

For discussion on
25 February 2008

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

Administration's response to the views of the Bills Committee

Purpose

This paper sets out the Administration's response to requests and views expressed by Members of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 ("the Bill") at the meeting on 31 January 2008.

Penalties for the offences in the Bill

2. In response to Members' request, we have set out at Annex A the information on the relevant offence provisions under the Employment Ordinance (Cap.57) reference to which have been made when drafting the proposals in the Bill.

Enforcement actions against non-enrolment and default contributions

3. At the last meeting, Members raised a number of issues related to the enforcement actions that can be taken by the Mandatory Provident Fund Schemes Authority ("MPFA") against employers for their non-compliance acts of non-enrolment and default contributions. To better illustrate the enforcement strategy of the MPFA, a general overview of the enforcement actions taken by the MPFA in respect of non-enrolment and default contribution cases is set out at Annex B for Members' reference.

Prosecution actions against company directors

4. In non-enrolment and default contribution cases, prosecution action will be taken against the employer company as well as against its

directors so as to impose on them criminal liability for better deterrent effect. In the year 2006-07, the MPFA applied for 440 summonses in respect of non-enrolment and default contributions. Amongst these summonses, 105 summonses were laid against 15 directors/managers of limited companies in respect of default contributions. A total of 13 directors/managers were convicted for default contributions and each was imposed a fine ranging from \$8 000 to \$37 000.

Using fines to settle outstanding contributions

5. At the last meeting, a Member suggested that the fines paid by the employers should be used to settle the outstanding mandatory contributions. We have consulted the Treasury Branch of the Financial Services and the Treasury Bureau and are given to understand that fines imposed by the Magistrates' Courts, the District Court, the High Court and the Court of Final Appeal are “moneys received for the purposes of the Government” and should therefore go to the general revenue by virtue of section 3(1) of the Public Finance Ordinance (Cap. 2). As the Government has no obligation to pay the MPF contributions to the employees on behalf of the defaulting employers under the existing law, the proposal is tantamount to requiring the Government to assume an additional liability and to incur an additional expenditure. The Treasury Branch is not aware of any existing arrangement of using fines to fulfill the financial obligation of the convicted party.

6. In default contribution cases, the priority of the MPFA would be to persuade the employers to repay the outstanding contributions or to file civil claims in case the employers still fail to repay the contributions after persuasion. Prosecution action would be instigated where there is sufficient evidence. According to the MPFA, the fines imposed on the employers, which are on average around \$3 000 per summons in the year 2006 - 07, are unlikely to pose grave financial burden on the employers causing them not able to repay the outstanding contributions. Besides, in cases where the employers are convicted and fined, the MPFA would still continue to recover the outstanding contributions through civil proceedings and other means as appropriate to ensure that the interest of the employees is protected.

Proposals to enhance the enforcement actions

7. At the last meeting, a Member raised the issue as to how the proposals in the Bill could better enable the MPFA to recover outstanding mandatory contributions from non-compliant and/or insolvent employers such as the Sing Pao Newspaper Management Limited (“Sing Pao”).

8. The MPFA has been determined in its effort to help the employees of Sing Pao to recover the default contributions as soon as possible. Apart from recovering the default contributions by filing civil claims with the District Court and the High Court, the MPFA had prosecuted Sing Pao several times. The MPFA had also resorted to other means to recover the default contributions from Sing Pao, including obtaining garnishee order to freeze the company’s bank account and applying for bailiff action. The MPFA will continue to closely monitor the case to ensure that the interest of the employees of Sing Pao is protected.

9. In the event where an employer company goes into liquidation, the MPFA will submit a Proof of Debt Form to the liquidator/Official Receiver for the purpose of recovering the default contributions owed by the insolvent company to its employees.

