

LEGISLATIVE COUNCIL BRIEF

Employees Compensation Assistance Ordinance (Chapter 365)

Employees Compensation Assistance (Amendment) Bill 2002

INTRODUCTION

At the Executive Council meeting on 5 February 2002, the Council ADVISED and the Chief Executive ORDERED that, the Employees Compensation Assistance (Amendment) Bill 2002, at **Annex A**, should be introduced into the Legislative Council.

BACKGROUND

Employees Compensation Assistance Scheme

2. The Employees Compensation Assistance Scheme (the Scheme) was set up on 1 July 1991 under the Employees Compensation Assistance Ordinance (Cap. 365) (the Ordinance) to provide payment to injured employees who are unable to receive their entitlements for employment-related injuries from the employers or insurers after exhausting legal and financially viable means of recovery. It also provides for the protection of employers against default of their insurers who become insolvent.

3. The Scheme is administered by the Employees Compensation Assistance Fund Board (the Board), which holds the Employees Compensation Assistance Fund (the Fund) upon trust. The Fund is financed by a levy on the premium of employees' compensation (EC) insurance policies issued for the purpose of the Employees' Compensation Ordinance (ECO) (Cap. 282) to cover employers' liabilities arising from employment-related injuries. At present, a 5.3% levy is collected by the Employees' Compensation Insurance Levies Management Board through insurers for distribution to three statutory bodies, namely, the Board (1%), the Occupational Safety and Health Council (2%), and the Occupational Deafness Compensation Board (2.3%). The levy rate for the Board has remained at 1% since its inception in 1991.

4. In recent years, the amount of common law damages awarded by the Court has escalated with a number of payouts involving more than

\$10 million. Coupled with a decline in the levy income in recent years due to the completion of major infrastructure projects and keen competition in the insurance industry, the Fund has incurred annual operating deficit since 1996-97. A table showing the annual income and expenditure of the Fund is at **Annex B**.

5. The financial predicament of the Scheme was due to a number of reasons which included—

- (a) The scope of the Scheme, covering payments for statutory compensation, common law damages, interests, legal costs as well as claims from insurer insolvency, is comprehensive;
- (b) The levy income has been maintained at a low level which is not sufficient to cover the liabilities that the Scheme has taken on.

6. In June 2000, the Government agreed to provide a bridging loan of \$60 million to tide the Board over the impending financial difficulties. The Board drew down the bridging loan in July 2001. As at 31 December 2001, the Board held a balance of \$32.5 million.

Insolvency of the HIH Group

7. On 9 April 2001, three local subsidiaries of the HIH Group of insurance companies went into provisional liquidation because of the insolvency of its Australian parent company. Two of them were active players in the EC insurance market in Hong Kong. Under the Ordinance, the Board would have to indemnify employers against the default of insurers who become insolvent.

8. Based on the information provided by the provisional liquidators of the HIH Group, it is estimated that the total liabilities accruing from the employment-related injury claims under the EC policies underwritten by the insolvent insurers would amount to about \$350 million, the bulk of which will fall due within the first few years. Under section 265 of the Companies Ordinance (Cap. 32), the Board is one of the preferential creditors. While it is likely that some recovery can be made through subrogation from the assets of the insolvent insurers, the magnitude and timing of the actual recovery cannot be accurately ascertained at this stage.

9. Claims arising from the HIH insolvencies have depleted the Board's reserves rapidly in the last few months. At the rate it is going, and in the absence of further assistance, the Fund will probably be depleted before mid-2002. Section 26 of the Ordinance provides for a queuing mechanism in the event the Fund is exhausted in which case eligible applicants may only receive their assistance, with interest, from the Board when it has sufficient funds to pay, in accordance with the order of priority stated in the Ordinance. In view of the magnitude of the claims arising from the HIH insolvencies, it would be unrealistic to expect the Fund to be able to continue to function effectively without an increase in revenue.

THE PROPOSAL

10. We have formulated a rescue package for the Scheme, which includes –

- (a) measures to improve the financial stability of the Fund (paragraphs 11 to 21);
- (b) a net increase in the levy rate on EC insurance premium by one percentage point, i.e. from 5.3% to 6.3% (paragraph 22);
- (c) within the 6.3%, to apportion 3.1% to the Board for five years from 2002-03 to 2006-07, but to lower the levy rate for the Board to 2.5% from 2007-08 onwards (paragraph 25);
- (d) to reduce the levy rate for Occupational Deafness Compensation Board (ODCB) from 2.3% to 1.2% from 2002-03 to 2006-07 but to increase the levy rate for ODCB to 1.8% from 2007-08 onwards (paragraph 25); and
- (e) a Government loan of \$280 million (including the outstanding balance of \$50 million of the current bridging loan) at no-gain-no-loss interest rate repayable in 10 years starting from 2008-09 (paragraph 26).

Package of Reform Measures for the Scheme

(A) Relief Payment in lieu of Common Law Damages

11. The Scheme currently covers liabilities relating to common law damages in respect of employment-related injuries. The amount of common law damages awarded by the Court could be quite substantial, bringing about uncertainty to the financial exposure of the Scheme. There is, therefore, a need to reduce the financial volatility brought about by the common law awards but at the same time maintaining reasonable protection to injured employees. To achieve this aim, it is proposed that a relief payment should be payable under the Scheme in lieu of common law damages.

12. The proposed relief payment shall not exceed the aggregate sum of damages as awarded by the Court and shall not cover any costs arising from proceedings in respect of damages. Where the amount does not exceed \$1.5 million, the relief payment shall be paid in full 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 the wage of the worker at the time of the accident or \$10,000, whichever is the higher.

13. In a non-fatal employment-related injury, the relief payment will be payable to the injured employee who is the person entitled to the damages. If the injured employee dies before the outstanding balance of the relief payment has been exhausted, we propose to pay the monthly payments to his/her immediate family members including the spouse/cohabitee and children under the age of 21. Where the injured employee is not survived by a spouse/cohabitee and any children under the age of 21 at the time of his/her death, the monthly payment will then be payable to his/her parents. For fatal injuries, the relief payment will be payable to those family members of the deceased employees who have been awarded damages by the court.

(B) Revising the Interest Rate

14. At present, the Board is liable to pay interest on the assistance that an injured employee is entitled to receive. For the period after the Court passes down the judgement, the interest will be set at the interest rate of judgement debts (“judgement rate”) as determined by the Court from time to time. As for the period before the Court judgement, the interest rate would be as ordered by the Court, which normally would not exceed half of the judgement rate.

15. The “judgement rate”, now standing at 8.72 % per annum, is set above the market rate and is aimed at speeding up clearance of judgement

debts and damages. We consider that it is inappropriate for this rate to be applied to the Scheme's cases because the Scheme is ex-gratia in nature and it would not be in the Board's interest to delay payment.

16. To strike a balance between the interests of the Board and the applicants, it is proposed that the Board should pay interest on statutory compensation only and at half of the "judgement rate" or the rate as ordered by the Court, whichever is the lower. The proposed rate should still be good enough to preserve the value of the outstanding payment.

(C) Role of the Board in Legal Proceedings

17. At present, the Ordinance does not explicitly empower the Board to defend claims in legal proceedings. This places the Board in a disadvantaged position because defaulting employers are usually absent in the legal proceedings leaving the claims undefended. It is proposed that where a proceeding has been initiated to make a claim in connection with a work-related accident, the Board may apply to the Court to be joined in the proceedings as a party and defend the claims.

(D) Revising the Procedures for Claims

18. To strengthen the role of the Board and to better manage the applications for assistance, it is proposed that a person who intends to file an application for assistance with the Board should serve a notice of proceedings to the Board within 30 days (or such period as may be extended by the Board) from the date on which a writ is filed with the Court in respect of the claim against the employer or other parties. This would enable the Board to determine, for every potential claim, whether it should apply to the Court to be joined in the proceedings.

(E) Surcharge on Employers

19. In failing to ensure that he is covered by an EC insurance policy, an employer has in effect evaded payment of levy to the Board and created potential liabilities to the Scheme. It is fair to require such an employer to make up for the foregone levy they would have had contributed to the Board had they complied with the requirement of the law in relation to compulsory insurance.

20. We propose that uninsured employers should be liable to pay a surcharge to the Board, which shall be three times the levy payable for the benefit of the Board under the Employees' Compensation Insurance Levies

Ordinance (Cap. 411) on the premium paid in relation to an EC insurance policy taken out after the offence was detected. Where no EC insurance policy has been taken out after the detection of the offence, an employer who no longer engages any employee shall be liable for a surcharge of \$5,000. Any uninsured employer who fails to provide information as requested by the Board shall be liable for a surcharge of \$10,000.

