

立法會
Legislative Council

LC Paper No. CB(1)71/13-14

Ref: CB1/SS/12/12

Paper for the House Committee meeting on 18 October 2013

**Report of Subcommittee on Proposed Resolutions under
the Bankruptcy Ordinance and the Companies Ordinance**

Purpose

This paper reports on the deliberations of the Subcommittee on Proposed Resolutions under the Bankruptcy Ordinance and the Companies Ordinance ("the Subcommittee").

Background

2. The Secretary for Financial Affairs and the Treasury intended to move four proposed resolutions ("the Proposed Resolutions") at the Legislative Council ("LegCo") meeting of 10 July 2013 to seek the approval of LegCo of --

- (a) The Bankruptcy (Amendment) Rules 2013,
- (b) The Bankruptcy (Fees and Percentages) (Amendment) Order 2013,
- (c) The Companies (Fees and Percentages) (Amendment) Order 2013, and
- (d) The Companies (Winding-up) (Amendment) Rules 2013 ("the Amendment Rules/Orders") made by the Chief Justice under sections 113 and 114 of the Bankruptcy Ordinance (Cap. 6) ("BO") and section 296 of the Companies Ordinance (Cap. 32) ("CO") on 18 June 2013.

If the Proposed Resolutions are approved by LegCo, the Amendment Rules/Orders will come into effect upon their publication in the Gazette.

Fees charged by the Official Receiver's Office

3. At present, the Official Receiver's Office ("ORO") levies various statutory fees, charges and deposits for administering bankruptcy and winding-up cases. These fees, charges and deposits are set out in the Bankruptcy Rules (Cap. 6 sub. leg. A), the Bankruptcy (Fees and Percentages) Order (Cap. 6 sub. leg. C), the Companies (Fees and Percentages) Order (Cap. 32 sub. leg. C) and the Companies (Winding-up) Rules (Cap. 32 sub. leg. H). The Administration's policy is that fees charged by the Administration should in general be set at levels adequate to recover the overall costs of the Department concerned in providing the services. This ensures that the costs for providing the services do not fall on the general taxpayers.

4. According to the Administration, it has been ORO's established practice to levy fees and charges for the provision of insolvency services without reference to the actual time spent in any particular case. In general, the vast majority of insolvency cases administered by ORO are non-remunerative cases¹, which means there are no or inadequate assets to cover the costs incurred by ORO in administering these cases. On the other hand, the fees and charges collected in remunerative insolvency cases are higher than the actual costs incurred by ORO to administer these cases. This fee charging approach is intended to help defray ORO's costs of administering the vast majority of non-remunerative cases. In 1987, LegCo passed legislative amendments to both BO and CO to expressly provide for ORO to levy fees for the recovery of costs generally without reference to the administrative or other costs incurred in any particular case.

5. ORO's statutory fees, charges and deposits were last revised in 1997, with a general increase of statutory fees and charges mostly in line with inflation to prevent further deterioration of the cost recovery rate².

¹ According to the Administration, in 2011-2012, 98% of new insolvency cases administered were non-remunerative cases. The percentage of non-remunerative cases has remained more or less the same for the past five years.

² Before the last fee revision exercise in 1997, ORO's cost recovery rate for 1996-97 was 56%.

Revision of fees by the Official Receiver's Office

6. The Administration has advised that ORO recently conducted a review of its statutory fees, charges and deposits. After taking into account their existing levels and ORO's actual operating revenue and costs, it is projected that ORO will achieve cost recovery rate at 111% in the financial year 2013-2014. As such, the Administration has proposed, by virtue of making the Amendment Rules/Orders mentioned in paragraph 2, to reduce 31 fees, deposits and charges in relation to bankruptcy and winding-up proceedings back to their levels prior to the last fee revision exercise in 1997, including the deposit payable to the Official Receiver ("OR") on the presentation of a bankruptcy/winding-up petition as shown in items (a) and (b) in the table below. The Administration also suggests replacing the "realization fee" by a fixed fee (item (c) in the table).

