

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

**Response to Matters Raised by Members at the Meeting on 6 November 2015**

This paper sets out the Government's response to the matters, as listed in the letter from the Clerk to the Bills Committee dated 10 November 2015, raised by Members in relation to the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Bill 2015 at the meeting on 6 November 2015.

Interface between the winding-up process and application for the Protection of Wages on Insolvency Fund ("PWIF")

2. Under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) ("the CWUMPO"), a company unable to pay its debts may be wound up as follows:

- (a) Court winding-up: The company may be wound up by the court upon the filing of a winding-up petition by a relevant party<sup>1</sup>; or
- (b) Creditors' voluntary winding-up: Where the shareholders of a company resolve that the company be wound up voluntarily on account of its inability to pay debts, the winding-up would proceed as a creditors' voluntary winding-up<sup>2</sup>.

3. The PWIF provides timely relief to employees of insolvent employers. The employees will obtain, without having to wait until the completion of the bankruptcy/winding-up process, ex gratia payments to cover the verified outstanding wages, wages in lieu of notice, severance payment and pay for untaken statutory holidays/untaken annual leave payable to them as soon as possible.

4. The PWIF is applicable to employees who are owed wages and other payments in court winding-up cases. Under section 16 of the Protection of Wages on Insolvency Ordinance (Cap 380) ("the PWIO"), upon the filing of a winding-up petition against a company and the application for PWIF by the company's employees, if it appears to the Commissioner for Labour ("the Commissioner") that the company has failed to pay to an applicant any wages, wages in lieu of notice, severance

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<sup>1</sup> Creditors (including the employees), shareholders of the company and the company itself may petition to the court to wind up the company.

<sup>2</sup> Apart from creditors' voluntary winding-up, the CWUMPO also provides that the winding up of a solvent company may proceed as a members' voluntary winding-up. The liquidator will make relevant arrangements for paying the debts, namely the employees' wages. The winding up of solvent companies will not involve application for PWIF.

payment and/or pay for untaken statutory holidays/untaken annual leave, the Commissioner may, in accordance with the caps specified in the PWIO<sup>3</sup>, make an ex gratia payment to the applicant out of the PWIF of the amount of the wages, wages in lieu of notice, severance payment and/or pay for untaken statutory holidays/untaken annual leave<sup>4</sup>.

5. For creditors' voluntary winding-up cases, if the employees who are owed wages and other payments want to apply for the PWIF, they may file a winding-up petition to the court. Under the PWIO, the filing of a winding-up petition against a company is a pre-condition for the grant of ex gratia payments from the PWIF. Therefore, in a creditors' voluntary winding-up, so long as a relevant party (including an employee of the company concerned) has filed a winding-up petition to the court, the mechanism for the grant of ex gratia payments from the PWIF to the employees will be triggered.

6. An employee who wants to receive legal aid for filing a winding-up petition against the company concerned may seek assistance from the Labour Department ("LD") for referral of their case to the Legal Aid Department ("LAD"). The LAD will process an application for legal aid in accordance with its established procedures and criteria. Before making an application for legal aid, unless the amount owed to the employee is undisputed between the company and the employee and the company has signed a "Statement of Inability to Pay" to confirm its inability to pay the said amount, the applicant is required to confirm (a) the employment of the applicant by the company in liquidation; and (b) the payment item(s) and amount owed by the company in liquidation to the applicant. If there is any dispute between the applicant and the company in liquidation over items (a) and/or (b), the LD will take into consideration the Labour Tribunal ("the Tribunal")'s determination on the dispute when processing the application so as to establish the facts in respect of items (a) and/or (b). Hence, the determination of the Tribunal is required before the LD refers

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<sup>3</sup> According to the PWIO, the ex gratia payments from the PWIF are capped as follows: \$36,000 for wages; \$22,500 for wages in lieu of notice; \$50,000 plus 50% of any excess entitlement for severance payment (as the maximum amount of severance payment payable under the Employment Ordinance (Cap 57) is \$390,000, the ex gratia payment for severance payment is capped at \$220,000); and \$10,500 for the total payment in respect of pay for untaken statutory holidays/untaken annual leave. Each employee is entitled to receive not more than \$289,000 ex gratia payments.

<sup>4</sup> It is also provided in section 18 of the PWIO that notwithstanding that a bankruptcy/winding-up petition has not been presented to the court for a particular case, the Commissioner may exercise his discretion to make relevant ex gratia payments to an applicant if the employer is a company and the Commissioner is of the opinion that:

- (a) the company employs less than 20 employees;
- (b) the company is unable to pay its debts; and
- (c) it is unreasonable or uneconomic to present a winding-up petition in that case.

the case to the LAD. If necessary, the LD will assist the applicant in filing a claim to the Tribunal for determination. For failures on the part of the company in liquidation to make payments in accordance with the Tribunal's determination, the applicant may, by virtue of such determination, seek the LAD's assistance in his filing of petition to the court to wind up the company.

