# BALANCING COMPETING INTERESTS IN BANKRUPTCY: DISCHARGE BY CERTIFICATE OF THE OFFICIAL ASSIGNEE IN SINGAPORE

After more than a hundred years, Singapore made major reforms to its bankruptcy laws in 1995. These changes attracted considerable public interest, with the Government taking pains to emphasise that the new law was designed to "strike a balance between the interest of the debtor, the creditor and society". The greatest scrutiny of the provisions, to determine whether in law and in practice the competing interests of debtors and creditors could effectively be balanced, was in respect of the discharge provisions. In this article, the writer, who was then the Official Assignee, discusses how the novel remedy of discharge by certificate of the Official Assignee was conceived, drafted and successfully implemented.

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## I. Introduction

1 Bankruptcy or personal insolvency results from a debtor's inability or refusal to settle his debts. It is, therefore, nothing more than a private dispute between a debtor and his creditors. Yet, it has never been treated in Singapore, as in England, "as an exclusively private matter".[1] It is surprising, for instance, that there has been no objection to the need for special bankruptcy rules and regulations beyond existing laws and procedures governing civil disputes. Nor have serious questions been raised on the propriety of state intervention, at public expense, in such private disputes which involve possible conflicts of interest between debtors, creditors and the public.

2 In recent years, the most important insolvency issue that has engaged public attention is the manner in which bankrupts are discharged from bankruptcy.[2] There are various reasons for this. The

1 Insolvency Law Review Committee (UK) ("The Cork Committee"), *Insolvency Law and Practice (1982)* (Cmnd 8558) at para 390.

2 Bankruptcy has been the subject of many media reports, letters to the press and parliamentary questions. The Select Committee inquiring into the Bankruptcy Bill (*cont'd on the next page*)

growing population of undischarged bankrupts has raised concerns in a country which uses public funds for bankruptcy administration. The provision of an orderly process for dealing with the financial affairs of insolvent persons is important for Singapore, an international financial centre and trading hub, which encourages investors and entrepreneurs. Unlike corporations under liquidation which can finally be put to rest, bankruptcies involve people who need a fresh start in life. This is especially so if their insolvency is the result of misfortune rather than malpractice. Finally, there is the realisation in all quarters that proceedings in bankruptcy cannot always be terminated solely by the private efforts of combatants with conflicting interests.

## II. The move towards bankruptcy reforms

### *A. The archaic Bankruptcy Act*

3 Until 1995, Singapore's bankruptcy laws were based on the archaic, excessively pro-creditor, Bankruptcy Ordinance of 1888.[3] This was modelled by the British colonial government on the English Bankruptcy Act of 1883, "developed during the period of the Industrial Revolution against a backdrop of Victorian values".[4] Other than for minor amendments, the 1883 Ordinance remained unchanged for more than a hundred years. It is indeed astonishing that Singapore, a developing country and reputable financial centre, was functioning with archaic bankruptcy laws for more than a hundred years.

4 Since 1987 there were renewed calls in Parliament to the Minister of Law for the review of the bankruptcy laws. These came more frequently after the enactment of the UK Insolvency Act of 1986[5] which had made substantial amendments to the insolvency laws in the UK.

5 The quick fix that was first proposed in 1990 was to import into Singapore the whole of the UK Insolvency Act of 1986 "lock, stock and barrel" and the massive 600-odd subsidiary rules needed to support the UK Act.[6] Fortunately, the introduction of this massive Bill was delayed because of disagreements over the qualifying period for the proposed automatic discharges when the Bill was circulated amongst various

in 1994 received 35 representations on this subject. See the *Report of the Select Committee on the Bankruptcy Bill (Bill No 16/94)*, Eighth Parliament of Singapore.

3 Cap 20, 1985 Rev Ed.

4 Roslinda Baba, "Bankruptcy Act 1995: Protecting Creditors Without Stifling Entrepreneurship" (1995) 9 Asia Business Law Review 63.

5 See *infra* n 33.

6 See Anna Teo, "Singapore revives plan to change law on discharge of bankrupts" *Business Times* (1 March 1993).

professional bodies. It was subsequently abandoned on the advice of new office-holders in the offices of the Attorney-General[7] and the Official Assignee in 1991. With that began the daunting task of drafting a new Bankruptcy law.

### *B. Problems under the old legislation*

#### *(1) Cumbersome procedures*

6 It had been apparent for sometime that the existing Bankruptcy Act had a number of weaknesses[8] which contributed to costs and substantial delays in bankruptcy administration. The law facilitated bankruptcies as the minimum debt level for a bankruptcy petition was a paltry $500 that had been set in 1955. It contained cumbersome and archaic procedures long abandoned in many Commonwealth countries. To begin with, petitioning creditors had to establish one of ten acts of bankruptcy and issue a bankruptcy notice, before filing a bankruptcy petition. Non-compliance with rules of procedure was a serious breach resulting often in the dismissal of the petition.[9] If successful, the petitioning creditor would obtain two orders of court – a receiving order and an adjudicating order. The limited powers of the Official Assignee caused difficulties in his adequately supervising the affairs of a bankrupt.

#### *(2) Weaknesses in the discharge mechanisms*

7 The most significant problem, however, was the one most relevant to this discussion. Due to weaknesses in the discharge mechanisms, undischarged bankrupts remained within the bankruptcy regime almost indefinitely.

8 It was not possible for a bankrupt to be discharged without a court order. Such an order could only be obtained if a bankrupt had

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7 Then Attorney-General Chan Sek Keong took a personal interest in the new Bill and met officers of the Official Assignee's office at a number of meetings to discuss the provisions of the existing Bankruptcy Act and to discuss how these could be improved in a new Bill.

8 These are well documented in the Official Assignee's *Guide to the Bankruptcy Act* (Insolvency and Public Trustee's Office, 2nd Ed, 1999) at [4]. See also the Minister's speech at the second reading of the 1994 Bankruptcy Bill: *Singapore Parliamentary Debates* (1994) vol 63 at cols 400–401; Kala Anandarajah, *et al*, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999) ch 1.

9 For a fuller discussion, see Kala Anandarajah, *id*, at [68–71]. In a decision after the 1995 Act in *The Straits Times Press (1975) Ltd v Wong Chee Kok* [1998] SGHC 77, Chan Seng Onn JC held that "mere technicalities which existed previously for setting aside a bankruptcy notice should not be imputed into the new bankruptcy regime … Due regard must be had to the objects of the new Bankruptcy Act".

paid his debts in full or had proposed a scheme of arrangement or composition which was acceptable to his creditors. For "special reasons" and usually where at least 50%[10] of the debts had been paid, a bankrupt could obtain a court order for a discharge. Court applications for a discharge, therefore, were hardly made especially as the application had to be made by the bankrupt himself.

9 With poor prospects of securing a discharge from bankruptcy, there was very little incentive for a bankrupt to seek a discharge by contributing to his bankruptcy estate for the benefit of his creditors or to obtain the help of his friends and relatives to do so. Consequently, the number of undischarged bankrupts grew exponentially over the years.[11]

10 From 1984 to 1994, when new legislation was proposed, their numbers increased from 4,297 to 14,495, a phenomenal 337% increase.[12] In view of the high volume of undischarged bankrupts, the bankruptcy clearance rate, or the number of cases discharged compared to the number of new cases, was well below 40% until 1994.[13] Consequently, staff morale remained low due to high volume of work. There was also a substantial increase in the costs of bankruptcy administration over the years.

11 The constant growth in the already large number of bankrupts caused considerable difficulties to the Official Assignee in investigating into and realising the assets of bankrupts and in generally administering the affairs of the bankrupts. As a result, the vast majority of creditors received little or no dividend payments for years and were disillusioned with the insolvency administration in the country. In view of the poor conduct of bankrupts in regularly contributing to their bankruptcy estate, creditors were largely unwilling to even consider realistic proposals for settlement of debts.

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10 This was reduced to 20% under s 124 (j) of the 1995 Bankruptcy Act (Cap 20, 2000 Rev Ed).

11 See the *Official Assignee & Public Trustee's Report 1993*, at [41], Fig. BK-2; Insolvency and Public Trustee's Office, *The Millennium Report 2000*, at [22]. I am grateful to Official Assignee See Kee Oon and to Kala Rengasamy, Manager, Individual Insolvency Division ("IPTO") for their assistance in providing statistics that are used in this article.

12 See *infra* n 13.

13 According to official statistics maintained by the Insolvency and Public Trustee's Office, the bankruptcy clearance rate in 1994 was only 38.6%. It rose to 151% in 1995 (when the new Act came into force), to 121% in 1996 and to a record 162% in 1997.

