

**Bills Committee on  
Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015**

**Response to matters raised by the Assistant Legal Advisor**

This paper sets out the Government's response to the matters in relation to the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 ("the Bill") as raised in the letter of the Assistant Legal Advisor ("ALA") of the Legislative Council dated 21 January 2016. Pursuant to our oral response at the Bills Committee meeting held on 25 January 2016, we would like to set out our response in writing and provide supplementary information as appropriate.

**Part I – Legal issues**

Clause 92 – section 267A

2. The new section 267A(2) (Clause 92 of the Bill) is derived from the existing section 267 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) ("CWUMPO") which, in gist, provides that a floating charge on a company's undertaking or property created by the company within 12 months before the commencement of its winding-up shall be invalid unless it is proved that the company immediately after the creation of the charge was solvent. Under the Bill, the provision relating to the 12-month period is to be found in the new section 267A(2)(a) while the provision on the solvency requirement is to be found in the new section 267A(2)(b).

3. The Bill improves the existing section 267 of CWUMPO on the invalidation of floating charges created before the winding-up by extending the claw-back period in relation to floating charges created in favour of persons who are connected with the company ("connected persons")<sup>1</sup> from 12 months to two years (the new section 267A(1) (Clause 92 of the Bill) refers). Since connected persons are in a position where they may possess or have access to information concerning the company that is not generally available, or where they may be able to take action to manipulate or exert influence on the affairs of the company in order to safeguard or gain some advantage for their own interests, there is a greater risk of abuse in the case of connected persons. Therefore, the requirement to establish that the company was unable to pay its debts under the new section 267A(2)(b) is not applied to a floating charge created in favour of a connected person.

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<sup>1</sup> The concept of "connected person" is set out in the new sections 265A to 265C (Clause 88 of the Bill).

#### Clause 105 – section 296D

4. As we explained at the Bills Committee meeting on 25 January 2016, the purpose of the new section 296D(6) (Clause 105 of the Bill) is to ensure that a failure to make a document or information available on a website continuously throughout the period mentioned in the new section 296D(2)(f) or 296D(3), which is wholly attributable to circumstances that it would not be reasonable to have expected the provisional liquidator or liquidator to prevent or avoid, would not affect the validity of the use of the website for sending or supplying the document or information. Examples may include a failure which is wholly attributable to fire, earthquake, etc. that it would not be reasonable to have expected the provisional liquidator or liquidator to prevent or avoid.

#### Clause 120 – Rule 2 of Chapter 32H

5. Further to paragraph 12 of our paper No. CB(1)383/15-16(03) to the Bills Committee, we will consider introducing Committee Stage Amendments relating to the term “affidavit of concurrence” as appropriate in this provision and other provisions in the Bill where the term is mentioned.

### **Part II – Drafting issues**

#### Clause 105 – section 296D

6. As we indicated at the Bills Committee meeting on 25 January 2016, we will introduce a Committee Stage Amendment to amend the reference to “subsection (7)” in the new section 296D(8) (Clause 105 of the Bill).

#### Clauses 116 to 118 – Twelfth Schedule, Fifteenth Schedule and Schedule 25

7. There are cross-references to Schedules numbered in ordinal form in the English text of CWUMPO and the new Companies Ordinance (Chapter 622). It would be prudent to examine the implications on the relevant provisions carefully and comprehensively before taking forward the suggestion to amend the numbering style of the Schedules. We will consider the numbering style of the Schedules in CWUMPO separately after the amendments proposed by the Bill and the Companies Ordinance (Chapter 622) have all come into operation.

#### Clause 149 – Rules 69(4) and 71(3) of Chapter 32H

8. The words “In addition” in the new rules 69(4) and 71(3) of the Companies (Winding-up) Rules (Chapter 32H) (“CWUR”) (Clause 149 of the Bill) serve to make

it clear that the requirements under those two rules that the notices concerned must be in the specified forms are in addition to the requirements under the new rules 69(3) and 71(2) (Clause 149 of the Bill). The new rules 69(3) and 71(2) set out the more fundamental requirements for the notices concerned (e.g. to notify the relevant persons, to state the relevant information, etc.), while the new rules 69(4) and 71(3) set out the requirement on the format of the notices. The words “In addition” serve to indicate the relationship between the two sets of requirements.

#### Clause 173 – Forms in Appendix of Chapter 32H

9. The existing rule 3 of CWUR provides that the forms in the Appendix of CWUR are to be used with such variations as circumstances may require. Therefore it is presently permissible for users of Forms 1 and 98 as well as other Forms in the Appendix of CWUR to amend references of “19 ” to “20 ” manually.

10. Having regard to the non-essential and technical nature of the amendment of the references of “19 ” to “20 ”, and the fact that there are many similar references to “19 ” in the existing Forms in the Appendix of CWUR, we have taken the position that amendments to references to “19 ” in the existing Forms will only be taken forward if there are substantive amendments being proposed for those particular Forms in the Bill. Therefore, we do not propose to amend Form 1 and other Forms in the Appendix of CWUR solely for the purpose of updating “19 ”. However, we will introduce a Committee Stage Amendment to update the reference to “19 ” in Form 98 (Clause 173 of the Bill) as there are substantive amendments proposed for this Form.

#### Clause 177 – Schedule 26

11. Section 31(2) of the new Schedule 26 (Clause 177 of the Bill) provides that if the winding up of a company commences before the expiry of a period as described therein, in accordance with section 31(3) of the new Schedule 26, the pre-amended section 274 of CWUMPO is to have effect. The period so described is the 2-year period beginning on the 1st day of the company’s first financial year that begins on or after the commencement date of the Bill. We will consider simplifying section 31(2) of the new Schedule 26 by way of a Committee Stage Amendment.

**Financial Services and the Treasury Bureau  
Official Receiver’s Office  
15 February 2016**