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Report of the Bills Committee on Employees Compensation Assistance (Amendment) Bill 2002

Purpose

This paper reports on the deliberations of the Bills Committee on Employees Compensation Assistance (Amendment) Bill 2002.

Background

2. The Employees Compensation Assistance Scheme (the Scheme) was set up under the Employees Compensation Assistance Ordinance (the Ordinance) in July 1991 to provide payments to employees injured in the course of employment who are unable to receive compensation after exhausting all other legal means of recovery. The Scheme is administered by the Employees Compensation Assistance Fund Board (the Board) which holds the Fund on trust. The Fund is financed by a levy on the premium of employees' compensation insurance.

3. In recent years, the amount of assistance paid by the Board has substantially increased. On the other hand, there has been a decline in the levy income due to the completion of major infrastructure projects and keen competition in the insurance industry. The Employees Compensation Assistance Fund (the Fund) has incurred an annual operating deficit since 1996-97. The situation was worsened by the provisional liquidation of the HIH Group of insurance companies in April 2001 which was triggered off by the insolvency of their parent company in Australia. As a result, the financial stability of the Fund has suffered. According to the Administration, the Fund will probably be depleted by mid 2002.

4. The Administration has formulated a rescue package for the Scheme which includes the proposed amendments in the Bill.

The Bill

5. The Bill seeks to amend the Ordinance with a view to improving the financial stability and viability of the Fund. The Bill also seeks to amend the Employees' Compensation Insurance Levies Ordinance (Cap. 411) and the Employees' Compensation Insurance Levy (Rate of Levy) Order (Cap.411 sub. Leg.) to increase the rate of levy on the premium of employees' compensation insurance from 5.3% to 6.3% from 1 July 2002, and to adjust the distribution of such levy income amongst the Board, the Occupational Safety and Health Council and the Occupational Deafness Compensation Board.

The Bills Committee

6. At the House Committee meeting on 1 March 2002, Members agreed that a Bills Committee be formed to study the Bill. The membership list of the Bills Committee is in **Appendix I**.

7. Under the chairmanship of Hon Audrey EU Yuet-mee, the Bills Committee has held 10 meetings with the Administration. The Bills Committee has met with representatives from the Board, the General Insurance Council (GIC) of The Hong Kong Federation of Insurers, the Employers' Federation of Hong Kong and The Hong Construction Association Ltd. (HKCA).

Deliberations of the Bills Committee

Regulation of insurance companies underwriting employees' compensation insurance

8. Members have noted that the financial stability of the Fund has suffered from the provisional liquidation of the three local subsidiaries of the HIH Group which was triggered off by the insolvency of their parent company in Australia. Members have expressed concern about the regulation of insurance companies underwriting employees' compensation insurance in Hong Kong, and how the existing regulatory regime applies to insurance companies with parent companies in overseas countries.

9. The Administration has responded that the Insurance Companies Ordinance (Cap. 41) (ICO) stipulates that the principal function of the Insurance Authority is to regulate and supervise the insurance industry for the promotion of the general stability of the insurance industry in Hong Kong, and for the protection of existing and potential policy holders. To this end, the Office of the Commissioner of Insurance (OCI) has put in place an effective system which is in line with international standards for regulating and supervising insurers authorised in Hong Kong.

10. The Administration has explained that under the ICO, all insurers carrying on general insurance including employees' compensation business in Hong Kong are subject to the same regulatory requirements regardless of whether such insurers are stand alone companies or subsidiaries of parent companies overseas. The requirements, set out in the ICO, include those on minimum paid-up capital, solvency margin, fit and proper management, adequacy of reinsurance arrangements and annual reporting of financial information. On the basis of the periodic returns submitted by insurers, the Insurance Authority assesses, on a regular basis, whether or not they comply with these requirements. On-site inspections and interviews are also conducted. Where there is any cause of concern, more frequent assessments would be conducted and if the situation warrants, the Insurance Authority would invoke the power of intervention provided for in the ICO. Such powers include restricting an insurer to take on new businesses and maintaining assets in Hong Kong.

11. The Administration has further explained that to ensure a prudent spread of assets, the Insurance Companies (General Business) (Valuation) Regulation places a limit on the amount of debts due from all companies, including parent companies, to 10% of the value of an insurer's total assets. This limitation currently does not apply to insurance debts, e.g. reinsurance recoverable from parent companies. While such practice is in line with that in many other places, such as the United Kingdom, Singapore and Malaysia, OCI considers that there is room for further enhancement in the light of the experience in HIH incident.

12. The Administration has also informed members that at present, in line with the practice recommended by the International Association of Insurance Supervisors, where an insurer reinsures substantially with its parent company, OCI will communicate with its home regulator and examines the parent company's audited accounts and the reports prepared by credit agencies to ascertain the financial position of the parent company. To further enhance the system, OCI is considering to set an admissibility limit to the amount of reinsurance recoverable from the parent company. This means that this type of assets, if exceeding the limit, would be disallowed in assessing the solvency position of the insurer. The insurance industry would be consulted once the proposal is finalised.

Proposed Employees Compensation Insurer Insolvency Scheme

13. The Administration has informed members that as illustrated by the experience of the insolvency of the HIH Group, insurer insolvency would create a sudden and substantial strain on the resources of the Fund. To avoid creating such a sudden strain, and thus exerting inordinate pressure on the financial stability of the Fund, the Administration considers it appropriate that protection against insurer insolvency should be excluded from the scope of the Scheme and dealt with separately. The Administration therefore proposes that a separate employees compensation insurer insolvency scheme (the proposed insolvency scheme) be set up to deal with any future insolvency of insurers underwriting employees' compensation business.

