

立法會
Legislative Council

LC Paper No. CB(1)2072/07-08
(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 eighth meeting
held on Friday, 9 May 2008, at 8:30 am
in Conference Room A of the Legislative Council Building**

- Members present** : Hon James TIEN Pei-chun, GBS, JP (Chairman)
Hon LEE Cheuk-yan
Hon CHAN Yuen-han, 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
- Members absent** : Hon CHAN Kam-lam, SBS, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon SIN Chung-kai, SBS, JP
Hon TAM Yiu-chung, GBS, JP
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

Ms Sharon CHAN
Legislative Assistant (1)8

Action

I Confirmation of minutes and matters arising

(LC Paper No. CB(1)1460/07-08 —Minutes of meeting on 15 April
2008)

The minutes of the meeting held on 15 April 2008 were confirmed.

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

Follow-up to issues raised at the meeting on 24 April 2008

- (LC Paper No. CB(1)1366/07-08(01) —List of follow-up actions arising from the meeting held on 24 April 2008 prepared by the Legislative Council Secretariat
- LC Paper No. CB(1)1366/07-08(02) —Administration's response to members' views and concerns raised at the meeting held on 24 April 2008 and further draft Committee Stage amendments (version as at 7 May 2008)
- LC Paper No. CB(1)1459/07-08(01) —MPFA's paper on recovery of arrears
- LC Paper No. CB(1)1490/07-08(01) —Marked-up copy of further draft Committee Stage amendments (version as at 8 May 2008) prepared by the Legal Service Division (Chinese version only)
- LC Paper No. CB(1)1231/07-08(01) —Marked-up copy of the draft Committee Stage amendments (version as at 11 April 2008) prepared 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. To address members' concern about the procedures and timeframe according to which the Mandatory Provident Fund Schemes Authority (MPFA) would take actions to apply for liquidation of the employer company that had persistently failed to settle the outstanding mandatory contributions, the Administration/the MPFA were requested to consider and respond to the following:

- (a) Noting that the MPFA would follow up the court judgment to ensure that the employer paid the arrears and surcharge to the MPFA, a member's suggestion that if the judgment debt was not settled before the expiry of a three-month period after the court judgment was made, the MPFA should proceed to serve a statutory demand on the defaulting employer, to be followed by a winding-up petition if the defaulting employer failed to settle the debt within three weeks after the service of the statutory demand.
- (b) Another member's view that the follow-up actions set out in paragraphs 4 and 5 of the MPFA's paper on recovery of arrears (LC Paper No. CB(1)1459/07-08(01)) would unduly lengthen the process of arrears recovery. Instead of taking these actions, the MPFA should proceed without delay to serve a statutory demand on the defaulting employer within a short timeframe of, say, two weeks after the court judgment if the employer still failed to settle the judgment debt, to be followed by a winding-up petition if the debt was not settled within three weeks after the service of the statutory demand.
- (c) The motion passed at the Bills Committee meeting, as follows:

"本委員會促請政府及積金局就「積金局採取行動申請把僱主公司清盤的程序及時限」文件中的第4段和第5段的局方行動，定出明確的時限。"

動議人：王國興議員

和議人：李鳳英議員

(Translation)

"That this Committee urges the Government and the MPFA to set a definite timeframe for the Authority's actions set out in paragraphs 4 and 5 of the paper on "Procedures and timeframe under which the MPFA would take actions to apply for liquidation of an employer company"."

Moved by : Hon WONG Kwok-hing

Seconded by : Hon LI Fung-ying

- (d) Having regard to the views and suggestions in (a), (b) and (c) above, to consider incorporating the procedures and timeframe for the MPFA's follow-up actions in its internal guidelines on enforcement actions against defaulting employers.

(Post-meeting note: MPFA's response to paragraph 3 was circulated to members vide LC Paper No. CB(1)1525/07-08 (01) on 15 May 2008.)

4. In relation to a member's concern about the difficulties in taking enforcement actions against employer companies (including those registered outside Hong Kong) whose directors were not domiciled in Hong Kong or whose directors were corporate directors, the Administration was requested to consider the matter in the context of the company law regime at a higher level of the Government.

Admin

III Discussion on the way forward

(LC Paper No. CB(1)1366/07-08(03) —Draft Committee Stage amendments on liability of officers, managers and partners and civil liability of company directors and shareholders prepared by the Legal Service Division

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)

Draft Committee Stage amendments (CSAs) prepared by the Legal Service Division

5. The Bills Committee considered two sets of draft CSAs prepared by the Legal Service Division (LC Paper No. CB(1)1366/07-08(03)) to give effect to members' following suggestions raised at previous meetings:

- (a) 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 (proposed new clause 12A); and
- (b) to impose a personal liability on company directors to settle the unpaid mandatory contributions (proposed new clause 12B).

