

立法會
Legislative Council

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

**Further Information and Comments
in relation to Directors' Criminal Liabilities,
Magistrate's power to punish for contempt
and Proposals for possible enforcement measures**

At the Bills Committee meeting held on 13 March 2008, members requested the legal adviser to the Bills Committee to provide further information and comments on the following items to facilitate members' discussion of their concerns:-

- (a) the personal criminal liability of a company director for an offence committed by the company under the Mandatory Provident Fund Schemes Ordinance (Cap. 485) (the Ordinance) and the Bill as compared with the Copyright Ordinance (Cap. 528) and the Unsolicited Electronic Messages Ordinance (Cap. 593);
- (b) the power of a Magistrate to punish contempt; and
- (c) proposals for possible enforcement measures.

Directors' criminal liabilities

2. Under section 44(1) of the Ordinance, when an offence under the Ordinance is committed by a company and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect of, any officer, or other person concerned in the management of the company or any person who was purporting to act in that capacity, the officer or person as well

as the company commits the offence and each is liable to be proceeded against and punished accordingly¹. Hence, if the conditions stipulated in section 44(1) are satisfied, a director or a manager could be convicted of the same offence that has been committed by the company. There is no provision in the Bill that seeks to amend section 44(1).

3. The comparable provision under the Copyright Ordinance (Cap. 528) is section 125(1)² and under the Unsolicited Electronic Messages Ordinance (Cap. 593), section 60(1)(a)³. The several conditions required to be satisfied under each of the provisions for a director to incur criminal liabilities for an offence committed by the company as compared with section 44(1) of the Ordinance are set out in the Table of Comparison at **Annex IV** (the Table) for members' easy reference.

4. It will be observed from the Table that section 44(1) of the Ordinance is similar to section 125(1) of Cap. 528. Upon the conditions being satisfied, the effect is that the director or the person concerned commits the same offence as is committed by the company. Section 60(1)(a) of Cap. 593 is differently drafted. It focuses on an act or a conduct. Upon the conditions under that section being satisfied, the director or the person concerned is presumed to have done the act or have engaged in the conduct. The presumption is rebuttable by contrary evidence. Whether the director or person is guilty of any offence will depend on whether all the elements of an offence have been proved beyond reasonable doubt. Hence, it seems that section 60(1)(a) of Cap. 593 only raises an evidential presumption with regard to the commission of the prohibited act or conduct. However, it is submitted that ultimately the effect of the two forms of drafting may have no fundamental difference because under each form of drafting, the mental state of the director or person charged is required to be proved by evidence.

5. It is further observed that none of the provisions has made any distinction between executive or non-executive directors.

¹ The full text of section 44 of the Ordinance is set out in **Annex I**.

² The full text of section 125(1) of Cap. 528 is set out in **Annex II**.

³ The full text of section 60(1)(a) of Cap. 593 is set out in **Annex III**.

Magistrate's power to punish for contempt

6. Magistracies are inferior courts of record. At common law, they only have jurisdiction to punish for contempt committed in the face of court but not other contempt⁴. This jurisdiction is largely superseded by statutory provisions. A magistrate may under section 99 of the Magistrates Ordinance (Cap. 227) summarily sentence any person who behaves in an insulting manner or use any threatening or insulting expression to or concerning or in the presence of a magistrate to a fine of \$10,000 and to imprisonment for 6 months⁵. Also a magistrate is empowered by section 101 to commit to prison an offender who has not forthwith paid a pecuniary penalty or amends for an offence under Cap. 227 or any other enactment⁶.

7. It is unclear whether disobeying an order requiring an employer to procure for the employee concerned membership in a registered scheme within the time specified in the order made by a magistrate under the proposed new section 43BA (i.e. clause 12 of the Bill) is a contempt that can be punished by a magistrate. It appears that neither the common law nor Cap. 227 confers on a magistrate the power to punish an employer for non-compliance with such an order. It is also doubtful that non-compliance with a magistrate's order requiring the employer to pay any mandatory contribution or contribution surcharge that is outstanding at the time of the conviction would come within the ambit of section 101 of Cap. 227.

Proposals for possible enforcement measures

Order to be made by a court under new section 43BA

8. During the Bills Committee's scrutiny of the Bill, it is observed that there does not appear to be sufficient sanctions for non-compliance with orders to be made by a court under the proposed new section 43BA (i.e. clause 12 of the Bill) when the court is a magistrate's court. It is doubtful that a magistrate may punish as contempt an employer who has not complied with such an order⁷. It was therefore suggested at the 13 March meeting that instead of an order being made by a court that has dealt with the criminal case,

⁴ Halsbury's Laws of Hong Kong, Vol. 7(1) para. 454; Archbold Hong Kong 2007, §30-26.