## III. Drafting new bankruptcy legislation

### *A. The challenge to the Official Assignee*

12 The Official Assignee's task was then to put together a new Bankruptcy Act that would draw from the best of the existing legislation[14] and from the insolvency provisions in other jurisdictions[15] and yet address the current problems. As Singapore is an international financial centre and a trading hub which encourages both investments and entrepreneurship, the need to have a bankruptcy regime which balanced both the interests of creditors and debtors was considered critical.

13 In proposing new bankruptcy provisions we had the benefit of examining two law commission reports on insolvency reform which have been described as representing "the freshest and most inclusive approach to insolvency".[16] These were the 1982 report of the UK Insolvency Law Review Committee under Sir Robert Cork (commonly referred to as the "Cork Report")[17] and the 1988 report of the Australian Law Reform Commission under Ron Harmer (the "Harmer Report").[18] There were consultations with international insolvency administrators and visits to the UK, Australia and Germany. It was thought that an examination of the insolvency regime of a non-commonwealth country like Germany, with its stringent approach towards consumer bankruptcies, might prove useful, especially with the recent unification of East and West Germany.

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14 Bankruptcy Act (Cap 20, 1985 Rev Ed): *eg*, s 38 (disabilities of a bankrupt), s 40 (debts provable), s 62 (powers of the Official Assignee), ss 88–92 (jurisdiction of the High Court, powers of the bankruptcy court, appeals in bankruptcy) were retained in the new Act.

15 For example, some of the provisions adopted from the UK Insolvency Act 1986 were s 48(1) (conditions for making an interim order), s 49(1) (nominee's report on debt proposal), s 59 (bankruptcy order), s 62 (presumption of inability to pay debts), s 127 (effect of discharge), s 133 (defence of innocent intention). Sections 57 and 58 (persons who may present creditor's and debtor's petition), s 90 (priority of debts), s 91 (payment of partnership debts) and s 129 (duties of a bankrupt) were modelled on similar provisions in the Canadian Bankruptcy and Insolvency Act 1993 and s 116(1)–(2) (power to impound passport, etc of bankrupt) were taken from the Malaysian Bankruptcy Act (A360).

16 Jukka Kilpi, *The Ethics of Bankruptcy* (Routledge, London, 1998) at para 129.

17 Cmnd 8558.

18 The Law Reform Commission Report No 45, *General Insolvency Inquiry* (Australian Government Publishing Service, Canberra, 1988).

### *B. Key reforms under the new 1995 Bankruptcy Act*[19]

14 It was finally decided that the main aims of the new Bankruptcy Act (the "Act") ought to be to:

(a) Reduce instances where parties resort to bankruptcy proceedings and to encourage the settlement of debts. The minimum debt for petitioning for bankruptcy was raised from $500 to $2,000[20] and a voluntary arrangement system prior to bankruptcy was introduced.[21]

(b) Simplify cumbersome and archaic bankruptcy procedures. Outdated acts of bankruptcy and bankruptcy notices were replaced by a statutory demand and the ground of the inability to pay debts as the basis for commencing bankruptcy proceedings.[22] There was to be a single bankruptcy order to replace the adjudication and receiving orders.[23]

(c) Enhance the Official Assignee's powers to enforce the bankrupt's legal obligations. The Official Assignee was empowered to detain travel documents, to enter premises and take inventory and seize assets.[24] More importantly, bankrupts could be prosecuted for breaches of their legal obligations instead of being hauled into court for contempt of court which previously proved costly and rather circuitous.[25]

(d) Encourage unsecured creditors to assume a more active role in bankruptcy proceedings by appointing private trustees and a creditors' committee to advise on the administration of the bankruptcy estate.[26] An Insolvency Assistance Fund was created from unclaimed monies to finance proceedings to recover assets on behalf of the bankruptcy estate.[27]

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19 Cap 20, 2000 Rev Ed. For a Ministerial statement of the key reforms of the Act, see Singapore Parliamentary Debates (1994) vol 63 at cols 399–405.

20 See s 61(1)(a) of the 1995 Bankruptcy Act Cap 20, 2000 Rev Ed. This amount was further raised to $10,000 on 3 July 1999 by the Bankruptcy (Variation of Minimum Amount of Debt for Petition for Bankruptcy Order 1999 (GN No S 301/1999).

21 Bankruptcy Act (Cap 20, 2000 Rev Ed) Pt V.

22 Section 61(c) read with s 62.

23 Section 59.

24 Sections 116, 108.

25 For the newly created bankruptcy offences, see Pt X (Bankruptcy Offences) of the Bankruptcy Act.

26 Under Pt IV and s 80 of the Act

27 Section 165 of the Act. The fund may be applied, for example, for the remuneration of special managers, payment of all costs and fees to solicitors appointed to commence proceedings to recover assets of the bankrupt's estate. For further details, see the Official Assignee's *Guide to the Bankruptcy Act* (Insolvency and Public Trustee's Office, 2nd Ed, 1999) at para 4.

> (e) Introduce a regime for easier discharges of bankruptcy. Described by the Minister of law in Parliament as a "major innovation", its objective was stated as "to encourage entrepreneurship where bankrupts who have become so through misfortune rather than malpractice will be subjected to a more practical and pragmatic regime of bankruptcy".[28]

15 When the Bill was read a third time in Parliament and passed, it was described as a "major step in the process of updating and reforming our laws".[29] As the authors of one of the leading local texts on bankruptcy observe:[30]

> The focus of the Bankruptcy Bill was to find a happy balance between the interest of creditors, who wanted to be paid, and the interest of bankrupts, who wanted to be able to start afresh. It was essentially a tussle between maintaining commercial morality and confidence on the one hand and encouraging financial rehabilitation and entrepreneurship on the other.

16 That the new Act and the discharge provisions, in particular, seek to balance the interests of both creditors and bankrupts have been repeatedly emphasised in Parliament by the Minister for Law.[31]

## IV. A regime for easier discharges from bankruptcy

17 One of the key reforms proved the most difficult to conceptualise: discharge from bankruptcy. For the reasons indicated earlier in this paper, there was an obvious need for a major change in our discharge provisions if any real reform was to take effect. It had to somehow cater for two disgruntled groups whose interests were inherently incompatible: debtors and creditors. As Jukka Kilpi observes, in his fascinating account of "*The Ethics of Bankruptcy*", bankruptcy discharge "poses the biggest ethical challenge and has caused the most controversies in public debate over bankruptcy legislation".[32]

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28 *Singapore Parliamentary Debates* (1994) vol 63 at col 401.

29 *Singapore Parliamentary Debates* (1995) vol 64 at col 1084. The Bankruptcy Bill was introduced in Parliament on 25 July 1994 and read for the second time on 25 August 1994. It was then referred to a Select Committee which presented its report to Parliament on 7 March 1995. The Bill was passed on 23 March 1995 and was brought into force on 15 July 1995.

30 Kala Anandarajah, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999) at [409].

31 See, *eg*, the *Singapore Parliamentary Debates* (1994) vol 63 at col 399; (1995) vol 64 at col 399; (1998) vol 67 at col 1521; (1998) vol 68 at cols 946–947; (1999) vol 70 at col 2187.

32 Jukka Kilpi, *The Ethics of Bankruptcy* (Routledge, London, 1998) at para 12. Kilpi explores ethical concerns raised by duty-based principles and other ethical theories as well as the moral aspects of a bankrupt's contractual and fiduciary duties.

### *A. The rejection of automatic discharges*

18 The obvious and the easiest choice for bankruptcy discharges in the circumstances prevailing in 1994 was automatic discharges. There were advantages in such a remedy which is used in a number of countries including the UK, Ireland, Australia and New Zealand. It would help to periodically clear a large number of bankrupts from the system and, hence, help contain costs of bankruptcy administration. However, the rather tempting remedy for bankruptcy administrators raised some difficult questions. Would automatic discharges satisfy the public interest? And would this balance the interests of both bankrupts and creditors, a desired objective of our bankruptcy regime? When the Bill was tabled in Parliament in 1994, only one of the three Members of Parliament who spoke on the Bill was in favour of introducing automatic discharges.[33]

#### *(1) Disadvantages of automatic discharges*

19 The principal aim of automatic discharges is the termination of bankruptcy administration, not its satisfactory completion. And once begun, there is likely to be constant pressure to reduce the period of bankruptcy for such discharges. For example, the UK 1976 Insolvency Act introduced automatic discharges after a period of five years. This was reduced to three years in 1986. Similarly, in Australia, the three-year period of automatic discharges was reduced to six months under the 1966 Bankruptcy Act. In both jurisdictions, consumer bankruptcies have soared [34] as a result, for the system plainly encourages bankruptcy filings to obtain a quick discharge of debts with little or no payment at all. Liberal discharge provisions in the US responsible for a bankruptcy crisis of epidemic proportions have finally resulted in the enactment in 2005 of legislation appropriately entitled "The Bankruptcy Abuse Prevention and Consumer Protection Act".[35]

20 If, as the Cork Committee noted, the basic principle that should guide the development of a modern insolvency law is the provision of a "fair and orderly process for dealing with the financial affairs of

33 Lawyer and MP Davinder Singh. Addressing Parliament during the Second Reading of the Bill on 25 August 1994, he expressed the view that, as in England, "there ought to be a simpler procedure where everyone is discharged after a fixed number of years". See *Singapore Parliamentary Debates* (1994) vol 63 at col 408.