10. Some of the proposals in the Bill seek to strengthen enforcement measures of the MPFA to provide stronger deterrent effect against non-enrolment and default contributions and facilitate the recovery of outstanding contributions from the employers. These proposals are set out below:

(a) Non-payment of contributions in non-enrolment cases

11. At present, in non-compliance case where an employer fails to comply with both the enrolment and contribution requirements under sections 7 and 7A of the Mandatory Provident Fund Schemes Ordinance (“MPFSO”), the MPFA can institute criminal prosecution action against the employer for non-enrolment under section 7 but no criminal and civil action could be taken against the employer for default contribution under section 7A. To plug this loophole, one of the proposals in the Bill is to make it clear that an employer who does not enrol its relevant employee into an MPF scheme is still liable to pay MPF contributions for its

employee.

12. It is proposed that prosecution can be taken against an employer for non-payment of MPF contributions in a non-enrolment case and there would be no retrospective effect for the criminal offence. For non-payment of MPF contributions in non-enrolment case, an employer's obligation to pay mandatory contributions will cover contributions which would have been payable had the employee been enrolled in an MPF scheme in accordance with section 7 of the MPFSO. Accordingly, the contributions which would have been payable since 1 December 2000 or the date of commencement of the employment concerned, whichever is the later, can be recovered through civil proceedings. The courses of action to recover the outstanding contributions in non-enrolment cases would be the same as those for non-payment of MPF contributions in cases where the employees have been enrolled in an MPF scheme.

(b) Increasing the penalty against non-enrolment and default contributions

13. It is also proposed under the Bill that the penalty for the offences related to non-enrolment and default contributions be increased so as to raise the deterrent effect against non-compliance. Those proposals are:

- (i) Increasing the maximum penalty for failure to comply with the enrolment or contribution obligation to a fine of \$350,000 and imprisonment for three years; and
- (ii) Imposing a higher penalty of a fine of \$450,000 and imprisonment for four years in the cases where the employers do not remit the deducted employee mandatory contributions from employees' wages to the relevant MPF schemes or the MPFA.

Other issues

14. At the last meeting, Members raised a number of issues related to the proposal on issuance of court order (paragraph 4 of the notes of meeting) and the employers' and employees' liability in respect

of the outstanding contributions in non-enrolment cases (paragraph 5(a) to (c) of the notes of meeting). We are actively considering those issues in consultation with the Department of Justice and would provide a response separately as soon as possible.

Financial Services and the Treasury Bureau
Mandatory Provident Fund Schemes Authority
February 2008

**Comparison of the proposed penalty under the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007
and the penalty for similar/relevant offence under the Employment Ordinance**

Offence	Existing penalty	Proposed penalty	Penalty for similar/relevant offence under the Employment Ordinance (Cap. 57) (“EO”)
Employer’s failure to enrol its employees in an Mandatory Provident Fund (“MPF”) scheme in accordance with section 7 of the Mandatory Provident Fund Schemes Ordinance (Cap.485) (“MPFSO”) or employer’s failure to make mandatory contributions in accordance with section 7A of the MPFSO	Currently prosecutable under section 43B of the MPFSO – a maximum fine at level 6 (\$100,000) and imprisonment for six months on the first occasion, and a maximum fine of \$200,000 and imprisonment for 12 months on each subsequent occasion	Maximum fine of \$350,000 and imprisonment for three years	Wage defaults under section 63C of the EO - a maximum fine of \$350,000 and imprisonment for three years
Employer’s failure to make mandatory contributions in accordance with the proposed section 7AA of the MPFSO in the Bill	New offence	Ditto	Ditto