14. Regarding the operation of the proposed insolvency scheme, the Administration has advised that an employees' compensation insurers bureau would be established to administer the proposed insolvency scheme. The proposed insolvency scheme would be financed by a levy on employees' compensation insurers, and only cover employees' compensation insurance claims arising from the insolvency of insurers. The Administration is consulting the GIC on the proposed scheme.

15. At the Bills Committee meeting on 23 April and in its relevant submissions, the GIC has expressed objection to the proposal to excise the insolvency element from the Scheme. The GIC is concerned about the adequacy of the start up fund under the proposed insolvency scheme, and has cast doubt over the protection rendered to policyholders (i.e. employers) and employees during the start up period of the proposed insolvency scheme. The GIC is also concerned about the different standards of claims assessment arising from two separate schemes, difficulty in assessing the adequacy of the levy and additional administrative costs. It also rejects the suggestion that insurers should contribute to the proposed insolvency scheme.

16. The Administration has responded that the HIH incident demonstrated that placing employees' compensation insurer insolvency together with ordinary employees' compensation claims would create an unstable cash flow effect on the Fund. Segregating the two elements would solve such cash flow problems. The Administration has also pointed out that insolvency of employees' compensation insurers has been uncommon, and the HIH Group is the only incident in which there were employees' compensation insurers in Hong Kong becoming insolvent in the past 10 years. As such, the Administration believes that there would be adequate time for the proposed insolvency scheme to accumulate funds to render adequate protection for policyholders and employees.

17. The Administration has further advised that in the very unlikely event of depletion of funds under the proposed insolvency scheme during the start-up stage, other options could be explored, e.g. seeking bridging loans from banks. The Administration also considers that any suggestion for the Government to use public money to fund the proposed insolvency scheme or play the role of "the lender of the last resort" will have financial implications and will need to be justified.

18. Regarding the insurance industry's concern about the standards in claims assessment, the Administration has advised that the matter would be dealt with when the details of the proposed insolvency scheme are drawn up. The Administration will continue to discuss with the insurance industry matters relating to the proposed insolvency scheme, such as the administration of the fund and level of levy, with a view to establishing the proposed insolvency scheme as soon as possible.

19. In response to members' question, the Administration has confirmed that the provisions in the Bill to repeal those sections of the Ordinance relating to insurer insolvency will not come into effect unless and until the proposed insolvency scheme is in place.

Application by employers for payment from the Fund

20. Section 17 of the Ordinance provides for an employer, who has made compensation payment or damages for which he would be liable, to apply for payment from the Fund in the case of insolvency of his insurer. Section 18 provides for an employer to apply for payment from the Fund to the person entitled to receive the compensation or damages for which he would be liable. The proposed section 18A(1) requires an employer to make an application to the Board for payment under section 17 or 18 within 180 days after the date on which he is entitled to make such application.

21. Members have sought clarification concerning the date on which an employer makes an application to the Board. The Administration has clarified that an employer would be entitled to make an application for payment from the Fund under section 17 or 18 not later than 180 days after -

- (a) the date on which the court has made a judgment or the Commissioner for Labour has issued the certificate of assessment in respect of the employment-related injury; and
- (b) the date on which the Board has issued a notice of insurer insolvency in accordance with section 20,

whichever is the later.

22. Members have questioned the rationale for imposing a time limit for such applications. Some members have expressed reservations about the limitation of 180 days. These members consider that employers should not be deprived of the right to seek remedy from the Fund. Some members have asked whether the Board could be given discretion concerning the date on which an employer to make an application.

23. The Administration has explained that the imposition of such limitation is to enable the Board to exercise the right transferred to and vested in it under section 37 as early as possible so as to protect the interests of the Board. Moreover, the earlier the employer makes the application, the easier it is for the Board to verify the eligibility of the employer, such as to get in touch with the employee concerned to confirm receipt of payment from the employer.

24. The Administration has also informed members the issue of the discretion by the Board concerning the date on which an employer makes an application has been considered in drafting the Bill. It is considered that the employers, in the event of insurer insolvency, should have an interest to apply for assistance as soon as possible after making payment to the injured employee. In the view of the Administration, the 180 days limit is reasonable. Moreover, the Administration will take steps to notify the affected employers in the event of insurer insolvency so that they would be aware of the time frame for making applications.

Protection to principal contractors

25. The Administration proposes to amend sections 17 and 18 of the Ordinance to make it clear that a principal contractor who has taken out a policy of insurance in accordance with section 40(1B) of the ECO shall also be eligible to make application for assistance from the Board. The HKCA has raised concern that these proposed sections will not have retrospective effect to enable principal contractors in the case of HIH insolvency to apply for assistance.

26. The Administration has explained that upon the operation of the proposed sections 17(2) and 18(2), principal contractors who fulfil the requirements of the Ordinance shall be eligible to make an application under the relevant provisions of the Ordinance. For the avoidance of doubt, the Administration has agreed to move an amendment to the Bill to make it clear that the amendments to sections 17 and 18 in relation to principal contractors shall be applicable to all applications under these sections irrespective of whether a notice of insurer insolvency is issued by the Board before, on or after the commencement of the Bill.

Penalty against uninsured employers under the Employees' Compensation Ordinance

27. Under the Employees' Compensation Ordinance (Cap. 282) (ECO), an employer who fails to comply with the compulsory insurance requirement shall, upon summary conviction, be liable to a fine at level 6, i.e. \$100,000, and to imprisonment for one year on summary conviction or two years on indictment. Some members have expressed concern whether the level of fine has sufficient deterrent effect.

