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Secretary for Financial Services and the Treasury
Financial Services Branch
Financial Services and the Treasury Bureau
18th Floor, Admiralty Centre Tower 1,
18 Harcourt Road,
Hong Kong.

Attn: Mr. Arthur Au

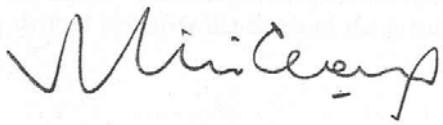
Dear Sir,

Review of the Role of the Official Receiver's Office Consultation Paper

The Hong Kong Society of Accountants welcomes the opportunity to consider the findings of the consultancy study as set out in the "Review of the Role of the Official Receiver's Office Consultation Paper". Our submission aims to respond to, whilst not necessarily being restricted by, the recommendations and issues raised in the Consultation Paper.

We trust that you find our comments to be constructive. If you have any questions in respect of the submission, please contact Peter Tisman, our Deputy Director (Business & Practice) at 2287 7084.

Yours faithfully,



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c.c. Mr. Eamonn O'Connell, Official Receiver's Office

Hong Kong Society of Accountants
Submission on
"Review of the Role of the Official Receiver's Office Consultation Paper"

I. KEY POINTS

The Role and Functions of the Official Receiver's Office

Administration of corporate insolvency and bankruptcy cases

Both corporate compulsory and personal insolvency work should be contracted out to the private sector.

The Society does not see a need for the Official Receiver's Office (ORO) to retain any caseload in-house as a means to maintain a skill base within the ORO.

Licensing

The introduction of a system of licensing of private sector insolvency practitioners (PIPs) is a desirable long-term goal to ensure the maintenance of high standards within the insolvency profession and to encourage the development of a good local base of young skilled practitioners in Hong Kong. However, we acknowledge that there are practical and market-related issues that would first need to be addressed.

In the meanwhile the existing administrative authorisation scheme should continue, although it needs to be improved to ensure that cases are contracted out only to those PIPs that are adequately experienced and resourced for the cases allocated. The Society is willing to work closely with the ORO to help improve the scheme.

"Cab rank" system

The proposals as regards a possible "cab rank" system need to be further clarified, and how such a system would work in Hong Kong would need to be clearly explained e.g. if the proposal involved putting all summary and non-summary cases through the system, we would suggest that there would have to be an objective measure of the suitability of candidates for such a cab rank, as it would include jobs of substantially different sizes. Furthermore, given the lack of remunerative cases in Hong Kong, such a system would only be commercially viable if it were to be properly funded. [This would be particularly important if it were to operate only where the creditors did not express a preference as to the liquidator, as a significant proportion of the more remunerative are currently direct creditor appointments].

Investigation and enforcement

The ORO should focus more of its efforts on investigation and enforcement in relation to possible breaches of insolvency law or misappropriation of assets, working closely with other authorities such as the Commercial Crime Bureau (CCB), Independent

Commission Against Corruption (ICAC), and Department of Justice (DoJ). It needs be adequately resourced for this role.

In order to strengthen the ORO's hand in this respect, and to send a clear message to the business community and the general public, that directors will not with impunity be able to deplete the assets of a company before it is put into liquidation, we are in favour of introducing legislation on insolvent trading (subject to the qualifications regarding the level of staff to which they should apply) in conjunction with the provisions on corporate rescue. We would also support widening the range of offences prosecuted and increasing the severity of the penalties that are imposed on delinquent directors in terms of fines and the length of disqualification orders. We further believe that the penalties for failure to maintain books and records or assist liquidators with their investigations should also be increased.

Oversight of the legal and regulatory framework

The ORO has an important role to play in the oversight, monitoring and review of the legal and regulatory framework for insolvencies in Hong Kong. We consider that this is an area in relation to which more attention should be given.

ORO support on cross-border insolvencies

The Society believes that the ORO, as a government department, should assume a more direct role in supporting duly-appointed private sector insolvency practitioners (PIPs) on cross-border insolvency matters involving the Mainland or other jurisdictions, especially in relation to voluntary liquidation cases.

