

立法會
Legislative Council

LC Paper No. CB(1)1460/07-08
(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 sixth meeting
held on Tuesday, 15 April 2008, at 10:45 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon James TIEN Pei-chun, GBS, JP (Chairman)
Hon CHAN Kam-lam, SBS, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon CHAN Yuen-han, SBS, JP
Hon SIN Chung-kai, SBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon LI Fung-ying, BBS, JP
Hon WONG Kwok-hing, MH
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
- Public officers attending** : Mr Patrick HO
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
Chief Manager (Policy Development & Research)
- 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 Confirmation of minutes and matters arising**
(LC Paper No. CB(1)1197/07-08 —Minutes of meeting on 13 March 2008)
- The minutes of the meeting held on 13 March 2008 were confirmed.
- II Meeting with the Administration/Mandatory Provident Fund Schemes Authority (MPFA)**
Follow-up to issues raised at the 4th meeting on 13 March 2008
(LC Paper No. LS67/07-08 —Paper on further information and comments in relation to directors' criminal liabilities, magistrate's power to punish for contempt and proposals for possible enforcement

measures prepared by the Legal Service Division

LC Paper No. CB(1)1142/07-08(01) —Administration's response to members' views and concerns raised at the meeting held on 13 March 2008

LC Paper No. CB(1)1196/07-08(01) —MPFA's paper on recovery of arrears – difficulties and remedies prepared at members' request at the meeting held on 13 March 2008)

Follow-up to issues raised at the 5th meeting on 27 March 2008

(LC Paper No. CB(1)1196/07-08(02) —Administration's response to members' views and concerns raised at the meeting held on 27 March 2008)

Clause-by-clause examination of the Bill

(LC Paper No. CB(1)1231/07-08(01) —Marked-up copy of the draft Committee Stage amendments (version as at 11 April 2008) provided by the Legal Service Division

LC Paper No. CB(1)1214/07-08(01) —Draft Committee Stage amendments (version as at 9 April 2008) provided by the Administration

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)

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

Follow-up actions to be taken by the Administration / the Mandatory Provident Fund Schemes Authority (MPFA)

3. In relation to members' concerns 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 MPFA were requested to:

- (a) consider the Labour Department's recent recommendations to the Labour Advisory Board on the seven measures to facilitate the enforcement of Labour Tribunal awards in respect of employers' default in payment of wages; and examine whether any of these measures could apply in the recovery of mandatory contributions in arrears from employers;
- (b) examine measures to plug the loophole where an unscrupulous employer could transfer assets from his company to other companies, thus depriving the company of assets out of which the outstanding mandatory contributions could be settled;
- (c) provide information on the tools available in taking enforcement actions against employer companies whose directors were not ordinarily resident in Hong Kong or where the directors were corporations and not natural persons;
- (d) provide further information on the outcome of the enforcement actions taken in respect of the 5 102 default contribution complaints received by the MPFA in 2006-2007, with a breakdown showing the number of cases in which all or part of the outstanding contributions had been successfully recovered and the number of cases in which any of the directors of the employer companies had been convicted of Mandatory Provident Fund (MPF)-related offences; and
- (e) note (i) a suggestion to reverse the onus of proof or impose an evidential burden in criminal prosecution against the director as to his not having knowledge of or consented to the MPF-related offences committed by the company and (ii) the approach outlined in paragraph 13 of LC Paper No. LS67/07-08 proposing to impose a personal liability on directors for the unpaid mandatory contributions; as well as some members' suggestion that the Administration should re-consider whether to take on board (i) and (ii).

(Post-meeting note: The Administration's response to paragraph 3 above was issued to members vide LC Paper No. CB(1)1267/07-08(02) on 23 April 2008)

III Any other business

Meeting arrangements and way forward

4. Members noted that the next meeting of the Bills Committee would be held on 24 April 2008 at 10:45 am to continue with the clause-by-clause examination of the Bill and to consider other outstanding issues relating to the Bill.