7. In fact, in a company winding-up case handled by a liquidator, the liquidator also has to establish the facts in respect of items (a) and (b) in paragraph 6 above. Whenever a dispute over items (a) and/or (b) arises, the liquidator will request the applicant to submit further evidence to confirm his employment by the company in liquidation and the payment items and amount owed to him by the company.

8. Regarding the processing time of PWIF applications, on the presentation of a winding-up petition to the court, the LD will, in accordance with its performance pledge, make ex gratia payments to the qualified employees within 10 weeks after receiving all the information and documents required for the application.

9. The numbers of winding-up cases of insolvent companies over the past three years are as follows:

Number of wound-up companies <sup>5</sup>	Financial year		
	2012/13	2013/14	2014/15
(a) Court winding-up	335	250	284
(b) Creditors' voluntary winding-up	135	93	128

10. The numbers of applications for PWIF over the same period as provided by the LD are as follows:

Numbers of applications (in terms of numbers of persons) (including company and non-company applications) <sup>6</sup>	Financial year		
	2012/13	2013/14	2014/15
(a) Applications processed [(a)=(b)+(c)+(d)]	3 001	2 048	2 573
(b) Applications approved [(b)=(i)+(ii)+(iii)]	2 588	1 771	2 215
(i) Applications with winding-up petition filed	1 677	1 081	1 403
(ii) Applications with ex-gratia payment made under the discretionary powers of section 18 of the PWIO (see Footnote 4) (including non-company applications)	822	633	750

<sup>5</sup> The numbers of solvent companies proceeding to winding up are as follows: 774 cases in financial year 2012/13, 781 cases in financial year 2013/14 and 761 cases in financial year 2014/15.

<sup>6</sup> The CWUMPO is applicable to company applications only.

Numbers of applications (in terms of numbers of persons) (including company and non-company applications) <sup>6</sup>	Financial year		
	2012/13	2013/14	2014/15
(iii) Other non-company applications	89	57	62
(c) Applications rejected (including cases where the applicants (e.g. self-employed persons) are not entitled to claim for wages and other payments under the Employment Ordinance (Cap 57))	50	22	44
(d) Applications withdrawn by the applicants	363	255	314

Caps on preferential payments for employees

11. As to whether the Government should consider lifting the caps stipulated under section 265 of the CWUMPO on preferential payments to employees<sup>7</sup> to the levels of ex gratia payments under the PWIO (see Footnote 3), it should be pointed out that for employees who are paid ex gratia payments from the PWIF, their beneficial interests will not be affected by the caps under section 265 of the CWUMPO since the wages and other payment items owed to them will first be paid from the PWIF, subject to the PWIF caps on respective items. Since the PWIO provides that the PWIF has subrogation rights in applications that have been granted ex gratia payments, the lifting of the caps under section 265 of the CWUMPO in such circumstances will result in the transfer to the PWIF an even larger amount of money received from the realisation of a wound-up company's assets. A number of stakeholders consider that instead of enhancing the rights of employees, the lifting of the existing caps under section 265 of the CWUMPO will create unfavourable impact on other creditors in such circumstances. They are of the view that the caps should not be lifted at this stage.

12. In light of the views of Members, we will examine carefully, for those creditors' voluntary winding-up cases that failed to make use of the relevant procedures to invoke the PWIF application process, whether we may and should address the problems faced by the employees of wound-up companies in such cases by lifting the caps under section 265 of the CWUMPO on preferential payments to the employees.

Order of priority of payment for unsecured creditors

13. It is important that the distribution of the assets of a wound-up company among the unsecured creditors is handled in accordance with the relevant principles

<sup>7</sup> The wages/salary is capped at \$8,000, severance payment at \$8,000, and wages in lieu of notice at \$2,000.

that it must be fair, reasonable and operationally practicable. In this regard, the international norm is to uphold the corporate insolvency law principle of *pari passu*. With reference to the *pari passu* principle, the existing CWUMPO provides that except for the cases of employees' wages in arrears and government statutory debts, all other unsecured creditors should be treated on an equal footing, with the company assets distributed to each such creditor subject to the proportion of the claim amount of each of them in the total claim amounts. Making further distinction among these unsecured creditors and according to some of them a higher payment priority as compared to their existing priority status will affect the interests of the other unsecured creditors. This raises the question whether such arrangement is fair. We should also consider if there is a reasonable and practical way to define "ordinary customer" and "small supplier". Further distinction of an "ordinary customer" and a "small supplier" from other unsecured creditors who are themselves customers and suppliers to differentiate the payment priority will make the payment mechanism even more complicated, prolong the winding-up process, and result in delay of payment to creditors. If the Committee wishes to explore further this idea, it will be prudent to give all stakeholders affected the opportunities to fully express their views to facilitate a comprehensive deliberation and assessment of the matter, ensuring that the outcome is fair, reasonable and operationally practicable.

**Financial Services and the Treasury Bureau  
Official Receiver's Office  
27 November 2015**