

立法會
Legislative Council

LC Paper No. CB(1)1197/07-08
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/07/2

**Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007**

**Minutes of the fourth meeting
held on Thursday, 13 March 2008, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon CHAN Yuen-han, SBS, JP
Hon SIN Chung-kai, SBS, JP
Hon LI Fung-ying, BBS, JP
Hon WONG Kwok-hing, MH
Hon Alan LEONG Kah-kit, SC
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
- Members absent** : Hon James TIEN Pei-chun, GBS, JP (Chairman)
Hon CHAN Kam-lam, SBS, JP (Deputy Chairman)
Hon TAM Yiu-chung, GBS, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
- Public officers attending** : Mr Albert LAM
Deputy Secretary for Financial Services and the
Treasury (Financial Services)
- Ms Jenny CHAN
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)

Mr Ryan CHIU
Assistant Secretary for Financial Services and the
Treasury (Financial Services)

Miss Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Miss Selina LAU
Senior Government Counsel
Department of Justice

Attendance by invitation : Mandatory Provident Fund Schemes Authority

Mr Darren MCSHANE
Executive Director (Regulation & Policy)

Ms Gabriella YEE
Senior Manager (Policy & Development)

Clerk in attendance : Miss Polly YEUNG
Chief Council Secretary (1)5

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Rosalind MA
Senior Council Secretary (1)8

Action

I Election of chairman to act during the absence of the Chairman and Deputy Chairman

As both the Chairman and Deputy Chairman were out of town and unable to attend the meeting, members elected a chairman to act during the absence of the Chairman and Deputy Chairman in accordance with Rule 76(2) of the Rules of Procedures. Mr Ronny TONG was nominated by Mr Albert HO and the nomination was seconded by Ms LI Fung-ying. Mr TONG accepted the nomination. There being no other nominations, Mr TONG took the chair in the absence of the Chairman and Deputy Chairman.

II Confirmation of minutes and matters arising

(LC Paper No. CB(1)1028/07-08 —Minutes of meeting on 25 February 2008

2. The minutes of the meeting held on 25 February 2008 were confirmed.

III Meeting with the Administration/Mandatory Provident Fund Schemes Authority (MPFA)

(LC Paper No. CB(1)1027/07-08(01) —Administration/MPFA's response to views submitted by various organizations/individuals on the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 (as of 11 March 2008)

LC Paper No. CB(1)1027/07-08(02) —Administration/MPFA's response to members' views and concerns raised at the meetings held on 31 January and 25 February 2008

LC Paper No. CB(1)854/07-08(07) —Administration/MPFA's response to members' views and concerns raised at the meeting held on 31 January 2008 (Part)

LC Paper No. CB(3)261/07-08 —The Bill

LC Paper No. CB(1)654/07-08(01) —Marked-up copy of the Bill prepared by the Legal Service Division

FSB CRG4/51C(2007) —The Legislative Council Brief issued by the Financial Services and the Treasury Bureau)

3. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

Follow-up actions

4. In relation to members' concern about the deterrent effect of the proposed amendments and the effectiveness of actions/ measures for the recovery of

outstanding mandatory contributions from non-compliant employers, the Administration/ the Mandatory Provident Fund Schemes Authority (MPFA) were requested to:

- (a) consider and provide a response to the following suggestions of the legal adviser-
 - (i) to empower the MPFA to apply to the Court of First Instance for a court order to compel a convicted or acquitted employer to rectify the non-enrolment and non-payment situation, and to commence proceedings against the employer concerned for "contempt of the court" when the latter failed to comply with the court order; and
 - (ii) to provide a provision to hold the directors and/or shareholders of a limited company personally liable to settle the outstanding mandatory contributions (i.e. having the effect of lifting the corporate veil).
- (b) provide a paper on the difficulties encountered by the MPFA in taking enforcement actions for contribution arrears recovery and how such difficulties could be overcome.

(Post-meeting note: The Administration's and the MPFA's responses to paragraph 4 were issued to members vide LC Paper Nos. CB(1)1142/07-08 and CB(1)1196/07-08 on 27 March and 8 April 2008 respectively.)

