President's ruling
on proposed resolutions to amend the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008 proposed by Hon Mrs Regina IP LAU Suk-yee and Hon LEE Wing-tat

Hon Mrs Regina IP and Hon LEE Wing-tat have given notice to move proposed resolutions to amend the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008 ("No. 2 Notice") at the meeting of the Legislative Council of 10 December 2008. In considering the admissibility of these proposed resolutions for consideration by the Council, I have invited the Administration to comment on the proposed resolutions and the Members concerned to respond to the Administration's comments. The Administration's comments and the Members' responses are summarized in the **Appendix**.

2. In the two submissions of the Administration, I notice that the Administration has addressed at some length the "lawfulness" of the Members' proposed resolutions. I wish to reiterate that the President determines the admissibility of the proposed resolutions in accordance with the Rules of Procedure of the Legislative Council ("RoP") only. My rulings are procedural in nature. Legal or constitutional issues would be considered when they form an integral part of the procedural question under my consideration. I shall take into account all relevant considerations and the purpose of the relevant rules when forming my opinion.

3. In the course of my consideration, I have made reference to the advice of Counsel to the Legislature in respect of the Council's power to amend subsidiary legislation, his analysis of the meaning of "public moneys" in the context of RoP 31(1), and also to past cases in the Council where references were made to principles of ultra vires and charging effect.

Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008

4. The Employees Retraining Ordinance (Cap. 423) ("ERO") establishes a body corporate, known as the Employees Retraining Board ("the Board"), to administer the Employees Retraining Fund ("the Fund") for providing training and retraining for local workers.

5. Under section 14 of ERO, a levy, known as the Employees Retraining Levy ("the levy"), shall be payable by each employer who employs imported employees under a labour importation scheme in respect of each imported employee to be employed by him under a contract of employment and granted a visa. The amount of levy payable is the sum specified in Schedule 3 of ERO multiplied by the number of months specified in the contract of

employment. Section 31(1) provides that the Chief Executive in Council ("CE-in-Council") may, by notice in the Gazette, amend Schedule 3.

6. On 1 August 2008, the Employees Retraining Ordinance (Amendment of Schedule 3) Notice 2008 ("Amendment Notice") was gazetted to reduce the sum of $400 specified in Schedule 3 to $0 for two years with effect from that date. The Amendment Notice was tabled in Council on 8 October 2008.

7. On 11 November 2008, the No. 2 Notice was gazetted to repeal the Amendment Notice and extend the reduction of the sum to $0 for five years, and revert the sum to $400 as from 1 August 2013. The No. 2 Notice was tabled in Council on 12 November 2008.

Hon Mrs Regina IP's proposed resolution

The proposed resolution

8. Mrs IP's proposed resolution seeks to amend the No. 2 Notice to the effect that the levy in respect of each imported employee to be employed under the "Scheme for Importation of Foreign Domestic Helpers ("FDHs")" approved by CE-in-Council on 25 February 2003 shall remain at $0 from 1 August 2013 onwards, whereas the sum for each imported employee to be employed under any other labour importation scheme shall revert to $400.

Ultra vires issues

9. The Administration refers to section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1) and submits that Mrs IP's proposed amendment is not "consistent with" the power to make the No. 2 Notice, and hence is ultra vires section 31(1) of ERO. The argument put forward by the Administration is that in making the No. 2 Notice, CE-in-Council merely sought to provide temporary relief. As Mrs IP's proposed resolution seeks to dispense altogether with the need to impose a levy on the employers of FDHs for an indefinite period, contrary to ERO itself, the proposed amendment exceeds the power that CE-in-Council was exercising in making the No. 2 Notice. The Administration also argues that there is nothing in ERO indicating that differential levies may be set.

10. Mrs IP does not agree to the Administration's views. Mrs IP submits that if CE-in-Council may suspend the levy of $400 for a fixed period of time, CE-in-Council must also have the power to extend the suspension period until further notice. Mrs IP also submits that there is no prohibition against CE-in-Council to apply different rates of levy.

11. Counsel advises me that there is no expressed or implied restriction on the length of period during which a certain specified amount of levy, including

the amount of "$0", should apply to amendments made to Schedule 3 to ERO under section 31(1) thereof. Such length of period is essentially a question of policy. Counsel's view is that the proposed amendment is within the power of CE-in-Council to make, and it does not fall foul of the requirement that the amendment proposed to be made pursuant to section 34(2) of Cap. 1 has to be made in a manner consistent with the power to make the No. 2 Notice under section 31(1) of ERO.