Funding of the ORO

We believe that the ORO needs to be adequately funded but that the existing means of funding are inappropriate and inequitable, and alternative means should be found to cover the department's costs. However, given that the ORO provides what are largely non-remunerative public service functions (e.g. liquidator of last resort, oversight of the insolvency regime) and that its future role should, in our view, emphasise investigation and enforcement, we also consider that no specific cost-recovery targets should be set.

II. DETAILED COMMENTS ON THE RECOMMENDATIONS IN THE CONSULTATION PAPER

In this section, our comments are outlined below under the respective recommendations in the consultation paper ("the Report") (with the relevant page references indicated).

Liquidation

1. The outsourcing policy under the Panel A and tender schemes should be retained pending the results of a formal consultation exercise to explore the feasibility of a "cab rank" system. (p.11).

   The consultancy study concludes that the use of the Panel A and tender schemes has proved a cost-effective approach to meeting the ORO's obligation to provide a liquidator of last resort (paragraph 2.7). The Society supports the proposed continuation of the outsourcing policy under Panel A and tender schemes pending the results of a formal consultation exercise to explore the feasibility of a "cab rank" system, and pending in the longer term the establishment of a licensing system of PIPs.

2. The ORO should retain (unless a cab rank system were to be introduced) a small number of cases for ORO resolution, rather than outsourcing the entire liquidation caseload (p.11).

   The Society is of the view that the ORO should outsource the entire liquidation caseload.

   The Report suggests that retaining a small number of cases will maintain a core of case-experienced staff in the ORO that can deal with cases should the economics or practicality of outsourcing change in future. However, we do not believe this to be an efficient use of manpower, nor do we think it to be necessary. Alternative approaches should instead be considered, in the unlikely event that case administration skills are considered to be required within the ORO in future, if a decision is taken to outsource the existing caseload.

3. The ORO should review the allocation of staff and resources to address the change in priorities for case administration consequent on outsourcing the majority of cases (p.12).

   We agree that the ORO should review the allocation of staff and resources to address the change in priorities for case administration consequent on outsourcing all or the majority of the cases. We believe that the ORO has an important public service role to play in monitoring and maintaining the adequacy of insolvency infrastructure, ensuring overall that insolvency administration is running efficiently and effectively, and in a way that enhances confidence in the markets, and pursuing fraudulent directors and officers so that they are held accountable for their actions. These functions need to be properly funded and do not generate many obvious streams of income. As such the ORO should not be governed by specific cost-recovery targets although it should endeavour to operate in an efficient, streamlined and cost-effective manner. At the same time, we would suggest that other potential sources of revenue should be explored, one of which would be compiling and making available more insolvency data on a commercial basis (as suggested at paragraphs 3.36 and 6.27 of the Report, see below).

4. <u>The ORO should utilise this public consultation exercise to explore reductions in mandatory casework for summary cases (p.12).</u>

The Society supports the proposal to undertake a thorough review to identify further modifications where existing statutory or procedural requirements are unlikely to be cost-effective in protecting the public interest, or add value to the administration of a case. In particular, we agree that in low- or no-asset cases, it is appropriate to seek a reduction in the mandatory workload, which often provides no benefit to creditors and serves only to deflect the PIP away from areas of activity where his limited time costs may be better invested, such as in the investigation of the insolvent company's operations prior to winding up.

In addition to the areas referred to in paragraph 2.15 of the Report, i.e. s.190 Preparation of a Statement of Affairs, s.191 Report by Official Receiver (OR) or liquidator, s.227F Summary procedure order and s.203 Filing and supervision of accounts, we have identified various other areas where there is scope for simplification or streamlining, as follows:

- revising the s.203 accounts to make them more 'user friendly' from the perspective of the preparer (e.g. requiring PIPs to sign the account once only and submit a duplicate set by way of a photocopy, instead of signing a total of eight times, as under the current format), as well as for the ultimate users (i.e. creditors);

- implementing better guidelines on the standard format of the six monthly report that accompanies the s.203 accounts in summary cases;

