香港會計師公會的信頭
Letterhead of HONG KONG SOCIETY OF ACCOUNTANTS

BY FAX AND BY POST
(2869 6794)

Our Ref.: C/COG(II)(6C), M2059 24 March 2000
Your Ref.: CB1/BC/6/99

Ms. Leung Siu-kum,
Clerk to Bills Committee on
Companies (Amendment) Bill 2000,
Legislative Council,
Legislative Council Building,
8 Jackson Road,
Central, Hong Kong.

Dear Ms. Leung,

Bills Committee on
Companies (Amendment) Bill 2000

I attach the views of the Hong Kong Society of Accountants' Insolvency Practitioners Committee (IPC) on the above Bill. The attached comments have not as yet been considered by the Society's Council, but should be referred to the Council at its April meeting. We will let you know as soon as possible of any further points that may be made by Council members.

The submission follows the order of the provisions contained in the Bill and is not intended to reflect any order of importance.

Please do not hesitate to call me if you have any questions on the submission. As I will be away next week, if you wish to follow up during that period, please contact Winnic Cheung, the Society's Director of Professional Practices in the first instance.

Yours sincerely,

PETER TISMAN
DEPUTY DIRECTOR
(PROFESSIONAL PRACTICES)
HONG KONG SOCIETY OF ACCOUNTANTS

PMT/ay
Encl.

c.c. Eric Li
Susie Ho, FSB

Comments on the Companies (Amendment) Bill 2000

Clause 19

In clause 19(c)(i) presumably paragraph "(aa)" should be inserted after rather than before paragraph (a) s168I(3), otherwise there will be inconsistency with the numbering elsewhere in the Companies Ordinance.

Corporate Rescue Procedures

Clause 24, new section 168U

The definition of "voluntary arrangement" should also provide for the powers and duties of the supervisor to be specified, unless this is done elsewhere in the Ordinance (see below).

New section 168V

The cross-reference in subsection (1)(b) appears to be incorrect. The relevance of the reference to s168ZD(10) is unclear since there is nothing in that subsection or subsection (4) of s168ZD, which is cross-referenced in the former, that addresses the question of whether a regulated industry may be subject to provisional supervision.

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. It is understood, for example, that the sale of Barings Bank in the UK was conducted in the context of an administrative arrangement.

New section 168W

The Hong Kong Society of Accountants worked closely with the Official Receiver ("OR") to devise suitable criteria for the membership of the original liquidators' panel scheme. In order to ensure that any requirements (e.g. relating to qualifications and experience) for membership of the proposed panel of persons eligible to be provisional supervisors ("PS") are practical and appropriate in the circumstances, we suggest that "after consultation with the Hong Kong Society of Accountants and the Law Society of Hong Kong" be added after "Official Receiver" in the second line of subsection (1)(c).

It is not clear what is intended to happen in the case of a person who is temporarily suspended from practicing as a professional accountant or a 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 OR specifies.

New section 168X

We do not support the proposal to require security to be posted. No such requirement is specified in relation to Companies Ordinance, s166 schemes of arrangement or to creditors' voluntary windings-up. This will add to the cost of the procedure, diminish its convenience (which will add further to costs and result in unnecessary additional administration by the Official Receiver's Office) and is contrary to the trend in other jurisdictions to move away from bonding. We are also aware of difficulties that some practitioners have found in obtaining bonds if they do not have a previous history with the bond suppliers, particularly 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 could enter into provisional supervision ("PSN").

New section 168Y

Joint-appointments of PSs should be permitted.

S168Y(b) should be amended by inserting after (a), "after the commencement of a winding up--" and then changing (b) and (c) to (i) and (ii).

New section 168ZA

Clarification is required as to what basis is to be used for calculating the amount of money to be contained in the trust fund under s168ZA(c)(iv). Prima facie, other than for "former workers" i.e. those whose employment has already been terminated, there should be no requirement to provide for severance or long-service payments.

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 to the Companies Ordinance s265 limits.