12. As regards differential rates of levy, Counsel points out that section 7(2) of Cap. 1 provides to the effect that words and expressions in the singular include the plural and vice versa. Section 2(1) of the same provides that save where the contrary intention appears, section 7(2) applies to ERO. The references to "the amount of levy" and "the sum specified in Schedule 3" in section 14(2) of ERO, couched in the singular, can be easily explained by the fact that the reference they relate to is "in respect of each imported employee". To construe that wording as disallowing differential levies may well be too restrictive because different labour importation schemes may be approved which may need differential levies to cater for their individual circumstances. In Counsel's view, no contrary intention appears against construing the relevant provisions as allowing differential sums of levies to be specified.

13. Having considered the relevant sections of Cap. 1 and ERO and the views of the Administration, Mrs IP and Counsel, I am of the opinion that no provision is found in ERO which restricts the power of CE-in-Council in amending Schedule 3 in such a way that it has to be for a definite period. It is entirely a question of public policy to be reflected in Schedule 3. ERO does not impose any restriction regarding the duration that a specified amount of levy should apply and so the proposed amendment is not inconsistent with the ERO and thereby with section 34(2) of Cap. 1.

14. As regards differential rates, the Administration's submission fails to persuade me that there can only be one rate for the levy under ERO. I am therefore of the opinion that Mrs IP's proposed amendment to provide a separate rate in respect of the employees under the FDH scheme is not out of order.

<u>Charging effect issue</u>

15. The Administration is of the view that Mrs IP's proposed amendment has charging effect and hence is caught by RoP 31(1), which says:

> "A motion or an amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by –

(a) the Chief Executive; or

(b) a designated public officer; or

(c) a Member, if the Chief Executive consents in writing to the proposal."

16. The Administration submits that the assets of the Fund plainly fall within the broad definition of "revenue or other public moneys". Whether sourced from employers by way of the levy or by subvention out of general revenue, the assets of the Fund can only be regarded as public and not private moneys. The Administration considers that the proposed amendment is an infringement which "fails to respect the Executive's financial initiatives", and "interferes with CE's constitutional responsibility to ensure that the Fund is at all time adequate to ensure that the Board can fulfil its statutory responsibilities". The Administration also submits that under section 27(2) of ERO, if and when the Fund's assets are no longer required, the assets may be transferred to general revenue.

17. The Administration further submits that the object or effect of the proposed amendment is to dispose of (i.e. to get rid of) the levy in relation to FDHs as from 1 August 2013. It would thereafter inexorably reduce the income of the Fund, and therefore the assets of the Fund.

18. The Administration has referred to my predecessor's ruling in 1998 in relation to the Pneumoconiosis Compensation Fund[1] and has made the comment that the President took far too narrow a view of the meaning of "revenue or public moneys". The Administration also argues that while the Government had not given any funding support to the Pneumoconiosis Compensation Fund in the past other than the initial loan facility in 1980 which had already been repaid in full in 1983, a zero levy post-2013 in relation to FDHs would necessitate reinstatement of government subventions to the Employees Retraining Fund if the purposes of ERO are thereafter to be fulfilled.

19. Mrs IP submits that judging from how the Fund is established, vested, maintained, used and operated under ERO, the Fund is independent of the Government and does not fall within the definition of "public moneys". Mrs IP also points out that the Administration's submission does not provide an accurate description as to what amounts to "public moneys".

20. Counsel advises that the Board, as a body corporate, has a distinct legal personality of its own. It is empowered to perform the Board's functions and exercise its powers on its own, subject to section 27 of ERO, which

[1] Ruling on Hon LEE Cheuk-yan's amendment to the Administration's resolution under the Pneumoconiosis (Compensation) Ordinance (Cap. 360) dated 20 July 1998

provides that CE may give to the Board such directions as he thinks fit in relation to the performance of its functions or the exercise of its powers and the Board shall comply with such directions. Nevertheless, where this happens, it is still the Board, and the Board alone, which performs its functions or exercises its powers. In this regard, section 2 of Schedule 1 to ERO specifically provides that the Board "shall not be regarded as a servant or agent of the Government or as enjoying any status, immunity or privilege of the Government".

21. Counsel points out that the definitions of “public moneys” in the Public Finance Ordinance (Cap. 2) and the Audit Ordinance (Cap. 122) are the only statutory definitions of the expression. These definitions not only appear in the two main ordinances dealing with public finance, but they also carry the same narrow meaning. As advised by Counsel, in today's public finance system of Hong Kong, funds that fall within the meaning of "public moneys" include, for example, the Capital Works Reserve Fund, Capital Investment Fund, and trading funds of various government departments. Regarding section 27(2) of ERO, Counsel points out that similar mechanisms are found in other ordinances, for example section 23C of the Probate and Administration Ordinance (Cap. 10), to deal with non-public moneys which are being held by a public authority.

22. In the light of Counsel's advice in paragraph 21 above, I share Counsel's view that there is a strong argument that the Employees Retraining Fund does not fall within the meaning of "other public moneys" in RoP 31(1). Counsel further advises that ERO does not place any statutory obligation on the Government to inject funds into the Fund on any account.

