Bills Committee on Bankruptcy (Amendment) Bill 2004

Summary of issues of concern on individual clauses of the Bill
(Position as at 29 March 2005)

Abbreviations:

Grant Thornton (GT)

Hong Kong Institute of Certified Public Accountants (HKICPA)

Joseph SC CHAN & Co (Chan & Co)

The Association of Chartered Certified Accountants (Hong Kong) (ACCA)

Consumer Council (CC)

Yip, Tse & Tang Solicitors (YTT)

Kenny Tam & Co (Tam & Co)

The Society of Chinese Accountants and Auditors (SCAA)

The Hong Kong Association of Banks (HKAB)

The Chinese General Chamber of Commerce (CGCC)

The Law Society of Hong Kong (Law Soc)

Clause no./ Section no.	Issues of concern	Administration's responses
Clause 3 (section 12 of Bankruptcy Ordinance (BO))	Members consider that there is a need for the Administration to propose a Committee Stage Amendment (CSA) to reflect its policy intent that the Bill will enable only the outsourcing of debtor-petition summary bankruptcy cases (and not creditor-petition summary bankruptcy cases) to the private-sector insolvency practitioners (PIPs) by the Official Receiver (OR).	The Administration will propose a CSA to reflect its policy intent. (LC Paper No. CB(1)1060/04-05(02))
Clause 3 (proposed section 12(1A) of BO)	GT considers that it may be necessary to set out procedures and/or criteria to: (a) allow the Official Receiver's Office (ORO) the flexibility not to have to treat all cases with assets of less than $200,000 summary cases; (b) ascertain how ORO forms a view that the assets are unlikely to have a value of more than $200,000; and (c) enable the Government/ORO to provide funding for PIPs to be appointed trustee (or agents of OR as trustee) to carry out detailed investigations for public	(a) We believe that cases with assets of less than $200,000 should be treated by summary procedures. (b) The ORO will form the view from the available information. In a debtor-petition case, a sworn statement of affairs is filed in court together with the petition and the value of the property of the bankrupt may be ascertained from the petition and the statement of affairs and any other available information, e.g. information provided by the creditors. (c) The Government does not intend to provide funding for investigations by PIPs in individual bankruptcy cases.

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	interest and/or other reasons.	Investigations should be conducted by using the assets of the estate. (LC Paper No. CB(1)436/04-05(16))
	HKICPA considers it important for ORO to take reasonable steps to ensure adherence to the requirements of the proposed new subsection (1A) of section 12 of BO. Two suggestions: (a) Where ORO considers that the property of the bankrupt is unlikely to exceed $200,000, it should support its view with reasons and confirm to the court that reasonable enquiries have been made beforehand. (b) Where ORO is unable, on the basis of the information available or otherwise, to form a view as to the value of the bankrupt's property, no appointment should be made under the provision.	(a) We see no need to introduce a further confirmation to the court on the enquiries that have been made. After the case is outsourced, the PIP who is appointed has still to make his own enquiries in order to ascertain whether the case is a summary case (i.e. assets not likely to exceed $200,000). He should only make the report to the court under proposed section 112A of the BO if he is satisfied that the property of the bankrupt is not likely to exceed $200,000. (b) Under proposed section 12(1A) of the BO, the ORO may appoint another person to be the provisional trustee where the ORO considers that the value of the property is unlikely to exceed $200,000. If the ORO is unable to

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		form the view on the value of the bankrupt's property, then we agree that no appointment should be made. Having said that, however, we do not consider that there will be many such cases where the ORO will be unable to form the view on the value of the bankrupt's property as the debtor in a debtor-petition case must file a sworn statement of affairs with the petition and the value of the property could be ascertained there from and any other available information. (LC Paper No. CB(1)523/04-05(01))
	Chan & Co suggests that the scope of the outsourcing scheme be expanded to allow ORO to outsource bankruptcy cases where the value of the bankrupt's property does not exceed $500,000.	Under section 17A of the BO, the appointment of trustee in bankruptcy for cases where no summary administration order (i.e. for cases with assets likely to be more than $200,000) will generally be made by the creditors in general meeting. It is not the intention of the Administration to take away the power of the creditors for appointment of trustee for cases of assets of value from $200,000 — $500,000. Moreover, setting the threshold at $200,000 would already enable the ORO to outsource over 90% of the bankruptcy cases.

