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** (not attached).

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.

Charging effect issue

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