We are concerned that in the event of a proposal for a voluntary arrangement ultimately not being approved, employees will in effect be given a statutory preference. This would mean that they will be much better off in a winding-up that follows an unsuccessful attempt to enter into a voluntary arrangement than they would have been had the company gone directly into liquidation. (It is also noted that the trust fund arrangement would mean that employees are protected to a greater degree even that they would been had they benefited under the Protection of Wages on Insolvency Fund). This creates two parallel sets of arrangements for corporate windings-up with potentially very different consequences for creditors. This is clearly undesirable

The issue of "connected persons" needs to be dealt with in relation to s168ZA(c)(iv), otherwise situations could arise in which a majority of independent creditors vote against a proposal but the directors, who may have funded their business through loans, etc., are able to carry the vote. Such directors may wish to prevent an early liquidation in order to escape avoidance actions (relating for example to unfair preferences, transactions at an undervalue) being pursued by a liquidator. We understand that this issue has been addressed under the UK regime for voluntary arrangements

New section 168ZC

The PS should be required to write to all creditors whose details can be ascertained from the company's books and records in addition to publishing a notice in the press.

New section 168ZD

The oblique references to "the moratorium" could be confusing. There is no definition of the term or any specific provision imposing it. Subsection (3) indicates what happens during the moratorium and similarly other provisions assume its meaning.

We would suggest that the moratorium also extend to the commencement of any actions in respect of directors' liabilities under a personal guarantee. We understand that such actions are included under the Australian legislative framework. This would give directors a greater incentive to consider PSN.

The scope of subsection (10) is apparently much broader than simply the effects of the moratorium. Under the circumstances, this may not be the most appropriate place to insert this subsection.

S168ZD(11) terminates the appointment of a (provisional) liquidator upon the appointment or a PS. However, under the circumstances described in s168ZQ(2)(b) (major creditor rejects the idea of PSN) or 168ZS(6) (meeting of creditors rejects the proposal), then s168ZD(11) is deemed never to have terminated the appointment of the (provisional) liquidator. Although this provision may be intended to be purely procedural. there could be other practical implications, given that in the intervening time, which could be some weeks, the (provisional) liquidator will not have had control over the activities of the company. While it is quite possible that the PS and the (provisional) liquidator will be the same person, it is not necessarily the case.

S168ZD(11) should perhaps be amended by deleting "the provisional supervisor of the company is" and replacing it with "a provisional liquidator or a liquidator has been".

New section 168ZE

Subsection (4) appears to relate more directly to the effects of the moratorium and it would perhaps be clearer if it was inserted into s168ZD.

"Significant financial hardship" should not be the sole ground for being exempted from the moratorium. Where the court is satisfied that a secured creditor's collateral is being seriously jeopardized, it should also be able to order exemption.

There is no requirement in this section for the PS to notify creditors of an application to extend the moratorium. A link ought to be made between s168ZE and s168ZR.

New section 168ZF

Clarification is needed as regards when and how a PS's liabilities will end. Can the PS later disclaim contracts that he has adopted or adopt them conditionally. If not, what happens if the creditors do not agree that the company should be wound up where this is the PS's recommendation?

New section 168ZG and the Eighteenth Schedule

It would be desirable to specify that the PS has the power to sell assets of the company during the moratorium (if need be, with the sanction of the court). The power to require officers of the company to provide information (s168ZN) could also usefully be included in the Eighteenth Schedule.

New section 168ZH

The PS should be able to delegate to other senior management staff of the company. As the risk is borne by the PS, he should be given some flexibility as to the choice of potential delegates. In addition some international companies my not have directors based locally.

Consideration should be given to providing for the imposition of sanctions on delegates who knowingly act outside the scope of their delegated powers and contrary to the interests of the

company (c.f. s168ZI(2) which provides that a director discharging a duty or exercising a power in his capacity as a director during the moratorium is liable to imprisonment).

New section 168ZI

The PS as well as the company and the director are bound by actions carried out by a director in contravention of s168ZI(a) provided that a third party who deals with the director acts in good faith and changes his position to his detriment. The implications of this for the PS's liability are unclear. It would not be reasonable if the PS were ultimately held to be personally liable for the conduct of a director who was not acting under any delegated authority.

New section 168ZJ

It would be clearer for subsection (3) to refer to contracts being "terminated" rather than "determined".

