

**For discussion on
10 April 2008**

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

Administration's Response to the Views of the Bills Committee

Purpose

This paper sets out the Administration's response to the following questions raised at the last meeting of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 ("the Bill") held on 13 March 2008:

- (a) whether the Mandatory Provident Fund Schemes Authority ("MPFA") should be specifically empowered to apply to the Court of First Instance ("CFI") 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
- (b) whether the directors and/or shareholders of a limited company should be held legally liable personally to settle any outstanding MPF mandatory contributions owed by the company concerned.

Administration's Response

(I) Court order by CFI

2. Members are requested to note that under the Administration's current legislative proposal as set out in section 43BA of the Bill and the proposed Committee Stage Amendment to that section as explained in para. 10 of paper LC Paper No. CB(1)1027/07-08(02) which

was discussed at the last Bills Committee meeting, MPFA's enforcement power as well as the deterrent effect against non-enrolment and non-payment of MPF mandatory contributions would be enhanced. First, MPFA would be empowered to apply to the Magistrates' Court which handle the case concerned to make an order requiring the employer to enroll its employees in an MPF scheme and/or to pay any outstanding mandatory contribution or contribution surcharges, as the case may be. Secondly, it will be an offence if an employer does not comply with the court order, which would be subject to a maximum penalty of a fine of \$350,000 and imprisonment for three years, and a daily fine of \$500 for each day during which the offence is continued. This would provide certainty that the employers concerned would be subject to criminal liability for non-compliance of any such court order.

3. In comparison, the suggestion for the MPFA to apply to the CFI for making an order with the same content as that described in para. 2 above would be more time-consuming in procedural terms, and could be less effective as a deterrent against non-enrolment and non-payment of MPF mandatory contributions. In normal circumstances, it would likely take longer time before the CFI would start to hear an application for it to make a court order, and since it would be the first time the CFI handle the case concerned, it may consider it necessary to examine the relevant details of the case although such had been examined by the Magistrates' Court before. And in case there is non-compliance with the court order, it could take considerable time before the CFI would start to consider any prosecution for "contempt of court".

4. Besides, as discussed at the last Bills Committee meeting, whether a breach or non-compliance of a court order would amount to a "contempt of court" would be a matter for the judge to decide having regard to the circumstances of the case in question. By contrast, the Administration's proposal would provide certainty that the employers concerned would be subject to criminal liability for non-compliance of any such court order.

(II) Legal liability of directors and / shareholders to settle outstanding MPF contributions

5. At the last meeting, some Members asked that reference should be made to the corresponding provisions in the Copyright Ordinance (Cap.528) and the Unsolicited Electronic Messages Ordinance (Cap.593) which impose legal liability on directors of a company in respect of certain offences.

6. According to the Department of Justice, neither of these two ordinances impose any civil liability on directors and/or shareholders of a company to settle any outstanding payment owed by the company concerned, whereas directors or persons under the immediate authority of the directors who are responsible for the internal management of the company would be subject to criminal liability under specified circumstances. This is similar to the Mandatory Provident Fund Schemes Ordinance under which directors or persons concerned in the management of a company would be subject to criminal liability in respect of breaches by that company under the Ordinance.

Financial Services and the Treasury Bureau
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