

For discussion on
13 March 2008

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

Administration's Response to the Views of the Bills Committee

Purpose

At the meetings of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 ("the Bill") held on 31 January 2008 and 25 February 2008, the Administration was requested to follow up a number of requests and comments made by Members. This paper aims to set out the Administration's response to those comments and requests which were not covered in the LC Paper No. CB(1)854/07-08(07).

Outstanding Issues for the Meeting on 31 January 2008

(I) Issuance of court order

2. On the proposed section 43BA of the Bill which seeks to confer a discretionary power on the court to make an order to compel an employer to enrol its employee in an MPF scheme and pay any outstanding mandatory contributions and/or contribution surcharge, the Administration/MPFA were requested to –

- (a) advise on the meaning of "the court" referred to in the proposed section 43BA, having regard to the interpretation of the "Court" under section 2 of the Mandatory Provident Fund Schemes Ordinance ("MPFSO") to mean "the Court of First Instance" and the fact that MPF-related offences are normally tried in the Magistrates' Court;

- (b) give an account on the procedures involved in applying for or making the court order specified in the proposed section 43BA;
- (c) explain how the court order could be enforced, the resultant offence (such as “contempt of the court”) committed and the sanction for non-compliance with the court order;
- (d) consider the alternative arrangement suggested by Members, i.e. instead of giving the court a discretionary power to make an order (which might in effect shift the enforcement responsibility from the MPFA to the court and impose an onus on the court), to add a new provision to the effect that if an employer found guilty of the offence failed to rectify the non-enrolment and non-payment situation within a specified period, it would be liable to further prosecution; and
- (e) to avoid double jeopardy against the defendant, the new provision suggested in (d) above might be drafted in such a way that an employer found guilty of the offence and who failed to rectify the non-enrolment and non-payment situation within the specified period would be committing a continuous offence.

3. **With respect to para.2(a)**, the Department of Justice (“DoJ”) advises that according to the proposed section 43BA, the court, whether it convicts or acquits an employer of an offence against sections 43B(1), 43B(1C) or 43B(1D), may make an order requiring the employer to enrol its employees in an MPF scheme and/or to pay any outstanding mandatory contribution or contribution surcharges. The use of the word “court” in the context of the proposed section 43BA would suggest that the power to make such orders is to be given to any criminal courts, including the Magistrates’ Court, which may convict or acquit the employer of the offence.

4. **With respect to para.2(b)**, we understand from the DoJ that the application for a court order under the proposed section 43BA will be made immediately after conviction or acquittal of an employer. The Magistrate who has heard the case would have all the materials before him to decide whether an order should be made and the terms of the order. If the employer has not given evidence at trial (or if it is convicted on its own guilty plea), he will be given an opportunity to be heard before the order is made.

5. **With respect to para.2(c)**, the DoJ advises that breach or non-compliance of a court order (including order issued by the Magistrates' Court) may amount to contempt of court if it is shown that the act is calculated to interfere with the administration of justice or the lawful process of the court. The Magistrates' Court, however, has no jurisdiction to deal with contempt of court cases which will have to be committed to the Court of First Instance for hearing. The court may impose a short custodial term or a fine in the case where the offender has been shown to have deliberately or willfully disobeyed the court order.

6. Apart from contempt of court, the Magistrates' Court could enforce order for payment under section 51 of the Magistrates Ordinance (Cap. 227) by issuing warrants of distress.

7. **With respect to the suggestions in para.2(d) and (e)**, we understand from the DoJ that the constitutional principle is that no one should be tried or punished again for an offence for which he has already been finally convicted or acquitted. Prosecution of the same person again for his failure to rectify non-enrolment and / or non-payment would amount to double jeopardy since both prosecutions are based on substantially the same set of facts and the same statutory duty.

8. Regarding the suggestion to create a continuous offence for non-enrolment and non-payment, we would like to clarify that non-enrolment by an employer is already a continuous offence under section 7(1A) of the MPFSO. Under section 43B(3) of the MPFSO, an employer commits a continuous non-enrolment offence is subject to a

fine at \$100,000 and to imprisonment for 6 months on the first occasion on which the person is convicted of the offence as well as to a daily penalty of \$500 for each day on which the offence is continued according to section 43B(3)(b) of the MPFSO. As such, a convicted employer who fails to rectify by enrolling its employee in an MPF scheme can be prosecuted again for the second time subsequent to the prosecution of the first offence. As for the non-payment offence, the DoJ considers that since the offence is an isolated breach and is not continuous in nature, it does not seem appropriate to make the failure to rectify the original omission a continuous offence. Creating such an offence might also raise the issue of double jeopardy. We have therefore proposed to create a new offence for failure to comply with the court order (please refer to para. 10 below for details of the proposed offence).