New section 168ZK

S168ZK(2) appears to indicate that where a PS has not accepted or has terminated on employee's contract in writing within 14 days of the "relevant date" (effectively the date of the commencement of the PSN), then that contract will be deemed to have been terminated by the company at the end of the 14-day period. Under s168ZK(3), the wages, salaries and other emoluments under the contract, to the extent that they are "qualifying liabilities", shall be paid out the property of the company in priority to the indemnity given to the PS under s168ZL. The problem with this is that, firstly, as mentioned above, it is not totally clear what is required to be contained in the trust fund under s168ZA(c)(iv). It seems as if the liabilities under the s168ZK(2) could include wages for 14-day period after the relevant date plus all termination payments for employees whose contracts are not taken on by the PS. This could be financially onerous and under s168ZL(3) it must be paid out of the company's assets in preference to the indemnity given to the PS against his personal liability for any contracts entered into by him as PS.

The interface between subsections (1) and (3) is also unclear. Under s168ZK(1), the PS is personally liable for the wages, salaries, and other emoluments of any employees whose contracts he adopts within 14 days after the relevant date. Under subsection (3), those liabilities are payable out of the property of the company to the extent that they are "qualifying liabilities". Under the definition in subsection (4), "qualifying liabilities" are wages or salary or contributions to an ORSO or MPF pension scheme. The status of severance and long-service payments appears to be left up in the air. Subsection (5) suggests that qualifying liabilities representing payments for services rendered before the PS accepted the contact are to be disregarded. This suggests that any such payments will not be preferential (but in any event they should be covered by the trust fund to the extent that they relate to the service rendered before the relevant date). It could possibly be assumed that that portion of severance or long term pay relating to work done before the adoption of contracts should be similarly disregarded but what then is the position as regards the portion of termination payments relating to work done after a contract has been accepted by the PS?

It should perhaps be clarified that acceptance under subsection (1)(a) is deemed to have occurred as of the relevant date.

From the point of view of clarity, it might be better to deem all contracts of employment to have been terminated before the relevant date. This would render the PS's liabilities more clear-cut. However, it would mean presumably that the trust fund would have to contain all termination

payments for all employees, which would decrease the likelihood of companies being able to enter into PSN.

Directors and their family members should not be treated in the same way as other employees, otherwise there will be scope for considerable abuse (e.f. "associates" under s266 of the bankruptcy Ordinance (Chapter 6) and relevant Australian provisions).

New section 168ZL

It is not clear why it needs to be specified that the PS will not be entitled to an indemnity in respect of contracts, remuneration and fees, etc. attributable to misconduct or negligence and the inclusion of such a statement could invite disputes. S168ZL already states that the indemnity relates to reasonable fees, etc. and s168ZM states that the PS is entitled to be remunerated in discharging his duties. Presumably misconduct and negligence would fall outside the scope of a PS's duties.

New section 168ZM

We believe that provision should be made for the creditors to approve variations in fees from the OR's scale, subject to appeal to a remuneration panel (along the lines proposed by the LRC (see Chapter 4 of the "Report on the Winding-up Provisions of the Companies Ordinance", July 1999)). The court should not need to get involved unless there is a further appeal from the panel on a point of law.

No indication is given of the relative priority of the PS's fees and the costs of the PSN in relation to the company's other liabilities.

Subsection (4) should not provide for the scale in subsection (1) to be reduced but only for the level of fees to be reduced if they are regarded as excessive.

There is an imbalance in the Bill in that the court must be satisfied that an increase of fees is warranted based the factors listed in subsection (3), but is not required to take into account any specific factors in dealing with an application for reducing fees under subsection (5). Before considering any reduction in fees the court should be required to take into account the actual work done by the PS.

As presently worded, if a PS wanted to propose a rate of remuneration lower than the scale referred to in section 168ZM(1) he would need to apply to the court and the court would have to be satisfied that this was warranted on the basis of the factors in subsection (3). These provisions are clearly aimed at a situation where the PS is seeking a higher rate and for the avoidance of doubt, this should be made explicit.

It is not clear why a notice under subsection (7) specifying another possible factor that a court should consider under subsection (3) is deemed to be subsidiary legislation, whereas, for example, a notice adding to the list of a PS's duties and/or powers under the Eighteenth Schedule is not so deemed.