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		(LC Paper No. CB(1)436/04-05(16))
Clause 3 (proposed section 12(1B) of BO)	GT notes that under the proposed new subsection (1B) of section 12 of BO, OR may appoint two or more persons as joint provisional trustees but "such an appointment must make provision as to the circumstances in which the provisional trustees must act together and the circumstances in which one or more of them may act for the others". There are two points of concern: (a) Given that appointments are usually on "joint and several" basis, it is not sure why the appointment of joint provisional trustees must make provision to the circumstances mentioned in the proposed new subsection (1B). (b) Who will be in that position (and based on what) to spell out any such circumstances, for a case of assets of less than $200,000?	Proposed section 12(1B) follows the wording in existing section 17(2) of BO. The provision is necessary to give the OR the power to appoint more than one person as joint provisional trustees. The circumstances as to when the joint provisional trustee must act together and when one of them may act for the other will be proposed by the appointees themselves when tendering for the contract of appointment. The ORO will consider the proposals made by the appointees. (LC Paper No. CB(1)436/04-05(16))
Clause 4 (section 13 of BO)	GT considers that: (a) A PIP should be able to be appointed as an interim trustee. Besides, as long as a creditor is prepared to provide the funding for this appointment, the ORO should not insist on seeing "evidence" from the applicant/creditor that there are definitely assets worth more than HK$200,000 (and hence should not be dealt with as a "summary" case).	Section 13 of BO provides that the ORO may be appointed as the interim trustee. There was only one case of such appointment in the past ten years, which petition was subsequently withdrawn. In practice, we see no need to amend the section for PIPs to be appointed as interim trustee. (LC Paper No. CB(1)436/04-05(16))

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	(b) "Protection of the estate" should be extended to include protection of books and records of the potential bankrupt.	
	HKICPA points out that section 13 of BO does not provide for any person other than OR to be appointed as interim trustee. This may be contrasted with the position under section 193(2) of the Companies Ordinance (Cap. 32) (CO), which provides that OR "or any other fit person" may be appointed as provisional liquidator. Two suggestions: (a) To allow for the possibility of appointing PIPs as interim trustees under BO, the Bill should be amended to converge more closely with the equivalent provisions in CO, i.e. sections 193 and 194(1)(aa) of CO. (b) A provision similar to Rule 28(3) of the Companies (Winding-up) Rules should also be incorporated into the Bankruptcy Rules to allow the interim trustee to be paid his remuneration out of the assets of the estate in the event that a bankruptcy order is not ultimately made.	In practice, we see no need to amend the section for PIPs to be appointed as interim trustee. There was only one case of such appointment in the past ten years, and the petition was subsequently withdrawn. (LC Paper No. CB(1)523/04-05(01))
Clause 8 (section 18 of BO)	HKICPA suggests that as a trustee may not have been appointed within 21 days of the making of the bankruptcy order, section 18(1) should be amended to read "the bankrupt shall submit … to the trustee or provisional trustee, as the	Proposed section 58(1B) provides that save in the specified sections, unless the context otherwise requires, the provisional trustee shall be regarded as the trustee for the

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	case may be, not more than 21 days after…".	purposes of the BO. A reference to "trustee" in the Ordinance, save in the specified sections, shall therefore be regarded as including the "provisional trustee". As section 18 was not included as one of the specified sections in proposed section 58(1B), the reference to trustee in section 18 includes a provisional trustee. (LC Paper No. CB(1)523/04-05(01))
Clause 9 (section 19 of BO)	HKICPA considers that in order to enable a provisional trustee to undertake his duties as soon as possible, section 19 of the BO should also allow a provisional trustee to undertake a public examination of the bankrupt. HKICPA also suggests that the power given to the OR or trustee under section 64 of the BO, to inspect goods held by way of security, should be made available to a provisional trustee, even though these powers are currently available to the OR only as trustee and not in his capacity as receiver.	Please refer to the response to section 18. As section 19 was not included as one of the specified sections in proposed section 58(1B), the reference to trustee in section 19 includes a provisional trustee. We do not agree that the power is at present only available to the OR as the trustee and not in his capacity as receiver. Section 64 provides that the power is available to the "Official Receiver or trustee". There is no limitation in the section as to the capacity of the OR. Furthermore, as section 64 was not included as one of the specified sections in proposed section 58(1B), the reference to trustee in section 64 includes a provisional trustee. (LC Paper No. CB(1)523/04-05(01))

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Clause 10 (section 23 of BO)	ACCA considers that the requirement in section 23 for a trustee to give security to the OR should also be applicable to a provisional trustee.	Proposed section 58(1B) provides that save in the specified sections, unless the context otherwise requires, the provisional trustee shall be regarded as the trustee for the purposes of the BO. A reference to "trustee" in the Ordinance, save in the specified sections, shall therefore be regarded as including the "provisional trustee". As section 23 was not included as one of the specified sections in proposed section 58(1B), the reference to "trustee" in section 23 includes a "provisional trustee". (LC Paper No. CB(1)436/04-05(16))
Clause 11 (section 37(1) of BO)	GT considers that the priority of costs and charges set out in the proposed amendments to section 37(1) of BO gives little incentive to PIPs to take up bankruptcy cases. There are four points of concern: (a) It is not fair to pay everybody else in full first before paying the PIP who is often wholly responsible for the realization of the assets of the bankrupt. (b) It is not clear as to why ORO is entitled to charge fees and commissions on a percentage of realization basis where little work, if any, is done by ORO in the realization of the same.	Under the proposed section 37 of the BO, the payment of the expenses properly incurred in preserving, getting in or realizing any of the assets of the bankrupt shall first be paid out of the assets. Any remaining assets shall, subject to order of the court, be paid in the order of priority as set out in the proposed section. If a PIP has incurred expenses as aforesaid, such expenses shall first be paid over all other items in the proposed section. The proposed priority of the items set out in section 37(1) by and large follows that provided under rule 179(1) of the