(F) Employees Compensation Insurance Insolvency Scheme

21. By its very nature, insurer insolvency would inevitably create sudden and substantial strain on the Fund's resources. It is considered appropriate that in the longer term, protection against insurer insolvency should be excluded from the scope of the Scheme and dealt with separately. It is therefore proposed that a separate compensation fund be set up to cater for any future insolvencies of insurers writing employees' compensation business. Such an arrangement is in line with practices overseas. The Financial Services Bureau and the Office of the Commissioner of Insurance are consulting the insurance industry, including the Insurance Advisory Committee, in taking the matter forward. Upon the setting up of the said fund, the Ordinance will be amended to limit the Scheme's responsibilities to meeting claims only when injured employees, after exhausting legal and financially viable means of recovery, are unable to receive their entitlement from employers who are uninsured.

Adjustment of Levy Rates

(A) Levy Increase

22. When consulted on the reform package for the Scheme, before the HIH insolvencies had arisen, employer representatives on the LAB indicated that they would be prepared to accept an increase in the levy rate for the scheme by one percentage point. This would raise the total levy rate imposed on EC insurance premium from 5.3% to 6.3%. Together with the reform package, the additional levy income would allow the Scheme to regain long term financial viability.

23. However, with the HIH insolvencies, it is clear that the additional liabilities would exceed the Fund's financial capability even with the proposed levy increase. Having considered the current economic situation, we have devised a financial package which would help the Fund meet the liabilities arising from the HIH insolvency without having to further

increase the total levy rate on EC insurance premium beyond the one percentage point as agreed by the LAB.

(B) Adjustment of Levy Rates

24. The Occupational Deafness Compensation Fund (ODCF) is primarily tasked to provide compensation to employees in noisy occupations who have suffered occupational deafness. For the year 2001-02, the estimated annual income of ODCF is about \$64.7 million, while the estimated expenditure is around \$29.9 million. As at end of December 2001, the fund has built up a sizable reserve of \$236 million.

25. To address the Fund's financial commitments arising from the insolvency of the HIH Group, it is proposed to re-distribute levy income from ODCF to the Fund. After examining the income and expenditure of ODCF, as well as its substantial reserve, it is proposed to reduce the levy rate for ODCF by 0.5 percentage point as from 2002-03 and to re-distribute this to the Fund on a long term basis. In addition, a further 0.6 percentage point of levy income of the ODCF should be redistributed to the Fund for a period of 5 years from 2002-03 to 2006-07. With such adjustments, the Fund will be able to meet its liabilities from the HIH insolvency, while ODCB will remain viable in the long-term. The Fund's levy rate would become 3.1% and the ODCF levy rate would become 1.2% over the next five years from 2002-03 to 2006-07. As from 2007-08, the levy rates would be changed to 2.5% for the Fund and 1.8% for ODCF.

Government Loan

26. As the impact of HIH insolvencies on the Fund's financial position will be immediate, the Fund would need assistance to tide over the financial commitments under the Ordinance. We propose to extend a Government loan of \$280 million (including the outstanding balance of \$50 million of the current bridging loan) to the Board, at no-gain-no-loss rate of interest. The Government is also prepared to allow repayment of the loan plus interest to commence from 2008-09 over a ten-year period. The cash flow projection taking into account the levy increase, the adjustment of the levy rates for the Scheme and ODCB and the Government loan is at **Annex C**.

27. The Administration has consulted the Board, the Labour Advisory Board (LAB) and the LegCo Panel on Manpower on the package of measures to restore the viability of the Fund. There was support from both employer and employee representatives on the LAB.

THE BILL

28. The main provisions of the Bill are as follows -.
- (a) **Clause 3(b)** amends section 2 to add two new definitions of “eligible person” and “relief payment”.
 - (b) **Clause 6** repeals and replaces section 16(3) to clarify the circumstances in which it is considered that a person is unable to recover from an employer payment of an amount of compensation such that the person is entitled to make an application to the Board for payment from the Fund in respect of that amount.
 - (c) **Clause 12** adds new sections 20A to 20G dealing with relief payments.
 - (d) **Clause 14** amends section 22 to reduce the interest payable on payments from the Fund.
 - (e) **Clause 17** adds new sections 25A and 25B to empower the Board to join as a party to Court proceedings which may affect the interest of the Fund and to require a person who commences proceedings to claim compensation or damages to serve a notice of proceedings to the Board.
 - (f) **Clause 22** amends section 35 to provide that the right of a person in respect of a relief payment does not survive the person for the benefit of his estate.
 - (g) **Clause 23** adds a new section 36A to impose a surcharge on employers who have failed to comply with the compulsory insurance requirements under the ECO.
 - (h) **Clause 33** and the Schedule make consequential amendments to the Employees’ Compensation Ordinance (Cap. 282), the Employees’ Compensation Insurance Levies Ordinance (Cap. 411) and the Employees’ Compensation Insurance Levy (Rate of Levy) Order (Cap. 411 sub. leg.) for the levy increase and adjustment of levy rates for the different bodies.

Implementation

29. The Amendment Bill, if enacted, will come into effect on a day to be appointed by the Secretary for Education and Manpower, except the present provisions of the Ordinance relating to applications by employers for payments from the Fund where their insurers are insolvent will not be repealed on a day to be appointed by the Secretary for Education and Manpower until the insurance industry has set up a replacement scheme.

LEGISLATIVE TIMETABLE

30. The legislative timetable for the Bill is as follows:

Publication in the Gazette	15 February 2002
First Reading and commencement of Second Reading debate	27 February 2002
Resumption of Second Reading debate, Committee stage and Third Reading	to be notified

BASIC LAW IMPLICATIONS

31. The Department of Justice advises that the proposed legislation does not conflict with those provisions of the Basic Law carrying no human rights implications.

HUMAN RIGHTS IMPLICATIONS

32. The Department of Justice advises that the proposed legislation is consistent with the human rights provisions of the Basic Law.

BINDING EFFECT OF THE LEGISLATION

33. The amendment will not affect the current binding effect of the Ordinance.

FINANCIAL AND STAFFING IMPLICATIONS

34. Subject to approval by Finance Committee, the Government will extend a loan of \$280 million (including the outstanding balance of \$50 million of the current bridging loan) at no-gain-no-loss interest rate to the Board. The ability of the Board to repay this loan, with interest, is dependent on the proposed levy increase and adjustment of levy income (paragraphs 22-25) materialising. It is also dependent on the Administration putting in place separate arrangements to meet claims for employees compensation arising from future cases of insurer insolvency. Enactment of the Bill itself will have no financial or staffing implications for the Government.

ECONOMIC IMPLICATIONS

35. A net increase in the levy rate on EC insurance premium by one percentage point will mean an additional contribution of around \$29 million per year from employers. As this corresponds to less than 0.1% of the total wage bill in the economy, the resultant impact on the cost of doing business should be relatively small. Also, to the extent that the levy rate for the Scheme has hitherto been underestimated, the proposed net increase reflects the realistic cost stemming from an on-going statutory obligation on employers. Compliance by employers should be seen in this context.

PUBLIC CONSULTATION

36. The LegCo Panel on Manpower and the LAB have been consulted on the package of measures to reform the Scheme. The LegCo Panel on Manpower agreed with the proposed reform measures. While the LAB originally agreed that the relief payment should only be payable to the spouse and children under the age of 21 of a deceased employee, the scope of beneficiaries had to be expanded upon the advice of the Department of Justice on human rights grounds. The changes are:

- (i) in a fatal accident, the beneficiaries of relief payment shall include those family members who have been awarded damages by the court ; and
- (ii) in a non-fatal accident, the beneficiaries shall be the parents if the injured employee is not survived by any spouse/cohabitee

and children under the age of 21 when he passes away before the relief payment is exhausted.

37. The LegCo Panel on Manpower, the LAB, the Board and the ODCB have been consulted on the financial arrangements which include increasing the overall levy rate on EC insurance premium for the benefit of the Scheme, adjusting the levy rates for the Scheme and the ODSCS and extending a government loan of \$280 million to the Board. All parties consulted endorsed the proposals.

PUBLICITY

38. A press release will be issued on 15 February 2002. A spokesman of the Labour Department will be available to handle press enquiries.

