LC Paper No. LS12/01-02

Paper for the Bills Committee on Mandatory Provident Fund Schemes (Amendment) Bill 2001

Nature of powers proposed by clauses 9, 10 and 11 of the Mandatory Provident Fund Schemes (Amendment) Bill 2001

Purpose

This paper analyses whether the powers proposed to be conferred on the Mandatory Provident Fund Schemes Authority (MPFA) by clauses 9, 10 and 11 of the Mandatory Provident Fund Schemes (Amendment) Bill 2001 are newly-created powers or whether those powers are existing powers available to MPFA by virtue of the provisions of the Interpretation and General Clauses Ordinance (Cap. 1).

Clause 9 - proposed section 20(12)

2. Section 20 of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (MPFSO) provides for matters relating to approval of trustees. Section 20(8) provides that in approving an applicant as an approved trustee, MPFA may impose such conditions with respect to the conduct of the applicant's business as it considers appropriate. Under section 20(9), on approving an applicant as an approved trustee, MPFA must issue the applicant with a certificate of approval and must specify the conditions, if any, that have been imposed on the applicant under section 20(8).

3. Clause 9 of the Bill seeks to amend section 20 of MPFSO to empower MPFA to amend existing conditions or impose new ones on an approved trustee.

Clauses 10 and 11 - proposed sections 21(8A) and (12) and 21A(8A) and (12)

4. Sections 21 and 21A of MPFSO provide for matters relating to registration of provident fund schemes as employer sponsored schemes, master trust schemes and industry schemes. Unlike section 20 of MPFSO, there is no express provision in sections 21 and 21A granting MPFA a general power to impose conditions on registering a provident fund scheme. However, such power can be said to be implied under sections 21(8) and 21A(8) of MPFSO although the power to impose conditions appears to be confined to the administration of the scheme[1].

[1] Sections 21(8) and 21A(8) of MPFSO provide that MPFA may, as a condition of registering a provident fund scheme as an employer sponsored scheme, a master trust scheme or an industry scheme, require the applicant to enter into an undertaking with respect to the administration of the scheme.

5. Proposed sections 21(8A) and 21A(8A) seek to give MPFA a power to impose, on registering MPF schemes, such conditions with respect to the administration or marketing of the schemes as it considers appropriate. Proposed sections 21(12) and 21A(12), on the other hand, empower MPFA to amend existing conditions or to impose new ones with respect to the administration or marketing of an MPF scheme after registration.

Whether the proposed powers are newly-created powers or existing powers

6. To determine whether the legal effect of clauses 9, 10 and 11 of the Bill is to confer on MPFA new powers, it is necessary to consider whether the relevant provisions in Cap. 1 are applicable to MPFSO. For the purposes of this analysis, sections 39(1), 40(1) and 46(a) of Cap. 1 are relevant.

(a) <u>Sections 39(1), 40(1) and 46(a) of Cap. 1</u>

7. Section 39(1) of Cap. 1 provides that where any Ordinance confers any power or imposes any duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires.

8. Section 40(1) of Cap. 1 provides that where any Ordinance confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

9. Under section 46(a) of Cap. 1, where any Ordinance confers any power upon any person to make, grant, issue or approve any proclamation, order, notice, declaration, instrument, notification, licence, permit, exemption, register or list, such power shall include power to amend or suspend such proclamation, order, notice, declaration, instrument, notification, licence, permit, exemption, register or list.

10. Under section 2 of Cap. 1, the provisions of Cap. 1 shall apply to Cap. 1 and to any other Ordinance in force save where the contrary intention appears either from Cap. 1 or from the context of any other Ordinance or instrument.

(b) <u>Whether section 39(1) of Cap. 1 applies to sections 20(8), 21(8) and 21A(8) of MPFSO</u>

11. Section 20(8) of MPFSO does not confer on MPFA a power to impose conditions at any time as it considers appropriate. Instead, section 20(8) specifies that the power to

impose conditions is exercisable when MPFA approves an applicant as an approved trustee. The way section 20(8) is drafted, in our view, displaces the application of section 39(1) of Cap. 1. Accordingly, once MPFA has exercised the power under section 20(8), the power is exhausted and cannot be exercised from time to time as occasion requires. In the absence of an express provision conferring on MPFA the power to impose conditions on an approved trustee after the approval is granted, it appears that there is no power under the existing MPFSO enabling MPFA to do the same.