23. I note from the previous rulings of my predecessor the following principles which have been established in relation to the application of RoP 31(1):

(a) any consequence on a statutory fund, not being the revenue or other public moneys of Hong Kong, incidental or direct, would not have any charging effect within the meaning of RoP 31(1); and

(b) unless there is a relevant obligation under which the Government is bound by law, any effect that an amendment will have on government revenue will not constitute charging effect.

24. There is nothing in the Administration's submission to persuade me that the above principles should not apply in the present case. None of the points raised by the Administration could, on its own or taken together, establish to my satisfaction that the Employees Retraining Fund is within the meaning of "public moneys" of RoP 31(1). I have no alternative but to form

the opinion that the Fund is not a part of public moneys and so Mrs IP's proposed resolution does not have charging effect under RoP 31(1).

Hon LEE Wing-tat's proposed resolution

The proposed resolution

25. Mr LEE's proposed resolution seeks to provide for the reversion of the amount of the levy to $400 to come into operation on a date to be appointed by the Secretary for Labour Welfare (SLW) subject to the approval of the Council.

26. The Administration has made a submission to object to Mr LEE's proposed amendment on grounds of ultra vires and charging effect, which I shall address later. Mr LEE's proposed amendment has also raised a drafting issue, which has called for a study of its compliance with section 28(4) of Cap. 1. In the course of my consideration, I have been assisted by Counsel to the Legislature on whether the drafting of the proposed amendment is in order. Under RoP 30(3)(c), I am under the obligation to direct the notice of a motion to be returned to the Member who signed it, if it is in my opinion out of order.

Ultra vires issues

27. Mr LEE's proposed amendment is to repeal section 1(1) of the No. 2 Notice, and substitute it with the following:

> "(1) Section 2 shall come into operation on a date to be appointed by the Secretary for Labour and Welfare subject to the approval of the Legislative Council.".

Section 2 reverts the amount of levy from $0 to $400. Section 1(1) is to enable section 2 to come into operation on 1 August 2013, with the effect that the $0 levy will be in force for five years from 1 August 2008.

28. Mr LEE's proposed amendment comprises three operative parts:

(a) that section 2 shall come into operation on a date to be appointed;

(b) that the date shall be appointed by SLW; and

(c) that the commencement of section 2 shall be subject to the approval of the Council.

29. Counsel advises me that Mr LEE's proposed amendment contains no requirement that the appointment be "by notice", which is always present in commencement clauses providing for the commencement date to be appointed. According to Counsel, the statutory provision that governs the commencement

of subsidiary legislation is section 28(3) and (4) of Cap. 1. The relevant provision for the present purpose is subsection (4), which provides:

> "A person who makes subsidiary legislation may provide for the subsidiary legislation to commence on a day to be fixed by notice to be given by him or by some other person designated in the subsidiary legislation.".

The effect of subsection (4) is to empower the maker of the subsidiary legislation to defer the fixing of a commencement date to another date to be appointed by notice, and the notice may be given by himself or by another person. Where this power to defer the fixing of a commencement date is exercised, it is clear that the power has to be exercised as provided, that is, by notice.

30. I have looked closely at the relevant provision in the context of section 28 of Cap. 1 and noted how the requirement of "notice" relates to the definition of subsidiary legislation. I agree with Counsel that the requirement to make the appointment of the commencement date "by notice" is essential to the valid exercise of the power to make such an appointment. Hence, it follows that Mr LEE's proposed resolution is ultra vires the said subsection (4) as the governing provision.

31. The Administration's objection to Mr LEE's proposed amendment is also on ultra vires ground but on a basis different from that referred to in the foregoing paragraphs. The Administration's submission refers to the third part of Mr LEE's proposed amendment, i.e. the commencement of the reversion of the amount of levy to $400 shall be subject to the approval of the Council. The Administration points out that a notice made under section 31(1) of ERO including the commencement provision as set out in section 1 of the No. 2 Notice is a form of subsidiary legislation which is subject to the requirement of section 34 of Cap. 1 that it be tabled in Council, i.e. the negative vetting procedure[2]. Mr LEE's proposed amendment has the effect of making the commencement subject to section 35 of Cap. 1, i.e. the positive vetting procedure[3]. While section 31(1) of ERO is not subject to section 35 of Cap. 1, the proposed imposition or importation of such a requirement would have the effect of applying the requirement of section 35 of Cap. 1 to the making of subsidiary legislation under section 31(1) of ERO. The Administration

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[2] Under the negative vetting procedure provided in section 34 of Cap. 1, all subsidiary legislation is to be tabled at the next Council meeting after the publication in the Gazette of the subsidiary legislation. The Council may amend an item of subsidiary legislation by a resolution passed at a Council meeting held not later than 28 days after the meeting at which it was tabled. The Council may also extend the scrutiny period by 21 days, or to the Council meeting immediately following the 21 days, if there is no Council meeting on the 21st day.

