

LEGISLATIVE COUNCIL BRIEF

Employees Compensation Assistance Ordinance (Chapter 365)

Employees Compensation Assistance (Miscellaneous Amendments) Bill 2003

INTRODUCTION

At the meeting of the Executive Council on 18 November 2003, the Council ADVISED and the Chief Executive ORDERED that the Employees Compensation Assistance (Miscellaneous Amendments) Bill 2003, at the Annex, should be introduced into the Legislative Council.

BACKGROUND

2. To ensure that employers are able to discharge their statutory obligations of paying compensation or damages to their employees who are injured at work, the Employees' Compensation Ordinance (ECO) requires employers to take out an insurance policy to cover their liabilities under the ECO and the common law.

3. The Employees Compensation Assistance Scheme (the Scheme) is set up under the Employees Compensation Assistance Ordinance (ECAO) to provide assistance to injured employees who are unable to recover their entitlements for employment-related injuries from their employers 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. It 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 paid by employers on the premium of their employees' compensation (EC) insurance policies.

THE PROPOSAL

4. We propose that the ECAO and the Employees Compensation Assistance (Amendment) Ordinance 2002 (the Amendment Ordinance) should be amended to provide for the following –

- (a) to make it clear that the Board may, in the event of insurer insolvency, assist employers in meeting the costs incurred by them, or ordered against them, in legal proceedings in relation to claims for compensation or damages arising from an employment-related injury which happened to their employees; and
- (b) to clarify that, after the provision relating to insurer insolvency are excised from the ECAO, the ECAO will continue to cover those claims for which the insurer has become insolvent before the date on which the excision comes into effect, irrespective of whether the employer’s liability to pay compensation or damages is determined before, on or after that date.

JUSTIFICATIONS

(A) Assistance to Employers on Legal Costs

5. Sections 17 and 18 of the ECAO provide that an employer may apply to the Board for the payment of compensation or damages for which he is liable if his insurer becomes insolvent. Section 23(7) further provides that in addition to the compensation or damages to be paid to an employer, the Board may also assist the employer in respect of the costs incurred by him in making the application under section 17 or 18.

6. In processing the cases affected by the insolvency of the HIH Group of insurance companies¹, the Board received advice from its legal advisers that the “costs in making the application” under section 23(7) might be narrowly interpreted to exclude costs incurred in the course of court proceedings brought by injured employees against their employers. Similarly, the Department of Justice (DoJ) also advised the Labour Department that the ECAO did not give power to the Board in assisting employers on the costs of such legal proceedings.

¹ On 9 April 2001, three insurers of the HIH Group were placed into provisional liquidation. A notice of insolvency in respect of the insurers was issued pursuant to section 20 of the ECAO. Employers who had taken out employees’ compensation insurance policies with these HIH insurers are entitled to apply to the Board for assistance.

7. As a common practice, an EC insurance policy normally indemnifies an employer for the legal costs that he has incurred or is liable to pay in proceedings relating to a claim that arose from work injuries. It would be inequitable to the employer, who has taken out an EC insurance policy covering such costs, has paid the statutory levy for the benefit of the Board, and has been assisted by the Board in paying compensation or damages to the injured employee, if he is denied assistance from the Board on legal costs in the event of his insurer's insolvency. Moreover, if the Board does not assist employers on legal costs, employers would have little incentive to defend the claims at court diligently even though they might have doubts on the claim. This would result in the Board having to join in the legal proceedings to contest the claims or paying the uncontested claims as awarded by the court. Even so, the Board could not assist the employer for legal costs payable to the injured employee as ordered by the Court.

8. Injured employees would also be affected if their employers defaulted on payment of the legal costs as ordered by the Court. In these circumstances, the injured employees would have to pay legal fees to their lawyers on their own account. This would reduce the amount of compensation that the employees could actually receive in the end.

9. It is proposed that amendments to the ECAO should be introduced so that in the event of insurer insolvency the Board may, in addition to assisting employers for compensation or damages, assist employers on legal costs in relation to proceedings brought by their employees for employment-related injuries.