34 See Jacob S Ziegel, *Comparative Consumer Insolvency regimes – A Canadian Perspective* (Hart Publishing, 2003).

35 Susan Jensen, "A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (2005) The American Bankruptcy Law Journal, vol 79 [485].

insolvent individuals",[36] then the extent to which the law effectively regulates the competing interests of creditors and debtors must be considered. Creditors' interests would not be sufficiently protected under an automatic discharge regime. Consequently, this would affect the cost of credit. The more readily available the benefit of discharge, the higher the cost of credit.[37]

*(2) The views of the Select Committee*

21 The Select Committee on the Bankruptcy Bill (1994)[38] rejected proposals for automatic discharges although one of its members was a firm supporter of such discharges.[39] The Committee felt that "it would not be appropriate to introduce the concept of automatic discharges"[40] and gave the following reasons for their decision:

> Firstly, the Committee felt that it is difficult to arrive at a set of criteria that satisfies all parties (as demonstrated by the varied suggestions from the representors).
>
> Secondly, the Committee felt that automatic discharge would provide no incentive for bankrupts to co-operate with the Official Assignee in the administration of their estates and the discharge of their debts.
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> Thirdly, the Committee felt that it is likely that the knowledge that discharge from bankruptcy would be automatic after a period of time could have the effect of encouraging debtors not to take their financial obligations seriously.

(a) Difficulty in determining discharge criteria

22 The Select Committee had received a number of representations on automatic discharges, mostly from undischarged bankrupts, but remained unconvinced. The representors suggested that automatic discharges be granted on the basis of various criteria. These included the cause of bankruptcy, the amount and nature of bankruptcy debts, the conduct of the bankrupt before and after his bankruptcy, the duration of the bankruptcy and other mitigating factors.

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36 Insolvency Law Review Committee (UK), *Insolvency Law and Practice (1982)* (Cmnd 8558) at [15] para 33.

37 Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986) ch 10.

38 Eighth Parliament of Singapore, *Report of the Select Committee on the Bankruptcy Bill (Bill No 16/94)* which was presented to Parliament on 7 March 1995.

39 See *supra* n 33.

40 Eighth Parliament of Singapore, *Report of the Select Committee on the Bankruptcy Bill (Bill No 16/94)* at p vi. For a ministerial statement in Parliament on the Select Committee's conclusions, see *Singapore Parliamentary Debates* (1995) vol 64 at col 1082–1083.

(b) Lack of incentives to co-operate with the Official Assignee

23 The Select Committee echoed the fears of bankruptcy officers involved in the administration of bankruptcy estates in this regard. These officers believed that automatic discharges would provide insufficient incentives for a bankrupt to repay his debts or to co-operate with the Official Assignee in recovering assets and in the administration of his affairs. Logically, if debtors could wipe out their debts by a mere passage of time, without being required to make payments or surrender their assets or without suffering any consequences of their bankruptcy, there would be no need for any co-operation with the trustee. Noting that the UK law does not consider the prior conduct of the bankrupt which resulted in his bankruptcy before his automatic discharge, Ian Fletcher rightly points out that "there is a danger of progressive erosion of the standards of commercial morality, to the extent that bankruptcy could in time be viewed as a mere rite of passage, or formative experience, carrying little or no connotation of moral opprobrium".[41]

24 As the onus would be on the Official Assignee to continuously monitor a bankrupt's affairs and object to a bankrupt's automatic discharge, it would increase the burden and costs of administration. Speaking in Parliament at the Second Reading of the Bankruptcy Bill in 1994, the Minister of Law asked rhetorically:[42]

> Should the onus be on the individual who has become indebted to demonstrate that he has taken sufficient steps to arrange his financial affairs in such a way that will enable him to discharge his debts? Or should the burden be, as it appears in the United Kingdom, on the Official Assignee who has to make an appearance in court or object to a discharge?

25 In yearly discussions amongst insolvency regulators in countries belonging to the International Association of Insolvency Regulators,[43] this was disclosed as one of the serious disadvantages of automatic discharges in both the UK and Australia. The required vigilance of this nature on the part of the part of the regulator or trustee to object requires considerable resources of its own. It is not surprising that for the year 2001 there were only 24 objections by trustees to automatic discharges in Australia.[44]

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41 Ian F Fletcher, *The Law of Insolvency* (3rd Ed, London, 2002) at [323].

42 *Singapore Parliamentary Debates* (1994) vol 63 at col 412.

43 Formed in 1993, this association of government regulators from 32 countries regularly meet to exchange information, report on recent developments in their region, discuss current thinking on insolvency policy and legislation and share experiences on administration and practice. For further details visit www.insolvencyreg.org.

44 According to the *Insolvency and Trustee Service Australia Annual Report for 2001–2002*, table 22. The number of actual automatic discharges was not reported.

(c) Forsaking financial obligations

26 There is sufficient evidence to support the Select Committee's view that debtors may be encouraged to refuse to pay their debts under a regime of automatic discharges from bankruptcy. As the Hong Kong Law Reform Commission, which recommended such a remedy in 1995 appeared to recognise, the introduction of automatic discharges would "shift the emphasis from discharge being a privilege to its being a right".[45] The Commission's belief, however, that a procedure to allow the trustee or creditor to object to an automatic discharge would provide a safeguard against abuse or misconduct by the bankrupt, proved wrong. Following the introduction of automatic discharges from bankruptcy in 1996, Hong Kong witnessed a phenomenal increase in bankruptcy in the next few years. Between 1996 and 2004, self-petitions for bankruptcy rose from 0.7% in 1994 to 86% by 2004,[46] despite a deep-rooted cultural stigma of bankruptcy.

27 It was a similar story in Australia when the period of automatic discharge was reduced from three years to six months in 1996. As a result, debtors were rushed to file bankruptcy petitions thus prompting the Government to pass new legislation in 2003 to restore the three-year period.[47] In the UK, the reduction of the period of bankruptcy for purposes of an automatic discharge, from three years to 12 months, by the Enterprise Act 2002, is believed to have caused a substantial increase in bankruptcies almost immediately. In the nine months following the coming into force of the Enterprise Act on 1 April 2004, bankruptcies rose by 29.6% from 21,109 to 27,374. According to Steven Frieze, this was the result of bankruptcy now being considered a "soft option".[48]

28 It was therefore concluded that automatic discharges were unacceptable in our system of bankruptcy administration and would not meet the interests of both creditors and the public. After the Bill was brought into force, there were no calls from the public or the legal community for the introduction of automatic discharges. In 1999, when

45 Law Reform Commission of Hong Kong, *Report on Bankruptcy (1995)* paras 17.24, 17.26.

46 Official Receiver's Office (Hong Kong), *Statistics on Compulsory Winding up and Bankruptcy*, http://www.info.gov.hk/oro/ststistics/statistics.htm. See also Daniel Buenas, "Self-declared bankrupts swell with relaxed rules" *Business Times* (Singapore) (4 October 2003).

47 Stephen Davies, *Insolvency and the Enterprise Act 2002* (Jordon Publishing, London, 2003).

48 Steven A Frieze, "Personal Insolvency – One Year After the Enterprise Act came into Force" (2005) Insolvency Intelligence vol 18, no 4 at 57 and 58. According to statistics released in the House of Commons, bankruptcy orders made in 2004–2005 totalled 38,130, rising to 52,327 in 2005–2006 and 64,488 in 2006–2007: http://www.publications.parliament.uk/pa/cm200607/cm/hansard/com070711/text/70711woo16.htm.

the Bankruptcy Act was amended by the reduction of the period of bankruptcy to three years, for purposes of obtaining discharge by certificate of the Official assignee, the Minister of State stressed that there "will be no automatic discharges".[49] If automatic discharges were an unacceptable remedy, how could we devise a discharge mechanism that would still provide for easier discharges and balance the interests between debtors and creditors?