- addressing any inconsistencies between the requirements of the Court and the ORO in respect of the format of the final receipts and payments, which may be a cause of delays in closing summary cases;

- eliminating the requirement to contact all banks per the ORO's list (approximately 124 in number) where previous bank accounts operated by the company cannot be confirmed;

- alternatively, entering into an arrangement with the Hong Kong Association of Banks whereby all banks are notified of the appointment of particular liquidators in a much more efficient manner i.e. by e-mail;

- eliminating the current requirement in summary cases to provide a copy of the s.203 accounts to all creditors and contributories. The OR has a discretion to do this under s.203(5) of the Companies Ordinance; and

- issuing of more detailed guidelines by ORO on the minimum level of investigation required in insolvency administrations to ensure there is a more consistent approach amongst all firms.

5. The ORO should utilise this public consultation exercise to explore the feasibility of introducing a "cab rank" system (p.13).

We would like to clarify whether any "cab rank" system that it is envisaged might be introduced would include all compulsory liquidation cases, or whether some cases would be retained for administration by the ORO. It also needs to be clarified whether it would operate only where creditors expressed no preference for a particular liquidator to be appointed, as is the current arrangement for the Panel A cases.

The Society believes that the feasibility of introducing a cab rank system in Hong Kong would need to be considered carefully in light of the relevant factors.

In considering its feasibility, consideration should be given, firstly, to the particular circumstances of Hong Kong. The Report highlights the large proportion of low- or no-asset insolvencies, and also the likelihood that the number of "last resort" cases is likely to increase as Hong Kong shifts to a more service based economy. A cab rank system, in which over 80-90% of the allocated cases were summary cases, would be likely to place a unacceptable burden on PIPs, from a commercial point of view, as they would be required to take on a great number of non-remunerative cases in order to obtain a few reasonably well-remunerated cases. For that commercial burden to be alleviated, fee rates charged by PIPs in remunerative cases would have to increase in order to cover the costs of the increased caseload of non-remunerative work. This would have the effect of depressing potential dividends in asset-rich insolvencies without any obvious benefit accruing to the non-remunerative work.

Without a reasonable additional source of funding, likely knock-on effects of the volume of non-remunerative work would be a decrease in the time and effort PIPs were willing and able to devote to low-asset administrations, and a greater incentive to cut corners in order to minimise the costs of each administration.

In essence, therefore, we do not believe a cab rank system would work unless it was properly funded.

In this connection, a possible additional means of funding windings-up that might merit exploring further would be to increase the petitioner's deposit and make this, in part at least, available to cover the liquidator's fees and costs (but see also our comments on funding of the ORO below).

Leaving aside commercial concerns, in applying a strict cab rank policy, there would be the possibility of PIPs with limited resources being appointed to major insolvencies that they were not equipped to handle. Whilst there are a number of established insolvency practices among the major and second-tier accounting firms in Hong Kong, it is clear that the insolvency market has opened up considerably in the past 10 years, and there is now a wider range of PIPs in the market, some of whom would not be adequately-equipped to handle very large assignments. Without drawing a clear distinction between PIPs of different

capabilities and capacities, as the current two-tier outsourcing system endeavours to do, a cab rank system may not best serve the public interest.

Bankruptcy

6. Legislative changes should be introduced to allow the ORO to outsource the administration of personal bankruptcy cases (p.24).

The Society believes that the extension of outsourcing to bankruptcy would be a logical step, particularly given the volume of cases that the ORO is required to deal with, and the prior experience of outsourcing corporate insolvency cases. We agree that modifications to the existing legislation would be required to fully exploit the potential for outsourcing.

However, given that the majority of bankruptcy cases involve limited assets, it seems unlikely that such cases could be successfully outsourced to PIPs with the appropriate skills and experience, without some form of subsidy and a reduction in the level of case administration work that would be required to be done.

