

**Information Paper for the
Legislative Council Panel on Manpower
Meeting on 19 April 2001**

Review of the Employees Compensation Assistance Scheme

PURPOSE

This paper informs Members of the Administration's proposals to modify the Employees Compensation Assistance Scheme (ECAS) and the necessary amendments to the Employees Compensation Assistance Ordinance (ECAO), Cap 365.

BACKGROUND

The ECAS

2. The ECAS was set up on 1 July 1991 under the ECAO to provide payment to injured employees who are unable to receive their entitlements from the employers or insurers after exhausting legal and financially viable means of recovery. The Scheme also provides for the protection of employers against default of their insurers who become insolvent.

3. The ECAS is administered by the Employees Compensation Assistance Fund Board (ECAFB) which holds the Employees Compensation Assistance Fund (ECAF) upon trust and considers applications from persons applying for payment from the Fund.

4. The ECAS is financed by a levy on the premium of employees' compensation insurance which employers are required to take out under the Employees' Compensation Ordinance (ECO). At present, a total of 5.3% levy is collected by the Employees' Compensation Insurance Levies Management Board through insurers for distribution to three statutory bodies, namely the ECAFB (1%), the Occupational Safety and Health Council (2%) and the Occupational Deafness Compensation Board (2.3%). The levy rate for the ECAS has remained at 1% since its inception in 1991.

Consultancy Review

5. In recent years, a rising number of large claims have emerged and the amount of common law damages awarded by the Court has been escalating. Coupled with a decline in the levy income in recent years¹, the ECAF has incurred annual operating deficits since 1996/97. A table showing the income and expenditure account of the ECAF is at Annex A.

6. With a view to restoring the long term financial viability of the ECAS as a safety net for employees injured at work, Education and Manpower Bureau commissioned a consultancy review of the Scheme in February 1999, studying its scope and extent of coverage, the financing arrangements as well as the operational procedures of the ECAFB.

7. The review was completed in December 1999. The Consultant concluded that the financial predicament of the ECAS was due to the significant imbalance between income and expenditure. To restore the long term financial viability of the Scheme, there is a need to increase the financial resources for the Fund and limit the scope of protection of the ECAS. The Consultant has looked at three strategic options for modifying the ECAS -

- (a) retaining the existing coverage of the ECAS;
- (b) capping the payment to each applicant at \$4 million; and
- (c) removing payment of common law damages.

8. The Consultant also proposed other changes to the ECAS including -

- (a) removal or reduction of payment of interest;
- (b) removal of entitlement to legal costs; and
- (c) strengthening the role of the ECAFB to empower the Board to take a more active role in the legal proceedings.

In view of the imbalance of the Board's income and expenditure, the Consultant considered that the levy rate has to be increased from 1% to a level ranging from 2.9% to 4.4%, depending on which of the above strategic options would be adopted.

¹ The decline in levy income is attributable to a number of factors such as the completion of major infrastructure projects, keen competition in insurance industry and the recent economic downturn.

Consultation on the findings of the Consultancy Review

9. The Administration has consulted various parties on the findings of the Consultancy Review, including the ECAFB and the Labour Advisory Board (LAB). The previous LegCo Panel on Manpower was also consulted on 27.4.2000. Members of the Panel had differing views on a proposal to impose a \$4 million cap on the amount of payment to each applicant under the ECAS. Members also considered that measures should be taken to deter employers from non-compliance with the compulsory insurance requirement under the ECO so as to reduce the caseload for the ECAS. They urged the Administration to step up enforcement, increase the penalty for failing to take out insurance and require employers who fail to comply with the requirement of taking out insurance to pay levy direct into the Board.

PROPOSED PACKAGE OF MEASURES

10. Taking into account the views expressed by various parties during the consultation, the Administration has formulated a package of measures, which are summarised in paragraphs 11 to 29.

(a) Scope of Assistance under the ECAS

(i) Statutory Compensation under the ECO

11. The scope of assistance under the ECAS needs to be redefined in order that the Fund could be financially viable in the long run. To uphold the ECAS as a safety net, it is proposed that the revised Scheme should maintain the full protection of entitlements in respect of statutory compensation under the ECO. This will include the list of the compensation items that an injured employee or family members of a deceased employee may be eligible to claim from the employers (Annex B).