[3] Under the positive vetting procedure provided in section 35 of Cap. 1, where any ordinance provides that an item of subsidiary legislation is to be subject to the Council's approval, the item must be submitted to the Council for approval.

considers that it is beyond the scope of powers under section 31(1) to make such an amendment, which may only be achieved by way of an amendment ordinance.

32. In Mr LEE's submission, he argues that there is nothing in section 35 or other parts of Cap. 1 that requires that amendments to a provision to the effect that it be submitted for the approval of the Council could only be made when the provision itself is subject to the requirement of section 35 of Cap. 1. Mr LEE also points out that there is no previous ruling that such an amendment is "beyond the scope of power".

33. I accept the Administration's submission that the imposition of requirements of section 35 of Cap. 1 to the making of the subsidiary legislation, i.e. a commencement notice, under section 31(1) of ERO is beyond the powers given to CE-in-Council by the same section. Accordingly, I rule Mr LEE's proposed amendment out of order.

Charging effect issue

34. As I have already formed the opinion that Mr LEE's proposed amendment is ultra vires, I shall not deal with the issue of whether it has charging effect under RoP 31(1).

My ruling

35. I rule that:

(a) Hon Mrs Regina IP may move her proposed resolution to the No. 2 Notice at the Council meeting of 10 December 2008; and

(b) Mr LEE Wing-tat's proposed resolution is out of order and its notice be returned to him under RoP 30(3)(c).

(Jasper TSANG Yok-sing)
President
Legislative Council

8 December 2008

Appendix

Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008

**Summary of Members' proposed resolutions,
the Administration's comments and the Members' responses**

Proposed resolutions	Administration's comments	Members' responses
(a) Hon Mrs Regina IP LAU Suk-yee		
The proposed resolution seeks to amend the No. 2 Notice to the effect that the levy in respect of each imported employee to be employed under the "Scheme for Importation of FDHs" approved by CE-in-Council on 25 February 2003 shall remain at $0 from 1 August 2013 onwards, whereas the sum for each imported employee to be employed under any other labour importation scheme shall revert to $400.	<u>Ultra vires and section 34(2) of Cap. 1</u> The proposed resolution to specify the amount of levy imposed in relation to FDHs to be $0 and the amount of levy imposed in relation to other imported workers to be $400 is objectionable because it is ultra vires section 31(1) of ERO, and hence is not "consistent with" the power to make the No. 2 Notice and goes beyond the power conferred by section 34(2) of Cap. 1 in the following way. First, the proposed resolution exceeds the power that CE-in-Council was exercising in making subsidiary legislation by the No. 2 Notice. CE merely sought to give temporary relief to employers of imported workers including FDHs for a limited time, that being justified by the current balance of the Fund. The proposed resolution goes far further. It would seek to dispense altogether with the need to impose a levy on employers of FDHs for an indefinite period, contrary to ERO itself. Second, ERO establishes a framework under which CE-in-Council may approve a labour importation scheme which requires employers of workers covered by that scheme	<u>Ultra vires</u> Looking at ERO as a whole, one will note that under section 14(3) of ERO, CE-in-Council may approve a labour importation scheme under the terms of which a levy shall be payable. In addition, under section 31(1), CE-in-Council has been given a general power to amend Schedule 3, i.e. the Schedule containing the amount of the levy. It is reasonable to argue that there is no prohibition against CE-in-Council to apply different rates of levy to different types of labour importation scheme. Further, one must put the proposed resolution in the context of ERO. The provisions imposing the levy are set out in ERO. The effect of the proposed resolution is not to amend those provisions. The main difference between Administration's proposal and the proposed resolution is that the Administration proposes to suspend the imposition of the levy for a fixed period of time whereas the proposed resolution suspends the imposition until

