Further Submission of the
Hong Kong Institute of Certified Public Accountants (HKICPA)[1]
Bankruptcy (Amendment) Bill 2004

Comments	Response of the Administration
Framework While the Administration indicated that the Official Receiver's Office (ORO) plans to outsource debtor-petition cases only, the wording in the Bill does not limit the scope to debtor-petition cases only.	We will propose Committee Stage Amendments (CSAs) to limit the scope of the outsourcing to debtor-petition cases only.
As each case differs on its facts and circumstances and there are minimum standards of professionalism and good practice to be observed by private sector insolvency practitioners (PIPs), as members of regulated professional bodies and as officers of the court, there will be a limit on the extent to which economies of scale can be achieved in practice.	We would like to re-iterate that for summary debtor-petition cases, many of the procedures under the Bankruptcy Ordinance (BO) will not need to be resorted to, for example, investigation procedure that requires substantial funds or the distribution of dividend. In view of the relatively straightforward nature of the administration of such cases, we believe that economies of scale can be achieved by outsourcing the cases in batches. In any case, PIPs are free to decide whether or not to participate in the tendering exercise, taking into account the relevant arrangements and their own business considerations.

[1] This table aims to summarise the comments made by the HKICPA. For details, please see the submission dated 1 April 2005.

Clause 3 (section 12) Some practitioners have indicated that for outsourcing under section 194(1A) of the Companies Ordinance (CO), the onus has shifted to creditors to prove that the company has assets of more than $200,000. There have been cases involving property exceeding $200,000 in value but were outsourced. It is important that the OR should have a due processes in place to ensure adherence to the requirements of both section 194(1A) of the CO and the proposed section 12(1A) of the BO.	As already indicated by us on several occasions, the ORO will form a view on the value of the property of the bankrupt from the available information. In debtor-petition cases, a sworn statement of affairs is filed in court together with the petition and the value of the property may be ascertained from the statement of affairs. The ORO has not shifted, and will not shift, the onus to creditors to require them to prove the value of the assets of the bankrupts, although they are welcome to provide any information in this regard to the ORO. We would further re-iterate that 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 one. 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.
Clause 4 (Section 13) We continue to believe that the BO should be amended to converge more closely with the equivalent provisions in the CO, i.e. section 193 and section 194(1)(aa) and Rule 28(3) of the Companies (Winding Up) Rules so as to facilitate the contracting out of bankruptcy work to the private sector.	We presume that the HKICPA was suggesting the appointment of PIPs as interim receiver. The present exercise aims to facilitate the outsourcing of summary bankruptcy cases, i.e. cases where the assets not likely exceeding $200,000, by the ORO to PIPs as provisional trustees or trustees in bankruptcy. Appointment of an interim receiver is based on the ground of protection of estate of debtor. The two types of appointment are not the same. Moreover, the appointment of an interim receiver is extremely rare. We do not see the need for the amendment as suggested.

Clause 11 (Section 37) We do not agree that it is necessary or appropriate to follow the priority of items as provided under Rule 179(1) of the Companies (Winding-up) Rules. Not sure whether the remainder of the deposit after deducting the OR's fees and expenses ($2,500 to $3,000) would in principle be available to cover the costs, expenses and remuneration of the trustee, subject to the priority listed in Clause 11.	Noted. We are of the view that the proposed priority is appropriate. For details, please see the Administration's Response to the List of Follow-up Actions to the Bills Committee Meeting on 11 January 2005 (LC Paper No. CB(1)925/04-05(02)). In a nutshell, the estimated amount available in a typical summary bankruptcy case for payments for the costs of persons properly employed by the PIP and the PIP's remuneration, even without additional asset realized and without income contribution made by the bankrupt, is between $4,150 and $5,750.
Clause 15 (Section 58) Section 58(1B) is an important definitional provision and should be included in the "interpretation" section or incorporated as a stand-alone section.	We are considering the need for CSAs to the provision as well as the interpretation section of the BO.
Clause 27 We maintain our view that the wording in new section 85A(1) is too open-ended. In practice, similar ambiguity in the CO and Companies (Winding-up) Rules and their application has given rise to uncertainty. The judiciary has indicated that liquidator's remuneration in summary winding-up cases can only be charged on a percentage basis, rather than on a time cost basis. However, as suggested in the Institute's earlier submission dated	We consider that there is no ambiguity in the wording of new section 85A(1) for fixing the remuneration of PIPs in outsoured summary bankruptcy cases, which generally follows the wording in the existing section 196(1A) of the CO for the remuneration of a provisional liquidator appointed in a summary liquidation case. However, there are differences between the relevant arrangements. Under proposed section 85A(1), OR shall fix the remuneration of the provisional trustee

