

**Additional comment by the Insolvency Law Committee on the Companies
(Amendment) Bill 2000**

The Insolvency Law Committee's general views have already been communicated on the Bill. It has provided additional comments :-

1. Reasons offered to support the repeal of Section 228A include the fact that it has no equivalent in other jurisdictions and that it is a procedure that is said to be potentially subject to abuse. It has been suggested that Section 228A provides the directors of insolvent companies with a means of placing them in liquidation in circumstances where the directors nominate a provisional liquidator to take immediate charge of the company's affairs. As a result the creditors who would normally control an insolvent liquidation, are not involved in the early stages of the process and therefore it is suggested that their interests may not be fully protected.
2. While it has been suggested that there are examples of abuse, the Committee has always made the point that relatively few specific examples have been cited to support that criticism.
3. The Committee's view is that even if a provisional liquidator is appointed who is the choice of the directors he or she would only hold office for a limited period until the first meeting of creditors. During the time of their appointment provisional liquidators have limited powers. Ultimately the appointment of the liquidator is subject to control of the creditors at the first creditors' meeting. In addition, in Hong Kong, provisional liquidators are almost invariably professionals who fully recognise that their actions can be scrutinised by later liquidators.
4. It follows that the scope for abuse is probably limited. If there are examples of this occurring it appears that they are probably as much the result of the failure of creditors to adequately assert their rights in choosing and monitoring the liquidator and the course of the liquidation process rather than the misuse of power under Section 228A.

Taking all these matters together, the Committee do not think that the case for the repeal of the Section has been made out.

On the other hand, Committee members are aware that this procedure is recognised by insolvency practitioners as an efficient way of placing a company in liquidation and permitting a provisional liquidator to assert control over assets for the benefit of all creditors when a company reaches the point where it cannot continue to trade and meet its debts.

A further point to be made is that the new legislation contemplates that directors have higher responsibilities in relation to trading while insolvent. The speed and efficiency with which a company can be placed in liquidation by directors using this procedure as soon as it is recognised that the company is insolvent, is consistent with the philosophy of encouraging prompt responsible action by directors to protect the interests of creditors generally.

**The Law Society of Hong Kong
Insolvency Law Committee
6 April 2000**