputed father,

and references in this section to a spouse shall include a former spouse.

(8) For the purposes of this section, a debtor shall be taken to have control of a company if—

(*a*) the directors of the company or of another company which has control of it (or any of them) are accustomed to act in accordance with his directions or instructions, but a debtor shall not be considered to have control of a company by reason only that the directors act on advice given by him in a professional capacity; or

(*b*) he is entitled to exercise, or control the exercise of, 1/3 or more of the voting power at any general meeting of the company or of another company which has control of it,

and where 2 or more persons together satisfy either of the above conditions, they shall be taken to have control of the company.

(9) In this section, "company" (公司) includes any body corporate (whether incorporated in Hong Kong or elsewhere); and references to directors and other officers of a company and to voting power at any general meeting of a company shall have effect with any necessary modifications.

(Added 76 of 1996 s. 36)

52. Dealings with undischarged bankrupt

(1) *(Repealed 76 of 1996 s. 37)*

(2) Where any individual, company or firm has ascertained that a person having a deposit, whether a deposit in respect of capital or not, or a credit balance, with such individual, company or firm is an undischarged bankrupt, then it shall be the duty of such individual, company or firm forthwith to inform the Official Receiver and the trustee in the bankruptcy of the existence of the deposit or credit balance, and such individual, company or firm shall not make any payment out of or in respect of the deposit or credit balance except under an order of the court or in accordance with instructions from the Official Receiver or the trustee in the bankruptcy.

香港法律改革委員會

關於《公司條例》的清盤條文

報告書

本報告書已上存互聯網，網址：**<http://www.info.gov.hk>**。

這份法改會報告書的撰寫工作主要由高級政府律師**紀禮能先生**負責。

1999 年 7 月

第 4 章　　司職人員的酬金（收費）[1]

4.1　　《諮詢文件》沒有對司職人員酬金事宜作詳細探討。自《諮詢文件》在 1998 年 4 月發表後，法院對於酬金的立場已起了變化。因此，本章所載的建議都不曾經過全面諮詢程序的。

4.2　　不過，我們已向最可能受有關建議影響的代表團體，即香港律師會、香港會計師公會和香港公司秘書公會徵詢意見，而有關團體均表示大致支持這些建議。我們得指出，下文所載有關審查員的建議尚未向有關團體提述，因爲這建議是於接獲他們的意見書後才擬定。

4.3　　我們無意過於專注探討法院在過去或現在審理有關收費的訴訟，因爲我們的目的是在參考本港和英國兩地的發展後，嘗試爲未來的發展方向擬定建議。

4.4　　不過，在闡述香港的發展時，便必須提述百富勤案 [2]，因爲香港法院在這案中確立了處理司職人員酬金的立場。百富勤案所牽涉的問題，大部分是關於臨時清盤人在處理 1998 年 1 月由法院清盤的百富勤集團公司案所收取的費用。臨時清盤人在百富勤案和其他案所收取的費用，都成爲法院審查的目標。

4.5　　《公司條例》沒有就臨時清盤人的酬金作出規定。私人執業臨時清盤人在執行工作後獲得相應報酬固然是理所當然的，但必須支取得當。至於臨時清盤人的委任，自有人提交呈請要求將一間公司清盤起至法院依據《公司條例》第 193 條發出清盤令爲止的任何時間內，都可隨時作出委任。但無論如何，在法院依據《公司條例》第 194 條發出清盤令後至首次債權人會議委出清盤人爲止的一段期間內，必須委任臨時清盤人行事。[3]

4.6　　英國方面也有人就收費事宜提出質疑，而且所質疑的對象不僅限於清盤人和臨時清盤人，還旁及其他司職人員，《費里斯委員會報告書》(Report of the Ferris Committee)[4] 便是在此情況下擬定的。

1　參閱導言第 12 段關於“**司職人員**”的定義。

2　See *re Peregrine Investments Holdings Ltd.* [1998] 3 HKC 1 CF1.

3　參閱《公司（清盤）規則》第 28、146 及 147 條。

4　Report of Mr. Justice Ferris' Working Party on the remuneration of office-holders and certain related matters.

《費里斯報告書》所載述的論點，其實已較費里斯法官在“麥士維案”(Maxwell case)就接管人申請收費所作的尖刻評論較爲溫和。[5]

4.7 香港的法院認爲，司職人員：

“……有責任保護、收集、變現非屬於他們而是屬於債權人或各受益人的資產和財產，並最終轉移予有關的債權人和受益人。”

法院進一步指出：

“讓司職人員收取酬金已有違常規，乖違通用於各種擔任受信人的規則——就是受託人不得因受信而獲利益的規則。這項違反常規的安排難免會牽涉利益衝突，就是收取這類酬金的受信人的利益與有權問責和支付有關酬金的人的利益之間的衝突。”

4.8 從時序而言，香港法院對百富勤案所作的評論，是於麥士維案後但在《費里斯報告書》發表以前作出的。

4.9 在香港，臨時清盤人、接管人和其他司職人員的酬金是按時計酬，但也可按收費率或按百分率收費。在百富勤案或其他一般案件，引起法院微言的，不是臨時清盤人的時薪收費表水平，而是有關收費是否徵收得宜。法院嚴正質疑臨時清盤人的累算收費方式，並對處理無力償債業界中“**互相袒護的小圈子**”大加撻伐。

4.10 法院對於香港的會計師事務所不是採用律師事務所的計酬方法，甚表驚訝。律師一般以每六分鐘工時爲單位來收取費用，所以會記錄每六分鐘工時是如何花掉的。會計師的收費常規卻是以概要方式計算，所以無法如律師般細緻記述耗用工時的工作。

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[5] *Mirror Group Newspapers v Maxwell* [1998] BCC 324, the "*Maxwell Case*". 關於接管人費用的評定工作已編配予總聆案官處理，而他已於 1999 年 1 月 12 日作出判決，認許約 99%的接管人費用。總聆案官作出評估時，是依據《最高法院規則》第 62 號規則第 12(1)條應用合理準則作測試，(即理智的律師在考慮到他當時所具有的知識而爲其當事人的利益行事時所作的合理舉措。)，並在刻意摒除事後才知悉的資料作考慮後，引用 *Francis v Francis & Dickerson* [1955] All ER 836 一案的裁決方針作出判決。總聆案官點出麥士維案的不同之處，在於麥士維生前標榜其巨富身分，並控制一系列大規模且極具價值的跨國公司。不過，其後進行調查後才發現這一切純屬假象，有關資產的真正擁有權必須由司職人員經過縝密調查後才能確定。總聆案官又指出，倘若司職人員未有竭盡所能追查所有可能屬於麥士維產業的財產，他們反而可能受到最爲嚴峻的責難。(摘錄自 Wilde Sapte, Solicitors, London 擬定的總聆案官 Hurst 的判詞概要。)

4.11 上述細微但重要的區別，並非只限見於香港的情況。《費里斯報告書》也承認，律師界沿用的按時計酬作業模式，是經過法院的訟費評定官多年來審查其帳單工作而發展出來的，而會計師的收費卻一向都沒有受到這樣的審查。這當中的細微分別，或許是香港法院就百富勤案作出評論時所忽略的。

4.12 我們得指出，法院認爲開誠公布司職人員的收費是關乎公眾利益。法院的觀點獲得支持，這從回應《諮詢文件》的意見書中有不少都提述司職人員酬金一事，便可見一斑。此外，無力償債專業人員也希望釐清有關事宜。下文載述的建議正是要釐清有關情況。