New section 168ZN

The statement of affairs should also include the directors' / specified person's view of the value of the assets and should indicate any encumbrances to which any assets are subject and any constraints on the salability of any assets (e.g. due to defects, unwanted logos).

Under subsection (4), the PS will have to agree to the costs of producing the statement of affairs without knowing whether the company has sufficient assets to cover it. It is not clear how this can be addressed.

New section 168ZO

The acceptable grounds for a PS resigning, as st out in subsection (3), are too limited and the procedures too inflexible, particularly when judged against the background of the PS's personal liability for contracts that he may have adopted or entered into. Other reasons for a PS wishing to resign would include potential conflicts of interest arising, ill health, etc.

This section also leaves several questions unanswered. What are the respective personal liabilities of the PS and the former PS? Does the former PS remain liable for contracts that he entered into even where the PS may have acted negligently leading to the company's assets being insufficient to cover the PSs' indemnities? What are the respective priorities of the indemnities given to the former PS and the PS? Presumably, the former PS should have a higher priority for liabilities disclosed at the time of the hand over, but this is not provided for in the section. Is the former PS able to retain control over some of the company's assets to enable him to satisfy his liabilities?

Consideration should be given as to whether the creditors should have a general right to reject the PS within a certain period without needing to establish cause. Ultimately, if the creditors have no confidence in the PS, they can reject the proposal, but this is a roundabout route, particularly if they believe that there is scope for a proposal to work.

How will creditors be notified of the cessation of the moratorium under subsection (4)(iii) and what other procedures, if any, will then apply? The end of the moratorium would seem to mean that the directors will resume control over the company. Is it their responsibility to notify creditors of the position? Provisions need to be added into the Bill to clarify this.

New section 168ZP

As drafted, subsection (4) could be read to suggest that if a creditor is willing to advance further operating capital under this section, then he must provide the entire amount of the minimum required operating capital specified by the PS. Presumably, the point is that the total amount advanced by all willing creditors, whether relevant creditors or not, should be not less that the minimum required operating capital.

It is not entirely clear why fixed charges should have priority over relevant funds in the winding-up of the company, but a floating charge should not. It is also not clear why it needs to be specified in subsection (1) that relevant funds should have priority over other debts of creditors (apart from fixed charges) in the voluntary arrangement. The terms of the voluntary arrangement are in principle are matter for the creditors to agree. It is likely that creditors advancing relevant funds would in any case make this a condition of doing so.

New section 168ZQ

This section is problematic. It is not clear how the $33^{1}/3\%$ is to be calculated. At the relevant date a creditor may hold a quantifiable debt amounting to less than that proportion but his total debt, including contingent liabilities of the company, may ultimately exceed the threshold. In any event it may be difficult within the very limited time available to establish whether a particular creditor has a claim that reaches the threshold, particularly where for example cross-guarantees are involved. (N.B. s168ZT(18) refers to unliquidated amounts, but this provision is concerned only

with voting rights). Furthermore, as the provision is currently drafted, to be regarded as a major creditor a creditor is required to hold a single charge securing at least 33^{1}/3% of the company's liabilities. In practice, one creditor may hold several charges none of which individually reaches the threshold but which cumulatively exceed it. Such a creditor should also be regarded as a major creditor.

We have reservations about the fact that a creditor can hold a charge over the substantially all of a company's assets but may still not be regarded as a major creditor because the liabilities secured by the charge do not reach the threshold.

Under subsection (3), where a major creditor fails to give the PS the "2nd notice" within 3 working days of his receiving 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 new Part IVB of the Ordinance. The 7-day period could be too short a time. If there is a long holiday shortly after the relevant date, it is conceivable that a major creditor who did not support the PSN would be compelled to give the 2nd notice before he has even received the 1st notice from the PS notifying him of the appointment of the PS. It would be preferable to express all deadlines in terms of working days.

Under subsection (2), where a major creditor does not agree with the PS proceeding to prepare a proposal, the moratorium will cease and under subsection (2)(d) the PS is to vacate his office as soon as practicable. However, it is likely that a winding-up petition will be presented and a provisional liquidator appointed shortly afterwards. It is not clear who will be responsible for what if both the PS and a provisional liquidator (assuming it is not the same person) are in office at the same time. The PS 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 PS's indemnity under s168ZL to consider. There needs to be a more distinct division between the end of PSN procedures and the commencement of any subsequent procedures and a more clearly defined procedure for vacating the office of PS.