Proposed resolutions	Administration's comments	Members' responses
	to apply to the Director of Immigration for permission to engage workers from abroad and, having obtained that permission, to pay a levy in respect of any such worker. The amount of the levy is specified in Schedule 3 to ERO. There is nothing in ERO indicating that differential levies may be set. Section 14(2) of ERO refers to the "sum specified in Schedule 3" and section 31(1) of ERO only empowers CE-in-Council to amend Schedule 3, i.e. "the amount of levy specified for the purposes of section 14(2)". It does not empower CE-in-Council to specify different sums in relation to different classes of imported employees or in respect of different schemes approved under section 14(3). An amendment Ordinance would be required for this purpose.	further notice. The power of CE-in-Council to impose the levy under ERO is not affected by the proposed resolution. If CE-in-Council may suspend the levy for a fixed period of time, CE-in-Council must also have power to extend the suspension period until further notice. As the power of CE-in-Council to impose the levy under ERO is not prejudiced by the proposed resolution, the proposed resolution will not infringe the purported "Executive's financial initiative". In any event, CE-in-Council has no role in the use of the Fund and thus "Executive's financial initiative" is irrelevant in this context.
	<u>Charging effect under RoP 31(1)</u> The proposed resolution has charging effect and hence is caught by RoP 31(1). It may not be proposed without the written consent of CE. The assets of the Fund plainly fall within the broad description of "revenue or other public moneys". The Fund is currently vested in the Board which in turn is accountable to LegCo (section 13 of ERO). The Fund itself is partly sourced from moneys provided by Government (a total of $4 billion since the establishment of the Board in 1992 including some $400 million paid annually between 2001-2002 and 2007-2008) (section 6(3)(e) of ERO). The Fund includes the levy collected by a public	<u>Charging effect</u> It appears that the Administration is not disputing that the levy or the Fund is not part of the revenue. The main issue is whether the proposed resolution will dispose of or charge any part of other public moneys of Hong Kong. The Fund was established by section 6 of ERO and is vested in 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 ERO. The operation of the Fund is based on ERO and is independent from the Government. Apparently, the Fund does not fall within the definition of "public moneys" in Cap. 2.

Proposed resolutions	Administration's comments	Members' responses
	officer (the Director of Immigration) and remitted to the Fund (sections 14(1), 15(1) and 16 of ERO). The Fund is subject to examination by the Director of Audit (section 12 of ERO). If and when the Fund's assets are no longer required, the assets may be transferred to general revenue (section 27(2) of ERO). We have examined the definitions in Cap. 2 (dealing primarily with the process of LegCo's approval of Government expenditure and the responsibility of controlling officers) and those in Cap. 122 (which covers the work of the Director of Audit). Those definitions, applicable in the context of those particular statutory provisions, do not purport to be of general application, still less to govern the meaning of RoP 31(1). There is no good reason for treating the Fund and its assets as beyond the wide meaning of the words "revenue or other public moneys". Put simply, the Board is there to carry out a facet of public policy. The Fund is there to facilitate that public purpose. Whether sourced from employers by way of the statutory levy, or by subvention out of general revenue, the assets of the Fund can only be regarded as public (not private) moneys, albeit presently vested in the Board for statutory purposes. It is surely for that reason that ERO contains the provisions of sections 12, 13, 14(1), 15, 16 and 27(2). The purpose of RoP 31(1) is to reflect the long-established parliamentary principle of respecting the Executive's financial initiative.	Although the Administration submits that the definition of "public moneys" in Cap. 2 and 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.

Proposed resolutions	Administration's comments	Members' responses
	The proposed resolution removes or extends the all-important temporal element in relation to FDHs. It turns what would have been short-term relief for employers of FDHs during the period of surplus into permanent or long-term relief. It would override the decision of CE-in-Council that there were special reasons to justify reducing the statutory levy to zero for five years only, and would perpetuate or extend relief from the statutory levy in relation to FDHs. This is exactly the kind of infringement that fails to respect the Executive's financial initiative. It interferes with CE's constitutional responsibility to ensure the Fund is at all time adequate to ensure the Board can fulfil its statutory responsibilities. The "object or effect" of the proposed resolution is equally plain. The proposed resolution would deprive the Fund after 1 August 2013 of an important source of its income as enacted by section 14 of ERO. That section, read with the No. 2 Notice, presently provides for a levy payable by employers of FDHs and to be received by the Fund at the monthly rate of $400 from 1 August 2013. The object or effect of the proposed resolution is to "dispose of" (i.e. get rid of) that levy in relation to FDHs as from 1 August 2013. It would thereafter inexorably reduce the income of the Fund, and therefore the assets of the Fund. The proposed resolution's object or at least its effect may be to charge the revenue in the future in the all too likely event that it becomes necessary for unforeseen subventions to top up the Fund to make good the loss of the revenue stream from the levy.	

Proposed resolutions	Administration's comments	Members' responses
	Previous rulings In the 1998 ruling in relation to the Pneumoconiosis Compensation Fund, the President took far too narrow a view of the meaning of "revenue or other public moneys" in RoP 31(1). It is clearly a broader term than "revenue of Government". Furthermore, to refer to a "statutory fund" as *sui generis* cannot be justified if it can be seen that the assets in the fund are to be treated as part of "public moneys", although set aside for specific public purposes (here to provide training in vocational skills to meet changing employment market conditions). As ERO contemplates (section 6(3)(e)) and as history has shown in recent years, the Government would be bound to make up any deficit in the Fund available to implement this important element of its employment and training policies caused by loss of income from the levy. Although there is currently a substantial surplus that has built up in the Fund, it is all too likely (and Members have shown their anxiety on this account) that a zero levy post-2013 in relation to FDHs would necessitate reinstatement of government subventions to the Fund from general revenue if the purposes of ERO are thereafter to be fulfilled. The President ought properly to take account of this consideration in forming his opinion of the object and effect of the proposed resolution. Public moneys will not only be disposed of (by loss of the income from the levy), but the general revenue will be charged to make good that loss. In addition, the subject matter of the 1998 ruling is, we submit, anyhow distinguishable in the following way. The	Previous rulings 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 Cap. 360, the President ruled that, in 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. 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.