### *B. Inspiration from an Australian proposal*

#### *(1) The Harmer proposal*

29 Rather ironically, it was a proposal in the Harmer Report, in respect of automatic discharges (which we had rejected), that provided the ideas for the novel method of discharge by certificate of the Official Assignee which we finally adopted.

30 The Harmer Report had initially proved useful in its recognition of two main characteristics of bankruptcy.[50] These were the rehabilitation of bankrupts and the function of discharge in regulating commercial morality or behaviour. The balance of these interests in a commercial centre like Singapore was a highly desirable goal. The challenge was to adequately safeguard both interests.

31 The Harmer Report suggested as an "appropriate policy"[51] that automatic discharges be expedited by an early discharge on a trustee's certificate.[52] The Commission's proposals, briefly, were as follows:[53]

> (a) Where the trustee administering a bankrupt estate is of the opinion that a bankrupt is eligible for discharge before automatic discharge would normally occur, the trustee could issue and file with the court a certificate to that effect.

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49 *Singapore Parliamentary Debates* (1999) vol 70 at col 2186.

50 The Law Reform Commission Report No 45, *General Insolvency Inquiry* (Australian Government Publishing Service, Canberra, 1988) (the Harmer Report) at [541].

51 *Id*, at [228]. The other two suggested approaches were retaining the existing structure of discharges and retaining the existing structure with certain modifications to provide for easier automatic discharges such as reducing the qualifying period of bankruptcy from three years to one year and revising the grounds for objections to such discharges.

52 Harmer Report, at [229]–[230]. This recommendation was not accepted by the Australian Government.

53 *Id*, at [229]. The draft legislation proposed by the Harmer Commission appears at Appendix A, Pt J, [115]–[119] of its report.

(b) In deciding whether a certificate should be issued, the trustee would be required to have regard to a number of prescribed considerations.

(c) A certificate would operate to discharge the bankrupt at the expiration of a specific period (for example, two months after the date the certificate is filed) unless, within that period, an objection is filed by a creditor.

(d) The trustee would be required to notify each creditor of the filing of the certificate and provide a statement explaining the effect of filing the certificate and a copy of the report on his administration.

(e) A creditor would be entitled to object to discharge by operation of the certificate.

(f) If such objection were filed by a creditor, discharge of the debtor would be postponed until the matter had been determined by the court.

32 The Harmer proposal was for an expedited automatic discharge, at the instance of the trustee, though largely court supervised. This proposal did not give the trustee powers to grant a straight discharge by certificate. Instead, the trustee's certificate merely indicated to the court that the bankrupt was fit for discharge earlier than the three-year period for automatic discharges. It was the court which had wide powers to uphold objections to the certificate being issued by the trustee entered by a creditor or the Inspector General for Bankruptcy. In deciding whether to uphold the trustee's certificate, the court was required to take into account prescribed factors listed in the draft legislation.[54]

*(2) The difficulties with the Harmer proposal*

33 Whilst there were a number of advantages in this proposal, the Commission itself noted "several difficulties". In particular, the Commission was concerned that for the successful implementation of its proposal for a discharge by the trustee's certificate, trustees would have to be given "adequate, objective guidelines".[55] There was the danger of inconsistent decisions between various trustees. Further, a trustee may be subjected to pressures to either give or refuse a certificate. Indeed, the Commission's proposals, because they were largely court driven, had the disadvantages of delay, increase in costs for trustees, bankrupts and objecting creditors.

54 A number of these were adopted in our scheme of discharge by certificate of the Official Assignee under s 125 of the Act but not listed in the Act. These were approved by the High Court in *Re Ng Lai Wat* [1996] 2 SLR 106 at [118].

55 *Id*, at [230]. The Harmer proposal was not accepted by the Australian Government.

34 The writer's first thoughts, as Official Assignee, on reading the Harmer Report was whether we could have a straight discharge by certificate of the Official Assignee. What became obvious was that the difficulties identified by the Harmer Commission had to be addressed if this method of discharge by certificate of the trustee was to be recommended for adoption in Singapore.

## V. Discharge by certificate of the Official Assignee

### *A. The solution*

35 What was needed was clear. We needed a more liberal regime in respect of bankruptcy discharges, especially in cases where bankruptcy had arisen from misfortune rather than malpractice. It would need to be an inexpensive method of discharge, provide incentive to bankrupts to work towards their discharge, promote business entrepreneurship and be more acceptable to creditors in keeping with Singapore's position as a financial hub. How was such a system to be devised?

36 Instead of automatic discharges, a scheme of easier discharges by certificate of the Official Assignee was decided upon. As explained later in the Official Assignee's *Guide to the Bankruptcy Act (1995)*:[56]

> With the scheme of easier discharges, bankrupts would be encouraged to work towards an early discharge. This would have the salutary effect of promoting the policy of encouraging business entrepreneurship without eroding financial discipline and commercial morality.

### *B. Our concerns with the proposed solution*

37 In addition to the difficulties highlighted by the Harmer Commission, there were some additional concerns in the office of the Official Assignee with the proposal to provide for discharges by certificate. The first was a public law question. Could a bankruptcy order, being an order of the High Court, be effectively set aside by the administrative act of the regulator-trustee in bankruptcy? If so, what ought to be the criteria for discharges by certificate and how should these be determined? Should the criteria be spelt out in the law? If so, would we face constant and costly challenges in court over the Official Assignee's decisions? Administratively, how was the Official Assignee going to maintain fairness and consistency in determining who ought to be discharged?

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56 *Supra*, n 8 at [28].

## *C. The legislative provisions*

### *(1) Discharge at the Official Assignee's discretion: s 125*

38 The new s 125 of the Bankruptcy Act,[57] which came into effect on 15 July 1995, provided as follows:

> 125.—(1) The Official Assignee may, *in his discretion* and subject to section 126, issue a certificate discharging him from bankruptcy.
>
> (2) The Official Assignee shall not issue a certificate discharging a bankrupt from bankruptcy under sub-section (1) unless–
>
> (a) a period of 5 years has lapsed since the date of the commencement of the bankruptcy and
>
> (b) the debts which have been proved in bankruptcy do not exceed $100,000 or such other sum as may be prescribed.
>
> [emphasis added]

39 Subsection (3) further provided for the notice of discharge to be given to the Registrar of the High Court and to be published in the Government Gazette and in any local newspaper. This was to ensure that the Registrar's records captured the fact of discharge and that the public was similarly informed of the discharge. No formal application was needed and the procedure for the issuance of the Official Assignee's certificate was kept simple.[58]

40 In order to be eligible for consideration for discharge by the Official Assignee's certificate, a bankrupt had to satisfy only two requirements relating to the amount of his debts ($100,000)[59] and the length of his bankruptcy (five years).[60] The Official Assignee was thus precluded from issuing the certificate unless a period of five years had lapsed since the commencement of the bankruptcy and the proven bankruptcy debts did not exceed $100,000. The five-year period was chosen to give the Official Assignee sufficient time to review the large amount of cases that had been accumulated over the years and to allow the older cases to be processed first. Additionally, it would give the Official Assignee sufficient time to investigate, realise and distribute the assets to creditors in new bankruptcies. Bankrupts too would have time

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57 Cap 20, 2000 Rev Ed.

58 For details of the procedure on discharge by Official Assignee's certificate see Kala Anandarajah, et al, *Law and Practice of Bankruptcy in Singapore and Malaysia,* (Butterworths Asia, 1999) at [427]–[428].

59 This amount was increased to $250,000 in September 1997 and to a further $500,000 in May 1999. See *infra* n 96.

60 This period was reduced to three years in September 1999 by the Bankruptcy (Amendment) Act (Act 37 of 1999).

to contribute sufficiently towards their bankruptcy estates for the benefit of their creditors to qualify for discharge.

