Corporate Law Reform Committee

Responses and Comments Received on
Consultative Document
"Company Liquidation – Reforms and Restatement of the Law"

Respondents:

A total of twelfth (12) responses were received from the following:

1. Lim Peng Hock
2. Malaysian Associated of Company Secretaries (MACS)
3. PFA Corporate Services Sdn Bhd
4. Institute of Approved Company Secretaries (IACS)
5. The Malaysian Institute of Chartered Secretaries and Administrators (MAICSA)
6. The Association of Chartered Certified Accountants (ACCA)
7. Ms. Judy Lim
8. The Association of Banks In Malaysia (ABM)
9. Malaysian Investment Banking Association (MIBA)
10. Malaysian Institute of Accountants & The Malaysian Institute of Certified Public Accountants (MIA-MICPA)
11. Lee Hishammuddin Allen & Gledhill
12. Bar Council

Summary of responses and comments:

Respondents	Comments
Lim Peng Hock	To consider making it mandatory upon the Liquidator to distribute the company assets and wind up such a company within 12 months of its newspaper announcement of the company's appointment of a named liquidator and authorizing him to distribute the company's assets amongst the shareholders, contributors. Otherwise, a director or shareholder will be deprived of his share when the liquidator drifts and does not distribute over a more than 2 years period from the date of the newspaper advertisement. The said company has given a loan to a director who passed away after the advertisement but his list of Asset & Liabilities in Probate certified he has enough bank deposits to repay in full that lending. The liquidator did not recover the money for distribution to each and every shareholder. Friends / relatives of a supposed-to-be beneficiary in the public advertisement may get the wrong impression of his lifestyle, not knowing that he did not receive a single cent out of the supposed (but not implemented) distribution. Also, that public advertisement turns into misleading information.
MACS	**Reply to Question 1 – 30:** Answer to the questionnaire 1 to 30: We agree all. We also agree with the suggestion made by the CLRC in Question 12 that the appropriate time frame for the creditor to file a petition to wind up a company is 3 months after the expiry of the period for the company to comply with the statutory demand notice. **Reply to Question 31:** We agree. We further recommend that the Section 601AA of the Australian Corporations Act 2001 that allows the company or its director or member of the company or a liquidator to lodge an application for the voluntary deregistration of a company be adopted.
PFA Corporate Services Sdn Bhd	**Reply to Question 1:** We agree that the date of the order by the court to wind up the company should be the date of compulsory winding up. **Reply to Question 2:** We agree to state a list of exempt dispositions. **Reply to Question 3:** We agree as this will stream line the procedures and reduces the need to cross-reference. **Reply to Question 4:** We agree that the transactions as suggested should be stated. **Reply to Question 5:** Yes, this seems to be similar to the timeframe provided by the Bankruptcy Act 1967 which is currently referred to in a compulsory winding up process. **Reply to Question 6:**

	We agree that section 293 of the Companies Act 1965 should be amended. **Reply to Question 7:** Yes, but what about in the case of voluntary winding up? Will the floating charge be voidable as well, if a floating charge was created 6 months of the special resolution to wind-up a company? **Reply to Question 8:** We agree with this recommendation, as this is in line with the recommendation for the date of commencement of the compulsory winding up to be the date that the order was made by the court to wind up the company. **Reply to Question 9:** We only agree with this for the creditors' voluntary winding up. It should not be allowed for a members' voluntary winding, because the company is solvent. **Reply to Question 10:** We agree. **Reply to Question 11:** We agree that the amount of RM5,000 is reasonable under present economic conditions, and the costs involved to engage legal assistance to activate a claim. **Reply to Question 12:** We agree that there should be a time limit within which applications for winding up must be filed and we are of the opinion that a three-month recommendation seems appropriate. **Reply to Question 13:** We agree and welcome this recommendation to allow a relevant party to terminate winding up proceedings once these have commenced. However we would prefer to limit the persons who could apply for the termination to the director, shareholder, liquidator or the Registrar. **Reply to Question 14:** We accept that the term "interim liquidator" be used to describe "an approved liquidator provisionally appointed'. **Reply to Question 15:** We agree with the streamlining and modification of the powers of the liquidator. Perhaps the best way to achieve this is to list the powers of the liquidator in different types of winding up in a "schedule". **Reply to Question 16:** Yes, we agree. **Reply to Question 17:** Yes, we agree. **Reply to Question 18:** Yes, we agree. **Reply to Question 19:**

	Yes, we agree. **Reply to Question 20:** Yes, we agree. **Reply to Question 21:** We agree that the company secretary should not be mentioned for submitting the statement of affairs. Company Secretary are in no position to know about the financial affairs like debtors and creditors of a company as he is not a decision maker. **Reply to Question 22:** Yes, we agree. **Reply to Question 23:** We agree that secured creditors should be expressly provided in the Companies Act and the NZ model be adopted. **Reply to Question 24:** We agree with the deletion. **Reply to Question 25:** We agree that the right to set-off be expressly provided in the Companies Act. **Reply to Question 26:** We agree that the right of set-off should not apply to creditors who have reason to believe that the company is unable to pay its debts. **Reply to Question 27:** We agree with the retention of the provision on preferential creditors, but with modifications. **Reply to Question 28:** We agree with the increase in quantum of wages and salaries entitled to priority. **Reply to Question 29:** We agree with this recommendation. **Reply to Question 30:** We agree. **Reply to Question 31:** Whilst we agree with the recommendation to allow a liquidator to apply to the Registrar to strike-off the name of a company that is no longer in operation by using a prescribed form, we would propose that Director(s), if available be allowed to make such application, subject to:- (i) either the approval by the members; or (ii) any one director, if shareholders are not able to meet; or (iii) by a secretary, who may be left in the company If a strike off case relates to defunct companies, where directors cannot be contacted or the secretary having vacated the position, then a liquidator be allowed to apply for strike-off. The question is who will ask the liquidator to apply.

IACS	**Reply to Question 1:** IACS is unable to discern any reason in the report to postpone the commencement of winding up from the presentation of petition to the day the court ordered a winding up. Unless hardship has been experienced by any party we are not in favour of changing the definition of commencement of compulsory winding up. In the event that the Reform Committee is minded to recommend a change, we suggest that the law of relation-back be amended as well to take care of disposal of company's assets that happened after the presentation of the petition but before the order is made. **Reply to Question 2:** IACS is agreeable that a list should be drawn up. The list should be clear in the nature of payment which should include the minimum ordinary operational cost of the company. In particular the list should also include payment of staff salary and contribution to EPF, SOCSO, Employee's income tax deduction and audit and company secretarial professional fees. There should also be a saving provision that allows payment not defined in the list to be exempted upon application to court. **Reply to Question 3:** IACS is agreeable to this proposal because it eliminates the inconvenient of cross referencing. **Reply to Question 4:** IACS concurs with the above proposal. However, IACS is of the opinion that:- Part (b) should be worded as to avoid conflict with Question 7. i. e. the giving of floating charge to a company. Will these give the effect of a fixed charge is void under this recommendation and a floating charge is voidable under section 294? Part (c) should further be defined in the nature of the obligation referred to. This is to avoid treating payment for transactions in the ordinary course of business of the company to become undue preference. **Reply to Question 5:** IACS is of the view that six months is reasonable. **Reply to Question 6:** IACS is agreeable in relation to the aforesaid matter. **Reply to Question 7:** Will these give effect of a fixed charge is void under this recommendation and a floating charge is voidable under section 294? **Reply to Question 8:** IACS concludes that section 295 should be amended to include voluntary winding up of the company. **Reply to Question 9:** IACS agrees in respect of the aforesaid matter. **Reply to Question 10:** IACS is agreeable to the above matter.