Proposed resolutions	Administration's comments	Members' responses
	object or effect of the proposed resolution contemplated to the No. 2 Notice would reduce the income to and therefore the assets of the Fund. That is why it would "dispose of public moneys". On the other hand, it would not affect how the Fund might be disbursed by the Board. The 1998 amendment was different for it affected out-goings from the statutory fund by raising compensation levels (the imaginary equivalent here might be a proposal to raise training allowances payable by the Board). Nor was any Government revenue paid into the Pneumoconiosis Compensation Fund. The Government had not given any funding support to the Pneumoconiosis Compensation Fund in the past other than the initial loan facility in 1980 which had already been repaid in full in 1983. The 2001 ruling on the Public Revenue Protection (Revenue) Order confirms that it is common ground that an amendment under section 34 of Cap. 1 falls within the constraints of RoP 31. It also confirms that RoP 31(1) applies to "revenue which may be collected under statutory authority" (which we would suggest is exactly the case here). It is otherwise distinguishable. It was concerned with an order that was the sole source of authority for raising temporary revenue. In the present case, the levy sourcing the Fund is already the subject of an enacted Ordinance (section 14 of ERO) and is collected under statutory authority. The No. 2 Notice is only concerned with fixing its rate over the next five years.	

Proposed resolutions	Administration's comments	Members' responses
(b) Hon LEE Wing-tat		
The proposed resolution seeks to provide for the reversion of the amount of levy to $400 to come into operation on a date to be appointed by SLW subject to the approval of the Council.	<u>Ultra vires and section 34(2) of Cap. 1</u> The proposed resolution to provide that section 2 of the No. 2 Notice shall come into operation on a date to be appointed by SLW subject to the approval of LegCo is ultra vires section 31(1) of ERO, and hence is not "consistent with" the power to make the No. 2 Notice and goes beyond the power conferred by section 34(2) of Cap. 1. A notice made under section 31(1) of ERO including the commencement provision as set out in section 1(1) of the No. 2 Notice is a form of subsidiary legislation which is subject to the requirement of section 34 of Cap. 1 that it be laid on the table of LegCo. It is under section 34 of Cap. 1 that LegCo is empowered to amend the subsidiary legislation in a manner consistent with the power to make it. Separately, section 35 of Cap. 1 provides that where any Ordinance provides that subsidiary legislation shall be subject to the approval of LegCo or contains words to like effect, the subsidiary legislation shall be submitted for the approval of LegCo by a resolution. There are no such words under section 31(1) of ERO (or any other provision of that Ordinance) to indicate that the making of subsidiary legislation under section 31(1) of ERO is subject to the requirements of section 35 of Cap. 1. The proposed imposition or importation of such a requirement by amending the No. 2 Notice would have the effect of applying the requirements of section 35 of Cap. 1 to the making of subsidiary legislation under section 31(1) of ERO. It is	<u>Ultra vires and section 34(2) of Cap. 1</u> The Administration's submission does no more than stating the undisputed facts that: (a) a notice made under section 31(1) of ERO is a form of subsidiary legislation which is subject to the requirement of section 34 of Cap. 1 that it be laid on the table of LegCo; and (b) it is under section 34 of Cap. 1 that LegCo is empowered to amend the subsidiary legislation in a manner consistent with the power to make it. It is difficult to base on (a) and (b) above to conclude that my proposed resolution is ultra vires section 31(1) of ERO and hence is "not consistent with" the power to make the No. 2 Notice and goes beyond the power conferred by section 34(2) of Cap. 1. The Administration submits that section 35 of Cap. 1 provides that where any Ordinance provides that subsidiary legislation shall be subject to the approval of LegCo or contains words to like effect, the subsidiary legislation shall be submitted for the approval of LegCo by a resolution. The Administration is of the view that there are no such words under section 31(1) of ERO to indicate that the making of the subsidiary legislation under section 31(1) of ERO is subject to the requirements of section 35 of Cap. 1, and that the making of my