Revised Proposal

9. The proposal to empower the court to order rectification of non-enrolment and / or non-payment of mandatory contributions and contribution surcharge in section 43BA of the Bill (“the court order proposal”) adds flexibility to the enforcement work of the MPFA as an additional tool to deal with the most unscrupulous employers. The court order proposal is modeled on section 65 of the Employment Ordinance (Cap.57) (“EO”)¹. The objective is to further enhance the deterrent effect against non-enrolment and non-payment by creating criminal consequences for failure to comply with a court order. For non-payment cases, the current civil process taken by the MPFA against defaulting employers for recovering outstanding mandatory contributions will not amount to any criminal offence if, after judgment, they still fail to pay the contributions. The court order proposal is designed, amongst other things, to facilitate recovery of outstanding contributions from the convicted or acquitted employers who can be subject to further

¹ Section 65 of EO –

(1) An employer convicted of an offence under this Ordinance shall, in addition to any fine imposed under this Ordinance, if the court before which the conviction was obtained so orders, pay any wages or other sum outstanding at the time of the conviction and in respect of which the offence was committed.

(2) Where the employer is acquitted of an offence under this Ordinance on grounds that his default was not wilful or not without reasonable excuse, the court may, if it finds that any wages or other sums in respect of which the charge was brought are due, order the employer to pay such wages or other sums.

prosecution if the default contributions are not settled as directed in the court order.

10. We note DoJ's advice that while breach or non-compliance of a court order may amount to contempt of court, the latter is nevertheless a drastic means which should not be readily resorted to in enforcing court orders. Besides, the Magistrates' Court where MPF-related offences are normally tried has no jurisdiction over contempt of court cases which will have to be heard by the Court of First Instance. In the light of the above and after further consultation with the DoJ, we propose to add a provision under section 43BA to set out that non-compliance of the court order is an offence which would be subject to a maximum penalty of a fine of \$350,000 and to imprisonment for three years (equivalent to the proposed maximum penalty for non-enrolment or default contributions), and a daily fine of \$500 for each day during which the offence is continued. This is similar to the case in section 18A of the Waste Disposal Ordinance (Cap.354)². The proposal can improve the operation of section 43BA by providing certainty on the actions that can be taken against an employer for non-compliance of a court order.

² Section 18(A) of Waste Disposal Ordinance -

1) If a person is convicted of an offence under section 16A in respect of waste deposited on Government land, the magistrate may, either on application by the Director or on the magistrate's own initiative, order the person to—

(a) remove the waste from that land within the period specified in the order; or
(b) if the Director has already removed the waste, pay the Director any expenses reasonably incurred by him in carrying out the removal.

(2) An order under subsection (1) is in addition to any penalty imposed under section 18 in respect of an offence under section 16A.

(3) A person who is subject to an order under subsection (1)(a) shall inform the Director immediately upon completion of the removal of the waste concerned by delivering by hand a written notice at his office or sending a written notice by registered post to his office address.

(4) A person who, without reasonable excuse, fails to comply with an order made against him under subsection (1)(a) commits an offence and is liable—

(a) to a fine of \$200000 and to imprisonment for 6 months on the first occasion on which he is convicted of the offence;
(b) to a fine of \$500000 and to imprisonment for 6 months on each subsequent occasion on which he is convicted of the offence; and
(c) to an additional daily penalty of \$10000 for each day on which the offence is proved, to the satisfaction of the magistrate, to have continued.

(5) A person who, without reasonable excuse, fails to comply with subsection (3) commits an offence and is liable to a fine at level 3.

(6) For the purposes of this section, a reference to Government land is a reference to unleased land as defined in the Land (Miscellaneous Provisions) Ordinance (Cap 28).

(II) The liability of employers and employees in respect of outstanding contributions in non-enrolment cases

11. In respect of the liability of employers and employees to settle outstanding contributions in non-enrolment cases, the Administration / MPFA were requested to -

- (a) clarify the legal liability, if any, of an employee to pay his past outstanding MPF contributions which had not been deducted from his wages in a situation where his employer had failed to enrol him in an MPF scheme and make the MPF contributions, given that it was proposed in the Bill that the employer's obligation to repay default contributions would be dated back to 1 December 2000 or the commencement of the employee's employment, whichever was the later;
- (b) the consequences, if any, faced by the employee if he did not repay the MPF contributions; and
- (c) if the employer was to be held liable for the employee's default contributions described in (a), to consider whether this arrangement was equitable and enforceable.

12. The set-up of the MPF System is designed to place a statutory responsibility on an employer to enrol his employees in an MPF scheme, and to remit both the employer mandatory contributions made from its own funds as well as the employee mandatory contributions deducted from the employees' relevant income to the MPF scheme. Since its inception in December 2000, the MPF System has been operating along this principle as reflected in section 7 and 7A of the MPFSO. Where default contributions are reported for *enrolled employees*, the MPFA will initiate civil actions to recover both the employer mandatory contributions and employee mandatory contributions from the employer concerned (including cases where the employer has not made deduction from the employees' relevant income). The proposed section 7AE of the Bill is drafted to reflect the same

principle that employers should be held responsible for settling both the employer mandatory contributions and employee mandatory contributions that have been outstanding during the past contribution periods when the employees were *not enrolled* in an MPF scheme by their employers.