	We also recommend that the definition of section 122 be adopted for persons connected to directors of the company and section 69D for the substantial shareholders of the company. **Reply to Question 11:** IACS agrees to increase the statutory amount. However, what is the justification for RM5000 for the Malaysian context? Why not further increase the statutory amount to RM30,000 as in personal bankruptcy? **Reply to Question 12:** IACS agrees with the proposal of 3 months as the appropriate period. Without this the presumption of insolvency under Section 218 will last forever. Further it gives indication to the Company on the intention of the creditor will still proceed with the winding up proceedings. **Reply to Question 13:** IACS concurs that Companies Act 1965 should be amended to introduce a provision for termination of the winding up proceedings. This will help to clarify the status of a company which was granted a stay. However the committee should also provide the scenario where the court should terminate the winding up proceedings rather than to leave it to common law to develop the scenario the company is entitled to apply for a stay. **Reply to Question 14:** IACS agrees with the above proposal. **Reply to Question 15:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 16:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 17:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 18:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 19:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 20:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 21:** IACS agrees with the above matter. The reason being company secretaries are not in the position to state any aspect of the state of affairs of the

	company. **Reply to Question 22:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 23:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 24:** IACS concurs that any cross references to the bankruptcy Act 1967 in relation to proving debts by creditors under section 291 of the Companies Act 1965 be deleted. **Reply to Question 25:** IACS is agreeable to the above matter. The current position of not allowing a set off is not accepted by most creditors. As most creditors will not be able to accept the scenario that they are liable in full for the debt owed to the company, while at the same time the company is not liable to pay the creditor any money owed to them. **Reply to Question 26:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 27:** IACS proposed that the liquidators or other professional bodies be consulted on this issue. **Reply to Question 28:** IACS concurs with the aforesaid matter. **Reply to Question 29:** IACS concurs with the aforesaid matter. **Reply to Question 30:** IACS agrees with the recommendation to abolish any preference accorded to federal taxes in recovering unpaid taxes of a company. **Reply to Question 31:** IACS do not agree with this proposal. We are of the opinion that the existing company secretaries should be allowed to apply to the Registrar to strike-off the name of a company that is no longer in operation.
MAICSA	**Reply to Question 1:** We agree with the recommendation that the date for the commencement of the compulsory winding up be the date that the order to wind up the company is made by the court. However, as a safeguard for creditors, we recommend that Australia's 'relation-back day' provision be adopted. **Reply to Question 11:** We agree with the recommendation to increase the prescribed amount. There are, however, differing views and concerns that the amount of RM5,000 may be either too high that it precludes small creditors to petition

	and allow larger companies having the financial means to petition. What it means is that if the threshold is at a reasonable level, smaller creditors may still want to petition within the reasonable legal and court charges. In view of this, we recommend a study into the average monetary value of the transactions entered into by small enterprises in Malaysia to ascertain the amount to be prescribed. **Reply to Question 12:** Yes, we agree that there should be a time limit within which applications for winding up must be filed and we are of the opinion that the three-month recommendation seems appropriate. **Reply to Question 15:** We agree with the streamlining and modification of the powers of the liquidator. Perhaps the best way to achieve this is to list the powers of the liquidator indifferent types of winding up in a "schedule". **Reply to Question 31:** Whilst we agree with the recommendation to allow a liquidator to apply to the Registrar to strike-off the name of a company that is no longer in operation by using a prescribed form, we believe that this provision would be made more effective if the Directors of the company are allowed to make such application, subject to the approval by the members. Additionally, in case where the Directors and shareholders of the company are not contactable, the **Company Secretary** should be allowed to make such application, since company secretaries names existed in Form 49, even if they choose to vacate under section 139 (1C) of the Companies Act 1965. This would greatly assist the Registrar of Companies in weeding out dormant companies where the Directors and shareholders are no longer interested in attending to the needs of the company. **Other views and comments:** An additional area that should be examined in the area of liquidation is the question of whether changes may be made to the directors and company secretary of the company. The Companies Act 1965 is currently silent on whether changes to the directors and the company secretary are allowed during a liquidation process. The absence of clarity in this area has lead to two different interpretation: i. The directors and company secretary of the company may be changed once liquidation commences so long as the numbers do not fall below the statutory requirement of two (2) directors with their only or principal residence in Malaysia and one (1) Company Sectary. This effectively means that directors and company secretaries may resign and new persons appointed to fill these vacancies. i. The directors and company secretary of the company **cannot be changed** once liquidation commences. Although the Companies Commission of Malaysia has been chosen to adopt the second interpretation, the lack of clarity in this area is still an issue that must be addressed. We therefore **recommend that the Companies Act 1965 be amended to state specifically whether the directors and company secretary may be changed once liquidation commences** in order to address this ambiguity.

ACCA	**Reply to Question 1:** Yes. **Reply to Question 2:** Yes. **Reply to Question 3:** Yes. **Reply to Question 4:** Yes. **Reply to Question 5:** Yes. **Reply to Question 6:** Yes. **Reply to Question 7:** Yes. **Reply to Question 8:** Yes. **Reply to Question 9:** Yes. **Reply to Question 10:** Yes. **Reply to Question 11:** Yes. **Reply to Question 12:** Yes. 3 to 6 months. **Reply to Question 13:** Yes. **Reply to Question 14:** Yes. **Reply to Question 15:** Yes. Collate common law and decisions handed down from precedent legal cases under a new parliamentary act. **Reply to Question 16:** Yes. **Reply to Question 17:** Yes. **Reply to Question 18:** Yes. **Reply to Question 19:**

	Yes. **Reply to Question 20:** Yes. **Reply to Question 21:** Yes. **Reply to Question 22:** Yes. **Reply to Question 23:** Yes. **Reply to Question 24:** Yes. **Reply to Question 25:** Yes. But it may be difficult to prove that the creditor has such knowledge. **Reply to Question 26:** Yes. **Reply to Question 27:** Yes but RM10,000 could be more reasonable. Any amount above RM10,000 would include the salary that of management. Management, as stewards of the company, responsible for the operations and sustainability of the Company should not be entitled to priority. **Reply to Question 28:** Payment of gratuity is not feasible if included as preferential. **Reply to Question 29:** Yes. **Reply to Question 30:** Yes.
Judy Lim	**Reply to Question 1:** NO, whilst the judicial system in M'sia remains vulnerable, easily swayed by political, economical and personal favours, it would be a dismerit to defer the commencement of winding up and leave the decision to the jurisdiction of the courts. **Reply to Question 2:** NO. With consideration to Item 2.3 which justify such a recommendation, CLRC has not given due diligence to the interest of the Company's stakeholders which Section 223 seeks to protect. For your information, in the absence of Section 223, the parcel of land where my Condo was half-built would have been disposed off before the purchasers had time to lodge any caveat on the land title. I believe Section 223's purpose is deterrent in nature and objective, for any Company to avoid landing their businesses into such a position. **Reply to Question 3:** Yes.

