

**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 10 December 2015.

Clause 6(2) – section 2(1)

2. The new section 194(1)(da) provides that the Official Receiver becomes the provisional liquidator if a vacancy occurs in the office of a provisional liquidator who is holding office by virtue of section 194(1)(aa) or section 194(1A) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO"). It is further provided that the Official Receiver is "taken to be" the provisional liquidator of the company holding office by virtue of section 194(1)(a) of CWUMPO. As the proposed amended definition of "liquidator" in section 2(1) of CWUMPO provides that "liquidator" includes "a provisional liquidator holding such office by virtue of section 194(1)(a) or (aa) or (1A)", we do not consider it necessary to include section 194(1)(da) in the proposed amended definition of "liquidator".

3. The proposed Chinese renditions in the Bill for "transaction at an undervalue" and "unfair preference" are "遜值交易" and "不公平優惠" respectively. Compared with the Chinese renditions of these two terms in the Bankruptcy Ordinance (Cap. 6) which are "以低於一般價值而訂立的交易" and "不公平的優惠" respectively, they have the same meaning but are more akin to the formulation of a defined term. Whilst we have taken the opportunity of this legislative exercise to introduce in the Bill a more succinct Chinese rendition "遜值交易" for "transaction at an undervalue" and to omit the "的" in the Chinese rendition of "unfair preference" for the purpose of the corporate winding-up regime, it will be prudent of us to consider separately in due course whether to amend the Chinese renditions of the same terms that appear in the other ordinances viz. the Bankruptcy Ordinance and the Payment Systems and Stored Value Facilities Ordinance (Cap. 584) in the context of the next review of these ordinances (instead of making consequential amendments to these ordinances now as part of this Bill), as the different contexts of different ordinances and the possible implications of such changes to the respective regimes should be examined carefully before a decision is made to pursue such amendments to these other ordinances.

Clause 15(7) – section 168IA(7)

4. The amendment to section 168IA(7) of CWUMPO is made as a consequence of the addition of the new rule 51A (Clause 137 of the Bill). The new rule 51A and the new section 286A (Clause 101 of the Bill) improve the public examination procedure in the winding-up regime under Part V of CWUMPO, while section 168IA, which provides for a similar public examination procedure in relation to a person who is liable to a disqualification order under Part IVA of CWUMPO, is similarly amended for consistency and improvement. The new rule 51A(1), which also applies to the proceedings under section 168IA by virtue of the amended rule 57A (Clause 143 of the Bill), provides that for the purposes of an application for a court order for public examination under the new section 286A(1), evidence in support of the application may be in the form of a report to the court setting out the reasons why a public examination order is needed and such a report is confidential.

5. It is our intention that such a report should be confidential as it may contain information which, if disclosed to the person proposed to be made subject to the order, may adversely affect the effectiveness of the order being sought or even frustrate its purpose, e.g. the targeted person may be alerted to conceal, dissipate or destroy information or materials which may tend to incriminate himself but relevant to the investigation. In line with the addition of the new rule 51A, the requirements to furnish a copy of a report to a person to be examined under the existing section 168IA and section 222 (i.e. the existing provisions on public examination procedure in the winding-up regime) of CWUMPO are removed.

6. To strike a balance between maintaining effectiveness of the examination procedures and affording a fair treatment to the person to be summoned, the new rule 51A(2) (which also applies to the proceedings under the amended section 168IA) further provides that a person to be examined may apply to the court to see all or part of the report and, if he satisfies the court that it would be unfair to him not to see it, the court may allow him to see all or part of the report subject to any condition that it thinks fit.

Clause 20 – section 170A

7. “Shareholder” is used in the new section 170A as a term to denote a person from whom shares of a company have been bought back or redeemed out of the company’s own capital. Since the new section 170A concerns the liability of a person who has held shares in a company, it is more appropriate to use the term

“shareholder” instead of “member” to denote such a person because the meaning of “member” is broader and it includes members of a company which has no share capital, which is irrelevant to the context of the new section 170A.

8. Moreover, the use of “shareholder” in the new section 170A is useful in drawing a distinction between the liability under section 170(1) of CWUMPO, which applies to all kinds of “members” (i.e. members of all kinds of companies), and the more specific liability under the new section 170A, which only applies to persons who have held shares in a company (i.e. with a share capital).

9. “Shareholder” is not only used in section 2(10) of CWUMPO, but also in paragraph 10(d) of the Third Schedule, the Fourth Schedule, and sections 2(1)(a)(ii)(C) and 3(1) of the Twenty-third Schedule, to CWUMPO. The distinction between “shareholder” and “member” is exemplified particularly in section 3(1) of the Twenty-third Schedule to CWUMPO.

10. Regarding Clause 20 of the Bill with respect to the new section 170A(5), which is modelled on section 76(5) of the United Kingdom Insolvency Act 1986, the purpose of the subsection is that the limitation on liabilities of contributories under section 170 of CWUMPO does not apply to liabilities accruing under the new section 170A. Taking into account ALA’s concern, we will consider introducing an amendment to the new section 170A(5) by way of a Committee Stage Amendment to express in more clear terms the intended effect of the provision.

Clause 30(6) – section 190(2B)

11. The new section 190(2A) allows a provisional liquidator or liquidator to require certain persons to make and submit an “affidavit of concurrence” to concur in the statement of affairs as required under section 190(1) of CWUMPO. The new section 190(2B) provides that the affidavit of concurrence may be qualified, in respect of matters dealt with in the statement of affairs, where the maker of the affidavit does not agree with the maker of the statement of affairs, considers the statement to be erroneous or misleading, or is without the direct knowledge necessary for concurring in the statement.

12. Taking into account ALA’s concern, we will consider introducing an amendment to the term “affidavit of concurrence” by way of a Committee Stage Amendment to better reflect the nature of the affidavit.

Clause 33(3) – section 193(7)

13. Pursuant to section 193 of CWUMPO, at any time after the presentation of a winding-up petition and before the making of a winding-up order in respect of a company, either the Official Receiver or any other fit person may be appointed by the court as a provisional liquidator of the company. Where a vacancy occurs in the office of a provisional liquidator appointed by the court under section 193, such vacancy can be filled by the court pursuant to the same power under section 193(1). We consider that further amendment to section 193 of CWUMPO is not necessary.

Clause 34 – section 194

14. The existing sections 194(2) to (5) of CWUMPO were introduced by the Companies (Amendment) Ordinance 1997 (No. 3 of 1997) to enable the Official Receiver as the liquidator in court winding-up cases to outsource some winding-up cases to private insolvency practitioners to act as liquidator in place of the Official Receiver. Against this background, section 194(2) of CWUMPO provides that the Official Receiver may, where he is the liquidator of the company, at any time apply to the court for the appointment of a liquidator in his place. It is not the legislative intent to give liquidators of the company (other than the Official Receiver) a similar right to apply to the court for the appointment of a person as a liquidator in their place.

Clause 37 – section 199B

15. The provisions in the new sections 199(6), 199A(3) and 199B(7) are derived from the existing section 199(3) of CWUMPO. We will consider introducing amendments to these provisions by way of a Committee Stage Amendment to improve consistency among these provisions.

**Financial Services and the Treasury Bureau
Official Receiver's Office
7 January 2016**