

立法會秘書處譯本，只供議員參考用)

(香港銀行公會信箋)

香港  
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立法會  
《2004年破產(修訂)條例草案》委員會  
主席  
譚香文議員

譚議員：

**《2004年破產(修訂)條例草案》**

謹多謝法案委員會給予機會，讓香港銀行公會就《2004年破產(修訂)條例草案》提出意見。

據瞭解，《2003年破產(修訂)條例草案》已改名為《2004年破產(修訂)條例草案》，並於近日提交立法會。本會支持賦權破產管理署署長把破產案件的管理工作外判予私營清盤從業員的建議，但前提是必須有穩妥的外判安排。本會特別認為，在新法例實施前必須制訂嚴謹的挑選準則和審計程序，以及訂立有效程序處理有關私營清盤從業員質素的投訴，這點至為重要。本會已向政府當局傳達了我們的關注，其後並獲當局保證，破產管理署署長只會把破產案件的管理工作外判予會計界和法律界能勝任的私營清盤從業員。儘管如此，本會依然認為，較可取的做法是按照本會於2004年2月6日致財經事務及庫務局局長的函件中所建議，將這些保證載入法例中。現附上該函件的複本，希望當中所載的建議會對法案委員會的討論有幫助。

秘書  
葉其蓁  
(簽署)

連附件

2004年11月17日

(立法會秘書處譯本，只供議員參考用)

(香港銀行公會信箋)

香港  
夏慤道18號  
海富中心第1座18樓  
財經事務及庫務局  
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林女士：

**《2003年破產(修訂)條例草案》**

繼於2003年11月4日致函閣下後，現再修函就2003年11月28日刊憲的《2003年破產(修訂)條例草案》提出意見。

一如本會在早前2003年11月4日的函件中指出，我們對《破產(修訂)條例草案》的主要關注在於清盤從業員的挑選準則，以及投訴處理程序和監督。《破產條例》第84條使法院可就受託人的行為操守進行查訊，但對於不當地運用產業或引致產業損失的唯一制裁，似乎只是由法院命令受託人就任何失當行為或違反受信人的職責而償還遭不當運用或損失的產業或對該等產業負責或支付補償。本會相信，在建議的外判安排下，這樣並不足以保障債權人和債務人雙方的利益。因此，本會建議，條例草案應載有類似英國《1986年破產清盤法令》中處理清盤從業員的挑選準則、投訴的處理及監督的第394至398條(見隨附的摘錄)的條文。另外，《破產條例》第84條應予修訂，以加入類似《公司條例》第168C至T條的條文，使法院可作出命令，取消某人出任公司清盤人的資格。

在這課題上，為進一步加強外判安排的穩妥性，本會亦建議破產管理署署長在符合與清盤從業員達成的合約安排下，適當地參考適時提供管理資料的做法，以便有效監管清盤從業員的工作。

請將本會在上文第2及第3段所述的意見分別轉達法案委員會及破產管理署署長，以供他們考慮。

秘書  
葉其綦  
(簽署)

連附件

2004年2月6日

Section 394

Insolvency Act 1986

S. 393(1)

The Secretary of State is the only competent authority for the time being: see the note to s. 392(2).

S. 393(2)

The regulations referred to above set out in some detail the matters which are to be taken into account in determining whether an applicant is a fit and proper person, ranging from his personal integrity and history as a law-abiding citizen to the adequacy of the systems of control and record-keeping in his business practice: see SI 1990 No. 439, reg. 4.

The same regulations (reg. 5) give details of educational requirements, but these apply only to applicants who were born after 15 December 1951 and do not already hold an authorisation (reg. 5(2)). Practical training and experience is demanded of all applicants: this may be reckoned in a number of ways, but a minimum of five appointments to office within the past five years or 1,000 hours of "higher insolvency work experience" within the same period is stipulated (reg. 8).

S. 393(3)

The regulations referred to fix a maximum period of three years from the date on which authorisation is granted (reg. 10).

S. 393(4)

The procedure for appeal from the withdrawal, or the refusal, of an authorisation is set out in ss. 394-398.

Section 394 Notices

394(1) [Notice to applicant re grant] Where a competent authority grants an authorisation under section 393, it shall give written notice of that fact to the applicant, specifying the date on which the authorisation takes effect.

394(2) [Notice re proposed refusal, withdrawal] Where the authority proposes to refuse an application, or to withdraw an authorisation under section 393(4), it shall give the applicant or holder of the authorisation written notice of its intention to do so, setting out particulars of the grounds on which it proposes to act.

394(3) [Date to be stated re withdrawal] In the case of a proposed withdrawal the notice shall state the date on which it is proposed that the withdrawal should take effect.

394(4) [Notice to give details re rights] A notice under subsection (2) shall give particulars of the rights exercisable under the next two sections by a person on whom the notice is served.

(Former provision: IA 1985, s. 6)

General note

The Insolvency Act 1985, s. 6, from which s. 394 is derived, was brought into force on 1 July 1986 (SI 1986 No. 840, reg. 3), together with IA 1985, ss. 7-9, on which ss. 395-398 below are based.

394(1)

Without authorisation, the person will not be "qualified" under s. 390(2)(a), and will be automatically liable to criminal prosecution under s. 389 if he acts as an insolvency practitioner; but this will not affect any appointment which he already held when the Act came into force: see Sch. 11, para. 21.

394(2)-(4)

It would appear from the repeated use of the word "propose" that a decision to refuse or withdraw an authorisation does not take effect until the applicant or holder is informed of his rights to make representations under s. 395(1) and to refer the matter for consideration to the Insolvency Practitioners Tribunal under s. 396, and given an opportunity to do so. It is submitted that the word "decision" in s. 396(2)(b) must mean "provisional decision", to be consistent with this view. There is no indication in s. 394(3) whether the authority is free to specify any date it chooses as the effective date, but it would seem that, to make sense of the scheme of the Act as a whole, the date should be fixed at least 28 days ahead, and the notice should probably state in addition "or such later date as the authority may subsequently fix, if steps are taken by the holder to have the case reconsidered or reviewed under s. 395 or s. 396."