	Reply to Question 4: Yes. **Reply to Question 5:** NO. The specified period for undue preference transactions should be within 6 months prior to the date of filing for winding up or 6 months before the resolution was passed, until the dissolution of the winding up proceedings.. **Reply to Question 6:** Yes. **Reply to Question 7:** A floating charge should be voidable from the date of filing of a compulsory winding up or 6 months prior. **Reply to Question 8:** YES, it should be 2 years prior to the date of filing or prior to the resolution for winding up. **Reply to Question 9:** Yes. **Reply to Question 10:** Yes. **Reply to Question 11:** NO. Whilst the per capita income between Malaysia and the cited countries remain incompatible, it is not wise to revise the sum. Moreover, a country has to be totally free from poverty, with the income disparity narrowed or poverty level alleviated before such a move is deemed reasonable. At present moment, it is a known fact that there are many in our society still drawing an income below RM500 a month, hence the amendment is not justifiable. **Reply to Question 12:** NO. On the basis that the creditor may be negotiating with the Company for a settlement wherein a delay tactic may be used by the debtor Company to inconvenience the creditor, it is best to leave the law as it is. Any change or amendments made to it will jeopardize the efficiency of debts settlement, which will also give space for manipulation by the Debtor Company and hence, victimisation of Creditors, especially, those ignorant and oblivious of the law. Item 3.10 is illogical, as every creditor has the right to demand payment and settlement of debts and if any Company is afraid of such an abuse, then they should be advised to conduct their businesses as a proprietor or in partnership, instead of a Company. **Reply to Question 13:** YES, the recommendations in item 4.13 (a) is OK. The conditions to be imposed for part (b) is as stated in Item 4.2, where the onus of proof is on the applicant to satisfy the court on reasons for terminating the winding up. I would like to suggest for additional conditions to be imposed : Termination should be subject to the consent and withdrawal of winding up application, by the party filing the petition.

	Reply to Question 14: Yes. **Reply to Question 15:** YES. Since the powers accorded to the liquidator is the same regardless of the types of winding up, it is best to assign a section to address this topic, specifying the same powers to be applied in all types of winding up and if not, then what the variations are in each specific situation. It is fine to adopt the UK approach but additional powers stated in item 6.43 is also worth the inclusion. **Reply to Question 16:** Yes. **Reply to Question 17:** Yes. **Reply to Question 18:** Yes. **Reply to Question 19:** Yes. **Reply to Question 20:** Yes. **Reply to Question 21:** NO. First of all, a Company Secretary's duty is to ensure their client's compliance of the Companies Act by advising their representatives accordingly and making sure that there is no violation of the Act on the part of their client at any one time. I believe it was on this basis that the Company Secretary has been included into the role to ensure submission of SOA. For sure, whoever came up with such designs for this section is not ignorant of the limitations of the capacity of a Company secretary. The whole objective of including them into the picture is to ensure that the SOA is submitted without failure or excuse, as the Company Secretary should know well who is the appointed person taking charge of the business operations and thus should be able to extract such info from the people concerned; whereas, some directors' contribution in a business venture is only limited to shareholdings, thus are not involved with the day-to-day operations of the business. **Reply to Question 22:** Yes. **Reply to Question 23:** YES, provided the secured creditor is not disposing off their collateral which happens to be the right and claim of other class of creditors who had a written contract for delivery of the collateral at a fixed future date, eg. collateral is a piece of land which the Company had sold parcels of it to buyers, subject to delivery of it's completion at a fixed future date. YES, with exclusion to the specified situation as stated above. **Reply to Question 24:**

	Yes. **Reply to Question 25:** Yes. **Reply to Question 26:** Yes. **Reply to Question 27:** YES, I strongly recommend for house or property buyer to be categorized as a Preferred Creditor, given the fact that deposit and progress payment collected from them are being held in trust by the Company, pending delivery of the contracted finished goods at a future date. In tandem with the nature of business, all customers are categorized as Current Assets, as goods have been delivered pending their future repayment. However, since payment have been collected in advance from customers pending delivery of properties purchased in a construction company, they fall under the creditors category. Hence, preference should be accorded to them since customers are the source of income generator in any businesses. **Reply to Question 28:** NO, in comparing Malaysia's standard and cost of living with Singapore's, RM3000 is a reasonable limit sum for priority payment of wages, workers' compensation, vacation leave and any other payment due to employees of the company under receivership. Payment to each category of staff benefits should not exceed this sum at any one time. **Reply to Question 29:** Payment in lieu of termination of employment is justifiable but payment for gratuity is not. The rationale is employees should be the first to be alerted concerning the company's illiquid state and hence would have more than sufficient time to seek alternative employment and job placement. Hence, the company will spend less on employing staff, if they can lower their operating costs with temporary staff on board and this will free up more cash for distribution to creditors. **Reply to Question 30:** YES, because the tax revenue can be recovered through other means, eg. recipients' income or corporate tax. **Reply to Question 31:** Yes.
ABM	**Reply to Question 1:** Yes. However, we would like to seek clarification whether banks are allowed to freeze the company's accounts from the date the petition to wind up the company is filed. **Reply to Question 2:** We agree that section 223 of the Companies Act 1965 be amended to include a list exempt dispositions. **Reply to Question 3:** We agree that the cross-referencing to the provisions of the Bankruptcy Act 1967 in relation to undue preference transactions under Section 293 of the

	Companies Act 1965 be done away with and the list of undue preference transactions be incorporated into Section 293 accordingly. **Reply to Question 4:** Save for item (e), we agree that the transactions listed may be set aside as undue preference transactions if they were entered into within the specific period. Item (e) should be amended to exclude payment of money under a judgement or order of a court as inclusion of this item will deprive the judgement creditor of the benefit of the judgement which he has obtained against the company. **Reply to Question 5:** Yes. **Reply to Question 6:** The matter needs further deliberation and CLRC should look at other jurisdictions other than New Zealand. **Reply to Question 7:** We agree that Section 294 be clarified and recommend that the section also provide some guiding criteria as to what circumstances the liquidator may exercise the right to determine that the floating charge should be voided. **Reply to Question 8:** Yes. But innocent third party rights should be considered to achieve a balance. **Reply to Question 9:** Yes. **Reply to Question 10:** Yes, as the proposed amendments enlarge the right of recovery of the liquidator and benefit the creditors. **Reply to Question 11:** We agree that section 218(2)(a) of the Companies Act 1965 be amended to be in line with other jurisdictions. **Reply to Question 12:** A shorter period is recommended. No objections to the 3 months period. **Reply to Question 13:** Yes. **Reply to Question 14:** Yes. **Reply to Question 15:** Yes, we agree. The U.K. approach is a suitable model for streamlining the provisions. **Reply to Question 16:** Yes, as an advocate may sometimes be required to assist the liquidator on areas that the liquidator is unable to handle himself.

