

立法會
Legislative Council

LC Paper No. CB(1)1526/07-08
(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 seventh meeting
held on Thursday, 24 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 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 Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon WONG Ting-kwong, BBS
Hon Ronny TONG Ka-wah, SC
- Members absent** : Hon Albert HO Chun-yan
Hon TAM Yiu-chung, GBS, JP
- 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
- Ms Sharon CHAN
Legislative Assistant (1)8

Action

I Confirmation of minutes and matters arising

(LC Paper No. CB(1)1323/07-08 —Minutes of meeting on 27 March
2008)

The minutes of the meeting held on 27 March 2008 were confirmed.

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

(a) 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)

(b) Follow-up to issues raised at the meeting on 15 April 2008

(LC Paper No. CB(1)1267/07-08(01) —List of follow-up actions arising from the meeting held on 15 April 2008 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)1267/07-08(02) —Administration's response to members' views and concerns raised at the meeting held on 15 April 2008)

III Discussion on the way forward

(LC Paper No. CB(1)1322/07-08(01) —Summary of issues over which the Bills Committee will consider the way forward prepared by the Legislative Council Secretariat

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

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)

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)

Clause-by-clause examination of the Bill

Clause 31 – Part IVA added

3. In relation to the concerns raised by the legal adviser and members of the Bills Committee about the provisions relating to controllers of approved trustees under the proposed sections 42A to 42F of the Mandatory Provident Fund Schemes (General) Regulation, the Administration/the MPFA were requested to:

(a) ***Proposed section 42A(2)***

- examine further the meaning of "substantial shareholder" under the proposed section 42A(2), having regard to whether it was necessary to include under the definition an associate of the substantial shareholder who was a person acting in concert with the substantial shareholder (i.e. making reference to section 4 of Schedule 8 to the Mandatory Provident Fund Schemes Ordinance (MPFSO) (Cap. 485));

(b) ***Proposed sections 42B(3), 42C(3), 42D(5) and 42E(1)***

- consider whether to amend the proposed provisions pertaining to the requirements on controllers, including officers, indirect controllers and substantial shareholders of a trustee to align with the criteria for determination of a "fit and proper person" under section 129 of the Securities and Futures Ordinance (Cap. 571);

(c) ***Proposed section 42C***

- consider whether it was an appropriate arrangement to require a trustee to apply to the MPFA for consent to persons proposing to become indirect controllers, having regard to the fact that indirect controllers normally acted behind the scene and the above arrangement might appear to encourage behind the scene activities and might not be conducive to effective regulation over the MPF trustees; and

(d) ***Proposed sections 42A and 42C***

- explain the material difference, if any, between the meaning of "indirect controller" of a trustee under the MPFSO and that of "shadow director" of a company under the Companies Ordinance (CO)(Cap. 32). If there was no material difference, consider whether the term "shadow director" should be adopted in the MPFSO so that the procedures and sanctions in relation to "shadow director" under the CO could be readily applicable to MPF scheme trustees.

(*Post-meeting note:* The Administration's response to paragraph 3 was issued to members vide LC Paper No. CB(1)1366/07-08(02) on 7 May 2008.)

Policy issues

Admin/
MPFA

4. To address members' concern about the protection of employees' accrued benefits under the MPF System, the Administration/the MPFA were requested to:

- (a) provide a paper setting out the procedures and timeframe according to which the MPFA would take actions to apply for liquidation of the employer company that had persistently failed to settle the outstanding mandatory contributions; and
- (b) note a member's suggestion to extend the scope of the Mandatory Provident Fund Schemes Compensation Fund to cover default MPF contributions owed by insolvent employer companies, and consider whether the suggestion can be taken on board.

5. In relation to the suggestion in paragraph 4(b), members agreed that this should be referred to the Panel on Financial Affairs (FA Panel) for follow-up.