7. A "fast-track" bankruptcy procedure should be created to deal with selected consumer bankruptcy cases (p.25).

We support in principle the proposal to create a "fast-track" bankruptcy procedure to deal with selected individual bankruptcy cases. We believe that extending the summary administration provisions in Hong Kong to allow for a fast-track approach, combining reduced casework with an accelerated discharge period, would help to enable the ORO to focus its resources on cases with material assets, those where a business is involved and cases in which creditors have expressed concern over the bankrupt's behaviour. A conditional discharge after a shorter period than presently applies, on the basis that a full investigation has been completed, would be feasible and reasonable for the "rehabilitation" of individuals, in the absence of any explicit indications of wrongdoing or creditor complaints. This would be in line with the international trend, although care would have to be taken in explaining such a measure to the public given the apparently widely-held impression that the number of personal insolvencies has shot up following, and to a large degree, as result of, the introduction of provisions for automatic discharge in the Bankruptcy (Amendment) Ordinance 1996.

The availability of the fast-track procedure should be based on workable and clearly-defined criteria rather than arbitrary exclusions, although we believe that establishing suitable practicable criteria may not be easy. The exclusions proposed in paragraph 3.26 of the Report, for example, seem to be somewhat arbitrary and inappropriate for enactment in law. For instance, who would conduct the investigation to determine whether a debt "has been recklessly or deliberately incurred"? Given that different individuals have many and varied sources of income at any given time, it seems likely that there can be no simple mechanism to decide that the use of credit card has been "clearly in excess of any ability to repay" – the fact that an individual has been adjudicated bankrupt is, almost by definition, proof that he has a clear inability to repay. In the absence

of clearly-defined criteria, deciding who has and who has not been reckless becomes a matter for subjective judgment on the part of the person doing the investigation and this does not appear to be a sound basis for law.

No argument is made as to why trading bankruptcies should not also have access to fast-track procedures, and we believe that in principle they should not be excluded from any such facility. An "honest" trader may become bankrupt as a result, say, of the collapse of a key customer and should not be treated in law as deserving of more severe punishment than the consumer debtor holding multiple credit cards, who manages to scrape in under whatever arbitrary limits are set. In our view, therefore, reference simply to the nature of the case, e.g. consumer cases, or the face value of the assets in the estate concerned will be inadequate.

8. Consideration should be given to making bankruptcy an extra-judicial process (p.25).

We are not persuaded that the case for an extra-judicial process is adequately made out in the Report. The principal benefits identified in paragraph 3.23 – that it would be cheaper and faster – are the same as those advanced in favour of a fast-track system. Given this, it strikes us that not much is really gained and, in fact, something is lost if the Court's role is to be diminished. The Report seeks to distinguish between fast-track procedures and extra-judicial process whilst, we believe, any perceived benefit would only accrue if fast-track procedures were made extra-judicial.

9. Public and lender access to bankruptcy data should be enhanced (p.26).

To assist decision-making by lenders on the provision of credit (paragraph 3.36), and provide another potential revenue source for the ORO (paragraphs 6.27 and 7.6), the Society expresses support for the proposal to enhance public and lender access to bankruptcy data. We also agree that the data retention period in respect of bankruptcy and individual voluntary arrangement should be reviewed in consultation with the Privacy Commissioner.

Regulation and Supervision

10. The ORO should not be responsible for PIP fee authorisation except where it has a direct and appropriate involvement in the specific case concerned (p.30).

As a matter of principle, creditors of an insolvent entity, who are effectively paying for the service, should primarily be responsible for assessing the reasonableness and appropriateness of insolvency fees.

For some time now, discussions have been underway between the ORO and PIPs, in which the Court has also been involved, to provide a standard format for the presentation of bills for fees and disbursements. There are also other issues to be considered, such as the chargeability/non-chargeability of certain activities (e.g. travelling time). Under the circumstances, therefore, it may not be appropriate for creditors to be solely responsible for reviewing PIPs' fee

claims at this time and we would accept that there should be a residual role for the ORO to play in the authorisation of fees at least until these matters have been satisfactorily clarified and resolved. This is true particularly in respect of small insolvency cases where the majority of creditors/committee of inspection members may be less certain of what to expect from insolvency practitioners.