28. The Administration has explained that the present maximum level of fine, which is pitched at the highest level of fine prescribed for offences under the ECO, was introduced in August 2000. According to legal advice when setting the level of maximum fine in 2000, the level of penalty was appropriate and commensurate with the seriousness of the offence concerned. As the new maximum level has been in place for less than two years, the Administration will monitor the sentences passed down by the court, and review the levels of penalty for different offences under the ECO from time to time.

Surcharge to be imposed on uninsured employers

29. Under the Bill, an employer who fails to comply with the compulsory insurance requirement under the ECO will be liable to pay a surcharge to the Board. The Bill also provides that the surcharge will be set at three times the levy payable on the premium paid on the employees' compensation insurance policy taken after the offence has been detected. For employers who no longer employ any employee, the surcharge is proposed to be a fix sum of \$5,000. For employers who fail to provide sufficient information within the specified period to the Board for determining the amount of surcharge, the prescribed surcharge will be \$10,000.

30. Some members have expressed concern whether the level of surcharge would have sufficient deterrent effect, and have questioned the basis for fixing the level of surcharge at three times the levy payable on the premium paid. These members have requested the Administration to consider increasing the level of surcharge. They have also suggested that for those employers who are convicted for a second time for failing to take out an employees' compensation insurance policy within a certain period, they should be required to pay a surcharge at a higher level when the second offence is detected.

31. The Administration has explained that according to legal advice, in determining the level of surcharge to be imposed on uninsured employers, the principle of "proportionality" should be adhered to. One of the policy intents of imposing the surcharge on uninsured employers is to require them to make up the foregone levy that the Board should have been entitled to receive if the employer had taken out the insurance. However, as the offending employer has not taken out any insurance policy at the time of offence, it is impossible to assess the amount of forgone levy objectively. Having taken into account the principle of "proportionality", the Administration proposes to set the level of surcharge with reference to the levy payable by the offending employer to the Board when he takes out an employees' compensation insurance after the offence has been detected. As such, the level of surcharge should, to a certain extent, correlate with the foregone levy that the offending employer might have been required to pay to the Board.

32. The Administration has advised that after the coming into operation of the Bill, the levy rate will be increased to 3.1% for the Board for the next five years. Therefore, the proposed level of surcharge will be roughly equivalent to 10% of the premium on the employees' compensation insurance.

33. Regarding some members' suggestion to increase the level of surcharge, the Administration has, at the request of the Bills Committee, consulted the Labour Advisory Board (LAB). The Administration has informed members that the majority of LAB members consider the proposed level appropriate. The Administration therefore has no plan to increase the level of surcharge at this stage. The Administration would keep the position under review and consider revising the level when the circumstances warrant.

34. The Administration has taken on board members' suggestion to impose a higher surcharge against those employers who are convicted for a second time for failing to take out an employees' compensation insurance policy within certain period. Having taken the views of the LAB, the Administration proposes to require those employers, who are convicted again for failure to comply with the compulsory insurance requirement within two years as from the last contravention of the compulsory insurance provisions, to pay a surcharge at six times the levy payable to the Board when the second offence is detected. The relevant amendments will be introduced by the Administration.

35. Hon LEE Cheuk-yan has proposed that the level of surcharge be increased from three times to 10 times the levy payable on the premium paid on the employees' compensation insurance policy taken after the offence has been detected. The majority of members do not support the proposal.

Relief payment

Amount of relief payment

36. The Scheme currently covers liabilities relating to common law damages in respect of employment-related injuries. For injured employees who are unable to recover common law damages after exhausting all other legal means of recovery, the Administration proposes that a relief payment be payable under the Scheme in lieu of common law damages. Under the Bill, the relief payment shall not exceed the aggregate sum of damages as awarded by the court and shall not cover any costs arising from proceedings in respect of damages. Where the amount does not exceed \$1.5 million, the relief payment shall be paid in full in a lump sum. If it exceeds \$1.5 million, a first payment of \$1.5 million shall be paid and then followed by monthly payments at the rate of the monthly earnings of the injured employee at the time of the accident or a prescribed monthly amount currently set at \$10,000, whichever is the higher. The Administration has informed members that the proposals are put forward on the basis of a consensus of the LAB.

First payment

37. Members have enquired about the basis for setting the first payment at \$1.5 million. Some members have suggested that the first payment be increased from \$1.5 million to \$2 million.

38. The Administration has explained that the amount of common law damages awarded by the court could be quite substantial, thus bringing about uncertainty to the financial exposure of the Scheme. To reduce the financial volatility brought about by common law awards, and to resolve the financial predicament faced by the Fund without substantially increasing the levy rate payable by employers, it is considered that the scope of the protection under the Scheme should be redefined. The Administration considers that the Scheme should no longer assume the liabilities of employers in paying common law damages due to employers' negligence or breach of duty. To provide assistance to injured employees, the Administration proposes that assistance in the form of relief payment, which is ex-gratia in nature, should be paid to injured employees or their family members who have been awarded damages by the court.

39. The Administration has further explained that in setting the first payment, the limit of \$1.5 million is arrived at after taking into consideration the distribution of the amount of assistance in respect of common law damages assisted by the Board since its inception. Amongst the cases assisted by the Board, about 75% received not more than \$1.5 million, and the average amount of damages assisted is \$1.4 million per case.

It is therefore considered reasonable and appropriate to set the first payment at \$1.5 million.