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		Companies (Winding-up) Rules, which has been in place for many years. Among the relevant items, the OR has the highest priority because of his dual role, namely the supervisory role (e.g. in examining annual statement of proceedings from PIPs under section 89 and receiving and auditing the accounts of the trustee under section 93) and the role of administering the bankrupt's estate while acting as trustee in bankruptcy. Costs and expenses incurred by a trustee have higher priority than the remuneration of a PIP as the PIP should have made an assessment as to the available assets for the costs and expenses before incurring them.
	(c) The wording of the proposed section 37(1)(e) does not read well as the charges of any shorthand writer can hardly be related to "expenses properly incurred in preserving, getting in or realizing the assets of the bankrupt".	Paragraph (e) of section 37(1) should be read together with the opening lines of section 37(1) as well as the new section 37(3). The combined effect being the cost of a shorthand writer appointed by the OR, which is regarded as an expense properly incurred in getting in or realizing the assets of the bankrupt concerned, would have been deducted from the bankrupt's assets before the remaining assets are distributed in the proposed order of priority.

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	(d) On the proposed section 37(3), it is not clear why the shorthand writer appointed or authorized by OR should have any preference over others.	The exclusion ("except.....) tries to highlight this point. Proposed section 37(3) will bring the priority of the costs of the shorthand writer appointed by the OR to a higher priority. This is in line with the rationale that the costs and expenses incurred by the OR (who have a dual role) should be accorded a higher priority than other expenses of the bankruptcy. (LC Paper No. CB(1)436/04-05(16))
	ACCA considers that it appears that the remuneration of a provisional trustee may be included under either the proposed section 37(1)(a) or (h) of BO. To ensure clarity, the remuneration should be explicitly shown in the revised order of priority of costs and charges.	The remuneration of PIPs is provided for under proposed section 37(1)(h). The reference to "trustee" in section 37 includes a "provisional trustee", as provided under section 58(1B). (LC Paper No. CB(1)436/04-05(16))
	Tam & Co and SCAA point out that under the existing section 37(1) of BO, the fees of OR acting as trustee is given a higher priority than the petitioner's costs. However, under the proposed amendments to section 37(1), fees of PIPs acting as trustee is given a lower priority to the petitioner's costs for similar duties previously performed by OR. The proposed priority of costs and charges will create a disincentive to PIPs to maximize realization of assets for the	Under the proposed section 37 of the BO, the payment of the expenses properly incurred in preserving, getting in or realizing any of the assets of the bankrupt shall first be paid out of the assets.

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	benefits of creditors. While petitioner's costs may not be an issue in the self-petitioned cases, it is possible that OR may contract out creditor-petitioned cases in future. It is necessary to address the above discrepancy. There are two suggestions: (a) To amend the proposed section 37(1) so that disbursements and fees of PIPs acting as trustee (i.e. proposed section 37(1)(f), (g) and (h)) will have higher priority than the petitioner's costs (i.e. proposed section 37(1)(b)). (b) To introduce in due course the amendments mentioned above to the order of priority in Rule 179 of the Companies (Winding-up) Rules so that the same arrangements in disbursements and fees of PIPs will apply to liquidation cases.	The proposed priority of the items set out in section 37(1) by and large follows that provided under rule 179(1) of the Companies (Winding-up) Rules. Since only self(debtor)-petitioned cases will be outsourced, the cost of petition will in any case be paid by the bankrupt himself. (LC Paper No. CB(1)436/04-05(16))
	HKICPA suggests that consideration be given to elevating the priority of the trustee's remuneration further up the scale to provide a greater incentive for the trustee to pursue claims. Requests for the Administration's clarification on the following two issues:	The proposed priority of the items set out in section 37(1) by and large follows that provided under rule 179(1) of the Companies (Winding-up) Rules, which has been applied for many years in the case of company liquidation. The period of bankruptcy for a first time bankrupt up to the discharge is normally 4 years (Section 30A(2)(a)) which may be

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	(a) How much is likely to be made available to private sector trustees out of the petitioner's deposit; and	extended up to 8 (not 7) years by the court upon valid objection being made out to the satisfaction of the court (Section 30A(3)(a)). The deposit for a debtor-petition case is $8650. The fees and expenses of the OR to be deducted will depend on the actual fees and expenses to be incurred in the particular case. As a rough estimate, the amount to be deducted will be in the range of $2500 - $3000. Such fees and expenses cover work done by the ORO such as gazettal of the notice of the bankruptcy order and other administrative duties.
	(b) Whether the costs incurred by the trustee in preserving and realizing assets should be regarded as "the expenses properly incurred in preserving, getting in or realizing any of the assets of the bankrupt" referred to in the beginning of the proposed section 37(1), which will be payable ahead of the priorities referred to in the proposed section 37(1)(a) to (i). It would seem unnecessary to include the second part of the	Proposed section 37 provides that the assets remaining after the payment of the "expenses properly incurred in preserving, getting in or realizing any of the assets of the bankrupt …" shall subject to any order of the court first be liable to the payments as provided for in proposed section 37(1)(a)-(i). Costs are not included in the section. Therefore any costs incurred by the PIP would be paid under the appropriate head of priority under proposed section 37(1) instead. Section 37(3) expressly provides that it is