13. Upon the Assistant Legal Adviser's enquiry, we have further checked with the DoJ which confirms that an employer is liable to pay both the retrospective employer mandatory contributions and employee mandatory contributions to the MPFA under the proposed section 7AE³. If the employer has not made any deduction from the employees' relevant income as employee mandatory contributions, the employer may recover the amount paid as a civil debt from the employees concerned.

14. At the last meeting of the Bills Committee, some Members expressed concern about the legal liability of employers under the proposed section 7AE to pay both the retrospective employer mandatory contributions and employee mandatory contributions for non-enrolled employees attributable to the period as early as from 1 December 2000. We consider that the long-established principle for employers to be held responsible for settling the outstanding default contributions (including both the employer and employee portions) under the MPFSO should be preserved to maintain the integrity of the MPF System. However, we note that the retrospective civil liability for payment under the proposed section 7AE might impose considerable financial burden on employees when employers file civil claims against them to recover the employee mandatory contributions paid. To avoid causing hardship to employees, subject to Members' views, the Administration is open to consider the feasibility of limiting the 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 made no deduction of

³ The proposed section 7AE(2)(a) refers to "the amount of contributions that would have been payable by the employer under section 7A to a registered scheme for each contribution period". Under the existing section 7A(8), an employer has the obligation to ensure that contributions required to be made in accordance with section 7A in respect of an employee are paid to the trustee of the registered scheme. Such contributions will cover both employer mandatory contributions and employee mandatory contributions.

employee mandatory contributions from the employees' relevant income in respect of the same retrospective period.

Outstanding Issues for the Meeting on 25 February 2008

Payment of fines and default contributions

15. At the meeting on 25 February 2008, Members raised concern about whether the employees' entitlements would be jeopardized as a result of a convicted employer's inability to settle the outstanding contributions after payment of the fine to the Government, the Administration/MPFA were requested to-

- (a) illustrate the extent of the problem by providing information on the amount of outstanding contributions settled or still defaulted by the convicted employers in those prosecution cases in 2006-2007 under which 13 directors/managers were convicted for default contributions and were imposed fines by the court; and
- (b) advise on the feasibility of the further suggestion of stipulating in the MPFSO that employers convicted of default contributions must fulfill their obligation to settle the outstanding MPF contributions before paying the fine to the Government.

16. According to the MPFA, among the 13 directors/managers (involving a total of 12 employer companies as two directors/managers were from the same company) who were convicted for default contributions in 2006-07, 12 of them have settled the fines. Of the 12 companies involved, prosecution action was taken against two companies which have fully settled the fines and all the outstanding contributions. Another three companies have also fully settled the outstanding contributions. Civil action to recover outstanding contributions was pursued against the other companies where applicable.

17. We by far find no evidence to substantiate that the non-payment of default contributions is due to genuine financial difficulties faced by the employers arising from their payment of fines. But what is fairly clear from those convicted company cases is that payment of a fine would not lead to their inability to settle outstanding contributions. Besides, we note that the possible criminal consequences arising from failure to pay the fines create a strong deterrent effect against non-payment. To create the same deterrent effect against non-payment of default contributions, we therefore propose in para.9-10 above that an employer can be subject to further prosecution if it fails to settle outstanding contributions in accordance with a court order.

18. We understand that it is a normal practice that the court will ascertain the financial position of an employer before it imposes a fine, particularly if the fine is of a considerable amount. If the court is satisfied that an employer is in financial difficulties, the court may also allow for payment of outstanding contributions by installments. We consider it desirable to continue the existing practice which will provide flexibility for the court to take into consideration the financial position of the employers in exercising its discretion to determine the suitable level of fine, if any, and the manner for the payment of the contributions, for example, whether the contributions should be paid in installments. In the extreme case where a company goes into liquidation, outstanding MPF contributions are admitted as preferential debts which have priority over other debts. The realized assets of the wound-up companies cannot be used for payment of fines due to courts.

19. Regarding the suggestion of stipulating in the MPFSO that employers convicted of default contributions must fulfill their obligation to settle the outstanding MPF contributions before paying the fine to the Government, after consulting the DoJ, we do not consider it appropriate to make a fine subordinate to outstanding MPF contributions by way of legislation as a fine seeks to punish the convicted person and deter others from commission of the same offence, which is the purpose of taking prosecution action.

Financial Services and the Treasury Bureau
Mandatory Provident Fund Schemes Authority
March 2008