6. In reply to the Chairman, the Administration confirmed that as the Bill already contained various proposals to improve enforcement and to achieve a greater deterrent effect, and for reasons explained at previous meetings, it would not propose any further CSAs to give effect to the suggestions in paragraphs 5(a) and (b) above. The Chairman therefore put to vote the question of whether the Bills Committee should propose the CSA in paragraph 5(a) in its name. Of the six members present, five members voted for and the Chairman voted against the proposal in question. The Chairman declared that the proposed CSA would be moved by the Bills Committee in its name. The Chairman also put to vote the question of whether the Bills Committee should propose the CSA in paragraph 5(b) in its name. Of the six members present, four members voted for and the Chairman voted against the proposal in question. One member abstained. The

Chairman declared that the proposed CSA would be moved by the Bills Committee in its name.

7. The Chairman said that as he was not in support of the proposed CSAs, it might not be desirable for him to move the CSAs on behalf of the Bills Committee. After discussion, it was agreed that the Deputy Chairman would move the CSAs on behalf of the Bills Committee. In this connection, the Chairman reminded members that whether the proposed CSAs to the Bill could be moved would depend on the ruling of the President of the Legislative Council (LegCo).

Way forward

8. Assuming that the Bills Committee could complete deliberations at the next meeting scheduled to be held on 16 May 2008, members noted the proposed legislative timetable as follows:

Date of House Committee meeting to consider Bills Committee report	Deadline for Public Officers to give notice for resumption	Deadline for giving notice of CSAs	LegCo meeting for resumption of Second Reading debate
Friday, 30 May 2008	Monday, 2 June 2008	Saturday, 7 June 2008	Wednesday, 18 June 2008

IV Any other business

9. There being no other business, the meeting ended at 10:23 am.

Council Business Division 1
Legislative Council Secretariat
27 June 2008

**Proceedings of the
Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007
Eighth meeting on Friday, 9 May 2008, at 8:30 am
in Conference Room A of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000106	Chairman	Confirmation of minutes of the 6 th meeting held on 15 April 2008 (LC Paper No. CB(1)1460/07-08).	
<i>Follow-up to issues raised at the meeting on 24 April 2008</i>			
000107 – 000514	Chairman Mandatory Provident Fund Schemes Authority (MPFA)	Briefing by the MPFA on recovery of arrears (LC Paper No. CB(1)1459/07-08(01)).	
000515 – 003119	Mr WONG Kwok-hing MPFA Chairman Administration Mr WONG Ting-kwong Ms LI Fung-ying	(a) Concern shared by Mr WONG Kwok-hing and Ms LI Fung-ying about the timeframe for the MPFA to take follow-up actions set out in paragraphs 4 and 5 of LC Paper No. CB(1)1459/07-08(01). Mr WONG's view that by being lenient to the defaulting employers under the current arrangement, the MPFA was causing hardship to the employees concerned. The members' request that the MPFA should set a definite timeframe for the actions in paragraphs 4 and 5 of the paper so that enforcement action such as filing a winding-up petition would be taken promptly. (b) Mr WONG Ting-kwong declared interest as a non-executive director of the MPFA. His view that it would be more practicable to set out the timeframe for actions in the internal guidelines of MPFA on enforcement, rather than in the	