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	proposed section 37(1)(e), "except expenses properly incurred …..", as it appears that the point is already covered by the proposed new subsection (3), when this is read in conjunction with the introductory part of subsection (1).	made for the purpose of section 37(1)(e) and we need a similar set of wording in both subsections to create a link between them. If the second part of section 37(1)(e) is removed, there is no hint there that it has to be read together with the chapeau of subsection (1) and the deeming provision in subsection (3). The whole section 37, as presently drafted, is more user-friendly. (LC Paper No. CB(1)523/04-05(01))
Clause 15 (section 58 of BO)	GT notes that the proposed new section 58(1A) of BO provides that "[o]n the appointment of a person other than the Official Receiver as provisional trustee, the property shall forthwith pass to and vest in the provisional trustee appointed". There are two points of concern: (a) In the event that the provisional trustee does not eventually become the trustee, how then would the property become vested from the provisional trustee to the trustee? (b) Even if the provisional trustee becomes the trustee, what is the mechanism for vesting of property from the provisional trustee to the trustee?	If the provisional trustee does not eventually become the trustee and another person is appointed as trustee, the property will be passed on to and be vested in the appointed trustee under section 58(2) of the BO. If the provisional trustee becomes the trustee, the property of the bankrupt shall pass to and shall vest in the trustee for the time being under section 58(3) of the BO. (LC Paper No. CB(1)436/04-05(16))

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	HKICPA notes that the proposed new section 58(1B) of BO provides that save in some specified sections of the Ordinance, the provisional trustee shall, unless the context otherwise requires, be regarded as the trustee for the purposes of this Ordinance. There are two points of concern: (a) It is possible that this provision would resolve the concerns raised above in relation to clauses 8 and 9, but it is not entirely clear from the drafting. If the provisional trustee may do anything that a trustee may do, other than in relation to those specified sections of the Ordinance, this may need to be stated more explicitly. (b) As drafted, the proposed provision is likely to create some uncertainty and debate. For example, it is unclear whether the provisional trustee should be regarded as the trustee in relation to the priority of payments under the proposed section 37(1)(h), or whether, in view of clause 27, the remuneration of the provisional trustee should be treated as "costs, charges and expenses incurred or authorized by the Official Receiver" under section 37(1)(a).	Section 58(1B) is like an interpretation provision. It explains how references to "trustee" throughout Cap. 6 are to be interpreted. Apart from the sections that have been expressly excluded from it, the subsection provides that provisional trustees shall be regarded as the trustees for the purposes of the BO. Hence, if a provision grants powers to trustees, the same powers are enjoyed by the provisional trustees who are regarded as trustees. If a provision imposes duties on trustees, the same duties are imposed on provisional trustees who are, as far as that provision is concerned, taken to be the trustees. We do not see any ambiguity in the effect of section 58(1B). In section 85A(1), what is being fixed is the remuneration of a provisional trustee and the first trustee constituted under section 112A, and what is to be approved (instead of "authorized") is the basis for calculating the remuneration. That has nothing to do with costs, charges or expenses incurred or authorized by the Official Receiver under section 37(1)(a). We like to add that a provisional trustee is not an employee of the Official Receiver and that further rules out the possibility that the trustee's costs, charges

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		and expenses are to be given priority under section 37(1)(a). (LC Paper No. CB(1)523/04-05(01))
Clause 23 (section 79 of BO)	GT notes that under the proposed section 79(1) and (2) of BO, the official name of a provisional trustee (or a trustee) shall be "the provisional trustee (or the trustee) of the property of ….. a bankrupt". The proposed provision may give the impression that the trustee does not (have powers to) deal with liabilities, creditors or general affairs of the bankrupt. Suggests that "trustee of the estate" be used instead.	The wording "trustee of the property of a bankrupt" is already used in the existing section 79, and we are not aware of any problem arising from its use. In any case, the powers of the provisional trustee are provided for under proposed section 60(2), which should be sufficient to deal with the general affairs of the bankrupt. (LC Paper No. CB(1)436/04-05(16))
	HKICPA points out that the "Provisional trustee" is defined in clause 2 of the Bill as, inter alia, any person appointed as provisional trustee of the property of the bankrupt under section 12(1A) of BO. "Trustee" is defined in section 2 of BO as the "trustee in bankruptcy of a bankrupt's estate". For the sake of consistency, it suggests that section 2 of BO be amended with wording similar to that proposed in clauses 2 and 23 of the Bill.	The expression "bankrupt's estate" is given specific meaning in the BO (see section 43) and it is used extensively (it appears in 23 provisions) in the Ordinance. The proposed amendment to the definition of "trustee" in section 2 has across the board implications and we do not see the need to amend the definition as proposed. (LC Paper No. CB(1)523/04-05(01))

