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香港特別行政區政府財經事務局的信頭
Letterhead of FINANCIAL SERVICES BUREAU, GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

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來函檔號 YOUR REF.:

10 April 2000

Mr Andy Lau,
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong
[Fax: 2121 0420]

Dear Mr Lau,

Companies (Amendment) Bill 2000

I refer to the discussion this morning by the Bills Committee on the proposed repeal of section 228A of the Companies Ordinance (Cap 32) on "Special procedure for voluntary winding up in case of inability to continue its business" by a company.

As we have pointed out, the Law Reform Commission's Insolvency Sub-committee had, during its review of the winding-up provisions in the Companies Ordinance, carried out extensive public consultation as well as internal discussion on this particular section in the Ordinance. After careful deliberation on the pros and cons involved, the Insolvency Sub-committee came to the conclusion that section 228A should be repealed as it held the view that "it is desirable to cut out any potential within the winding-up provisions for abuse and that, while there has been only anecdotal evidence of abuse, the potential remains while this section is in effect". Extracts from the Law Reform Commission's Report on the Winding-up Provisions of the Companies Ordinance regarding its

recommendation on the repeal of section 228A are enclosed for Members' information and reference.

Yours sincerely,

(L W TING)
for Secretary for Financial Service

statements without having reasonable grounds for making the statements should also be liable to the penalty. This recommendation should also apply to other winding-up provisions where one director verifies the written statements.[3]

15.4 These recommendations received some support and no opposition. We did receive a submission to the effect that in the case of an insolvency as envisaged in section 228(1)(c), a resolution by a simple majority, as opposed to a special resolution, should suffice. We do not agree with the submission on the ground that a simple resolution would allow a member or members of the company holding a slim majority of shares to resolve to wind-up the company. In the context of the family orientated nature of many Hong Kong companies it would be an undesirable step to take.

15.5 We note, in addition, that the notice requirements for meetings where special resolutions are to be presented are longer than those for ordinary resolutions.[4]

Section 228A Special procedure for voluntary winding-up in case of inability to continue business

15.6 The consultation process prior to the publication of the *Consultation Paper* attracted a number of submissions, none of them supportive of the provision and all of which advocated abolition or restrictions. The *Consultation Paper* proposed that the section, which was introduced under the Companies (Amendment) Ordinance 1984, should be abolished due, in part, to the weight of the submissions but also because other provisions in the Companies Ordinance were adequate for the purposes of winding-up a company efficiently and in a more appropriate manner. In addition, it is noted that the Registrar of Companies is also considering the introduction of a statutory procedure to deregister solvent and defunct private companies.[5]

15.7 The section empowers a majority of directors at a meeting, who have formed the opinion that the company cannot by reason of its liabilities continue in business, to resolve and deliver for filing to the Registrar of Companies a statutory declaration by one of the directors verifying written statements signed by the directors resolving that:

- the company cannot by reason of its liabilities continue in business; and
- they consider that it is necessary that the company be wound-up and that there are good and sufficient reasons for the winding-up to be commenced under this section; and

3 See the recommendation under section 233, at paragraphs 16.3 to 16.9.

4 Note sections 114 and 116, particularly section 116(1)(a) which makes special provision for notice for a resolution to wind-up under section 228.

5 See the proposals of the Registrar of Companies, at paragraphs 17.25 to 17.32, and, on the recommendation that directors should be able to wind-up companies, see paragraphs 10.2 to 10.7.

- meetings of the company and of its creditors will be summoned not later than 28 days after the delivery of the declaration to the Registrar.

15.8 The fear expressed by the submissions prior to the publication of the *Consultation Paper* was that it gave unscrupulous directors the opportunity to wind-up a company in the period between the date of the resolution and the meetings of creditors and contributories, without reference to either the creditors or the shareholders and that unscrupulous directors could use the provision to their own advantage. The section allows directors, in effect, as agents of the shareholders, to take actions that should properly be taken by the shareholders.

15.9 The *Consultation Paper* noted that the provision had been described in the Insolvency Sub-committee as "*statutory Centrebinding*"[6] in reference to a case in the United Kingdom, which originated, though not in the actual case, a practice whereby unscrupulous liquidators nominated by equally unscrupulous directors could sell off assets of a company at a bargain price to purchasers close to the directors. The United Kingdom insolvency provisions now act to prevent the practice.[7] A 1993 amendment[8] to section 228A providing that any provisional liquidator appointed under the section must be a solicitor or a professional accountant should have had the effect of cutting down on any abuse of the section that may still happen.

15.10 A submission pointed out that a provisional liquidator under section 228A was forbidden by law from selling off the assets of the company except where these were perishable or he obtained leave of the Court and that, if he chose to break the law, he could do so equally in any liquidation.

15.11 The Insolvency Sub-committee is not unanimous about abolishing the section. The majority was of the view that the section was peremptory, debtor led, paralysed creditors with an inability to apply to the court and might cause disputes over fees and disputes over the propriety and conduct of liquidators. It was also questioned why a procedure that on the face of it was more expensive to use than other options would be attractive to responsible directors.