現時如何看待司職人員的收費

4.13 《費里斯報告書》鑑定有 11 類與處理無力償債案有關的業務。如前文所述，《公司條例》對於各類無力償債專業人員的酬金的規定或有疏漏，但就這方面事宜訂立嚴格規則，也非良策。我們認爲訂明指引，以規範司職人員的作業模式會較爲適當。

4.14 對無力償債案所牽涉的酬金／收費進行全面審查的工作。目前尚未有任何組織可以勝任，甚至法院也不能勝任。現將有關費用的類別載列如下：

- 接管人所收取的費用。該接管人是由債權證持有人委任並負責變現足夠資產以清償債權證的欠款額（有關公司甚至可能不是無力償債的）；

- 清盤人的收費，包括臨時清盤人的收費；

- 清盤人所委任的律師和代理人的收費；及

- 在新的企業拯救法例生效後引入的臨時監管人的收費。

4.15 訟費評定官在處理法律費用方面固然游刃有餘，但在處理清盤人的收費方面卻未必能勝任，因爲清盤事務屬於另一個專業範疇，更何況訟費評定官是否有司法管轄權審裁清盤人或臨時清盤人的收費，迄今尚存疑問。法院審查收費的能力可能更遜於訟費評定官，更何況法院也沒有時間詳細考查收費細節。

4.16 司職人員的職責包括監管工作，以確保有關的律師和特別經理人的收費是合理的，而所提供的服務也物有所值。就本報告書

而言，無論他們在過去或現在是否有切實履行其責任，但“**互相袒護的小圈子**”的情況既已曝光，當局便需要正視處理。

《費里斯報告書》

4.17 《費里斯報告書》是於 1998 年 8 月發表的，研究課題爲：

“司職人員的酬金和准支付予律師或由司職人員支付予律師的款額”。

4.18 該報告書又研究釐定酬金的一般準則，包括破產事務處處長的收費率、佔已變現或分發資產的若干百分率、預設或不預設上限的合理衡工量值收費率等、由各有關方面商議協定的收費方式，或甚至按事態發展而訂定酬金的收費方式等。

4.19 就本報告書而言，我們注意到現時引起爭議的並非清盤人、臨時清盤人以至其他人的收費率基準，而是有關費用是否徵收得當。至於收費率事宜，或需要留待其他組織日後探討。我們目前只**建議**保留按收費率釐定收費的方法。

4.20 《費里斯報告書》指出，《無力償債法令》提供了兩條評定酬金的方程式，並在權衡利害後，表明選用《無力償債規則》第 4.30 條提述的**“臨時清盤人方程式”**，而捨棄《無力償債規則》第 4.127 條所提述的**“清盤人方程式”**，理由如下：**(i)臨時清盤人方程式**處理工時的方法較合邏輯（將工時當作必須結合其他多項因素來檢討，而非作爲獨立因素看待），以及**(ii)臨時清盤人方程式**的演算方式，是將相關因素視作爲評定酬金時需予通盤考慮的，而非只限於在選用計算酬金基準方法時，即按資產值的若干百分率或按時計酬方法之間作出取捨時，才予考慮。

4.21 **臨時清盤人方程式**所包括的因素如下：

- 所耗用時間；
- 案情複雜與否；
- 需承擔的額外責任；
- 表現績效；及
- 所處理的財產的價值和性質。

4.22 我們**建議**採用**臨時清盤人方程式**，作爲下文所述司職人員的指引，並供下文所述的小組應用。

4.23 《費里斯報告書》也考慮了其他多項評定酬金的條件，但認爲**臨時清盤人方程式**所列的因素已兼顧了有關的條件。不過，我們**建議**在**臨時清盤人方程式**中另加一項條件，就是《費里斯報告書》所指的**"爲提高可變現款額而進行調查的需要和適切性"**的條件。

4.24 我們**建議**採納這項測試準則，但須先修改爲**"爲可能會或可能不會提高變現款額而進行調查的需要和適切性"**。我們認爲酬金和變現款額無疑是重要，但同時也確有需要向公司進行最起碼且恰當的法定調查工作，更何況在評定酬金是否合理時，所變現的款額也並非是唯一需要考慮的因素。我們會在探討破產管理署署長的經費一章再詳細論述。[6]

4.25 如果說《費里斯報告書》有任何可議之處，就是該報告書在評審司職人員的作爲方面，過於着重物有所值和變現款額的條件。我們認爲將資產變現的工作固然重要，以確保司職人員不會將債權人的金錢胡亂花在無大用處的程序上或成功機會渺茫的追討工作上，但也應該留有餘地，使清盤人和審查委員會遇到成果未卜的情況時，例如採取行動後未必能如願取得成果，或耗資調查公司高級人員也許會徒勞無功時，也能決定採取行動。即使最終是無功而還，司職人員也不用擔心其酬金會因而受影響。我們認爲這個方針與總聆案官就"麥士維案"收費所作的評論相若。[7]

需要成立小組審查司職人員的收費

4.26 我們**建議**的解決方法，是成立小組審裁交予其覆檢的無力償債案收費。

小組／審查員處理程序

4.27 我們**建議**這小組應該在破產管理署署長轄下設立。

4.28 我們關注到這個小組的收費，必須不致大幅增加處理無力償債程序的開支。因此，我們**建議**設立的制度，是將所有向小組申訴的案件都先交由一位審查員審議，評估該申訴的理據。開設審查員一職尚有其他優點，就是在貫徹應用規則和引用經時間累積的先

6 參閱第 5.15 段和第 11.42 段。

7 參閱第 4.6 段的註腳內容。

例方面，審查員都較小組更爲勝任，而且處理個案所需時間也較短。

4.29 只有當涉案其中一方屆時不接納審查員的評估時，才會成立小組審裁。在這情況下，破產管理署署長會從小組名單中委出成員組成小組，以審議有關申訴，並作出最後決定。小組所作的決定不會受上訴規限。

小組只審議經轉介的爭議收費個案

4.30 在綜觀無力償債案的整體情況後，可見將所有無力償債案所涉及的收費事宜都轉交小組審議，未免不切實際，而且涉及費用高昂。現時每年平均有超過 1,000 宗成員（有償債能力情況下）自動清盤案，超過 200 宗債權人（無力償債情況下）自動清盤案，以及約有 450 宗法院清盤案，另外尚有接管案和破產案等。即使只按上述三類清盤案的數字來計算，如以小組每星期工作五天計，平均每天便需要審理六宗案件。

4.31 鑑此，我們**建議**有關司職人員及其代理人的收費，如律師的收費等（但經評定者除外），應該只限於對收費有爭議時才轉交小組處理。我們得重申，該小組是不會參與釐定收費水平，而只會評定有關收費是否支取得宜。

小組成員

4.32 我們**建議**這小組成員應該由特許無力償債專業人員和註冊無力償債專業人員出任（在尚未有這類成員前，則由現時破產管理署署長委入甲組和乙組名單的無力償債專業人員出任），並包括其他尚待鑑定界別的專業人士、破產管理署的代表，以及在可行情況下加入其他如破產欠薪保障基金委員會和消費者委員會等組織的代表。

4.33 兩個受諮詢團體卻不大歡迎上述的最後建議，因爲來自消費者委員會等業外團體的代表，對於無力償債程序或司職人員的工作，一般都缺乏經驗或認識，有關團體並表示無法理解爲何將消費者委員會等團體界定爲有利益關係的團體，更無法想像這類組織在小組中可發揮甚麼功能。