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Clause 24 (section 80(1) and (1A) of BO)	GT notes that under the proposed new subsections (1) and (1A) of section 80 of BO, when two or more persons are appointed as provisional trustees (or trustees), the appointment shall state whether any act required or authorized to be done by a provisional trustee (or trustee) is to be done by all or any one or more of such persons. Please refer to the comments on section 12(1B) of BO.	See response on clause 3 (proposed section 12(1B)) above. (LC Paper No. CB(1)436/04-05(16))
Clause 25 (section 81A of BO)	GT notes that under the proposed new section 81A(2) of BO, the power of OR to appoint a person to fill a vacancy in the office of a provisional trustee may be exercised without a creditors' meeting and it includes power to appoint two or more persons as joint provisional trustees but "such an appointment must make provision as to the circumstances in which the provisional trustees must act together and the circumstances in which one or more of them may act for the others". There are two points of concern: (a) It is not clear why there is a reference to the exercising of the OR's power "without a creditors' meeting". (b) Same concern as that on section 12(1B) of BO.	Proposed section 81A provides for the appointment of a provisional trustee by the ORO in the event of a vacancy in the office of provisional trustee. Such a vacancy may occur after a creditors' meeting. Proposed section 81(A)(2) provides that the power may be exercised without a creditor's meeting to clarify any doubts that a creditor's meeting is required for the appointment. (LC Paper No. CB(1)436/04-05(16))
Clause 27 (section 85A of BO)	CC: (a) expresses concern over the high level of fees charged by PIPs, and considers that ORO should play an active role in supervising the level of fees charged by PIPs; and	Information on the remuneration and supervision of PIPs is provided in Administration's papers. (LC Paper Nos. CB(1)436/04-05(18),

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	(b) welcomes the introduction of the proposed new section 85A of BO to provide that the remuneration of PIPs shall be fixed and approved by ORO, and that creditors can apply to ORO for a review of PIP's remuneration.	CB(1)654/04-05(04) and CB(1)925/04-05(02))
	GT considers that: (a) in the proposed new section 85A(1) of BO, it should be made clear as to whether the "scale of fees" as fixed by OR will be fixed on a case-by-case basis, or will be applied across the board for all cases at the relevant time; and (b) it appears that the (provisional) trustee himself does not have any capacity to apply to the court to have his fee basis and/or remuneration reviewed. This would not appear to be fair.	The scale/basis of fees will be fixed by the ORO and agreed with the provisional trustee at the time of the appointment. The ORO intends to outsource the debtor-petition summary bankruptcy cases to PIPs by way of open tender as is done in the summary liquidation cases and the remuneration will be on such scale or basis as agreed at the time of the award of the tender. As the remuneration will be agreed with the provisional trustee at the time of appointment, there is no reason to allow the provisional trustee to apply to court for a review. There is also no right to apply for a review by a trustee appointed by the creditors under existing section 17 of the BO. (LC Paper No. CB(1)436/04-05(16))

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	HKICPA considers that the wording in the proposed new section 85A(1) of BO, which appears to be based on that in section 196 of CO, is too open-ended and could create uncertainty. In fact, similar ambiguity in CO and the Companies (Winding-up) Rules and their application has given rise to uncertainty. It requests the Administration's clarification on the following two areas: (a) How will the proposed new section 85A(1) operate? (b) What bases of remuneration could be applied and under what circumstances?	The provisions for the remuneration of the provisional liquidator by the OR have been put in practice for a number of years and have worked well. Perhaps the HKICPA will clarify the uncertainty in proposed section 85A(1) they are referring to. As for the actual operation of the section, in short, the scale/basis of fees will be fixed by the ORO and agreed with the provisional trustee at the time of the appointment. The ORO intends to outsource the debtor-petition summary bankruptcy cases to PIPs by way of open tender as is done in the summary liquidation cases and the remuneration will be on such scale or basis as agreed at the time of the award of the tender.
	Under the proposed new section 85A(2) of BO, if one-fourth in number or value of the creditors apply to OR or OR is of the opinion that the remuneration of the provisional trustee or first trustee should be reviewed, OR may apply to the court and thereupon the court may confirm, increase or reduce such remuneration. HKICPA suggests that the grounds on which the court may confirm, increase or reduce the remuneration be specified in the provision. HKICPA requests clarification on the source of the wording	The court in exercise of its discretion may take into account all circumstances of the case. We see no need to provide specifically for the grounds on which the court may confirm, increase or reduce the remuneration of the trustee. Proposed section 85A follows relevant

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	of the proposed new section 85A.	provisions in section 85 on the remuneration of the trustee other than the provisional trustee. (LC Paper No. CB(1)523/04-05(01))
	Chan & Co suggests that contingency fee arrangement (or conditional fee arrangement) be introduced as the basis of PIPs' remuneration. Under the proposal, if a PIP succeeds in recovering more assets of the bankrupt's estate, he will be rewarded by additional payment. The proposal will motivate the PIPs to adopt a more proactive attitude in the recovery of assets.	Under the proposed section 85A of the BO, the ORO will fix the remuneration of the PIPs. The basis will be considered at the time of outsourcing. (LC Paper No. CB(1)436/04-05(16))
	ACCA considers that as the term "first trustee" does not appear in section 112A of BO, clarification should be made regarding the reference to "first trustee constituted under section 112A" in the proposed new section 85A(1)(b).	"First trustee" is not a defined term in the Ordinance and the word "first" should therefore be given its literal meaning. Here, a first trustee simply means the first person appointed as trustee under section 112A(1)(i). The meaning looks clear. Moreover, "first trustee" is also used in the heading of section 17A, and "first such trustee" appears in section 17. (LC Paper No. CB(1)436/04-05(16))
	Law Soc has reservations as to whether the system currently being proposed is likely to attract solicitors to accept such appointments.	We believe that there should be sufficient interest from PIPs in tendering and that the outsourcing proposal should be commercially viable. Hence, there should