22 December 2004, it would not be equitable and, from a commercial point of view, it would certainly be less viable, if the basis for fixing remuneration were not to provide a reasonable degree of certainty and fair reward for work properly undertaken, which, generally, the imposition of the percentage basis in summary cases would not do.	and the first trustee constituted under section 112A. Where for summary liquidation cases under s.196(1A), the OR may fix the remuneration of the provisional liquidator only. The remuneration for liquidators is governed by the Companies (Winding Up) Rules. As indicated in our earlier responses, the ORO intends to outsource the summary bankruptcy cases through a tender system. The scale/basis of the remuneration will be fixed by the ORO and agreed at the time of the appointment. The Administration has no plan to adopt a percentage basis, given that in the great majority of summary bankruptcy cases, the bankrupts would have limited assets or no asset at all.
We would reiterate that clause 27 should specify the grounds on which the court may, on the OR's application under section 85A(2), confirm, increase or reduce the remuneration of the trustee.	The court should be able to take into account all circumstances of the case. We see no need to provide specifically for the grounds on which the court may give a direction. Also, there is appeal mechanism under the judicial system.
<u>Clause 28</u> The duty under new section 86B(1)(a) for the trustee "to raise money in any case where in the interests of the creditors it appears necessary so to do" is potentially an onerous duty and do not understand the purpose of including such a provision in the Bill.	The purpose for raising the money will be for undertaking the duties of the trustee e.g. in recovery of assets or protection or preserving the bankrupt's property – see section 38(5B) where the court has power to make such order for distribution of assets with a view to giving those creditors who provided the indemnity for costs or funding an advantage over others in consideration of the risk run by them.

	The inclusion of new section 86B(1)(a) will specifically state such duty of the trustee who acts in a fiduciary capacity and will be under such duty. The Administration will propose CSAs to limit the scope of the outsourcing to debtor-petition cases only. As the statement of affairs would already have been sworn and filed with the bankrupt petition in those cases, PIPs will not generally need to perform this duty. In any case, it is not unreasonable to require a trustee to assist in the preparation of a statement of affairs. It is also a duty currently undertaken by the ORO when acting as trustee in bankruptcy.
We object to the inclusion of new section 86B(1)(f) which is an onerous duty. In a debtor-petition case, while the statement of affairs may have been sworn, input may also be required from the trustee in relation to any amendments that are required to be made. Furthermore, the scope of the Bill is not limited to debtor-petition cases.	
<u>Clause 30 (Section 88)</u> Clause 30 should include a provision similar to that contained in proposed section 19(4A) empowering the trustee to require a creditor to pay a deposit as a pre-condition for taking the action required.	Rule 176 of the Bankruptcy Rules provides that where in pursuance of section 88, a trustee is required to provide to creditors a statement of the accounts, the cost of furnishing and monitoring such statement shall be calculated at the rate of $20 per folio for each statement. Under the proviso in section 88 as proposed to be amended, the person at whose instance the accounts are provided shall, if so required, deposit with the trustee a sum sufficient to pay the costs of the accounts, which sum shall be repaid to him out of the estate only if the court so directs. The effect of the two provisions is that the trustee would be able to require the creditor(s) concerned to pay the cost of the accounts, unless the court directs otherwise.

Clause 31 (Section 89) We repeat that it would seem appropriate to take the opportunity to review the format of accounts with a view to simplifying them. This would also apply to the Form 137, produced by the trustee in his application for release.	The proposals do not appear to fall within the scope of the Bill, and any suggestions for reviewing accounts and forms should be considered separately.
Unfair Preferences The Bill provides a good opportunity to update the provisions on unfair preferences under the BO (section 50, section 51B, etc) and Companies Ordinance. For example, unfair preferences given to holding companies are not caught by the provision, due to the limited definition of "associate" under section 51B of the BO.	The provisions on unfair preferences follow, by and large, similar provisions on unfair preferences in the UK Insolvency Act 1986. The review proposed by the Institute is outside the scope of the Bill.