	Reply to Question 17: Yes. **Reply to Question 18:** No, as the liquidator's powers to compromise debts has been enlarged to RM10,000 under Question 17. **Reply to Question 19:** Yes, as the present time frame of 4 weeks is too short for the liquidator to complete the necessary investigations. **Reply to Question 20:** We disagree that section 238(2) be deleted. We would suggest that a liquidator retain the same amount of money but the period of retention of such amount be increased to 14 days. **Reply to Question 21:** Yes, as the responsibility should be on the directors. **Reply to Question 22:** Yes, as this will be a more efficient use of resources and time. **Reply to Question 23:** Yes. Section 305 of the New Zealand Companies Act 1993 can be used as a model for such codification. **Reply to Question 24:** Yes, as it is clearer to have the specific provisions in the Companies Act instead of cross referencing to the Bankruptcy Act. **Reply to Question 25:** Yes, as this is fairer to the creditors. It is also proposed that the new express set-off the same section (which is to fulfil the same purpose as Section 41 of the Bankruptcy Act) clarifies whether it still applies in light of any failure to register in the face of section 108(3)(k) of the Companies Act. **Reply to Question 26:** No, as it will raise uncertainty in term of the rights to set-off. **Reply to Question 27:** We agree that the list of provision of preferential creditors be modified in order to confer greater benefits on employees and small unsecured creditors. **Reply to Question 28:** Yes. **Reply to Question 29:** Yes. **Reply to Question 30:** Yes, as the federal government has other avenues of collecting taxes which were not available to small unsecured creditors.

	Reply to Question 31: Yes, as this will facilitate the dissolution of the company
MIBA	**Reply to Question 1:** Yes, in line with practices in Australia and Singapore. **Reply to Question 2:** Yes, to be more cost effective and ease the burden faced by companies which are still carrying on its day-to-day business operations after the order has been made. **Reply to Question 3:** Yes, the recommendations provide a clearer requirements to be compiled with. **Reply to Question 4:** Yes, agree with the recommendations for (a), (b), (c), (d) and (e). **Reply to Question 5:** Yes, agree with the recommendations for (a) and (b). **Reply to Question 6:** Yes, this will avoid problem with proving a subjective element and can better deter potential undue preference by the company. **Reply to Question 7:** Yes. **Reply to Question 8:** Yes. **Reply to Question 9:** Yes, both compulsory winding up or voluntary winding up should provide the liquidator to set aside unfair preference transactions to protect both creditors and minority shareholders' interests. **Reply to Question 10:** Yes, provided that the term "persons connected" should make reference to section 122A of the Companies Act 1965, for purpose of consistency. **Reply to Question 11:** Yes. **Reply to Question 12:** Yes, 6 months (after the expiry of the 21-day period given to the company to comply with the statutory demand) is recommended. **Reply to Question 13:** Yes. **Reply to Question 14:** Yes. **Reply to Question 15:** Yes, provided that there are clear provisions for the different types of winding up are in placed before adoption of section 165, 166 and 167 of the

	Insolvency Act 1986. **Reply to Question 16:** Yes. **Reply to Question 17:** Yes. **Reply to Question 18:** Not necessary. Recommendation 6.22(d) should suffice or be further enhanced, if need be. **Reply to Question 19:** Yes. **Reply to Question 20:** Yes. **Reply to Question 21:** Yes, the director of the company should be responsible to submit the statement of affairs. **Reply to Question 22:** Yes, the requirement to settle the list of contributories should not be a mandatory requirement. **Reply to Question 23:** Yes, the New Zealand Companies Act 1993 model seems appropriate subject to any modification to cater to local environment, in particular issues relating to National Level Code. **Reply to Question 24:** Yes. **Reply to Question 25:** Yes. **Reply to Question 26:** Yes. **Reply to Question 27:** Yes, agreed with the recommendation that in the event there are competing priority claims between the Companies Act 1965 and other statutes involving employees, the order of priority claims should prevail. **Reply to Question 28:** Yes. **Reply to Question 29:** Yes. **Reply to Question 30:** Yes. **Reply to Question 31:** Yes, filing up the simple form in accordance with the Companies

	Regulations 1966 with the Registrar to dissolve a company should be recommended.
MIA-MICPA	**Reply to Question 2:** We suggest that dispositions made in good faith, in the ordinary course of business and for valuable consideration should be exempt, rather than providing a list of exempt dispositions. **Reply to Question 7:** We suggest that the existing wording in section 294 – "unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company" be retained. This will provide "comfort" and certainty to the lenders of actions to be taken or securities to be charged when considering whether to grant new facility. **Reply to Question 12:** We propose that the tome frame of 3 months be amended to 6 months as 3 months is too short a time frame for the creditor to exercise his option to file a winding up petition. **Reply to Question 13:** We suggest that section 239 be amended to provide, inter alia, that upon termination of the winding up proceedings, a liquidator may under section 239 apply for his release, section 240(4) which states "An order of the court releasing the liquidator shall discharge him free from all liability in respect of any act done or default made by him in the administration of the affairs of the company …" shall apply. **Reply to Question 15 - 19:** We agree with CLRC's recommendation that liquidators be able to compromise with debtors for debts up to RM10K without the need to be sanctioned by the Court or COI. However, the second limb of the proposed amendment appears to be more restrictive compared to the existing provision. We therefore suggest that the upper limit should be decided by the Court or the COI. Likewise, to be consistent, we suggest the liquidators be able to compromise with the creditors (including contingent and disputed creditors) for amount owing up to RM10K without the need to be sanction by the court or COI. Again, no upper limit shall be imposed. To facilitate compromise, we suggest that the statute empower the Court or the COI with an authority to give mandate to the liquidator to compromise with any debtor or creditor any such sum higher than RM10K. **Other Comments:** Other comments for CLRC to consider i. Section 8(2A) of the Bankruptcy Act 1967 appears to suggest that no secured creditor shall be entitled to any interest in respect of his debt after the making of a receiving order if he does not realize his security within 6 months from the date of the receiving order. We suggest that any such cross-referencing be deleted. ii. We suggest that an express provision be inserted to the effect that NLC chargee be allowed to proceed with foreclosed proceeding without the need to obtain leave of court or consent of the liquidator, provided that it is not in consistent with the provisions of the NLC. iii. We suggest that section 292 incorporate additional wordings to the effect that "… for avoidance of doubt, the law governing priority of