(B) Transitional Arrangement for the Excision of the Protection of Insurer Insolvency

10. The Amendment Ordinance, which aimed at introducing a series of reform measures to the Scheme, was enacted on 26 June 2002. It provides for, among other things, the excision of the protection for employers in the event of their insurer's insolvency when the Employees Compensation Insurer Insolvency Scheme² (ECIIS) takes over such protection. The target date of such excision is 1 April 2004.

² Established in February 2003, the ECIIS is an administrative scheme operated by the insurance industry and financed by a charge (at 2% of the premium) imposed on insurers underwriting EC insurance policies. The scheme has been collecting the charge since April 2003 and would cover cases where the insurer becomes insolvent on or after 1 April 2004.

11. In order to protect the interests of employers whose insurers had become insolvent before 1 April 2004, it is our policy intention to allow these employers to continue having the right to receive assistance from the Board on or after 1 April 2004. The transitional arrangement is provided for in section 46A(8), which was introduced by the Amendment Ordinance and has not yet come into operation. However, we have identified an ambiguity in the section such that the policy intention cannot be truly reflected.

12. DoJ has advised that the current wordings in section 46A(8) would have the unintended effect of excluding those employers who have been affected by the HIH insolvency from the protection of the ECAO if their liability for compensation or damages is determined on or after 1 April 2004. These employers would also not be entitled to seek assistance under the ECIIS. To achieve the policy intent as mentioned in paragraph 11, it is necessary to amend the relevant provisions on the transitional arrangement. There are now some 180 outstanding HIH cases in court involving more than 90 applicants.

THE BILL

13. The Bill seeks to amend the Employees Compensation Assistance Ordinance and the Employees Compensation Assistance (Amendment) Ordinance 2002. The main provisions of the Bill are summarised below -

- (a) **Clause 2** repeals the existing sections 23 (7) to (10) which deal with the assistance to employers (including a principal contractor) in respect of the costs for making an application under section 17 or 18.
- (b) **Clause 3** adds new sections 23A and 23B to allow the Board, after determining an application under section 17 or 18 in favour of the applicant, to pay the costs incurred by the applicant in making the application, in defending the relevant proceedings as well as the costs ordered by the Court to be payable in respect of those proceedings.
- (c) **Clause 4** amends section 46A(8) (which was enacted by the Amendment Ordinance) to clarify that even after the repeal of the provisions on insurer insolvency under the ECAO, such provisions will continue to apply to employers and principal contractors whose insurer is declared insolvent under section 20 of the ECAO before the repeal, irrespective of whether their liability to pay compensation or damages is determined before, on or after that date.

LEGISLATIVE TIMETABLE

14. The legislative timetable will be -

Publication in the Gazette	21 November 2003
First Reading and commencement of Second Reading debate	3 December 2003
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

15. The proposed amendments are in conformity with the Basic Law, including the provisions concerning human rights. They do not affect the current binding effect of the ECAO. The proposal has no productivity, environmental or sustainability implications. It has no financial or staffing implications for the Government.

16. In setting the revised levy rate for the Scheme when the Amendment Ordinance was enacted in June 2002, it was then assumed that the Board is liable to assist employers in respect of legal costs and hence the liability has already been included in the financial projections. The proposal will not therefore lead to further increase in the levy rate for the Board, which is currently set at 3.1% on the premium of EC insurance policies, and hence will not pose additional cost on employers.

PUBLIC CONSULTATION

17. Both the Labour Advisory Board and the Employees Compensation Assistance Fund Board supported the proposal. The LegCo Panel on Manpower was also informed of the proposal and indicated its support.

PUBLICITY

18. A press release will be issued on 21 November 2003. A spokesman from the Labour Department will be available to handle press enquiries.

ENQUIRIES

19. For enquiries, please contact Mrs Jenny Chan, Assistant Commissioner for Labour (Rights and Benefits) at 2852 4083.

Economic Development and Labour Bureau
Labour Department
19 November 2003

A BILL

To

Amend -

- (a) the Employees Compensation Assistance Ordinance, to empower the Employees Compensation Assistance Fund Board to make payments in favour of employers and certain principal contractors in respect of costs of proceedings; and
- (b) the Employees Compensation Assistance (Amendment) Ordinance 2002, to enable such employers and principal contractors to apply to the Board in respect of their liability for compensation or damages for employment-related injury, irrespective of whether the liability is determined before, on or after the commencement of certain provisions of that amendment Ordinance.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Employees Compensation Assistance (Miscellaneous Amendments) Ordinance 2003.

