

立法會
Legislative Council

LC Paper No. CB(1)1323/07-08
(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 fifth meeting
held on Thursday, 27 March 2008, at 2:30 pm
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 Ronny TONG Ka-wah, SC
Hon LEE Cheuk-yan
Hon SIN Chung-kai, SBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon WONG Kwok-hing, MH
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
- Members absent** : Hon Albert HO Chun-yan
Hon CHAN Yuen-han, SBS, JP
Hon LI Fung-ying, BBS, JP
Hon Alan LEONG Kah-kit, SC
- Public officers attending** : Mr Patrick HO
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 Selina LAU
Senior Government Counsel
Department of Justice

Attendance by invitation : Mandatory Provident Fund Schemes Authority

Ms Hendena YU
Chief Operating Officer (Enforcement)

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)1028/07-08 —Minutes of meeting on 25 February
2008

The minutes of the meeting held on 25 February 2008 were confirmed.

**II Meeting with the Administration/Mandatory Provident Fund Schemes
Authority (MPFA)**

Discussion of policy issues

(LC Paper No. CB(1)1027/07-08(01) —Administration/MPFA's response to
views submitted by various
organizations/individuals on the

Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007 (as of
25 March 2008)

LC Paper No. CB(1)1027/07-08(02) —Administration/MPFA's response to members' views and concerns raised at the meetings held on 31 January and 25 February 2008

LC Paper No. CB(1)854/07-08(07) —Administration/MPFA's response to members' views and concerns raised at the meeting held on 31 January 2008 (Part)

LC Paper No. CB(1)1143/07-08(01) —Administration/MPFA's response to views submitted by the Law Society of Hong Kong

Clause-by-clause examination of the Bill

(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)

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

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

Policy issues

3. Regarding concerns about the liability of employers and employees to settle outstanding mandatory contributions in non-enrolment cases under the proposed section 7AE, members noted the Administration's alternative proposal in paragraph 14 of LC Paper CB(1)1027/07-08(02) to limit the retrospective liability for payment of outstanding contributions by defaulting employers for non-enrolled employees to the employer mandatory contributions only, provided that the employers had made no deduction of employee mandatory contributions from the employees' relevant income in respect of the same period. For the purpose of devising an equitable and enforceable arrangement for the recovery of retrospective outstanding contributions in non-enrolment cases, the Administration/MPFA were requested to further

consider the views and suggestions of members, including the following:

- (a) The alternative proposal would be inconsistent with the existing recovery mechanism in respect of enrolled employees under which the defaulting employer would be liable for both the employer and employee mandatory contributions.
- (b) Although from a drafting point of view, it was feasible to introduce provisions to limit the defaulting employer's retrospective liability to employer mandatory contributions only for the period before the enactment of the Bill, for the sake of consistency, some members considered that the employer's liability for both employer and employee mandatory contributions should apply in both past and future non-enrolment cases.
- (c) The employer should be held liable to settle both the outstanding employer and employee mandatory contributions. It would be a matter for the employer and the employee to decide whether and how the employer would recover the amount of employee mandatory contributions from the employee. Alternatively, it might be provided in the legislation that it would be for the court to decide whether the employer had a right to recover the amount from the employee, having regard to the circumstances of the case in question.
- (d) The employer should be held liable as set out in (c) above. However, a new provision should be added to stipulate that the employer who had intentionally evaded the responsibility to pay mandatory contributions would not have the right to recover the employee mandatory contributions from the employee concerned as a civil debt or through wage deduction.
- (e) The Administration might wish to re-examine whether it was appropriate to impose the obligation on employers to pay outstanding mandatory contributions retrospectively from 1 December 2000 as currently proposed in the Bill.

Clause-by-clause examination of the Bill

Clause 5 – Sections added

4. The Administration/MPFA would give further consideration to the observations of the legal adviser and a member of the Bills Committee on the following provisions:

(a) ***Proposed section 7AA(2)(a)***

Whether the current drafting of the proposed section 7AA(2)(a) was

sufficiently clear on the liability of the employer to contribute to a registered scheme in respect of his employee.

(b) *Proposed section 7AA(10)*

To clarify whether a separate permitted period was to be specified for section 7AA in the proposed section 7AA(10). In any event, any permitted period specified for the purposes of the existing section 7 must have expired long ago.

(c) *Proposed section 7AA(11)*

Saturdays should be excluded from "contribution day" in the proposed section 7AA(11) as payment could not be made through banks on Saturdays.