	debts shall be deemed to be governed by this section notwithstanding any other law to the country". iv. We suggest that CLRC looks into a mechanism where if the Official Receiver/Provisional Liquidator does not call for the first creditors meeting within say 21 days, creditors shall be entitled to apply to the court for him to be replaced. v. We suggest that consent of the Liquidator is not required for the Receiver & Manager in a debenture to sell assets charged under the debenture as agent of the company. vi. We suggest that CLRC consider the adoption of UNCITRAL Model on cross-border insolvency. As an alternative, in the interim, we suggest that CLRC consider enacting a provision similar in operation to section 426 of Act regulates cross border co-operation and the enforcement of insolvency orders in relation to insolvency. This provision is restricted in its application to cases where a request is made by a court in "a relevant country or territory".
Lee Hishammuddin Allen & Gledhill	**Reply to Question 1:** 1. We agree that the date for the commencement of compulsory winding up should be the date that the order was made by the court to wind up the company. 2. However, in order to preserve the company's assets from the time of the presentation of the winding up petition, the Australian approach in dealing with void and voidable dispositions under the Australian Corporations Act 2001 **(ACA 2001)** should be followed. **Reply to Question 2:** 1. We agree. The proposed insertion of a section similar to section 486(2) of the ACA 2001 creates commercial certainty. We however note that there are 2 provisions under section 486(2) of ACA 2001 that are not be applicable to Malaysian Law, namely section 486(2)(aa) and section 486(2)(ab) of ACA 2001. 2. The relevant provisions are section 486(2)(a) and section (2)(b) of ACA 2001. The proposed inclusion of section 486(2)(a) would be logical and necessary to facilitate and expedite the process of liquidation. 3. The proposed inclusion of a provision similar to section 486(2)(b) of ACA 2001 is also necessary as it resolves the uncertainty arising from decisions in Re Gray's Inn Construction Co Ltd [1980] 1 WLR 711 and Bank Of Ireland v Hillicourt (Contracts) Ltd [2000] EWCA Civ 263. **Reply to Question 3:** 1. We agree that cross-referencing to the provisions of the Bankruptcy Act 1967 (BA 1967) in relation to undue preference transactions under section 293 of the Companies Act 1965 (CA 1965) should be done away with because: a. CLRC's recommendation would simplify and clarify the law relating to section 293 of CA 1965 and section 53 of BA 1967; b. CLRC's recommendation would also resolve the issue of whether section 293 of CA 1965 should be read with section 52 of BA 1967. This issue arises because section 293 of CA 1965 is widely drafted statutory provision and hence, seems to include section 52 of BA 1967; c. However, when section 52 of BA 1967 is read as a whole, the said section is framed in terms relating to family settlements. In our opinion, its application is inappropriate in the context of companies; and

	d. We note that the Court of Appeal had recently decided a matter relating to the application of section 293 of CA 1965 and section 52 of BA 1967 (see *Korakyat Plantations Sdn. Bhd. V Tan Siew Ee & Ors* [2005] 2 CLJ 578). However, and with all due respect, the Court of Appeal had merely assumed that the provisions were applicable. 2. We would however note that any amendment to section 293 of CA 1965 must take into account of section 4(1) of the Civil Law Act 1956. Pursuant to section 4(1) of the Civil Law Act 1956, it is to be noted that the law of bankruptcy is applicable to the winding up of companies where its assets are insufficient for the payment of debts and liabilities and the costs of winding up. **Reply to Question 4:** We agree. The proposed amendment would, in our opinion, create commercial certainty. **Reply to Question 5:** We agree. No comments. **Reply to Question 6:** We agree because: a. The proposed amendment removes the element of subjectivity and introduces an objective test. This is preferred because when a liquidator is appointed, the liquidator will usually have difficulty in gathering sufficient evidence to establish that there was intention on the part of the company to prefer certain creditors at the time of the transaction; and b. The amendment would better protect the interest of the creditors in a winding up. **Reply to Question 7:** 1. Yes. This is to ensure consistency with the amendment to the date of commencement of winding up under section 219(2) of CA 1965. 2. We however note that the relation back period of 6 months is too short. Prof. Andrew Keay in **McPherson, The Law of Company Liquidation** (4th Ed., LBC Publications Services, 1999), at pages 471-472, observed (in the context of section 588FJ of ACA 2001) that a longer time period should be adopted in cases where the parties may be connected. The learned author related an example where – *"a director, who can foresee the likelihood of liquidation, could take a charge and provided that he or she ensures, perhaps by assisting to prop up the company artificially, that no winding up applications are filed or winding up resolutions passed during the following 6 months, the charge remains effective. A period of 12 months or more would make it far more difficult for a related entity to orchestrate the company's affair so as to benefit herself or herself ultimately."* 3. We associate ourselves with the observations made by Prof. Andrew Keay. We also recommend a further amendment that where floating charges relate to directors, persons connected to directors and substantial shareholders (as defined under sections 69D, 122 and 123 of CA 1965), the relation back period should be at least 1 year from the date of presentation of the a petition for compulsory winding up.

	Reply to Question 8: Yes. This is to ensure consistency with the proposed amendment to section 219(2) of CA 1965. **Reply to Question 9:** Yes. This is to ensure consistency with the amendment to the date of commencement of winding up under section 219(2) of CA 1965. **Reply to Question 10:** We agree. No comments. **Reply to Question 11:** 1. Yes, we agree with the recommendation by the CLRC. 2. This will be in line with the amount of debt to commence bankruptcy proceedings in BA 1967 vide amendment made to section 5(1)(a) of BA 1967. 3. in comparison to other jurisdictions such as in Singapore, Hong Kong and United Kingdom where the statutory amount of debt has been increased over the years, it is timely that section 218(2)(a) of CA 1965 be amended accordingly. 4. The proposed increase from RM 500 to RM 5,000 would not prejudice the small creditors, as the amount is reasonable based on the present value of the Ringgit. Generally small creditors with a claim of less than RM 5,000 would be reluctant to initiate winding up proceedings as the costs of doing so may exceed RM 5,000. 5. The proposed increase will also prevent creditors from abusing the provisions of section 218 of CA 1965 by issuing statutory demand based on trivial claims against a Debtor Company with no intention to commence winding up proceedings. **Reply to Question 12:** 1. We agree. 2. This will to some extent reduce the possibility of a creditor abusing the statutory demand. A time frame would also ensure that a Debtor Company would not be under a continuous threat of a winding up petition being presented against it. 3. We recommend that the appropriate time period to present the winding up petition be six (6) months from the expiry of the period for the company to comply with the statutory demand notice, similar to the time period prescribed in bankruptcy proceedings. 4. However, merely fixing a time limit would not prevent the abuse of the statutory demand as the creditor would still have the opportunity to issue a fresh statutory demand after the expiry of the time limit. We recommend that to prevent such abuse a creditor who has issued a statutory demand and fails to present a winding up petition after the expiry of the 6 months' period of the statutory demand, will need to obtain the leave of court before he can issue another statutory notice based on the same debt under the earlier statutory demand. **Reply to Question 13:** 1. We agree: 2. At present, the judicial view on the question as to whether the court has the power, inherent or otherwise, to set aside or to rescind a winding up order is not uniform due to the lacuna in the CA 1965 or the