Item	Existing amount (\$)	Revised amount (\$)
(a) Deposit by the petitioner to the Official Receiver ("OR") on the presentation of a bankruptcy petition -- (i) debtor's petition (ii) creditor's petition	(i) 8,650 (ii) 12,150	(i) 8,000 (ii) 11,250
(b) Deposit by the petitioner to OR on the presentation of a winding-up petition	12,150	11,250
(c) "Realization fee" ³ of bankruptcy and winding-up cases levied by ORO	10% on payments made into the Bankruptcy Account by OR as interim trustee or trustee in bankruptcy cases; or the amount of assets realized by OR as liquidator in winding-up cases	170

³ According to paragraph 2(c) of the LegCo Brief on the Proposed Resolutions, when OR acts as the interim trustee or trustee in bankruptcy cases or as the liquidator in court winding-up cases, ORO's efforts in realizing the assets mainly involve transferring money into the bank accounts of the estates of the bankrupts or companies being wound up.

7. The Administration has explained that if the proposed fee revision comes into effect before 2014, ORO's projected cost recovery rate for 2013-2014 will be around 100%.

The Subcommittee

8. At the meeting of the House Committee held on 28 June 2013, members agreed to form a subcommittee to study the four Proposed Resolutions. At the request of the House Committee, the Secretary for Financial Services and the Treasury wrote to the Clerk to LegCo on 2 July 2013 to withdraw his notice to move the Proposed Resolutions at the Council meeting of 10 July 2013. Under the chairmanship of Hon WONG Ting-kwong, the Subcommittee has held two meetings. The membership list of the Subcommittee is in **Appendix I**. The public including relevant business and professional organizations as well as social service agencies have been invited to give views on the Proposed Resolutions. The Subcommittee received oral representations from deputations at the meeting on 3 October 2013. A list of the organizations which have given views to the Subcommittee is at **Appendix II**.

Deliberations of the Subcommittee

9. The Subcommittee is generally in support of the Amendment Rules/Orders, which aim at introducing fee reduction. The Subcommittee will not propose any amendment to the Amendment Rules/Orders.

Deposit paid by the petitioner to the Official Receiver on the presentation of a bankruptcy petition

10. The Subcommittee notes that under the Bankruptcy (Amendment) Rules 2013, the deposit for a bankruptcy petitioner to pay OR on the presentation of the petition will be reduced from \$8,650 to \$8,000. Members have enquired about the purpose of charging such a deposit.

11. The Administration has explained that the deposit, charged pursuant to rule 52 of the Bankruptcy Rules (Cap. 6 sub. leg. A), is to set off the statutory "minimum fees" for bankruptcy charged by ORO where the OR acts as the trustee⁴. The fees cover the costs and expenses incurred in handling a bankruptcy case such as the costs of publishing the

⁴ The statutory "minimum fees" for bankruptcy are currently \$12,150. Under the Bankruptcy (Fees and Percentages) (Amendment) Order 2013, the fees are proposed to be reduced to \$11,250.

notices relating to the case in the Gazette and in the newspaper, conducting searches as well as administering the bankrupt's property. The Administration has proposed to reduce the amount of the deposit to \$8,000 so as to revert the level to that prior to the last fee revision exercise in 1997.

12. Hon Paul TSE considers that the deposit can be further reduced to a level much lower than \$8,000, having regard to the fact that ORO has contracted out the work of administering a bankrupt's property to outside provisional trustees at a fee generally lower than \$2,000. Hon CHAN Kin-por has asked the Administration to draw reference from other Government services and reconsider whether there could be some flexibility in the recovery of the full cost of administering a bankruptcy case, taking into consideration the petitioner's financial difficulties; or else ORO should review whether its operation costs could be lowered.