(Post-meeting note: The MPFA's paper on paragraph 4(a) was issued to members vide LC Paper No. CB(1)1459/07-08(01) on 7 May 2008. The issue in paragraph 4(b) was referred to the FA Panel and included in the Panel's list of outstanding items for discussion.)

IV Any other business

Meeting arrangements and way forward

6. The Bills Committee had completed the clause-by-clause examination of the Bill except for Clause 31 on which further discussion would be required. To follow up the issues raised at the meeting and discuss the way forward, the Chairman suggested and members agreed that at least two meetings be held in May 2008. In addition to the meeting scheduled for Friday, 16 May 2008 at 8:30am, members agreed that another meeting be held on Friday, 9 May 2008 at 8:30 am.

(Post-meeting note: Notice of the meetings to be held on 9 and 16 May 2008 was issued to members vide LC Paper No. CB(1)1366/07-08 on 25 April 2008.)

7. There being no other business, the meeting ended at 12:55 pm.

Council Business Division 1
Legislative Council Secretariat
15 May 2008

**Proceedings of the
Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007
Seventh meeting on Thursday, 24 April 2008, at 10:45 am
in the Chamber of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000349	Chairman	Confirmation of minutes of the 5 th meeting held on 27 March 2008 (LC Paper No. CB(1)1323/07-08).	
<i>Clause-by-clause examination of the Bill</i>			
000350 – 000537	Chairman Mandatory Provident Fund Schemes Authority (MPFA)	Mandatory Provident Fund Schemes (General) Regulation <u>Clause 30 – Appointment of officer of approved trustee that is a company</u> Members raised no query on clause 30.	
000538 – 001159	MPFA ALA6 Administration	<u>Clause 31 – Part IVA added</u> 42A. Application and interpretation ALA6's concern about the definition of "substantial shareholder" under the proposed section 42A(2).	The Administration/the MPFA to take action as required in paragraph 3(a) of the minutes.
001200 - 005747	MPFA ALA6 Mr WONG Kwok-hing Mr Ronny TONG Chairman Ms LI Fung-ying Mr WONG Ting-kwong Mr Andrew LEUNG Miss CHAN Yuen-han	42B. Authority's consent required in respect of appointment of officers 42C. Authority's consent required in respect of persons proposing to become indirect controllers 42D. Authority's consent required in respect of persons proposing to become substantial shareholders 42E. Authority may object to existing controllers	