4.34 不過，爲樹立小組公開無私的形象，也爲免致小組予人有“互相袒護的小圈子”的印象，加入消費者委員會等組織的代表作爲小組成員，正可消除這種觀感。如上文所述，法院認爲司職人員

的收費涉及公眾利益，而回應《諮詢文件》的意見書也認同這見解。況且業外代表可迅速累積足夠知識去評定酬金是否合理。我們得提醒司職人員，這個小組所審議的不是收費水平，而是有關費用是如何招致的，以及按有關案情而論是否合理。

4.35 每宗經轉介的個案都會由三個來自上述不同利益界別的代表組成小組審理。這樣的組合安排，當可消弭以自律爲名來維持高收費的疑慮。

向小組申訴

4.36 我們**建議**法院、破產管理署署長和司職人員都有當然權利要求該小組審議案件，使法院和破產管理署署長可以將他們認爲可疑的收費案轉介小組評審和作最後決定。司職人員遇有債權人和債權證持有人不同意他們的收費時，也可以行使當然權利提出申訴。由法院或破產管理署署長提出的申訴，有關費用會由有關的產業支付。由司職人員提出的申訴，有關費用須由司職人員支付，但他可從產業取得彌償。

4.37 我們**建議**，債權人、債權證持有人和其他對司職人員費用享有權利的人必須向法院申請後，才可向小組提出申訴。在這些情況下，有關申訴的費用，由法院視乎評估結果而裁定。這是確保提交小組審議的申訴均是有理據的，因爲法院會將所有基於錯誤理解或瑣屑無聊的申訴摒諸門外。

小組如何收費

4.38 我們**建議**這個小組應該自負盈虧。由於小組的管理工作會由破產管理署署長負責，所以必須考慮該署在這方面所需的經費。現時擬藉徵收費用來彌補破產管理署的行政費用和小組成員的費用。

4.39 至於小組收費方面，可以參照訟費評定官的收費率。訟費評定官現行的徵費細則如下：首 10 萬元的收費率爲 6%，其次的 15 萬元的收費率爲 4%，再其次的 25 萬元的收費率爲 3%，餘款的收費率劃一爲 1%。[8] 我們預期小組的收費或可定得較低。事實上，情況

[8] 《高等法院費用規則》（第 4 章）附表 1 第 19 段。

理應如此，尤以由審查員自行解決而無需再經小組處理的個案爲然；這類個案應該佔大多數。

小組享有訊問權

4.40 我們**建議**小組應該享有如訟費評定官的訊問權。[9] 訟費評定官履行評定訟費的職能時：

- 可就任何與正在評定中的訟費的支付相關的金錢往來製備帳目；
- 可訊問證人；及
- 可指示交出有關文件。

[9] 《高等法院規則》（第 4 章）第 62 號命令第 14 條規則。

Appendix 6

THE LAW REFORM COMMISSION
OF HONG KONG

REPORT ON

THE WINDING-UP PROVISIONS OF THE COMPANIES ORDINANCE

This report can be found on the Internet at: ***<http://www.info.gov.hk>.***

Mr Jeremy Glen, *Senior Government Counsel, was principally responsible for the writing of this Commission report.*

JULY 1999

Chapter 4 - Remuneration (Fees) of Office-holders[1]

4.1 The *Consultation Paper* made little reference to the remuneration of office-holders. Since the publication of the *Consultation Paper* in April 1998, there have been developments in the approach of the court to the question of remuneration. Because of this, the recommendations made in this chapter have not been subject to the full consultation process.

4.2 We have, however, consulted the representative bodies of those who would be most likely to be affected by the recommendations, that is, the Law Society, the Hong Kong Society of Accountants and the Hong Kong Institute of Company Secretaries. The bodies expressed broad support for the recommendations. We note, however, that the recommendations set out below in relation to the convenor were not addressed to the bodies as they evolved after the bodies' submissions were received.

4.3 We do not intend to focus any more than necessary on cases that have been or are before the court on fees as the recommendations attempt to look forward having taken account of the developments both here and in the United Kingdom.

4.4 We need, however, to refer to the *Peregrine case*[2] to set out recent events in Hong Kong, as this case more than any other has established the court's approach to office-holders' fees in Hong Kong. The *Peregrine case* relates, for the most part, to the fees of the provisional liquidators of the Peregrine group of companies which were wound-up by the court in January 1998. The fees of the provisional liquidators in the *Peregrine case*, and in other cases, have been the subject of scrutiny by the court.

4.5 The Companies Ordinance does not make provision for the remuneration of provisional liquidators. It is accepted that a private provisional liquidator is entitled to sufficient remuneration to compensate him for the work done, so long as it is properly earned. A provisional liquidator may be appointed once a petition to wind-up a company has been presented and before a winding-up order has been made under section 193 of the Companies Ordinance and, in any event, under section 194, a provisional liquidator acts in all cases after a winding-up order has been made up to the appointment of a liquidator by the first meeting of creditors.[3]

4.6 Questions have been raised in the United Kingdom over the fees of not just liquidators and provisional liquidators, but other office-holders, which

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1 For definition of "*Office-holder*" see paragraph 12 of the Introduction.

2 See *re Peregrine Investments Holdings Ltd.* [1998] 3 HKC 1 CFI.

3 Note the Companies (Winding-up) Rules, rules 28, 146 and 147.

culminated in a *Report of the Ferris Committee "the Ferris Report"*[4] which itself moderated its tone from comments originally made in the "*Maxwell case*" where Ferris J. had taken a strong view on an application for fees by receivers.[5]

4.7 The Hong Kong court considered that office-holders were:

> "*... fiduciaries charged with the duty of protecting, getting in, realizing and ultimately passing on to others assets and properties which belong not to themselves but to creditors or beneficiaries of one kind and another.*"
>
> The court continued that:
>
> "*The allowance of remuneration to office-holders represents an exception to the rule that a trustee must not profit from his trust which rule applies to all kinds of person who are in a fiduciary position. This exception inevitably involves a conflict between the interests of the fiduciary who is to receive such remuneration and the interests of those to whom the fiduciary duties are owed, who will bear whatever remuneration is allowed.*"

4.8 The comments of the court in the *Peregrine case* came after the comments in the *Maxwell case* but before the *Ferris Report*.

4.9 The usual method of charging fees for provisional liquidators, receivers and other office-holders in Hong Kong has been on a time costing basis but a scale or percentage basis may also be appropriate. There was no dispute about the level of time cost scale of fees charged by the provisional liquidator in the *Peregrine case* or, generally, in other cases. The concern of the court was on how the fees had been charged. The court raised serious questions about the way that provisional liquidators have been accumulated their fees and made harsh comments about "*cosy relationships*" in the insolvency business.

4.10 The court expressed astonishment that accounting firms in Hong Kong did not time cost their work in the same way as firms of solicitors. Solicitors generally charge in units of 6 minutes and are therefore able to account for how every six minutes is spent. The practice of accountants has been to charge on a

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[4] Report of Mr. Justice Ferris' Working Party on the remuneration of office-holders and certain related matters.