5. Members agreed that the Bills Committee would further consider the following issues at the next meeting, with a view to deciding whether the Bills Committee should propose amendments to the Bill in its name if the Administration would not change its present stance against taking the suggestions on board:

- (a) the suggestion in paragraph 3(e) in relation to the criminal liability of directors of companies;
- (b) the approach outlined in paragraph 13 of LC Paper No. LS67/07-08 to hold directors and shareholders of a company personally liable for the unpaid mandatory contributions; and
- (c) whether a defaulting employer should be barred from recovering the employee mandatory contributions that he had paid to the MPFA from the employee if the default was wholly due to the fault of the employer concerned.

6. There being no other business, the meeting ended at 12:46 pm.

Council Business Division 1
Legislative Council Secretariat
8 May 2008

**Proceedings of the
Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007
Sixth meeting on Tuesday, 15 April 2008, at 10:45 am
in the Chamber of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000108	Chairman	Confirmation of minutes of the 4 th meeting held on 13 March 2008 (LC Paper No. CB(1)1197/07-08).	
<i>Follow-up to issues raised at the 4th meeting on 13 March 2008</i>			
000109 – 002630	Chairman Miss CHAN Yuen-han Administration Mr WONG Kwok-hing Mr Albert HO Mr Andrew LEUNG	<p>(a) Miss CHAN Yuen-han's strong view that the Administration had not adequately addressed some members' concern about the need to impose personal legal liability on directors of a company in respect of Mandatory Provident Fund (MPF)-related offences.</p> <p>(b) Referring to the case of Sing Pao Newspaper Management Limited, Miss CHAN's doubt about the effectiveness of the Mandatory Provident Fund Schemes Authority (MPFA)'s enforcement actions against unscrupulous employers.</p> <p>(c) Mr WONG Kwok-hing's similar concern about the enforcement of court judgments on default contribution cases. His view that the Administration/the MPFA should put in place effective measures to ensure settlement of outstanding mandatory contributions by employers.</p> <p>(d) Mr WONG Kwok-hing's and Mr Albert HO's view that the Administration should take on board the approach outlined in paragraph 13 of</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>LC Paper No. LS67/07-08 proposing to hold directors of defaulting company personally liable for unpaid contributions.</p> <p>(e) The Administration's explanation of its proposed amendment to the proposed section 43BA of the Bill seeking to make non-compliance of a court order an offence liable to a fine and imprisonment. The revised proposal could provide a greater deterrent effect.</p> <p>(f) Directors of companies were already subject to criminal liability in respect of offences committed by the companies under the Mandatory Provident Fund Schemes Ordinance (MPFSO) (Cap. 485). There was no provision in the MPFSO imposing on company directors a civil liability to settle the outstanding MPF contributions owed by the company concerned.</p> <p>(g) Referring to the relevant provisions under the Building Management Ordinance (Cap. 344) on the liability of owners' corporation in procuring and keeping in force third party risks insurance policy for common parts of the building, Mr Albert HO's suggestion to reverse the onus of proof or impose an evidential burden on the defendant director as to his not having knowledge of or given consent to the offence in the criminal prosecution of MPF-related</p>	

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		<p>offences.</p> <p>(h) The Administration's response that in criminal prosecution, the onus of proof was normally placed on the prosecution. In drafting provisions of and amendments to the MPFSO, reference had been made to the relevant provisions in the Employment Ordinance (Cap. 57), given that the payment of mandatory contributions was akin to payment of wages and employer-employee relationship was involved.</p> <p>(i) Mr Andrew LEUNG's view that the suggestion to reverse the onus of proof on the defendant director in the criminal prosecution of MPF-related offences was contrary to the common law principle. He considered it unfair to introduce stringent requirements on employers across the board, in particular small and medium size enterprises, in the light of a few extreme cases of non-compliance. His view that where necessary, cases might be referred to the Commercial Crime Bureau of the Police Force for investigation. The MPFA could also make reference to the class actions taken by the Consumer Council on behalf of consumers and provide assistance to employees in making civil claims on defaulting employers collectively.</p> <p>(j) The Administration's advice that under the existing</p>	