If the PS has issued the notices under s168C at this juncture, and technically he may not have done so, then he should also be required to notify any creditors to whom he has previously written (see our comments on that section) of the cessation of the moratorium. Generally, the time-frames are so tight that there is a reasonable likelihood of these various procedural steps crossing over one another, e.g. the PS could be gazetting his appointment and calling for creditors to lodge their claims (under ss168B and 168C) almost at the same time as he is gazetting the cessation of the moratorium. This could lead to confusion amongst creditors.

Other than subsection (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. It is possible that were the company to be wound up these transactions would fall within the statutory time-frames, but if several months pass, they may fall outside of the relevant periods. The directors could enter into PSN and then fail to implement the proposal, leading to the supervisor petitioning for a winding up under s168ZW(3)(c). As a result of the intervening time, the voidable transactions may have been legitimised. If the reference in subsection (4) is to "this Part" is to Part IVB, then this provision should be inserted in a separate section, unless the intention is that that the charge is excluded only for the purposes of a major creditor opting out.

Consideration should be given as to whether there is a need for provisions in the Bill on valuing unliquidated claims.

New section 168ZR

The PS should be required to hold the first meeting of creditors within a specified time. Under the Bill, he could defer a meeting until nearly the end of the 6-month period.

It is noted that there are no general provision on voidable dispositions in PSN, only a specific provision rendering invalid any charges created on the undertaking or property of the company within the 12-month period before the relevant date, unless it was proved that the company was solvent immediately after the creation of the charge - see s168ZQ(4). The PS, however, will have to comment on voidable dispositions to enable the creditors to be able to determine whether a liquidation is more or less advantageous than a voluntary arrangement.

Should separate meetings for different classes of creditors be held? Otherwise there could be oppression by a dominant group. Currently, under s168T(2), it is stipulated that relevant creditors at a recent meeting will form one class only.

Under s168ZR(2), the PS is only required to make available his report on the company upon request. Under subsection (2)(b)(vi)(C)(III), where a proposal for a voluntary arrangement is to be made, the PS is required to make available a summary of the proposal. These provisions may be reasonable in view of the potential size of the relevant documents. However, under subsection (2)(b)(vii)(B), where the PS is unable to complete the proposal within the 6-month moratorium period, and under subsection(2)(b)(viii)(A), where the PS is satisfied that none of the relevant purposes of a voluntary arrangement can be achieved, he is only required to make his statement available upon request. It would seem reasonable if a PS cannot complete a proposal within 6 months or he does not think that a proposal can achieve any of the specified purposes, that he should inform all the creditors of his reasons for this. The relevant statement would presumably not be that voluminous. This is all the more so, as under subsection (2)(b)(vi)(C), where the PS is able to complete the proposal within 6 months, he is required to attach a statement to all creditors as to which of the relevant purposes of a proposal can be achieved and which cannot.

We have reservations about the procedure under subsection (4). It is not appropriate for quite extensive subsections of principal legislation (even though they are primarily procedural) to be alterable by the Secretary for Financial Services simply by placing a notice in the Gazette. This could create a good deal of uncertainty.

New section 168ZS

The effect of subsection (4)(a) is unclear. It appears to require more than 50% in value of creditors present 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 are already mandated under subsection (4)(b) and provision is made under s168ZT(7) for the necessary resolutions to be deemed to have been passed where there is no quorum or where the meeting failed to pass the resolutions. The stipulation in s168ZS(4)(a) therefore appears to be overridden elsewhere.

It should be made clear that the creditors can resolve to set up a creditors' committee to act on their behalf. At present the only reference to this possibility seems to be under the powers of the PS in the Eighteenth Schedule.

The issue of related-party creditors needs to be looked at, particularly given that the Bill proposes that all creditors should form one class for voting purposes. A group of creditors with sufficient voting power and acting together, who may be related to the company in PSN and/or each other, could ride roughshod over the interests of all other creditors. Specific measures have been introduced in other jurisdictions to deal with this problem.