41 At the same time, discharge by order of the court was made less onerous under s 124 of the 1995 Act[61] to support the regime for easier discharges and to assure deserving bankrupts that they would be assisted in obtaining a court discharge if they did not qualify for discharge by the Official Assignee's certificate. First, the application to court for a discharge could now be made "at any time after the making of a bankruptcy order".[62] The need to conduct a public examination of the bankrupt was removed. The requirement that the bankrupt's assets had to be less that 50% of his debts to be eligible for an absolute discharge was amended to a mere 25% and that too only if the bankrupt had committed a fraudulent disposition of property.[63] More importantly, the category of persons who could apply for a court discharge was expanded from only the bankrupt himself to any person having an interest in the matter[64] and including the Official Assignee. Indeed, the Official Assignee has given the assurance that he will assist in making the application to court in "all deserving cases".[65]

42 In 1996, in the case of *Re Siah Ooi Choe, ex parte Hongkong and Shanghai Bank Banking Corporation,*[66] the High Court had occasion to consider the "scheme of the discharge provisions" in the new Act. In that case, the bankrupt was a very successful entrepreneur prior to his bankruptcy. He had incurred substantial debts exceeding $140 million when his business empire collapsed, following an economic recession. Nine of the 30 institutional creditors objected to his application to court

61 Cap 20, 2000 Rev Ed.

62 Section 124(1) of the Bankruptcy Act (Cap 20, 2000 Rev Ed). Commenting on this provision in *Re Siah Ooi Chee* [1998] 1 SLR 903, Khoo J opined: "It seems to me that except in very exceptional circumstances, the minimum waiting time for s 124 cases should be at least similar to that for s 125 cases; it should probably be longer, but not necessarily in a proportion measured by the amount of the indebtedness, as otherwise there would be many cases where no application could ever be made because of the size of the debt, and this would be quite contrary to the intention of the Act." The Court of Appeal took a similar view in *Jeyaretnam Joshua Benjamin v Indra Krishnan* [2005] 1 SLR 395.

63 See s 124(4) of the Bankruptcy Act (Cap 20, 2000 Rev Ed), considered by the High Court in *Re Siah Ooi Choe, ex parte Hongkong and Shanghai Bank Banking Corporation* [1998] 1 SLR 903.

64 The intent was for a concerned family member or friend, having the means to assist the bankrupt, to obtain a discharge in deserving cases. There may be little purpose in such an application without the approval of the Official Assignee.

65 See the Official Assignee's *Guide to the Bankruptcy Act 1995* (2nd Ed) at [33], Insolvency and Public Trustee's Office, Bankruptcy Information Sheet No 4, "How to be Discharged from Bankruptcy" at [4]. Under s 280(1) of the UK Insolvency Act 1986, only the bankrupt can be the applicant.

66 [1998] 1 SLR 903 considered in the Malaysian cases of *Re Joshua Tan Pin Pin* [2007] 4 MLJ 534; Re *Siow Ah Moi @ Seow Yin Fong* [2007] 3 MLJ 713.

for a discharge. The Official Assignee supported the application as the bankrupt had made substantial effort to make payments to his bankruptcy estate although these represented a small fraction of his enormous debts. The High Court upheld the Registrar's order of discharge. Warren Khoo J took the opportunity to explain the rationale of the new discharge provisions:[67]

> A proper approach to an application to discharge from bankruptcy involves a consideration of the object and purpose of these new provisions of the Bankruptcy Act (Cap 20, 1996 Ed) (the Act). The Act was designed to meet two major conflicting concerns. One stemmed from the recognition that many an individual businessman becomes insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle. It would be in the interest of society that people who had become bankrupt in such circumstances, and generally, should be given a second chance in life, so that the social cost of waste of entrepreneurial resources could be reduced. The other concern was that, without proper safeguards, people who had used dishonest or fraudulent methods in conducting their business affairs to the detriment of their creditors might get an undeserved advantage from their own wrongdoings. The fear of people taking advantage of their own frauds is probably as old as the institution of bankruptcy itself, and it was natural that such fears were highlighted when an easier regime for discharge from bankruptcy was being proposed.

(a) The $100,000 limit

43 Before the Select Committee, the amount of $100,000 was the subject of a number of representations. These came from both undischarged bankrupts and financial institutions which by the mid-1990s made up more than 60% of the petitioning creditors. Bankrupts suggested that the ceiling be raised to as high as $1m whilst creditors wanted it to be lowered to $50,000.[68] This was hardly surprising given their different and often competing interests. The $100,000 was retained as the Select Committee considered this was a reasonable ceiling to set at that time. Easier discharges by certificate were being introduced for the first time and 71% of the bankrupts had debts below $100,000 and were eligible for the Official Assignee's consideration.[69]

67 *Id*, at [907]–[908].

68 *Singapore Parliamentary Debates* (1995) vol 64 at col 1082–1083.

69 As revealed by the Parliamentary Secretary to the Minister for Law in Parliament on 23 March 1995 at the Third Reading of the Bankruptcy Bill: *Singapore Parliamentary Debates* (1995) vol 64 at col 1083.

(b) The Official Assignee's discretion

44 The Official Assignee's exercise of his discretion under s 125 of the Act is of course subject to judicial review under s 126. However, the decision to give the Official Assignee an unfettered discretion in issuing a discharge certificate, under s 125, was a deliberate one. The absence of legal conditions on the exercise of his discretion (other than in respect of the period of bankruptcy and the debt amount) was to discourage unnecessary judicial challenges, expedite the discharge process and contain costs. For this reason, the factors that the Official Assignee could take into account in the exercise of his discretion were not prescribed in the Act. To have done so would have encouraged judicial challenges based on the purported existence or absence of one factor or the other and involved the Official Assignee in prolonged and costly litigation. This would have unnecessarily fettered the exercise of the Official Assignee's discretion.

45 In contrast, on an application, under s 124 of the Act, for an order of discharge by the court, the High Court may refuse to discharge the bankrupt or may discharge him but subject him to "such conditions as it thinks fit to impose".[70] These include conditions with respect to any income which may be subsequently due to him or acquired by him after his discharge. In addition, where the bankrupt has committed any bankruptcy offence or any offence concerning fraudulent deeds and dispositions under the Penal Code[71] or is guilty of misconduct as prescribed in s 124(5,) he can only be granted a conditional discharge.

46 These conditions were described by Justice Warren Khoo in *Re Siah Ooi Choe*[72] as a "rather exhaustive list".[73] For that reason, the judge explained, the factors that the court is required to consider when dealing with such an application "are all set out in the Act" and in exercising its discretion the court "should be guided largely by these provisions". Despite their "discretion" Khoo J further cautioned judges that what they "must not do is to introduce or take into consideration requirements or factors which go against the dominant object or purpose of the Act".[74] Indeed, it is submitted, that it is difficult in these circumstances to argue that the court has a discretion that is either wide or unfettered.

70 Section 124(3) of the Bankruptcy Act (Cap 20, 2000 Rev Ed).
71 (Cap 224, 1985 Rev Ed) ss 421–421. For a fuller discussion see *Re Siah Ooi Choe* [1998] 1 SLR 903.
72 [1998] 1 SLR 903.
73 At para 16 of his judgment in *Re Siah Ooi Chee* [1998] 1 SLR 903.
74 *Ibid*.

47 The factors that the Official Assignee would consider were, therefore, not spelt out in legislation but left entirely to the Official Assignee to determine administratively. For public information, these were announced in Parliament at the time the Bankruptcy Bill was tabled.[75] The Official Assignee subsequently, in information sheets and in a published *Guide to the Bankruptcy Act 1995*, made it clear to both bankrupts and creditors what these factors were. They would "include" the following:[76]

(1) the cause of the bankruptcy;

(2) the period of the bankruptcy;

(3) the bankrupt's assets and payments to his bankruptcy account;

(4) the bankrupt's conduct; and

(5) the level of the bankrupt's co-operation given to the Official Assignee in the administration of his affairs.

48 Again the choice of the word "include" in introducing the list of factors was carefully chosen. This was in order to give the Official Assignee complete discretion in the choice of factors relevant to a particular case and not to be shackled by an exhaustive list of factors. What is clear from the list itself is that speedier discharges were to be available to persons who had become bankrupt because of misfortune rather than malpractice. The clear message to bankrupts was that the speed of their discharge from bankruptcy was in their own hands. That their effort was to be rewarded by earlier discharges was also emphasised by factors (3) to (5) as stated above.

49 The nature of the Official Assignee's discretion to grant a discharge came up for scrutiny before the High Court in *Re Ng Lai Wat; Official Assignee v Housing and Development Board*.[77] In that case, the bankrupt (Ng) had been issued with a discharge certificate by the Official Assignee after six years in bankruptcy. He had an outstanding debt in respect of rental of business premises with the Housing and Development Board (HDB). Ng had been earning a low income and had fully co-operated with the Official Assignee. The only property that Ng had was a small HDB flat which did not vest in the Official Assignee as

75 *Singapore Parliamentary Debates* (1994) vol 63 at col 402. These appear to have been approved by the court in *Re Ng Lai Wat* 1996] 3 SLR 106 at 110.