12. As mentioned in paragraph 4 above, any power that MPFA may have with respect to imposing conditions under sections 21(8) and 21A(8) on registering a provident fund scheme can only be implied as there is no express provision under sections 21 and 21A providing for such power. In respect of this implied power, sections 21(8) and 21A(8) clearly stipulate that it is exercisable only on registering a provident fund scheme. This would suggest that the power had not been intended to be exercisable from time to time as occasion requires. From the way sections 21(8) and 21A(8) is drafted, it is submitted that a contrary intention appears making section 39(1) of Cap. 1 not applicable to the construction of the provisions concerned. Any proposal to confer powers on MPFA to amend conditions or impose new ones on an MPF scheme after its registration would have the effect of widening the scope of MPFA's powers.

(c) *Whether section 40(1) of Cap. 1 applies to sections 20, 21 and 21A of MPFSO*

13. When applying section 40(1) to sections 20, 21 and 21A of MPFSO, it can be said that as those provisions have conferred on MPFA the powers to approve trustees and to register provident fund schemes, MPFA also has, by virtue of section 40(1) of Cap. 1, all those powers that are reasonably necessary to enable MPFA to perform these functions. The question is the scope of these reasonably necessary powers. In our view, to enable MPFA to register provident fund schemes, it may be reasonably necessary for MPFA to have the power to impose conditions as it considers appropriate on registering schemes. Accordingly, proposed sections 21(8A) and 21A(8A), which provide for the power of MPFA to impose conditions on registering provident fund schemes, would serve the purpose of making explicit an existing power of MPFA. However, the powers conferred by virtue of section 40(1) of Cap. 1 should be exercisable only in respect of the acts which MPFA is empowered to do under sections 20, 21 and 21A of MPFSO. This would mean that section 40(1) of Cap. 1 would not be applicable after the approval of trustees and registration of provident fund schemes.

(d) *Whether section 46(a) of Cap. 1 applies to sections 20, 21 and 21A of MPFSO*

14. Although section 46(a) of Cap. 1 provides for a power to amend, such power appears to be confined to "proclamation, order, notice, declaration, instrument, notification, licence, permit, exemption, register or list" as stipulated in the provision. When a statutory provision might have covered a number of matters but in fact mentions only some of them, unless these are mentioned by way of examples, it is likely that the *expressio unius* principle[2] would apply to construe the provision. Section 46(a) of Cap. 1 makes express mention of certain types of documents and from the way it is drafted, those types of documents do not appear to be mentioned by way of examples. The application of the *expressio unius* principle to construe section 46(a) of Cap. 1 would mean that other documents which are not mentioned in the section are presumed to be excluded by implication. Accordingly, the power to amend provided by section 46(a) is exercisable only in respect of the documents designated in that section.

15. The above construction of section 46(a) of Cap. 1 would lead us to the view that MPFA does not have any power, by virtue of the said section, to amend under MPFSO any documents which do not carry the designations of documents as expressly mentioned in section 46(a). Any power of MPFA to amend the approval of trustees and the conditions to which the approval is subject should be provided expressly in MPFSO and would appear to be a new power. Likewise, unless the courts are prepared to give a liberal interpretation to section 46(a) of Cap. 1, MPFA would not have power under MPFSO to amend the approval of registration of MPF schemes in the absence of an express provision.

Conclusion

16. Based on the above analysis, we come to the view that clauses 9, 10 and 11 of the Bill, insofar as they propose to confer on MPFA the power to amend existing conditions or impose new ones on an approved trustee and on a registered MPF scheme, would likely have the effect of widening the scope of MPFA's powers. The proposed power of MPFA to impose conditions on registering a provident fund scheme, however, can be regarded as an existing power which MPFA possesses by virtue of section 40(1) of Cap. 1.

Prepared by
Legal Service Division
Legislative Council Secretariat
5 November 2001

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[2] The *expressio unius* principle is a principle of statutory interpretation and operates to exclude by implication matters not expressly mentioned in a statutory provision.