5. In relation to the suggestions in paragraph 4(a), the legal adviser was requested to provide the following information:

- (a) the jurisdiction of the Magistrates' Court to proceed against defendants for "contempt of the court", notably in cases where an employer had breached or failed to comply with a court order to rectify the non-enrolment and non-payment situation;
- (b) a comparison of the provisions on the legal liability of directors of limited companies under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and those under the Copyright Ordinance (Cap. 528), the Unsolicited Electronic Messages Ordinance (Cap. 593) and the Inland Revenue Ordinance (Cap. 112) which also imposed liability on directors in respect of certain offences.
- (c) the difference, if any, in the legal liability of executive directors, non-executive directors and shadow directors of a limited company for MPF-related offences committed by the company; and

- (d) the suggestions as stated in 4(a) and 5.

(Post-meeting note: The paper prepared by the Legal Service Division in relation to paragraph 5 was issued to members vide LC Paper No. CB(1)1130/07-08 on 26 March 2008.)

6. Members agreed in principle to further examine the legal adviser's suggestions in paragraphs 4(a) and 5 and the Administration's response thereto to see whether the Bills Committee should consider proposing Committee Stage amendments to the Bill to strengthen its deterrent effect and protection for employees.

IV Any other business

Meeting arrangements

7. Members noted that the next meeting of the Bills Committee was scheduled for Thursday, 27 March 2008 at 2:30 pm. As some members would not be able to attend the meeting on 27 March, it was agreed that the Secretariat would consult the Chairman after the meeting to explore whether alternative meeting arrangements should be made.

(Post-meeting note: Having considered the views expressed by members at the meeting, the Chairman directed that the issues raised at the meeting held on 13 March 2008 would be followed up at the 6th meeting scheduled to be held on 10 April 2008. The next meeting to be held on 27 March 2008 would deal with other policy issues arising from the Bill and where practicable, the Bills Committee would commence clause-by-clause examination. The notice of meeting was issued to members vide LC Paper No. CB(1)1084/07-08 on 18 March 2008.)

8. There being no other business, the meeting ended at 10:05 am.

**Proceedings of the
Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007
Fourth meeting on Thursday, 13 March 2008, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000604	Clerk Mr Albert HO Ms LI Fung-ying Mr Ronny TONG	Election of chairman to act during the absence of the Chairman and the Deputy Chairman.	
000605 – 001321	Mr Ronny TONG Administration	<p>(a) The Administration's briefing on the written response to members' views and concerns raised at the meetings held on 31 January and 25 February 2008 (LC Paper No. CB(1)1048/07-08(02)).</p> <p>(b) The Administration's brief introduction of the response to views submitted by various organizations/individuals on the Bill (LC Paper No. CB(1)1048/07-08(01)). Members agreed that reference would be made to details of the response during the clause-by-clause examination of the Bill.</p>	
001322 – 002202	Mr Albert HO Mr WONG Ting-kwong Mr Ronny TONG Administration Mandatory Provident Fund Schemes Authority (MPFA) Mr LEE Cheuk-yan	(a) The Administration's advice that to avoid causing financial hardship to employees and subject to members' views, the Administration was prepared to consider limiting the civil liability for payment of retrospective outstanding contributions by defaulting employers for non-enrolled employees under the proposed section 7AE to the employer mandatory contributions only, provided that the employers had made no deduction of employee mandatory contributions from	

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		<p>the employees' relevant income in respect of the same period.</p> <p>(b) Mr Albert HO's support for the revised proposal in (a) above. His view that this arrangement could relieve employees from civil claims being filed against them by employers if the latter was held responsible for retrospective employee mandatory contribution as well as currently proposed under section 7AE of the Bill.</p> <p>(c) On the number of non-enrolment cases, MPFA's advice that it had received about 2 400 complaints against employers in 2006-2007.</p> <p>(d) Mr LEE Cheuk-yan's concern about the consistency between the revised proposal and the recovery of outstanding contributions in default for enrolled employees, given that the MPFA would take actions to recover both the employer mandatory contributions and employee mandatory contribution in the latter case. His view that he had to examine further the merits or otherwise of the proposal.</p> <p>(e) The Administration's advice that the proposed section 7AE had been drafted to the effect that employers should be held responsible for settling both the outstanding mandatory contributions of employers and employees in respect of past contribution periods during which the employees were not enrolled.</p>	