PART 1

AMENDMENTS TO EMPLOYEES COMPENSATION
ASSISTANCE ORDINANCE

2. Costs: Payment in favour of employees

Section 23 of the Employees Compensation Assistance Ordinance (Cap. 365) is amended -

- (a) by repealing subsections (7) to (10);
- (b) in subsection (11), by repealing "principal application" and substituting "application under section 16".

3. Sections added

The following are added -

"23A. Costs: Payment in favour of employers

- (1) In this section -

"application" (申請) means an application under section 17 or 18;

“relevant court” (相關法庭) means, in relation to costs incurred or payable in respect of relevant proceedings, the court before which those proceedings took place;

“relevant policy of insurance” (相關保險單) means, in relation to an application, the policy of insurance to which the application relates;

“relevant proceedings” (相關訴訟) means, in relation to an application, the proceedings of which the subject is, or has been, the compensation or damages to which the application relates.

(2) Subject to subsection (3), if the Board has determined an application in favour of the applicant, the Board may make a payment from the Fund for the purpose of paying on behalf of the applicant, or indemnifying the applicant for having incurred or paid, any or all of the following costs -

- (a) costs incurred by the applicant in making the application;
- (b) costs incurred by the applicant in defending the relevant proceedings;
- (c) costs ordered by the relevant court to be payable by the applicant in respect of the relevant proceedings to the person who is

entitled to receive the compensation or damages concerned (whether the amount of the costs payable is subsequently agreed or ascertained by taxation).

(3) The Board may only make a payment in respect of the costs mentioned in subsection (2) (b) or (c) if the relevant policy of insurance indemnifies the applicant in respect of the applicant's liability for the costs concerned.

(4) The amount that may be paid in respect of the costs mentioned in subsection (2) (a) shall not exceed -

(a) if those costs have been taxed on the common fund basis, the amount so allowed;
or

(b) in any other case, such amount as in the opinion of the Board would be allowed on taxation of those costs by the District Court on that basis.

(5) Subject to subsection (7), the amount that may be paid in respect of the costs mentioned in subsection (2) (b) shall not exceed -

(a) if those costs have been taxed on the common fund basis, the amount so allowed;
or

(b) in any other case, such amount as in the opinion of the Board would be allowed on taxation of those costs by the relevant court on that basis.

(6) Subject to subsection (7), the amount that may be paid in respect of the costs mentioned in subsection (2) (c) shall not exceed -

(a) if those costs have been taxed on the party and party basis, the amount so allowed; or

(b) in any other case, such amount as in the opinion of the Board would be allowed on taxation of those costs by the relevant court on that basis.

(7) The amount that may be paid in respect of the costs mentioned in subsection (2) (b) and (c) shall not exceed the amount that the applicant is entitled to receive under the relevant policy of insurance in respect of those costs.

23B. Provisions ancillary to section 23A

(1) In determining under section 23A whether to make a payment in favour of the applicant of an application under section 17 or 18, and if so, the amount to be paid, the Board shall have regard to -

- (a) whether and at what time the applicant notified the Board of the likelihood that the applicant would make a claim with the Board (be it for compensation, damages or costs);
- (b) whether any part of the costs concerned was, in the opinion of the Board, unnecessary or wasteful; and
- (c) if the determination relates to the costs mentioned in section 23A(2) (b) or (c) -
 - (i) whether the liability to pay the costs concerned is attributed to compliance by the applicant with instructions from an insurer; and
 - (ii) whether the Board has intervened in the proceedings concerned, or defended the same as an interested party.

(2) In no case is the Board liable under section 23A for the costs of an insolvent insurer, whether incurred before, on or after the insolvency.

(3) An amount determined under section 23A becomes payable when the amount determined in respect of the application under section 17 or 18 becomes payable.