15.12 A minority view was expressed to the effect that it could be useful in the cases of companies which had ceased trading and where the directors had lost interest. By using the provision, the directors could start the winding-up immediately without having to wait for 28 days before a meeting of creditors could be held.

15.13 Submissions on the *Consultation Paper* have, however, indicated a change of view as regards the section. We received quite a number of comments on the section and all but one of these comments were in favour of retaining the section, which represented a reversal of views. The Hong Kong Society of Accountants, for instance, stated that it was now of the view that the section should be retained as it was a useful provision. The submission noted that since the section was tightened up a few years ago, the Society was not aware of any great abuses in practice, even though, conceptually, it was possible to point to potential pitfalls in the procedure.

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6 *Re Centrebind Ltd* [1967] 1 WLR 377.

7 See the Insolvency Act, sections 98, 114 and 166.

8 Ordinance No. 75 of 1995.

15.14 A forceful submission disagreed strongly with the suggestion that other provisions in the Companies Ordinance were adequate. The submission said that:

> *"...there will in many circumstances be a situation where the directors, who have perhaps gone on a little too long, recognise that there is no future. While frequently the directors can be criticised in that situation, often they are sincerely trying to keep the company afloat and are simply not in command of the true financial position. There is no altemative procedure that works as well in most of these situations. Without the support of the shareholders, perhaps merely because they are absent or overseas, the directors cannot put an insolvent company into voluntary liquidation. This leaves a court application as their only route. This is confusing, slow and expensive. By the time the documents have been prepared, served on the Official Receiver and a Court hearing obtained, which in reality is never going to be put through on an urgent basis for other than the most significant companies, days and perhaps weeks will have gone by. This will inevitably often lead to execution by creditors and in some cases the improper removal or confiscation of the company's property."*[9]

15.15 We have taken note of the view of most submissions that the section should be retained. Nonetheless, **we recommend that** the section should be abolished. Our reasons are that it is desirable to cut out any potential within the winding-up provisions for abuse and that, while there has been only anecdotal evidence of abuse, the potential remains while this section is in effect. We also consider that the introduction of a statutory procedure to deregister solvent and defunct private companies, would adequately provide for any situation that might arise and which would not provide a *"grey"* period of time which might be exploited by directors to the detriment of creditors and shareholders.[10]

Penalties under sub-section (2)

15.16 We refer to the recommendation on the penalties that should attach to directors who make a written statement under sub-section (1) without reasonable ground for forming that opinion.[11]

Section 229 Notice of resolution to wind-up voluntarily

15.17 A company shall, within 14 days of passing a resolution for voluntary winding-up, advertise the resolution in the Gazette. The provision is subject to a fine for failure to comply with the requirement.[12]

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9 Nelson Wheeler Corporate Advisory Services Ltd.

10 See paragraph 15.6.

11 See paragraph 15.3 under section 228. Note that a failure by a director to comply with any obligation imposed on him by or under section 228A is an applicable matter for determining the unfitness of a director under the fifteenth schedule to the Companies Ordinance.

12 $10,000 plus a daily default fine of $300.

償債情況，則只需過半數人通過清盤決議便可，無須經特別決議議決。我們並不同意這意見，因爲如果可藉簡單決議通過清盤，則會容許只持有公司略多於半數股份的一個或多個成員決議將公司清盤。鑑於香港有很多公司都是由家族經營的，這項措施並不適合香港的情況。

15.5 我們注意到提交特別決議的會議通知期較普通決議的會議通知期爲長。

第 228A 條 在無能力繼續業務的情況下自動清盤的特別程序

15.6 在《諮詢文件》發表前進行的諮詢程序期間所接獲的多份意見書，沒有一份認同本條的作用，反而全都主張把本條廢除或施加限制。《諮詢文件》提議廢除這條由《1984 年公司（修訂）條例》引入的條文，一方面是順應意見書的意見，另一方面是因爲《公司條例》有其他條文足以提供更有效率和更適當的方式將公司清盤。此外，公司註冊處處長現正研究訂立法定程序，處理有償債能力但不營運的私人公司的撤銷註冊工作。

15.7 本條授權予出席會議的過半數董事，如果認爲公司因負債而不能繼續其業務，可議決並向公司註冊處處長交付一份由其中一名董事作出的法定聲明，用以核實經該等董事簽署並記錄以下決議的書面聲明：

- 公司因其負債而不能繼續其業務；及
- 該等董事認爲需要將公司清盤，及有好而充分的理由根據本條開始清盤；及
- 公司會議及公司債權人會議會在該份法定聲明交付公司註冊處處長後 28 天內召集。

15.8 在《諮詢文件》發表前提交的意見書都提出疑慮，本條會讓居心不良的董事鑽空子，在決議當日至債權人會議及分擔人會議舉行前的一段期間內，在未有諮詢債權人或股東的情況下將公司清

