Written Submissions on the Bankruptcy (Amendment) Bill 2004[1]

Organisation	Comments	Response of the Administration
Hong Kong Institute of Certified Public Accountants	Framework In principle the HKICPA supports the policy of contracting out government services to suitably qualified persons in the private sector, wherever possible and practicable. The Bill provides that the remuneration of any trustee other than the OR should rank last, except for out of pocket expenses necessarily incurred by the creditors' committee subject to approval of the trustee. In practice, a PIP may undertake significant work simply to realize assets to meet the costs and expenses incurred or authorized by the OR and the costs of the solicitors acting for the petitioner creditor.	Noted Information on the financial arrangements involved in the handling of bankruptcy cases by PIPs is provided in our paper issued to the Bills Committee on 8 December 2004. Under the proposed section 37 of the BO, the payment of expenses properly incurred in realizing any of the assets of the bankrupt shall first be paid out of the assets. Furthermore, we would like to point out that the ORO plans to outsource debtor-petition cases only, i.e. there would be no petitioning creditors.

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

	The Bills Committee should be made aware of the fact that most bankruptcies are "non-remunerative" i.e. have very limited assets and therefore it is important that whatever framework is put in place is able to ensure that there will be sufficient funds available for suitably qualified and experienced PIPs acting as trustee to be remunerated at reasonable level for work properly undertaken. In this regard we should be interested to know how much approximately the ORO currently spends in total on the administration of bankruptcy cases.	It is agreed that in the great majority of bankruptcy cases, in particular debtor-petition cases, the bankrupts have very limited assets and income, or no assets and no income at all. Experience also shows that a number of arrangements under the BO have not been resorted to in practice for bankruptcy cases with limited or no assets. These include investigation procedures that require substantial funds or the distribution of dividend. The proposal is that the PIPs will be remunerated from the balance of the deposit available after deduction of the fees and expenses of the ORO. Furthermore, the bankruptcy cases will be outsourced in batches so that PIPs can achieve economies of scale. We have not done any detailed estimate of the costs incurred by the ORO in the administration of bankruptcy cases. In this regard, we would like to point out that it may not be appropriate to compare the costs incurred by the ORO, as the ORO (vis-à-vis PIPs) has to perform regulatory roles and has different organizational set-up.
	The proposed framework should also ensure that the OR would appoint only those who are adequately qualified and experienced to act as (provisional) trustees.	Please refer to our paper issued to the Bills Committee on 8 December 2004.

	The Institute would appreciate further information as to how the Administration sees that proposed arrangements for the outsourcing of bankruptcy cases working in practice.	Information on the tender arrangements for outsourcing is provided in the paper issued to the Bills Committee on 8 December 2004.
	<u>Clause 3 (Section 12)</u> We suggest that where the ORO is of the view that the property of the bankrupt is unlikely to exceed $200,000, the Department should support its view with reasons and confirm to the court that reasonable enquiries have been made beforehand.	Please refer to the response to Grant Thornton on how the ORO forms a view on the value of the assets. 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.
	We would suggest that this arrangement also be formalized in relation to the procedure under s. 194(1A) of the Companies Ordinance.	The proposed change (to company liquidation arrangements) appears to be outside the scope of the present amendment exercise, which focuses on the mechanism to allow the ORO to outsource the administration of personal bankruptcy.

	Where the ORO is unable, on the basis of the information available or otherwise, to form the view as to the value of the bankrupt's property, arguably, no appointment should be made under the provision.	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 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 therefrom and any other available information.
	We should appreciate further clarification as to how bankruptcy cases with assets likely to be above $200,000 will be handled once the Bill is implemented.	Where the ORO has formed the view that the assets are likely to exceed $200,000, an appointment of provisional trustee under proposed section 12(1A) of the BO will not be made. The ORO will summon the creditors' meeting for appointment of trustee under section 17A of the BO as is done presently.

	Clause 4 (Section 13) We believe that it would be sensible to allow for the possibility of appointing PIPs as interim trustees under the BO, even though such appointments are likely to be quite rare. The BO should be amended to converge more closely with the equivalent provisions in the CO i.e. section 193 and s. 194(1)(aa). A provision similar to Rule 28(3) of the Companies (Winding-up) Rules should be incorporated 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. Clause 8 (Section 18) As a trustee may not have been appointed within 21 days of the making of the bankruptcy order, we would suggest to amend section 18(1) to read "the bankrupt shall submit … to the trustee or provisional trustee, as the case may be, not more than 21 days after…".	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 10 years, and the petition was subsequently withdrawn. 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 regards 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.

	<u>Clause 9 (Section 19)</u> To enable a provisional trustee to undertake his duties as soon as possible, s. 19 of the BO should also allow a provisional trustee to undertake a public examination. It is also suggested that the power given to the OR or trustee under s. 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. <u>Clause 11 (Section 37)</u> The remuneration of the trustee is some way down the pecking order, ranking last except for one. As the intention behind the proposed legislation is to contract out more work to PIPs, we would suggest that consideration be given to elevating the priority of the trustee's remuneration further up the sale, which would provide a greater incentive for the trustee to pursue claims that were worth pursuing but which might not result in immediate recoveries.	Please refer to the response to section 18 in the preceding paragraph. 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. 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.