(d) *Proposed sections 7AB and 7AC*

To consider a member's suggestion of adding a provision to stipulate the requirement for the MPFA to pass the statement provided by the employer under the proposed section 7AB, together with the contributions received from the employer, to the approved trustee concerned.

(Post-meeting note: The Administration's response to issues in paragraphs 3 and 4 above was issued to members vide LC Paper No. CB(1)1196/07-08(02) on 8 April 2008)

III Any other business

Meeting arrangement

5. Members noted that the next meeting of the Bills Committee was scheduled for Thursday, 10 April 2008 at 2:30 pm. The Bills Committee would follow-up the issues raised at the meetings held on 13 and 27 March 2008 and continue with clause-by-clause examination of the Bill.

(Post-meeting note: The next meeting of the Bills Committee was rescheduled to be held on Tuesday, 15 April 2008 at 10:45 am. Members were informed of the meeting arrangement vide LC Paper No. CB(1)1196/07-08 on 8 April 2008.)

6. There being no other business, the meeting ended at 4:27 pm.

**Proceedings of the
Bills Committee on Mandatory Provident Fund Schemes
(Amendment) (No.2) Bill 2007
Fifth meeting on Thursday, 27 March 2008, at 2:30 pm
in the Chamber of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000000 – 000343	Chairman	Confirmation of minutes of the 3rd meeting held on 25 February 2008 (LC Paper No. CB(1)1028/07-08).	
000344 – 000602	Chairman Administration	The Administration's briefing on its responses to views of the Bills Committee and to views submitted by deputations (LC Paper Nos. CB(1)1027/07-08(01), CB(1)1027/07-08(02) and CB(1)854/07-08(07)).	
000603 – 003258	Chairman Assistant Legal Adviser 6 (ALA6) Mr LEE Cheuk-yan Administration Mandatory Provident Fund Schemes Authority (MPFA) Mr Ronny TONG Mr WONG Kwok-hing	(a) ALA6's view that members might have to consider further the following issues: (i) If the retrospective liability for payment of outstanding mandatory contributions by defaulting employers for non-enrolled employees under the proposed section 7AE would be limited to the employer mandatory contributions only, whether such arrangement would also apply in future to non-enrolment cases in respect of the contribution period after the commencement of the proposed section 7AE, if enacted. (ii) The legal basis for an employer to recover the amount of retrospective outstanding contributions as a civil	

Time Marker	Speaker	Subject(s)	Action Required
		<p>debt from the employee concerned and whether the employee's liability to pay to the employer the employee mandatory contributions paid by the employer should be stipulated in the legislation.</p> <p>(b) Responding to Mr LEE Cheuk-yan's concern about the retrospective legal liability of employers and employees to settle the outstanding contributions, the Administration's advice that according to the Department of Justice, if the employer had not made any deduction from the employee's relevant income as employee mandatory contributions, the employer would be entitled to recover the employee mandatory contribution paid as a civil debt from the employee concerned. The Administration's view that by design, the Mandatory Provident Fund (MPF) System placed the statutory responsibility of enrolment and the act of payment of contributions on the employer.</p> <p>(c) Mr LEE Cheuk-yan's view that as under the existing practice, the MPFA would take actions to recover from the defaulting employers both the employer and employee mandatory contributions in default contribution cases for enrolled employees, the option of limiting the</p>	

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		<p>retrospective liability for payment of outstanding contributions by defaulting employers for non-enrolled employees to the employer mandatory contributions only would give rise to inconsistency.</p> <p>(d) Concern shared by Mr LEE Cheuk-yan, Mr Ronny TONG and Mr WONG Kwok-hing that employees might become reluctant to report non-enrolment cases to the MPFA fearing that they would face civil claims from employers for the employee mandatory contributions paid for the retrospective period.</p> <p>(e) Mr Ronny TONG's view that employers were entitled to recover from the employee concerned the amount of employee mandatory contributions paid by him to the MPFA. Mr TONG's enquiry about the amount of outstanding contributions involved and whether settlement could be made by installment.</p> <p>(f) The MPFA's advice that from its operational experience, the amount of outstanding contributions in respect of an employee would usually not be very substantial given the maximum amount of monthly mandatory employee contribution was at \$1,000 and that a long period of default contribution was uncommon.</p>	