	Companies (Winding Up) Rules 1972. Foreign precedents also show conflicting views on this point.[1] In Malaysia too, the view on the power of the court to set aside or to vary a winding up order are conflicting.[2] Some company law text book writers hold the view that there is no jurisdiction for the court to rescind a winding up order already made and that the sole remedy available to the affected company is to file an appeal against such an order.[3] This view has been accepted by our courts.[4] 3. Due to this lacuna in the CA 1965 or the Companies (Winding Up) Rules 1972 in conferring the court with the power or jurisdiction to set aside or to rescind a winding up order, an aggrieved party may only resort to section 243 to apply to stay the winding up proceeding or section 253 to appeal against the winding up order. 4. Under section 243, the granting of a stay of the winding up order is at the discretion of the court and the onus is on the applicant to make out a positive case for a stay.[5] The effect of an order to stay proceedings under the winding up order after a winding up order has been made is a total discontinuance or termination of the winding up proceedings but this does not mean that the winding up order has been wiped out from existence.[6] 5. It should be noted that section 243 only provides for a stay at any time after the winding up order has been made. Therefore, if a company perceives a threat of winding up petition, it normally will resort to an order for injunction to restrain a possible petitioner from instituting or continuing with such action. In such circumstances, the court may be constrained by the principles in granting an injunction. If there is an express provision for the court to terminate the winding up proceeding, the court may at its discretion terminate the winding up proceeding or winding up order is oppressive, against commercial morality or public interest 6. It should also be noted that section 243 confines the persons who could seek the stay of winding up order to the liquidator, the creditor or the contributory, the company which has been ordered to be wound up cannot seek a stay of the winding up order from the court.[7] By introducing a provision where the court is given the power to terminate the winding up proceeding or winding up order on the application of all entitled persons, this will also give the company, which has been subjected to a winding up proceeding or ordered to be wound up, a new remedial venue and the application to terminate the winding up proceeding. 7. If each of the creditor has been paid in full or the entire debt has been settled or discharged or the solvency of the company is clearly demonstrated or the creditors have consented for the termination of the winding up order, in these circumstances, it is of significance that the winding up order is terminated, and is not merely stayed, as its

[1] K. V Padmanabha Rau, Winding Up of Companies [cases and commentaries] at page 313.
[2] K. V Padmanabha Rau, Winding Up of Companies [cases and commentaries] at page 315-316.
[3] Palmer's Company Law; The Law of Company Liquidation by Macpherson and JO Donovan.
[4] Court of Appeal in the case of Vijayalakshmi Devi d/o Nadshatiram v Jegadevan s/o Nachatiram & Ors [1995] 1 MLJ 830; High Court in the case of Perdana Merchant Bankers Bhd v Maril Rionebel (M) Sdn Bhd p1996] 4 MLJ 343
[5] Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan S/O Nadchatiram & Ors [1995] 2 MLJ 709;
[6] Vijayalakshmi Devi d/o Nadchatiram v Jegadevan s/o Nadchatiram & Ors [1995] 1 MLJ 830.
[7] Sri Hartamas Development Sdn Bhd v MBf Finance Bhd [1991] 3 MLJ 325.

	existence would be detrimental to the commercial morality or against the public interest. 8. Ultimately, by having the express provisions, it will also clear the doubt as to whether the courts do have the power or jurisdiction to absolutely terminate a winding up proceeding or a winding up order. **Reply to Question 14:** 1. The CLRC appear to be of the view that – a. The term 'provisional liquidator' is used exclusively only to refer to the Official Receiver (OR) who is appointed provisionally either before or after the winding up order; b. Where a private liquidator is appointed prior to the winding up order, he is referred to as 'a liquidator appointed provisionally' under section 231. 2. This is, with respect, not entirely correct. 3. In so far as after the winding up order is concerned, if there is no private liquidator appointed, the OR by virtue of his office becomes the provisional liquidator – section 227(1). It is only the OR that can be a provisional liquidator after the winding up order. 4. In so far as prior to the winding up order is concerned, section 231 provides – *"The Court may appoint the Official Receiver or an approved liquidator provisionally at any time after presentation of a winding up petition and before the making of a winding up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the Court may specify in the order appointing him."* a. Section 231b allows the Court to appoint the OR or a private liquidator provisionally pending disposal of a winding up petition. It does not make any distinction on the terminology to be used depending on whether the OR or a private liquidator is appointed. b. Whether or not the OR or a private liquidator under section 231, the person appointed is known as a provisional liquidator. 5. There is no necessity to introduce the phrase 'interim liquidator' to specifically to refer to a private liquidator appointed provisionally. 6. There is no reason to make any distinction between the OR and a private liquidator who is appointed as provisional liquidator under section 231. The powers and purpose of a provisional liquidator are the same irrespective whether the OR or a private liquidator is appointed as provisional liquidator. 7. Section 246 of the New Zealand Companies Act 1993 also does not make any distinction. Whether or not their Official Assignee or a named person is appointed prior to the winding up order, he is known as interim liquidator. It is just that they use the term interim liquidator while we use the term provisional liquidator. 8. In any case, the principles applicable for the appointment of a provisional liquidator are well-settled in Malaysia – *Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors* [1997] 2 CLJ 116, CA. There is therefore

[8] Section 553C(2) of the Australian Corporations Act 2001.
[9] Section 310(7) of the New Zealand Companies Act 1993.
[10] Rule 4.90 of the UK Insolvency Rules 1986.

	also no necessity to adopt section 246 of the New Zealand Companies Act 1993 as a model. **Reply to Question 15:** 1. The present structure is not confusing. The general powers of the liquidator are essentially found in only 2 sections – section 236 for winding-up by Court and section 269 for voluntary winding-up. Section 269 essentially only adopts section 236 with some modifications. 2. We therefore do not think it is necessary to adopt the English Insolvency Act 1986 for this purpose. In fact, their provisions appear more confusing than our present provisions. **Reply to Question 16:** 1. We agree the present requirement in section 236(1)(e) hinders the smooth running of the liquidation process. 2. We do already have a general provision in section 236(2)(i) which allows the liquidator to appoint an agent to do any business which he is unable to carry out himself. 3. Section 236(3) which allows a creditor or contributory to challenge the exercise or proposed exercise of the powers of the liquidator is a sufficient safeguard should the prior approval of the court or committee of inspection not be required for the appointment of an advocate and solicitor. 4. This proposal would also resolve the uncertainty arising from the conflicting decisions of the high Court on whether prior approval of the court or committee of inspection is required by the liquidator to appoint an advocate and solicitor for the purpose of bringing or defending legal proceedings in the name of the company – *Bensa Sdn Bhd v Malayan Banking Bhd* [1993] 2 CLJ 68; *Selvam Holdings (Malaysia) Sdb Bhd v Toby Lam* [1994] 4 CLJ 899; *Maiko Woods Maritime & Properties Sdn Bhd & Ors v Asia Commercial Finance (M) Bhd* [1998] 4 MLJ 395; *Kang Wah Construction Sdn Bhd v Chan Ai Min Property Sdn Bhd & Anor* [1999] 7 CLJ 172, *Subterranean Natural Mineral Water Sdn Bhd v Kho Boon Kwang* [2002] 6 CLJ 340. **Reply to Question 17:** Yes. No comments. **Reply to Question 18:** 1. Yes, in principle. 2. However, while there is nothing objectionable for the court to consider each application on a case to case basis since it has jurisdiction over all companies in liquidation, it appears somewhat inconsistent for a Committee of Inspection of a particular company to consider on a case to case basis when it will only be considering once whether to give blanket approval. **Reply to Question 19:** Yes. No comments. **Reply to Question 20:** Yes. No comments. **Reply to Question 21:** Yes. Corresponding changes will have to be made to rule 67 of the Companies (Winding-Up) Rules 1972.