It has been suggested that under subsection (5)(b), the creditors' voluntary winding up should be deemed to have commenced on the relevant date in relation to s265 also, with an provision added for the PS to obtain the sanction of the court for payments properly made under the PSN scheme.

There is nothing in the Bill to prevent secured creditors (assuming there has been no veto from major creditors) from being required to accept less than 100%, which appears to be contrary to the intention of the Law Reform Commission. Something like s4(3) of the UK Insolvency Act 1986 into this section

It is also the case that because there is only a single class of voters, secured creditors could vote for an arrangement that would mean that unsecured creditors would get less than they would in a winding up. In other jurisdictions creditors cannot be forced to take less than they would receive in a liquidation. The situation is exacerbated by the fact that there are no broad provisions on voidable preferences under PSN.

New section 168ZT

If all debts to workers as at the relevant date are protected in the trust account specified under s168ZA(c)(iv), then employees should not be in a position to tip the balance in favour of proposal at a relevant meeting of creditors. The possibility of their being able to do so must be seen in the light of the specified purposes of a proposal (see s168Z). One such purpose is a more advantageous realisation of the company's property than would be effected in a winding up of the company; another is, the more advantageous satisfaction, in whole or in part, of the debts and other liabilities of the company. Under the first scenario, the suggestion is that the company's assets will be liquidated over a period and the question arises again as to why a different set of rules should apply to workers where the winding up occurs via a PSN as opposed to directly? As regards, the second scenario, clearly it would be advantageous to employees to proceed under a voluntary arrangement, but how is their advantage to be balanced against that of other creditors? Generally, only creditors who are impaired (e.g. their rights are modified or adversely affected) should be able to vote.

Although shareholders may attend a relevant meeting of creditors, there is no provision for approval of a proposal by shareholders. Under s168U(1)(b)(iii), a voluntary arrangement is defined a being binding on shareholders amongst others. There may be situations in which shareholders inject new capital, debt is converted into equity, new classes of shares created (or existing classes cancelled), the company's paid up share capital is altered, amendments need to be made to the company's articles, etc. Shareholders should therefore have a greater say in approving a proposal as they would in a s166 restructuring.

The numbering of this section is confusing. There are two paragraphs (b)(i) and (ii) under subsection (7). It is noted that under the second subsection (7)(b)(ii), the PS is required to appoint a liquidator, which may be himself, at the latest within 7 days of the meeting referred to in the provision. However, under subsection (8), where the PS fails to comply with this requirement he is deemed to have appointed himself as the liquidator. This is an odd provision. Prima facie, the PS has breached the provisions of the Bill and arguably one should be thinking in terms of sanctions. If the only purpose of the provision is to ensure that the office of liquidator is filled quickly, then it would appear to be simpler to state under subsection (7)(ii)(A) that the PS will be the liquidator unless he appoints another suitable person within a specified timeframe.

Alternatively if it is felt that there is an increased possibility of conflicts arising where the PS becomes the liquidator, then it could be specified that be 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 on the other

hand he has not acted in good faith, then sanctions should be provided for. Another possibility would be to require the approval of creditors before the PS could become the liquidator - this is apparently the requirement in Australia

It is not clear whether the reason for requiring a 662/3 % majority in value to be required to pass a resolution approving or modifying a proposal under subsection (14) (all other resolutions, including a resolution to wind up the company require only a bare majority in value) is linked with the definition of a major creditor, i.e. a secured creditor with a claim representing at least 331/3 % of the company's debts. Arguably if a bare majority could pass a proposal, then it could be inconsistent for a major creditor to be able to veto PSN. If this is the rationale and if doubt is cast over the definition of major creditor, then the provisions on voting may also need to be reconsidered.

Our comments on the commencement of a winding up under s168ZS (i.e. those relating to s265), would also apply to s168ZT(17).

It is not clear why under subsection (17)(b)(ii), the remuneration of the liquidator should necessarily be at the same rate as the PS was remunerated before he vacated his office. It will not automatically be the case that the liquidator will be one and the same person as the PS and the logic of binding an incoming independent liquidator to the rate applied to the PS requires further explanation. If the liquidator was appointed by the creditors under s168ZS, this provision would not apply to him. Therefore there is an inconsistency here.