[5] *Mirror Group Newspapers v Maxwell* [1998] BCC 324, the "*Maxwell case*". It should be noted that the assessment of the fees of the receivers was allocated to a Chief Master who delivered a judgment on 12 January 1999 which allowed about 99 per cent of the receivers' fees. The Master approached the assessment by applying the test of reasonableness under RSC Order 62, rule 12(1), (that is, that of a sensible solicitor considering what, in the light of his then knowledge, was reasonable in the interests of his client) and without using hindsight, in accordance with the decision in *Francis v Francis & Dickerson* [1955] All ER 836. The Master distinguished the *Maxwell case* to the extent that during his lifetime Mr Maxwell had portrayed himself as a man of immense wealth controlling a range of large multinational companies which were themselves of great value but that subsequent investigations showed that much of this was a facade and the true ownership of assets could only be established by the office-holders after the most painstaking investigation. The Master also noted that had the office-holders not investigated all leads in respect of the property potentially belonging to the estate of Mr Maxwell they would have been open to the severest of criticism. (Extracted from a synopsis of the judgment of Chief Master Hurst prepared by Wilde Sapte, Solicitors, London).

more general basis with the consequence that they are unable to account for fees in the same detail as solicitors.

4.11 This fine and important distinction is not just a Hong Kong practice and the *Ferris Report* acknowledged that the time costing practices of solicitors had developed through many years of scrutiny of their bills by Taxing Masters in the courts whereas accountants had not been subject to such scrutiny. This distinction might not have been apparent to the Hong Kong court when some of its comments in the *Peregrine case* were made.

4.12 The point to be taken is that the court considers that it is a matter of public interest that the matter of fees of office-holders should be open and above board. That the court has support for this view is clear in that submissions on the *Consultation Paper* have made a number of references to remuneration of office-holders. It is also clear that insolvency practitioners would also like to see matters clarified. This is what these recommendations seek to achieve.

How office-holders' fees are treated at present

4.13 The *Ferris Report* identified eleven types of insolvency related practice. As stated, the Companies Ordinance does not adequately address the remuneration of the different types of insolvency practitioner and it might not be the best solution to lay down rigid rules in this respect. We consider that it would be appropriate to set out guidelines within which office-holders should operate.

4.14 At present there is no one body, including the court, which is qualified to consider all aspects of remuneration/fees that arise in an insolvency. These fees range from:

- the fees of a receiver appointed by a debenture holder in realizing sufficient assets to cover the amount owed under the debenture (the company might not even be insolvent);
- the fees of liquidators, including provisional liquidators;
- the fees of solicitors and agents appointed by liquidators; and
- the fees of provisional supervisors when new corporate rescue legislation is introduced.

4.15 The Taxing Master is capable of dealing with legal fees but not necessarily with the fees of liquidators, which relate to a different discipline. There are even questions about the jurisdiction of the Taxing Master to adjudicate on liquidators' or provisional liquidators' fees. The court is probably less qualified than a Taxing Master to consider fees and, in any event, would not have the time to investigate fees in detail.

4.16 Office-holders are expected to make sure that the fees of their solicitors and special managers are reasonable and provide value for money. The extent to which this obligation might or might not have been honoured in the past is

not relevant for the purposes of this report as, rightly or wrongly, the "*cosy arrangement*" genie is out of the bottle and needs to be addressed.

The Ferris Report

4.17 The *Ferris Report*, which was published in August 1998, considered:

> "*the remuneration of office-holders and the amount to be allowed for disbursements paid or to be paid by an office-holder to solicitors.*"

4.18 The *Report* considered the general basis on which remuneration should be fixed including the Official Receiver's scale of fees, percentages of assets realized or distributed, on a *quantum meruit* with or without a ceiling, by agreement between the parties and even on a contingency basis.

4.19 For the purposes of this report, we note that there was no dispute about the scale fees basis of charging fees for liquidators, provisional liquidators and others: the question was whether fees were properly charged. It might be the work of some other body to look at scale fees at a later date but, for now, we **recommend** retaining scale fees as the method of establishing fees.

4.20 The *Ferris Report* noted that the Insolvency Act provided two formulae for assessing remuneration. The *Report* opted for what it termed the "Provisional Liquidator formula *(PL formula)*", being the formula used in the Insolvency Rules, rule 4.30, over what it termed "*the Liquidator Formula*" in the Insolvency Rules, rule 4.127, on the basis that (i) the *PL formula* treated time spent in a more logical way (as one of several factors which had to be reviewed in conjunction with each other, not as a separate factor) and (ii) the *PL formula* was expressed in such a way as to make these factors of general relevance in assessing remuneration instead of appearing to confine that relevance to the choice between adopting a percentage of asset value or time spent as the basis of remuneration.

4.21 The *PL formula* factors are:

- time spent,
- complexity or otherwise,
- exceptional responsibility assumed,
- effectiveness of performance, and
- value and nature of the property dealt with.

4.22 We **recommend** the *PL formula* as a guideline for office-holders, and for application by the Panel we refer to below.

4.23 The *Ferris Report* also considered a number of other criteria for assessing remuneration but felt that the *PL formula* factors already contemplated these other criteria. We **recommend**, however, the addition of one of the other criteria to the *PL formula*. The *Ferris Report* referred to the criterion of "*the need for and desirability of investigatory work leading to additional realizations.*"

4.24 We **recommend** the adoption of an amended version of this test, that of "*the need for and desirability of investigatory work* ***which may or may not*** *lead to additional realizations*". We consider that while the question of remuneration and realizations are important, there is also an underlying need for a proper minimum statutory investigations of companies and that realizations are not the only issue that need to be considered in assessing the reasonableness of remuneration. We expand on this subject in comments in the chapter on the funding of the Official Receiver's Office.[6]

4.25 If we take issue with anything that has come out of the *Ferris Report*, it is to the extent that the *Report* tends to dwell on value for money and realizations in assessing the actions of office-holders. We consider that while realizations are important and while it is important to ensure that office-holders do not squander creditors' money on investigations or proceedings with little merit or prospects of recovery, there must be some outlet, for example, for a liquidator and a committee of inspection to decide to take an action where the prospects of a favourable outcome are uncertain or to spend money on investigations into the actions of officers of a company which may not necessarily bear fruit. If nothing ultimately results from such an action, an office-holder should not expect to be prejudiced in terms of his remuneration. We would note that this approach has parallels with the comments made by the Chief Master in his assessment of the fees of the *Maxwell case.*[7]

The need to establish a Panel to scrutinise office-holders' fees

4.26 The solution, we **recommend**, is to establish a Panel that would adjudicate all insolvency fees brought before it.

How the Panel/Convenor would operate

4.27 We **recommend** that the Panel should be established under the auspices of the Official Receiver.

4.28 We are concerned that the Panel should not have the effect of adding greatly to the costs of an insolvency proceeding. For this reason, we **recommend** the establishment of a system under which every application to the Panel would be considered in the first instance by a convenor who would make an assessment of the merits of the application. Other advantages of a convenor would be that the convenor would be in a position to apply with consistency the rules and precedents that would be established over a period of time and the convenor would be able to do so more quickly than a Panel.

4.29 A Panel would be formed only where one of the parties concerned was not prepared to accept the assessment of the convenor. In such circumstances a Panel would be appointed by the Official Receiver from the panel list to consider the application and to make a final decision which would not be subject to any appeal.

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6 See paragraph 5.15 and paragraphs 11.41 and 11.42.

7 See the footnote to paragraph 4.6.

The Panel to consider disputes as to fees only in cases referred to it

4.30 Looking at the overall picture of insolvency cases, it would be impractical and expensive to provide that fees in every insolvency matter should be brought before the Panel. In an average year, there are over 1,000 members' (solvent) voluntary windings-up, over 200 creditors' (insolvent) voluntary windings-up and about 450 windings-up by the court, not to mention receiverships and bankruptcy. In terms of the three figures quoted above alone, the Panel would need to consider up to six cases per day based on a 5-day working week.