Reply to Question 22:

1. We agree with the CLRC's recommendation to expressly provide for the rights of the secured creditors in the Companies Act 1965, as this could provide a clearer view to the secured creditors as to what their prima facie rights are.
2. On the question as to which model for such a codification should be followed, we prefer section 305 of the New Zealand Companies Act 1993. The New Zealand model is the most comprehensive among all the jurisdictions and caters for the rights of the secured creditors in dealing with secured property in the event of liquidation of a company.

Reply to Question 23:

1. We do not agree that it should be deleted. The proposed amendments by the CLRC would take care of the issue on the right to set-off. However, the cross reference to the BA 1967 will continue to be relevant to some extent in dealing with the proof and ranking of claims by the creditors, for example, on the claim of interest, which is claimable from the company if it is solvent, but not so if it is insolvent.
2. it should be noted that even in Australia, despite the existence of section 553C(1) and (2) of the ACA 2001 setting out the right to set-off any mutual debts between the creditors and the company, which the CLRC recommends to follow, section 553E retains the applicability to the winding up of insolvent companies of provisions in the Bankruptcy Act dealing with the proof and ranking of claims. Furthermore, under the English Insolvency Act 1986, the cross-reference provisions remains although they have the Insolvency Rules governing the rights of set-off between the creditors and the company.
3. Having said that, the cross reference to the BA 1967 may be taken away, if a further amendment to cater for the proof and ranking of claims by the creditors is made in the CA 1965.

Reply to Question 24:

We agree that the right to set-off should be expressly provided in the Companies Act and that the rights be made available not only to contributories but also to creditors in general subject to the existence of mutual debts between the concerned parties.

Reply to Question 25:

1. We agree that the rights to set-off should not apply to the creditors who have reason to believe that the company is unable to pay its debts.
2. However, we would like to highlight the differences between the provisions for exception to the right of set-off in the following jurisdictions:
   a. Australia - if the creditor has notice of the fact that the company was insolvent at the time the credit was given or received.[8]
   b. New Zealand – set-off is not available within a 'restricted period', unless the creditor is able to prove that he did not have reason to suspect the company was unable to pay its debts at the time of the transaction.[9]
   c. UK – if the creditor has notice at the time the sums owed become due that a meeting of creditors had been summoned or a petition for the winding up of the company was pending.[10]

Reply to Question 26:

1. We agree.

	2. Most of the provisions in section 292 of CA 1965 are for the protection and benefit of employees of companies facing liquidation and for this reason ought to be retained. 3. However, modifications are required. We recommend the following modifications: a. To widen the definition of wages and salary of employees in section 292(1)(b) to include the payment of notice in lieu of termination of employment and payment for gratuity for termination of employment by reason of the winding up; b. It is noted that the definition of wages and salary are wider in other jurisdictions such as Singapore, Hong Kong, New Zealand and United Kingdom; c. The quantum of wages and salary entitled to this priority debt should be increased to RM 15,000. On this proposed recommendation, refer to Question 27; d. The priority given to vacation leave in section 292(1)(d) should also be extended to sick leave, maternity leave and public holiday leave; and e. To delete section 292(1)(f). Please refer to Question 29 for our reasoning. **Reply to Question 27:** 1. We agree. 2. We recommend the proposed increase for the following reasons: a. The value of ringgit since 1965 (the year in which our Companies Act has been introduced) has decreased. Other jurisdictions have also from time to time amended their provisions to increase the quantum; b. To further enhance the social obligation of companies towards the well beings of their employees. **Reply to Question 28:** 1. We agree. 2. It is noted that in other jurisdictions such as Singapore, Hong Kong, New Zealand, Australia and United Kingdom, the term wages and salary have been given a wider definition and this in turn accord a better protection for the employees of the company. 3. The recommendation proposed to section 292(1)(b) of the Companies Act 1965 to give a wider definition to the term of wages and salary would be in line with the need to enhance the social obligation of the company towards the well-being of its employees. **Reply to Question 29:** 1. We agree. 2. The government has other means to enforce and collect taxes from companies including the right to make the directors of companies personally liable. However, employees and small creditors of companies in liquidation do not have the same resources as that available to the Government. **Reply to Question 30:** 1. We agree that a liquidator should be allowed to apply to the Registrar to strike-off the name of a company that is no longer in operation. This procedure should be made available to the liquidator, after all of the company's affairs have been fully wound up and the company is no longer in operation.

	2. Before the liquidator makes the application, he must first prepare an account showing how the winding up was conducted and the assets were disposed off. After receiving this application, the Registrar should send a show cause notice to the company as to why it should not be deregistered within a specified period of time. The proposed deregistration should be published in the Gazette stating that after the expiration of a stipulated period, the company will be deregistered and cease to exist. After that, the Registrar may proceed to strike-off the name of the company.
Bar Council	**Reply to Question 1:** Yes. **Reply to Question 2:** Section 223 would have to be amended (if the date for commencement of winding up is amended) if it is intended to still cover dispositions from the date of the filing of the petition to the date of the winding up order as the CLRC intends. The list of exempt dispositions should further include: 1. The disposal by a company of its assets in the ordinary course of its business. There may however be some practical issues in determining whether the circumstances come within the exemption and the matter should be considered further from this perspective; 2. Dispositions by persons with particular interests and rights in the assets of the company for example, chargees and other security holders. The circumstances in Section 468(2) of the Australian Corporations Act 1981 should be considered further. While it should in principle be included among the exempt dispositions, the circumstances have to be such that the banks will feel comfortable in practice to pay monies in reliance on such an exempt disposition. Would "good faith" and "ordinary course of business" be sufficiently clear from a practical perspective. **Reply to Question 3:** Yes, the cross-referencing should be done away with. The approach should be such that the Companies Act should be a comprehensive piece of legislation by itself in so far as it relates to the insolvency of companies and should be framed with company insolvency in mind as against bankruptcy generally. The proposals in CD4 appear to be more in the form of a transfer of existing bankruptcy provisions into the Companies Act. The effect of any preference should also be made clear. The CLRC should consider combining the New Zealand provision with the approach taken in Section 588FA of the Australian Corporations Act 2001 (Corporations Act). The definition as proposed in Section 292 of the New Zealand Act could be adopted as being the kind of transactions which could constitute undue preference transactions. However, in order to actually constitute undue preference transactions, they should also satisfy certain tests of the kind provided for in Section 588 FA of the Corporations Act. These should include, whether the transaction is commercial or not and the benefits and detriment of the transaction in accordance with certain statutory tests. Whether the transaction is insolvent in accordance with a statutorily defined framework should also be taken into account. The statutory provisions should also spell out clearly when the transaction will be avoided and any additional requirements to be satisfied before this can occur. The comments in this paragraph should also be considered in the context of Questions 4, 5 and 6.