It is unclear how broad the court's power under subsection (20)(c) is intended to be. In the context, we would assume that the power to extend the moratorium is e.g. in relation to the possible need to reconvene a creditors' meeting and conduct another vote. It would be helpful to indicate in what general circumstances the court could extend the moratorium under this provision.

If the chairman's decision is reversed or raised under subsection (20)(a), this would mean that in the view of the court his decision was manifestly unreasonable. Under these circumstances, costs should presumably not be the liability of the applicant. Is it the intention of subsection (21) merely to indicate that while costs can be awarded against the company, they cannot be awarded against the chairman personally?

New section 168ZU

The reference to "matters incidental thereto" under s168ZU(1)(a) is too vague. It should be specified for example that minutes of the meeting should be recorded and signed off within a specified period and thereafter retained for a specified period.

Under subsection (1)(b), the terms of the voluntary arrangement should be binding on all creditors, whether or not they received the notice under s168R(2)(b) or (13), provided that the PS acted in good faith

New sections 168ZV and 168ZW

If the supervisor is a different person from the PS, the former should attend and give consent to supervising the voluntary arrangement at a relevant meeting of creditors where the proposal is passed.

As regards the provision relating to security to be provided by a supervisor, under s168ZW(1)(b), see our comments on s168X(b). The cost of any security under this provision and s168X(b) should be a charge against company.

"Domestic premises" under s168ZW(3)(b) should be defined so as to be limited to premises being used for domestic purposes.

There appears to be an imbalance in the Bill between the extensive legal framework for PSN and the very limited provisions for the implementation and termination of a voluntary arrangement. All major issues including the powers and duties of the supervisor, his liabilities, his resignation or removal from office, the holding of meetings, the status of company officers, the length of the voluntary arrangement, its termination, etc. are left to be dealt with in the voluntary arrangement itself. This seems to be a potentially flimsy legal hook on which to hang the core part of the corporate rescue arrangements. It is also noted that a number of these matters are not specifically provided for in the definition of "voluntary arrangement" under s168U. We understand that in Australia a proforma deed of company arrangement is specified. A similar procedure here would be of some assistance (see also our comments in relation to s168ZZA below).

Under s168ZW(3)(c), the supervisor may "present a petition to wind up of the company if he considers that the voluntary arrangement is not being adhered to by the company. Meanwhile under S168ZV there is in effect a continuing moratorium on creditors bound by the arrangement. The only avenue for creditors who consider that the voluntary arrangement is not being adhered to is under s168ZW(6), which provides for creditors aggrieved by any act or omission of the supervisor to apply to the court. This seems to be insufficient.

There ought to also to be a requirement to notify creditors where a supervisor files a petition under this subsection.

The provision on deviations under s168ZW(5) appears to be too inflexible. If a deviation of substance, which may be beneficial to creditors, is agreed by the creditors, why should the court not be permitted to sanction it?

New section 168ZX

This provision does not deal with the issue of the respective liabilities of the original supervisor and his successor. In fact, more generally, the issue of a supervisor's liabilities and indemnities is not addressed. This is too important an issue to be omitted.

New section 168ZY

Notification should also be given individually to all known creditors.

New section 168ZZA

One way to deal with the absence of a framework relating to the implementation of a voluntary arrangement, referred to above (see *New sections 168ZV and 168ZW* above) could be to provide for specific regulation-making powers to address such matters. This should be considered.

We have indicated above that there is no specific reference to security to be provided by a PS or supervisor under this section, although the provisions of the Bill relating to security cross-refer to s168ZZA. We do not think it is advisable to rely on the very general regulation-making powers under subsections (2)(h) and (i) to deal with substantive issues of which all parties should already be aware.

Other matters relating to corporate rescue

There should be a provision to ensure that utility companies cannot pull the plug on a company in PSN, along the lines of s30E of the Bankruptcy Ordinance.

General Winding up Provisions

Clause 27 (section 191)

In subsection (2) it may not be appropriate to retain the word "also" as the first reference to "Official Receiver" in this section is repealed under paragraph (a).