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		<p>(g) Mr WONG Kwok-hing's view that given the employer's stronger bargaining position and the onus of compliance placed on him under the Mandatory Provident Fund Schemes Ordinance (MPFSO) (Cap. 485), the employer should be liable to pay both the employer and employee contributions in default. It would be unfair if the employee, who was in a weaker bargaining position, would be liable to settle the retrospective employee mandatory contributions paid by his employer.</p> <p>(h) The Administration's response that the MPF System had been designed to provide retirement protection for the workforce through mandatory contributions made from the funds of the employers and from the relevant income of the employees. While the Administration was prepared to consider not requiring employers to make retrospective employee mandatory contributions for non-enrolled employees as a one-off measure and thereby relieving employees from the liability to civil actions that might be brought by their employers, it might not be appropriate to apply this same arrangement in future.</p>	
003259 – 003909	Mr LEE Cheuk-yan MPFA Chairman ALA6	(a) Responding to Mr LEE Cheuk-yan's enquiry about actions taken by employers to recover the amount of employee mandatory contributions paid for	

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		<p>employees, the MPFA's advice that it would claim the entire 10% employer and employee mandatory contributions from the defaulting employers and normally, agreement would be reached between the employers and employees to settle the amount paid. The MPFA's further advice that it was not aware of employers filing civil claims against their employees for recovery of the employee mandatory contributions so paid.</p> <p>(b) Mr LEE Cheuk-yan's view that he would not support limiting the retrospective liability for payment of outstanding contributions by defaulting employers for non-enrolled employees to the employer mandatory contributions only as this was inconsistent with the existing arrangement for recovery of outstanding contributions for enrolled employees. The proposal would also have significant implication on the accrued benefits of the employees in the long run.</p> <p>(c) Advice of the Administration and ALA6 that from the drafting point of the view, limiting the liability to employer mandatory contributions only could be made an one-off arrangement.</p> <p>(d) The MPFA's advice that under the existing legislation, while it was not empowered to institute civil proceedings for contribution arrears recovery in non-enrolment cases, it had made efforts to</p>	

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		<p>persuade the employers concerned to settle the outstanding contributions. The proposed amendments under the Bill aimed to plug the existing loophole and to empower the MPFA to take actions in recovering the contribution arrears in non-enrolment cases.</p>	
003910 – 010540	<p>Mr Ronny TONG Chairman Mr Andrew LEUNG Mr WONG Kwok-hing Administration Mr LEE Cheuk-yan Mr CHAN Kam-lam ALA6</p>	<p>(a) Mr Ronny TONG shared Mr WONG Kwok-hing's view that defaulting employers in non-enrolment cases should be held responsible for payment of both outstanding employer and employee mandatory contributions. To increase the deterrence against non-enrolment, the Administration might consider adding a new provision to MPFSO to the effect that employer had no right to recover the employee mandatory contributions so paid through civil claim or deduction of wages.</p> <p>(b) Mr Andrew LEUNG's different view that it would be unfair to hold the employer solely liable for the outstanding contributions in non-enrolment cases. His view that both employers and employees were parties to the employment contract and were on equal footing.</p> <p>(c) Mr WONG Kwok-hing's support for Mr TONG's suggestion and his view that given an employee's weaker bargaining position and his fear of losing his job, he often had no alternative but to accept unfair employment terms.</p>	<p>The Administration/MPFA to take action as required in paragraph 3 of the minutes.</p>

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		<p>(d) Mr LEE Cheuk-yan's suggestion to provide in the legislation that it would be for the court to decide whether the employer could recover the retrospective employee contributions from the employee.</p> <p>(e) The Administration's preliminary view that both employers and employees shared the responsibility to contribute to the MPF scheme. It was difficult to justify why employers should be barred from recovering from the employees concerned the employee mandatory contributions paid to the MPFA.</p> <p>(f) Mr Ronny TONG's further suggestion that only those employers who had intentionally evaded the responsibility to pay the outstanding mandatory contributions should not have the right to recover the amount of employee mandatory contributions from the employee concerned. The legislation could be amended to empower the court to make such a ruling, in addition to the imposition of a fine and imprisonment on the convicted employer.</p> <p>(g) Mr CHAN Kam-lam's remark that members of the Bills Committee seemed to have expressed contradictory views on the civil and/or criminal liability of the employers and employees to settle the outstanding mandatory contributions in</p>	