40. The Administration has also pointed out that the highest amount of compensation payable under the ECO together with the amount of the first payment may reach a maximum of more than \$4 million. Under the proposed limit of the first payment, the majority of the injured employees receiving assistance from the Scheme would be able to receive the full entitlement of the relief payment within a reasonable period of time.

41. Regarding the suggestion to increase the first payment from \$1.5 million to \$2 million, the Administration has provided members with an assessment of the financial implications on the Fund. According to the Administration, the additional payments arising from the proposed increase will have an accumulated effect of draining the resources of the Scheme over the years, coupled with the need to repay the government loan in 10 years starting from 2006-07, the reserve of the Fund will drop to a risky low level at the end of the repayment period.

42. The Administration does not support the suggestion of raising the level of first payment on the following grounds -

- (a) The proposed level of first payment at \$1.5 million is set on the basis of the consensus view of the LAB after prolonged discussions. This level strikes a balance between the interests of employers and injured employees by according reasonable protection to the latter who have been awarded common law damages by the court, while ensuring the long term financial viability of the Fund; and
- (b) The proposed increase of first payment would have adverse impact on the cash flow of the Fund.

Monthly payments to seriously injured employees who require long term care

43. Some members have expressed concern that the amount of monthly payment of the relief payment may not be sufficient to meet the needs of those employees who have been seriously injured and require long term care and attention by other persons. These members have suggested that further assistance should be provided to these employees, e.g. by increasing the amount of monthly payment.

44. Having considered members' views, the Administration has consulted the LAB on the provision of further assistance to those seriously injured employees who require long term care and attention. The Administration has informed members that there is no majority view among the LAB members on the issue. Some LAB members are of the view that in reaching a consensus on the proposal concerning the relief payment, consideration has already been given to the assistance to seriously injured employees for care and attention. Whereas the monthly payments provide on-going financial assistance to the injured employee and his/her family members, the first payment of

\$1.5 million should provide some cover if the injured employee needs the care and attention by another person.

45. The Administration has stated that it does not support any proposal which has not been agreed by the LAB. The Administration has also pointed out that under section 8(1) of the ECO, where an injured employee suffers from permanent incapacity and is unable to perform the essential actions of life without the attention of another person, the employer shall be liable to pay the compensation for attention. The maximum amount of such compensation shall be \$412,000. In the view of the Administration, the compensation for attention under the ECO together with the first payment of the relief payment should be able to meet the needs of seriously injured employee for care and attention to a certain extent.

46. Some members remain of the view that further assistance should be provided to seriously injured employees who require long term care and attention by other persons. Hon LEE Cheuk-yan proposes that the prescribed monthly amount for seriously injured employees who require long term care and attention should be increased from \$10,000 to \$30,000. These employees should fall within the meaning of injured employees requiring attention of other persons as in section 8(1) of the ECO, i.e. injured employees who suffer from permanent incapacity and are unable to perform the essential actions of life without the care of another person. At the last meeting of the Bills Committee on 7 June 2002, Hon LEE Cheuk-yan proposed that amendments should be moved by the Bills Committee to this effect. As there were divided views among members, a vote was taken on whether the Bills Committee should move the amendments. The Bills Committee decided by a majority vote that the Bills Committee should move the amendments.

47. The Administration has subsequently informed members that the LAB has revisited the issue and reached a consensus to provide an enhanced monthly payment to seriously injured employees who require long term care and attention. On the basis of LAB's consensus, the Administration proposes that an enhanced amount of monthly payment at \$10,000 shall be payable to an injured employee who has, as a result of the injury, suffered from total paralysis (quadriplegia) or paraplegia and is unable to perform the essential actions of life without the care and attention of another person. It is considered that the proposed level of payment would be sufficient to cover expenses incurred for the care and attention of the injured employee by either hiring a live-in helper or admission to residential care homes for physically disabled persons. According to information collected from private residential care homes, the monthly charge for residential care would be around \$7,000. The enhanced amount of \$10,000 would also be able to cover reasonable expenses relating to medical care and consumables, such as diapers, required by the injured employee. This enhanced payment should be set off from the aggregate amount of the relief payment payable to the injured employee, but will not affect the payment of the monthly payment referred to in paragraph 36 above.

48. The Administration also proposes that this enhanced payment should be made to the injured employee until the balance of the relief payment has been fully paid or

the death of the injured employee, whichever is the earlier. As this payment is intended to defray the costs for the care and attention of the injured employee, it would not be payable to the spouse, children under the age of 21 or surviving parents of the injured employee after the death of the employee. The relevant amendments will be made by the Administration.

49. The Administration has assessed that the additional payouts arising from the proposal can be absorbed within the available resources of the Board without the need of further increasing the levy rate.

50. The majority of members express support for the Administration's proposal. The Bills Committee has decided not to pursue the amendments referred to in paragraph 46 above.

Eligible persons for relief payment in non-fatal injury

51. The Bill provides that an eligible person who is unable to recover from any employer payment of damages for which the employer is liable may apply to the Board for a relief payment. The Bill also provides that in a non-fatal employment-related injury, the relief payment shall be payable to the injured employee. If the injured employee dies before the amount of the relief payment has been exhausted, his/her surviving spouse or cohabitee, and any surviving child who is under the age of 21 at the time of the death of the injured employee will be eligible for the relief payment. Where the injured employee is not survived by a spouse or cohabitee, any child under the age of 21, then his/her surviving parents will be eligible for the relief payment.

52. Members have sought clarification whether the spouse/cohabitee, children under the age of 21 and parents of an injured employee in a non-fatal accident would be entitled to relief payment if the injured employee dies, for a cause not related to the work accident, before the damages are awarded by the court.