- (4) The Board may make a payment in respect of -
- (a) any of the costs mentioned in section 23A(2) even if the application under section 17 or 18 was determined by the Board before the commencement of the Employees Compensation Assistance (Miscellaneous Amendments) Ordinance 2003 (of 2003);
 - (b) the costs mentioned in section 23A(2) (a) or (b) even if the costs concerned were incurred before that commencement; or
 - (c) the costs mentioned in section 23A(2) (c) even if those costs were ordered before that commencement by a court to be payable.”.

PART 2

AMENDMENTS TO EMPLOYEES COMPENSATION ASSISTANCE (AMENDMENT) ORDINANCE 2002

4. Section added

Section 30 of the Employees Compensation Assistance (Amendment) Ordinance 2002 (16 of 2002) is amended, in the new section 46A -

(a) in subsection (2), by repealing "and 23(7) to (11) inclusive" and substituting ", 23A and 23B";

(b) by repealing subsection (8) and substituting -

"(8) Despite the commencement of subsection (2), an employer, or a principal contractor who has taken out a policy of insurance in accordance with section 40(1B) of the Employees' Compensation Ordinance (Cap. 282), may apply under the repealed section 17 or repealed section 18 as if the section had not been repealed, if the application relates to an insurer in respect of whom a notice has been published, before that commencement, under section 20.

(8A) Despite the commencement of subsection (2), this Ordinance as in force immediately before that commencement shall continue to have force in relation to -

(a) an application that is made before that commencement under section 17 or 18 (whether the application has been determined by the Board

before that commencement);

and

- (b) an application that is made under the repealed section 17 or repealed section 18 by virtue of subsection (8)."

Explanatory Memorandum

This Bill amends the Employees Compensation Assistance Ordinance (Cap. 365) ("principal Ordinance") and the Employees Compensation Assistance (Amendment) Ordinance 2002 (16 of 2002) ("amendment Ordinance").

2. Both the principal Ordinance and the amendment Ordinance contain provisions relating to employers and principal contractors who have taken out policies of insurance covering the liability in respect of compensation or damages for employment-related injury. The proposed amendments relate to a situation where an insurer who, after issuing such a policy of insurance, has become insolvent.

3. The main provisions of the Bill are explained below -

PART 1

- (a) Part 1 amends the principal Ordinance. Under section 17 or 18 of the principal Ordinance, an employer or principal contractor in such a

situation may apply to the Employees Compensation Assistance Fund Board ("Board") for payment from the Employees Compensation Assistance Fund ("Fund") for assistance in paying compensation or damages. Under section 23 of the principal Ordinance, if the Board determines the application in favour of the applicant, the Board may also make a payment from the Fund in respect of the costs that are incurred by the applicant in making the application.

(b) The purpose of clause 3 is to empower the Board to make payments in favour of the applicant in respect of costs of proceedings. If the compensation or damages are or have been the subject of proceedings, it is proposed that the Board may also make payments in respect of -

- (i) the costs incurred by the applicant in defending those proceedings; and
- (ii) the costs ordered by a court to be payable by the applicant in respect of those proceedings to the person who is entitled to receive the compensation or damages.

PART 2

- (c) Part 2 relates to two of the new subsections that are to be added by the amendment Ordinance to section 46A of the principal Ordinance (i.e. section 46A(2) and (8)). Those subsections have not yet commenced operation.
- (d) When section 46A(2) commences operation, sections 17 and 18 and certain other provisions of the principal Ordinance will be repealed. Section 46A(8) provides that if before that commencement a person *is entitled* to apply under section 17 or 18, that person may do so after that commencement as if the section had not been repealed.
- (e) Clause 4 amends section 46A(8) to clarify that the person may apply after that commencement under the repealed section 17 or repealed section 18, irrespective of whether the liability for the compensation or damages concerned is determined before, on or after that commencement.
- (f) Clause 4 also provides that those repealed provisions of the principal Ordinance continue

to have force in relation to applications
made -

- (i) before that commencement under section
17 or 18; and
- (ii) after that commencement under the
repealed section 17 or repealed
section 18.