(ii) Ex-gratia payment

12. To reduce the financial volatility brought about by the escalating amount of common law awards and provide reasonable protection to injured employees, it is proposed that an ex-gratia payment shall be payable under the ECAS in lieu of common law damages.

13. The proposed ex-gratia payment shall be payable, where common law

damages have been awarded in the case concerned. Its amount shall not exceed the aggregate sum of damages as awarded by the Court. Where the amount does not exceed \$1.5 million, the ex-gratia payment shall be made in a lump sum. If it exceeds \$1.5 million, an initial payment of \$1.5 million shall be paid and then followed by monthly payments calculated at the rate of \$10,000 or the wage of the worker at the time of the accident, whichever is the higher.

14. The ex gratia payment payable shall be paid to the injured employee in a non-fatal case. For a fatal case or in case the injured employee has passed away before his/her entitlement of ex gratia payment is fully paid, the ex gratia payment (including the initial payment and the subsequent monthly payments) shall be paid to his/her spouse and children under the age of 21. A child of the deceased employee will cease to be entitled to the monthly payment when he/she reaches the age of 21. Other dependants of the deceased employee will not be eligible to ex gratia payment by the ECAFB.

15. The proposal would reduce the financial volatility brought about by the huge common law claims and restore the financial viability of the Fund in the long run. Under the proposal, injured employees and their families would also be provided with long term financial support.

(b) Reduction of Interest Payment

16. At present, the ECAFB pays ‘pre-judgement interest’ on the payment accrued from the date of accident to the date of court judgement and ‘post-judgement interest’ accrued from the date of judgement to the date of payment by the Board. The court normally awards the two components at 50% and 100% of the “judgement rate”² respectively. The “judgement rate” was 12.5% per annum as at March 2001.

17. The “judgement rate” is set above the market rate and is aimed at speeding up the clearance of judgement debts and damages. In respect of cases assisted by the ECAS, there is no reason for the Board to delay payment deliberately. It would not therefore be appropriate to apply full judgement rate to cases assisted by the ECAS. Moreover, there is no time limit for making an application for payment from the

² The “judgement rate” refers to the interest rate determined in accordance with section 49(1)(b) of the High Court Ordinance (Cap 4) which provides that,

“Judgement debts shall carry simple interest, ..., at such rate as may be determined from time to time by the Chief Justice by order.”

ECAF and the favourable judgement rate has become a disincentive for an applicant to make prompt application to the ECAFB.

18. To plug the loophole, it is proposed that the ECAO should be amended such that the ECAFB should only pay an interest on statutory compensation at one-half of the “judgement rate”. It is considered that the new rate would still be good enough to preserve the value of the outstanding payment.

19. After an application is received, the ECAFB will vet the documents and make enquiries, where necessary. The ECAFB will also seek legal advice on each application before a determination is made. These processes take time, during which accrual of interest is considered unreasonable. Based on operational experience, 80% of applications are determined by the ECAFB within four to six months after the ECAFB has received the application. It is therefore proposed that no interest should be payable for a period of 180 days from the date on which the applicant makes an application for payment from the ECAFB.

(c) Legal costs

20. Following the proposal to provide ex gratia payment in lieu of common law damages, the ECAFB will no longer be liable for common law damages and hence it will not pay legal costs in respect of common law claims. The Administration has considered the Consultant's suggestion to abolish the payment of legal costs in respect of claims for statutory compensation. In order not to erode employees' benefits, particularly for cases involving relatively small compensation, we propose that the ECAFB should continue making payments of legal costs in respect of claims for statutory compensation.

(d) Role of the ECAFB in legal proceedings

21. At present, the ECAO does not explicitly empower the ECAFB to defend claims in legal proceedings. This places the Board in a disadvantageous position because defaulting employers are usually absent in the legal proceedings leaving the claims undefended. To better protect its interests, the ECAFB should be empowered to take a more active role in legal proceedings relating to potential claims to the ECAF.