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		<p>Nevertheless, having regard to concerns raised by the Bills Committee and in consideration of the possibility that employees might face a heavy financial burden if their employers were to file civil claims against them for repayment of employee contributions, the Administration had put forward the revised proposal for members' consideration.</p>	
002203 – 003123	<p>Ms LI Fung-ying Mr Ronny TONG Administration MPFA</p>	<p>(a) Ms LI Fung-ying's concern about the deterrent effect of the court order made pursuant to the proposed section 43BA and her enquiry about possible prosecution action against employers for breach or non-compliance of the court order.</p> <p>(b) Mr Ronny TONG's advice that whether a breach or non-compliance of a court order would amount to "contempt of the court" was a matter for the judge to decide having regard to the circumstances of the case in question.</p> <p>(c) The Administration's advice that commencing proceedings against an employer for "contempt of the court" was a relatively drastic measure which should not be readily resorted to in enforcing court orders. A revised proposal had therefore been put forward in paragraph 10 of LC Paper No. CB(1)1027/07-08(02), i.e. adding a provision under the proposed section 43BA to set out that non-compliance of a court order would be an offence subject to a</p>	

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		<p>maximum penalty of a fine of \$350,000 and to imprisonment for three years, and a daily fine of \$500 for each day during which the offence was continued.</p> <p>(d) Ms LI Fung-ying's concern about the effectiveness of actions/ measures for the recovery of outstanding mandatory contributions from employers convicted of MPF-related offences. Her enquiry about the tools available to the MPFA to ensure employers' settlement of the outstanding mandatory contributions.</p> <p>(e) The MPFA's advice that it would take necessary actions to recover the default contributions through civil proceedings. Generally, MPFA would issue a payment notice on an employer who failed to make mandatory contributions. If the employer did not pay the default contributions and surcharge as required, depending on the amount of the contributions in arrears, the MPFA would lodge a civil claim at the Small Claims Tribunal, the District Court or the High Court. If a judgment was obtained and the employer did not settle the arrears as required, the MPFA could apply for bailiff action to execute the court judgment, or apply to the court for a charging order or a garnishee order. The MPFA might also impose financial penalties on employers defaulting on MPF contributions.</p>	

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		(f) Responding to Mr Ronny TONG's enquiry, the MPFA's advice that bailiff action had been frequently taken in the course of the MPFA's enforcement work.	
003124 – 003353	Mr LEE Cheuk-yan Mr Ronny TONG MPFA	(a) Mr LEE Cheuk-yan's concern that some unscrupulous employers might evade their responsibility of paying wages and mandatory MPF contributions by setting up subsidiaries with no assets for the employment of staff, as in the case of the Sing Pao Newspaper Management Limited. (b) The MPFA's advice that companies could rely on different sources of funding for operation. The MPFA's further advice that where convicted employers had no assets to settle the amount of judgment debt, the MPFA would examine the details of the case and take appropriate course of action, including the option of winding-up the company concerned in the more extreme cases.	
003354 – 004644	Mr WONG Kwok-hing Mr Ronny TONG Administration ALA6	(a) Mr WONG Kwok-hing's concern about the effectiveness of the civil proceedings in recovering the outstanding mandatory contributions from non-compliant employers. His doubt about the effectiveness or deterrence of the proposed increase in maximum penalties, in particular if the convicted employers were unable to settle the outstanding contributions after payment of the fine.	

