

立法會
Legislative Council

LC Paper No. CB(1)855/07-08
(These minutes have been seen
by the Administration)

Ref : CB1/BC/3/07/2

**Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007**

**Minutes of the second meeting
held on Thursday, 31 January 2008, at 8:30 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon James TIEN Pei-chun, GBS, JP (Chairman)
Hon CHAN Kam-lam, SBS, JP (Deputy Chairman)
Hon LEE Cheuk-yan
Hon CHAN Yuen-han, SBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon LI Fung-ying, BBS, JP
Hon WONG Kwok-hing, MH
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon WONG Ting-kwong, BBS
- Members absent** : Hon Albert HO Chun-yan
Hon SIN Chung-kai, SBS, JP
Hon Ronny TONG Ka-wah, SC
- Public officers attending** : Mr Albert LAM
Deputy Secretary for Financial Services and the
Treasury (Financial Services)
- Ms Jenny CHAN
Principal Assistant Secretary for Financial Services and
the Treasury (Financial Services)
- Mr Ryan CHIU
Assistant Secretary for Financial Services and the
Treasury (Financial Services)

Miss Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Miss Selina LAU
Senior Government Counsel
Department of Justice

Attendance by invitation : Mandatory Provident Fund Schemes Authority

Mr Darren MCSHANE
Executive Director (Regulation & Policy)

Ms Gabriella YEE
Senior Manager (Policy & Development)

Clerk in attendance : Miss Polly YEUNG
Chief Council Secretary (1)5

Staff in attendance : Mr KAU Kin-wah
Assistant Legal Adviser 6

Ms Rosalind MA
Senior Council Secretary (1)8

Action

I Confirmation of minutes and matters arising

(LC Paper No. CB(1)729/07-08 — Minutes of meeting on 24 January 2008)

The minutes of the meeting held on 24 January 2008 were confirmed.

II Meeting with the Administration/Mandatory Provident Fund Schemes Authority

(LC Paper No. CB(3)261/07-08 — The Bill

LC Paper No. CB(1)654/07-08(01) — Marked-up copy of the Bill prepared by the Legal Service Division

- | | |
|---------------------------------|--|
| FSB CRG4/51C(2007) | —The Legislative Council Brief issued by the Financial Services and the Treasury Bureau |
| LC Paper No. LS32/07-08 | —The Legal Service Division Report on the Bill |
| LC Paper No. CB(1)653/07-08 | —Background Brief on major proposals of the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 prepared by the Legislative Council Secretariat |
| LC Paper No. CB(1)749/07-08(01) | —Powerpoint presentation material provided by the Mandatory Provident Fund Schemes Authority (tabled at the meeting and soft copy issued to members on 31 January 2008)) |

2. The Bills Committee deliberated (Index of proceedings attached at **Appendix**).

Follow-up actions to be taken by the Administration/the Mandatory Provident Fund Schemes Authority (MPFA)

3. On the proposals under the Bill to increase the level of maximum penalty on employers for non-enrolment of employees in an MPF scheme, non-payment of MPF contributions and failure to remit the deducted wages as employees' mandatory contributions, the Administration/MPFA were requested to-

- (a) provide information on the relevant offence provisions under the Employment Ordinance (EO) (Cap. 57) reference to which had been made when drafting the above-mentioned proposals; and to set out in a table the respective penalties stipulated in the EO and those proposed under the Bill to facilitate consideration by the Bills Committee of whether the proposed maximum penalties were pitched at a reasonable level; and
- (b) in relation to members' concern about deterrent effect of the criminal liability on directors of limited companies for offences under the Mandatory Provident Fund Schemes Ordinance (MPFOS) (Cap. 485), to provide information on the number of cases, if any, in which the

directors of the limited companies had been held personally liable for the offences committed by the companies.

