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By fax and by Hand
(2537 1851)

Mr. Jimmy Yuen
Public Information Division
Legislative Council
8 Jackson Road
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Hong Kong

Dear Sir,

COMPANIES (AMENDMENT) BILL 2000

I am writing with regard to the various proposed amendments contained in the Companies (Amendment) Bill 2000 gazetted on 7 January 2000.

I have for the last 18 years practiced as an insolvency practitioner in Hong Kong and on balance welcome the introduction of provisions that are aimed at encouraging troubled companies to start forming debt restructuring plans at an early stage. It is encouraging that the introduction of provisional supervision and the availability of a moratorium will provide a formal platform from which restructuring plans can be implemented.

In reality though, debt restructuring has always been the preferred recovery mechanism in Hong Kong. This is because of the unique make up of Hong Kong. The majority of Hong Kong businesses are either property related, trading or manufacturing and because of Hong Kong's import/export role most companies unsecured debts are with banks. As a result, the banks have always taken a proactive role in recovering their money, because they realise the benefits of debt restructuring rather than liquidation and they also agree to standstill, rather like a moratorium.

In Hong Kong many large companies have at some time in the past been insolvent but have successfully traded out of this situation with the support of their banks. To illustrate this point, there are thought to be some 70 publicly listed companies in Hong Kong currently undergoing some form of debt restructuring.

My concerns with the proposed introduction of the insolvent trading provisions in section 295, are that instead of promoting debt restructuring plans at an early stage they may in fact have the reverse effect and cause further insolvencies. Section 295D deals with the presumption of continued insolvency in certain circumstances where a liquidator can demonstrate that the company being wound up was insolvent at any point within twelve months prior to its

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winding up. If demonstrated, it is presumed that the company was insolvent for the entire twelve-month period prior to it being wound up (unless the contrary can be proven) and the court may decide, under section 295C(1), that the company's directors and senior managers may be liable for the debts during that period.

Any responsible person, whether executive directors, non-executive directors or senior managers would not wish to run the risk of becoming personally liable under section 295C by trading out of the first point of insolvency if the presumption is, should he ultimately fail, that the company remained insolvent from the first point of insolvency throughout until the company's eventual winding-up.

This surely is contradictory to the overall purpose of the proposed amendments.

The effect of these amendments may be too overbearing on directors and senior management and exert too much pressure on them at a financially critical time. If the presumption is that directors and senior management may end up being personally liable for the Company's debts during the relevant time period then the net result may be that these responsible persons may opt for liquidation and or provisional supervision rather than take any personal risk.

The likely hood is that professional advisors to directors will advise them to place the company immediately into provisional supervision rather than take any chance of personal risk. Which director or non-executive director of a public company will be willing to take the risk?

Finally, the broadening of the scope of who is a responsible person, section 295A, to senior managers is harsh and there is a danger that it will further exacerbate the problem highlighted above. As far as I am aware senior management are not held out as responsible people in any other jurisdiction and therefore Hong Kong would be setting a precedent.

I hope that my representations are not too late for the sub-committee in its deliberations in considering the proposed amendment bill.

Yours sincerely,



Jim Wardell

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Managing Director

c.c. Miss Julina Chan – Financial Services Bureau