Clause 30 (section 194)

It is not clear why it is proposed to repeal paragraph (d) of subsection (1) under (a)(iii).

We would suggest that either the figure of $200,000 in proposed subsection (1A) be replaced by "such figure as the Secretary for Financial Services may specify by notice in the Gazette" or that, at least after "$200,000" should be added "or such other figure ...in the Gazette"

Clauses 32 and 33 (sections 196 and 199)

Paragraph (b) of clause 32 and paragraph (a) of clause 33 suggests that the term "liquidator" in ss196(2) and 199(1) and (2) is being used to cover both liquidators and provisional liquidators. This is inconsistent with the treatment under paragraph (a) of clause 32 and elsewhere.

Rather than specifying a figure of "$100,000" in paragraph (b) of clause 33, it should be provided for a figure to be specified by the Secretary for Financial Services in the Gazette, or at least, "or such other figure as may be specified by the Secretary for Financial Services by notice in the Gazette" should be inserted after "$100,000".

Clause 36 (section 222)

It is noted that the Bill repeals one of the two grounds for holding a public examination, namely that a prima facie case exists against a person that would render him liable to a disqualification order. The sole remaining ground is where a fraud has been committed. It is not clear why this has been done.

Clause 37 (section 227F)

It is also suggested either that "or such other figure as the Secretary for Financial Services may specify by notice in the Gazette" be added after "200,000" in paragraph (b) of subsection (1), or that the figure be deleted altogether and reference be made only to the Gazette. This would provide for greater flexibility to extend the summary procedure as may be necessary given the inevitable devaluation over time of the $200,000 figure.

Clauses 38, 39, 40, 41, 42(b)(iii) and 43

We do not agree with the proposal to repeal s228A. We believe that it serves a useful function and against the background of the proposed insolvent trading provisions contained in the Bill, it provides directors with an expeditious way to commence winding up procedures and so avoid the risk of their being under pressure to enter into transactions that could make them liable for insolvent trading. There are situations in which the company is insolvent, but for example, the

shareholders are either reluctant to do anything about it or are bound by a shareholders' agreement not to file a petition or otherwise to contribute to the company being wound up. The directors therefore need the power to take the necessary action.

Consideration should also be given to permitting directors to petition for a compulsory winding up

We have previously given comments on a proposal to repeal section 228A to the Law Reform Commission's Sub-committee on Insolvency and we attach a copy of our earlier submission. Practitioners are not aware of any abuses of the provisions since amendments were made to the Companies Ordinance to limit the persons eligible to become provisional liquidators under s228A to accountants and lawyers.

Insolvent Trading Provisions

New section 295A

We are concerned that the definition of "responsible person" includes a manager involved to a substantial or material degree in directing the company's business. This could embrace a range of persons who have some responsibilities in particular areas of the company's business but who have no overall degree of control. The requirements of the Bill could put such people in a difficult position vis-a-vis the directors or the board. This part of the definition could perhaps be limited to senior management who have some responsibility for the extension of credit to the company.

New section 295C

The sense of subsection (1)(a) is not entirely clear. Under the Nineteenth Schedule "insolvent trading" appears to be a state rather than an activity. If this is so, it is unclear how "engaged in insolvent trading" is to be interpreted. Under subsection (1)(b) the company must have "incurred debt". This ought not to include, for example, debts which automatically arise, such as management fees, or such things as bank overdraft facilities or lines of credit that the company would normally expect to be extended but which are called in for reasons that do not relate to the company's affairs. However it is not clear whether debts such as these would be excluded.

There must be some doubt whether some of the non-director-level persons currently caught by the definition of "responsible person" would be, or should be expected to be, aware of the form contained in Part 2 of the Nineteenth Schedule.

New section 295E

It is open to question whether compensation provisions alone would be a sufficient or meaningful deterrent. Given that the persons who may be held liable for insolvent trading includes management, it could be that the person against whom a declaration is made will have little or no means to pay compensation.

Consideration could be given to introducing criminal sanctions but we appreciate that it might be better to leave this until a later time when it is possible to see the practical effects of the new provisions.

New section 295G

Consideration could be given to allowing a liquidator to assign a cause of action for insolvent trading with the sanction of the court.

Hong Kong Society of Accountants
24 March 2000