Admin/
MPFA

4. On the proposed section 43BA of the MPFSO which sought to confer a discretionary power on the court to make an order to compel an employer to enrol its employee in an MPF scheme and pay any outstanding mandatory contribution and/or contribution surcharge, the Administration/MPFA were requested to-

- (a) advise on the meaning of "the court" referred to in the proposed section 43BA, having regard to the interpretation of "the Court" under section 2 of the MPFSO to mean "the Court of First Instance" and the fact that MPF-related offences were normally tried in the Magistrates' Court;
- (b) give an account on the procedures involved in applying for or making the court order specified in the proposed section 43BA;
- (c) explain how the court order could be enforced, the resultant offence (such as "contempt of the court") committed and the sanction for non-compliance with the court order;
- (d) consider the alternative arrangement suggested by members, i.e. instead of giving the court a discretionary power to make an order (which might in effect shift the enforcement responsibility from the MPFA to the court and impose an onus on the court), to add a new provision to the effect that if an employer found guilty of the offence failed to rectify the non-enrolment and non-payment situation within a specified period, he would be liable to further prosecution; and
- (e) to avoid double jeopardy against the defendant, the new provision suggested in (d) above might be drafted in such a way that an employer found guilty of the offence and who failed to rectify the non-enrolment and non-payment situation within the specified period would be committing a continuing offence.

Admin/
MPFA

5. As to members' concern about better protection for employees to whom MPF contributions were owed, the Administration/MPFA were requested to-

- (a) clarify the legal liability, if any, of an employee to pay his past outstanding MPF contributions which had not been deducted from his wages in a situation where his employer had failed to enrol him in an MPF scheme and make the MPF contributions, given that it was proposed in the Bill that the employer's obligation to repay default contributions would be dated back to 1 December 2000 or the commencement of the employee's employment, whichever was the later;

- (b) the consequences, if any, faced by the employee if he did not repay the MPF contributions;
- (c) if the employer was to be held liable for the employee's default contributions described in (a), to consider whether this arrangement was equitable and enforceable;
- (d) advise on the feasibility of settling the outstanding mandatory contributions in respect of the employee from the fine paid by the convicted employer to the Government so that the employee's entitlement would not be jeopardized even if the employer went into bankruptcy or liquidation; and note a member's view that improved treatment in relation to repayment of outstanding wages to employees had been made in bankruptcy or winding-up proceedings; and
- (e) referring to the example of the default in payment of mandatory contributions in the recent case involving Sing Pao Daily News and its employees, to illustrate whether and how the proposals under the Bill could better enable the MPFA to recover outstanding mandatory contributions from non-compliant and/or insolvent employers.

(Post-meeting note: The Administration/MPFA's written response to paragraphs 3, 5(d) and 5(e) was circulated to members vide LC Paper No. CB(1)854/07-08(07) on 19 February 2008.)

III Any other business

Meeting arrangements

6. Members noted that the next meeting was scheduled for Monday, 25 February 2008 at 2:30 pm for meeting with the Administration/MPFA and deputations. Members also agreed that the meeting originally scheduled for 11 March 2008 at 8:30 am be re-scheduled to be held on Thursday, 13 March 2008 at 8:30 am.

(Post-meeting note: Members were informed of the re-scheduling of meeting of 11 March 2008 vide LC Paper No. CB(1)748/07-08 on 31 January 2008.)

7. There being no other business, the meeting ended at 10:30 am.

**Proceedings of the
Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007
Second meeting on Thursday, 31 January 2008, at 8:30 am
in the Chamber of the Legislative Council Building**

| Time Marker | Speaker | Subject(s) | Action Required |
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| 000125 – 000149 | Chairman | Confirmation of minutes of the 1 st meeting held on 24 January 2008 (LC Paper No. CB(1)729/07-08) | |
| 000150 – 001840 | Administration Mandatory Provident Fund Schemes Authority (MPFA) | Briefing by the Administration and the MPFA on the legislative proposals under the Bill | |
| 001841 – 002159 | Mr Andrew LEUNG Administration Chairman | (a) Mr Andrew LEUNG's concern that the proposal to increase the maximum penalty for non-compliant employers might be too draconian. His enquiry on the reference made to comparable penalty provisions under the Employment Ordinance (EO) (Cap. 57). (b) The Administration's reference to the maximum penalty for breaching section 32 of the EO in relation to the offence of illegal wage deduction. | |
| 002200 – 002914 | Ms LI Fung-ying Administration MPFA Chairman | (a) Ms LI Fung-ying's concern that despite the increase in maximum penalties, where a convicted employer became insolvent as a result of the fine imposed, the mandatory contributions unpaid by the employer could still not be recovered. (b) The Administration's advice that the MPFA would continue to take enforcement actions through the existing arrears recovery mechanism. The MPFA's explanation that recovery of outstanding mandatory contributions for the | |