Education and Manpower Bureau
February 2002

Annex A

**EMPLOYEES COMPENSATION ASSISTANCE
(AMENDMENT) BILL 2002**

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A BILL

To

Amend the Employees Compensation Assistance Ordinance to revise the scheme providing for the protection of the entitlement of employees and others to compensation for employment-related injury; for the making of relief payments to eligible persons in relation to damages for employment-related injury; to increase the membership of the Board; to revise the procedures for filing applications which may affect the Fund; to require the Board to be notified of proceedings which may affect the Fund; to empower the Board to take part in legal proceedings in order to protect the Fund; to reduce the amount of interest payable on payments from the Fund; to require employers who have failed to take out the relevant policies of insurance to pay a surcharge to the Board; and to make connected amendments, including consequential amendments to the Employees' Compensation Ordinance, the Employees' Compensation Insurance Levies Ordinance and the Employees' Compensation Insurance Levy (Rate of Levy) Order.

Enacted by the Legislative Council.

1. Short title and commencement

(1) This Ordinance may be cited as the Employees Compensation Assistance (Amendment) Ordinance 2002.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Education and Manpower by notice

published in the Gazette.

2. Long title substituted

The long title to the Employees Compensation Assistance Ordinance (Cap. 365) is repealed and the following substituted -

"An Ordinance to provide for the protection of the entitlement of employees and others to compensation for employment-related injury; for the making of relief payment to eligible persons in relation to damages for employment-related injury; for the establishment of a board and a fund for those purposes; and for incidental or connected matters."

3. Interpretation

Section 2 is amended -

(a) by renumbering it as section 2(1);

(b) in subsection (1), by adding -

"cohabitee" (同居者), in relation to an employee, means any person who, at the time of the death of the employee, was living with the employee as the employee's wife or husband;

"eligible person" (合資格人士), in relation to a relief payment -

(a) where the employment-related injury concerned is non-fatal, means -

(i) the injured employee;

or

(ii) in the case of the death of the injured employee after damages have been awarded -

(A) any surviving spouse or cohabitee of the injured employee;

(B) any surviving child of the injured employee, whether by blood or an adoption specified in subsection (2) made before the date on which the accident occurred to which the relief payment relates, who was under the age of 21 years at the time of the death of the injured employee;

(C) if there is no surviving spouse or cohabitee, and no surviving child, as mentioned in sub-subparagraph (A) or (B), any surviving parent of the injured employee;

(b) where the employment-related injury concerned is fatal, means a person who has any of the following relationship in respect of the deceased employee, whether by blood or an adoption specified in subsection (2) made before the

date on which the accident occurred to which the relief payment relates -

- (i) a spouse or cohabitee;
 - (ii) a child;
 - (iii) a parent or grandparent;
- or
- (iv) a grandson, granddaughter, stepfather, stepmother, stepson, stepdaughter, son-in-law, daughter-in-law, brother, sister, half-brother, half-sister, father-in-law, mother-in-law, brother-in-law, sister-in-law, and child of a brother or sister of the whole blood;

"prescribed monthly amount" (訂明每月數額) means the amount specified in Part 1 of Schedule 4;

"prescribed relief payment" (訂明濟助付款) means the amount specified in Part 2 of Schedule

4;

"prescribed surcharge" (訂明附加費) means the

amount specified in Part 3 of Schedule 4;

"relief payment" (濟助付款) means a relief payment

made or which may be made from the Fund

pursuant to an application under section

20A;

"spouse" (配偶), in relation to an employee, does

not include a person who, at the time of the

death of the employee, has ceased to be the

employee's spouse;"

(c) by adding -

"(2) For the purposes of the definition of

"eligible person" -

(a) an adoption means an adoption -

(i) made under an adoption

order made in

accordance with the

Adoption Ordinance

(Cap. 290);

(ii) to which section 17 of

the Adoption Ordinance

(Cap. 290) applies; or

(iii) made in Hong Kong in

accordance with

Chinese law and custom

before 1 January 1973;

and

- (b) any person so adopted shall be treated as the child of the adopter, and not as the child of any other person, and all relationships to the adopted person shall be deduced accordingly."

4. Constitution of the Board

Section 3(2)(b) is amended -

- (a) by repealing "5" and substituting "6";
- (b) in subparagraph (ii), by repealing "and";
- (c) in subparagraph (iii), by adding "and" after "law;";
- (d) by adding -
 - "(iv) 1 is a person having expertise in the practice of insurance;".

5. Employees Compensation Assistance Fund

Section 7(1) is amended by adding -

- "(aa) moneys received by the Board as surcharges under section 36A;".

6. Application by employee etc. for payment from the Fund in relation

to unpaid compensation

Section 16 is amended -

(a) by repealing subsection (1) and substituting -

“(1) A person who is unable to recover from an employer payment of an amount of compensation for which the employer is liable may apply for payment of that amount from the Fund.”;

(b) in subsection (2), by repealing everything before paragraph (b) and substituting -

“(2) For the purpose of this section an employer is not to be regarded as liable for the payment of an amount of compensation unless -

(a) the amount is payable -

(i) pursuant to a judgment or order of a court or tribunal of competent jurisdiction in Hong Kong;

(ii) by virtue of section 16A(9) of the Employees' Compensation Ordinance (Cap. 282) following an assessment of compensation by the Commissioner under that section; or

(iii) pursuant to a

Certificate of
Compensation
Assessment for Fatal
Case or Review
Certificate of
Compensation
Assessment for Fatal
Case issued under the
Employees'
Compensation Ordinance
(Cap. 282);";

(c) by repealing subsection (3) and substituting -

"(3) For the purpose of this section a person is not to be regarded as being unable to recover from an employer payment of an amount of compensation for which the employer is liable unless the person has taken such proceedings to recover payment of the amount -

(a) from, wherever applicable -

- (i) the employer;
- (ii) the principal contractor who is liable to pay compensation to the person under section 24 of the Employees'

Compensation Ordinance

(Cap. 282); and

(iii) an insurer who has issued a policy of insurance -

(A) which is in force in relation to the injured employee at the time of the accident

concerned; and

(B) indemnifying the employer, or the principal contractor mentioned in subparagraph (ii), in respect of such liability; and

(b) as are reasonable in the circumstances, having regard to the likely cost of such proceedings, the resources available to the person and the amount likely to be recovered from, wherever applicable, the employer,

the principal contractor and the insurer.".

7. Application by employer for payment from the Fund

Section 17 is amended -

- (a) by renumbering it as section 17(1);
- (b) in subsection (1)(b), by adding "or deceased" after "injured";
- (c) in subsection (1)(c)(ii), by adding "as specified in a notice under section 20 published in the Gazette" after "insolvent";
- (d) by adding -

“(2) A principal contractor who has taken out a policy of insurance in accordance with section 40(1B) of the Employees’ Compensation Ordinance (Cap. 282) is entitled to make an application under subsection (1) -

- (a) in respect of compensation, as if the principal contractor were an employer;
- (b) in respect of damages which the employer concerned is liable to pay, on behalf of the employer.

(3) Any reference to an employer in any other provision of this Ordinance which relates to this section shall be construed to include a principal

contractor to whom subsection (2) applies.".

**8. Application by employer for payment
from the Fund to third party**

Section 18 is amended -

- (a) by renumbering it as section 18(1);
- (b) in subsection (1)(b), by adding "or deceased" after "injured";
- (c) in subsection (1)(c), by adding "as specified in a notice under section 20 published in the Gazette" after "insolvent";
- (d) by adding -

"(2) A principal contractor who has taken out a policy of insurance in accordance with section 40(1B) of the Employees' Compensation Ordinance (Cap. 282) is entitled to make an application under subsection (1) -

- (a) in respect of compensation, as if the principal contractor were an employer;
- (b) in respect of damages which the employer concerned is liable to pay, on behalf of the employer.

(3) Any reference to an employer in any other provision of this Ordinance which relates to this section shall be construed to include a principal contractor to whom subsection (2) applies.".

9. Section added

The following is added -

**"18A. Provisions ancillary to sections
17 and 18**

(1) An application under section 17 or 18 shall be made by an employer not later than 180 days after the date on which the employer is entitled to make the application.

(2) An employer who fails to comply with subsection (1) in the case of section 17 shall not be entitled to any payment from the Fund in relation to the application to which the failure relates.

(3) Where an employer makes an application under section 18 after the expiration of 180 days after the date on which the employer is entitled to make the application, no interest, or surcharge payable under the Employees' Compensation Ordinance (Cap. 282), as the case may be, is payable on the amount to which the application relates in respect of the period beginning on that expiration and ending on the date on which the application is made.