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		<p>enforcement mechanism, the MPFA was already making civil claims on behalf of the employees.</p>	
002631 – 003218	Mr Ronny TONG Administration	<p>(a) Mr Ronny TONG's view that holding company directors criminally liable for MPF-related offence committed by the company might have greater deterrent effect.</p> <p>(b) The Administration's reiteration that the proposed amendment to section 43BA of the Bill to make non-compliance of the court order an offence would enhance the deterrent effect. Its reference to existing section 44(1) of the MPFSO would provide for criminal liability of officers, managers and partners for offences committed by the company.</p> <p>(c) The Administration did not consider it appropriate to include in the Bill any changes to the onus of proof with respect to the existing section 44(1) of the MPFSO.</p>	
003219 – 003923	Mr LEE Cheuk-yan ALA6 Administration MPFA	<p>(a) Mr LEE Cheuk-yan's query on the effectiveness or deterrent effect of criminal prosecution against directors of the defaulting employer companies and his following suggestions for improvement:</p> <p>(i) to impose an evidential burden on the defendant director as to his not having knowledge of or consented to the</p>	

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		<p>offence in the criminal prosecution of MPF-related offences; and</p> <p>(ii) to add a deeming provision that a summons served on the company was also deemed to be served on the directors of the company concerned, including directors who were not ordinarily resident in Hong Kong.</p> <p>(b) ALA6's view that Mr LEE's suggestion in (a)(i) above might make it easier for the Prosecution to prove the offence beyond reasonable doubt.</p> <p>(c) The MPFA's response that the summons would be served on a person who would be subject to the legal proceedings. Mr LEE's suggestion of a deeming provision might increase the chance of successful service of summons on directors/managers, but might also give rise to concern about fairness to the directors/managers. The Administration's remark that deeming provisions in legislation had often been subject to contention.</p>	
003924 – 005730	<p>Ms LI Fung-ying Administration ALA6 Mr SIN Chung-kai Chairman MPFA Mr WONG Kwok-hing</p>	<p>(a) View shared by Ms LI Fung-ying and Mr WONG Kwok-hing that the Administration should consider taking on board the approach outlined in paragraph 13 of LC Paper No. LS67/07-08 proposing</p>	

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		<p>to impose a civil liability on directors for unpaid mandatory contributions.</p> <p>(b) The Administration's response that it would not pursue the proposal on imposing civil liability on directors for unpaid mandatory contributions noting that a new proposal had been put forward to impose criminal liability on directors for non-compliance of court order.</p> <p>(c) Concern shared by Ms LI Fung-ying and Mr WONG Kwok-hing about the need to devise measures to strengthen the deterrent effect of the MPFA's enforcement action with reference to the Labour Department's recent recommendations on the seven measures to facilitate the enforcement of Labour Tribunal awards in respect of employers' default payment of wages.</p> <p>(d) Mr SIN Chung-kai's enquiry on whether the MPFA had exhausted all available tools in the recovery of outstanding mandatory contributions through civil routes.</p> <p>(e) The MPFA's explanation of according high priority to the recovery of outstanding mandatory contributions from defaulting employers, including filing civil claims to the appropriate level of court depending on the amount of arrears involved. If a claim was awarded and</p>	<p>The Administration/the MPFA to take action as required in paragraph 3(a) of the minutes.</p>

