Written Submissions on the
Bankruptcy (Amendment) Bill 2004

Organisation	Comments[1]	Response of the Administration
1. The Chinese General Chamber of Commerce	處理外判破產個案之人員可能認識破產人士，使其未必能公正地執行職務。此外，申請破產人士亦可能會因處理其案件之外判人員並非破產管理署職員而對提供個人私隱資料有所顧慮，影響工作順利進利。	Private sector insolvency practitioners (PIPs) are professionals. They have statutory duties under the Bankruptcy Ordinance (BO) and the terms of contract of appointment with the Official Receiver's Office (ORO). They are also subject to professional rules or codes of conduct of the professional bodies they are members of (namely the Hong Kong Institute of Certified Public Accountants, 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 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.
2. Consumer Council	The issue of the costs of insolvency has been positively addressed by the proposed provisions of s.85A of the Bill. Hopefully, the relevant provisions will ensure a high standard of professionalism amongst PIPs.	Noted. Information on the remuneration and supervision of PIPs is provided in our paper issued to the Bills Committee on 8 December 2004.
3. Hong Kong Monetary Authority	No comment.	Noted

[1] This table aims to summarise the relevant comments made. For details, please refer to the submissions concerned.

4. The Hong Kong Association of Banks	Vigilant selection criteria and audit procedures, as well as effective procedures to deal with complaints regarding the quality of PIPs, should be in place before the new legislation is introduced. A preferred approach is to enshrine the assurances in the legislation. For example, the Bill should contain provisions similar to Sections 394 to 398 of the UK Insolvency Act 1986 dealing with selection criteria of PIPs, complaint handling and supervision. Alternatively, section 84 of the 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.	Agreed. The ORO will ensure that appropriate selection criteria and audit procedures, as well as effective procedures to handle complaints, are put in place before the proposed legislative amendments come into operation. We agree that there is the need to ensure PIPs are properly selected and sufficiently supervised. As mentioned in our paper issued to the Bills Committee on 8 December 2004, 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; 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. The ORO will also impose appropriate provisions in the contract with the PIPs to ensure effective monitoring of PIPs' work.
	The ORO should make appropriate references, within the contractual arrangements with the PIPs, to the timely provision of management information to facilitate effective monitoring of the output of PIPs.	
5. The Law Society of Hong Kong	The Law Society considers the proposed amendments to be uncontroversial and thus will not be providing submissions.	Noted
6. Standing Committee on Company Law Reform	No particular views or comments.	Noted.

7. Joseph S C Chan & Co	Support the outsourcing and suggest to expand the ambit to – 1. Include bankruptcy cases where the value of the bankrupt's property is unlikely to exceed $500,000 as the administration of bankrupt's estate of around $200,000 cannot be that much complicated than cases where the value is around $500,000 and limiting outsourcing to cases where the bankrupt's assets are less than $200,000 is not commercially viable. 2. Permit contingency fee arrangement (or conditional fee arrangement) to be the basis of PIPs remuneration, as it would motivate the PIPs to adopt a more proactive attitude in recovery of assets and may deter people from abusing bankruptcy proceedings.	1. 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. Cases will be allocated to PIPs in batches, so that PIPs can achieve economies of scale. 2. 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.

8. Hong Kong Institute of Company Secretaries	Fully supports the amendments.	Noted.
9. Association of Chartered Certified Accountants	<u>Section 37</u> The provisional trustee's remuneration should be explicitly shown in either subsection (a) or (h) of section 37(1). <u>Section 85A and Section 112A</u> The term "first trustee" does not appear under section 112A. Further clarification required. To tidy up the order of sequence of the sub-sections under section 112A.	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). "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. 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.

	<u>Section 86B</u> Whether the "securities" in proposed section 86B(2) has the same meaning as "security" under section 23. If so, the trustee's duty regarding security should be referred to in the same provision in order to ensure clarity. <u>Section 23</u> The requirement in section 23 for a trustee to give security to the OR should also be applicable to the provisional trustee.	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 section 86B and section 23 respectively are not the same. 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".