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		<p>(b) The Administration's advice that the proposal under the Bill would enhance the deterrent effect in a non-enrolment and non-payment situation. MPFA would continue its effort in the recovery of outstanding mandatory contributions through civil proceedings.</p> <p>(c) ALA6 put forward the following suggestions for the consideration of members and the Administration/MPFA:</p> <p>(i) enabling the MPFA to apply to the Court of First Instance for a court order requiring an employer to comply, failing which proceedings would be instituted against the employer concerned for "contempt of the court"; and</p> <p>(ii) adding a new provision to hold the directors and/or shareholders of a limited company personally liable to settle the outstanding mandatory contributions.</p> <p>(d) The Administration's confirmation that the MPFA had prosecuted directors of companies in their personal capacity for offences under the Mandatory Provident Fund Schemes Ordinance (MPFSO) (Cap. 485) where the evidence of the cases so justified. The changes contemplated under ALA6's suggestions had not been</p>	<p>The Administration/MPFA to take follow-up action as required in paragraph 4(a) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		considered in the context of the Bill.	
004645 – 005652	Miss CHAN Yuen-han Mr Ronny TONG ALA6 Administration MPFA	<p>(a) Miss CHAN Yuen-han's view that amendments to the MPFSO had not been made in a timely manner to plug obvious loopholes and had therefore failed to protect the interest of the employees. Referring to the case of Sing Pao Newspaper Management Limited, Miss CHAN's grave concern that the MPFA did not have adequate statutory powers to take effective enforcement actions against unscrupulous employers who disregarded the law.</p> <p>(b) On Miss CHAN's enquiry about the moving of Committee Stage amendments (CSAs), ALA6's advice that whether the CSAs proposed by the Bills Committee or individual members were within the scope of the Bill would be subject to the President's ruling.</p> <p>(c) The Administration's advice that the MPFA, with the assistance of the MPF Schemes Operation Review Committee, reviewed from time to time the operation and administration of the MPF System and where necessary, made recommendations for legislative amendments. The proposed amendments under the Bill and those enacted through the Mandatory Provident Fund Schemes (Amendment) Ordinance 2008 aimed to bring about improvements to the MPF System.</p>	

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		<p>(d) Mr Ronny TONG requested the MPFA to provide information on its difficulties in taking enforcement actions for contributions arrears recovery to facilitate members' consideration of the type of legislative amendments required.</p> <p>(e) While there was a range of tools for enforcement through both the civil and criminal routes, the MPFA's explanation that they were no guarantee for recovery of outstanding mandatory contributions from non-compliant employers, in particular companies with inadequate assets to settle the amount in default.</p>	<p>The Administration/MPFA to take follow-up action as required in paragraph 4(b) of the minutes.</p>
005653 – 011704	<p>Mr SIN Chung-kai Mr WONG Ting-kwong Mr Ronny TONG MPFA Mr Albert HO ALA6</p>	<p>(a) View shared by Mr SIN Chung-kai and Mr Albert HO that in examining the question of the legal liability of directors of limited companies under the MPFSO, reference should be made to the comparable provisions under other legislation such as the Copyright Ordinance (Cap. 528), the Unsolicited Electronic Messages Ordinance (Cap. 593) and the Inland Revenue Ordinance (Cap. 112).</p> <p>(b) Mr WONG Ting-kwong's support for the proposed amendments under the Bill for enhancing the enforcement of the MPF System. His view that the Administration/MPFA should consider holding directors of limited companies personally liable for offences committed by the companies, having</p>	<p>The legal adviser to take follow-up action as required in paragraph 5(c) of the minutes.</p>

