



**葉劉淑儀議員辦事處**  
**Office of Hon. IP LAU Suk-ye, Regina**

Dear President,

**Re: Proposed Amendments to the  
Employees Retraining Ordinance (Amendment of Schedule 3)  
(No. 2) Notice 2008**

I have given notice to move amendments to the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008 (L.N. 244 of 2008) (No.2 Notice), which was made by the Chief Executive in Council under section 31(1) of the Employees Retraining Ordinance (Cap. 423) (the Ordinance). The propose amendments are to repeal section 2 of the No.2 Notice, and to substitute with the following provision:-

**\*2. Amount of levy specified for the purposes of section 14(2)**

Schedule 3 to the Employees Retraining Ordinance (Cap. 423) is amended by repealing "\$0" and substituting -

"\$0 (in respect of each imported employee to be employed by an employer under the "Scheme for Importation of Foreign Domestic Helpers" approved by the Chief Executive in Council on 25 February 2003 under section 14(3) of the Ordinance)

\$400 (in respect of each imported employee to be employed by an employer under any other labour importation scheme approved by the Chief Executive in Council under section 14(3) of the Ordinance)".

**2. The effects of the proposed amendments are:-**

- (a) to suspend the imposition of the Employees Retraining Levy (the Levy) on employers of foreign domestic helpers (FDHs) until further notice;
- (b) in relation to the Levy imposed on employers of all other imported employee under any other labour importation scheme, to be restored to \$400 on 1 August 2013.

**The Administration's Views**

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3. The Administration has set out their views on the amendments proposed in their submissions to the President dated 2 December 2008. Essentially, the Administration is of the view that the proposed amendments are:-

- (a) ultra vires the power of the Chief Executive in Council under the Ordinance;
- (b) the proposed amendments have charging effect and are thus prohibited by Rule 31(1) of the Rules of Procedure;

4. The Administration also seeks to distinguish the previous ruling of the President on the amendments proposed by Hon LEE Cheuk-yan in the 1998 Pneumoconiosis Compensation Fund.

#### Ultra Vires

5. The Administration points out, at paragraph 6 of the submissions, that the proposed amendments to the No. 2 Notice are ultra vires because the Chief Executive "merely sought to give temporary relief to employers of imported workers including foreign domestic helpers for a limited time". The proposed amendments go far further. The Administration also points out that there is nothing in the Ordinance which empowers the Chief Executive in Council to specify different sums in relation to different classes of employees or in respect of different schemes approved under section 14(3).

#### Charging Effect

6. The Administration has made references to the definition of "public moneys" in the Public Finance Ordinance (Cap. 2) and the Audit Ordinance (Cap. 122). The Administration considers that "public moneys" in those ordinances only apply to their context but not of general application. The Administration submits that the Employees Retraining Board (the Board) is there to carry out a facet of public policy. The Employees Retraining Fund (the Fund) is there to facilitate that public purpose. Whether sourced from employers by way of the Levy, or by subvention out from general revenue, the Administration submits that assets of the Fund can only be regarded as "public", as opposed to "private" money.

7. The Administration also submits that such amendments will infringe the Executive's financial initiative, and interferes with the Chief Executive's constitutional responsibility to ensure



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that the Fund is at all time adequate to ensure the Board can fulfil its statutory responsibilities (paragraph 16).

#### Previous Ruling of the President

8. In relation to the previous rulings of the President, the Administration submits that the President took a far too narrow view on "revenues or other public moneys" in Rule 31(1) in 1998 ruling regarding the Pneumoconiosis Compensation Fund (paragraph 19).

9. The Administration is also of the view that the President's ruling in 1998 in relation to the amendments to the Pneumoconiosis Compensation Fund is distinguishable from the present case because the amendments in that case affect the outgoing from the Pneumoconiosis Compensation Fund whereas the present amendments reduce the incoming of the Fund. The Administration also points out that the Government has not given any financial support to the Pneumoconiosis Compensation Fund whereas for the Fund, the Government has injected capital to it.