4.31 We **recommend** therefore that the fees of office-holders, and those of their agents, such as solicitors, save where otherwise taxed, should be capable of being referred to the Panel only in the event of a dispute as to fees. We reiterate that the Panel would not be involved in the fixing of fees, merely in assessing whether the fees have been properly charged and spent.

Who would be on the Panel

4.32 We **recommend** that the Panel should be made up of Licensed and Registered Insolvency Practitioners when established (but until then by insolvency practitioners appointed to the Official Receiver's List A Panel and List B Panel), other professionals to be identified, representatives of the Official Receiver's Office and representatives from bodies such as the Protection of Wages on Insolvency Fund Board and the Consumer Council.

4.33 This last recommendation was not greeted with enthusiasm by two of the bodies consulted on the recommendations on the basis that representatives of lay bodies such as the Consumer Council would generally have no experience or knowledge of insolvency procedures or the work of office-holders. It was also stated that it was unclear how the Consumer Council, for instance, could be considered an interested party or what role would be envisaged for them on the Panel.

4.34 There is, however, the need for openness and the need to avoid the Panel being perceived as being part of a cosy relationship. The presence of representatives of bodies such as the Consumer Council would serve to dispel such perceptions. It is clear that the court sees an element of public interest in the fees of office-holders and submissions on the *Consultation Paper* echoed this view. Lay representatives would quickly accumulate the necessary knowledge to assess claims for remuneration. We would also remind office-holders that the Panel would not consider the level of fees but only how fees had been incurred and whether the fees were reasonable in the circumstances.

4.35 A panel of three would sit in every case referred to it. The composition of each Panel would be made up of different representatives from the areas of interest identified above. This mix on Panels should serve to dispel doubts about self-regulation maintaining high fees.

Access to the Panel

4.36 We **recommend** that the court, the Official Receiver and office-holders should have the right to apply to the Panel as of right. The court and the

Official Receiver would therefore be able to refer fees that it considered questionable to the Panel for assessment and final decision. Office-holders should be able to apply as of right in the event that creditors or debenture holders would not agree to their fees. In an application by the court or by the Official Receiver, the costs of the Panel would be borne by the estate. In the event of an application by an office-holder, the costs would be paid by the office-holder subject to an indemnity from the estate.

4.37 We **recommend** that creditors, debenture holders and others who may have an interest in the fees of an office-holder should only have access to the Panel by application to the court. In such cases, the costs of the application should be decided by the court depending on the outcome of the assessment. The reason for this is to ensure that applications to the Panel would be of substance. The court would act to exclude misconceived or nuisance applications.

How the Panel would charge

4.38 We **recommend** that the Panel should be self-funding. The administration of the Panel would be carried out by the Official Receiver and the funding of the Official Receiver's Office in this regard would need to be addressed. The intention would be that the administration costs of the Official Receiver's Office and the costs of Panel members would be covered by fees charged.

4.39 The Panel could charge on the scale employed by the Taxing Master, who charges six per cent of the amount of fees allowed up to $100,000, four per cent for the next $150,000, three per cent for the next $250,000 and one per cent for the remainder.[8] We anticipate that the fees of the Panel would be lower. This should be the case, particularly in cases, which should be the majority, where an assessment by the convenor is not referred to the Panel.

Panel to be inquisitorial

4.40 We **recommend** that the Panel should have inquisitorial powers along the lines of the powers enjoyed by the Taxing Master.[9] The Taxing Master, in the discharge of his functions may, among other things:

- take an account of any dealings in money made in connection with the payment of the costs being taxed;
- examine witnesses; and
- direct the production of documents.

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8 See the High Court Fees Rules (Cap. 4), First Schedule, paragraph 19.

9 See The Rules of The High Court (Cap. 4), Order 62, rule 14.

228A. Special procedure for voluntary winding up in case of inability to continue its business

(1) The directors of a company or, in the case of a company having more than 2 directors, the majority of the directors, may, if they have formed the opinion that the company cannot by reason of its liabilities continue its business, resolve at a meeting of the directors and deliver to the Registrar a statutory declaration by one of the directors verifying written statements signed by the directors recording the resolution that—

(*a*) the company cannot by reason of its liabilities continue its business; and

(*b*) subject to subsection (1B), they consider it necessary that the company be wound up and that the winding up should be commenced under this section because it is not reasonably practicable for the winding up to be commenced under another section of this Ordinance; and *(Replaced 46 of 2000 s. 32)*

(*c*) meetings of the company and of its creditors will be summoned for a date not later than 28 days after the delivery of the declaration to the Registrar.

(1A) A statutory declaration made under subsection (1) shall have no effect for the purposes of this Ordinance unless it is delivered to the Registrar for registration within 7 days after the date on which it was made. *(Added 75 of 1993 s. 14)*

(1B) The resolution referred to in subsection (1) shall specify the reasons in support of the consideration mentioned in paragraph (*b*) of that subsection. *(Added 46 of 2000 s. 32)*

(2) Any director of a company making a declaration under subsection (1) without having reasonable grounds—

(*a*) for the opinion that the company cannot by reason of its liabilities continue in business; or

(*b*) to consider that the winding up of the company should be commenced under this section because it is not reasonably practicable for the winding up to be commenced under another section of this Ordinance,

shall be liable to a fine and imprisonment. *(Replaced 46 of 2000 s. 32)*

(3) Where a statutory declaration made by a director of a company under subsection (1) is delivered to the Registrar—

(*a*) the winding up of the company shall commence at the time of the delivery of such declaration;

(*b*) the directors shall forthwith appoint a person to be provisional liquidator in the winding up and deliver evidence of the appointment to the Registrar with the statutory declaration;

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228A. 在無能力繼續業務的情況下自動清盤的特別程序

(1) 公司的董事或(如公司有多於 2 名董事)過半數的董事如已得出結論，認為公司因其負債而不能繼續其業務，可在董事會議上議決並向處長交付一份由其中一名董事作出的法定聲明，而該份法定聲明是核實經該等董事簽署並記錄有以下決議的陳述書的—— *(由 2000 年第 32 號第 48 條修訂)*

(*a*) 公司因其負債而不能繼續其業務；及

(*b*) 在符合第(1B)款的規定下，該等董事的意見認為需要將公司清盤，並認為基於根據本條例的其他條文開始清盤並非合理地切實可行，故應根據本條開始清盤；及 *(由 2000 年第 46 號第 32 條代替)*

(*c*) 公司會議及公司債權人會議會在該份法定聲明交付處長後 28 天內召集。

(1A) 根據第(1)款作出的法定聲明，除非是在其作出的日期後 7 天內交付處長登記，否則就本條例而言並無效力。 *(由 1993 年第 75 號第 14 條增補)*

(1B) 第(1)款提述的決議須指明有何理由支持該款(*b*)段提及的意見。 *(由 2000 年第 46 號第 32 條增補)*

(2) 如公司的任何董事根據第(1)款作出法定聲明，但並無合理的理由而——

(*a*) 得出公司因其負債而不能繼續其業務的結論；或

(*b*) 認為基於公司根據本條例的其他條文開始清盤並非合理地切實可行，故應根據本條開始清盤，

該名董事可處罰款及監禁。 *(由 2000 年第 46 號第 32 條代替)*

(3) 凡公司的一名董事根據第(1)款所作出的法定聲明交付處長——

(*a*) 公司的清盤即於該份法定聲明交付時開始；

(*b*) 董事須立即委任一人為清盤的臨時清盤人，並將該項委任的證據連同該份法定聲明交付處長；

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(*c*) the directors shall cause meetings of the company and the creditors of the company to be summoned for a date not later than 28 days after the delivery of such declaration.