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	A better and more realistic course is for there to be a basic fee subsidy provided through the OR's Office, as is the case with summary company liquidations. It seems to us that this recognises the desirability of having the bankruptcy system operate properly and is in the public interest and interests of the business and general community at large. It is also the only realistic basis upon which solicitors (and probably most other PIPs) can be expected to undertake this office. Alternatively, in some cases there may be a justification to establish an additional fund which the OR could make available on a discretionary basis in the event there is some demonstrably cost effective recovery exercise which would benefit the estate and its creditors in question and also ultimately to compensate for funding concerned.	be no question of government subsidy. In any case, we do not see any ground for and have no plan to provide subsidy in the outsourcing of summary bankruptcy cases. If there is a demonstrably cost-effective recovery exercise which would benefit the estate and the creditors of a bankrupt, the concerned PIP should be able to obtain additional funding from creditors for chasing after the assets. We do not see any justification for the ORO's involvement in such process. (LC Paper No. CB(1)654/04-05(02))
Clauses 27 and 35 (sections 85A and 96(2)(a) of BO)	YTT expresses concern on whether PIPs have adequate experience and expertise in handling bankruptcy cases. In implementing the outsourcing proposal, the Administration should provide adequate training to PIPs and monitor their performance so as to ensure that they perform their duties and responsibilities in an effective manner.	As mentioned in LC Paper No. CB(1)436/04-05(18), the ORO will only outsource the management of bankruptcy cases to competent PIPs, who must be professionals in the accountancy and legal sectors and the company secretaries. They are required to have a number of years of post-qualification experience and a minimum number of professional or chargeable hours

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		in respect of insolvency work. There are many checks and balances to monitor the performance of PIPs in administrating the outsourced cases. For instance, the ORO will monitor the performance of the PIPs under the tender contract. Details can be found in the paper issued to the Bills Committee. The ORO will also brief successful tenderers of their duties in administrating the outsourced cases. The ORO will also ensure that effective procedures to handle complaints are put in place before the proposed legislative amendments come into operation. The bankrupt may also appeal to the court against any act or decision of the trustee (PIPs) under section 83 of the BO. (LC Paper No. CB(1)436/04-05(16))
	CC hopes that the following provisions will ensure a high standard of professionalism amongst PIPs serving as trustees: (a) Under the proposed section 85A(4) of BO (clause 27), the appointed PIP is prohibited from accepting any gift or benefit (except his remuneration) from any persons in connection with the handling of a bankruptcy case;	Information on the remuneration and supervision of PIPs is provided in Administration's papers. (LC Paper Nos. CB(1)436/04-05(18), CB(1)654/04-05(04) and CB(1)925/04-05(02))

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	and from making any arrangement for giving up any part of his remuneration to any of such persons. (b) Under the amended section 96 of BO (clause 35), creditors may apply to the court for removing a PIP from the office of trustee on grounds of misconduct, needlessly protracting of trusteeship, or in the interests of the creditors concerned.	
	HKAB suggests that the Bill should contain provisions similar to sections 394 to 398 of the UK Insolvency Act 1986 on - (a) selection criteria for appointing PIPs to handle bankruptcy cases; (b) procedures for handling complaints against PIPs; and (c) supervision of PIP's performance. Alternatively, section 84 of BO should be amended to include provisions similar to section 168C to T of the Companies Ordinance to enable the court to make orders disqualifying a person from acting as a liquidator of a company.	We agree that there is the need to ensure PIPs are properly selected and sufficiently supervised. As mentioned in our paper (LC Paper No. CB(1)436/04-05(18)), there are many checks to help ensure the proper performance of PIPs. For example, ORO will outsource the management of bankruptcy cases only to competent professionals in the accountancy and legal sectors and company secretaries. The PIPs are required to perform the statutory duties under the BO and are subject to supervision under the following provisions of the Ordinance such as - Section 83 - Creditors or affected parties may appeal to court against any act or decision of the PIPs; Section 84 - Control of court over PIPs;

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		Section 96 - The PIPs are subject to the removal by the court or the creditors. The ORO will further require periodical reports from the PIPs – sections 89 (annual statement of proceedings) and 93 (accounts) of the BO for monitoring the progress of the administration. The above control and supervision is considered to be sufficient. On this basis, we do not consider it necessary to adopt the provisions of the UK Insolvency Act 1986 for the setting up of a system to authorize PIPs or to introduce provisions for disqualification of PIPs from acting as trustee-in-bankruptcy (similar to section 168C to T of the Companies Ordinance). There are provisions in the BO which require the PIPs to provide regular reports to the OR through which the ORO may monitor the progress of the administration - Section 89 - To provide the ORO with annual statement of proceedings; Section 93 - The ORO may require the trustee (PIPs) to provide him with the accounts at any time which may be audited.