When there is no committee of inspection, such as in summary cases, more emphasis will be placed on fee authorisation by the Court if the ORO is not responsible for fee authorisation. It is, therefore, important that the problem of significant delays currently experienced by PIPs in obtaining approval of fees from the Court is addressed.

In principle, we do not believe the Court should be responsible for taxation of fees, other than as final arbiter in the event of disputes arising. Many PIPs are currently experiencing significant delays with taxation and this problem may be exacerbated if more onus is placed on the Court to resolve matters.

11. The consultation exercise should be used to assess the degree of support/ desire for a formal licensing system, and whether such a system should involve the ORO (p.31).
If consultation shows strong support for an ORO-administered licensing and supervisory system, a simple system based on authorisation could be used (p.31).

There is currently no formal regulatory structure for PIPs, and the respective roles of the ORO, the Court and the relevant professional bodies, e.g. HKSA and the Law Society of Hong Kong, vis-à-vis the insolvency profession itself seem to be unclear. We believe that, in line with the practice in other advanced jurisdictions, such as Australia and the UK, where stringent experience and qualification requirements apply, ultimately the implementation of a more formal licensing system for PIPs in Hong Kong would be desirable to ensure the maintenance of high standards within the insolvency profession and to encourage the development of a good local base of young skilled practitioners in Hong Kong. Such a system could be jointly administered by the ORO and the relevant professional bodies.

However, given the practical difficulties of implementing in the near future the necessary supervisory and examination and qualification-related infrastructure to support licensing, and given the uncertainty in the longer term about the overall size of the market in terms of potentially remunerative insolvency cases, we see licensing as a longer-term goal. In the meanwhile, we consider that the existing system of authorisations will suffice, but we would suggest that improvements need to be made to it.

At present, only a very limited number of cases are outsourced under the Panel A scheme, where PIPs are currently 'authorised' by the ORO, and under the tender scheme, too much emphasis appears to be placed on the amount of the fee, i.e. the minimum subsidy required, rather than the fulfilment of reasonable experience and qualification requirements.

In addition, with new entrants being allocated a minimal number of cases under Group B of the tender scheme, it may be that the tender system is in practice being as a training ground for PIPs with little or no relevant experience. This appears to be similar to the Panel B arrangements that preceded the tender scheme, in relation to which the OR took the view that such cases could be handled by less experienced practitioners. We would maintain that such a "black and white" distinction is not appropriate, particularly given that the amount of assets held by a company at the time of the winding up order is not always a sound indicator of the potential complexity of the subsequent liquidation. As a result, we are of the view that the current arrangements are potentially storing up problems for the future and that one of the reasons that they have not emerging so far could be due to the fact that the ORO's resources are overstretched and the department has a limited capacity for close monitoring, as well in relation to investigation and enforcement.

We are willing to work closely with the ORO to suggest improvements to the arrangements under the present Panel and tendering systems.

Enquiry and Enforcement

12. The ORO should establish a specialist investigations unit (p.37).

Successful prosecution of company directors is dependent on adequate investigation being undertaken in the first place. The Society agrees that the ORO should establish a specialist investigation unit whereby more resources and effort are dedicated to conducting proper investigations. Such a specialist investigation unit should work closely with other relevant authorities, e.g. the CCB, ICAC and DoJ and vigorously enforce prosecution proceedings against directors who are involved in fraud or who fail to comply with a liquidator's requests for information including an adequate Statement of Affairs and books and records of a company. We understand that the low level of penalties that have been imposed, even where convictions have been obtained, may to some extent act as a discouragement to carrying out the necessary preliminary work leading to a prosecution. This is a matter that also need to be addressed.

Part of this work should be to monitor the conduct of bankrupts prior to their discharge to ensure that they are not in breach of the conditions attaching to their bankruptcy (e.g. continuing to act as a director). In order to do this effectively, more information about existing bankrupts (i.e. in addition to their names and last-known address) may in principle need to be made available to and exchanged with third parties so that bankrupts can be properly identified.