(4) No interest, or surcharge payable under the Employees' Compensation Ordinance (Cap. 282), as the case may be, is payable on the amount to which an application under section 18 relates in respect of the period beginning on the date of the application and ending upon the expiration of 180 days after that date."

**10. Limitations on applications by
employers**

Section 19(1) is amended -

- (a) in paragraph (a), by repealing "by the employer";
- (b) in paragraph (b), by repealing "of insolvency given under this Part" and substituting "under section 20 published in the Gazette".

11. Notice of insolvency of insurer

Section 20(2)(a) is repealed and the following substituted -

"(a) shall be in a form specified by the Board;".

12. Sections added

The following are added -

"20A. Application by employee etc. for relief payment from the Fund in relation to unpaid damages

(1) An eligible person who is unable to recover from an employer payment of an amount of damages for which the employer is liable may apply for a relief payment of that amount from the Fund.

(2) For the purposes of this section, an employer is not to be regarded as liable for the payment of an amount of damages unless the amount is payable pursuant to a judgment or order of a court of competent jurisdiction in Hong Kong.

(3) For the purpose of this section, an eligible person is not to be regarded as being unable to recover from an employer payment of an amount of damages for which the employer is liable unless the eligible person has taken such proceedings to recover payment of the amount -

- (a) from, wherever applicable -

- (i) the employer; and
- (ii) an insurer who has issued a policy of insurance -
 - (A) which is in force in relation to the injured employee at the time of the accident concerned; and
 - (B) indemnifying the employer in respect of such liability; and
- (b) as are reasonable in the circumstances, having regard to the likely cost of such proceedings, the resources available to the eligible person and the amount likely to be recovered from, wherever applicable, the employer and the insurer.

20B. Amount of relief payment

(1) Subject to section 20A(2) and subsection (2), the amount of a relief payment to an eligible person shall be the amount of damages for which the employer is liable to pay the eligible person after that amount is reduced by -

- (a) the amount, if any, of compensation which has been paid or is payable under the Employees' Compensation Ordinance (Cap. 282) in respect of the injured employee in relation to the accident concerned; and
- (b) the amount, if any, of those damages already paid by the employer.

(2) Notwithstanding the definitions of "compensation" and "damages", for the purposes of determining the amount of a relief payment -

- (a) any interest payable on any amount; and
- (b) any costs,

arising from proceedings in respect of any damages or compensation claim shall not be included.

(3) For the avoidance of doubt, it is hereby declared that where -

- (a) a non-fatal injury gives rise to a relief payment in relation to an eligible person who is the injured employee; and
- (b) that eligible person subsequently dies,

then the balance, if any, of the relief payment shall be paid to the other eligible persons, if any -

- (c) remaining in relation to that first-mentioned eligible person; and
- (d) falling within paragraph (a)(ii) of the definition of "eligible person".

20C. Manner of payment of relief payment

(1) Subject to subsections (3), (4) and (5) and sections 20D to 20G, where the amount of a relief payment does not exceed the prescribed relief payment, the Board shall pay the amount in full to the eligible person or eligible persons, as the case may be.

(2) Subject to subsections (3), (4) and (5) and sections 20D to 20G, where the amount of a relief payment exceeds the prescribed

relief payment, the Board shall pay the amount to the eligible person or eligible persons, as the case may be, as follows -

- (a) a first payment equivalent to the prescribed relief payment; and
- (b) subject to section 20D, subsequent monthly payments at the rate of -
 - (i) the prescribed monthly amount; or
 - (ii) the monthly earnings of the injured employee at the time of the accident concerned,

whichever is the higher.

(3) A surviving child who was an eligible person falling within paragraph (a)(ii)(B) of the definition of "eligible person" at the time of the death of the injured employee -

- (a) shall be entitled to the payment under subsection (1) or (2)(a) notwithstanding that he has attained the age of 21 years or above at the time the payment is made;
- (b) shall not be entitled to a payment under subsection (2)(b) if he has attained the age of 21 years or above at the time the payment would, but for this paragraph, be made.

(4) Where 2 or more eligible persons are entitled to receive a relief payment, the amount of relief payment paid to each eligible person shall not exceed the amount to which they are respectively entitled under section 20F.

(5) For the purposes of calculating the rate of payments under subsection (2)(b), the monthly earnings of the employee concerned shall mean the employee's earnings as determined in accordance with section 11 of the Employees' Compensation Ordinance (Cap. 282).

20D. Cessation of payments under
section 20C(2)(b)

Payments under section 20C(2)(b) shall be payable until -

- (a) subject to section 20G, the amount of relief payment has been fully paid; or
- (b) in the case of each eligible person entitled to receive such payments, the person -
 - (i) dies; or
 - (ii) ceases to be entitled to receive such payments pursuant to section 20E,

whichever is the earlier.

20E. When eligible person ceases to be
entitled to relief payment

An eligible person shall cease to be entitled to a relief payment where -

- (a) subject to section 20C(3) in the case of an eligible person falling within paragraph (a)(ii)(B) of the definition of "eligible person", the person attains the age of 21 years;
- (b) the eligible person has been paid the amount to

which the eligible person is entitled, whether as relief payment or payment of damages from the employer concerned, including any combination thereof.

20F. Apportionment of relief payment

(1) Where 2 or more eligible persons are entitled to receive a relief payment in respect of a deceased employee, then the relief payment shall be apportioned as follows -

(a) either -

(i) on a pro rata basis in accordance with the respective amounts awarded to the eligible persons by the court mentioned in section 20A(2); or

(ii) on an equal share basis if subparagraph (i) is not applicable or that court has not otherwise made an order on how the amount of damages should be apportioned amongst the eligible persons;

(b) where an eligible person has died or is no longer entitled to a relief payment, the relief payment shall be re-apportioned to the remaining eligible persons in proportion to the outstanding amount of relief payment respectively due to them;

(c) where an eligible person makes a successful application to the Board for a relief payment at

a time when the payments under section 20C(2)(b) are being made to other eligible persons, the payments shall be re-apportioned -

- (i) from the date the Board makes a determination under section 22 that the first-mentioned eligible person is entitled to the relief payment; and
- (ii) to the first-mentioned eligible person and the other eligible persons in proportion to the outstanding amount of relief payment respectively due to them.

(2) For the avoidance of doubt, it is hereby declared that the re-apportionment of a relief payment under this section shall correspond with whichever of subsection (1)(a)(i) or (ii) is applicable to the relief payment.

20G. Set-off

Where an eligible person -

- (a) is receiving payments under section 20C(2)(b);
and
- (b) during the course of receiving the payments, receives any payment of an amount of damages in relation to the injury to which the payments relate,

then the Board shall set-off from the outstanding amount of the

payments due to the eligible person the amount of damages (including damages by way of indemnity) so received by the eligible person."

13. Applications

Section 21 is amended -

- (a) in subsection (1)(b), by repealing "prescribed manner and form" and substituting "manner and form specified by the Board";
- (b) by repealing subsection (4)(a) and substituting -
 - "(a) require the employer (or the employer's representative) or the employee or his member of the family or representative, the employer's insurer or any other employee of the employer to furnish such information or particulars relating to an application; and".

14. Determination of applications by the Board

Section 22 is amended -

- (a) in subsection (1), by adding "and, in particular, the amount of each payment, if any, to be made from the Fund by virtue of those determinations" after "determinations";
- (b) in subsection (2) -
 - (i) by repealing "An" and substituting "Subject

to subsection (3), an”;

(ii) by adding “half” after “at”;

(c) by adding -

“(3) No interest is payable on an amount mentioned in subsection (2) -

(a) which is a relief payment;

- (b) where the application concerned under section 16 is made after the expiration of 180 days after the date on which the employer concerned is liable for the payment of the amount, in respect of the period beginning on that expiration and ending on the date on which the application is so made;
- (c) in respect of the period beginning on the date the application concerned under section 16 is made and ending upon the expiration of 180 days after that date;
- (d) where section 25B is applicable, in respect of the period between the expiration of the period mentioned in section 25B(1)(c) and the date on which an extension, if any, is granted under section 25B(2);
- (e) where the application concerned is under section 17, in respect of the period beginning on the date the employer makes the payment concerned of an amount of compensation or damages and ending on the date on which payment is made from the Fund in respect of that application.