(3A) A director who fails to comply with subsection (3)(*b*) or (*c*) shall be liable to a fine. *(Added 75 of 1993 s. 14)*

(3B) Where the directors of a company fail to comply with the requirements of subsection (3)(*c*) the provisional liquidator appointed under subsection (3)(*b*) may summon such meetings. *(Added 75 of 1993 s. 14)*

(3C) No person shall be appointed to be a provisional liquidator under subsection (3)(*b*) unless—

(*a*) he has consented in writing to such appointment; and

(*b*) he is a solicitor, or a professional accountant under the Professional Accountants Ordinance (Cap. 50). *(Added 75 of 1993 s. 14)*

(*c*) 董事須安排在該份法定聲明交付後 28 天內召集公司會議及公司債權人會議。

(3A) 任何董事未有遵從第 (3)(*b*) 或 (*c*) 款的規定，可處罰款。 *(由 1993 年第 75 號第 14 條增補)*

(3B) 凡公司董事未有遵從第 (3)(*c*) 款的規定，根據第 (3)(*b*) 款獲委任的臨時清盤人可召集有關會議。 *(由 1993 年第 75 號第 14 條增補)*

(3C) 任何人不得根據第 (3)(*b*) 款被委任為臨時清盤人，除非——

(*a*) 該人已用書面同意該項委任；及

(*b*) 該人是一名律師，或是一名《專業會計師條例》(第 50 章) 所指的專業會計師。 *(由 1993 年第 75 號第 14 條增補)*

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(4) Not later than 14 days after the appointment of a provisional liquidator by the directors of a company under this section, the directors shall give public notice in the Gazette of—

(*a*) the commencement of the winding up of the company by the delivery to the Registrar of a statutory declaration made under this section, and the date of such delivery; and

(*b*) the appointment of the provisional liquidator and his name and address.

(4A) A provisional liquidator appointed by the directors of a company under this section shall, within 14 days after the date of his appointment, deliver to the Registrar for registration a notice of his appointment. *(Added 75 of 1993 s. 14)*

(4B) If a provisional liquidator fails to comply with subsection (4A) he shall be liable to a daily default fine. *(Added 75 of 1993 s. 14)*

(5) *(Repealed 75 of 1993 s. 14)*

(6) A provisional liquidator appointed by the directors of a company under this section shall—

(*a*) unless the liquidator is sooner appointed, hold office until a meeting of creditors of the company summoned under subsection (3)(*c*) or, if that meeting is adjourned, any adjourned meeting, may allow;

(*b*) take into his custody or under his control all the property and things in action to which the company is or appears to be entitled;

(*c*) be entitled, out of the funds of the company, to such remuneration as the committee of inspection or, if there is no such committee, the creditors, may fix and to reimbursement of expenses properly incurred by him, but he shall not be liable, and no civil action or other proceedings shall lie against him, in respect of acts properly done by him.

(7) A provisional liquidator appointed by the directors of a company under this section shall, for the period of his appointment, have the like powers and be subject to the like duties as a liquidator in a creditors' voluntary winding up, and, accordingly, all the powers of the directors shall cease during that period except so far as may be necessary for the purpose of enabling the directors to comply with this section or the provisional liquidator sanctions the continuance thereof for any other purpose.

(7A) Notwithstanding subsection (7), a provisional liquidator appointed by the directors of a company under this section shall not have power to sell any property to which the company is or appears to be entitled, except where such sale is made in the course of carrying on business in accordance with section 231, unless—

(*a*) the property is of a perishable nature or likely to deteriorate if kept; or

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(4) 在公司董事根據本條委任臨時清盤人後 14 天內，董事須就以下事項在憲報發出公告——

(*a*) 公司藉向處長交付根據本條作出的法定聲明而開始清盤一事，以及該份法定聲明的交付日期；及

(*b*) 臨時清盤人的委任及其姓名和地址。

(4A) 公司董事根據本條所委任的臨時清盤人，須於其委任日期後 14 天內，將一份有關其委任的通知書交付處長登記。 *(由 1993 年第 75 號第 14 條增補)*

(4B) 臨時清盤人如未有遵從第(4A)款的規定，可處按日計算的失責罰款。 *(由 1993 年第 75 號第 14 條增補)*

(5) *(由 1993 年第 75 號第 14 條廢除)*

(6) 公司董事根據本條所委任的臨時清盤人——

(*a*) 除非清盤人在較早之前委出，否則須任職直至根據第 (3)(*c*) 款召集的公司債權人會議所容許的時間，或如該會議延期，則直至任何延會所容許的時間；

(*b*) 須將公司有權享有或看似有權享有的所有財產及據法權產加以保管或控制；

(*c*) 有權獲得從公司資金中撥付經審查委員會或(如無審查委員會)債權人釐定的酬金，以及臨時清盤人所恰當招致的開支的補還款項，但他無須就其恰當作出的作為而承擔法律責任，且任何人亦不得就該等作為而對其提出任何民事訴訟或其他法律程序。

(7) 公司董事根據本條所委任的臨時清盤人，在其獲委任期間所具有的權力及須執行的職責與債權人自動清盤案中的清盤人所具有者及須執行者相同，而據此，公司董事的所有權力須在該段期間終止，但如為使公司董事能遵從本款規定而有所需要，或臨時清盤人為任何其他目的而認許公司董事權力的延續，則屬例外。

(7A) 即使有第 (7) 款的規定，公司董事根據本條所委任的臨時清盤人，無權將公司有權享有或看似有權享有的任何財產出售(但如屬按照第 231 條經營業務的過程中作出的出售則除外)，除非——

(*a*) 該財產屬易毀消性質，或如予以留存則相當可能會變壞；或

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(*b*) the court, on the application of the provisional liquidator, orders the sale of the property. *(Added 75 of 1993 s. 14)*

(8) In relation to every winding up commenced under this section—

(*a*) section 241 shall apply to a meeting of the creditors of the company summoned under this section as it applies to a meeting of the creditors of a company summoned under that section except that—

(i) for the words "at which the resolution for voluntary winding up is to be proposed" in subsection (1) of that section there shall be substituted the words "of the company";

(i*a*) the sending of the notices by post and the advertisement of the meeting of creditors required by subsections (1) and (2) of that section respectively shall occur at least 7 days before the meeting of creditors, and the requirement in subsection (1) of that section as to simultaneous sending of notices shall not apply; *(Added 75 of 1993 s. 14)*

(ii) subsection (5) of that section shall be omitted;

(*b*) subject to paragraph (*a*), sections 241 to 248 shall apply as they apply in relation to a creditors' voluntary winding up.

(Added 6 of 1984 s. 161. Amended 75 of 1993 s. 14)

229. Notice of resolution to wind up voluntarily

(1) When a company has passed a resolution for voluntary winding up, it shall, within 14 days after the passing of the resolution, give notice of the resolution by advertisement in the Gazette. *(Amended 1 of 1949 s. 16; 15 of 1955 s. 6)*

(2) If default is made in complying with this section, the company and every officer of the company who is in default shall be liable to a fine and, for continued default, to a daily default fine, and for the purposes of this subsection the liquidator of the company shall be deemed to be an officer of the company. *(Amended 7 of 1990 s. 2; L.N. 587 of 1995)*

[*cf. 1929 c. 23 s. 226 U.K.*]

230. Commencement of voluntary winding up

Except as provided in section 228A(3)(*a*), a voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.

