Subcommittee on Proposed Resolutions under the Bankruptcy Ordinance and the Companies Ordinance Follow-up to Meeting on 3 October 2013

Responses by the Financial Services and the Treasury Bureau/ Official Receiver's Office to Written Submissions

Purpose

At the invitation of the Legislative Council Subcommittee on Proposed Resolutions under the Bankruptcy Ordinance and the Companies Ordinance ("the Subcommittee"), the Debt Counseling and Financial Capability Service of the Caritas Family Crisis Support Centre ("Caritas") and the Hong Kong Institute of Certified Public Accountants ("HKICPA") made separate submissions on the proposed resolutions on 26 September 2013 and 3 October 2013 respectively. This paper sets out the responses by the Financial Services and the Treasury Bureau ("FSTB") and the Official Receiver's Office ("ORO") to their suggestions and comments.

Responses by FSTB and ORO

2. The various suggestions and comments of Caritas and HKICPA were discussed at the Subcommittee meeting on 3 October 2013 when FSTB and ORO had provided their responses. The gist of the responses is recapitulated at **Annex**.

Financial Services and the Treasury Bureau
Official Receiver's Office
10 October 2013

Annex

FSTB and ORO's Responses to Written Submissions

Summary of suggestions/comments made by deputation	**FSTB and ORO's responses**
Caritas's suggestions and comments as set out in its letter of 26 September 2013	
To provide flexibility for those bankruptcy petitioners whose income is below the median income by allowing them to pay only half of the statutory deposit to the ORO upfront at the time of petition, and then upon the making of the bankruptcy order, to settle the remaining half of the deposit by instalments over one or two years.	This suggestion would give rise to a number of legal and operational issues. 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. Caritas' proposal 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. This would affect the interests of other creditors, and is not consistent with the general "*pari passu*" principle under bankruptcy law that ordinary creditors should be entitled to a proportionate share of all such assets realised by the trustee during the bankruptcy period. This suggestion would also require ORO to change its administration system and take on new duties to track and handle payment / non-payment of the deposits by instalments. Apart from resource implications and increase in the workload of ORO, this will compromise the cost recovery rate of ORO, which is estimated to be just about 100% after the implementation of the statutory fees, charges and deposits proposals under the current legislative exercise.
At the same time, to put in place a mechanism to allow further extension of the bankrupt's bankruptcy period until the full balance of the deposit is settled.	The suggestion to introduce a new mechanism to allow an extension of the bankrupt's bankruptcy period until the full balance of the deposit is settled would result in the bankruptcy period being extended infinitely unless and until the bankrupt has settled the balance of the deposit. It is 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.

Summary of suggestions/comments made by deputation	**FSTB and ORO's responses**
HKICPA's suggestions and comments as set out in its letter of 3 October 2013	
The proposed reduction of the deposit payable for each debtor-petitioned bankruptcy case from $8,650 to $8,000 would convey an ambiguous message to the community that the Government is smoothing the path to bankruptcy.	In general, the proposed adjustment to the deposit would only represent a very small proportion of the overall debt incurred by a bankrupt and hence it should have little bearing on a debtor's decision on whether or not to pursue bankruptcy action. On the other hand, from the broader perspective, as a number of other statutory fees payable to ORO are proposed to be reduced to their original levels before the last fee revision exercise, it would be reasonable to introduce similar changes to the level of the deposits.
Consideration should be given to abolishing the fee payable by creditors for filing proofs of debts (i.e. the fee as set out in Table A Item 10 of the Companies (Fees and Percentages) Order (Cap 32C)) in order to simplify the administration of the winding-up process. As it is common for creditors to be situated in foreign jurisdictions for winding-up cases in Hong Kong, it may cost more for these creditors to obtain a bank draft than the actual amount of the fee.	A creditor is required to prove his debt in order to be entitled to a share of the assets of winding-up cases. There is no question of waiving this requirement. When creditors file proof of debt, ORO has to carry out administrative work such as filing and checking the contents and in some cases clarifying with creditors as regards the claim. Therefore, it is reasonable for ORO to levy a charge on its services so provided and this fee for submission of proof of debt should apply equally to foreign and local creditors. Under our current proposal, the fee payable by creditors for filing proofs of debts would be reduced from $40 to $35.
The proposal to replace the present mechanism for charging the "realisation fee" (i.e. Item IV(2), Table B, Schedule 3 of Cap 32C) by a fixed fee of $170 on each payment made into the Companies Liquidation Account for a court winding-up case would not have significant impact as the Official Receiver ("OR") now rarely acts as provisional liquidator or liquidator in court winding-up cases.	Our proposal is to replace the present mechanism for charging the "realisation fee" for both court winding-up and bankruptcy cases by a fixed fee of $170 on each payment made into the Companies Liquidation Account and the Bankruptcy Account respectively where OR is the liquidator or trustee respectively. Notwithstanding the introduction of schemes to outsource the administration of insolvency cases, OR still acts as trustee for a large number of bankruptcy cases. Our proposal would benefit the creditors of these bankruptcy cases as the proposal is to reduce the "realisation fee" levied by OR.

Summary of suggestions/comments made by deputation	**FSTB and ORO's responses**
A cap on the "ad valorem fee" (i.e. Item I, Table B, Schedule 3 of Cap 32C) collected by ORO should be imposed since the ad valorem fee of some infrequent large-scale corporate winding-up cases may result in windfall amounts being levied by ORO.	The relevant legislation already provides a mechanism for handling the reduction of fees for winding-up cases. In accordance with paragraph 9 of Cap 32C, 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. When compared with the proposed imposition of a statutory cap, this approach would allow for the flexibility by the Court where appropriate.
According to section 295 of the Companies Ordinance, ORO may invest the money in the Companies Liquidation Account on fixed deposits or deposits at call at the request of the committee of inspection or the liquidator. Out of the interest paid on the investments, 1.5% per annum of the money invested shall be paid to the ORO and the balance shall be paid to the company in liquidation. Under the prevailing low interest rate environment, little or no interest is currently paid to the credit of the general body of creditors. Therefore, HKICPA suggested that in the future this legislative provision may be amended to the effect that a certain fraction of the interest paid on investment would be paid to ORO.	Interest rates on investments are subject to fluctuations and we have seen much higher interest rates in Hong Kong before. We should not change a well-established mechanism just because of the occurrence of a low interest rate environment in a certain period. Besides, the interest paid on investments under section 295 is one of the sources of income which contributes to the overall cost recovery for ORO. The proposed change would result in a reduction of income for ORO and hence would compromise the cost recovery rate of ORO, which is estimated to be just about 100% after the implementation of the statutory fees, charges and deposits proposals under the current legislative exercise.