	Given that no subsidy will be payable by the OR to PIPs, and that a bankrupt will not be discharged from bankruptcy until the expiration of 4 years, which may be extended for up to 7 years, the HKICPA would like to obtain further clarification from the Administration as to how much is likely to be made available to private sector trustees out of the petitioner's deposit.	The period of bankruptcy for a first time bankrupt up to the discharge is normally 4 years (Section 30A(2)(a)) which may be 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.
	We should also like to seek the views of the Administration as to 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 realising any of the assets of the bankrupt" which will therefore, be payable ahead of the priorities referred to in the proposed s. 37(1)(a)-(i).	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.

	It would seem unnecessary to include the second part of the proposed s. 37 (1)(e) beginning "except expenses properly incurred…" as it appears that the point is already covered by proposed subsection (3) when this is read in conjunction with the introductory part of subsection (1). <u>Clause 15(Section 58)</u> It is possible that proposed section 58 will 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 sections of the Ordinance that are specifically excluded in clause 15, this may need to be stated more explicitly.	Section 37(3) expressly provides that it is 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. 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).

	For example it is unclear whether in view of the proposed s. 58(1B), the provisional trustee should be regarded as the trustee in relation to the priority of payments under the proposed s. 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 s. 37(1)(a).	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 and expenses are to be given priority under section 37(1)(a).
	<u>Clause 23 (Section 79)</u> For the sake of consistency, we suggest that s.2 BO which provides for the definition of "trustee" as the "trustee in bankruptcy of a bankrupt's estate" should be amended with wording similar to that proposed in clauses 2 and 23 of the Bill which provides for the official names of the provisional trustee and trustee to be provisional trustee and trustee of the "property of" and for the definition of provisional trustee to be the provisional trustee of the "property of".	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.

	Clause 27 (Section 85A) The wording of proposed section 85A(1) is too open-ended and could create uncertainty. It seems to be reasonable that a PIP should not be left in any doubt about the basis on which he will be remunerated before taking on a case. In practice, similar ambiguity in the CO and Companies Winding-up Rules and their application has given rise to uncertainty as yet unresolved, in relation to the basis of liquidators' remuneration in summary winding up cases. We believe that the opportunity should be taken to ensure greater clarity from the outset under the Bill. More specifically we should like to know how the Administration believes that this section will operate and 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.
	Section 85A(2) provides that if ¼ in number or value of the creditors apply to the OR and the OR is of the opinion that the remuneration of the trustee or provisional trustee should be reviewed, the OR may apply to the court and the court may confirm, increase or reduce such remuneration. We would suggest that Clause 27 should specify the grounds on which the court may confirm increase or reduce the remuneration of the trustee.	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.

	More generally we should also appreciate clarification as to the source of the wording of the proposed new S85A.	Proposed section 85A follows relevant provisions in section 85 on the remuneration of the trustee other than the provisional trustee.
	<u>Clause 28 (section 86B)</u> The provisions of section 86B(1)(a) i.e. "to raise money in any case where in the interests of the creditors it appears necessary so to do" seems to be more a power than a duty.	Similar comment raised in the submission made by Grant Thornton. This is a duty of the trustee. Other than having to comply with the BO, a trustee acts in a fiduciary capacity.
	Proposed section 86B(1)(f) i.e. "to assist the bankrupt in preparing his statement of affairs in case the bankrupt has no solicitor acting for him and is unable properly to prepare it himself…" is not the duty of a liquidator under the corresponding provisions of the CO and could be onerous, given the lack of available resources in most bankruptcies.	Similar comment raised in the submission of Grant Thornton. 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). 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.

	We believe that the application of s. 86B(1) should be extended to the provisional trustee. Under Clause 15, we assume that this is intended to be the case, but please see our comments above in relation to clause 15.	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.
	<u>Clause 30 (Section 88)</u> We would suggest that clause 30 should include a provision similar to that contained in the proposed s. 19(4A) empowering the trustee to require a creditor to pay a deposit as a pre-condition for taking the action required.	We are considering the comment and will revert.
	<u>Clause 31 (Section 89)</u> The wording of Clause 31 suggests that the format of the accounts (Form 150) should follow the requirements of s. 89 BO. The Bill would seem to offer a good opportunity to review the format of accounts with the aim of simplifying 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 amend 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 s. 89 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.

	Other Matters Unfair preferences There are deficiencies in the provisions dealing with unfair preferences under the BO for example in relation to the onus of proof required, which makes the provisions difficult to apply effectively. There are also significant deficiencies in the unfair preference provisions as applied to company liquidations. For example unfair preferences given to fellow subsidiaries or holding companies are not caught by the provision due to the limited definition of "associate" under s. 51B of the BO. Given the opportunity presented by the Bill, consideration should also be given to reviewing and strengthening the unfair preference provisions of the BO.	Our preliminary view is that the proposed review is outside the scope of the present amendment exercise.