76 At p 28. See also Bankruptcy Information Sheet No 4 entitled "How to be discharged from bankruptcy" available at the IPTO website: www.ipto.gov.sg.

77 [1996] 3 SLR 106. For a criticism of the case, see Lee Eng Beng, "Discharge under the new bankruptcy regime: *Re Ng Lai Wat*" (1996) SJLS 600; Tan Sook Yee, "Bankruptcy and the owner of an HDB flat" (1997) 9 SAcLJ 199.

expressly stated under s 51 of the HDB Act.[78] The HDB objected to the discharge and took out an application in court, under s 126(4) of the Bankruptcy Act, for an order prohibiting the Official Assignee from issuing the certificate or in the alternative that the discharge be subject to the condition that the HDB be entitled to the net proceeds of sale of Ng's share in Ng's flat in the event of sale. The Deputy Registrar made the conditional order of discharge as requested by the HDB. The Official Assignee appealed against the order.

50 The Official Assignee submitted[79] that the court should be cognisant of the essential differences between the powers of the court and the Official Assignee as provided under the Act. It was clear from the provisions in the Act that the Official Assignee, as administrator of the affairs of bankrupts, had been given by Parliament "an absolute and unfettered discretion"[80] to issue a certificate of discharge. The court, therefore, ought not to intervene in the exercise of that discretion except for very good reasons. The Official Assignee further submitted that the condition imposed for Ng's discharge was "contrary to Parliament's intention in enacting the Act – to rehabilitate bankrupts and to address certain weaknesses in the previous legislation. It would render the OA's certificate of discharge inoperative under the new provisions if conditions similar to the present were imposed."[81] Whilst it was accepted that the court had powers to impose conditions to the discharge, the thrust of the argument was that the very scheme of easier discretionary discharges as envisioned by the Act depended on the Official Assignee's exercise of his discretion not being circumscribed unnecessarily.

51 The learned judge held that the word "may" in s 125 (ignoring the words "in his discretion") and s 126 was used in "a permissive sense" and hence the discretion of both the court and the Official Assignee "is completely unfettered".[82] She further reasoned that "[a]dmittedly section 126 of the Act does not contain qualifying words to the effect that the court can interfere with the OA's decision only if the decision is unreasonable". The question as to the nature and frequency of permissible court intervention in the exercise of the Official Assignee's discretion, given the legislative provisions and the fact that the Official Assignee is a quasi-judicial officer, remained unanswered. It has been

78 Cap 129, 1996 Rev Ed. This is a public housing scheme that houses about 85% of the population whose roof over their heads is protected by the HDB Act.

79 These submissions are reproduced in full in the judgment reported at [1996] 2 SLR 106 at [110]–[113]. The author who was then the Official Assignee argued the appeal with Assistant Official Assignee Andy Sim.

80 *Re Ng Lai Wat, Official Assignee v Housing and Development Board* [1996] 3 SLR 106 at [110].

81 At p 112 of the case report.

82 *Re Ng Lai Wat, Official Assignee v Housing and Development Board* [1996] 3 SLR 106 at [118].

held that in reviewing the acts of the Official Assignee in relation to the administration of a bankrupt's estate that the court will not intervene unless there was bad faith or absurdity.[83]

*(2) Permitting creditor objections: s 126*

52 Both creditors and bankrupts have the right of judicial review if dissatisfied with the acts or omissions of the Official Assignee.[84] In addition, creditors' interests are safeguarded by the provision of a mechanism for creditors to object to a bankrupt's discharge by certificate of the Official Assignee. Section 126 of the Act requires the Official Assignee to serve a notice of his intention to discharge the bankrupt together with a statement of his reasons for wishing to do so. If a creditor's objections are rejected by the Official Assignee, the creditor may then apply to court to prohibit the Official Assignee from issuing the certificate of discharge as was done in *Re Ng Lai Wat.* Upon hearing the creditor's grounds of objection, the court may dismiss the application or make an order imposing conditions for the discharge or order that the bankrupt shall not be discharged for a further period of two years, effectively suspending the Official Assignee's decision for two years. Rather significantly, the court was not given the power, upon hearing such an objection, to allow the application, that is, to prohibit the Official Assignee from issuing the certificate.

## VI. Implementation of the new discharge law[85]

53 Described as "the first of its kind in the world"[86] the innovation of discharge by certificate of the Official Assignee received considerable interest amongst local legal and insolvency practitioners and within the international insolvency community. It was clear before the date of implementation on 15 July 1995, that its success would largely depend on the rate of creditor objections to the Official Assignee's attempts to discharge bankrupts by his certificate and in the number and frequency of challenges in court. There would also be considerable scrutiny of the cases chosen by the Official Assignee in granting a discharge.

54 The creditors' main concern was whether the Official Assignee would be fair in selecting the right people deserving of easier discharges

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83 For a fuller discussion on this point, see Lee Eng Beng, *supra* n 77, at [601]. Duty of a trustee in respect of the adjudication of proofs was held to be quasi-judicial by the Singapore High Court in *Erprima SA v Chee Yoh Chuang* [1998] 1 SLR 83.

84 Under s 31 of the Bankruptcy Act (Cap 20, 2000 Rev Ed).

85 All statistics have been obtained from the website of the Insolvency and Public Trustee's Office ("IPTO") at http://www.ipto.gov.sg and from the IPTO.

86 Kala Anandarajah, et al, *Law and Practice of Bankruptcy in Singapore and Malaysia* (Butterworths Asia, 1999) at p 426.

or whether bankrupts would be able to get a discharge purely because of the efflux of time. On the other hand, bankrupts had to be convinced that the Official Assignee was serious in discharging them under the new scheme and that there would be fairness in the new discharge system. To achieve consistency in the selection process, private trustees were not permitted under the Act to exercise the powers of the Official Assignee in granting a discharge by certificate but could apply to the Official Assignee instead.[87] To ensure creditors' support, the grounds upon which bankrupts were to be granted a discharge by certificate and the amount of dividend payments that would be paid to them were disclosed in notices to creditors. A 24-hour answering service (Bankruptcy Information Service) to transmit a 40-second message on the criteria for discharges and a hot-line for public inquiries were installed.

55 The success of the novel experiment to expeditiously discharge bankrupts by certificate of the Official Assignee went beyond all expectations.

### *A. Low creditor objections*

56 It was encouraging to note that of the first 17,535 creditors who were notified, by February 1998, of the Official Assignee's intention to discharge bankrupts, only 817 (4.6%) objected to the discharge. None of the 21 creditors who proceeded to court to prohibit the Official Assignee from discharging the bankrupts succeeded. Of the total number of 26,340 notices sent to creditors, between 15 July and 30 June 1999, there were objections in only 1,522 or 5.5% of the cases.

57 When the amount of the debts of $100,000 for eligibility for discharge by certificate was raised in subsequent years until at least 2002, the creditor objection rate remained fairly low and showed no significant rise. For example, in July 1995, when the scheme was first implemented the objection rate was 5.1%, in September 1997 (when the amount of the debts were increased to $250,000) the rate was 5.7% and this rose to only 5.8% in May 1999 when the minimum debt level was raised to $500,000.

87 Section 36(3) of the Act. Private trustees were permitted to administer bankruptcy estates for the first time under Pt IV the 1995 Act. However, there have been very few takers with only 21 bankruptcy estates having been administered by private trustees between 1995 and 2006.

58 Creditor objections were mostly from banks (36%), credit card companies (18%) and finance and hire-purchase companies (6%). Of the 1522 creditor objections received between 15 July 1995 and 30 June 1999, the Official Assignee accepted only 381 or 25% of these objections as having any merit and rejected 1,141 or 75%.

59 The objections that were upheld and further investigated were in cases where the creditor was able to provide evidence of misconduct including the concealment of assets. Only 31 creditors, or 0.1% of those who had received the Official Assignee's notice and 1.3% of those who had objected to the discharge, finally challenged the Official Assignee's rejection of their objections in court. None succeeded and their applications were dismissed with costs. Creditors were thus made aware that unreasonable objections would not be upheld by the Official Assignee or by the court.

60 The low rate of creditor objections showed the confidence that the creditors had in the Official Assignee selecting the right persons for discharge by his certificate. This was achieved with careful planning. A special Bankruptcy Unit for Discharges ("BUD") was set up with sufficient administrative support to implement the new scheme. We were aware of the importance of staff applying the criteria for selection fairly and consistently. A standard review form was drawn up for the use of staff reviewing bankruptcy files and their recommendations were monitored and reviewed by a review committee comprising of legal officers and finally approved by the Official Assignee. In this way, inconsistencies in the application of the selected criteria for discharges were reduced.