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		<p>non-enrolment cases. His view that both employers and employees had a role to play. To circumvent the various problems raised by members, consideration might be given to removing the provision to impose a retrospective liability on the employer to pay outstanding mandatory contributions commencing on 1 December 2000 the earliest. Mr Andrew LEUNG shared Mr CHAN's view.</p> <p>(h) The Chairman asked the Administration/ MPFA to consider members' views and suggestions.</p>	
010541 – 010649	Administration	<p>Clause-by-clause examination</p> <p>Part 1</p> <p><u>Clause 1 – Short title</u></p> <p><u>Clause 2 – Commencement</u></p> <p>Members raised no query on clauses 1 to 2</p>	
010650 – 011534	Administration Chairman Mr WONG Kwok-hing	<p>Part 2</p> <p><u>Clause 3 – Offences by employers</u></p> <p>Members noted that in response to the comment of ALA6, the Administration would propose a Committee Stage amendment to the proposed section 43B(1C) to distinguish (a) the situation in which the employer had deducted the employee contribution and paid it to the approved trustee but failed to pay the employer contribution from (b) the situation in which the employer had made the deduction but failed to make any payment to the trustee.</p>	

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011535 – 012315	Administration Chairman MPFA Mr CHAN Kam-lam Mr WONG Kwok-hing	Part 3 <u>Clause 4 – Interpretation</u> (a) Enquiry of the Chairman and Mr CHAN Kam-lam on the reason and need for adding "former self-employed persons" to the definition of "master trust scheme" in section 2(1) of the MPFSO. (b) The MPFA's explanation that the proposed amendment would make the definition of "master trust scheme" more complete, as operational experience had revealed that some self-employed persons (SEPs) had changed their status to become employees. Responding to Mr WONG Kwok-hing's enquiry, the MPFA pointed out that statistics on the number of SEPs who had changed their status had not been collected from the approved trustees.	
012316 – 013811	Administration ALA6 Chairman Mr WONG Kwok-hing	<u>Clause 5 – Sections added</u> 7AA. Employer required to pay contributions to Authority where relevant employee not member of registered scheme (a) ALA6's observation on the current drafting of the proposed section 7AA(2)(a) and the Administration's explanation on the policy intent and current arrangement. (b) ALA6's concern about the need to specify the meaning of "permitted period" in the proposed section 7AA(10).	The Administration/MPFA to take actions as required in paragraph 4 of the minutes.

Time Marker	Speaker	Subject(s)	Action Required
		(c) ALA6's suggestion that Saturdays should be excluded from "contribution day" in the proposed section 7AA(11).	
013812 – 015323	Administration Mr WONG Kwok-hing Chairman MPFA ALA6 Mr CHAN Kam-lam	<p><u>Clause 5 – Sections added</u></p> <p>7AB. Contributions paid under section 7AA be accompanied by statement</p> <p>7AC. Authority to pay contributions received under section 7AA to approved trustee</p> <p>7AD. Approved trustee's duties with regard to contributions received from Authority</p> <p>(a) Mr WONG Kwok-hing's concern about whether and how an employee would be notified of the information in the statement provided to the MPFA under the proposed section 7AB.</p> <p>(b) The Administration's explanation that the proposed section 7AB concerned the provision of information on contributions by the employer to the MPFA. The MPFA's advice that under the proposed section 7AA, the employer would be required to pay to the MPFA the employer and employee mandatory contributions for the period during which the employee was not a member of an MPF scheme, accompanied by a statement providing relevant information in relation to the employer and employee contributions.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>(c) Mr CHAN Kam-lam's enquiry on whether the MPFA would pass the statement provided by the employer as required under the proposed section 7AB to the approved trustee and if so, whether it would be desirable to specify such an arrangement in the legislation.</p> <p>(d) The Administration's advice that the MPFA was expected to provide the relevant information on the contributions received to the approved trustee. The Administration's further advice that the issue would be further examined</p> <p>(e) In response to ALA6's enquiry on how far the approved trustee was required or empowered to seek rectification of discrepancy by an employer under the proposed section 7AD(2), the MPFA's advice that, for enrolled cases, the approved trustee would mainly be required to check and follow up with the employer for rectification of any discrepancy between the calculation of contributions in the remittance statement and the amount paid. Where an employer had failed to rectify the discrepancy after being informed by the approved trustee, the latter would report the case to the MPFA for follow-up.</p>	
015324 – 015430	Administration	<p><u>Clause 5 – Sections added</u></p> <p><i>7AE.</i> Certain contributions due for payment to the Authority on</p>	

Time Marker	Speaker	Subject(s)	Action Required
		commencement of section 7AA Members raised no query on the proposed section 7AE.	
015431 – 015724	Administration	<u>Clause 6 – Sections 7 and 7A not to apply to certain employees</u> <u>Clause 7 – Section substituted</u> 9. Minimum level of income for contribution purposes <u>Clause 8 – Section substituted</u> 10. Maximum level of income for contribution purposes <u>Clause 9 – Voluntary contributions</u> Members raised no query on clauses 6 to 9	
015725 – 015823	Chairman	Date of next meeting	