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[4] 注意條例第 114 和 116 條，特別是條例第 116(1)(a)條就清盤決議的通知作出的特別規定，而有關的清盤決議是根據條例第 228 條作出的。

[5] 參閱第 17.25 至 17.32 段關於公司註冊處處長的建議，以及第 10.2 至 10.7 段關於董事應該可以將公司清盤的建議。

盤，又或者利用本條謀取私利。這些董事應用本條時實際上是以股東代理人身分行事，有可能作出原本應該由股東作出的行動。

15.9 《諮詢文件》已指出，無力償債問題小組委員會將本條形容爲"statutory Centrebinding"。[6] 這是一種手段，指居心不良的董事提名同樣居心不良的清盤人把公司資產廉價售予與董事有密切關係的買家。關於這種手段的典故是源於英國一宗個案，但並無在該案內實際應用。英國的無力償債條文已杜絕這種情況。[7] 在 1993 年就條例第 228A 條所作的修訂，[8] 規定根據該條委任的任何臨時清盤人必須是律師或專業會計師，應該可減少本條被濫用的機會。

15.10 有一份意見書指出，根據條例第 228A 條委任的臨時清盤人會受法例所約束，不能出售公司資產，但如有關資產屬於易耗損的物品或他已取得法院許可者則除外。然而，如果他是有意違法的，則不論在何種清盤案也會同樣違法。

15.11 無力償債問題小組委員會對於廢除本條的意見有分歧。大多數委員會成員認爲本條專橫武斷；以債務人的權益爲依歸；令債權人無法向法院提出申請；可能引發訟費爭端；以及令清盤人的作爲和操守受人爭議。此外，本條也會令人質疑，何以負責的董事竟會捨棄其他方式而採用本條表面上看來費用較高昂的程序。

15.12 有少數委員會成員則認爲，這程序適用於已停止營業而董事又無意繼續經營的公司。董事可藉引用本條立即進行清盤，無須等待 28 天召開債權人會議後才進行清盤。

15.13 從回應《諮詢文件》的意見書看來，業界對於本條的立場已起了變化。在我們接獲多份有關本條的意見書中，除了有一份意見書持不同觀點外，其餘都是贊同保留本條的。這顯示業界立場已改弦易轍。就以香港會計師公會爲例，該會現在認爲本條是有用的，所以應該予以保留。該公會在意見書中指出，本條在數年前經修訂後已更爲縝密。儘管在理念上而言，本條所訂的程序確有潛在流弊，但該公會並未察覺有嚴重的瀆職問題。

15.14 對於《公司條例》的其他條文足敷應用的見解，有一份意見書表示強烈反對。該意見書指出：

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6 *Re Centrebind Ltd* [1967] 1 WLR 377.

7 參閱《無力償債法令》第 98、114 及 166 條。

8 《1995 年第 75 號條例》。

"……有很多時候，董事可能在勉力撐持一段時間後，才肯承認其公司確無前景可言，儘管他們的作爲確有引人非議之處，但他們通常都是真心期求公司可繼續營運，只是未能充分掌握實際的財務狀況而已。對於處理這類清盤情況，實在別無其他更可取的程序。如沒有股東支持，董事便不能安排將無力償債的公司自動清盤；而沒有股東支持的原因，可能只因他們缺席或身在外地而已。在這情況下，董事便只有訴諸法院一途。這程序不僅令人感到混淆、費時失事，費用更是高昂。要待一切準備就緒，包括擬備所有文件並交付破產管理署署長備案，再排期由法院聆訊後，可能已是數日甚至數星期後。事實上，除非是個別具影響力的公司，否則公司清盤案都不會獲優先安排在法院聆訊的。由於有關手續需時辦理，債權人通常都會先執行規定，甚至不當地搬走或充公公司財物。" [9]

15.15 我們注意到大部分意見書都認爲應該保留本條。不過，我們建議刪除本條，以便根除清盤條文中潛在的濫權問題，儘管有關濫權事故都是道聽途說，但只要本條仍在施行，便會存有濫權的機會。我們認爲在引入撤銷有能力償債但不營運的私人公司的註冊的法定程序後，便足可應付各種可能發生的情況，而又不會留有一段"灰色期"，讓董事可鑽空子，以致損害債權人和股東的利益。 [10]

第(2)款的罰則

15.16 請參閱我們建議對於董事根據第(1)款作出的書面聲明內容如無合理理據支持所應該作出的懲罰。 [11]

第 229 條 自動清盤決議的通知

15.17 公司必須於通過自動清盤的決議後 14 天內在憲報刊登決議公告，如不遵從本條規定，可處罰款。 [12]

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9 Nelson Wheeler Corporate Advisory Services Ltd.

10 參閱第 15.6 段。

11 參閱關於條例第 228 條的第 15.3 段。注意如董事未有遵從條例第 228A 條向他施加的或根據該條向他施加的任何責任，可用作爲根據《公司條例》附表 15 確定他不適合擔任董事的事宜。

12 一萬元另加每日失責罰款 300 元。