Time Marker	Speaker	Subject(s)	Action Required
		<p>MPF legislation.</p> <p>(c) The MPFA's advice that the actions set out in paragraphs 4 and 5 of its paper outlined the fact-finding process under which necessary information such as the financial position of the employer could be ascertained to enable the MPFA to decide on the appropriate enforcement strategy. Filing a winding-up petition shortly after the employer's failure to settle the judgment debt might not be in the interest of serving employees, nor conducive to early recovery of arrears.</p> <p>(d) The MPFA would consider in consultation with its enforcement division the suggestion of incorporating the timeframes for actions to follow up court judgments in its internal guidelines.</p> <p>(e) The Administration's advice that the MPFA attached great importance to the early recovery of arrears. Nevertheless, it would take some time for the MPFA to examine the feasibility or otherwise of incorporating timeframes for various actions in its internal guidelines.</p>	
003120 – 005025	<p>Mr Alan LEONG MPFA Mr Andrew LEUNG Chairman Mr LEE Cheuk-yan ALA6</p>	<p>(a) Mr Alan LEONG's suggestion that the MPFA might allow the employer concerned to settle the judgment debt within three months after the court judgment. If the debt was not settled before the expiry of the three-month period, the MPFA should proceed to serve a statutory demand on the defaulting employer, to be</p>	<p>The Administration/the MPFA to take action as required in paragraph 3(a) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>followed by a winding-up petition if the employer failed to settle the debt within three weeks after the service of the statutory demand. His view that this would allow reasonable time for the defaulting employer to settle the debt and provide a definite timeframe for enforcement action by the MPFA.</p> <p>(b) Mr Andrew LEUNG's view that while liquidation could be an effective enforcement tool, it should not be used lightly across-the-board. Flexibility in the timeframe should be allowed for employers of small and medium enterprises as they might at times face certain liquidity problem. His view that setting out the procedures and timeframes for actions to enforce court judgments in the MPFA's internal guidelines would be useful in facilitating timely recovery of arrears.</p> <p>(c) The MPFA's response that Mr Alan LEONG's suggestion had to be further examined as it would bring about a major change to the MPFA's enforcement strategy under which liquidation would normally be used as the last resort, not a normal step.</p> <p>(d) Mr LEE Cheuk-yan's view that the MPFA should put in place a more effective enforcement mechanism to meet public aspiration on the timely recovery of outstanding MPF contributions. Mr LEE's view that instead of taking actions in paragraphs 4 and 5 of the MPFA's paper, the</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
		<p>MPFA should proceed without delay to serve a statutory demand on the defaulting employer within a short timeframe after the court judgment if the employer failed to settle the judgment debt, to be followed by a winding-up petition if the debt was not settled within three weeks after the service of the statutory demand.</p> <p>(e) Even if the procedures and timeframes for enforcement of court judgments were stipulated in the legislation, Mr LEE Cheuk-yan's question on the sanction, if any, against the MPFA for its failure to comply with such requirements.</p> <p>(f) ALA6's advice that legal proceedings such as application for a court order or judicial review might be brought against the MPFA. He nevertheless was of the view that incorporating the procedures and timeframes for the MPFA's follow-up actions in its internal guidelines on enforcement, together with regular monitoring by the relevant Panel, might suffice.</p>	
005026 – 010529	<p>Mr WONG Kwok-hing Chairman Miss CHAN Yuen-han MPFA Mr LEE Cheuk-yan Clerk Ms LI Fung-ying</p>	<p>(a) Mr WONG Kwok-hing moved a motion on "本委員會促請政府及積金局就「積金局採取行動申請把僱主公司清盤的程序及時限」文件中的第 4 段和第 5 段的局方行動，定出明確的時限。" The motion was seconded by Ms LI Fung-ying.</p> <p>(b) Miss CHAN Yuen-han's reference to the case of Sing Pao Newspaper Management</p>	<p>The Administration/the MPFA to take action as required in paragraphs 3(c) and 3(d) of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
		<p>Limited and opined that liquidation of the defaulting employer company would be an effective and deterrent tool. Her view that the MPFA should take such action without delay to protect employees' interest.</p> <p>(c) Mr LEE Cheuk-yan's reiteration of his view that the MPFA should proceed without delay to serve a statutory demand shortly after the court judgment, to be followed by a winding-up petition if the employer concerned still failed to settle the judgment debt.</p> <p>(d) The MPFA's response that it had all along been making every effort to ensure timely recovery of the outstanding MPF contributions from defaulting employers and would arrange to pay the amount recovered to the scheme trustee for allocation to scheme members' accounts as soon as possible.</p>	
010530 – 011441	Mr WONG Kwok-hing MPFA ALA6 Chairman Administration	<p>(a) Mr WONG Kwok-hing's concern about the difficulties in taking enforcement actions such as serving a statutory demand on employer companies (including those registered outside Hong Kong) whose directors were not domiciled in Hong Kong or whose directors were corporate directors.</p> <p>(b) The MPFA's advice that, in that case, it would be possible that the statutory demand could not be successfully served.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(c) The Chairman's view that the issues raised by Mr WONG Kwok-hing about enforcement actions against overseas companies and company directors residing overseas were not solely related to employment issue but would have to be considered in the context of the company law regime.</p> <p>(d) ALA6's comments that the Hong Kong enforcement authority might be able to take actions against directors in those overseas jurisdictions which had entered into mutual agreements with Hong Kong in respect of the enforcement of judgments.</p> <p>(e) The Administration's response that where enforcement actions involved persons domiciled in places outside Hong Kong, the relevant enforcement authority would have to liaise with the authorities of the places concerned to work out whether and what enforcement actions could be taken.</p>	<p>The Administration to take action as required in paragraph 4 of the minutes.</p>