22. It is proposed that where a proceeding has been initiated to claim statutory

compensation or common law damages for a work-related accident, the ECAFB may at any time apply to the Court for joining in the proceedings as a party and defend the claims. In addition, the ECAFB should be empowered to negotiate with the applicants for settlement of claims. In taking part in the proceedings in respect of claims under the ECO, the ECAFB should also have the right to agree costs with the parties involved prior to taxation.

(e) Procedures for filing claims

23. To enable the ECAFB to determine in every potential claim whether it should apply to the Court for joining in the proceedings, there is a need to specify a period within which a person who may be entitled to apply for payment from the Fund should be required to notify the ECAFB. It is proposed that such person should serve a notice of proceedings to the ECAFB within 30 days (or within such period as extended by the ECAFB) from the date on which a writ is filed with the Court in respect of the claim for compensation under the ECO or damages under common law. The person shall not seek to obtain judgement from the Court or to reach settlement with the other party within 45 days after the date of notification. This will facilitate the ECAFB to determine whether it should apply to the Court to join in the legal proceedings. The ECAFB shall not be liable to make any payment to a person who, without reasonable excuse, fails to serve the notice of proceedings as required.

24. Separately, to encourage early settlement of claims, thereby reducing the ECAFB's liability to make interest payments, an applicant should be required to file an application for payment in respect of compensation under the ECO to the Board within six months from the date on which the quantum of compensation has been assessed by the Court or determined by the Commissioner for Labour. The six-month period should be sufficient to enable applicants to execute the Court order by initiating bankruptcy or winding-up proceedings against the defaulting employer before applying to the Board for payment.

(f) Surcharge on employers

25. In failing to take out employees' compensation insurance, an employer evades the payment of levy to the Board and creates potential claims to the ECAS. During the consultation with the previous LegCo Panel on Manpower, it was suggested that such employers should be required to make up for the forgone levy they would have had contributed to the ECAFB had they taken out an insurance cover.

26. After exploring various options, the Administration proposes that uninsured employers shall be liable to pay a surcharge to the Board. To reflect the risk that the Board might have been exposed in relation to individual uninsured employers and the potential administrative costs in recovering the payment, it is proposed that the surcharge should be calculated with reference to the insurance premium subsequently paid by the employer in taking out an insurance policy after the offence was detected. A three-level scale is proposed as follows:

Amount of Premium	Amount of Surcharge
Below \$1,000	\$1,000
\$1,000 - Below \$4,000	\$4,000
\$4,000 or Above	\$8,000

27. A convicted employer who fails without reasonable excuse to provide information (e.g. insurance policy or notification of close of business) upon the request of the ECAFB for the purpose of surcharge evaluation would be required to pay a surcharge at \$8,000 to the ECAFB irrespective of the amount of premium the employer concerned has paid.

(g) Levy increase

28. The existing levy income for the ECAFB could not meet its expenditure. Since 1996/97, the annual levy income of the ECAFB has stabilised at \$20 million a year. After the above measures are implemented, it is estimated that the expenditure will average around \$43 million in the first four years and stabilise at around \$40 million from the fifth year onwards. Despite its slight increase as a result of the recent economic recovery, the levy income of the ECAFB at the current rate of 1% on insurance premium will still be insufficient to finance its shortfall.

29. To address the imbalance between income and expenditure of the ECAFB, it is proposed that the levy rate for the ECAS should be increased by 1% net. Including interest and investment income, the ECAFB would have an annual income of about \$45 million, sufficient to repay the loan and to restore to its longer term viability.

COMPLIANCE WITH THE COMPULSORY INSURANCE PROVISIONS

Enforcement

30. In the longer term, improving compliance with the compulsory insurance requirement would contain the number of potential claims to the ECAS. The Labour Department (LD) has all along attached high priority to the enforcement of compulsory insurance under the ECO. In 2000, the Department conducted 83,990 inspections on compulsory insurance representing an increase of 7% over that of 1999. LD will continue with its vigorous inspections in 2001 and its inspection strategy will be adjusted in line with its enforcement experience. Inspections to employers in the service sectors, new establishments and employers involved in interior renovation works in commercial premises, shopping malls and new residential estates will also be stepped up.

31. LD operates a complaint hotline for employees who suspect that their employers have not complied with the insurance requirements to provide information for investigations. The Department will continue to publicise the hotline.