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		<p>the employer had not settled the arrears as required, the MPFA could take actions such as application for bailiff service, or application for a charging order or a garnishee order to execute the court judgment for recovery of the arrears.</p> <p>(f) As to Mr SIN's view that liquidation might be an effective tool to compel rectifications by employers, the MPFA's advice that liquidation was a tool which would normally be used for the most extreme cases.</p> <p>(g) Mr WONG Kwok-hing's concern about effectiveness of enforcement actions in the following scenarios:</p> <p>(i) employer companies whose directors were not ordinarily resident in Hong Kong or where the directors were corporations and not natural persons; and</p> <p>(ii) employers who had transferred assets from their company to other companies, thus depriving the company of assets out of which the outstanding mandatory contributions could be settled.</p> <p>(h) The MPFA's reference to existing liquidation process applicable to companies, under which the liquidator might trace the assets</p>	<p>The Administration/the MPFA to take action as required in paragraphs 3(b) and 3(c) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>transferred before liquidation and take them into account as realized assets of the wound-up company for settlement of debts if such transfer was inappropriate or unlawful.</p>	
005731 – 010809	<p>Mr Albert HO Administration Mr LEE Cheuk-yan Chairman</p>	<p>(a) View shared by Mr Albert HO and Mr LEE Cheuk-yan that the Administration should further consider:</p> <ul style="list-style-type: none"> (i) the suggestion to reverse the onus of proof or impose an evidential burden on the defendant director in the criminal prosecution of MPF-related offence; and (ii) holding directors of defaulting company personally liable for the unpaid contributions. <p>(b) The Administration's response that the proposal of holding directors of company personally liable for the unpaid MPF contributions would have profound implications on the existing directors' liability under the current Companies Ordinance (Cap. 32).</p> <p>(c) As to Mr Albert HO's view on expanding the coverage of the Protection of Wages on Insolvency Fund to cover payment of outstanding mandatory contributions to employees of insolvent companies, the Administration was concerned about the</p>	<p>The Administration/ the MPFA to take action a required in paragraph 3(e) of the minutes</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>implications on the rights and benefits of employers and employees under the Fund.</p> <p>(d) Mr LEE Cheuk-yan's suggestion that if the Administration would not take on board the suggestions in (a) above, the Bills Committee might consider whether it should propose amendments to the Bill in its name.</p>	
010810 – 012248	<p>Mr WONG Kwok-hing MPFA Chairman Mr Andrew LEUNG Administration</p>	<p>(a) Mr WONG Kwok-hing's repeated concern about the unsuccessful recovery actions by the MPFA in cases where unscrupulous employers had transferred the assets of the company. His concern that employees might even have to pay the fees of the liquidators if the realized assets of the company concerned were insufficient to settle the liquidation costs in the end.</p> <p>(b) The MPFA's advice that the existing arrears recovery mechanism was generally effective with respect to the default contribution complaint cases in 2006-2007. It was inevitable that under any arrears recovery regime, there would be cases of unsuccessful recovery due to insufficient assets of the companies concerned to meet their liabilities. At present, it was the MPFA which took actions to recover the outstanding mandatory contributions on behalf of the employees. Hence, employees would not</p>	

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		<p>have to bear any costs for the civil proceedings. In the extreme case where a company went into liquidation, outstanding MPF contributions would be admitted as preferential debts which had priority over other unsecured debts.</p> <p>(c) Mr Andrew LEUNG's view that inappropriate or unlawful transfer of assets in the course of liquidation was a criminal offence and the MPFA might refer the case to the Commercial Crime Bureau of the Police Force for investigation.</p> <p>(d) The MPFA's advice that assets recovery would be carried out by the liquidator in accordance with the existing liquidation procedures, while the MPFA might report a suspected case involving fraudulent assets transfer to the Police, where necessary.</p>	
012249 – 012924	Mr LEE Cheuk-yan ALA6	<p>(a) Mr LEE Cheuk-yan's view that unscrupulous employers could use different tactics in the transfer of assets. His reiteration that the approach outlined in paragraph 13 of LC Paper No. LS67/07-08 should be pursued to hold directors personally liable for the unpaid contributions.</p> <p>(b) ALA6's advice that if the directors were to be held personally liable for the unpaid MPF contributions, the legislative provision had to be drafted in such a way as to target at a corporate employer which had</p>	