13. The minimum level of enquiry should be increased in summary cases (p.37).

We agree that the minimum level of enquiry or investigation should be increased in summary cases. There are, however, presently no clear guidelines as to the minimum level of investigation required to be carried out in summary cases or any type of insolvency administration. The Society believes that the ORO should issue guidelines specifying clearly the minimum expected level of

investigation but, as we indicate below, we believe that in principle the ORO should assume more responsibility for investigation.

14. The prosecution and disqualification policy should be modified (p.38).

The Report starts from the premise that a credit-based economy inevitably has to deal efficiently with insolvency to maintain credibility (paragraph 1.1). Whilst this is true, an efficient insolvency regime is arguably also has an important part to play in promoting good corporate governance. As noted in the Report, too many directors simply allow the assets of their companies to be dissipated before a winding up can be initiated by one or more aggrieved creditors. Earlier intervention on the part of directors would narrow the gap between the liabilities and the assets available to pay creditors. As an important side effect, this should also result in more windings-up being conducted as voluntary liquidations (by PIPs) rather than compulsory liquidations, which would lessen the workload of the ORO at the same time as ensuring a steady supply of remunerative liquidation work for PIPs.

The Society believes that the role the insolvency regime should play in the education of directors lies on the enforcement side – making it clear what directors can expect if they fail to recognise impending insolvency or do nothing about it when they do recognise it. At present, as the Report indicates, the insolvency regime is lacking in terms of insolvency offences and prosecutions that do result in convictions often attract only token fines. These inadequacies have been adversely affecting the level of recoveries achieved in insolvency administrations as directors are not sufficiently motivated under the current system to act appropriately in the face of impending insolvency, and to cooperate with the liquidators by delivering up the books and records or complying with requests for information. It is necessary to address this problem by strengthening the present prosecution and disqualification regime.

The Society is in favour of introducing legislation on insolvent trading in conjunction with the long-proposed provisions on corporate rescue (subject to the qualifications that we have expressed regarding the extension of liability for insolvent trading to staff below director level), widening the range of offences prosecuted, and seeing an increase in the severity of the penalties that are imposed on delinquent directors in terms of fines and the length of disqualification orders, in order to send a clear message to the business community and the general public. We also believe that the penalties for any failure to maintain books and records or assist liquidators with their investigations should also be increased.

The Society believes that the ORO is best placed to carry out the investigation/prosecution role, and that the balance of its non-regulatory work should tip in favour of this role, as opposed to direct involvement in case management. The prosecution of delinquent company officers is in the public interest and should therefore be undertaken at the expense of the public purse, except where an insolvent trading action brought by a liquidator results in an Order from the Court that the delinquent company officer should compensate the

insolvent estate, in which case the costs of that action should be borne by the insolvent estate.

15. The ORO should improve communication with the public on enforcement matters (p.39).

The Society believes that, in addition to strengthening the prosecution and disqualification policy, company directors should be reminded by way of continuous professional programmes of, e.g. their duties to creditors and shareholders, and the consequences of, and penalties for, misconduct and contraventions. Enhanced communication with the general public may take the form of, e.g. informative public reports or education programmes highlighting selected prosecution and disqualification cases, with a view to educating the public on what constitutes insolvency offences, thereby enhancing public awareness of such matters and encouraging reporting of such offences. Such exercises should involve active participation from the ORO and other relevant public bodies.

16. Other important functions of the ORO

In addition to the roles outlined above, we would suggest that the ORO has a vitally important role to play in relation to the oversight, monitoring and review of the legal and regulatory framework for insolvency in Hong Kong. This is an area that merits more resources and attention being devoted to it. Although significant changes have been made to some of the principal insolvency legislation in recent years, in particular to the Bankruptcy Ordinance, following the review of the regime by the Law Reform Commission, Hong Kong still for example lacks a viable corporate rescue procedure, and developments in the field taking place internationally should be closely observed as they are likely become more relevant with increasing globalisation.

There are already a number of technical and procedural issues, both legislative and regulatory, that need to be addressed or that require further consideration. In passing, we mention some of these below.