	Section 91(2) The provision requiring that if trustee at any time retains for more than 10 days a sum exceeding $2,000 or such other amount as the Official Receiver in any case may authorized him to retain, then unless he explains the retention to the satisfaction of the Official Receiver, he shall pay interest on the amount so retained in excess at the rate of 20% per annum is practically too difficult to comply with. The limit should be raised and the provision should be amended accordingly.	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. 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.
	Qualification of the provisional trustee Criteria for the qualification of the provisional trustee/ trustee, including domicile, independence, conflict of interest or expertise, should be considered.	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 our paper issued to the Bills Committee on 8 December 2004. 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.

10. The DTC Association	Support the outsourcing of part of the work of the ORO and have no further comments.	Noted
11. Yip, Tse & Tang Solicitors	支持建議，但擔心私人執業者未具充份經驗和專業知識 1. 日後破產署將案件交由私人執業者擔任受託人，必須設立有效的投訴機制。 2. 政府建議倘獲實行，必須提供充足訓練和監察。破產署能否妥善擔演監察角色，本行表示懷疑。破產署在交由私人執業者擔任信託人，必須務求信託人妥善履行其職責。	1. As mentioned in our paper issued to the Bills Committee on 8 December 2004, the ORO will only outsource the management of bankruptcy cases to competent private sector insolvency practitioners (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 in respect of insolvency work. 2. 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.

		3. 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.
12. Grant Thornton	<u>Proposed section 12(1B)</u> Appointments are usually on "joint and several" basis; hence it is not sure why "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." Who will be in that position (and based on what) to spell out any such circumstances, for a case with assets of less than HK$200,000?	Proposed section 12(1B) follows the wording in existing section 17(2) of the BO. The provision is necessary to give the OR the power to appoint more than 1 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.

	<u>Proposed section 37</u> The ranking and priority of the costs and charges gives little incentive to a PIP to take up bankruptcy work. It is unclear as to why the ORO is entitled to charge fees and commissions on a percentage of realisation basis where little, if any, work, is done by the ORO in the realisation of the same. The arrangement of paying everybody else in full first before paying the PIP when the PIP is often wholly and exclusively responsible for the realisation cannot be seen to be fair.	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 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.

	The wording in (1)(ii)(e) does not read well as the charges of any shorthand writer can hardly be related to (and "excepted" from) "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 Official Receiver, 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. The exclusion ("except.....) tries to highlight this point.
	Under (3), why should the shorthand writer appointed or authorized by the Official Receiver have any preference over others?	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.

	<u>Proposed Section 58(1A)</u> What happens if the provisional trustee does not eventually become the trustee, how then would the property become vested from the provisional trustee to the trustee? Even if the provisional trustee becomes the trustee, what is the mechanics of property becoming vested 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.
	<u>Section 79</u> Why is the name restricted to "(provisional) trustee of the property of ⋯ a bankrupt"? This may give the impression that the trustee does not (have powers to) deal with liabilities, creditors or general affairs of the bankrupt. Suggest to use "trustee of the estate" 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.
	<u>Section 80(1) and (1A)</u> Comments similar to those on the proposed section 12(1B) above.	See response on proposed section 12(1B) above.

	<u>Section 81A</u> In 81A(2), the appointment by the OR of any other person will be with reference to the office of provisional trustee (see 81A(1)), which appointment is before the calling of the first meeting of creditors. Hence it is unclear why there is a reference to the exercising of the OR's power during this interim period "without a creditors' meeting". <u>Section 85A</u> In (1), it should be made clear as to whether the "scale/basis of fees" as fixed by the OR will be fixed on a case by case basis, or fixed and then applied "across the board" for all cases at the relevant time.	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. 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.

	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.	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.
	<u>Proposed Section 86B</u> In (1)(a), 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.
	In (1)(f), this "duty" to assist the bankrupt in preparing his statement of affairs ("SoA") will very likely be abused by the bankrupt as a basis of taking a laid-back position and instead requiring the trustee to prepare the 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.

