

香港工業總會
Federation of
Hong Kong Industries

14 April 2000

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

Dear Ms Leung,

Companies (Amendment) Bill 2000

Thank you for your letter of 7 March 2000 inviting our comments on the captioned Bill. We would like to submit the following views for the consideration of the Bills Committee.

Corporate Rescue

To begin with, the Federation supports the establishment of a statutory system of corporate rescue as proposed in the Bill, which we believe is long overdue in Hong Kong. In our view, creating a system whereby viable and basically sound businesses that get into short-term financial difficulties can be given an opportunity to turn round and survive will be beneficial to all parties concerned, including the shareholders, creditors and employees. Although the proposals being made would be of little relevance in most insolvency cases, a moratorium would be of great help in cases where the company seeking rescue is a good company with sound business prospects. Moreover, a system of corporate rescue can also benefit society by saving employment opportunities that would have been lost if the company goes in liquidation.

Insolvent Trading

Clause 44 of the Bill proposes new provisions on insolvent trading. Basically, they seek to make directors and senior management of a company personally liable for all debts incurred whilst a company is insolvent. According to the Government, the purpose of introducing these amendments is to encourage directors and senior management to face the fact that a company is slipping into insolvency at an early stage and get them to address the situation.

While it is agreed that the law should ensure directors carefully monitor a company's financial position, we have reservation about the new provisions. There are several reasons. Firstly, it appears to us that the new requirements are simply an attempt *ex post facto* to make third parties liable. In real business situations, it is not unusual for a business to be "slipping into insolvency" if a *bona fide* business deal turns bad. If the proposal is made law then any company which does not have great cash strength should be closed down. This, we believe, is not what the Government would wish to see.

Secondly, the strength of Hong Kong's entrepreneurial spirit is the willingness to over trade while taking calculated risks. The threat of personal liability for debts is a strong deterrent against insolvent trading. As the *raison d'etre* for a businessman to form a company is to limit his liability, we do not see why this fundamental principle should be changed.

Thirdly, the existing Companies Ordinance already has "fraudulent trading" provisions to stipulate that persons who deliberately seek to defraud creditors through an insolvent company may be personally liable for the debts so incurred. In our view, this already provides sufficient protection for creditors against fraud. It is therefore unnecessary to impose extra liabilities on company directors and managers.

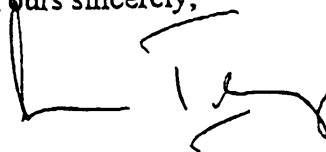
Appointment of Provisional Liquidator

At present, section 228A of the Ordinance provides for the speedy appointment of a provisional liquidator by majority resolutions of the directors of a company. Clause 39 of the Bill proposes to repeal this section. We think the current arrangement has a number of advantages and there are many instances where it can be effectively used. This is particular so when one considers the need for company directors to act quickly in cases of insolvency, given the proposed insolvent trading provisions. Even though there will still be the ability for company directors to approach the court for the appointment of a provisional liquidator, this cannot be done without incurring considerable legal expenses. We therefore recommend the retention of section 228A.

Liabilities of the Protection of Wages on Insolvency Fund

Our final comment is to support the decision not to increase the liabilities of the Protection of Wages on Insolvency Fund.

Yours sincerely,



Henry Y. Y. Tang
Chairman