<i>Discussion on the way forward</i>			
011442 – 012738	<p>Chairman ALA6 Mr LEE Cheuk-yan Miss CHAN Yuen-han Mr WONG Kwok-hing Administration</p>	<p>(a) ALA6's brief introduction on the draft Committee Stage amendments (CSAs) in LC Paper No. CB(1)1366/07-08(03).</p> <p>(b) The Bills Committee voted and agreed that the proposed CSAs should be moved in its name. Members noted that ultimately, the moving of the CSAs would have to be subject to the approval of the President.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(c) Members' agreement that the Deputy Chairman would move the CSAs on behalf of the Bills Committee as the Chairman was not in support of the proposed CSAs.</p> <p>(d) The Administration noted the Bill Committee's decision and advised that it would move a CSA to the proposed section 43BA of the Bill to provide for criminal liability for non-compliance with the court order.</p>	
012739 – 014851	<p>Chairman ALA6 Ms LI Fung-ying Administration Mr WONG Kwok-hing Miss CHAN Yuen-han</p>	<p>(a) Referring to the Administration's response to views raised at the last meeting (LC Paper No. CB(1)1366/07-08(02)), ALA6 reiterated his concern about-</p> <p>(i) the requirements on controllers of trustees under the proposed sections 42B(3), 42C(3), 42D(5) and 42E(1) not in alignment with the criteria for determination of a "fit and proper person" under section 129 of the Securities and Futures Ordinance (Cap. 571); and</p> <p>(ii) the drafting of the CSA to the proposed sections 7AA(2), (3) and (6A) might not achieve the intended objective. This was because in non-enrolment cases, there was no "registered scheme" to which contributions could be made as required under proposed sections</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>7AA(2) and (3). Before such a "registered scheme" was determined in accordance with the proposed section 7AC, it was doubtful whether the employer's legal liability to pay mandatory contributions would arise.</p> <p>(b) Concern shared by Ms LI Fung-ying, Mr WONG Kwok-hing and Miss CHAN Yuen-han about the recovery of outstanding MPF contributions (comprising both the employer's and the employee's portions) in non-enrolment cases from the employers.</p> <p>(c) The Department of Justice(DoJ)'s advice that the proposed sections 7AA(2) and (3) provided, inter alia, that the contributions had to be paid from the employer's own funds and would eventually be paid into a registered scheme determined in accordance with the proposed section 7AC. The proposed section 7AA(6A) required that the contributions be paid to the MPFA in the interim.</p> <p>(d) Members noted that ALA6 and the Administration held different views over whether the drafting of the proposed sections 7AA(2), (3) and (6A) could achieve the intended objective.</p> <p>(e) ALA6's view that under both the existing section 7A of the Mandatory Provident Fund Schemes Ordinance (MPFSO)</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(Cap. 485) and the proposed section 7AA, it appeared that the employer had no obligation to pay the employee's portion of MPF contributions if he had not made any deduction from the employee's relevant income.</p> <p>(f) The Administration's response that the MPFSO stated clearly that the employer had the responsibility to make the required contributions (both the employer's and the employee's portions). The relevant obligation was spelt out in the existing section 7A(8) and the proposed section 7AA(6A).</p> <p>(g) Members noted that ALA6 and the Administration held different views over the employer's liability for the employee's portion of MPF contributions as provided under the existing Ordinance and the Bill.</p> <p>(h) As the MPFSO, in its current form, did not explicitly impose an obligation on the employee to make MPF contributions, ALA6 opined that an employer who had paid the employee's portion of mandatory contributions in non-enrolment cases might not be able to recover from the employee the amount paid as a debt even if he had not made any deduction from the employee's relevant income. The Administration however considered that in such cases, the employer had a cause of action to recover the paid amount from the employee, and recalled that this view was shared by some</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>members at a previous meeting.</p> <p>(i) Members noted that ALA6 and the Administration held different views over the issue.</p> <p>(j) Miss CHAN Yuen-han's view that she would support an interpretation of the current provisions under the MPFSO to the effect that the employer had no right to recover from the employee the employee's portion of MPF contributions paid.</p> <p>(k) The Administration's view that the existing MPFSO was sufficiently clear that a statutory obligation was placed on the employer to enrol its employees into MPF schemes and to make MPF contributions. As such, the MPFA would recover the retrospective and current outstanding MPF contributions comprising both the employer's and the employee's portions from the employer. It would be for the employer to recover the employee's portion paid by him (if he had not made any deduction from the employee's relevant income) through mutual discussion or civil proceedings.</p> <p>(l) The DoJ's advice that the drafting of the CSAs to the proposed section 7AA (2), (3) and (6A) aimed to align the drafting with that of the existing section 7A(1), (2) and (8) to better reflect that it was the obligation of the employer to (i) make the employer mandatory contribution using his own fund, (ii) to make the</p>	

Time Marker	Speaker	Subject(s)	Action Required
		employee mandatory contribution through deduction from the employee's relevant income and (iii) to pay the contributions to the MPFA. The drafting had been seen by the Prosecutions Division of DoJ which confirmed that it was in order.	
014852 – 015052	Chairman Clerk	Meeting arrangements and legislative timetable	

Council Business Division 1
Legislative Council Secretariat
27 June 2008