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| | | <p>employees would be given very high priority in its enforcement action. The MPFA would institute civil proceedings to recover the defaulted sum so that the contributions and any surcharge recovered could be credited to the employee's account in the MPF scheme. The MPFA would take prosecution action where warranted.</p> <p>(c) The MPFA's confirmation that the fines imposed on a convicted employer would not be paid to the MPFA and hence, would not be credited to the employee's account under an MPF scheme. The fines imposed by the Magistrates' Court in past prosecution cases were not so heavy to the extent of forcing the convicted employer into bankruptcy.</p> | |
| 002914 – 003743 | Mr CHAN Kam-lam Administration MPFA Chairman | <p>(a) Mr CHAN Kam-lam's query about the propriety of the proposal of conferring on the court a discretionary power to make an order to compel an employer to enrol its employee in an MPF scheme and to pay outstanding mandatory contributions and surcharge. In his view, the proposed discretionary power might in effect shift the enforcement responsibility from the MPFA to the court and impose an onus on the court.</p> <p>(b) The Administration's advice that at present, there was no provision under the Mandatory Provident Fund Schemes Ordinance (MPFSO) (Cap.485) to compel employers to rectify cases of non-enrolment and non-payment. The MPFA's advice that the proposal would</p> | |

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| | | <p>provide an additional mechanism for securing compliance by employers. The Administration/MPFA would not envisage any significant increase in the court's workload as a result of the proposal.</p> | |
| 003744 – 005339 | <p>Mr LEE Cheuk-yan Chairman MPFA Mr Alan LEONG Mr CHAN Kam-lam</p> | <p>(a) Responding to Mr LEE Cheuk-yan's enquiry about the enforcement of the court order, the MPFA's advice that the court could avail itself of different courses of action against failure to comply with its direction. For instance, the employer might be prosecuted for "contempt of the court", the penalty of which could be imprisonment.</p> <p>(b) Mr LEE Cheuk-yan pointed out that where an employer had failed to comply with the direction issued by the Labour Tribunal to reinstate a worker dismissed due to his participation in trade union activities, the employer would not be liable for any legal consequence such as "contempt of the court". He was concerned about the anomaly, if any, between the enforcement of the court order under proposed section 43BA of the Bill and that of enforcing the judgment of the Labour Tribunal.</p> <p>(c) Noting the proposal in the Bill that employers' obligation to pay default contributions would be dated back to 1 December 2000 or the commencement of the employee's employment, whichever was the later, the Chairman was concerned about the liability, if any, of employees to pay their share of the outstanding MPF</p> | <p>The Administration/MPFA to take follow-up actions as required in paragraph 4(c) of the minutes.</p> |

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| | | <p>contributions.</p> <p>(d) The MPFA's advice that enforcement actions would be instituted against the employers only as it was the responsibility of employers under the MPFSO to enrol their employees in MPF schemes and make mandatory contributions for their employees to the respective schemes. By design, the MPF System placed a statutory responsibility on employers to make mandatory contributions as required.</p> <p>(e) Mr Alan LEONG's advice that it was the Court of the First Instance of the High Court which could take proceedings against a defendant for "contempt of the court" where the latter failed to comply with a court order. Lower courts were not empowered to do so. Mr LEONG's concern about the additional responsibility and workload for the court arising from the proposed discretionary power under the proposed section 43BA, and whether the Judiciary had been consulted on the proposal.</p> <p>(f) The MPFA's response that there was a standing arrangement for the MPFA to discuss legislative proposals with the Judiciary. Its confirmation that the suggestion of giving the court discretionary power was in fact raised by the Judiciary.</p> <p>(g) Mr CHAN Kam-lam's suggestion that instead of conferring on the court a discretionary power to make an order, consideration should be given to adding a new provision to the MPFSO to the effect that</p> | |