#### **My Response**

#### Ultra Vires

10. In relation to the power of the Chief Executive in Council under the Ordinance, the Administration focuses on the interpretation of section 31(1) of the Ordinance. However, looking at the Ordinance as a whole, one will note that:-

- (a) under section 14(3) of the Ordinance, the Chief Executive in Council may approve a labour importation scheme under the terms of which a levy shall be payable;
- (b) under section 31(1), the Chief Executive in Council has been given a general power to amend Schedule 3, i.e. the Schedule containing the amount of the levy.

11. It is reasonable to argue that there is no prohibition against the Chief Executive in Council to apply different rates of Levy to different types of labour importation scheme.

12. Further, one must put the proposed amendments in the context of the Ordinance. The provisions imposing the Levy are set out in the Ordinance. The effect of the proposed



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amendments to the No. 2 Notice is not to amend those provisions. The main difference between Administration's proposal and the proposed amendments to the No. 2 Notice is that the Administration proposes to suspend the imposition of the Levy for a fixed period of time whereas the proposed amendments suspend the imposition until further notice. The power of the Chief Executive in Council to impose the Levy under the Ordinance is not affected by the proposed amendments. If the Chief Executive in Council may suspend the Levy for a fixed period of time, the Chief Executive in Council must also have power to extend the suspension period until further notice.

13. As the power of the Chief Executive in Council to impose the Levy under the Ordinance is not prejudiced by the proposed amendments, the proposed amendments will not infringe the purported "executive's financial initiative". In any event, the Chief Executive in Council have no role in the use of the Fund and thus "executive's financial initiative" is irrelevant in this context.

#### Charging Effect

14. It appears that the Administration is not disputing that the Levy or the Fund is not part of the revenue (paragraphs 13 and 14 of their submissions). The main issue is whether the proposed amendments will dispose or charge any part of other public moneys of Hong Kong". The Fund was established by section 6 of the Ordinance and is vested in the Employees Retraining Board (the Board). Under section 8, the Board is required to maintain the Fund with a bank and pay all moneys comprising the Fund into the Account. Payments from the Fund is governed by section 7 of the Ordinance. The operation of the Fund is based on the Ordinance and is independent from the Government. Apparently, the Fund does not fall within the definition of "public moneys" in the Public Finance Ordinance (Cap. 2).

15. Although the Administration submits that the definition of "public moneys" in the Public Finance Ordinance (Cap. 2) and the Audit Ordinance (Cap. 122) confines to their specific context, and that the assets of the Fund can only be regarded as public (not private) because of the public nature of the Fund, the Administration's submissions do not provide an accurate description as to what amounts to "public moneys". Further, the Administration's understanding appears to be far too wide and may lead to absurdity if the Administration's interpretation is adopted.

#### Previous Rulings of the President



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16. In the ruling of the President dated 20 July 1998 in relation to an amendment to be moved by Hon LEE Cheuk-yan to amend the Pneumoconiosis (Compensation) Ordinance (Cap. 360), the President ruled that, at paragraph 10, "[r]ule 31 of the Rules of Procedure refers to revenue or other public moneys of Hong Kong. Since the Pneumoconiosis Compensation Fund is a statutory fund and not the revenue of the Government, any consequence on the Fund, incidental or direct..., would not have any charging effect on general revenue.". The set up and composition of the Pneumoconiosis Compensation Fund is similar to the Fund. Therefore, applying the ruling of the President in 1998, amending the Levy should carry no charging effect.

17. The Administration submits that this ruling should be distinguished from the present case because the Government had made no contribution to the finance to that fund whereas the Government did contribute to the Fund.

18. It should be pointed out that the Government are under no obligation to finance the Pneumoconiosis Compensation Fund and the Fund under the ordinances of which the two funds were established. Despite the Administration submits that the Government would be bound to make up any deficit in the Fund caused by loss of income from the Levy, the Administration is under no duty to finance the Fund and thus it is not in law "bound" to make up any deficit.

#### Conclusion

19. To conclude, I respectfully submit that the proposed amendments are not ultra vires of the power under the Ordinance, and that they carry no charging effect.

Mrs Regina Ip

Member of Legislative Council, HKSAR

3 December 2008