32. Apart from routine inspections and complaint investigations, LD also mounts special campaigns. For example, a territory-wide campaign was conducted in March 2001 and 6,280 establishments were covered in two weeks. As a result of that campaign, prosecutions against 141 employers for failure to take out insurance cover for their employees or produce insurance policies for inspection will be commenced. These inspections will convey to employers a clear message of the Administration's determination to ensure compliance with the compulsory insurance provisions.

Increasing the level of fines

33. With the coming into effect of the Employees' Compensation (Amendment) (No. 2) Ordinance on 1 August 2000, the maximum penalty for failure to take out employees' compensation insurance has been increased from \$25,000 to \$100,000. This will strengthen the deterrent effect against non-compliance with the compulsory insurance provisions.

Publicity and education

34. Since March 2001, LD has launched another series of major promotional activities to remind employers of the need to take out employees' compensation

insurance. Apart from broadcasting special announcements on the radio and TV, the Department has placed advertisements on public buses. The poster boxes at MTR stations, departmental homepage on the Internet and newsletters will also carry similar messages. Talks, seminars and exhibitions will be organised for employers and employees in 2001.

35. Special posters and leaflets on compulsory insurance and the complaint hotline are printed and distributed with the assistance of the Immigration Department, Home Affairs Department, Business Registration Office, major employers' associations, associations of small and medium sized enterprises etc. LD will make full use of the sum of \$1.1 million which is allocated to the Department in 2001-02 to launch publicity programmes on the ECO, including the provisions on compulsory insurance.

CONSULTATION

36. The LAB has endorsed the proposed package of measures. The ECAFB has also endorsed the proposals to strengthen the role of the Board in legal proceedings, revise the procedures for claims, adjust the rate of interest and impose a surcharge on convicted employers.

FINANCIAL AND STAFFING IMPLICATIONS

37. Since some lead time is needed for the enactment of legislative amendments and for the levy increase to take effect, the Finance Committee has approved a bridging loan of \$60 million at the Government's no-gain-no-loss interest rate to the ECAFB to be drawn down by 31 July 2001. Apart from that, the above proposals to revise the Scheme would not have any financial or staffing implications on the Government.

ECONOMIC IMPLICATIONS

38. Based on the employees' compensation insurance levy collected in 2000-01, it is estimated that the proposed 1% net increase in levy rate would generate an additional levy income of about \$22 million per year for the ECAFB.

LEGISLATIVE TIMETABLE

39. We hope to introduce the legislative amendments for the above measures into the Legislative Council within the 2000-01 legislative session. The amendments, if enacted, will come into immediate effect.

INSURER INSOLVENCY

40. Following the review and the extensive consultation carried out by the Administration, Members will be aware that the Insurance Authority recently appointed Managers to take control of the affairs and property of three local insurers and the Managers have concluded that the insurers were insolvent within the meaning of the Insurance Companies Ordinance. The Managers have accordingly presented winding up petitions to the Court. Under the ECAO, the ECAS is liable to make payment to employers who have taken out insurance policies from the insolvent insurers in respect of compensation or damages for injured employees covered by the insurance policies.

41. We are aware that two of the three insurers were active in the employees' compensation insurance business. While it is not possible at this stage to ascertain accurately the size of the ECAS claims that may arise from insolvency of these insurers, according to Labour Department's records, there are about 1000 outstanding claims relevant to the three insolvent insurers. It is therefore very likely that the levy rate for the ECAS will have to be further increased in order that the ECAFB may discharge such liabilities.

42. Despite this latest development, which may impact on the proposed levy rate, we would still wish to invite Members to express their views on the principles underlying the package as described in paragraphs 11 to 29 of this paper.