Unfair preferences

When the current provisions regarding unfair preferences were created as a result of the implementation of the Bankruptcy (Amendment) Ordinance in 1998, a loophole remained the effect of which is that a holding company is not deemed to be a connected or associated person when considered in the light of one of its subsidiaries. Therefore a parent company could, without redress, remove millions of dollars of assets from its subsidiary within a relatively short period before the commencement of the winding-up of the subsidiary, because although the holding company may control the subsidiary, and although the directors of the holding company may be substantially the same as the subsidiary, it is not considered to be an associate of the subsidiary. As a consequence, the unfair preferences provisions do not apply. This needs to be rectified as a matter of urgency.

Monetary limits

Various monetary limits in the Companies and the Bankruptcy Ordinances, as well as in the corresponding Rules, or set by the ORO, are now out-of date and unrealistic and should therefore be revised, for example:

- Currently the maximum amount allowed to be kept in the bank accounts for individual cases is only HK$10,000 thus necessitating frequent remittances of funds between the ORO and PIPs to be made. The ceiling of $10,000 should be raised to a more reasonable level; and

- Currently costs and charges exceeding HK$3,000 cannot be allowed and paid to the liquidator without taxation. The HK$3,000 limit should be increased to a reasonable level or the requirement for taxation of expenses for bills should be dispensed with altogether.

Order of priority of payment under r.179, Companies (Winding-up) Rules

Under r.179 of the Companies (Winding-up) Rules, the fees and charges payable to, or costs, charges and expenses incurred by and authorised by OR are paid out of the remaining assets of a company in a court winding-up in priority to, e.g. the taxed costs of the petition. However, after the amendment of s.194 of the Companies Ordinance in 2000 with respect to the appointment of a liquidator other than the OR, no adjustment was made to the order of priority of payment under r.179. Under r.179, the disbursements of liquidator (other than the OR) and of any person properly employed by the liquidator, and the remuneration of any liquidator and provisional liquidator (other than the OR), etc. are paid after, e.g. the fees and charges payable to, or costs, charges and expenses incurred by and authorised by OR, the taxed costs of the petition, the costs and expenses of any person who makes or concurs in making the company's statement of affairs and the taxed charges of any shorthand writer appointed to take an examination.

Currently, after the petitioner's taxed costs are paid, the liquidator would often need to draw on the subsidy to recover his fees and costs. We would suggest that the order of priority of payment under r.179 should be modified, in light of the amendment to s.194, to give priority to the disbursements of the liquidator and of any person properly employed by the liquidator, and the fees of any liquidator and provisional liquidator (other than the OR), over all other items referred to in r.179, other than the fees and charges payable to, or costs, charges and expenses incurred by the OR.

Practice/guidance notes on procedural and case management issues

On the regulatory front, the ORO should become more involved in issuing practice or guidance notes on procedural and case management issues, e.g. the format and presentation of accounts and reports required to be filed with the ORO, for circulation to PIPs. Such practice or guidance notes should be

reviewed and updated on a regular basis to take into account changes in the legislation and/or the ORO's guidelines.

Security bonds

There has been a long-standing question mark over the need for PIPs to take out security bonds in the context of cases undertaken under the arrangements for administrative authorisation. We believe that for firms and PIPs registered under the Panel A scheme, the requirement for individual security bonds for separate cases should be abolished, and a firm's professional indemnity insurance policy should be accepted as sufficient security. Alternatively, the cost of the bond should be allowed as an expense of the winding-up, and rather than being borne by PIPs.

Support in the administration of cross-border insolvencies

The Society believes that the ORO, as a government department, should also consider developing a more direct role in facilitating cross-border insolvency work by liaising with overseas regulatory and judicial authorities, particularly on the Mainland, given the increasing incidence of cases involving assets and persons in Hong Kong and elsewhere. In relation voluntary liquidations, for example, where no court order can be produced, the ORO could consider providing a letter confirming that a particular PIP is the duly-appointed liquidator of certain company undergoing a winding-up. This could be of assistance in helping to reduce the unnecessary delays and effort required for PIPs to obtain co-operation from the relevant overseas authorities.