Offence	Existing penalty	Proposed penalty	Penalty for similar/relevant offence under the Employment Ordinance (Cap. 57) (“EO”)
Employer’s failure to pay the deducted employee mandatory contributions from employees’ wages to the relevant MPF schemes in accordance with section 7A(8) of the MPFSO	Currently prosecutable under section 43B of the MPFSO - a maximum fine at level 6 (\$100,000) and imprisonment for six months on the first occasion, and a maximum fine of \$200,000 and imprisonment for 12 months on each subsequent occasion	Maximum fine of \$450,000 and imprisonment for four years	<ol style="list-style-type: none"> 1) Wage defaults under section 63C of the EO - a maximum fine of \$350,000 and imprisonment for three years; and 2) Illegal deduction from employees’ wages under section 63B of the EO - a maximum fine of \$100,000 and imprisonment for one year.
Employer’s failure to pay the deducted employee mandatory contributions from employees’ wages to the Mandatory Provident Fund Schemes Authority in accordance with the proposed section 7AA(2) of the MPFSO in the Bill	New offence	Ditto	Ditto

Enforcement actions taken
by the Mandatory Provident Fund Schemes Authority
in non-enrolment and default contribution cases

Employers' obligation of performing enrolment and making contribution

Section 7 of the Mandatory Provident Fund Schemes Ordinance (“MPFSO”) requires every employer of a relevant employee to ensure that its employee becomes a member of an Mandatory Provident Fund (“MPF”) scheme within the permitted period. The employer should then remit the employer mandatory contributions and the employee mandatory contributions deducted from the employee’s wages to the approved trustee of the MPF scheme by the statutory due date as required under section 7A of the MPFSO. An employer who fails to comply with the enrolment requirement (under section 7) or the contribution requirement (under section 7A) commits an offence under the MPFSO.

Enforcement measures of the MPFA

2. The Mandatory Provident Fund Schemes Authority (“MPFA”) has accorded high priority to tackle those cases where employers have failed to comply with the enrolment and contribution requirements under the MPFSO. Enforcement measures adopted by the MPFA include conducting proactive inspection visits to employment premises, investigating into complaints, imposing contribution surcharges and financial penalties on defaulting employers, filing civil claims and pursuing criminal prosecutions.

3. Non-enrolment and default contribution cases usually come to the attention of the MPFA through complaints from employees, reports submitted by approved trustees, or proactive inspection of business establishments. Some employers comply with the enrolment requirement but fail to comply with the contribution requirement whilst others fail to comply with both the enrolment and contribution requirements.

4. Upon the MPFA investigating the suspected non-enrolment and default contribution cases, some employers would rectify their cases by duly enrolling their employees into MPF schemes if they have not done so and

settling all the default contributions after persuasion by the MPFA. In case the employers fail to rectify, the MPFA would take other action, as appropriate, to ensure that the interest of employees and scheme members is protected. Recovery of default contributions is the major enforcement strategy adopted by the MPFA as the contributions so recovered will benefit the employees directly.

Recovery of contributions through civil proceedings

5. Where an employer has enrolled its employee into an MPF scheme but failed to make MPF contributions, the MPFA will generally issue a payment notice on the employer imposing on it a contribution surcharge calculated at 5% of the amount in arrears. The default contributions and the surcharge amount, when received by the approved trustee from the employer, will be credited to the employee's MPF account. For those employers who do not pay the default contributions and the surcharge as required, depending on the amount of contributions in arrears, the MPFA will then make civil claims to the Small Claims Tribunal, the District Court or the High Court on behalf of the employees. If a claim is awarded and the employer has not settled the arrears as required, the MPFA will make an application requesting a bailiff to execute the court judgment, or apply to the court for a charging order or a garnishee order for the recovery of the arrears. The MPFA may also impose financial penalties on employers defaulting on MPF contributions at the higher of \$5,000 or 10% of the amount in arrears.

Prosecution actions against employers

6. For cases where there is sufficient evidence, the MPFA, may, after obtaining legal advice, refer the cases to the Department of Justice and the Police for criminal prosecution for non-enrolment and default contributions. Prosecution action will be taken against the employer company as well as against its directors/managers so as to impose on them criminal liability for better deterrent effect. The Department of Justice will submit previous conviction records of repeated defaulters for the court's consideration in sentencing.