(4) No surcharge mentioned in paragraph (e) of the definition of “compensation” in section 3 of the Employees’ Compensation Ordinance (Cap. 282) shall be included in an amount mentioned in subsection (2) -

- (a) where the application concerned under section 16 is made after the expiration of 180 days after the date on which the employer concerned is liable for the payment of the amount, to the extent that the surcharge arises in respect of the period beginning on that expiration and ending on the date on which the application is so made;
- (b) to the extent that the surcharge arises in respect of the period beginning on the date of the application concerned under section 16 is made and ending upon the expiration of 180 days after the date.

(5) The interest payable on an amount mentioned in subsection (2) before the determination mentioned in that subsection is made shall be the rate mentioned in that subsection or the rate specified by the court or tribunal concerned, whichever is the lower.

(6) The Board may vary a determination under this section -

(a) to take account of -

(i) a person who becomes an eligible person on or after the date of the determination; or

(ii) the existence of an eligible person which was not known to the Board before that date; and

(b) in a manner not inconsistent with the provisions of this Ordinance.".

15. Costs

Section 23(1), (4) and (6) is amended by repealing "or damages" wherever it appears.

16. Board liable in certain proceedings as if employer

Section 25(1) and (4) is amended by repealing "or damages".

17. Sections added

The following are added immediately after section 25 -

**"25A. Board may apply to be joined
as party to proceedings**

(1) If proceedings have been initiated to claim compensation or damages (whether initiated before, on or after the commencement of this section), the Board may apply to the court to be joined as a party to the proceedings as follows -

(a) where no policy of insurance is known to be in force at the time of the accident to which the proceedings relate, the Board may apply to the court to take over the defence as if it were the employer in the proceedings if -

- (i) the employer cannot be identified or, if identified, cannot be found;
- (ii) the employer is insolvent;
- (iii) the employer is dead or has been dissolved, wound up or struck off the register;
- (iv) the employer, for any reason, cannot be served with the notice of proceedings;
- (v) at any time when the employer fails to attend the hearing, leaving the claim uncontested;

(b) where no policy of insurance is known to be in force at the time of the accident to which the proceedings relate and the employer is present at

the proceedings, the Board may apply to the court to join in the proceedings as a third party in accordance with Order 15, rule 6 of the Rules of the High Court (Cap. 4 sub. leg.);

- (c) where the insurer concerned is insolvent, the Board may apply to the court to join in the proceedings as a third party in accordance with Order 15, rule 6 of the Rules of the High Court (Cap. 4 sub. leg.).

25B. Notification of proceedings

(1) Where, after the commencement of this section, a person commences by writ proceedings in respect of a claim for compensation or damages, the person shall serve on the Board and, where applicable, the insurer concerned a notice of the proceedings -

- (a) in writing in a form specified by the Board, signed by the person and accompanied by a copy of the writ;
- (b) by registered post; and
- (c) subject to subsection (2), not later than 30 days after the date on which the writ is filed with the court.

(2) The Board may extend the period specified in subsection (1) in the case of a person who satisfies the Board, by notice in writing served on the Board, that there are good reasons why the

person cannot comply with subsection (1) within that period.

(3) A person who has served a notice under subsection (1) on the Board and who proposes to obtain judgment or reach settlement with the other party -

(a) in respect of the claim to which the notice relates;
and

(b) within 45 days after the date on which the notice has been so served,

shall, not less than 10 days before proposing to obtain judgment or reach a settlement, serve a notice in writing on the Board informing the Board that the person proposes to obtain judgment or reach a settlement in respect of that claim within 45 days after the date on which the first-mentioned notice has been served on the Board.

(4) It is hereby declared that -

(a) a notice under subsection (1) shall not combine a claim for compensation with a claim for damages;

(b) a notice under subsection (1) may be accompanied by a notice under subsection (3).

(5) A person who fails to comply with subsection (1) or (3) in respect of a claim mentioned in that subsection shall not be entitled to any payment under this Ordinance in respect of the claim, and notwithstanding the other provisions of this Ordinance.

(6) Upon receipt of a notice under this section, the Board shall carry out such inquiries as it considers necessary to facilitate

the proper carrying out of the functions of the Board in relation to the claim to which the notice relates.

(7) For the purpose of carrying out inquiries under this section, the Board may -

(a) require the employer (or the employer's representative) or the employee or his member of the family or representative, the employer's insurer or any other employee of the employer to furnish such information or particulars relating to the claim; and

(b) make such inquiries from any other person connected or associated with the claim,

as the Board considers necessary."

18. Priority of payments from the Fund

Section 26(2)(a) and (b) is repealed and the following substituted -

"(a) amounts liable to be paid in respect of applications under section 16 shall have priority over amounts liable to be paid in respect of applications under section 17, 18 or 20A;

(b) amounts of compensation liable to be paid in respect of applications under section 18 shall have priority over amounts of damages liable to be paid in respect of applications under section 18 and amounts liable to be paid in respect of applications under section 17 or 20A;

(ba) amounts of compensation liable to be paid in respect of applications under section 17 shall have priority over

amounts of damages liable to be paid in respect of applications under section 17, amounts of damages liable to be paid in respect of applications under section 18 and amounts liable to be paid in respect of applications under section 20A;

- (bb) amounts liable to be paid in respect of applications under section 20A where section 20C(1) or (2)(a) is applicable shall have priority over amounts liable to be paid in respect of applications under that section where section 20C(2)(b) is applicable and amounts of damages liable to be paid in respect of applications under section 17 or 18;
- (bc) amounts of damages liable to be paid in respect of applications under section 18 shall have priority over amounts of damages liable to be paid in respect of applications under section 17 and amounts liable to be paid in respect of applications under section 20A where section 20C(2)(b) is applicable;
- (bd) amounts liable to be paid under section 20A where section 20C(2)(b) is applicable shall have priority over amounts of damages liable to be paid in respect of applications under section 17; and".

19. Payments in anticipation of entitlement under section 16, etc.

Section 28 is amended -

- (a) in subsection (1), by repealing "this Part" and

substituting "section 16, 17 or 18";

(b) by repealing subsection (2) and substituting -

"(2) Any offer by the Board of payment under subsection (1) shall specify the section to which the Board considers that the person is or might be so entitled and, accordingly, any payment made under that subsection shall, for the purposes of section 26, be regarded as an amount as if the Board is liable to pay under the section so specified.

(3) If a person accepts an offer made under subsection (1) and receives payment accordingly, that person shall not have the right to make an application under section 16, 17 or 18, as the case may require, in respect of the claim to which the offer relates.

(4) If an offer made under subsection (1) is not accepted by a person, and in the subsequent proceedings in respect of the claim to which the offer relates the person is awarded an amount not more than the amount offered by the Board, then the Board shall not be required to pay more than the amount as awarded by the court or tribunal concerned.

(5) Where payment is made from the Fund to a person pursuant to subsection (3), then the Board

shall not be liable to pay the costs incurred by the person after the date of the offer to which the claim relates.

(6) Where the Board takes part in proceedings in respect of a claim for compensation, the Board shall have the right to agree costs with the parties involved in the proceedings prior to taxation."

20. Interpretation

Section 31 is amended by adding ", unless the context otherwise requires" after "Part".

21. Application of this Part

Section 33 is amended -

- (a) in paragraph (b), by repealing "or" at the end;
- (b) in paragraph (c), by repealing "applies." and substituting "applies; or";
- (c) by adding -

"(d) any compensation or damages for injury to an employee who has been engaged outside Hong Kong by an employer who -

- (i) is outside Hong Kong; and
- (ii) has no place of business in Hong Kong (and whether or not the employer's business is for gain)."

22. Survival of rights

Section 35 is amended -

- (a) by renumbering it as section 35(1);
- (b) in subsection (1), by repealing "On" and substituting "Subject to subsection (2), on";
- (c) by adding -

"(2) Subsection (1) does not apply in the case of any rights and entitlement of a person in respect of a relief payment."

23. Section added

The following is added immediately after section 36 -

"36A. Surcharge

(1) An employer who contravenes section 40(1) of the Employees' Compensation Ordinance (Cap. 282) shall be liable to pay a surcharge to the Board in accordance with this section.

(2) Subject to subsection (3), the amount of surcharge payable by an employer under subsection (1) shall be 3 times the levy payable to the Board under the Employees' Compensation Insurance Levies Ordinance (Cap. 411) on the premium paid in respect of the policy of insurance obtained to cause the cessation of the contravention referred to in that subsection to which the surcharge relates.

