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Central
Hong Kong

By Fax (2544 3271) & By Post

28 March 2002

Dear Mrs Chan,

Employees Compensation Assistance (Amendment) Bill 2002

I am in the course of scrutinizing the drafting and procedural aspects of the above Bill and would be pleased for your clarification on the following questions:-

Clause 3 - Amendments to section 2 (definition section")

(1) *"eligible person"*

Is it the intention of the Administration that surviving children mentioned in paragraph (a)(ii)(B) (i.e. of an injured employee who died after damages have been awarded) who are 20 years of age or under are covered?

(2) *"spouse"*

The proposed definition of "spouse" in section 2 does not include a person who, at the time of the death of the employee, has ceased to be the employee's spouse. Is the former spouse of an employee in a fatal accident who may have a valid dependency claim under the Fatal Accidents Ordinance (Cap.22) ("FAO") not regarded as eligible person for relief payment under the Bill?

(3) *Other claimants*

It seems that dependants who have a FAO claim for the death of an employee who died in the course of employment do not necessarily fall within the definition of "eligible person" for relief payment, e.g. a young nephew who used to financially depend on the deceased employee for support. Does the Bill seek to exclude these people from relief payment?

Clauses 6 & 12 - Amendment to section 16 & new section 20A

(4) Under the existing section 16(3), a person is not to be regarded as being unable to recover from an employer payment of an amount for which an employer is liable unless he has taken proceedings to recover from the employer or his insurer. In the proposed section 16(3)(a), a person is not to be regarded as being unable to recover from an employer payment of compensation for which the employer is liable unless he has take proceedings to recover "from, wherever applicable- (i) the employer, (ii) the principal contractor ...; and (iii) an insurer...". Is it intended that in each and every case, an injured or deceased employee must have issued proceedings against both the employer/principal contractor and the insurer before he may apply for payment from the Fund for unpaid compensation? The same question applies to proposed section 20A(3)(a) regarding application for relief payment for unpaid damages.

Clauses 7, 8 & 9 - Application by employers for payment from the Fund

(5) Please explain the rationale for imposing a time limitation for applications under proposed sections 17 and 18 in proposed section 18A.

(6) Why different treatments are given to employers applying for payment from the Fund and those applying for payment from the Fund to third parties?

Clause 12 - Apportionment of Relief Payment

(7) New section 20F deals with apportionment of relief payment amongst eligible persons. In law, claims for damages in respect of the death of a deceased employee may arise from the Law Amendment and Reform (Consolidation) Ordinance (Cap.23) ("LARCO") and the FAO. The former is a claim on behalf of the estate of the deceased and the latter is the dependants' claim for loss of dependency. In such cases, the plaintiffs may or may not necessarily be the eligible persons under the Bill. Please explain, if possible, with illustrations and examples how this new provision

works with the existing law of fatal accident claims.

Clause 13 - Applications

(8) Who is "the employer's representative" in proposed section 21(4)(a) and section 25B(7)(a)?

Clause 17 - Board may apply to be joined as party to proceedings

(9) New section 25A(1)(a) proposes that the Board may, in certain situations, apply to take over the defence of an employee's claim for compensation or damages where no policy of insurance is known to be in force at the time of accident. Are the situations set out in new section 25A(1)(a) to be construed conjunctively or disjunctively?

(10) Subsections (b) and (c) of new section 25A(1) propose to enable the Board to apply to the court to join as a third party under Order 15 Rule 6 of the High Court Rules (Cap. 4 sub. leg.). At present, third party proceedings are governed by Order 16 of the High Court Rules. It is generally understood that a third party in a proceedings is the one who is ultimately, according to the defendant's case, in whole or in part responsible for the loss and damage of the plaintiff. Please explain how the proposals in new section 25A (1)(b) and (c) operate within the existing system of civil procedure in relation to joinder of parties and third party proceedings.

(11) New section 25B(3) requires a person "who proposes to obtain judgment or reach settlement with the other party" to serve a notice in writing to inform the Board of such arrangement. What do the phrases "proposes to obtain judgment" and "proposes to reach settlement" exactly mean in this provision? What stage of the legal proceedings and negotiation for settlement is referred to?

(12) New section 25B(5) provides that a claimant who fails to serve a notice of proceedings under subsection (1) or to serve a notice to inform the Board that he proposes to obtain judgement or reach settlement under subsection (3) shall not be entitled to any payment under the Ordinance. Does the Administration consider it desirable to put in a procedure whereby the Board retains a discretion to allow a claimant to apply for payment from the Fund if the Board is satisfied that claimant can justify such failure?

Clause 23 - Surcharge

(13) New section 36A(6) provides that an applicant dissatisfied with a demand notice or a final notice in respect of surcharge may commence proceedings in a court against the Board. Which court does it refer to?

I would appreciate your reply to the above questions in Chinese and English at your earliest convenience.

Yours sincerely,

(Kitty CHENG)
Assistant Legal Adviser

cc: LA
CAS(2)1