Time Marker	Speaker	Subject(s)	Action Required
		<p>42F. Authority's power to give directions in relation to substantial shareholders</p> <p>(a) ALA6's observation that the requirements on controllers, including officers, indirect controllers and substantial shareholders of an MPF trustee under the proposed sections 42B(3), 42C(3), 42D(5) and 42E(1) appeared different from the criteria for determination of a "fit and proper person" under section 129 of the Securities and Futures Ordinance (SFO) (Cap. 571). His view that consideration should be given to align such requirements with the criteria under section 129 of the SFO.</p> <p>(b) View shared by Mr WONG Kwok-hing, Mr Ronny TONG, Ms LI Fung-ying and Miss CHAN Yuen-han that a high standard of requirements should apply to controllers of MPF trustees to safeguard the integrity of the trustees in the administration of the MPF funds. Their view that such requirements should be aligned with that stipulated under section 129 of the SFO.</p> <p>(c) Mr WONG Ting-kwong's view that while the requirements relating to character and reputation of the "fit and proper person" criteria under section 129 of SFO might equally apply to an officer of MPF trustees, the requirements on financial status and financial integrity might not be applicable as an officer was merely an employee of the trustee.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(d) Mr Andrew LEUNG's view that excessively stringent requirements on controllers of MPF trustees might not be conducive to the effective operation of MPF schemes. His view that only those relevant criteria under section 129 of SFO should be adopted for application to the controllers of MPF trustees.</p> <p>(e) The Administration/MPFA's advice that the current regulatory regime for MPF trustees had all along operated effectively and smoothly. The requirements in the proposed sections 42B to 42E were considered adequate.</p> <p>(f) ALA6's query about the provision under the proposed section 42C for the MPFA's consent to a person becoming an indirect controller of the trustee.</p> <p>(g) Mr Ronny TONG's view that an indirect controller would likely be a person who wished to act behind the scene. His doubt whether the trustee would make an application to the MPFA for consent of such indirect controllers.</p> <p>(h) The MPFA's response that the requirement of seeking MPFA's consent to indirect controllers aimed to impose an obligation on the trustees for better regulatory oversight.</p>	<p>The Administration/the MPFA to take action as required in paragraph 3(b) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		(i) Mr Ronny TONG's view that if there was no material difference between the meaning of "indirect controller" of a trustee under the MPFSO and that of "shadow director" of a company under the Companies Ordinance (Cap. 32), it might not be desirable to use two different terms for the same subject.	The Administration/the MPFA to take action as required in paragraph 3(c) of the minutes.
005748 – 005817	MPFA	<p><u>Clause 32 – Financial Penalties</u></p> <p>Members raised no query on clause 32.</p>	
005818 – 010010	MPFA Chairman	<p>Part 5</p> <p>Mandatory Provident Fund Schemes Ordinance</p> <p><u>Clause 33 – Section added</u></p> <p>43F. Offence relating to pay-record</p> <p>Members raised no query on clause 33.</p>	
<i>Follow-up to issues raised at the meeting on 15 April 2008</i>			
010011 – 010516	Chairman Administration	The Administration's briefing on its response to members' views and concerns raised at the meeting held on 15 April 2008 (LC Paper No. CB(1)1267/07-08(02)).	
010517 – 011107	Mr WONG Kwok-hing Administration MPFA	(a) Mr WONG Kwok-hing's concern about the MPFA's actions against unscrupulous employer who transferred assets from his company to other companies, thus depriving the company of assets out of which the outstanding mandatory contribution could be settled.	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) The MPFA's advice that where enforcement actions had commenced against the employer concerned, the MPFA could possibly take action to try stopping the employer's transfer of assets.</p> <p>(c) The MPFA's reference to the role of the liquidator in tracing the assets which had been inappropriately or fraudulently transferred before liquidation.</p> <p>(d) The MPFA's advice that it could ascertain the availability of assets and the financial status of the employer company through requiring the employer company to produce records for its inspection.</p> <p>(e) Responding to Mr WONG Kwok-hing's concern about the Administration/ the MPFA facilitating the Labour Department (LD)'s review of the enforcement of court judgment in civil cases, the Administration's advice that wage defaults and contribution defaults were difficult issues requiring efforts of relevant parties to identify how improvement could be made.</p>	
011108 – 011619	Mr LEE Cheuk-yan Chairman ALA6	<p>(a) Mr LEE Cheuk-yan's view that the Bills Committee might consider proposing the following Committee Stage amendments (CSAs) to the Bill :</p> <p>(i) to reverse the onus of proof or impose an evidential burden on the defendant director</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>in the criminal prosecution of MPF-related offence; and</p> <p>(ii) to hold directors of defaulting company personally liable for the unpaid MPF contributions.</p> <p>(b) The Administration's view that the proposals under the Bill, if passed, would bring about much improvement to the enforcement of the MPF System. Therefore, it was not prepared to propose CSAs to the Bill as suggested by Mr LEE.</p> <p>(c) ALA6's reference to the draft CSAs prepared for the Bills Committee's consideration.</p>	