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		<p>regard to the difficulties in taking effective enforcements actions to recover the outstanding mandatory contributions from some non-compliant employers such as the Sing Pao Newspaper Management Limited.</p> <p>(c) The MPFA's confirmation that under the existing MPF legislation, the company as well as its directors would be prosecuted where circumstances so warranted. In 2006-2007, the MPFA applied for 440 summonses in respect of non-enrolment offence and default contributions, amongst which 105 were laid against the directors/managers of limited companies.</p> <p>(d) Mr WONG Ting-kwong's concern about the legal liability of different types of directors of a limited company for MPF-related offences committed by the company.</p> <p>(e) Members agreed in principle to further examine ALA6's suggestions in paragraphs 4(a) and 5 and the Administration's response thereto to see whether the Bills Committee should consider proposing CSAs to the Bill to strengthen its deterrent effect and protection for employees.</p> <p>(f) Responding to Mr WONG's enquiry, the MPFA's advice that under the existing MPF legislation, an employer who defaulted in making MPF contributions for its employee</p>	<p>The legal adviser to take follow-up actions as required in paragraph 5(b) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>was subject to a contribution surcharge at a flat rate of 5% of the amount in arrears. This 5% contribution surcharge was intended to compensate for loss of investment income due to the default of the employer in making contributions.</p> <p>(g) In response to Mr Albert HO's enquiry about the issuance of court order under the proposed section 43BA of the Bill, the Administration's reference to the revised proposal of adding a provision under the proposed section 43BA to set out that non-compliance of the court order was an offence. The Administration's further explanation that for cases where the employers had failed to comply with the enrolment and contribution requirements under the MPF legislation, the MPFA would file civil claims for arrears recovery and pursue criminal prosecution where there was sufficient evidence.</p> <p>(h) ALA6's remark that lower courts such as a Magistrates' Court had no jurisdiction at common law to proceed against a defendant for "contempt of the court" if the latter failed to comply with a magistrate's order.</p>	<p>The legal adviser to take follow-up actions as required in paragraph 5(a) of the minutes.</p>
011705 – 012615	Mr LEE Cheuk-yan Mr Ronny TONG ALA6	<p>(a) Mr LEE Cheuk-yan's concern about-</p> <p>(i) whether the revised proposal of making employers' failure to comply with the court order an offence under the proposed section</p>	

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		<p>43BA of the Bill might give rise to double jeopardy against the defendant, as the defendant had already been prosecuted for the offence of non-compliance with enrolment and/or contribution requirements; and</p> <p>(ii) whether the summons for non-compliance of the court order made under the proposed section 43BA of the Bill would be laid against the directors of the limited company in their personal capacity, or just the company concerned.</p> <p>(b) ALA6's advice that the revised proposal should not give rise to double jeopardy as the new offence was for non-compliance of the court order.</p> <p>(c) Mr Ronny TONG's view that issues relating to the personal liability of directors of a limited company could be further deliberated at the next meeting of the Bills Committee.</p> <p>(d) Mr Ronny TONG's reference to relevant provisions in the Rules of the Supreme Court on procedures to deal with contempt of the court.</p>	
012616 – 013454	Miss CHAN Yuen-han Mr Ronny TONG Mr WONG Ting-kwong Mr Albert HO	(a) Miss CHAN Yuen-han's view that the proposals in the Bill could not deter unscrupulous employers from abuses. Her enquiry on whether proposed amendments to extend civil and criminal liabilities to	

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		<p>directors of companies would be within the scope of the Bill.</p> <p>(b) Mr Ronny TONG's reference to the general description of the objective of the Bill in the long title. Mr TONG's concern that the Bills Committee might not be able to complete scrutiny of the Bill in time for its enactment within the current legislative term if complicated issues (such as the personal liability of directors) had to be resolved and amendments, formulated.</p> <p>(c) Miss CHAN Yuen-han's indication that she would prefer effective improvements than a set of imperfect amendments hastily passed.</p> <p>(d) Mr WONG Ting-kwong's remark that responsible employers would have fulfilled their obligations under the MPF legislation. Proposed provision to impose civil and criminal liabilities on company directors would only strengthen deterrent effect on those unscrupulous employers.</p> <p>(e) Mr Albert HO's view that the proposals under the Bill would bring about certain improvement to the enforcement of the MPF System and should preferably be passed early for better protection of employees' interest. He did not consider it desirable that all problems had to be resolved before the current Bill could be passed.</p>	

Time Marker	Speaker	Subject(s)	Action Required
013455 – 013625	Mr Ronny TONG Clerk Miss CHAN Yuen-han	Feasibility of re-scheduling the next meeting (i.e. 27 March 2008 at 2:30 pm) as some members had indicated their unavailability.	

Council Business Division 1
Legislative Council Secretariat
11 April 2008