13. The Administration has explained that the level of statutory fees, charges and deposits for administering bankruptcy cases is determined with reference to the overall costs incurred by ORO in the provision of bankruptcy/insolvency-related services. This is to ensure that the costs for providing such services do not fall on the general taxpayers. As regards contracting out the trustee services, the Administration has advised that about 25% of the debtor-petitioned bankruptcy cases are outsourced to outside trustees and OR still acts as trustee for a large number of bankruptcy cases. Moreover, ORO's monitoring and checking of outside trustees' and liquidators' work incurs manpower costs. The Administration maintains the view that the deposit is charged at a reasonable level.

Assistance to bankruptcy petitioners who cannot afford the deposit

14. Some members of the Subcommittee including Hon Cyd HO Sau-lan, Hon CHEUNG Kwok-che, Hon SIN Chung-kai and Hon TANG Ka-piu have expressed concerns about the difficulties of low-income debtors in affording the bankruptcy petition deposit of \$8,650 (proposed to be reduced to \$8,000) and the court fee of \$1,045 charged by the Judiciary for scheduling a hearing. They have pointed out that some debtors who cannot secure money from families, relatives or friends to pay the petition fees will often go for illegal money lenders, and, in some extreme cases, suffer from mental distress or even commit suicide under the pressure from debt collectors. Their difficulties have also given an opportunity for some bankruptcy or debt restructuring consultants to charge debtors exorbitant consultancy fees.

15. Some members consider that special measures and assistance should be rendered to low-income debtors who cannot afford the petition fees. In this regard, Hon Cyd HO Sau-lan has suggested that arrangements should be made to offer needy petitioners a Government loan for filing the petitions. Hon NG Leung-sing supports exempting the needy from paying the petition fees, provided that a proper mechanism will be in place to prevent abuse and on the consideration that debtors should not be denied the opportunity to file a bankruptcy petition due to affordability reason.

Tiered system for the deposit

16. Hon CHEUNG Kwok-che is of the view that the Administration should levy the deposits for bankruptcy petitions on a multi-tier approach. Those petitioners with an income reaching 100% of the median household income should be levied 100% of the cost, while those with an income below the median household income should be levied a lower rate depending on their income as a percentage of the median household income. Hon Tang Ka-piu supports the multi-tier approach.

17. In examining various proposals on reducing or exempting the bankruptcy petition fees, the Subcommittee notes the two-tier deposit system suggested by Debt Counseling and Financial Capability Service and the Concern Group on Hong Kong Personal Credit Problem of the Caritas Family Crisis Support Centre ("CFCSC"), i.e. reducing the deposit payable by the elderly, the disabled or debtors who have no income for three months prior to the date of the bankruptcy petition to \$6,650, while keeping the deposit payable by other petitioners unchanged (at \$8,650).

18. The Administration has advised that the fee of \$1,045 payable by the petitioner to the Judiciary is not included in the current fee revision exercise. As regards the tiered system for the deposit, the Administration holds the view that any reduction to a level lower than \$8,000 would affect the full cost recovery of ORO, meaning that the costs of service will be borne by the general taxpayers. Besides, as most if not all persons who petition for bankruptcy may claim affordability problem, it is very difficult to design a fair reduction/waiver mechanism. Quoting overseas practices, the Administration has advised that in comparable common jurisdictions such as the United Kingdom ("UK") and Singapore, there is no separate statutory mechanism to charge certain categories of persons (e.g. the elderly or low-income persons) a lower deposit or to waive the

deposit. It has no plan to consider an alternative charging mechanism for specific categories of petitioners.

19. Hon CHEUNG Kwok-che does not agree that the absence of a reduction/waiver mechanism for the bankruptcy petition deposit in UK and Singapore means that such a mechanism cannot be introduced in Hong Kong, having regard to the local social and economic characteristics.

Payment of the deposit by instalments

20. The Subcommittee has deliberated proposals on allowing bankruptcy petitioners to pay the deposits by instalments. Hon SIN Chung-kai has urged ORO to contemplate changes to the existing payment structure under BO which requires bankruptcy petitioners to pay a full deposit at the time of petition. He considers that flexibility should be provided to allow the petitioners to pay a major part of the deposit at the end of the bankruptcy period. There are suggestions that if the bankrupt fails to settle the balance at the end of the bankruptcy period, he/she would be subject to an extension of the bankruptcy.

