CHARTERED SECRETARIES
特許秘書

April W. Y. Chan
President

Companies Bill Team
Financial Services and the Treasury Bureau
15/F, Queensway Government Offices
66 Queensway
Hong Kong

16 March 2010

Dear Sirs,

Re: Consultation Paper on Draft Companies Bill – First Phase Consultation

We are pleased to enclose our submission in response to the above consultation paper.

We have no objection to your disclosing our submission to the public.

Thank you for your attention.

Yours faithfully,

April W. Y. Chan FCIS FCS(PE)
President

Enclosure

The Hong Kong Institute of Chartered Secretaries
(Incorporated with limited liability)
The Institute of Chartered Secretaries and Administrators
3/F, Hong Kong Diamond Exchange Building, 8 Duddell Street, Central, Hong Kong
香港中環都爹利街8號香港鑽石會大廈3樓 Tel 電話: (852) 2881 6177 Fax 圖文傳真: (852) 2881 5050
Website: http://www.hkics.org.hk
E-Mail: ask@hkics.org.hk

香港特許秘書公會
(以有限責任形式成立)
特許秘書及行政人員公會

ICSA INTERNATIONAL

The Hong Kong Institute of Chartered Secretaries
Submission on the Consultation on Review of Corporate Rescue Procedure Legislative Proposals

		Comments
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.	We 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.	While we respect the view of the Law Reform Commission, consideration should be given to allow creditors to apply for the corporate rescue procedure. In fact, creditors should be encouraged to use this as the preferred procedure to achieve debt restructuring.
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.	Encourage companies to use electronic and website communications to correspond with its stakeholders – follow the footsteps of the proposed legislative amendments to the Companies Ordinance.
Question (4)	Do you support an initial moratorium period of 45 days? If not, please suggest alternatives and explain.	For the reasons stated in the consultation paper, we support an initial moratorium period but would suggest a longer period of 60 days. A longer period should reduce the number of court applications for extension of the initial moratorium period.

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.	For the reasons stated in the consultation paper, we support the proposal.
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.	For the reasons stated in the consultation paper, we support the proposal.
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.	If we are comfortable with court supervision for extension beyond the first six months, the proposed time limit safeguard seems unnecessary.
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.	We have no views on this issue.
Question (9)	Which of the above three options (namely, the 2003 Proposal, Alternative A or Alternative B) would you prefer? Please	For the reasons set out in the consultation paper (paragraph 4.15) we support Alternative B. The late Professor Philip Smart and Professor Charles D. Booth summed it up in their article: it would in no way inhibit

	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.	a company in financial difficulty from obtaining the all-important breathing space that the moratorium allows but at the same time strikes a fair balance between the interests of the employees and of the company's other creditors. If our suggestion to Question (4) is adopted, the company could have a valuable 60-day period to resolve the employees' outstanding entitlements.
Question (10)	Independent of which of the above options is adopted, what are your views on the treatment of outstanding employers' MPF scheme contributions?	If the objective is to encourage companies with financial difficulties to use the proposed procedure, perhaps outstanding employers' MPF scheme contributions should not form part of the employees' protected debt.
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?	Along with the solicitors and accountants, consideration should be given to follow Section 12(1A) of the Bankruptcy Ordinance to allow current members of The Hong Kong Institute of Chartered Secretaries to serve as provisional supervisors.
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	See our response to Question (11).

	on the associated investigatory and disciplinary regime in case of complaints against appointed persons.	
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.	For the reasons stated in the consultation paper, we support the proposal: it gives creditors greater involvement and control of the process.
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).	We support the proposal. The alternative is for the provisional supervisor to post a surety bond.
Question (15)	Do you support the introduction of insolvent trading provisions? In case you do not, please explain and suggest alternatives to (a) encourage timely initiation of provisional supervision; and (b) deter irresponsible depletion of the company's	For the reasons stated in the consultation paper, we support the introduction of insolvent trading provisions.

	assets.	
Question (16)	Do you agree with the proposed revised formulation of "insolvent trading"? If not, please suggest alternatives.	• We support the proposal to drop ground 6.1(1)(b), ie, 'reasonable grounds for suspecting'. • That said, we believe directors of the company should not be held liable for honest errors of commercial judgment. Absent an element of dishonesty, directors and officers should not be held responsible for debts of creditors.
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.	We agree with the way "major secured creditors" was defined in the 2001 bill.
Question (18)	Do you support the proposal to largely follow the 2001 Bill approach with respect to protection of "major secured creditors" and other secured creditors' rights? If you think any changes are needed, please elaborate and explain.	We believe the protection of secured creditors' rights is justified.
Question (19)	What are your views on retaining or removing the "headcount test" in the voting at meetings of creditors (i.e. requirement (a) stated in paragraphs 8.1 and 8.2 above) for resolutions to be passed at meetings of creditors?	It appears that the "headcount test" is now considered as a "relic" that no longer has a sound basis in policy: It is a distraction from the concept of respecting the value of the creditors.