011620 – 012129	Miss CHAN Yuen-han Chairman Administration	<p>(a) Miss CHAN Yuen-han's view that the Administration should further examine how the seven measures recommended by the LD to facilitate the enforcement of Labour Tribunal awards could be applied in the recovery of mandatory contributions.</p> <p>(b) The Administration's explanation that similar arrangements in respect of most of the LD's proposed measures were already in place under the MPF regime.</p>	
012130 – 012522	Mr SIN Chung-kai Administration Chairman	<p>(a) Mr SIN Chung-kai's concern that the proposed increase in maximum penalties for MPF-related offences under the Bill might not have sufficient deterrent effect as the court seldom imposed the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>maximum sentence.</p> <p>(b) The Administration's reference to other enhancement measures proposed under the Bill, such as empowering the court to issue an order to direct employers to rectify non-enrolment and/ or non-payment of mandatory contributions, non-compliance of which was a criminal offence.</p>	
012523 – 013106	Mr Andrew LEUNG MPFA Chairman	<p>(a) Mr Andrew LEUNG's view that the MPFA should further step up its enforcement actions against non-compliant employers.</p> <p>(b) The MPFA's response that it would not under-estimate the deterrent effect of the new provisions covered under the Bill. Under the existing enforcement regime, there were motivations for employers to duly comply with the enrolment and contribution requirements, given that there was a range of enforcement tools available to the MPFA for recovering arrears.</p>	
013107 – 014524	Mr WONG Kwok-hing Chairman Administration Ms LI Fung-ying Miss CHAN Yuen-han Mr LEE Cheuk-yan	<p>(a) Mr WONG Kwok-hing's concern about the lack of means to take enforcement actions against employer companies whose directors were not domiciled in Hong Kong. His view that a compensation fund should be established to settle the outstanding contributions owed by insolvent employer companies.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(b) The Administration's explanation that under the existing MPF legislation, directors of companies might be criminally liable for the offence committed by the company where there was sufficient evidence. However, it was a problematic area where the directors concerned were not ordinarily resident in Hong Kong.</p> <p>(c) Miss CHAN Yuen-han's view that the MPFA should take actions more promptly to apply for liquidation of an employer company which had persistently failed to settle the outstanding mandatory contributions. Miss CHAN's concern about possible action against employer companies which tried to evade responsibility by transferring assets out of the companies.</p> <p>(d) The Administration's response that these were difficult issues requiring extensive discussion.</p> <p>(e) The Chairman's comment that some of the issues raised by members might not be resolved in the context of the Bill.</p>	
014525 – 020651	<p>Mr LEE Cheuk-yan Chairman Mr Andrew LEUNG Mr WONG Ting-kwong Mr WONG Kwok-hing Administration MPFA Miss CHAN Yuen-han</p>	<p>(a) Mr LEE Cheuk-yan's suggestion that the Administration should consider extending the scope of the Mandatory Provident Fund Schemes Compensation Fund to cover default MPF contributions owed by insolvent employer companies. His suggestion</p>	<p>The Administration/ the MPFA to take actions as required in paragraph 4(b) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>to follow up this subject at the Panel on Financial Affairs (FA Panel).</p> <p>(b) The Chairman's agreement that the suggestion in (a) above could be further considered by the FA Panel as it might not fall within the scope of the Bill.</p> <p>(c) Mr Andrew LEUNG and Mr WONG Ting-kwong queried that the suggestion in (a) above might have the effect of making law-abiding employers responsible for the default contributions owed by non-compliant employers. Their emphasis that the MPFA should exhaust the existing enforcement tools before seeking to introduce new measures. Mr Andrew LEUNG's view that as evidenced in the case of Sing Pao Newspaper Management Limited, the application for liquidation had been effective in achieving compliance.</p> <p>(d) Mr WONG Kwok-hing's concern about the procedures and timing of various actions by the MPFA in applying for liquidation of the employer company. Miss CHAN Yuen-han expressed similar concern.</p> <p>(e) The MPFA's reiteration that the tools available under the existing enforcement regime, together with the measures proposed under the Bill, would facilitate its enforcement of the MPF System and arrears recovery.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		(f) While the MPFA would take civil proceedings to recover the outstanding contributions and criminal proceedings against defaulting employers where circumstances so warranted, liquidation would normally be used as a last resort, having regard to the implications of the action (in particular, the interest of employees of the company).	
020652 – 021044	Chairman	Meeting arrangements and way forward.	

Council Business Division 1
Legislative Council Secretariat
15 May 2008