61 All files reviewed were placed in three categories. These were category 1 (ready for discharge), category 2 (discharge to be postponed for follow-up action) and category 3 (discharge not supported), for example where the bankruptcy had been due to fraud or the bankrupt had disappeared for sometime. Bankruptcy officers subsequently conducted interviews with bankrupts in category 2 to advise them on how they could get themselves discharged from bankruptcy.

62 BUD was sufficiently organised to send out the first 750 notices to creditors of the Official Assignee's intention to discharge by certificate on 15 July 1995, the very day the enabling legislation came into effect.

### *B. Making the right choices*

63 What was important to demonstrate to creditors, bankrupts and the public was that in selecting the bankrupts for discharge, the Official Assignee was choosing people who were truly deserving of discharges. The low creditor objection rate of 4.6% to the first lot of notices and

subsequent 5% objections was encouraging. It indicated creditors' confidence and acceptance of the manner in which the Official Assignee was exercising his discretion. This was also supported by the fact that none of the 31 creditors who took their objections to court succeeded. In the first major reported decision on s 125 of the Act, in *Re Ng Lai Wat*,[88] the High Court set aside the conditions that the Registrar had imposed on a discharge by the Official Assignee giving further support to the Official Assignee's discharge process. Finally, of 6,110 bankrupts discharged between 15 July 1995 and 30 June 1999, only 15 bankrupts (0.25%) returned to bankruptcy with the next three years. This was again an indication that the right people were being chosen for discharge by the Official Assignee.

### *C. High rate of discharges*

64 The results in terms of the number of bankrupts discharged by the Official Assignee's certificate were impressive. In 1995, 1,582 bankrupts were discharged from bankruptcy as compared to 554 in 1994 and 323 in 1993. The discharge figure rose sharply to 2,752 in 1997. This increased the clearance rate of bankruptcy, or the number of new bankruptcies as against the numbers discharged, from a mere 38.6% in 1994 to 151% in 1995 and 162% by 1997. By February 1998 (30 months after the implementation of the new law), some 6,220 bankrupts had been discharged. Between 15 July 1995, when the new Act came into effect, and 31 January 2000, 6,780 bankrupts were discharged by certificate of the Official Assignee.

65 Bankrupts who did not fall within the eligibility criteria in terms of the period of bankruptcy (five years) and the amount of their debts ($100,000) but deserving of discharges were assisted by applications made to court for their discharges by the Official Assignee. For example, between 15 July 1995 and 30 June1999, 1,121 bankrupts and between 1999 and 2004, 2,439 bankrupts, were discharged by the court on the Official Assignee's application. Some 13% of all bankruptcy discharges are now the result of the Official Assignee's application made to court under s 124 of the Act.

### *D. Benefit for creditors*

66 The benefit to creditors was also significant. In 1990, there were 296 creditors who benefited from dividend payments of $1.3m. In 1993, when old files were being reviewed in preparation for the new Act of 1995, $7.5m dividend payments were made to 908 creditors. However,

88 *Re Ng Lai Wat, Official Assignee v Housing and Development Board* [1996] 3 SLR 106.

since 1996, when the new discharge provisions took full effect, there have been record dividend payments each year: $23.7m to 3,656 creditors in 1996, $30.7m to 4,944 in 1997, $31.2m to 6,266 creditors in 1998 and $39.9m to 7,052 creditors in 1999. Very clearly, from the level of co-operation in the realisation of assets and in regular payments to their bankruptcy estates, bankrupts knew that bankruptcy discharges would now be on the basis of effort.

67 With the evidence that the new discharge provisions were effective and were adequately serving the interests of both bankrupts and creditors, Minister of Law Jayakumar was able to inform Parliament in March 1998:[89]

> Despite the high volume of bankrupts, the bankruptcy clearance rate, i.e. the number of cases discharged compared to the number of new cases rose to a record high of 162.3%. Creditors too have had their interests served by receiving record dividend payments of $30.7 million in 1997, which was 29% higher than what was received in 1996. So the Official Assignee, through laws and through the administration, has tried to serve both the interest of individual bankrupts, not forgetting the interest of the creditors, which are two duties that he has to bear in mind.

### *E. Assistance to bankrupts*

68 In order to proactively assist unemployed bankrupts to obtain employment and increase their payment to their bankruptcy estates and thus expedite their discharges, the Official Assignee commenced an Employment Assistance Scheme ("EASE") in August 1998. EASE required bankrupts who claimed to be unemployed and hence unable to make regular payments, to register with EASE for employment. EASE was set up with assistance from the Ministry of Manpower, National Trades Union Congress, NTUC Income E-Ads, Community Development Councils, Private Employment Agencies and multinational companies. Between August 1998 to December 1999, more than 1,008 bankrupts who had disclosed unemployment as a reason for non-contributions, were registered with EASE. Of these, 41.6% found jobs, with the balance of 49.4% either finding their own employment or owning up that they were in fact already employed.[90]

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89 On 11 March 1998: *Singapore Parliamentary Reports* (1998) vol 68 at col 946–947.

90 One of the interesting facts that emerged from this project was that consistently 25% of bankrupts who had declared they were unemployed to avoid making monthly payments for the benefit of their creditors admitted they were employed when compelled to accept jobs through EASE. Unfortunately, EASE was discontinued in 2000 as the Official Assignee felt the resources could be better employed elsewhere. Instead, in 2002, a classification of bankrupts into "Green" and "Red" zones to reward those in the "Green" zone with quicker approvals of

(*cont'd on the next page*)

### *F. Change in mindsets*

69 What was apparent to all bankruptcy officers was the noticeable change in the mindsets of both bankrupts and creditors brought about by the new discharge provisions. It was both immediate and profound. Bankrupts were clearly motivated by what was now a real possibility of early discharges from bankruptcy. Their contributions to their bankruptcy estates for the benefit of their creditors were more regular. There was greater identification and realisation of their assets and better support from their family members for the settlement of debts. New bankrupts who were briefed on the new discharge law, with emphasis on the consequence of their efforts and work toward a discharge, showed a new level of co-operation that was previously unseen. Creditors in turn were more willing to accept settlement offers and generally less resistant to discharges.

## VII. Recognition for the new scheme of discharges

### *A. Certificate of achievement from the Commonwealth Association for Public Administration ("CAPAM")*[91]

70 CAPAM operates a global network of public service practitioners, academics and organisations in 53 Commonwealth nations. This enables them to share knowledge and "to maintain a current, creative and innovative approach to public administration and management". In 1998, CAPAM honoured the Insolvency and Public Trustee's Office of Singapore by awarding it a Certificate of Achievement. This followed its rating of the mode of expedited discharges by certificate of the Official Assignee as "truly innovative and worthy of recognition".

### *B. Accolades from the International Association of Insolvency Regulators ("IAIR")*[92]

71 The problems faced by insolvency administrators throughout the world are strikingly similar. Efficient discharges of bankrupts which also reduce bankruptcy administration costs and especially if pursued in the interests of both creditors and bankrupts, are a frequent subject of discussion and debate amongst IAIR members. The success of

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their application to travel and buy/sell HDB flats, to encourage bankrupts to work towards their discharge, was implemented.

91 More information on CAPAM is available on its website: www.capam.org. The award was mentioned in Parliament on 18 August 1999: *Singapore Parliamentary Debates* (1999) vol 70 at col 2185.

92 For information on IAIR see *supra* n 43.

Singapore's innovation in the expeditious discharge of bankrupts attracted considerable interest at IAIR meetings. A paper on the new discharge mechanism presented at an IAIR meeting in New Zealand in 1996 was well received. It was subsequently published in the IAIR Bulletin in December 1997.