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| | | <p>if an employer found guilty of the offence still failed to rectify the non-enrolment and non-payment situation within a specified period, the employer would be liable to further prosecution.</p> <p>(h) The MPFA's advice that the discretionary power for the court to make an order under section 43BA would apply to both convicted and acquitted cases. While further consideration would be given to Mr CHAN's suggestion, the MPFA's advice that the concern about prosecuting a defendant twice of the same offence would have to be addressed. The current proposal would provide a more flexible mechanism to secure employers' compliance with the enrolment and contribution requirements under the MPFSO.</p> | <p>The Administration/MPFA to take follow-up actions as required in paragraph 4(d) of the minutes.</p> |
| 005340 – 005947 | Chairman Administration Mr LEE Cheuk-yan | <p>(a) The Chairman's question on whether the legislative proposals had been thoroughly deliberated by relevant stakeholders, notably the Labour Advisory Board (LAB). His enquiry on the composition and appointment of the MPF Schemes Operation Review Committee (the Review Committee).</p> <p>(b) The Administration's confirmation that the Review Committee was not an internal committee of the MPFA. The Administration's response that the Review Committee was established for the purpose of reviewing the MPF System and the relevant legislation with regard to their operational and administrative aspects. The members of the Review</p> | |

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| | | <p>Committee comprised representatives of employer and employee bodies, service providers and professional organizations, as well as representatives from the Government and the MPFA.</p> <p>(c) According to the Administration, details of the legislative proposal had been provided to the LAB and its comments were also invited. While the LAB had not discussed the proposals at a meeting, individual LAB member had expressed support for some of the proposals.</p> <p>(d) Mr LEE Cheuk-yan's comment that the MPF System had all along been under the policy purview of the Financial Services and the Treasury Bureau (FSTB). As MPF was considered a retirement-related policy issue rather than a labour-related policy issue, the Administration only kept the LAB informed of developments but did not formally consult the LAB on MPF-related proposals.</p> | |
| 005948 – 010548 | Mr Andrew LEUNG Administration Chairman | <p>(a) Mr Andrew LEUNG's concern of whether the proposed maximum penalties were pitched at a reasonable level.</p> <p>(b) The Administration's advice that as highlighted in paragraphs 7, 8 and 11 of the LegCo Brief for the Bill, reference had been made to the maximum penalties under the relevant sections of the EO. Responding to Mr LEUNG's further concern about the protection for employees' entitlement under the MPF System, the Administration's reiteration that the MPFA had given priority to the recovery of</p> | The Administration/MPFA to take follow-up actions as required in paragraph 3(a) of the minutes. |

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| | | outstanding contributions in its enforcement action. | |
| 010549 – 011120 | Mr LEE Cheuk-yan Chairman MPFA | <p>(a) Mr LEE Cheuk-yan's support for the proposal of imposing a higher penalty on employers who had not remitted to the trustee the mandatory contributions deducted from employees' wages. His view that this act was more serious in nature and should attract a higher penalty.</p> <p>(b) Mr LEE Cheuk-yan's concern about the meaning of "the court" referred to in the proposed section 43BA and the procedures involved in applying for or making the court order under the section.</p> <p>(c) Mr LEE's query on whether the Small Claims Tribunal, where claims of MPF contributions were lodged as debts, had the power to make orders to compel payment of the judgment sum.</p> <p>(d) The MPFA's advice that there was a due process in the enforcement actions taken by the MPFA against non-compliant employers. Prosecution cases were tried at the Magistrates' Court. It was possible for civil recovery actions to be handled by lower courts such as the Small Claims Tribunal, if the amount of claim involved was within its jurisdiction. Issues related to the application for and making of an order in civil proceedings in a tribunal such as the Small Claims Tribunal would have to be further examined.</p> | The Administration/MPFA to take follow-up actions as required in paragraph 4(b) of the minutes. |
| 011121 – 012927 | Ms LI Fung-ying MPFA Chairman | (a) Concern shared by Ms LI Fung-ying and Miss CHAN Yuen-han about the efficacy or | |

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| | Miss CHAN Yuen-han | <p>otherwise of efforts to recover outstanding mandatory contributions for employees. Ms LI's query on whether the proposed increase in the maximum penalties could provide any assurance on the recovery of outstanding mandatory contributions.</p> <p>(b) The Chairman's question about the feasibility of settling the outstanding mandatory contributions in respect of the employee from the fine paid by the convicted employer to the Government so that the employee's entitlement would not be jeopardized even if the employer went into bankruptcy or liquidation.</p> <p>(c) The MPFA's advice that while the proposed amendments were not intended to provide assurance for the recovery of outstanding MPF contributions as such, convicted employers would be subject to sanctions imposed by the court under the criminal proceedings as well as the civil proceedings for recovery of mandatory contributions under the existing arrears recovery mechanism. The MPFA's further advice that in the light of past sentences imposed by the court, it was unlikely that the quantum of fines imposed by the court would reduce the chance of successful recovery of MPF contributions from a convicted employer.</p> <p>(d) Miss CHAN Yuen-han's reference to the case of Sing Pao Daily News and that its employees were still unable to recover the unpaid MPF contributions despite conviction</p> | <p>The Administration/MPFA to take follow-up actions as required in paragraph 5(d) of the minutes.</p> <p>The Administration/MPFA to take follow-up actions as required in paragraph 5(d) and 5(e) of the minutes.</p> |