	Others 1. The ORO/Government provide no subsidy to bankruptcy administrations. With only minimum or even no assets, the PIPs will not have commercial reasons to perform any in-depth investigation of the affairs of any bankrupt, and most cases will be treated as "summary cases" and will "die a natural death" as such. It may therefore be necessary to set procedures and/or criteria to:- ● allow the ORO the flexibility not to have to treat all cases with assets of less than HK$200,000 summary cases;	1. As mentioned in our paper issued to the Bills Committee, the cases will be allocated in batches as that PIPs can achieve economies of scale. Based on past experience, in the great majority of bankruptcy cases, the bankrupts have very limited assets and income, or no assets and no income at all. Given the profile of the bankrupt, experience shows that a number of the arrangements under the BO had 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. After all, the outsourcing will be proceeded by way of open tender and it is up to the PIPs to make a commercial decision on whether or not to make a bid. ● We believe that cases with assets of less than $200,000 should be treated by summary procedures. Please also see response in above paragraph.

	● ascertain how the ORO forms a view that the assets are unlikely to have a value of more than HK$200,000; and	● 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.
	● enable the Government/ORO to provide funding for PIPs to be appointed trustee (or agents of the OR as trustee) to carry out detailed investigations.	● The Government does not intend to provide funding for investigations by PIPs in individual bankruptcy cases. Investigations should be conducted by using the assets of the estate.
	2. A PIP should be able to be appointed as an interim trustee (Section 13). 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). Further, "protection of the estate" should be	2. Section 13 of the BO provides that the ORO may be appointed as the interim trustee. There was only one case of such appointment in the past 10 years, which petition was subsequently withdrawn. In practice, we see no need to amend the section for PIPs to be appointed as interim trustee.

	extended to include protection of books and records of the potential bankrupt.	
13. British Chamber of Commerce of Hong Kong	The Chamber has submitted a formal response to the consultancy at length and does not wish to give formal evidence to the Committee. Submissions of the British Chamber of Commerce in the Consultancy *on the aspect of outsourcing of bankruptcy cases* – Suggest that there would be little interest from PIPs in dealing with insignificant bankruptcy debts/debts if for no other reason than commercial exigencies. Having said that, it is appreciated that there would be significant benefit to the ORO for outsourcing the matters to PIPs if the PIPs were to be satisfied that there was a realistic financial return available to them for such work.	Noted As mentioned in our response to Grant Thornton above, we believe that there will be sufficient interest from PIPs in tenderering under the proposed arrangements.

	Perhaps PIPs outsourcing could include the proposed Interbank Debt Relief Company (which would be much less expensive than IVAs). This financial institutional industry initiative proposes to work with debtors on bankruptcy avoidance via restructuring programmes ("DRP") as well as debt counselling. It would be simple to extend such activities to include trustee administration. Ideally one industry body dealing with all aspects of debtor financial difficulties is the preferred solution.	Proposal is probably outside the scope of the present amendment exercise. In any case, we believe that the industry can pursue the initiative (if it so wishes), and the Interbank Debt Relief Company (if materialized) can tender for the outsourced bankruptcy cases provided that it meets the relevant pre-qualification criteria.

14. Kenny Tam & Co.	General Support the proposed outsourcing of management of bankruptcy cases to PIPs and also support the general framework of the proposed Bill.	Noted
	1. Priority of costs and charges The current proposed priority in proposed section 37 of the BO will create a disincentive to the PIPs to maximize realization for the benefit of the general body of creditors.	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.
	Propose that the priority of outside trustee's disbursements and fees (i.e. proposed section 37(1)(f), (g) and (h) of the BO) should be given a higher ranking before the petitioner's costs (i.e. proposed section 37(1)(b) of the BO).	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.

	2. <u>Allowance and taxation of costs</u> Propose to introduce a similar provision as to Rule 176 of Companies (Winding Up) Rules so that only bills of costs and disbursements which exceed $3,000 need to be taxed. 3. <u>Trustee's account</u> Propose to amend Rule 191 of the Bankruptcy Rules so that the trustee need only certify the account to be correct, similar to Rule 162 of the companies (Winding Up) Rules and need not verify the accounts by way of Affidavit or Affirmation as per Form 146 of the Bankruptcy (Forms) Rule.	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 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.
15. The Society of Chinese Accountants & Auditors	Endorse the views set out in Messrs. Kenny Tam & Co.'s submission	Noted