21. The Administration is not in support of the proposal of allowing bankruptcy petitioners to pay the deposit by instalments, on the grounds that it would give rise to a number of legal and operational issues. It has explained that, under the general principle of bankruptcy law, if a bankrupt makes contribution towards his estate during the bankruptcy period, such monies would be an asset to be distributed to all creditors in order of priority. The proposal of paying the deposit by instalments would imply that contribution made by the bankrupt should first be used to pay the deposit balance, representing a debt owed to ORO in priority to other creditors. The Administration considers that this would affect the interests of other creditors, and is not consistent with a general principle under bankruptcy law that ordinary creditors should be entitled to a proportionate share of all such assets realized by the trustee during the bankruptcy period.

22. According to the Administration, the proposal of payment by instalments would also require ORO to change its administration system and take on new duties to track and handle the payment/non-payment of the instalments. Apart from resource implications and increase in the workload of ORO, this would compromise the cost recovery rate of ORO, which is estimated to be just about 100% after the implementation of the fee reduction proposals under the current legislative exercise.

23. As regards the suggestion of putting in place a mechanism to allow further extension of the bankrupt's bankruptcy period until the full balance of the deposit is settled, the Administration holds the view that the suggestion would result in the bankruptcy period being extended infinitely unless and until the bankrupt has settled the balance of the deposit. It will be difficult to justify why failure to repay one particular debt should be a ground for extending the bankruptcy period up to an indefinite period as proposed. Therefore, the Administration has no plan to change the requirement that a petitioner has to settle the full deposit upfront at the time of petition.

Engaging other Government departments in offering assistance to debtors in respect of filing bankruptcy petitions

24. The Subcommittee notes that of the debtors who presented bankruptcy petitions from 2008 to 2012, 38% had no income and 40% had a monthly income below \$10,000. In view of the dire situations of the low-income debtors, Hon CHEUNG Kwok-che has suggested that the Administration should consider putting in place a mechanism for referral between ORO and the Social Welfare Department ("SWD") to provide financial assistance to debtors in paying the petition fees. The Chairman considers that the bankruptcy issue is worth exploring from the angle of social welfare and concurs with the view that a referral mechanism between ORO and SWD will be helpful to debtors. Ir Dr Hon LO Wai-kiwok supports that the issue of fee reduction/exemption for bankruptcy petitions should be taken up by SWD. Some members have suggested that the Administration should study the role that the Government's legal aid schemes can play in assisting debtors in the payment of bankruptcy petition fees.

25. About the role of SWD in offering assistance to debtors, the Administration has advised that the Department has all along been providing services to help stop debtors from applying for bankruptcy and help them rebuild their confidence in life. In gist, social workers will provide counselling services to people with personal or family problems leading to or arising from financial hardship and refer them to specialist services as appropriate. Social workers may apply for charitable/trust funds to help individuals, including those filing for bankruptcy, who have difficulties in meeting expenses for daily living. Individuals with financial difficulties and meeting the eligibility criteria can also apply for Comprehensive Social Security Assistance ("CSSA") to meet their basic needs. The Administration considers the above services and financial

assistance under the CSSA Scheme adequate in providing timely assistance to and addressing the needs of bankruptcy petitioners. It has reservations on the need to put in place a mechanism for referral between ORO and SWD.

26. As regards legal aid, according to the Administration, the policy objective on legal aid is to ensure that no one with reasonable grounds for pursuing or defending a legal action is denied access to justice because of a lack of means. In a debtor-petitioned bankruptcy case, the petitioner is not seeking to enforce a right or defend a claim. He/she is seeking to free himself from his debts and liabilities before his creditors take action so that he/she can have a fresh start of life. The procedural requirements for obtaining the relief are such that one could effectively represent himself/herself. The Administration does not consider it justified to grant legal aid which is funded by taxpayers' money to pay for the fees and charges relating to voluntary bankruptcy procedures.