(Amended 75 of 1993 s. 15)

[*cf. 1929 c. 23 s. 227 U.K.*]

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(*b*) 法院應臨時清盤人的申請下令將該財產出售。 *(由 1993 年第 75 號第 14 條增補)*

(8) 就根據本條而開始的每宗清盤而言——

(*a*) 第 241 條適用於根據本條召集的公司債權人會議，一如其適用於根據該條召集的公司債權人會議，但——

(i) 該條第 (1) 款中"將有自動清盤決議提出的"等字，須以"公司的"等字代替；

(i*a*) 該條第 (1) 及 (2) 款所分別規定的以郵遞方式送交債權人會議通知書及就債權人會議刊登公告事宜，須於債權人會議的最少 7 天前作出，而該條第 (1) 款關於同時送交通知書的規定，並不適用； *(由 1993 年第 75 號第 14 條增補)*

(ii) 該條第 (5) 款須予略去；

(*b*) 除 (*a*) 段另有規定外，第 241 至 248 條適用，一如其適用於債權人自動清盤。

(由 1984 年第 6 號第 161 條增補。由 1993 年第 75 號第 14 條修訂)

229. 自動清盤決議的通知

(1) 當公司已通過自動清盤決議時，須於決議通過後 14 天內，藉在憲報刊登公告而發出有關該決議的通知。 *(由 1949 年第 1 號第 16 條修訂；由 1955 年第 15 號第 6 條修訂)*

(2) 如因沒有遵從本條的規定而構成失責，公司及公司的每名失責高級人員均可處罰款，如持續失責，則可處按日計算的失責罰款，而就本款而言，公司的清盤人須當作是公司的高級人員。 *(由 1990 年第 7 號第 2 條修訂)*

[*比照 1929 c. 23 s. 226 U.K.*]

230. 自動清盤的開始

除第 228A(3)(*a*) 條另有訂定外，自動清盤須當作在自動清盤決議通過之時開始。

(由 1993 年第 75 號第 15 條修訂)

[*比照 1929 c. 23 s. 227 U.K.*]

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168L. Fraudulent trading

(1) Where the court makes a declaration under section 275 that a person is liable for all or any of the debts or other liabilities of a company, the court may, if it thinks fit and whether or not any person applies for such an order, make a disqualification order against the person to whom the declaration relates.

(2) The maximum period of a disqualification order under this section is 15 years.

168M. Criminal penalties

If a person acts in contravention of a disqualification order, he is guilty of an offence and is liable to imprisonment and a fine.

168N. Offences by body corporate

(1) Where a body corporate is guilty of an offence of acting in contravention of a disqualification order, and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

168O. Personal liability for company's debts where person acts while disqualified

(1) A person is personally responsible for all the relevant debts of a company if at any time—

(*a*) in contravention of a disqualification order or of section 156 he is involved in the management of the company; or

(*b*) as a person who is involved in the management of the company, he acts or is willing to act on instructions given without the leave of the court by a person whom he knows at that time to be the subject of a disqualification order or to be an undischarged bankrupt.

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168L. 欺詐營商

(1) 凡法院根據第 275 條宣布某人須對某間公司的全部或任何債項或其他債務承擔法律責任，法院如認為適合，可針對該項宣布有關的人作出一項取消資格令，而不論是否有人申請作出該項命令。

(2) 本條所訂的最長取消資格令期限為 15 年。

168M. 刑事罰則

任何人違反一項取消資格令，即屬犯罪，可處監禁及罰款。

168N. 法人團體所犯罪行

(1) 凡任何法人團體犯了違反一項取消資格令而行事的罪行，並且經證明該罪行是在該法人團體的任何董事、經理、秘書或類似的高級人員或在任何本意是以該身分行事的人的同意或默許下發生的，或是歸因於上述人士的疏忽而發生的，則上述人士以及該法人團體即屬犯罪，並可據此被起訴及懲罰。

(2) 凡法人團體的事務由其成員管理，則第 (1) 款適用於任何成員在其管理職能方面的作為及失責行為，猶如他是該法人團體的董事一樣。

168O. 在被取消資格期間行事的人須對公司債項承擔個人法律責任

(1) 任何人——

(*a*) 違反一項取消資格令或違反第 156 條而牽涉於公司的管理；或

(*b*) 作為牽涉於該公司的管理的人，如按或願意按另一人在未經法院許可的情況下所發出的指示行事，而該人當時知道該另一人是一項取消資格令所指的人或是一名未獲解除破產的破產人，

須對該公司一切有關債項承擔個人責任。

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275. Responsibility of directors for fraudulent trading

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the Official Receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

(1A) On the hearing of an application under subsection (1) the Official Receiver or the liquidator, as the case may be, may himself give evidence or call witnesses. *(Added 6 of 1984 s. 191)*

(2) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any such company or person, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.

For the purpose of this subsection, "assignee" (承讓人) includes any person to whom or in whose favour, by the directions of the person liable under the declaration, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in manner aforesaid shall, whether or not the company has been or is in course of being wound up, be guilty of an offence and liable to imprisonment and a fine. *(Replaced 6 of 1984 s. 191. Amended 7 of 1990 s. 2)*

(4)–(5) *(Repealed 6 of 1984 s. 191)*

(6) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made. *(Amended 76 of 1996 s. 77)*

275. 董事對欺詐營商的責任

(1) 如在公司清盤的過程中，公司任何業務的經營看似是意圖欺詐公司的債權人或任何其他人的債權人或是為了任何欺詐目的，則法院在破產管理署署長或公司的清盤人或任何債權人或分擔人提出申請時，如認為恰當，可宣布任何知情而參與以前述方式經營該業務的人，須按法院指示而就公司的所有或任何債項或其他債務承擔個人責任，且其法律責任是無限的。

(1A) 在法院聆訊根據第 (1) 款提出的申請時，破產管理署署長或清盤人 (視屬何情況而定) 可親自作供或傳召證人。 *(由 1984 年第 6 號第 191 條增補)*

(2) 凡法院作出任何該等宣布，可作出其認為恰當的進一步指示，以實施該項宣布，尤其可作出規定，使任何人根據該項宣布而承擔的法律責任成為公司欠該人的任何債項或公司須對該人履行的任何義務上的押記，或成為該人或代表該人的任何人或公司，或以承讓人身分藉着或透過須承擔法律責任的人或任何該等公司或人士而提出申索的任何人、就公司任何資產所持有或獲歸屬的任何按揭或押記上，或任何該等按揭或押記的任何權益上的押記；法院亦可不時作出為強制執行根據本款施加的任何押記而需要作出的進一步命令。 *(由 2000 年第 32 號第 48 條修訂)*

就本款而言，"承讓人" (assignee) 包括按根據該項宣布須承擔法律責任的人的指示，獲設定、發出或轉讓有關債項、義務、按揭或押記或獲設定有關權益的人或該債項、義務、按揭或押記是為使其受惠而設定、發出或轉讓或該權益是為使其受惠而設定者；但不包括真誠付出有值代價 (藉婚姻付出的代價不包括在內) 且對該項宣布所依據的事宜均不知悉的承讓人。

(3) 凡公司經營任何業務的意圖或目的如第 (1) 款所述者，則不論公司是否已清盤或正在清盤過程中，任何知情而參與以前述方式經營該業務的人，均屬犯罪，可處監禁及罰款。 *(由 1984 年第 6 號第 191 條代替。由 1990 年第 7 號第 2 條修訂)*

(4)–(5) *(由 1984 年第 6 號第 191 條廢除)*

(6) 即使有關的人可能會就該項宣布所依據的事宜承擔刑事法律責任，本條條文仍具效力。 *(由 1996 年第 76 號第 77 條修訂；由 2000 年第 32 號第 48 條修訂)*

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(7) *(Repealed 6 of 1984 s. 191)*

(Amended 6 of 1984 s. 191)
[cf. 1929 c. 23 s. 275 U.K.]