Proposed resolutions	Administration's comments	Members' responses
	beyond the scope of powers under section 31(1) of ERO to make such an amendment, which may only be achieved by way of an amendment Ordinance.	proposed amendment would be "beyond the scope of powers" under section 31(1) of ERO. I disagree with the Administration's view. First, the Administration has failed to show that there are specific provisions under section 35 or in other parts of Cap. 1 stipulating that subsidiary legislation "without words indicating that the making of which is subject to the requirements of section 35 of Cap. 1" is not subject to amendment to the effect that it be submitted for the approval of the LegCo or other authority. There is also no previous ruling that an amendment made to subsidiary legislation with an effect that it be submitted for the approval of the LegCo is "beyond the scope of power". Section 28(4) of Cap. 1 provides that a person who makes subsidiary legislation may provide for the subsidiary legislation to commence on a day to be fixed by notice to be given by him or by some other person designated in the subsidiary legislation. My proposed resolution has been submitted legitimately under section 28(4) of Cap. 1 and there is no question of "ultra vires" or beyond any scope of power under section 34(2) or section 35 of Cap. 1.
	<u>Charging effect under RoP 31(1)</u> The proposed resolution has charging effect and hence is caught by RoP 31(1). It may not be proposed without the written consent of CE.	<u>Charging effect under RoP 31(1)</u> I disagree with the Administration's view that my proposed amendment to section 1(1) of the No. 2 Notice to provide that section 2 therein shall come into operation on a date to be appointed by SLW

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	The assets of the Fund plainly fall within the broad description of "revenue or other public moneys". The Fund is currently vested in the Board which in turn is accountable to LegCo (section 13 of ERO). The Fund itself is partly sourced from moneys provided by Government (a total of $4 billion since the establishment of the Board in 1992 including some $400 million paid annually between 2001-2002 and 2007-2008) (section 6(3)(e) of ERO). The Fund includes the levy collected by a public officer (the Director of Immigration) and remitted to the Fund (sections 14(1), 15(1) and 16 of ERO). The Fund is subject to examination by the Director of Audit (section 12 of ERO). If and when the Fund's assets are no longer required, the assets may be transferred to general revenue (section 27(2) of ERO). We have examined the definitions in Cap. 2 (dealing primarily with the process of LegCo's approval of Government expenditure and the responsibility of controlling officers) and those in Cap. 122 (which covers the work of the Director of Audit). Those definitions, applicable in the context of those particular statutory provisions, do not purport to be of general application, still less to govern the meaning of RoP 31(1). There is no good reason for treating the Fund and its assets as beyond the wide meaning of the words "revenue or other public moneys". Put simply, the Board is there to carry out a facet of public policy. The Fund is there to facilitate that public purpose. Whether sourced from employers by way	subject to the approval of LegCo has charging effect under RoP 31(1). In a previous ruling by the President in 1998 on whether there is charging effect in Hon LEE Cheuk-yan's amendment to the Administration's resolution under Cap. 360, the President held that Mr LEE's amendment does not have any charging effect under RoP 31(1), since there is no statutory mechanism in the Ordinance to peg the level of levy to the amounts of compensation. Therefore, the Administration is not bound by law to make up any deficit in the Pneumoconiosis Compensation Fund. Mr LEE's amendment does not have the legislative effect of increasing Government's expenditure on the Pneumoconiosis Ex-Gratia Scheme. In the same ruling, the President expressly manifested that the Pneumoconiosis Compensation Fund is a statutory fund and not the revenue of the Government, and that "any consequence on the Fund, incidental or direct…would not have any charging effect on general revenue." In the case at hand, the Fund is a statutory fund established under the ERO, which is of the same nature as the Pneumoconiosis Compensation Fund established under Cap. 360. It is clearly established in the 1998 ruling that such statutory fund is not the revenue of the Government, and any consequence on the Fund, incidental or direct, would not have any charging effect on general revenue under RoP 31(1).