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		The ORO will also impose appropriate provisions in the contract with the PIPs to ensure effective monitoring of PIPs' work. (LC Paper No. CB(1)436/04-05(16))
	ACCA suggests that provisions on qualification criteria for provisional trustees/trustees be included in the Bill. The criteria may include expertise in handling bankruptcy cases, no conflict of interests with the bankrupt, etc.	The tender system of ORO for outsourcing will set out the qualification for persons to be eligible for appointment as provisional trustee, e.g. minimum experience in insolvency work and professional qualification. Further details can be found in the Administration's paper (LC Paper No. CB(1)436/04-05(18). As such and in order to maintain flexibility, we see no need to specify the qualifications in the BO itself. In this regards, we would like to point out that there is no specification of the qualification of a person that may be appointed as a trustee by creditors under existing section 17 of the BO. (LC Paper No. CB(1)436/04-05(16))
Clause 28 (sections 86A and 86B of BO)	GT considers that under the proposed new section 86B(1)(a) of BO, as regards the estate of a bankrupt, it shall be the duty of the trustee to raise money in any case where in the interests of the creditors it appears necessary so to do. In fact, this is more a "power" than a "duty".	This, i.e. to raise money in any case where in the interests of the creditors it appears necessary so to do, is a duty of the trustee. Other than having to comply with the BO, a trustee acts in a fiduciary capacity.

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	Under the proposed new section 86B(1)(f) of BO, it shall be the duty of the trustee to assist the bankrupt in preparing his statement of affairs (SoA) in case the bankrupt has no solicitor acting for him and is unable properly to prepare it himself. This "duty" will very likely be abused by the bankrupt as a basis of taking a laid-back position and requiring the trustee to prepare SoA from no or little information or incomplete books and records. This "duty" should be abolished. Instead, this may be included as a power of the trustee if circumstance really requires it to be exercised.	The bankrupt is under the duty to submit the statement of affairs within 21 days from the date of the bankruptcy order under section 18 of the BO. Failure to do so without reasonable excuse may render the bankrupt guilty of contempt of court under section 18(4). The bankrupt could not claim reasonable excuse if he takes a laid-back position and require the trustee to prepare the SoA from no or little information or incomplete books and records. At present, the ORO has a similar duty when acting as a trustee-in-bankruptcy. (LC Paper No. CB(1)436/04-05(16))
	HKICPA considers that the provision in the proposed new section 86B(1)(a) of BO is more a "power" than a "duty". The provision in the proposed new section 86B(1)(f) is not a "duty" of the liquidator under the corresponding provisions of CO, and could be onerous, given the lack of available resources in most bankruptcy cases. The application of the proposed new section 86B(1) should be extended to provisional trustee. HKICPA requests clarification on the source of, and the	Similar comment raised in the submission made by GT. This is a duty of the trustee. Other than having to comply with the BO, a trustee acts in a fiduciary capacity. Similar comment raised in the submission of GT. The bankrupt is under the duty to submit the statement of affairs within 21 days from the date of the bankruptcy order under section 18 of the BO. Failure to do so without reasonable excuse may render the bankrupt guilty of contempt of

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	reason for introducing, the wording of the proposed new section 86B.	court under section 18(4). We do not see this as an onerous duty on the PIPs because of the underlying obligation of the bankrupt to submit the statement of affairs. Furthermore the statement of affairs would have already been sworn and filed with the bankruptcy petition in debtor-petition cases and the PIPs do not need to perform the duty in those cases. At present, the ORO has a similar duty when acting as a trustee-in-bankruptcy. As proposed section 86B was not included as one of the specified sections in proposed section 58(1B), the reference to trustee in proposed section 86B includes a provisional trustee. (LC Paper No. CB(1)523/04-05(01))
	ACCA considers that as the duty of a trustee in respect of security has been dealt with under section 23 of BO, clarification should be made on whether the reference to "securities" in the proposed new section 86B(2) has the same meaning as that under section 23. To ensure clarity, the trustee's duty in respect of security should be referred to in the same provision.	Proposed section 86B deals with the duties of the trustee as regards the bankrupt's estate. The reference to "securities" in proposed section 86B(2) refers to securities as in property in the bankrupt's estate. On the other hand, section 23 refers to the security as in guarantee or bond to be given to the OR by an outside trustee. The references to "securities" and "security" in proposed