276. Power of court to assess damages against delinquent officer, etc.

(1) If in the course of winding up a company it appears that any person who has taken part in the formation or promotion of the company, or any past or present officer or liquidator or receiver of the company, has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of duty in relation to the company which is actionable at the suit of the company, the court may, on the application of the Official Receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter, officer, liquidator or receiver, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance, or breach of trust as the court thinks just.

(2) The provisions of this section shall have effect notwithstanding that the offence is one for which the offender may be criminally liable.

(3) *(Repealed 76 of 1996 s. 78)*

(Amended 6 of 1984 s. 192)
[cf. 1929 c. 23 s. 276 U.K.]

277. Prosecution of delinquent officers and members of company

(1) If it appears to the court in the course of a winding up by the court that any past or present officer or member of the company has been guilty of any offence in relation to the company for which he is criminally liable, the court may, either on the application of any person interested in the winding up or of its own motion, direct the liquidator to refer the matter to the Secretary for Justice. *(Amended 6 of 1984 s. 193)*

(2) If it appears to the liquidator in the course of a voluntary winding up that any past or present officer or member of the company has been guilty of any offence in relation to the company for which he is criminally liable, he shall forthwith report the matter to the Secretary for Justice, and shall furnish to the

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(7) *(由 1984 年第 6 號第 191 條廢除)*

(由 1984 年第 6 號第 191 條修訂)
[比照 1929 c. 23 s. 275 U.K.]

276. 法院針對犯罪高級人員等而評估損害賠償的權力

(1) 如在公司的清盤過程中，任何曾參與公司的組成或發起的人，或公司的任何過去或現在的高級人員或公司的任何清盤人或接管人，看似曾誤用或保留公司的任何金錢或財產，或須就公司的任何金錢或財產承擔法律責任或作出交代，或曾犯涉及公司的任何失當行為或失職行為，而公司是可就該等失當行為或失職行為提出起訴的，則法院可應破產管理署署長或清盤人或任何債權人或分擔人提出的申請，就該名發起人、高級人員、清盤人或接管人的行為操守進行訊問，並強迫該人償還或歸還該等金錢或財產或其任何部分，連同按法院認為公正的利率計算的利息，或就該項誤用、保留、失當行為或違反信託行為而將法院認為公正的款項注入公司的資產以作為補償。

(2) 即使有關罪行是有關罪犯可能須負刑事法律責任的罪行，本條條文仍具效力。

(3) *(由 1996 年第 76 號第 78 條廢除)*

(由 1984 年第 6 號第 192 條修訂)
[比照 1929 c. 23 s. 276 U.K.]

277. 對公司的犯罪高級人員及成員的檢控

(1) 在由法院作出的清盤過程中，如法院覺得公司的任何過去或現在的高級人員或成員曾犯涉及公司的任何罪行而又須就該罪行負刑事法律責任，則法院可應任何在該清盤中有利害關係的人提出的申請或主動指示清盤人將有關事宜轉呈律政司司長。*(由 1984 年第 6 號第 193 條修訂)*

(2) 在自動清盤的過程中，如清盤人覺得公司的任何過去或現在的高級人員或成員曾犯涉及公司的任何罪行而又須就該罪行負刑事法律責任，則清盤人須立即將此事向律政司司長報告，並須向律政司司長提供其所需要的資料，以便律政司司長按其需

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30E. 氣體、水、電等的供應

(1) 凡在任何一日("有關日期")——

(*a*) 有破產令針對一名債務人作出；或

(*b*) 由一名債務人建議的自願安排在根據第 20E 條召集的會議上獲批准，

則本條予以適用，而在本條中，"負責人" (the office-holder) 指破產管理署署長或受託人 (視屬何情況而定)；就一項自願安排而言，則指代名人。

(2) 如為在有關日期後為第 (4) 款所述的任何一項供應而提出第 (3) 款所指的要求，則供應者可將負責人就繳付該項供應的任何收費而親自作出的保證，作為作出該項供應的一項條件，但供應者不得直接或間接將就在有關日期之前向債務人作出的供應而尚未清償的收費須獲支付，作為作出該項供應的一項條件。

(3) 在以下情況下提出的要求，即為本款所指的要求——

(*a*) 由負責人提出或在其贊同下提出的；及

(*b*) 為債務人、該債務人是或曾經是成員的商號或合夥、或該債務人的或該商號或合夥的代理人或經理現在所經營或曾經營的業務而提出的。

(4) 以下乃第 (2) 款提述的供應——

(*a*) 向公眾供應氣體；

(*b*) 向公眾供應電；

(*c*) 根據《水務設施條例》(第 102 章) 供應水；

(*d*) 根據《電訊條例》(第 106 章) 獲發牌的公眾電訊經營商所提供的電訊服務。

(由 1996 年第 76 號第 21 條增補)

31. *(由 1996 年第 76 號第 22 條廢除)*

32. 破產解除令的效力

(1) 破產解除令並不使破產人得以免除償付下列債項或債務——

(*a*) *(由 1996 年第 76 號第 23 條廢除)*

(*aa*) 凡根據《販毒 (追討得益) 條例》(第 405 章) 作出任何沒收令或登記任何外地沒收令，則根據該沒收令或外地沒收令而須支付任何款項的法律責任；或 *(由 1989 年第 35 號第 32 條增補。由 1991 年第 19 號法律公告修訂)*

30E. Supplies of gas, water, electricity, etc.

(1) This section applies where on any day ("the relevant day")—

(*a*) a bankruptcy order is made against a debtor; or

(*b*) a voluntary arrangement proposed by a debtor is approved at a meeting summoned under section 20E,

and in this section "the office-holder" (負責人) means the Official Receiver or the trustee, as the case may be, or, in the case of a voluntary arrangement, the nominee.

(2) If a request falling within subsection (3) is made for the giving after the relevant day of any of the supplies mentioned in subsection (4), the supplier may make it a condition of the giving of the supply that the office-holder personally guarantees the payment of any charges in respect of the supply, but the supplier shall not, directly or indirectly, make it a condition of the giving of the supply that any outstanding charges in respect of a supply given to the debtor before the relevant day are paid.

(3) A request falls within this subsection if it is made—

(*a*) by or with the concurrence of the office-holder; and

(*b*) for the purposes of any business which is or has been carried on by the debtor, by a firm or partnership of which the debtor is or was a member, or by an agent or manager for the debtor or for such a firm or partnership.

(4) The supplies referred to in subsection (2) are—

(*a*) a public supply of gas;

(*b*) a public supply of electricity;

(*c*) a supply of water under the Waterworks Ordinance (Cap. 102);

(*d*) a supply of telecommunications services by a public telecommunications operator licensed under the Telecommunications Ordinance (Cap. 106). *(Amended 36 of 2000 s. 28)*

(Added 76 of 1996 s. 21)

31. *(Repealed 76 of 1996 s. 22)*

32. Effect of order of discharge

(1) An order of discharge shall not release the bankrupt—

(*a*) *(Repealed 76 of 1996 s. 23)*

(*aa*) from any liability to pay any amount under a confiscation order made under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) or under an external confiscation order registered under that Ordinance; or *(Added 35 of 1989 s. 32. Amended L.N. 19 of 1991)*