(3) The amount of surcharge payable by an employer under subsection (1) shall be the prescribed surcharge where -

- (a) the employer fails to comply with a requirement under subsection (4) in any case where paragraph (b) is not applicable and the Board is otherwise unable to obtain the information and particulars necessary for subsection (2) to apply in the case of the employer; or
- (b) the employer is not required to comply with section 40(1) of the Employees' Compensation Ordinance (Cap. 282) to cause the cessation of the contravention referred to in that subsection to which the surcharge relates.

(4) The Board may serve a notice in writing on an employer or insurer requiring the employer or insurer, as the case may be, to furnish information and particulars -

- (a) which enables the Board to determine, to its satisfaction, the amount of surcharge payable by the employer under subsection (1); and
- (b) within the period specified in the notice, being a period reasonable in all the circumstances of the case.

(5) Where a surcharge is payable under this section by an employer -

- (a) the Board shall serve a notice in writing ("demand notice") on the employer, accompanied by a copy of this section in the Chinese and English languages, advising the employer -

- (i) of the surcharge, its amount, the grounds therefor and the period, being a period of not less than 30 days after the date of service of the demand notice, within which the employer shall pay the surcharge to the Board; and
 - (ii) that the employer may, not later than 14 days after the date of service of the demand notice, serve a notice in writing ("review notice") on the Board requesting the Board to review, on the grounds specified in the review notice, the amount of the surcharge or the grounds therefor or both;
- (b) the Board shall carry out a review requested in a review notice and serve a notice in writing ("final notice") on the employer -
- (i) advising the employer that the demand notice is -
 - (A) confirmed;
 - (B) varied in the manner specified in the final notice and for the reasons stated therein; or
 - (C) withdrawn; and
 - (ii) not later than 30 days after receipt of the review notice.

(6) An applicant dissatisfied with a demand notice or final notice may commence proceedings in a court against the Board.

(7) Proceedings under subsection (6) shall be commenced by writ.

(8) A surcharge under this section shall be recoverable as a civil debt due to the Board.

(9) In this section, "employer" (僱主) includes a former employer."

24. Subrogation

Section 37 is amended -

- (a) by repealing subsections (1), (2) and (3) and substituting -

"(1) Where a payment is made from the Fund under Part IV to any person ("the recipient"), being payment of an amount of compensation or damages which an employer, insurer or third party is liable to pay the recipient, all the rights and remedies of the recipient with respect to -

- (a) the compensation or damages existing immediately before the payment are, to the extent of the amount of the payment; and
- (b) any sum payable in respect of interest or costs in respect of the compensation or damages are, transferred to and vested in the Board for the

benefit of the Fund.

(2) Where a payment is made from the Fund under Part IV to or on behalf of an employer, being payment of an amount for which an insurer is liable to indemnify the employer under a policy of insurance, all the rights and remedies of the employer with respect to -

(a) the amount for which the insurer is so liable existing immediately before the payment are, to the extent of the amount of the payment; and

(b) any sum payable in respect of interest or costs in respect of the amount are,

transferred to and vested in the Board for the benefit of the Fund.

(3) The Board may take such steps as it considers necessary to enforce the rights and remedies transferred and vested in it under this section, including steps where the Board permits in writing the recipient or employer from whom the rights and remedies were transferred to take proceedings to recover, for the benefit of the Fund, the amount (or any part thereof) to which the rights and remedies relate.”;

(b) by adding -

"(6) For the purposes of this section -

(a) any payment made under section 28 to a person shall be deemed as a payment which the employer is liable to make to the person;

(b) a relief payment shall be deemed to be payment of an amount of damages,

and the provisions of this section shall be construed accordingly."

25. Section added

The following is added -

"37A. Recovery of payment

Where an eligible person receives any amount of damages in respect of an injury for which a relief payment has already been made, then the Board shall be entitled to recover from the eligible person as a civil debt such part, if any, of that amount which, taken together with the relief payment, is in excess of the amount of damages to which the eligible person is entitled."

26. Recovery of payment made by mistake

Section 38 is amended -

(a) in subsection (1), by repealing "Subject to subsection (2), where" and substituting "Where";

- (b) by repealing subsection (2).

27. Offences

Section 40 is amended -

- (a) in subsection (1), by repealing "of \$100,000" and substituting "at level 6";
- (b) in subsection (2) -
 - (i) by adding "or 25B(7) or, where the person is an insurer, 36A(4)" after "section 21(4)";
 - (ii) by repealing "of \$5,000" and substituting "at level 2".

28. Regulations

Section 41(2) is amended by repealing "of \$10,000" and substituting "at level 3".

29. Section added

The following is added -

"45A. Amendment of Schedule 4

The Secretary may, by notice published in the Gazette, amend Schedule 4."

30. Section added

The following is added -

"46A. Transitional provisions in relation to Employees

Compensation Assistance

**(Amendment) Ordinance
2002**

(1) Where before the commencement of section 6 of the Employees Compensation Assistance (Amendment) Ordinance 2002 (of 2002) an employer is liable for the payment of an amount of compensation or damages for the purposes of section 16 as in force immediately before that commencement, then -

(a) the provisions of this Ordinance as amended by that Ordinance shall not apply to or in relation to any such compensation or damages;

(b) the provisions of this Ordinance as in force immediately before that commencement shall apply to and in relation to -

(i) any such compensation or damages; and

(ii) any application or claim made in relation thereto under this Ordinance as so in force, and whether or not the application or claim is made before, on or after that commencement.

(2) Sections 17, 18, 18A, 19, 20, 22(3)(e) and 23(7) to (11) inclusive are repealed.

(3) Section 26(2) is amended -

(a) in paragraph (a), by repealing "17, 18 or";

(b) by repealing paragraphs (b) and (ba);

(c) in paragraph (bb), by repealing "and amounts of damages liable to be paid in respect of

applications under section 17 or 18";

(d) by repealing paragraphs (bc) and (bd).

(4) Section 28 is amended -

(a) in subsection (1), by repealing ", 17 or 18";

(b) by repealing subsection (2);

(c) in subsection (3), by repealing ", 17 or 18, as the case may require,".

(5) Sections 31(b), 37(2) and (5) and 41(1)(a)(iv) are repealed.

(6) Section 43(b) is amended by repealing "or employer's insurer, as the case may be,".

(7) Where before the commencement of this subsection -

(a) a notice under section 20 is published in the Gazette in respect of an insurer; and

(b) an employer is entitled to make an application under section 17 or 18 in relation to a policy of insurance issued by that insurer,

then the provisions of this Ordinance as in force immediately before that commencement shall apply to and in relation to that entitlement.

(8) Where before the commencement of this subsection there is in force a policy of insurance in relation to an injured employee indemnifying the employee's employer in respect of the employer's liability for payment of an amount of compensation or damages in respect of the injury concerned for which he would be liable under section 16 or 20A, as the case may be, then, on and after that commencement, no person is entitled to make an application under

that section in respect of any compensation or damages arising from that injury.".

**31. Provisions regarding the Board
and its members**

Schedule 1 is amended, in paragraph 4, by repealing "4" and substituting "5".

32. Schedule added

The following is added -

"SCHEDULE 4 [ss. 2 & 45A]

PRESCRIBED MONTHLY AMOUNT, PRESCRIBED
RELIEF PAYMENT AND PRESCRIBED
SURCHARGE

PART 1

PRESCRIBED MONTHLY AMOUNT

\$10,000

PART 2

PRESCRIBED RELIEF PAYMENT

\$1,500,000

PART 3

PRESCRIBED SURCHARGE

\$10,000 where section 36A(3)(a) of this Ordinance is applicable and \$5,000 where section 36A(3)(b) of this Ordinance is applicable".

33. Consequential amendments

The enactments specified in the Schedule are amended as set out in the Schedule.

SCHEDULE

[s. 33]

CONSEQUENTIAL AMENDMENTS

Employees' Compensation Ordinance

1. Interpretation

Section 3(1) of the Employees' Compensation Ordinance (Cap. 282) is amended by adding -

"“ECAF” (管理局) means the Employees Compensation Assistance Fund Board constituted by section 3(1) of the Employees Compensation Assistance Ordinance (Cap. 365);”.