27. Members in general agree that the issue of offering financial assistance to bankruptcy petitioners warrants further discussion from a social welfare perspective but the Subcommittee may not be the right platform. They consider that individual members may pursue the matter at the meetings of the relevant Panel.

Other fees

28. The Subcommittee has no objection to the reduction of other fees, charges and deposits as proposed in the Amendment Rules/Orders. It has studied the views of the Hong Kong Institute of Certified Public Accountants ("HKICPA") on the levels of two items of fees under the Companies (Fees and Percentages) Order: (a) the fee for proof of debt⁵; and (b) the ad valorem fee payable to ORO in respect of compulsory winding-up of companies⁶. On item (a), HKICPA has suggested that the fee, to be reduced from \$40 to \$35 under the Companies (Fees and Percentages) (Amendment) Order 2013, be abolished completely to simplify the administration of liquidations. On item (b), a cap on the overall payment has been proposed⁷.

29. On the above proposals, the Subcommittee notes the Administration's explanation that, for item (a), when a creditor files a proof of debt, ORO has to carry out administrative work such as filing

⁵ Item 10 of Table A in Schedule 3 to the Companies (Fees and Percentages) Order

⁶ Item 1 of Table B in Schedule 3 to the Companies (Fees and Percentages) Order

⁷ Details about HKICPA's proposals are given in its submission (LC Paper No. CB(1)1866/12-13(01)).

and checking the contents, and, in some cases, clarifying with the creditor as regards the claim. The Administration considers it reasonable for ORO to levy a charge on its services so provided. For item (b), the Administration has advised that the relevant legislation already provides a mechanism for handling the reduction of fees for winding-up cases. In accordance with paragraph 9 of the Companies (Fees and Percentages) Order (Cap. 32 sub. leg. C), OR may apply to the Court for a reduction of the "ad valorem fee" on specified ground. The Court would consider each application on its own merits and any relevant circumstances of the case. The Administration holds the view that, when compared with the proposed imposition of a statutory cap, this approach would allow for the flexibility by the Court where appropriate.

Recommendation

30. The Subcommittee is in support of the Proposed Resolutions. The Subcommittee will not propose any amendment to the Proposed Resolutions to be moved by the Secretary for Financial Services and the Treasury.

Advice sought

31. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 1
Legislative Council Secretariat
17 October 2013

Appendix I

Subcommittee on Proposed Resolutions under the Bankruptcy Ordinance and the Companies Ordinance

Membership list

Chairman

Hon WONG Ting-kwong, SBS, JP

Members

Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan
Hon CHAN Kin-por, BBS, JP
Hon CHEUNG Kwok-che
Hon Paul TSE Wai-chun, JP
Hon NG Leung-sing, SBS, JP
Hon Steven HO Chun-yin
Hon CHAN Han-pan
Hon Dennis KWOK
Hon Christopher CHEUNG Wah-fung, JP
Hon SIN Chung-kai, SBS, JP
Hon TANG Ka-piu
Ir Dr Hon LO Wai-kwok, BBS, MH, JP

(Total: 14 members)

Clerk

Ms Sharon CHUNG

Legal Adviser

Miss Winnie LO

Appendix II

Subcommittee on Proposed Resolutions under the Bankruptcy Ordinance and the Companies Ordinance

List of deputations which have given views to the Subcommittee

1. Caritas Family Crisis Support Centre -- Concern Group on Hong Kong Personal Credit Problem
2. Caritas Family Crisis Support Centre -- Debt Counseling and Financial Capability Service
3. Hong Kong Institute of Certified Public Accountants
4. The DTC Association (The Hong Kong Association of Restricted Licence Banks and Deposit-taking Companies)
5. The Hong Kong Association of Banks
6. The Law Society of Hong Kong