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		section 86B and section 23 respectively are not the same. (LC Paper No. CB(1)436/04-05(16))
Clause 30 (section 88 of BO)	HKICPA suggests that section 88 of BO be amended to include a provision similar to that contained in the proposed new subsection (4A) of section 19, empowering the trustee to require a creditor to pay a deposit as a pre-condition for taking the action required.	The Administration is considering the comment and will revert. (LC Paper No. CB(1)523/04-05(01))
Clause 31 (section 89 of BO)	HKICPA considers that the wording of clause 31 suggests that the format of accounts (Form 150) should follow the requirements of section 89 of BO. It suggests that the format of accounts be reviewed so as to simplify them to facilitate compilation and to make them more meaningful to creditors. This would also apply to Form 137, produced by the trustee in his application for release.	Clause 31 amends the words "transmit to" to "provide …with" in section 89(1) and amend the word "transmitted" to "provided" in section 89(2). It is unclear as to why HKICPA stated that the wording of clause 31 suggests that the format of accounts should follow the requirements of section 89 of BO. Reviewing the format of the accounts and the format of Form 137 do not fall within the scope of the present amendment exercise, and any suggestions for revising the accounts and forms would be considered separately. (LC Paper No. CB(1)523/04-05(01))
Clause 32 (section 91 of BO)	ACCA notes that under section 91(2) of BO, if a trustee at any time retains for more than 10 days a sum exceeding $2,000, he is required to explain the retention to the satisfaction of OR or he may be removed from his office by	Section 91(1) requires the trustee to open an account in the name of the bankrupt's estate and to pay to the credit of such account all sums received by him as trustee.

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	OR. Given that it is difficult to comply with this requirement, the limit should be raised and the provision should be amended accordingly.	The provision in section 91(2) as to the retention means the retention of the sums received by him as trustee without payment into the bank account specified in section 91(1). There should be no difficulty in complying with section 91(2) as the bank account of the bankrupt's estate is maintained by the trustee himself. (LC Paper No. CB(1)436/04-05(16))
Clause 42 (section 112A of BO)	ACCA considers that the order of sequence of subsections under section 112A should be tidied up.	We do not see any problem with the sequence. Moreover, section 112A is an existing provision. Amendment should only be made if a genuine need is demonstrated. (LC Paper No. CB(1)436/04-05(16))
General issues	CGCC considers that the outsourcing proposal is one of the feasible means to handle bankruptcy cases but may give rise to operational difficulties, such as the conflict of interests involved in a case where the appointed PIP and the bankrupt know each other, and the bankrupt's possible concern about the protection of personal data by the appointed PIP during the process of handling his case. CGCC suggests that:	PIPs are professionals. They have statutory duties under the BO and the terms of contract of appointment with the ORO. They are also subject to professional rules or codes of conduct of the professional bodies they are members of (namely the HKICPA, the Hong Kong Law Society and the Hong Kong Institute of Company Secretaries). As trustees in bankruptcy, they are required to perform their duties in a professional manner

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	(a) a self-regulatory body be set up for supervision of the professional standards and integrity of PIPs; (b) an expert group be set up by ORO for investigation of frauds relating to bankruptcies, and an appeal board for reviewing the decisions concerned; and (c) the Administration should encourage creditors and the public to report on illegal acts of the bankrupt, e.g. by providing a hotline for the purpose.	and to avoid any conflict of interest. They are also bound by the Personal Data (Privacy) Ordinance. The ORO will handle any enquiries made by the bankrupts regarding the duties/work of the PIPs as the provisional trustee or trustee. (LC Paper No. CB(1)436/04-05(16))
Other issues	<u>Allowance and taxation of costs</u> Tam & Co and SCAA note that under section 86(3) of BO, all bills and charges of the persons employed by the trustee shall be taxed. Under Rule 149A of the Bankruptcy Rules, the fees and charges within the prescribed scale may be paid without taxation in the case of small bankruptcy under section 112A. There are two points of concerns: (a) Under Rule 176 of the Companies (Winding-up) Rules, taxation is not required for the said expenses under $3,000. Suggests that a similar provision be included in BO or the Bankruptcy Rules and the limit be increased to $5,000. (b) Details of the prescribed scale referred to in Rule 149A of the Bankruptcy Rules are not clear. Rule 191 of the Bankruptcy Rules requires the trustee to	The need for the proposed amendment is not apparent to us. In summary bankruptcy cases, it is not common for the trustee to employ other persons as agents, given that there are usually limited assets in the bankrupt's estate. Section 93(2) provides that the accounts of

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	submit an account to ORO every six months. The accounts are to be certified and verified pursuant to Form 146 of the Bankruptcy (Forms) Rules. The requirement for the trustee to verify the account by way of Affidavit before a solicitor or other qualified person increases the administrative cost with no apparent benefits. Tam & Co and SCAA suggest to amend such requirement in line with a similar provision in Rule 162 of the Companies (Winding-up) Rules that the account shall be certified correct in writing by the trustee himself.	the trustee shall be in the prescribed form and shall be verified by Affidavit. The issue is not solely related to outsourcing and we do not intend to consider the proposed changes in the current exercise. (LC Paper No. CB(1)436/04-05(16))
	Unfair preferences HKICPA considers that there are deficiencies in the provisions dealing with unfair preferences under BO (e.g. sections 50 and 51B). It suggests that consideration be given to reviewing and strengthening the unfair preference provisions.	Our preliminary view is that the proposed review is outside the scope of the present amendment exercise. (LC Paper No. CB(1)523/04-05(01))

Council Business Division 1
Legislative Council Secretariat
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