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	of the statutory levy, or by subvention out of general revenue, the assets of the Fund can only be regarded as public (not private) moneys, albeit presently vested in the Board for statutory purposes. It is surely for that reason that ERO contains the provisions of sections 12, 13, 14(1), 15, 16 and 27(2). The purpose of RoP 31(1) is to reflect the long-established parliamentary principle of respecting the Executive's financial initiative. The proposed resolution removes or extends the all-important temporal element. It turns what would have been short-term relief during the period of surplus into relief for an uncertain period. It would override the decision of the CE-in-Council that there were special reasons to justify reducing the statutory levy to zero for five years only, and remove the certainty of the suspension period of the levy leaving that period in limbo. It would further interrupt the flow of a prescribed amount of revenue from the established source. Under the proposed resolution, the reinstatement of the levy would become highly uncertain and the Fund would be deprived of an important source of its income as enacted by section 14 of ERO until a date appointed by SLW is approved by LegCo. The original section 1(1) of the No. 2 Notice, read with section 14 of ERO, provides for the reinstatement of the levy payable by employers of imported workers including FDHs to the monthly rate of $400 with effect from 1 August 2013, ensuring that the Fund has a steady and sufficient source of income in the long run. The	The decision on whether my proposed resolution has charging effect under RoP 31(1) is legal in nature. The only points that should be taken into consideration must be points of law. In this context, it is unreasonable to consider whether there is good reason for treating the Fund and its assets as beyond the meaning of the words "revenue or other public moneys", as suggested by the Administration. Based on the 1998 ruling, I am of the view that my proposed resolution is not a subject caught under RoP 31(1), and therefore there is not legitimate reason for it to be put to CE for his consent. Even if my proposed resolution is a subject caught under RoP 31(1), it would not lead to any charging effect. In the 1998 ruling, the President held that "Although it is the policy of the Government to bring the level of compensation under the Pneumoconiosis Ex-Gratia Scheme in line with that under the Ordinance, it is not bound by law to do so", and hence the amendment does not have the legislative effect of increasing Government's expenditure. Similarly, it follows that my proposed resolution does not lead to a legislative effect of binding the Government to "top up the Fund to make good the loss of the revenue stream" even if the levy remains at zero over an uncertain period. Whether the Administration will make up any deficit in the Fund remains a policy decision by the Administration, rather than a result of my proposed resolution. I urge the President to follow this *ratio decidendi* in

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	object or effect of the proposed resolution is to "dispose of" (i.e. get rid of) that levy until a date appointed by SLW is approved by LegCo by resolution. The uncertainty involved would interrupt the flow of the income of the Fund, and therefore the assets of the Fund. The proposed resolution's object or at least its effect may be to charge the revenue in the future in the all too likely event that it becomes necessary for unforeseen subventions to top up the Fund to make good the loss of the revenue stream when the levy remains at zero over an uncertain period.	the 1998 ruling and ignore any points other than points of law.
	<u>Previous rulings</u> In the 1998 ruling in relation to the Pneumoconiosis Compensation Fund, the President took far too narrow a view of the meaning of "revenue or other public moneys" in RoP 31(1). It is clearly a broader term than "revenue of Government". Furthermore, to refer to a "statutory fund" as *sui generis* cannot be justified if it can be seen that the assets in the fund are to be treated as part of "public moneys", although set aside for specific public purposes (here to provide training in vocational skills to meet changing employment market conditions). As ERO contemplates (section 6(3)(e)) and as history has shown in recent years, the Government would be bound to make up any deficit in the Fund available to implement this important element of its employment and training policies caused by loss of income from the levy. Although there is currently a substantial surplus that has built up in the Fund, it is all too likely (and Members have shown their anxiety on	

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	this account) that a zero levy for an uncertain period would necessitate reinstatement of government subventions to the Fund from general revenue if the purposes of ERO are thereafter to be fulfilled. The President ought properly to take account of this consideration in forming his opinion of the object and effect of the proposed resolution. Public moneys will not only be disposed of (by loss of the income from the levy), but the general revenue will be charged to make good that loss. In addition, the subject matter of the 1998 ruling is, we submit, anyhow distinguishable in the following way. The object or effect of the proposed resolution contemplated to the No. 2 Notice would reduce the income to and therefore the assets of the Fund. That is why it would "dispose of public moneys". On the other hand, it would not affect how the Fund might be disbursed by the Board. The 1998 amendment was different for it affected out-goings from the statutory fund by raising compensation levels (the imaginary equivalent here might be a proposal to raise training allowances payable by the Board). Nor was any Government revenue paid into the Pneumoconiosis Compensation Fund. The Government had not given any funding support to the Pneumoconiosis Compensation Fund in the past other than the initial loan facility in 1980 which had already been repaid in full in 1983. The 2001 ruling on the Public Revenue Protection (Revenue) Order confirms that it is common ground that an amendment under section 34 of Cap. 1 falls within the constraints of RoP 31. It also confirms that RoP 31(1) applies to "revenue which may be collected under statutory authority" (which we	

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	would suggest is exactly the case here). It is otherwise distinguishable. It was concerned with an order that was the sole source of authority for raising temporary revenue. In the present case, the levy sourcing the Fund is already the subject of an enacted Ordinance (section 14 of ERO) and is collected under statutory authority. The No. 2 Notice is only concerned with fixing its rate over the next five years.	

Abbreviations

Board	Employees Retraining Board
Cap. 1	Interpretation and General Clauses Ordinance
Cap. 2	Public Finance Ordinance
Cap. 122	Audit Ordinance
Cap. 360	Pneumoconiosis (Compensation) Ordinance
ERO	Employees Retraining Ordinance
CE	Chief Executive
FDHs	Foreign Domestic Helpers
Fund	Employees Retraining Fund
LegCo	Legislative Council
Levy	Employees Retraining Levy
No. 2 Notice	Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008
SLW	Secretary for Labour and Welfare
RoP	Rules of Procedure of the Legislative Council