	Reply to Question 4: It is in principle helpful to have a list of matters which may be set aside as undue preference transactions if entered into within a specified period. However, in avoid practical difficulties, the list must be clear as to its meaning and must address the issue of potential conflicts with other laws. In particular: 1. The meaning of paragraph (c) is very broad. The provision should be considered further in terms of the necessity for such a broad scope; 2. Paragraph (d) is not entirely clear; 3. In relation to paragraph (e), there needs to be provision on compliance with court orders in such circumstances as the obligations arising from undue preference and compliance with court orders may then conflict; 4. It would be necessary to consider whether any aspect of the listed transactions should be excluded from being set aside as an undue preference. For example, should certain of such transactions be excluded if bona fide and done in the ordinary course of business? See also comments in final paragraph in relation to Question 3. **Reply to Question 5:** It may not be appropriate to deem transactions as constituting a preference merely on grounds that they took place within a certain period. There may be transactions of a nature which legislation should not consider to be a preference. For example, bona fide transactions carried out in the ordinary course of business should not constitute a preference. The transactions which may be deemed to be a preference if entered into within such a time period should accordingly be subject to exceptions such as those suggested. The time period as proposed within which transactions may be deemed to be a preference should however be retained in the interests of certainty. The reference to the 6 month period being calculated from the time a resolution to voluntarily wind up the company should only apply if such a resolution was passed which would have resulted in a creditors' and not a members' voluntary winding up. It also assumes that no stay is granted on the winding up under such resolution which continues to have effect at the time of the presentation of the petition. There is a possibility of a resolution to wind up being passed but a stay being subsequently obtained perhaps of a permanent or indefinite nature which is tantamount to a termination in the winding up process. See also comments in final paragraph in relation to Question 3. The issues raised by Question 5 require further study. **Reply to Question 6:** See also comments in final paragraph in relation to Question 3. The issues raised by Question 6 require further study. **Reply to Question 7:** As with our comments in the first paragraph in relation to Question 5, there should be adequate protection against recovery particularly in bona fide transactions. For instance, Section 296(3) of the New Zealand Act gives protection against recovery where (inter alia) good faith is shown or where it is inequitable to order recovery. **Reply to Question 8:** There must however be adequate protection in respect of bona fide transactions and other similar transactions. We agree that a time limit

	should however remain in the interests of certainty in ownership of assets etc. There is however concern as to whether the time limits would preclude any recourse or remedy in respect of non-bona fide or similar transactions being entered into outside of the time period. This point also applies to other Questions posed in CD4 where time periods of this sort apply. The recourse should in such a case be only against the decision-makers in the insolvent company (if there were such people in the transaction concerned) and any persons conspiring with them and no one else. **Reply to Question 9:** There should be a distinction between a members' voluntary winding up and a creditors' voluntary winding up as the former involves a solvent company while the latter involves an insolvent situation. The ability for the liquidator to set aside transactions in the case of the former should be more restrictive. There should in any event be protection be given in bona fide and similar transactions as mentioned in relation to Question 8. **Reply to Question 10:** The definitions of "persons connected to directors" and "substantial shareholders of the company" are rather wide. We do not think that is appropriate to extend section 295 so as to cover such a broad range of persons. The objective of extending the application of section 295 is presumably to address circumstances where certain persons may have a greater reason to be held accountable in some way. It must not however have the effect of overextending the scope of persons coming within the ambit of application. "Persons connected to directors" should exclude for this purpose relatives who come within the definition who are estranged or who have not had family contact for a specified substantial period of time say, 2 or 3 years and should exclude business partners other than those involved in the insolvent business concerned. The extent of family relationship should perhaps also be limited to those involved in the insolvent company's management or otherwise to immediate family meaning spouse and children. The definition of "substantial shareholders" may include persons who may be rather remotely related to the company. For example, it may include a person who holds 15% voting shares in a company which holds 15% of such shares in another and this and all subsequent intermediate companies (which could be an infinite number of companies) hold 15% voting shares in a downstream company right down to the insolvent company concerned. Further, persons who may happen to have entered into a contract to purchase a substantial shareholding of shares in the company may also be deemed a substantial shareholder among other circumstances. The definition of substantial shareholder should be substituted with the test of "control" as utilised in takeover law and regulation under the Securities Commission Act 1993 as persons involved in "control" over the insolvent company. There should in any event be protection be given in bona fide and similar transactions as mentioned in relation to Question 8. **Reply to Question 11:** We agree that the statutory amount should be raised. The figure of RM5,000 may however be rather too low in the case of some companies. We propose that the figure be a percentage of the issued and paid up share capital of the company as appearing in the general search results as

	issued by the Companies Commission of Malaysia but subject to a maximum figure. **Reply to Question 12:** Yes. We propose a time limit of 3 months. **Reply to Question 13:** Yes, as the current law only allows for a stay. The persons entitled to apply for a termination should however be clarified. **Reply to Question 14:** Yes. **Reply to Question 15:** Yes. Consideration should be given to the approach taken in Commonwealth insolvency legislation for example, the UK Insolvency Act 1986. Consideration should also be given to "administrators". **Reply to Question 16:** Yes. **Reply to Question 17:** The limit should be increased. However, we are unclear as to whether the limit is to be on a "basket" or "individual" basis. To calculate the limit on an "individual" basis would require rather more safeguards. The amount of the limit should perhaps also be related to the size or total liabilities of the company in accordance with a specified formula to be considered subject to a maximum amount. **Reply to Question 18:** Yes, but subject to our comments in relation to Question 17. The court should however be able to approve without limit. **Reply to Question 19:** Yes. **Reply to Question 20:** The provision should not be deleted as it helps ensure compliance with section 238(1). The amount may perhaps be revised in accordance with an appropriate formula to be considered if RM200 is too burdensome. **Reply to Question 21:** The company secretary is an officer of the company and accordingly should remain liable to submit the statement of affairs. If there are practical difficulties, then exemptions should be considered in respect of specified situations. **Reply to Question 22:** Yes. **Reply to Question 23:** Yes, but subject to any right of election being within a fixed time period failing which the secured creditor would be deemed to have kept his security. There should be provisions to allow creditors to sell under the security without facing the issues in *Kimlin*.

	Reply to Question 24: Yes, but subject to the legislation setting out in full the rules on proof of debt. **Reply to Question 25:** A right of set-off with creditors in the case of mutual debts may result in inequitable treatment among unsecured creditors. Creditors should not be able to effectively secure their debts to the extent of the set-off merely because they happened to have claims against the company. This would be detrimental to other creditors who may happen to have no such claims. We accordingly do not agree. **Reply to Question 26:** If there is a right to set-off with creditors, yes. The CLRC should however consider certain exceptions for example, where goods or services are supplied at the company's request including, any professional services rendered in connection with any rescue or attempted rescue of the company and/or its subsidiaries (including, any debt or corporate restructuring or compromise or arrangement) or otherwise required in connection with the company's business or affairs. **Reply to Question 27:** Yes, and with modifications. Preferential creditors should include professional legal fees rendered in connection with any rescue or attempted rescue of the company and/or its subsidiaries (including, any debt or corporate restructuring or compromise or arrangement). **Reply to Question 28:** RM15,000 is too high. It would result in other creditors being disadvantaged with possible further consequential detrimental economic consequences to those creditors and accordingly their employees and those dealing with them. **Reply to Question 29:** No. Our comments in relation to Question 27 in regard to the impact on other creditors and others apply here as well. **Reply to Question 30:** Yes. **Reply to Question 31:** Certain others should also be allowed to do so. The company or a director or member of the company should be able to do so to follow the Australian position in section 601AA of the Corporations Act 2001 and the conditions in the Australian legislation.