Education and Manpower Bureau
April 2001

Employees Compensation Assistance Fund Board
Income and expenditure account

	91/92 (1.7.91 - 31.3.92)	92/93	93/94	94/95	95/96	96/97	97/98	98/99	99/2000	2000/2001 (as at 31.3.2001)
No. of assisted cases	27	12	12	20	18 {1}*	19 {1}*	23 {1}*	28	35	26
Total income	\$16.7m	\$15.7m	\$21.8m	\$33.8m	\$31.7m	\$23.9m	\$28.5m	\$22.4m	\$21.5m	\$26.0m
<i>levy income</i>	\$16.5m	\$15m	\$20.6m	\$31.3m	\$27.8m	\$20.9m	\$23.7m	\$20m	\$19.8m	\$25.2m
<i>interest and other income</i>	\$0.2m	\$0.7m	\$1.2m	\$2.5m	\$3.9m	\$3m	\$4.8m	\$2.4m	\$1.7m	\$0.8m
Total Expenditure#	\$2.6m	\$4.5m	\$23.8m	\$10.8m	\$11.2m	\$35.4m	\$49.7m	\$29.1m	\$40.6m	\$28.9m
<i>claims</i>										
- statutory	\$1.39m	\$0.48m	\$1.57m	\$0.86m	4.68m	\$2.08m	\$0.96m	\$7.93m	\$5.8m	\$4.47m
- common law	\$0.78 m	\$2.15m	\$3.88m	\$6m	\$15.4m { \$13.9m }*	\$25.6m { \$16.4m }*	\$33.8m { 15.3m }*	\$10.03m	\$18.9m	\$12.28m
<i>interest</i>	\$0.71m	\$0.97m	\$1.65m	\$2.06m	\$1.82m	\$2.36m	\$3.58m	\$4.32m	\$5.4m	\$3.29m
<i>legal cost</i>	\$0.49m	\$0.69m	\$1.57m	\$1.5m	\$2.51m	\$4.12m	\$9.72m	\$4.23m	\$7.7m	\$6.49m
<i>operating expense</i>	\$0.16m	\$0.4m	\$0.23m	\$0.43m	\$0.74m	\$1.2m	\$2.4m	\$2.55m	\$2.8m	\$2.34m
Surplus/Deficit	\$14.1m	\$11.2m	-\$2m	\$23m	\$20.5m	-\$11.5m	-\$21.2m	-\$6.7m	-\$19.1m	-\$2.9m
Retained surplus	\$14.1m	\$25.3m	\$23.3m	\$46.3m	\$66.8m	\$55.3m	\$34.1m	\$27.4m	\$8.3m	\$5.4m

Note:

The total expenditure does not necessarily represent the sum of statutory award, common law damages, interest and legal cost in the ensuing columns as the amount paid in a specific year may cover the balance of unpaid items of cases assisted in the previous year(s).

* Figures in { } denote the number of/amount paid for major common law cases with settlement exceeding HK\$10m.

**A List of Compensation Items
under the Employees' Compensation Ordinance**

Non-fatal Cases	Fatal Cases
<p>Periodical payments</p> <p>Payable during the period of temporary incapacity (sick leave arising from the work injury) at the rate of four-fifths of the monthly earnings of the injured employee.</p>	<p>Compensation for death</p> <p>Payable in fatal accidents to the family members of a deceased employee. The compensation is calculated with reference to the age and monthly earnings of the deceased employee. The maximum amount payable is \$1.764 million.</p>
<p>Compensation for permanent incapacity</p> <p>Payable when an injured employee suffers loss of earning capacity as a result of the work injury. This compensation will be paid in a lump sum, calculated with reference to the age, monthly earnings and the degree of loss of earning capacity of the injured employee. The maximum amount payable is \$2.016 million.</p>	<p>Funeral and Medical Attendance expenses</p> <p>Payable in fatal accidents to any person who has incurred expenses for the funeral of and medical attendance on the deceased employee, subject to a maximum of \$35,000.</p>
<p>Medical expenses</p> <p>Payable for the expenses incurred by the injured employee in seeking medical treatment, subject to a maximum of \$175 a day.</p>	
<p>Compensation for care and attention</p> <p>Payable when an injured employee who suffers permanent incapacity needs the attention of another person to perform the essential actions of life. The amount of such compensation is subject to a maximum of \$412,000.</p>	
<p>Prosthesis or surgical appliance costs Include the initial costs of the supplying and fitting of a prosthesis or surgical appliance, subject to a maximum of \$33,000 and the probable cost of repair and renewal of the prosthesis or surgical appliances, subject to a maximum of \$100,000.</p>	