

**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 4 January 2016. Pursuant to our oral response at the Bills Committee meeting held on 11 January 2016, we would like to set out our response in writing and provide supplementary information as appropriate.

Part I – Legal issues

Clause 43 – section 206A

Sections 206A(3) and 206A(4)

2. The new section 206A(3) (Clause 43 of the Bill) requires the liquidator to summon a meeting of the committee of inspection ("COI") for a date not later than 21 days after the date a request for meeting from a member of the COI is received by the liquidator after the first meeting of the COI. The new section 206A(4) (Clause 43 of the Bill) requires the liquidator to summon a meeting of the COI for the date and time resolved by the COI at its meeting. In a situation where the date of the meeting under the new section 206A(4) falls within 21 days after the date a request for meeting is received by the liquidator under section 206A(3), a liquidator may summon only one meeting for the purpose of both sections if the timing requirements in both provisions could be complied with.

Section 206A(7)

3. It is intended that, under the new section 206A(7) (Clause 43 of the Bill), the notice of a COI meeting must be given to a member's representative designated for that purpose, i.e. the representative designated to receive a notice of meeting. Under the new section 207A(2)(b)(i) (Clause 45 of the Bill), a representative may be appointed for specific matters. The notice should only be sent to the representative if that representative has been designated to receive the notice. The same analysis could be applied to the new sections 207A(1), 207E(3) and 207I(2) (all in Clause 45 of the Bill).

Section 206A(8)

4. The new section 206A(8) (Clause 43 of the Bill) provides that the requirement to give the notice of a COI meeting may be waived by or on behalf of a

member before or at a meeting. It is not the intention to confine the person who may waive the notice requirement under the new section 206A(8) to the member's representative designated to receive the notice under the new section 206A(7). The issue of whether a person has the authority to waive the notice requirement on behalf of the COI member would depend on whether the person is duly authorized to do so under the new section 207A(2) (Clause 45 of the Bill).

Clause 45 – sections 207A and 207B

Section 207A(2)(b)(ii)

5. Under the new section 207A(2)(b)(ii) (Clause 45 of the Bill), a letter of authority to authorize a person to represent a COI member can be signed by or on behalf of the member. This matter was discussed at the Bills Committee meeting held on 11 January 2016. Taking into account Members' views, we will consider introducing a Committee Stage Amendment to the effect that if the COI member is an individual, the person representing the individual COI member is authorized by holding a letter of authority that is signed by that member, and for other cases (e.g. the COI member is a body corporate), the letter of authority can be signed by or on behalf of the relevant COI member.

Section 207B(6)

6. Under the new section 206A(6) (Clause 43 of the Bill), the liquidator may summon a COI meeting with remote attendance of members by giving notice of the date, time and place of the meeting to every member of the COI. The new section 207B(6) (Clause 45 of the Bill) further provides that the liquidator may satisfy the requirement of specifying a place of the meeting under the new section 206A(6) by specifying the arrangements the liquidator proposes to enable the COI members to exercise their rights to speak and vote while they are not present together at the same place for the meeting.

7. On the other hand, the intention of the new section 207B(8) (Clause 45 of the Bill) is to allow any member of the COI to request a face-to-face meeting notwithstanding a meeting with remote attendance has been summoned by the liquidator. The liquidator must specify a place for the meeting by following the procedures in the new section 207C (Clause 45 of the Bill). In view of the above, the requirement to specify a place of the meeting arising from section 207B(8) is different from the requirement to specify a place of meeting under section 206A(6). Accordingly, the position is sufficiently clear that it is not necessary that section 207B(6) should be made subject to section 207B(8).

Clause 59 – section 228A

8. The existing section 228A(1) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32) (“CWUMPO”) provides that the

majority of the directors of a company “may” pass a resolution to the effect as specified in the existing section 228A(1)(a), (b) and (c) and deliver the winding-up statement to the Registrar of Companies if they have formed the opinion that the company cannot by reason of its liabilities continue its business. The new section 228A(1A) (Clause 59(2) of the Bill) is derived from the existing section 228A(1) of CWUMPO where the delivery of the winding-up statement is not compulsory. As provided under the existing section 228A(5)(a), a voluntary winding-up of a company under section 228A shall commence only upon the delivery of the winding-up statement to the Registrar of Companies.

Clause 75 – section 243A(5)

9. The amended section 241(1) (Clause 73(1) of the Bill) provides that the company shall cause the first creditors’ meeting to be summoned for a date not later than 14 days after the holding of the meeting of the company at which the resolution for voluntary winding-up is to be proposed. The requirement of calling the first creditors’ meeting is an important step to proceed with a creditors’ voluntary winding-up. In this connection, it is considered that where the company fails to cause the first creditors’ meeting to be summoned in accordance with the amended section 241(1), pursuant to the new section 243A(4) (Clause 75 of the Bill), the liquidator must apply to the court for directions as to the manner in which the default is to be remedied. On the other hand, for non-compliance with the existing sections 241(2) and 241(4), and the amended section 241(3) of CWUMPO, which concern some operational matters relating to preparation for the first creditors’ meeting, it is considered that the liquidator should be given the discretion under the new section 243A(5) to decide whether to apply to the court for directions on a case-by-case basis. In the event that the liquidator has decided not to apply to the court for direction, any contributory or creditor who does not agree with the liquidator's decision may still apply to the court to determine any question arising in the winding-up under the existing section 255 of CWUMPO.

Clause 101 – section 286A(8)(a)

10. Similar to the amendment to the existing section 168IA(7) of CWUMPO (Clause 15(7) of the Bill) (paragraphs 4 to 6 of our paper CB(1)383/15-16(03) to the Bills Committee refer), the removal of the existing right under section 222(6) of CWUMPO to have a copy of the further report under section 191(2) is made as a consequence of the addition of the new rule 51A (Clause 137 of the Bill). To improve the public examination procedure, the new rule 51A(1) provides that for the purposes of an application for a court order for public examination under the new section 286A(1) (Clause 101 of the Bill) (the existing provisions on public examination under section 222 of CWUMPO are improved and relocated to the new section 286A), 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.

11. 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 which are relevant to the investigation. In line with the addition of the new rule 51A, the requirement to furnish a copy of the further report to a person to be examined under the existing section 222(6) of CWUMPO is removed.

12. To strike a balance between maintaining effectiveness of the examination procedures and affording fair treatment to the person to be summoned, the new rule 51A(2) 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.

Part II – Drafting issues

Clause 66 – section 237A

13. We will introduce a Committee Stage Amendment to further amend section 237A(2) (Clause 66(4) of the Bill) to improve language consistency within the section.

Clause 69 – section 239

14. We will introduce a Committee Stage Amendment to amend Clause 69 of the Bill as advised by ALA.

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