Section 395 Right to make representations

395(1) [Right exercisable within 14 days] A person on whom a notice is served under section 394(2) may within 14 days after the date of service make written representations to the competent authority.

395(2) [Representations to be considered] The competent authority shall have regard to any representations so made in determining whether to refuse the application or withdraw the authorisation, as the case may be.

(Former provision: IA 1985, s. 7)

General note

Section 7 of IA 1985, from which s. 395 is derived, has been in force since 1 July 1986: see the note to s. 394.

In addition to his right to have the case referred directly to the Tribunal under s. 396, the person affected by a proposed refusal or withdrawal may ask the authority itself to reconsider its decision. This will not prevent him from seeking a review by the Tribunal if he is notified that the authority's earlier decision stands; and indeed he may apparently ask for a reconsideration under the present section and then change his mind and have the matter taken to the Tribunal without waiting for the authority to complete its reconsideration.

Section 396 Reference to Tribunal

396(1) [Application of Sch. 7] The Insolvency Practitioners Tribunal ("the Tribunal") continues in being; and the provisions of Schedule 7 apply to it.

396(2) [Person served with notice] Where a person is served with a notice under section 394(2), he may—

- (a) at any time within 28 days after the date of service of the notice, or
- (b) at any time after the making by him of representations under section 395 and before the end of the period of 28 days after the date of the service on him of a notice by the competent authority that the authority does not propose to alter its decision in consequence of the representations,

Mark J. Bradley

Section 397

Insolvency Act 1986

give written notice to the authority requiring the case to be referred to the Tribunal  
396(3) [Reference] Where a requirement is made under subsection (2), then, unless the competent authority—

(a) has decided or decides to grant the application or, as the case may be, not to withdraw the authorisation, and

(b) within 7 days after the date of the making of the requirement, gives written notice of that decision to the person by whom the requirement was made

it shall refer the case to the Tribunal.

(Former provisions: IA 1985, ss. 8(1), (2), (6), 11 (part);

General note

The sections of IA 1985, from which s. 396 is derived, were brought into force on 1 July 1986: see the note to s. 394.

S. 396(1)

The Insolvency Practitioners Tribunal was established by IA 1985, s. 8(6) to discharge the functions set out in ss. 396, 397 of the present Act. For further discussion, see the note to Sch 1 and the Insolvency Practitioners Tribunal (Conduct of Investigations) Rules 1986 (SI 1986 No. 952) which continue in force.

S. 396(2)

The present section provides a procedure which is in part alternative to s. 395 and in part supplementary to it. A person who has been notified by an authority that it proposes to refuse his application or withdraw his authorisation may invoke the jurisdiction of the Tribunal either (1) immediately and directly, or (2) after the authority's own procedure for reconsideration has run its course and the decision adverse to him is confirmed; and it appears that he may also interrupt the latter procedure and have the matter referred to the Tribunal without waiting for a second decision. He must act within 28 days of being notified of the authority's provision of a decision (in case (1)) or of its confirmed decision (in case (2)). The case is then referred by the authority itself to the Tribunal for review.

S. 396(3)

On receipt of a notice, the authority has seven days in which to change its mind and notify the person of its revised decision; failing this, it must refer the matter to the Tribunal (though not necessarily within that seven-day period).

Section 397 Action of Tribunal on reference

397(1) [Duties of Tribunal] On a reference under section 396 the Tribunal shall—

(a) investigate the case, and

(b) make a report to the competent authority stating what would in their opinion be the appropriate decision in the matter and the reasons for that opinion,

and it is the duty of the competent authority to decide the matter accordingly.

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397(2) [Copy of report to applicant] The Tribunal shall send a copy of the report to the applicant or, as the case may be, the holder of the authorisation; and the competent authority shall serve him with a written notice of the decision made by it in accordance with the report.

397(3) [Publication of report] The competent authority may, if he thinks fit, publish the report of the Tribunal.

(Former provision: IA 1985, s. 8(3)-(5))

General note

Section 8 of IA 1985, from which s. 397 is derived, was brought into force on 1 July 1986: see the note to s. 394.

The Tribunal makes its own investigation of the case but does not itself make a decision; instead, it gives directions to the authority (which are binding), supported by its reasons.

The requirement that the Tribunal should give a reasoned ruling plainly contemplates that it is open to a dissatisfied applicant to seek judicial review of a decision.

Section 398 Refusal or withdrawal without reference to Tribunal

398 Where in the case of any proposed refusal or withdrawal of an authorisation either—

- (a) the period mentioned in section 396(2)(a) has expired without the making of any requirement under that subsection or of any representations under section 395, or
- (b) the competent authority has given a notice such as is mentioned in section 396(2)(b) and the period so mentioned has expired without the making of any such requirement,

the competent authority may give written notice of the refusal or withdrawal to the person concerned in accordance with the proposal in the notice given under section 394(2).

(Former provision: IA 1985, s. 9)

General note

Section 9 of IA 1985, from which s. 398 is derived, came into force on 1 July 1986: see the note to s. 394.

If a person who has been notified under s. 394(2) of a proposal to refuse his application or withdraw his authorisation does not take the appropriate action within 28 days, he cannot prevent the refusal or withdrawal from taking effect. Whether this happens automatically, or whether a written notice must be given, depends upon whether the word "may" is to be read in a permissive or a mandatory sense. The stipulation that the notice shall be written probably indicates the latter: the point will be important only in regard to a withdrawal.

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