53. The Administration has explained that in formulating the proposal on relief payment, the LAB has recognised that assistance should continue to be made to the immediate family members of an injured employee even after his/her death irrespective of the cause of the death. The Administration will introduce an amendment to clarify that the persons eligible for the relief payment should still be able to receive relief repayment if the injured employee dies before the court passes down the award. Consequential amendments will also be made to allow these eligible persons to apply to the Board for payment.

54. Some members consider that dependant brothers and sisters should be eligible for relief payment if the deceased employee does not leave any surviving spouse/cohabitee, child and parents. Some members, however, do not consider that the scope of persons eligible for relief payment, if the injured employee dies before the relief payment has been exhausted, should be expanded.

55. The Administration considers the present proposal, which aims to provide assistance to the injured employees and his/her immediate family members, is reasonable. The Administration has explained that in a survey of 85 fatal personal accidents conducted in 2001, it was found that in none of the cases, the deceased persons were survived by brothers or sisters only without leaving any spouse/cohabitee, child or parent. Therefore, the Administration does not support any proposal to expand the scope of eligible persons to cover brothers or sisters of deceased employee for entitlement to relief payment in cases of non-fatal injury.

56. Some members remain of the view that dependant brothers and sisters of the deceased employee under the age of 21 should be eligible for relief payment if the deceased employee does not leave any surviving spouse/cohabitee, child and parent. At the last meeting of the Bills Committee on 7 June 2002, Hon LEE Cheuk-yan, on behalf of Hon LEUNG Yiu-chung, proposed that an amendment be moved by the Bills Committee to this effect. As there were divided views among members, a vote was taken on whether the Bills Committee should move the amendment. The result of the vote was that Hon LEE Cheuk-yan, Hon Andrew CHENG Kar-foo and Hon LI Fung-ying voted in favour of the Bills Committee moving an amendment to the effect that dependant brothers and sisters under the age of 21 should be eligible to relief payment if the deceased employee does not leave any surviving spouse/cohabitee, child and parent, Hon Kenneth TING voted against, and Hon TAM Yiu-chung and Hon LEUNG Fu-wah abstained from voting. The Chairman of the Bills Committee will, on behalf of the Bills Committee, move the amendment. Although it has not been raised in the Bills Committee, if surviving brothers or sisters are to be included as eligible persons, they should not be treated in any way better than surviving children. In line with this principle, the Chairman has decided that the amendment should also include a provision to the effect that these dependant brothers and sisters shall cease to be entitled to a relief payment when they attain the age of 21.

Eligible persons for relief payment in fatal employment-related injury

57. Under the Bill, in a fatal employment-related injury, the relief payment shall be payable to those eligible family members of the deceased employee, i.e. eligible persons, who have been awarded damages by the court but are unable to receive payment of the damages from the employer. Such family members include person who has any of the following relationship with the deceased employee, whether by blood or an adoption before the date on which the accident occurred -

- (a) a spouse or cohabitee;
- (b) a child;
- (c) a parent or grandparent;
- (d) a grandson, granddaughter, stepfather, stepmother, stepson, stepdaughter, son-in-law, daughter-in-law; brother, sister, half-brother, half-sister, father-in-law, mother-in-law, brother-in-law, sister-in-law, and child of a

brother or sister of the whole blood.

58. Members note that as a matter of law, any claim for loss of dependency as a result of an employment-related injury must be brought under the Fatal Accident Ordinance (FAO). This means that any person who can sue as a dependant of a deceased employee must fall within the definition of "dependants" under the FAO. Members have questioned why the definition of "dependants" is not adopted for "eligible persons" in respect of entitlement to relief payment in fatal injury under the Bill.

59. The Administration has responded that it is the consensus of the LAB that the relief payment in fatal injury should only be payable to the immediate family members, i.e. the spouse and children under the age of 21 of a deceased employee and who have obtained an award of damages from the court. The scope of "eligible persons" in the Bill is the same as that of "family members" under the ECO, to whom the compensation for death is payable. The LAB has not raised objection to the Administration's proposal to adopt the definition of "family members" in the ECO for "eligible persons" in the Bill.

60. The Administration has pointed out the definition of "dependants" under the FAO also include persons who are outside the scope of family members under the ECO. These persons include former spouse of the deceased employee, any ascendant (other than the parents or grandparents) of the deceased employee, any descendant (other than the children and grandchildren) of the deceased employee, any godchildren and godparent of the deceased employee according to the Chinese custom. There is no agreement in the LAB that the persons who are eligible for relief payment in fatal injury should be any of the aforesaid persons.

61. The Administration has also pointed out that relief payment is ex-gratia in nature and the Fund does not replace the employer in respect of the latter's liabilities to the deceased employee and his dependants. In the view of the Administration, the proposed definition of "eligible person" for entitlement to relief payment in fatal injury is appropriate.

Apportionment of relief payment

62. Under the Bill, in the case of non-fatal injury, where two or more persons are entitled to received the relief payment after the death of the injured employee, the payment shall be apportioned to them on equal shares.

63. For a fatal injury, the Bill provides that where two or more family members are entitled to the relief payment, the amount shall be apportioned in the following manner -

- (a) on a pro-rata basis in accordance with the respect of damages awarded to the eligible persons by the court; or

- (b) on an equal share basis if the court has not made an order on how the amount of damages should be apportioned among the eligible persons.