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		deliberately and persistently evaded its responsibility for MPF contribution. The provision was not intended to hold the directors personally liable where the company concerned became insolvent or had genuine financial difficulties.	
<i>Follow-up to issues raised at the 5th meeting on 27 March 2008</i>			
012925 – 013330	Chairman Ms LI Fung-ying MPFA Administration	Ms LI Fung-ying's request for further information on the 5 102 default contribution complaint cases received in 2006-2007.	The Administration/MP FA to take action as required in paragraph 3(d) of the minutes.
013331 – 013550	Mr LEE Cheuk-yan	In respect of non-enrolment and non-payment of MPF contributions, Mr LEE Cheuk-yan's view that the Bills Committee should consider further its position on whether and how an employer should be barred from recovering from the employee the outstanding employee mandatory contributions paid by him (Item 5(ii) of CB(1)1196/07-08(02)).	
<i>Clause-by-clause examination</i>			
013551 – 013809	Chairman Administration	Part 3 Mandatory Provident Fund Schemes Ordinance <u>Clause 10 – Recovery of mandatory contributions that are in arrears</u> Members raised no query on clause 10.	
013810 – 014347	Administration Ms LI Fung-ying Chairman ALA6	<u>Clause 11 – Offences by employers</u> (a) Proposed Committee Stage amendments (CSAs) to amend sections 43B(1B), 43B(1C)(a), 43B(1D)(a) and 43B(1E).	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) Responding to Ms LI Fung-ying's enquiry, the Administration's explanation that the proposed CSAs to sections 43B(1C)(a) and 43B(1D)(a) aimed to make it clear that an employer would be liable to a heavier penalty (i.e. a fine of \$450,000 and imprisonment for four years) if he had made a deduction from an employee's relevant income but had not remitted the deducted sum as contributions.</p>	
014348 –014834	Administration	<p><u>Clause 12 – Section added</u></p> <p>43BA. Court may make certain orders in proceedings for offences under section 43B</p> <p>Proposed CSA to the proposed section 43BA to create an offence for non-compliance of court orders made under the proposed section 43BA.</p> <p><u>Clause 13 – Minimum level of relevant income per contribution period</u></p> <p><u>Clause 14 – Maximum level of relevant income per contribution period</u></p> <p>Mandatory Provident Fund Schemes (General) Regulation</p> <p><u>Clause 15 – Interpretation</u></p> <p><u>Clause 16 – Acceptance of contributions and accrued benefits being transferred</u></p> <p>Members raised no query on clauses 12 to 16.</p>	

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014835 – 015210	Administration Chairman	<p><u>Clause 17 – Separate accounts for each scheme member</u></p> <p>Responding to the Chairman's enquiry, the Administration's advice that amending sections 78(6)(a)(ii) and 78(6)(b)(ii)(A) by repealing "per month" which appeared after "minimum level of relevant income" was to reflect that "minimum level of relevant income" could be on a basis other than monthly.</p>	
015211 – 015550	Administration Chairman	<p><u>Clause 18 – Definitions</u></p> <p><u>Clause 19 – Net loss sustained in respect of self-employed person's business</u></p> <p><u>Clause 20 – Contribution surcharge for, and report on, failure to pay contributions</u></p> <p><u>Clause 21 – Crediting of payments</u></p> <p><u>Clause 22 – Accrued benefits not to be transferred if contributions outstanding</u></p> <p><u>Clause 23 – Section added</u></p> <p>207. Rate of contribution surcharge</p> <p><u>Clause 24 – Financial Penalties</u></p> <p>Members raised no query on clauses 18 to 24.</p>	
015551 – 020004	MPFA	<p>Part 4</p> <p>Mandatory Provident Fund Schemes Ordinance</p> <p><u>Clause 25 – Suspension of approval of approved trustee</u></p> <p><u>Clause 26 – Revocation of approval of approved trustee</u></p>	

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		<p><u>Clause 27 – Regulations with respect to registered schemes</u></p> <p><u>Clause 28 – Power to make regulations for purposes of sections 45B and 45C</u></p> <p><u>Clause 29 – Regulations</u></p> <p>Members raised no query on clauses 25 to 29.</p>	
020005 – 020128	Chairman	Meeting arrangements and way forward	

Council Business Division 1
Legislative Council Secretariat
8 May 2008