

LIST OF QUESTIONS FOR CONSULTATION

Question 1 Do you agree with the proposed procedural changes relating to initiation of provisional supervision in paragraphs 2.4 to 2.6 above? If not, please provide reasons and suggest alternatives.

Answer I agree with the proposed procedural changes.

Question 2 Do you see any need for other changes to the initiation of provisional supervision, including who may initiate the procedure? If so, please elaborate on the suggested changes and reasons.

Answer No, I do not see any need for other changes to the initiation of provisional supervision and I think it appropriate that secured creditors (or indeed any other creditors) should not be able to initiate the procedure. In Australia, a secured creditor holding security over all or substantially all of the assets of the company can initiate the appointment of a voluntary administrator. This however is rarely done.

Question 3 Do you agree that the notice of appointment of provisional supervisor should be published in the local newspapers on the same day as the date on which the last document is filed with the Registrar of Companies? If you prefer additional or alternative means of publishing the notice of appointment, please describe and explain.

Answer I agree with this proposal.

Question 4 Do you support an initial moratorium period of 45 days? If not, please suggest alternatives and explain.

Answer The moratorium period of 45 days is subjective, however, in all the circumstances it would appear appropriate.

Question 5 Do you support the proposal to allow for extension of the moratorium up to a maximum period of six months from the commencement of provisional supervision, subject to approval by the creditors at a meeting of creditors? If not, please explain and suggest alternatives.

Answer I think that a moratorium of 6 months is too long. The moratorium can be achieved, as is done in Australia, simply by the entry by the company into voluntary administration/provisional supervision. For a large part, the entry by company into a deed of company arrangement has the effect of extending the moratorium. There are specific provisions in the Australian legislation for the protection of the rights of lessors to the company or suppliers supplying goods to the company under a retention of title arrangement. Query how the rights of these persons would be protected during a 6 or 12 month moratorium.

Question 6 Do you agree with the proposal to allow for extension of the moratorium beyond six months only upon court approval? If not, please explain.

Answer Refer to answer in question 5.

Question 7 If your answer to Q6 is yes, do you agree that any court extension should not exceed a maximum of 12 months from the commencement of provisional supervision? If not, please explain and suggest alternatives.

Answer Refer answer to question 5.

Question 8 Does the list of contracts and agreements which should be exempted from the moratorium, as set out at Appendix, need to be revised? If so, please suggest and explain.

Answer Agreed.

Question 9 Which of the above three options (namely, the 2003 Proposal, Alternative A or Alternative B) would you prefer? Please explain. If you have any suggestion to refine any of the above three options, please describe and explain. If you prefer another alternative, please describe and explain.

Answer In Australia, a deed of company arrangement now must contain a provision that employee creditors are entitled to a priority at least equal to what they would have been entitled to in a winding up. That is, there is no particular provision regarding payment in full of entitlements and one might question why employees should receive 100 cents in the dollar when small trade creditors whose financial livelihood depends upon receiving all of their debts or a significant portion of them, often receive only small pro rata dividends.

If one of the three options had to be chosen, I believe Alternative B would seem preferable.

Question 10 Independent of which of the above options is adopted, what are your views on the treatment of outstanding employers' MPF scheme contributions?

Answer No comment.

Question 11 Do you agree with the proposal that solicitors holding a practising certificate issued under the Legal Practitioners Ordinance (Cap 159) and certified public accountants registered in accordance with the Professional Accountants Ordinance (Cap 50) may take up appointment as provisional supervisors?

Answer I do not agree with this proposal. I am the chartered accountant, official liquidator and practising lawyer and previously worked as an insolvency and reconstruction accountant at KPMG. My partners here in Brisbane who hold practicing certificates would not be capable, of conducting corporate reconstructions. One needs practical experience. I have spoken with Damien Hodgkinson who is an

insolvency director at KPMG in Sydney and who worked for 7 years in the insolvency area in Hong Kong. Damien was on the Insolvency Interest Group which was dealing with the previous Bills. Damien informs me that all the four major accountancy firms have significant insolvency and reconstruction experience as do the mid-tier and global boutique firms such as Alvares and Marsil. Damien informs me that KPMG in Hong Kong have 40 – 50 staff in the insolvency and reconstruction area.

It may well be the case that, as is the position in Australia, lawyers who are not accountants have sufficient practical experience to conduct insolvency and reconstruction work.

I think it is critical that experience in insolvency and reconstruction be a pre-requisite for those persons who may take up appointment as a provision supervisor.

Question 12 Do you think that other persons without the above qualifications could also be appointed as provisional supervisors on a case-by-case basis? If so, should such an appointment be made by the OR or the Court? Please elaborate, in particular on the appeal channel in case of aggrieved applicants and on the associated investigatory and disciplinary regime in case of complaints against appointed persons.

Answer In Australia ASIC can approve, on a case-by-case basis, the appointment of registered/official liquidators. This sometimes occurs where the particular business is a specialised one. If such an arrangement is to be adopted in Hong Kong, I would have thought that the OR would be the appropriate person to approve the appointment, with aggrieved applicants having the right of appeal to the Court. It is doubtful whether the Court would "second-guess" the decision of the OR.

Question 13 Do you agree with giving creditors the choice to replace the provisional supervisor appointed by the company or its directors or the provisional liquidators or liquidators of the company and approve the remuneration of the provisional supervisor at the first meeting of creditors to be held within 10 working days from the commencement of provisional supervision? If not, please elaborate on the reasons and suggest alternatives.

Answer Yes, I agree with this, however in Australia prospective approval of remuneration of insolvency practitioners seems always to have difficulties due to the fact that the extent and nature of the work to be conducted can never be precisely known. In practice, where prospective remuneration approval is sought, it is usually "capped" and the appointee will need to approach the creditors should the cap be reached and further remuneration sought.

Question 14 Do you support imposing personal liability on provisional supervisors as proposed in paragraphs 5.14 to 5.17 above? If not, please suggest alternatives which would effectively address the issues set out under paragraphs 5.16(a) to (c).

Answer Yes, I support the position of personal liability with the exception, as is the case in Australia, of personal liability for employment contracts entered into prior to the appointment of the insolvency practitioner. The insolvency practitioner will be liable for post-appointment liabilities and the pre-appointment liabilities are met

either under the GEERS or out of the proceeds of floating charge assets, in priority to claims of secured creditors (sections 433 and 561, *Corporations Act*).

Question 15 Do you support the introduction of insolvent trading provisions? In case you do not, please explaining and suggest alternatives to
(a) encourage timely initiation of provisional supervision; and
(b) deter irresponsible depletion of the company's assets

Answer I support the introduction of insolvent trading provisions

Question 16 Do you agree with the proposed revised formulation of "insolvent trading"? If not, please suggest alternatives.

Answer I agree with the proposed revised formulation of "insolvent trading".

Question 17 Do you agree with the way that "major secured creditors" was defined in the 2001 Bill? If you think any changes are needed, please elaborate and explain.

Answer I agree with the way that "major secured creditors" were defined in the 2001 Bill.