64. Members have asked how the relief payment will be re-apportioned if one of the eligible persons has died.

65. The Administration has pointed out that as provided in the proposed section 20(F)(1)(b), if an eligible person has died, the relief payment shall be re-apportioned to the remaining persons in proportion to the outstanding amount of relief payment respectively due to them.

66. The Administration has explained that in the case where the death of an eligible person comes to the notice of the Board, say several months later, the Board shall re-apportion the monthly payment in proportion to the outstanding sum of relief payment respectively due to the remaining eligible persons at the time of the death of the eligible person. The adjusted ratio resulting from the re-apportionment shall be adopted by the Board in calculating the amount of monthly payment due to each of remaining eligible person since the death of that eligible person.

67. Regarding members' question as to how relief payment will be apportioned in the case where the deceased employee has made a will, the Administration has explained that it is the policy intent that the relief payment shall not be regarded as part of the estate of the deceased employee. As provided in the proposed section 35(2), the rights of any persons to the relief payment will not survive after his/her death and should not be regarded as part of his/her estate. The payment of relief payment will follow the provisions in the Bill and not subject to the arrangements that might be provided for in the will of the deceased employee.

Payment of relief payment for damages awarded to the estate of the deceased employee in fatal injury

68. Members note that for fatal cases, some items of damages, such as the pre-trial and post-trial accumulation of wealth, are awarded to the estate of the deceased employee. Some members have suggested that if an estate administrator is also the eligible person, these items of damages awarded to the estate of the deceased employee should be taken into account in determining the amount of relief payment to the eligible person.

69. The Administration has explained that as these items of damages are not awarded to the eligible person as defined under the Bill, the relevant amounts cannot be taken into account when determining the amount of relief payment to the eligible persons. The proposal to make relief payment in relation to the damages awarded to the estate of the deceased employee will go against the principle that the relief payment should be made for the benefit of the immediate family members of the deceased employee.

70. The Administration has pointed out that damages awarded to the estate of the deceased have to be dealt with in accordance with the probate procedures, which are totally different from those for the award of damages to those who are aggrieved by the death of the employee concerned. The estate administrator of the deceased employee, in receiving such damages, has the duty to clear the debts of the deceased and then distribute any remaining sum to those people who are entitled to have a share pursuant to the will or relevant legislation. It would not be fair to require the Board, which is financed by employers for the protection of injured employees and their family members, to make payment to some parties which are the beneficiaries of the estate of the deceased employee. Such beneficiaries might include debts of the deceased, the Government if the deceased has owed any money to the Government as well as charitable bodies if the deceased has made donation in his/her will.

71. The Administration has also pointed out that the maintenance of the family members of the deceased employee should not be affected even though the damages awarded to the estate of the deceased employee is not counted as part of the relief payment. In determining the amount of damages awarded to the family members of the deceased employee, which would be counted as relief payment, the court should have fully assessed the loss and needs of these persons. Therefore, it is reasonable and appropriate not to provide relief payment in relation to the amount of damages awarded to the estate of the deceased employee.

Attaching the relief payment payable to an injured employee for maintenance payment

72. Members have enquired whether a maintenance payee can apply to the court for attaching the relief payment payable to an injured employee for the purpose of effecting maintenance payment in the case of non-fatal injury.

73. The Administration has advised that a maintenance payee may apply to the court for an order to attach the relief payment or a part thereof for his/her maintenance payment in the case where the maintenance payee fails to receive maintenance payment pursuant to the maintenance order from the maintenance payer who is an injured employee receiving relief payment from the Board. If the court is satisfied that the injured employee defaults in maintenance payment without reasonable excuse and the relief payment which the employee is receiving from the Board is considered as income capable of being attached, the court may make an attachment of income order requiring the Board to deduct an amount from the relief payment and pay that amount to the maintenance payee direct.

Application for assistance in relation to statutory compensation where the injured employee dies before the compensation is determined

74. Members have asked which party shall be eligible to apply for assistance in relation to statutory compensation where an injured employee in a non-fatal injury dies before the compensation is determined.

75. The Administration has explained that the proposed section 16(1) provides that a person who is unable to recover from an employer an amount of compensation may apply for payment of that amount from the Fund. For a non-fatal injury, the injured employee himself will be the person eligible for making application for assistance from the fund since he will be the one to whom the employer is liable to pay the statutory compensation. However, if such an injured employee dies before the statutory compensation is determined either by the court or the Commissioner for Labour, the personal representative of the deceased employee shall step into the shoes of the deceased employee to pursue the compensation against the employer. When such personal representative is unable to recover the amount of statutory compensation from the employer, the personal representative shall be entitled to apply for the payment of the amount from the Fund for the benefit of the estate of the deceased employee.

76. The Administration has further explained that if the Board has determined in favour of an application made by the personal representative of the deceased employee, the proposed section 35(1) will allow the Board to make payment to the estate of the deceased employee.

Committee Stage amendments

77. Apart from the Committee Stage amendments (CSAs) explained in paragraphs 26, 34, 48 and 53 above, the Administration has agreed to move other minor and technical amendments to the Bill. A copy of the CSAs to be moved by the Administration is in **Appendix II**.

78. The Administration has informed members that as part of the introduction of the accountability system for principal official, the policy bureaux will be reorganised. As a result, the Administration will make the necessary legislative amendments so as to transfer the respective statutory functions to the respective new principal officials. A resolution to this effect will be moved by the Administration at the Council meeting on 19 June 2002. Subject to the approval by the Council of the proposed resolution, the statutory functions exercisable by the Secretary for Education and Manpower (SEM) would be transferred to one of the principal officials under the accountability system with effect from 1 July 2002.