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| | | <p>of their employer. Miss CHAN's view that alternative options should be explored, such as according a higher priority to the payment of outstanding MPF contributions due in bankruptcy or winding-up of an employer similar to outstanding wages.</p> <p>(e) The Administration's response that the Review Committee conducted on-going reviews of the relevant legislation with regard to the operation and administration of the MPF System. Where necessary, legislative amendments would be introduced.</p> | |
| 012928 – 013729 | Mr LEE Cheuk-yan Chairman MPFA | <p>(a) Mr LEE Cheuk-yan's concern about the legal liability, if any, of an employee to pay the outstanding MPF contributions which had not been deducted from his wages as a result of his employer's failure to enrol him in an MPF scheme and make the MPF contributions. As regards the deterrent effect of the proposed increase of maximum penalties, Mr LEE's view that since the actual levels of fine imposed by the court on convicted employers were far below the maximum level, consideration might be given to making directors of limited companies personally liable for offences under the MPFSO.</p> <p>(b) The MPFA's response that proceedings had been taken against directors individually for offences under the MPFSO where the evidence of the cases so justified. Although the fine imposed by the court had not been high (with the average fine imposed on non-enrolment cases and default payment cases</p> | The Administration/MPFA to take follow-up actions as required in paragraphs 5(a), 5(b) and 5(c) of the minutes. |

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| | | <p>at around \$9,000 and \$2,700 respectively), the proposed amendments to increase the maximum penalties would send a strong message to the courts on the seriousness of MPF-related offences.</p> | |
| 013730 – 014341 | Mr Alan LEONG MPFA | <p>(a) Mr Alan LEONG's view that the meaning of "the court" referred to in the proposed section 43BA should be clarified having regard to the interpretation of "the Court" under section 2 of the MPFSO to mean "the Court of First Instance" and the fact that MPF-related offences were normally tried in the Magistrates' Court.</p> <p>(b) Mr Alan LEONG's advice that the concern about double jeopardy against the defendant arising from the alternative arrangement suggested by Mr CHAN Kam-lam could be addressed by drafting the provision in such a way that an employer who failed to rectify the non-enrolment and non-payment situation would be committing a continuing offence.</p> | The Administration/MPFA to take follow-up actions as required in paragraphs 4(a) and 4(e) of the minutes. |
| 014342 – 015232 | Miss CHAN Yuen-han Administration Chairman | <p>(a) Miss CHAN Yuen-han's view that as MPF-related issues were also labour matters, the Administration should consider establishing an inter-departmental task force to coordinate the efforts of the relevant policy bureaux and the MPFA in the review of the operation and administration of the MPF System.</p> <p>(b) The Administration's response that membership of the Review Committee included representatives from the Labour Department. LAB was also</p> | |

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| | | <p>kept posted of the improvement proposals arising from reviews of the MPF System. While the MPF System was under the policy purview of FSTB, the Administration was keen to ensure that it was in alignment with other employment-related legislation, such as the EO.</p> | |
| 015233 – 015354 | Mr LEE Cheuk-yan Chairman Administration | <p>(a) Mr LEE Cheuk-yan's view that the deterrent effect of penalties for MPF-related offences could be increased by holding the directors of limited companies personally liable for the offences committed by the companies. Mr LEE's further suggestion that in such proceedings, consideration should be given to placing the onus of proof on the defendant directors. He considered it unlikely that the director had no knowledge of or consent to the offence.</p> <p>(b) The Chairman's contrary view that in accordance with the practice in criminal prosecution, the onus of proof should be on the prosecution, not the defendant.</p> <p>(c) The Administration's response that Mr LEE's view on the personal liability of directors was not covered in the current Bill.</p> | The Administration/MPFA to take follow-up actions as required in paragraph 3(b) of the minutes. |
| 015655 – 020009 | Chairman | Meeting arrangements | |