### *C. Adoption by the Malaysian Parliament*

72 The greatest compliment for the efficacy of this novel method of discharges was its adoption by Malaysia in 1998. The Malaysian Bankruptcy Act was amended[93] that year to insert two new sections, ss 33A and 33B, to provide for discharge by certificate by the Malaysian Official Assignee and a procedure for objections by creditors to such a discharge. These two sections are in terms identical to ss 125 and 126 of the Singapore Act. The only difference in the Malaysian provision is that there is no monetary limit set for eligibility for the Official Assignee's discharge. This resulted initially in a large number of applications from bankrupts to the Official Assignee for discharge and challenges in court by creditors.[94] The Malaysian Act also refrained from indicating the circumstances that the Official Assignee was required to take into account in exercising his discretion in granting a discharge certificate. Instead, as in Singapore, the relevant factors have been decided administratively.[95]

## VIII. Extension of the discharge provisions

73 Following its initial success and after more than 5,000 bankrupts had been discharged, the innovation of discharge by certificate of the Official Assignee was extended. In September 1997, bankrupts with proven debts of up to $250,000 became eligible for consideration for discharge. In responding to a call from a Member of Parliament for the financial limit of $100,000, set in 1995, to be raised, the Minister of State for Law told Parliament:[96]

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93 The sections were brought into effect on 1 January 1999 by the Malaysian Bankruptcy (Amendment) Act 1998. As the Malaysian Official Assignee became known as the Director-General of Insolvency, by a further amendment to the Malaysian Act in 2003, this form of discharge is now known as discharge by certificate of the Director-General of Insolvency.

94 Information obtained from the writer's discussions with the Malaysian Official Assignee and his officers in 1999.

95 These factors appear to be similar to those used in Singapore and include the cause of bankruptcy, age, assets of the bankrupt and the bankrupt's conduct. See Khoo Kay Ping, *Law and Practice of Bankruptcy* (Malayan Law Journal, 2nd Ed, 2003) at p 315.

96 *Singapore Parliamentary Debates* (1997) vol 67 at col 1521.

> We believe that the new provision has worked well. We started with the financial limit of $100,000 for the Official Assignee … In the light of experience gained, we are satisfied that we can raise it to $250,000. The Official Assignee will continue to apply the same criteria to select the cases for discharge, balancing the interests of both creditors and bankrupts.

74 In May 1999, the financial limit of $250,000 in proven debts was further increased to $500,000 to enable more bankrupts to fall under the scheme of early discharge by the Official Assignee.[97]

75 Following the recommendations of the Technopreneurship 21 Committee,[98] further changes to the bankruptcy regime were introduced in September 1999. This was done ostensibly to help cultivate a calculated risk-taking culture and foster a climate of greater tolerance for failure.[99] Further amendments to the Act[100] allowed the Official Assignee to consider the release from bankruptcy by discharge certificate after three years of bankruptcy instead of the five-year period set in 1995. This was to provide a greater incentive for bankrupts to work toward their discharge as demonstrated by the continuing increase in the dividends declared to creditors. It was also decided[101] to extend the mechanism of termination of bankruptcy, by certificate, to cases where the bankrupt's debts had been paid in full or to the satisfaction of his creditors by way of a composition of the debts or a scheme of arrangement. This enabled the Official Assignee to annul a bankruptcy order expeditiously by his certificate instead of having to apply to court as was previously required by law.

76 In a move to make bankrupts more economically productive, both s 22 of the Business Registration Act and s 148 of the Companies Act were amended, on 15 September 1999, to enable the Official Assignee to administratively allow bankrupts to take part or be concerned in the management of any business or to be the director of a company without the bankrupt having to apply for leave of the court. In the short three-month period from October 1999 to January 2000, there were 25 applications received by the Official Receiver compared with a

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97 This was done by way of subsidiary legislation as provided under s 125 (2)(b) of the Act: Bankruptcy (Variation of Sum of Debts under section 125(2)(b)) Rules 1999 (GN No S 126/1999).

98 The Technopreneurship 21 Committee was a ministerial committee led by Singapore's Deputy Prime Minister Tony Tan.

99 For a more detailed discussion, see Pauline L H Gan, "Recent Amendments to Singapore's Bankruptcy Laws: Towards A More Conducive 'Social Ambience' For Technopreneurs" (2000) 29 Asia Business Law Review 63; Aaron Kok, "Automatic Discharge: The Panacea to our Bankruptcy Woes" (2004) Sing Law Rev 204.

100 Bankruptcy (Amendment) Act 1999 (Act 37 of 1999).

101 See ss 95A and 123A inserted by the Bankruptcy (Amendment) Act 1999 (Act 37 of 1999) which came into effect on 15 September 1999.

mere four court applications made by bankrupts in the five years before the implementation of the new scheme.

77 The redefinition of insolvency in terms of risk was not quite appropriate given that 90% of bankruptcies were consumer bankruptcies.[102] A 2004 study revealed that of this group of bankrupts, 67.3% had become insolvent due to excessive use of credit facilities.[103] It is important to remember, however, that the1999 reforms were not designed to prejudice the interests of creditors. That was made clear by the Minister of State for Law when he moved the amendments to the Bankruptcy Act in 1999:[104]

> In formulating these changes, we have sought to strike a proper balance between the interests of debtors and creditors. We were mindful that over-liberalisation of the bankruptcy regime may erode creditors' rights and make it more costly for business to obtain financing. Changes that would work against creditors interests have been avoided.

78 Responding to Members of Parliament the Minister re-iterated:[105]

> … I think he (MP Inderjit Singh) captures the spirit behind the Bill, which is to encourage entrepreneurship. On the other hand, like I have said, we have to keep in mind the central point that we want to maintain a balance between the interest of the creditors and debtors. So we cannot go overboard. We must keep this in mind, because otherwise if bankrupts are able to get out of bankruptcy too easily without showing effort on their part, that may also increase business costs.

79 The importance of maintaining this balance of interest in Singapore's bankruptcy administration has received the approval of the High Court on a number of occasions.[106] In 2002, the Chief Justice had occasion to consider whether the fact that a bankrupt had committed an offence under the Bankruptcy Act, by travelling out of Singapore on 50 occasions without the Official Assignee's permission, should be treated more leniently. In convicting him, the magistrate had opted for a non-custodial sentence as he had considered that the accused's offence was but a negligent omission "contributed by the hectic pace of an

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102 *Singapore Parliamentary Debates* (2006) vol 81 at col 619; Aaron Kok, *supra* n 99, at 206.

103 "Bankruptcy Act: A fresh start for entrepreneurs or improvident spenders?" FYP project No 3451, Academic Year 2004/05, Bachelor of accountancy, National Technological University [40].

104 *Singapore Parliamentary Debates* (1999) vol 70 at col 2187.

105 *Singapore Parliamentary Debates* (1999) vol 70 at col 2202.

106 See, for example, *Re Ng Lai Wat* [1996] 3 SLR 106 and *Re Siah Ooi Choe* [1998] 1 SLR 903.

entrepreneurial effort". Chief Justice Yong Pung How rejected such an approach:[107]

> The promotion of enterprise in Singapore is important. However, it was clear from the debates on the reform to the bankruptcy regime on 25 August 1994, culminating with the passing of the new Bankruptcy Act that Parliament did not intend the promotion of enterprise to be at the expense of the need to protect the interests of creditors and society. At vol 63, col 399 of the Parliamentary Reports, the Minister for Law, Professor S Jayakumar, stated the functions of the new Act, as follows:
>
> > … to improve administration of the affairs of bankrupts and protect creditors' interests without stifling entrepreneurship. We will strike a balance between the interest of the debtor, the creditor and society.
>
> Furthermore, at col 401 of the same report, the minister stated that the Act would encourage enterprise through allowing the early discharge of bankrupts who became bankrupts due to business failure. Parliament's intention was to promote enterprise through such a mechanism, not through being more lenient towards bankrupts who broke the law while carrying on a business.

## IX. Conclusion

80 Discharge by certificate of the Official Assignee is a major reform in our personal insolvency law. It is a "uniquely Singapore" legal innovation that has undoubtedly worked well since its inception in 1995. By all accounts, discharge by certificate is also well regarded in Malaysia as an efficient bankruptcy discharge mechanism. The simplicity of the scheme, its informal procedures and the benefits of its implementation to administrators, debtors and creditors alike, have helped to entrench this novel institution in our legal system. Its success has also been largely due to the totality of legislative and administrative measures, described in this paper, that have helped to sustain it and the enthusiastic support the scheme has received from staff of the Official Assignee's office.

81 Above all, the continuous emphasis over the years by administrators, policy makers and the courts, that this is a remedy reflective of Singapore's need to balance the interests of debtors and creditors, has considerably assisted in maintaining the success of this institution.

82 Bankrupts will be more ready to work responsibly to secure their discharge and creditors more willing to accept the decisions of the

107 *PP v Choong Kian Haw* [2002] 4 SLR 776 at [783].

Official Assignee in discharging bankrupts, if both parties are satisfied that the administration of a bankruptcy estate is being done fairly and independently without their interests being compromised. That is the best guarantee that this innovation of discharge by certificate of the Official Assignee will endure.