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HONG KONG BAR ASSOCIATION

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12 October 2007

Mr. Justin Tam
for Clerk to Bills Committee on
Mandatory Provident Fund Schemes
(Amendment) Bill 2007
Legislative Council Building
8 Jackson Road
Hong Kong.

Dear *Justin*,

Bills Committee on Mandatory Provident Fund Schemes (Amendment) Bill 2007

I refer to your letter dated 24 July 2007.

I am pleased to enclose herewith a copy of the comments made by the Hong Kong Bar Association on the legislative proposals of the Mandatory Provident Fund Schemes (Amendment) Bill 2007, for your consideration, which has been considered and endorsed at the Bar Council Meeting held on 21 September 2007.

Yours sincerely,

Rimsky Yuen SC
Chairman

Encl.

香港大律師公會

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Mandatory Provident Fund Schemes (Amendment) Bill 2007
Comments from Hong Kong Bar Association

1. **Part 2**

Sections 3 to 10

Various provisions concerning undertakings

Provision Being amended

Sections 12, 17(12), 22, 46(3)(c), 47(3)(a) & (b), 68(5), 69(2) of General Regulation and Schedule 3 Exemption Regulation

Comment

Why does the written undertaking have to be in the form of a deed? What is the meaning of a document in “like form” of a deed and who decides?

2. **Part 8**

Section 24

Duty of self-employed person to become scheme member

Provision being amended

Section 7C MPFSO

Comment

Since the new sub-paragraph (2A) is inserted in the middle of the section, this should read “Section 7C is amended by adding the following immediately after Section 7C(2)”. This applies equally in several parts of the Bill.

The new sub-section is numbered 7C(2A), but a more logical choice would be '7C(7)' instead.

3. **Part 11**

Section 33

What is an approved pooled investment fund for the purposes of this Regulation?

Provision being amended

Section 6 General Regulation

Comment

Under new 6(7), the word “determine” (as in, ‘determine the application’), should be changed to “consider” (the application).

Section 34

Scheme may consist of a single constituent fund or of separate constituent funds

Provision being amended

Section 36 General Regulation

Comment

Under new 36(6) same as for section 33 of the Bill above.

4. **Part 12**

Section 36

Approved trustee to notify scheme member of entitlement

Provision being amended

Section 172 General Regulation

Comment

New 172(5)(b)(ii)-will the benefit statement literally need to state that the member “may at any time lodge with the approved trustee ... a claim ... in accordance with section 159”? The member will not understand the reference to section 159.

Section 37

Sections added

Provision being amended

Sections 172A, B & C General Regulation

Comment

Should the register under 172C indicate whether benefits have already been paid into court?

5. **Part 14**

Section 41

Authority may disclose certain information despite section 41

Provision being amended

Section 42 MPFSO

Comment

New S 42(1)(g)-This new power is welcomed. Suggest also requiring Authority to make disclosure as follows;

New Ss(8)-“The Authority shall publish information as referred to in sub section(1)(g) above in order to provide the public with details of fees and expenses charged by approved trustees or service providers in respect of available provident fund schemes and/or constituent funds or approved pooled investment funds.

(9) For the purpose of sub section (8) above the Authority may require such disclosure pursuant to its powers under Part IV of this Ordinance as may reasonably be necessary to obtain the said information”.

Consistent with the above enhanced publicity for fees and expenses S 42(1)(a) ought to be amended by deleting, “... but only if the summary is compiled ... from being ascertained from the summary”.

6. **Part 18**

Extension of Prosecution Time Limit

Sections 47, 48 and 49

Provision being amended

Sections 43C, 43E and S 26 of (Exemption) Regulation

Comment

The **extension of the time limit for prosecution** by summons is a necessary reform. But S 47-49 (as proposed in Part 18) provide for potentially open ended periods in cases where offences remain undiscovered for a long time.

So that liability to prosecution for summary offences under MPFSO not be too far out of line with the general rule a 'long stop' alternative date ought to be considered.

E.g. “ ... or comes to the notice of, the Authority **but no later than 2 years after the occurrence of the offence**”.

It is recognised that S 43B already provides such an open ended 'limitation' period in respect of offences by employers (2002 Amendments) but that is anomalous and ought not to be extended now without the 'long stop' proviso.

We note there is an extended 'long stop' prosecution time limit of 3 years under Securities and Futures Ord. (Cap. 571) Section 389.

In order to achieve consistency it is suggested that offences in S 43 and 43A also be subject to the same prosecution time limit. Certainly there is no apparent reason in principle for the different periods which now exist. In short, the general rule under S 26 Magistrates Ord. (Cap. 227) should be excluded from all and not just some of the offences under MPFSO, (save for S 43D-obstructing the Authority- where there may be no reason to depart from the general rule).

7. **Part 20**
Service of Summons
Section 51

Provision being amended

Section 47C MPFSO

Comment

The extension to means of service on an employer's place of business (and not just at a company's registered office in the case of a corporate employer) is welcomed. However, the question of fact as to whether a particular place is or is not one at which, "the employer carries on business", at the time of service may sometimes be a difficult one to answer.

Introduction of wording;

"the address stated in the employer's business registration certificate or, in the absence of which", after, 'by post to' and before, 'any place at which the employer ...' in the proposed new S 47C, would assist.

This should reduce the scope for dispute as to whether the place at which the summons is left is, in fact, a place at which the employer carries on business.

It is also consistent with Rules of the High Court (Order 81 rule 3) which allow service of process on a partnership by leaving the document at its "principal place of business" (but not at "any place at which the employer carries on business").

Certainly there must be a risk that service by leaving a summons at any place at which it might be said the employer carries on business would not be effective in the most important sense of bringing the document to the employer's attention promptly.

8. Anti employee discrimination

Proposed New Provision

Comment

It is suggested that protection be afforded to ‘whistle blowing’ employees in order to encourage their reporting of offences by employers in similar form to that which exists under the Employment Ordinance (Cap. 57) Sections 63A(5) and 72 B.

This would be a better way to meet concerns that employees may not report their existing employer which may have originally prompted the ‘open ended’ extension of prosecution time limit in 2002.

9. **Part 22**

Section 54

Approved trustee to provide scheme members with annual benefit statements

Provision being amended

Section 56(3) General Regulation

Comment

New para. (fa), replace with, “contain such further information as may be reasonably specified by the Authority ...”.

10. **Part 23**

Section 57

Eligibility of delegate of custodian

Provision being amended

Section 71 General Regulation

Comment

Under both sub-paragraphs (1) and (3), the reference to “related company” in the proposed amendment should be changed to “associated company”.

See S 2(1) ‘associated company’ and Part 3 of Schedule 8.

11. **Part 25**

Definition of Relevant Income

Section 60

Provision being amended

Section 2(1) MPFSO

Comment

We agree and see no problem with including ‘housing allowance’ or benefit’ (in terms of cash value) as income. (We understand that monthly maximum income is to be increased under the adjustment mechanism from \$20,000 to \$30,000 which we also support).

12. **Part 26**

Section 61

Section added

Provision being amended

New section 19A MPFSO

Comment

We agree this is a necessary and appropriate power for the Authority to have.

13. **Part 27**
Recovery of Arrears
Sections 62-63

Provision being amended

Section 18 MPFSO

Comment

It is hoped this amendment to streamline enforcement will assist the taking of effective steps against defaulting employers.

The Hong Kong Bar Association

12 October 2007