79. The Administration has further informed members that the Bill contains two clauses which make reference to SEM, namely the commencement notice of the Bill and SEM's power to amend Schedule 4. It is therefore necessary to make consequential amendments to the Bill. As the Administration wishes to resume the Second Reading debate on the Bill at the Council meeting on 26 June 2002, the deadline for giving notice of CSAs will be 17 June 2002. While the Administration will observe the deadline in giving the notice, the two consequential amendments cannot be finalised before 19 June 2002. In this connection, the Administration would have to seek the leave of the President to dispense with the notice requirement.

80. As explained in paragraph 56 above, the Chairman of the Bills Committee will, on behalf of the Bills Committee, move amendments to the Bill. A copy of the CSAs to be moved by the Chairman of the Bills Committee is in **Appendix III**.

Consultation with the House Committee

81. The Bills Committee consulted the House Committee on 14 June 2002 and sought the latter's agreement that subject to the CSAs to be moved by the Administration and the Chairman of the Bills Committee, the Second Reading debate on the Bill be resumed at the Council meeting on 26 June 2002.

Council Business Division 2
Legislative Council Secretariat
17 June 2002

**Bills Committee on
Employees Compensation Assistance (Amendment) Bill 2002**

Membership list

Chairman Hon Audrey EU Yuet-mee, SC, JP

Members Hon Kenneth TING Woo-shou, JP
Hon James TIEN Pei-chun, GBS, JP
Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon Eric LI Ka-cheung, JP
Hon CHAN Kwok-keung
Hon Bernard CHAN
Hon LEUNG Yiu-chung
Hon Andrew CHENG Kar-foo
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon LI Fung-ying, JP
Hon LEUNG Fu-wah, MH, JP

(Total : 14 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Miss Kitty CHENG

Date 14 March 2002

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3rd draft: 6.6.2002
4th draft: 6.6.2002
5th draft: 11.6.2002
6th draft: 13.6.2002
7th draft: 14.6.2002

EMPLOYEES COMPENSATION ASSISTANCE
(AMENDMENT) BILL 2002

COMMITTEE STAGE

Amendments to be moved by the Secretary for Education
and Manpower

Clause

Amendment Proposed

- 3(b) (a) In the proposed definition of "eligible person", in paragraph (a)(ii), by adding "whether before or" after "in the case of the death of the injured employee".
- (b) By adding -
- "prescribed monthly amount (extra)" (
-) means the amount
- specified in Part 1A of Schedule 4;
- "severely injured relevant eligible person"
- (
-), in relation to a
- relief payment, means an eligible
- person -

- (a) who falls within paragraph (a)(i) of the definition of "eligible person";
- (b) who suffers from paraplegia or quadriplegia as a result of the employment-related injury concerned such that he is unable to perform the essential actions of life without the care and attention of another person; and
- (c) in respect of whom a court of competent jurisdiction in Hong Kong has, in relation to the employment-related injury concerned, awarded expenses for care and attention by another person in respect of the period after the award is made;".

7(d) In the proposed section 17(2), by deleting every thing after "subsection (1)" and substituting "irrespective of whether the notice concerned under section 20 is published in the Gazette before, on or after the commencement of this subsection."

8(d)

In the proposed section 18(2), by deleting every thing after "subsection (1)" and substituting "irrespective of whether the notice concerned under section 20 is published in the Gazette before, on or after the commencement of this subsection."

12

(a) In the proposed section 20A, by adding -

"(4) Where -

(a) an eligible person falls within paragraph (a)(ii) of the definition of "eligible person";

(b) the death of the injured employee concerned occurs before damages have been awarded; and

(c) any amount of damages for which the employer concerned is liable is unable to be recovered from the employer,

then the eligible person shall be deemed to be an eligible person who falls within subsection (1) in respect of those damages notwithstanding that the eligible person -

(d) is not mentioned in the judgment or order concerned

mentioned in subsection (2);

and

(e) is unable to take any proceedings mentioned in subsection (3).".

(b) In the proposed section 20B, by adding -

"(1A) Subject to section 20A(2) and subsection (2), the aggregate amount of relief payment to one or more eligible persons who fall within section 20A(4) in the case of a particular injured employee shall be the amount of damages for which the employer concerned is liable to pay in relation to the accident concerned after that amount is reduced by -

(a) the amount of compensation which has been paid or is payable under the Employees' Compensation Ordinance (Cap. 282) in respect of the injured employee in relation to that accident; and

(b) the amount, if any, of those damages already paid by the employer.".

(c) In the proposed section 20C(2)(b), by adding

“, together with, in the case of an eligible person who is a severely injured relevant eligible person, the prescribed monthly amount (extra)” after “higher”.

(d) In the proposed section 20D -

(i) by renumbering it as subsection (1);

(ii) in subsection (1), by adding “(other than a prescribed monthly amount (extra))” after “section 20C(2)(b)”;

(iii) by adding -

“(2) A prescribed monthly amount (extra) under section 20C(2)(b) shall be payable until -

(a) subject to section 20G, the amount of relief payment has been fully paid; or

(b) the severely injured relevant eligible person entitled to receive such payment -

(i) dies; or

(ii) has been

fully paid

the amount

to which he

is entitled,

whether as
relief
payment or
payment of
damages from
the employer
or insurer
concerned,
including
any
combination
thereof,

whichever is the earlier."

14(c) By deleting the proposed section 22(6) and
substituting -

"(6) Subject to the provisions of this
Ordinance, the Board may vary a determination
under this section to take account of -

- (a) a person who becomes an eligible
person on or after the date of the
determination; or
- (b) the existence of an eligible
person which was not known to the
Board before that date."