Finance

17. The ORO's fees should be reviewed and revised as appropriate (p.46).

In view of the vital role of the ORO in the administration of insolvency legislation, the ORO must be adequately funded. Having said this, we also agree with the proposal in the Report that the ORO fees should be reviewed and revised as appropriate.

18. The consultation exercise should be used to explore interested parties reactions to financing alternatives (p.46).

Financing alternatives should be considered in view of the situation under the current system as described below.

Under the current system, the amount of fees does not necessarily bear any relationship to the work actually undertaken by the ORO on the particular administration from which the fees are taken. For example, the ORO currently raises a substantial amount of revenue through ad valorem fees and by taking the first 1.5% of the interest accruing on funds held in the Companies Liquidation Account. Consequently, creditors of insolvencies with large realisations often end up in effect funding the administration of unrelated

insolvency cases with fewer assets. In addition, the various fees and charges levied by the OR (including those discussed below), as well as the Companies Liquidation Account, are expensive to monitor and administer.

The Society's views on financing issues are as set out below.

- For both liquidation and bankruptcy cases, the ORO's costs should be met from the petitioner's deposit and government funding, rather than from the assets of the company/bankrupt.

- We appreciate that it is difficult to arrive at a universally acceptable solution as to the funding of the ORO and of the liquidation of companies with few or no assets. Amongst the section 194(1A) cases this year, the majority of winding-up petitions were presented by employees (to trigger payments from the Protection of Wages on Insolvency Fund (PWIF), and banks (most of which are secured creditors who merely want to close their files).

  We would suggest, therefore, that the Protection of Wages on Insolvency Ordinance should be amended, so as to remove the requirement for a winding-up petition to be presented before claims can be made for payments from the PWIF. This should reduce the number of compulsory winding-up cases involving few or no assets. As regards winding-up petitions presented by other creditors, e.g. banks or the Inland Revenue Department, consideration could be given, for example, to following the practice in Australia, where a capped indemnity is provided by the petitioner for a PIP to take up the case.

- Generally, the operation of the Companies Liquidation Account (CLA) is cumbersome and unnecessary for non-summary cases and it should be reviewed.

- In relation to voluntary liquidations, in addition to the ORO taking the first 1.5% of the interest accruing on the CLA once funds are paid into it by private liquidators, any withdrawal will incur a charge of HK$50 for every HK$1,000 withdrawn (up to a limit of HK$45,000). We would suggest that the excess funds in voluntary liquidations should not have to be paid into the CLA, as is currently required under section 285 of the Companies Ordinance.

- The ORO should cease to charge ad valorem charges.

- The requirement to pay HK$40 filing fee for proofs of debt should be abolished. Where the liquidator is a PIP and the OR is not involved in the case, creditors often dispute the necessity for paying the fee. For overseas creditors, a bank charge exceeding $40 to issue Payment for the fee would often apply.

19. The current basis of financial performance evaluation (60% recovery) should be changed (p.47).

The current basis of financial performance evaluation (60%) should be reviewed, taking into account that the objective of the ORO, by nature a cost and not a revenue centre, is to provide a service to the Hong Kong economy as a whole, rather than generating income against any pre-set financial performance target.

20. The ORO should explore the possibility of raising additional revenue (p.47).

An improvement in the ORO management information system, as discussed below, and in its public search database, may provide an additional income stream for the ORO. As we indicate above, we believe that more insolvency-related data could and should be made available to the public. This could be done on a commercial basis.

Administration

21. The planned investment in the ORO management information system (MIS) should be treated as a priority (p.48).

The Society agrees that the ORO should proceed with its proposed plan for an updated management information system (MIS) as a matter of priority.

Currently, for example, for the fee charged for liquidation and bankruptcy searches, the information produced is rather limited and does not indicate, e.g. who is the trustee in bankruptcy.

To ensure that PIPs can link into the revised MIS, with a view to streamlining various aspects of case management and accessing relevant data, any review of the MIS would benefit from more extensive consultation with PIPs.

21 October 2002