2. Payment of compensation and objection to determination of Commissioner

Section 6D is amended -

(a) by repealing subsection (4) and substituting -

"(4) An objection to a determination under section 6B(1)(a) may be made in writing -

(a) by the employer, any person who has made an application under section 6B(1) or the ECAFB;

(b) within 30 days after -

(i) in the case of the employer or any person who has made an application under section 6B(1), the date of issue of the Certificate of Compensation Assessment for Fatal Case concerned;

(ii) in the case of the ECAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap. 365) by a member

of the family of the
deceased employee,

or within such further time as the
Commissioner, in the
circumstances of any particular
case, thinks fit; and

(c) stating the grounds of the
objection.";

(b) in subsection (6) -

(i) in paragraph (a), by repealing "and to the
employer if the employer" and substituting
", to the employer if the employer is not the
objector and to the ECAFB if the ECAFB, as
the case requires,";

(ii) in paragraph (c), by repealing "and each of
the members of the family" and substituting
", each of the members of the family and the
ECAFB, as the case requires,";

(c) in subsection (9), by repealing "or any person named
in the Certificate" and substituting "any person named
in the Certificate, or the ECAFB".

3. Determination by Commissioner of claims for funeral and medical attendance expenses

Section 6E is amended -

(a) by repealing subsection (10) and substituting -

"(10) An objection to a determination under subsection (1) may be made in writing -

(a) by the employer, any person who has made an application under that subsection or the ECAFB;

(b) within 30 days after -

(i) in the case of the employer or any person who has made an application under that subsection, the date of issue of the Certificate for Funeral and Medical Attendance Expenses concerned;

(ii) in the case of the ECAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap. 365) by a person who is entitled to the reimbursement of the expenses of the funeral

of the deceased
employee or of the
expenses of the medical
attendance on the
deceased employee,

or within such further time as the
Commissioner, in the
circumstances of any particular
case, thinks fit; and

(c) stating the grounds of the
objection.";

(b) in subsection (12) -

(i) in paragraph (a), by repealing "and to the
employer if the employer" and substituting
, to the employer if the employer is not the
objector and to the ECAFB if the ECAFB, as
the case requires,";

(ii) in paragraph (c), by repealing "and each of
the persons who has made an application under
subsection (1)" and substituting ", each of
the person who has made an application under
subsection (1) and the ECAFB, as the case
requires,";

(c) in subsection (15), by repealing "or the persons named
in the Certificate" and substituting "the persons named
in the Certificate, or the ECAFB".

4. Determination of claims in respect of minor injuries

Section 16A is amended -

(a) by repealing subsection (3) and substituting -

"(3) An objection to the amount of compensation assessed under subsection (1) may be made in writing -

(a) by the employer, the employee or the ECAFB;

(b) within 14 days after -

(i) in the case of the employer or employee, the date of issue of the certificate issued under subsection (2);

(ii) in the case of the ECAFB, the date on which an application is made under section 16 of the Employees Compensation Assistance Ordinance (Cap. 365) by the employee,

or within such further time as the Commissioner, in the circumstances of any particular case, thinks fit;

- (c) stating the grounds of the objection; and
- (d) by the objector sending a copy of the objection -
 - (i) where the objector is the employer, to the employee;
 - (ii) where the objector is the employee, to the employer;
 - (iii) where the objector is the ECAFB, to the employer and the employee." ;
- (b) in subsection (5), by adding "and, where applicable, the ECAFB" after "employee";
- (c) in subsection (8), by adding ", the ECAFB" after "employee".

5. Cancellation of minor injuries claim certificate by the Court

Section 16B(1) is amended by repealing "or the Commissioner" and substituting ", the Commissioner or the ECAFB".

**Employees Compensation Assistance (Notice
of Insolvency of Insurer) Regulation**

6. Regulation repealed

The Employees Compensation Assistance (Notice of Insolvency of Insurer) Regulation (Cap. 365 sub. leg.) is repealed.

Employees' Compensation Insurance Levies Ordinance

7. Schedule 2 substituted

Schedule 2 to the Employees' Compensation Insurance Levies Ordinance (Cap. 411) is repealed and the following substituted -

"SCHEDULE 2 [ss. 4, 6(3)
& 7(1)]

BODIES SPECIFIED FOR THE PURPOSES
OF SECTION 7(1)

Item	Specified body	Proportion of the net resources of the Board to be distributed	
		Proportion of the net resources in respect of the relevant period ending on 30 September 2002 and up to the relevant period ending on 30 September 2007	Proportion of the net resources in respect of the relevant period ending on 31 December 2007 and thereafter
1.	The Occupational Safety and Health	20/63	20/63

	Council		
2.	The Employees Compensation Assistance Fund Board	31/63	25/63
3.	The Occupational Deafness Compensation Board	12/63	18/63".

**Employees' Compensation Insurance Levy
(Rate of Levy) Order**

8. Prescribed rate of levy

Paragraph 2(d) of the Employees' Compensation Insurance Levy (Rate of Levy) Order (Cap. 411 sub. leg.) is repealed and the following substituted -

- "(d) on or after 1 April 1998 and before 1 July 2002 is 5.3%;
- (e) on or after 1 July 2002 is 6.3%."

Explanatory Memorandum

The principal object of this Bill is to amend the Employees Compensation Assistance Ordinance (Cap. 365) ("the principal Ordinance") to -

- (a) revise the scheme providing for the protection of the entitlement of employees and others to compensation awarded for employment-related injury;
- (b) provide for relief payment in the case of damages awarded for employment-related injury;

- (c) revise the procedures for filing applications which may affect the Employees Compensation Assistance Fund ("the Fund");
- (d) empower the Employees Compensation Assistance Fund Board ("the Board") to apply to be joined as a party to proceedings which may affect the Fund;
- (e) require the Board to be notified of proceedings which may affect the Fund;
- (f) reduce the amount of interest payable on payments from the Fund; and
- (g) require employers who have failed to take out the relevant policies of insurance to pay a surcharge to the Board.

2. Clause 2 repeals and replaces the long title to the principal Ordinance to ensure that the long title accurately describes the principal Ordinance as amended by the Bill.

3. Clause 3(b) amends section 2 to, inter alia, add 2 new definitions of "eligible person" and "relief payment". The definition of "relief payment" is the term used to describe the payment that may be made from the Fund by the Board under the scheme relating to damages for employment-related injury. The definition of "eligible person" is the term used to describe the persons who may be entitled to a relief payment.

4. Clause 4 amends section 3(2)(b) to provide that there shall be an additional member of the Board who is a person having expertise in the practice of insurance. Clause 31 makes a consequential amendment to

Schedule 1 to increase the quorum of the Board from 4 to 5.

5. Clause 6(a) repeals and replaces section 16(1) to remove references to damages because applications for relief payment relating to damages will now be made under new section 20A at clause 12. Clause 6(c) repeals and replaces section 16(3) to clarify the circumstances in which it is considered that a person is unable to recover from an employer payment of an amount of compensation such that the person is entitled to make an application to the Board for payment from the Fund in respect of that amount.

6. Clause 9 adds a new section 18A to specify the period within which an employer shall make an application under section 17 or 18 for payment from the Fund where the employer's insurer is insolvent. The new section 18A also specifies the sanctions that follow if the employer fails to make such an application within the specified period.

7. Clause 12 adds new sections 20A to 20G dealing with relief payments. New section 20A sets out the basis on which an eligible person may make an application to the Board for a relief payment. New section 20B specifies the amount of relief payment to which an eligible person will be entitled. New section 20C sets out the manner of payment of a relief payment. It should be noted that a relief payment in excess of a specified amount will be by way of monthly payments (see new section 20C(2) and Parts 1 and 2 of Schedule 4 at clause 32). New section 20D sets out the circumstances in which those monthly payments shall cease. New section 20E sets out the circumstances in which an eligible person ceases to be entitled to a relief payment. New section 20F provides for the apportionment of a relief payment where there are 2 or more

eligible persons entitled to the relief payment. New section 20G empowers the Board to set-off, from the outstanding amount of monthly payments due to an eligible person, the amount of damages received by the eligible person subsequent to receiving the monthly payments.

8. Clause 14 amends section 22 to reduce the interest payable on payments from the Fund.

9. Clause 17 adds new sections 25A and 25B. New section 25A empowers the Board to apply to the court to be joined as a party to the proceedings which may affect the Fund. New section 25B requires persons who commence proceedings in respect of a claim for compensation or damages to notify the Board of the proceedings. Such a person is also required to notify the Board of any proposal to obtain judgment or reach a settlement with the other party in respect of the claim. A failure by the person to notify the Board in either case disentitles the person to any payment under the principal Ordinance in respect of the claim.