17 (a) In the proposed section 25A -

- (i) by deleting "(1) If" and substituting "If";
- (ii) in paragraph (a) -
 - (A) by adding "to join in the proceedings as a party in accordance with Order 15, rule 6 of the Rules of the High Court (Cap. 4 sub. leg.) or Order 15, rule 6 of the Rules of the District Court (Cap. 336 sub. leg.), as the case may require," after "court";
 - (B) in subparagraph (iv), by adding "or" after "proceedings;"
- (iii) in paragraph (b) -
 - (A) by deleting "third";
 - (B) by adding "or Order 15, rule 6 of the Rules of the District Court (Cap. 336 sub. leg.), as the case may require" after "(Cap. 4 sub. leg.)";
- (iv) in paragraph (c) -
 - (A) by deleting "third";
 - (B) by adding "or Order 15, rule 6 of the Rules of the District Court (Cap. 336 sub. leg.), as the case may require" after "(Cap. 4 sub. leg.)";

(b) In the proposed section 25B -

- (i) in subsection (2), by adding ", or failed to," after "cannot";
- (ii) by deleting subsection (3) and substituting -

"(3) A person who has served a notice under subsection (1) on the Board and who intends, within 45 days after the date on which the notice has been so served, to -

- (a) enter into an agreement with the other party in respect of the settlement of the claim to which the notice relates;
- or

- (b) obtain any judgement against the other party in respect of the claim to which the notices relates,

shall, subject to subsection (3A), not less than 10 days before the date of such agreement or

judgement, as the case may be, serve a notice in writing on the Board informing the Board that the person intends to enter into an agreement or obtain a judgement, as the case may be, in respect of that claim within 45 days after the date on which the first-mentioned notice has been served on the Board.

(3A) The Board may shorten the period of 10 days specified in subsection (3) in the case of a person who satisfies the Board, by notice in writing served on the Board, that there are good reasons why the person cannot, or failed to, comply with that subsection in relation to that period.”;

(iii) by deleting subclause (4)(a) and substituting -

“(a) separate notices are required under subsection (1) in respect of a claim for compensation and a claim for damages;”.

19(b)

By deleting the proposed section 28(4) and (5) and substituting -

"(4) If an offer made under subsection (1) is not accepted by a person, and in subsequent proceedings in respect of the claim to which the offer relates the person is awarded an amount not more than the amount offered by the Board, then the Board -

- (a) shall not be required to pay more than the amount as awarded by the court or tribunal concerned; and
- (b) shall not be liable to pay the costs incurred by the person after the date of the offer to which the claim relates."

23

In the proposed section 36A -

- (a) in subsection (2), by deleting "subsection (3)" and substituting "subsections (3) and (3A)";
- (b) in subsection (3), by deleting "The" and substituting "Subject to subsection (3A), the";
- (c) by adding -

"(3A) Where -

- (a) an employer has contravened section 40(1) of the Employees' Compensation Ordinance (Cap. 282)("first

contravention");

(b) a notice in writing under subsection (5)(a) has been served on the employer in respect of the first contravention; and

(c) the employer has, not later than 24 months after the date on which that notice was so served, again contravened section 40(1) of that Ordinance ("second contravention"),

then, in the case of the second contravention, the amount of surcharge payable by the employer under subsection (1) by virtue of subsection (2) or (3) shall be multiplied by a factor of 2.";

(d) by deleting subsections (6) and (7) and substituting -

"(6) An employer who is not satisfied with a determination of the Board as specified in a final notice under subsection (5)(b) may appeal against the determination to the District Court not later than 30 days after the final notice is served on the employer.

(7) The District Court may in a particular case extend the period specified in subsection (6) where it thinks fit to do so.

(7A) On an appeal under subsection (6), the District Court may -

(a) by order confirm, vary or cancel the determination of the Board as specified in the final notice the subject of the appeal;

(b) make such order as to costs as it thinks fit."

30 In the proposed section 46A -

(a) in subsection (5), by deleting "31(b)" and substituting "31";

(b) by adding -

"(6A) Schedule 2 is repealed."

32 In the proposed Schedule 4, by adding, after Part 1, the following -

"PART 1A

PRESCRIBED MONTHLY AMOUNT (EXTRA)

\$10,000".

EMPLOYEES COMPENSATION ASSISTANCE (AMENDMENT) BILL 2002

COMMITTEE STAGE

Amendments to be moved by the Honourable Audrey EU Yuet-mee, S.C., J.P.

<u>Clause</u>	<u>Amendment Proposed</u>
3(b)	<p>In the proposed definition of "eligible person", in paragraph (a)(ii), by adding—</p> <p>"(D) if there is no surviving spouse or cohabitee, surviving child and surviving parent, as mentioned in sub-subparagraph (A), (B) or (C), any surviving brother or sister of the injured employee who is a dependent of the injured employee and under the age of 21 at the time of death of the injured employee;"</p>
12	<p>(a) In the proposed section 20C(3), by deleting "A surviving child who was an eligible person falling within paragraph (a)(ii)(B) of the definition of "eligible person" at the time of the death of the injured employee" and substituting—</p> <p>"A surviving child or a surviving brother or sister who was an eligible person falling within paragraph (a)(ii)(B) or (D) of the definition of "eligible person" (as the case may be) at the time of the death of the injured employee".</p> <p>(b) In the proposed section 20E(a), by adding "or (D)" after "paragraph (a)(ii)(B)".</p>