10. Clause 19 amends section 28 to enhance the protection afforded to the Fund where the Board makes a payment, or offers to make a payment, from the Fund in anticipation of a person's entitlement to such a payment under section 16, 17 or 18.

11. Clause 21 amends section 33 to disallow any claim in respect of any compensation or damages for injury to an employee engaged outside Hong Kong where the employer is outside Hong Kong and has no place of business in Hong Kong.

12. Clause 22 amends section 35 to provide that the right of a person in respect of a relief payment does not survive the person for the benefit of his estate.

13. Clause 23 adds a new section 36A to provide for a surcharge on employers who have failed to take out policies of insurance as required by section 40(1) of the Employees' Compensation Ordinance (Cap. 282).

14. Clause 30 adds a new section 46A(1) to provide transitional provisions in respect of an employer's liability for compensation or damages under section 16 before section 16 was amended by the Bill. Such a liability will be dealt with as if the principal Ordinance had not been amended by the Bill. Further, the new clause also adds new section 46A(2), (3), (4), (5) and (6) to provide for the repeal of sections 17, 18, 18A, 19, 20, 22(3)(e), 23(7) to (11), 28(2), 31(b), 37(2) and (5) and 41(1)(a)(iv) and the amendment of sections 26(2), 28(1) and (3) and 43(b), at a later date. The reason for this is that the insurance industry in Hong Kong is in the process of establishing a scheme which will in effect replace the present provisions of the principal Ordinance relating to applications by employers for payments from the Fund where their insurers are insolvent. The new section 46A(2), (3), (4), (5) and (6) will be brought into operation when that scheme is in place. New section 46A(7) and (8) specifies transitional provisions arising from the commencement of new section 46A(2) to (6).

15. Clause 33 and the Schedule make consequential amendments to the Employees' Compensation Ordinance (Cap. 282), the Employees' Compensation Insurance Levies Ordinance (Cap. 411) and the Employees' Compensation Insurance Levy (Rate of Levy) Order (Cap. 411 sub. leg.).

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	00/01	01/02 (as at 31.12.01)
No. of assisted cases	27	12	12	20	18 {1} ^B	19 {1} ^B	23 {1} ^B	28	35	28	190 ^C
Total income	\$16.7m	\$15.7m	\$21.8m	\$33.8m	\$31.7m	\$23.9m	\$28.5m	\$22.4m	\$21.5m	\$26.0m	\$23.4m
<i>levy income</i>	\$16.5m	\$15m	\$20.6m	\$31.3m	\$27.8m	\$20.9m	\$23.7m	\$20m	\$19.8m	\$25.2m	\$23.1m
<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	\$0.3m
Total Expenditure ^A	\$2.6m	\$4.5m	\$23.8m	\$10.8m	\$11.2m	\$35.4m	\$49.7m	\$29.1m	\$40.5m	\$31m	\$44.35m
<i>Claims</i>	\$1.39m	\$0.48m	\$1.57m	\$0.86m	4.68m	\$2.08m	\$0.96m	\$7.93m	\$6m	\$4.47m	\$11.12m ^C
- statutory	\$0.78 m	\$2.15m	\$3.88m	\$6m	\$15.4m	\$25.6m	\$33.8m	\$10.03m	\$18.9m	\$13.24m	\$20.29m ^C
- common law	\$0.71m	\$0.97m	\$1.65m	\$2.06m	{ \$13.9m } ^B	{ \$16.4m } ^B	{ 15.3m } ^B	\$4.32m	\$5.4m	\$3.29m	\$2.84m
<i>interest</i>	\$0.49m	\$0.69m	\$1.57m	\$1.5m	\$1.82m	\$2.36m	\$3.58m	\$4.23m	\$7.6m	\$7.07m	\$5.6m
<i>legal cost</i>	\$0.16m	\$0.4m	\$0.23m	\$0.43m	\$2.51m	\$4.12m	\$9.72m	\$2.55m	\$2.6m	\$2.9m	\$4.5m
<i>operating expense</i>					\$0.74m	\$1.2m	\$2.4m				
Surplus/Deficit	\$14.1m	\$11.2m	-\$2m	\$23m	\$20.5m	-\$11.5m	-\$21.2m	-\$6.7m	-\$19m	-\$5m	-\$20.9m
Accumulated Fund	\$14.1m	\$25.3m	\$23.3m	\$46.3m	\$66.8m	\$55.3m	\$34.1m	\$27.4m	\$8.4m	\$3.4m	\$32.5m^D

Notes

- A 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).
- B Figures in { } denote the number of/amount paid for major common law cases with settlement exceeding HK\$10m.
- C In April 2001, 3 insurers of HIH Group were put into provisional liquidation. Employers who have taken out insurance cover from these insurers may apply for payment from the Fund. Out of the 190 assisted cases, 177 are cases arising from the insolvency of HIH Group. The pay-outs for employee' compensation and common law damages in respect of these 177 cases is \$7.54 million and \$11.67 million respectively.
- D In July 2001, a bridging loan of \$60M provided by the Government was drawn down by the Board and a total of \$10M was repaid on 1.8.2001 to the Government.

Assumptions for the Cash Flow Projection
For the Employees Compensation Assistance Scheme

- [1] Levy Rate : The levy rate will be increased to 3.1% with effect from 1.7.2002 for a period of five years until 30.6.2007. From 1.7.2007 onwards, the levy rate will be reduced to 2.5%.
- [2] Levy : Levy rate at 1% will generate annual levy income of \$29 million, to be distributed to the Board quarterly. There is a 6-month time gap for the collected levy to reach the ECAFB. Moreover, the levy received for the first two quarters would account for 60% of the total levy received for the whole year.
- [3] Recoveries Based on past experience, recoveries from employers or insurers is assumed to be 0.2% of the claims payment. For HIH cases, it is assumed that 10% of the total claims payment will be recovered by the Board 10 years later, i.e. 2011/12.
- [4] Surcharge After deducting the necessary administrative costs for collecting surcharge by the Board, it is assumed that the net surcharge received by the Board will be \$1.5 million per year.
- [5] Investment income Investment income is equivalent to 3% per year based on average cash balance held by the Board.
- [6] Payouts (Statutory Compensation, Excluding HIH Cases) Based on the past payment patterns, it is assumed that the Board will have to make payment of \$40 million during 2001/02 (including both statutory compensation and common law damages) before the implementation of the revised scheme.
- When the reform package is implemented, it is estimated that there will be 32 cases requiring assistance of statutory compensation per year. The average amount of each case is \$0.34 million. The total amount of payment is then \$10.88 million.
- Reserves will be required for year 2 to year 5 to cater for cases for which the transitional arrangement will allow the applicants to receive assistance according to the provisions in force before the amendment.

- [7] Payouts
(relief payment) It is estimated that there would be 20 cases requiring assistance of relief payment each year. The monthly payment for each case is \$15,000 on average. In order to give a larger safety margin in the projection, it is deemed that all the 20 cases will involve payment of monthly payment. It will take 3 years for the balance of relief payment to be cleared through monthly payment. As it is proposed to extend the beneficiaries of relief payment to all family members who are awarded damages by the Court for fatal cases, it is estimated that the revised proposal would give rise to an additional payouts of \$0.5M per year.
- [8] Payouts (HIH cases) According to the provisional liquidator of the HIH Group, as at 2 June 2001, the estimated claims relating to work accidents arising from HIH insolvency was \$292 million. To cater for the liabilities of unknown cases, it is estimated that the total liability arising from HIH insolvency will be \$350.4 million (i.e. plus 20%).
- It is assumed that around 60% of the liabilities (i.e. \$210.24 million) will be mature for payment in the first year. The remaining 40% will be mature for payment within the next 3 years.
- [9] Administrative Expenses It includes administrative expenses (\$1 million per year) and claims handling expenses (4.3% of claims payment).
- As quite a number of claims arising from HIH insolvency are straightforward cases which would be determined by the Commissioner for Labour, it is estimated that the administrative expenses for HIH cases is 2% of claims payment.
- [10] Government Loan A government loan of \$280 million will be provided to ECAFB, with \$240 million, \$30 million and \$10 million to be drawn down respectively during 2001/02, 2002/03 and 2003/04. Interest is charged at 2% below the average best lending rate of note-issuing banks. For the purpose of projecting the cash flow, the long term interest rate is assumed to be 4.75%. Interest will be capitalised before the repayment of loan. The loan together with the interest will be repaid by 10 annual instalments of equal amount from 2008/09 onwards.