⁵ The full text of section 99 of Cap.227 is set out in Annex V.

⁶ The full text of section 101 of Cap. 227 is set out in Annex VI.

⁷ See paragraphs 6 and 7 above.

provision be made for the Mandatory Provident Fund Scheme Authority (MPFA) to directly apply for such an order to the Court of First Instance. The advantage is that any uncertainty as to a magistrate's power to follow up non-compliance of any orders made under the proposed new section 43BA will be removed.

9. After the meeting, the Administration has drawn the legal adviser's attention to section 45F(2) of the Ordinance. That section is a general provision empowering the Court of First Instance to make an order, upon the application by MPFA, requiring any person, who has refused or failed to do any act or thing that the person is required to do under the Ordinance, to do that act or thing. The Administration further explained that the rationale for expressly providing for the power to make an order under the new section 43BA is economy and efficiency. A court that has dealt with the criminal charge against an employer will have full knowledge of all relevant information and could make an order under the new section 43BA incidental to a conviction or acquittal of the employer.

10. It is not disputed that the power to make an order as provided in the new section 43BA may not be necessary so far as the Court of First Instance is concerned. However, the Administration's legislative intent may be better served if a CSA to the new section 43BA is moved to provide for the application to the Court of First Instance for an order requiring an employer to procure for the employee concerned membership in a registered scheme or to pay mandatory contribution or contribution surcharge that is outstanding at the time of conviction or acquittal. This would not only remove the doubts created by the existing provision, but specific provisions could also be made for the procedural matters to ensure economy and efficiency, e.g. findings of the criminal court will be conclusive evidence and such order be made upon an ex parte application in writing only allowing the employer to apply to show cause before it is made absolute.

Personal liability of controllers of a persistent defaulting corporate employer

11. Some members are concerned that despite criminal charges and fines, some corporate employers have persisted in failing to make contributions required under the Ordinance. Recovery actions by MPFA are unsuccessful

because the defaulting companies have no assets. The Ordinance does not seem to contain any effective remedy against such employers. The interests of the employees appear not to have been sufficiently protected. It is therefore suggested that as a last resort the Administration may consider holding the directors (including a shadow director) and shareholders of such persistently defaulting company personally liable for the unpaid contributions.

12. By “shadow director”, it is intended to have the same meaning as the expression is defined in section 2(1) of the Companies Ordinance (Cap. 32). A shadow director means a person in accordance with whose directions or instructions the directors or a majority of the directors of the company are accustomed to act.

13. If members are of the view that it is appropriate to adopt the measure to hold directors (including a shadow director) and shareholders of a persistently defaulting company personally liable for the unpaid contributions, then members may consider adding to the Bill a provision along the following line:-

“Where—

- (a) any employer, which is a company, has been convicted more than once under section 43B;
- (b) recovery action by MPFA against the employer is unsuccessful because it has insufficient assets; and
- (c) the employer continues to carry on business and persists in failing to pay any contributions due,

the Court may, on an application by MPFA, make an order that the directors and shareholders of the employer or any of them (including a shadow director) shall personally pay to MPFA the outstanding contributions within the time specified in such order if the Court is satisfied that it is just and equitable so to order.”

14. The proposal set out in paragraph 13 is similar to section 275 of Cap. 32, although the context is quite different. The full text of section 275 is set out in **Annex VII**.

15. There is concern that it may not be appropriate to hold non-executive directors personally liable for a company's default in payment of contributions under the Ordinance. The proposal set out above contains an inherent safeguard. It would give the court sole discretion whether to hold a director or shareholder liable. A court would only make an order against a director, whether executive or non-executive, when it is satisfied that it is just and equitable to make such an order. It is further observed that section 275 of Cap. 32 also makes no distinction between executive and non-executive directors. What is relevant there is whether the director knowingly carries on fraudulent trading. In the present case, upon all the requisite conditions being satisfied, no director can say that he has no knowledge of the company's default. It is further submitted that attaching personal liability to directors and shareholders as a last resort is consistent with the provisions attaching criminal liabilities to directors as explained in paragraph 2 above.

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Annex I

CAP. 485 *Mandatory Provident Fund Schemes*

44. Liability of officers, managers and partners

(1) Where an offence under this Ordinance is committed by a company and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any officer, or other person concerned in the management of the company, or any person who was purporting to act in that capacity, the officer or person as well as the company commits the offence and is liable to be proceeded against and punished accordingly.

(2) Where an offence under this Ordinance committed by a partner is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner of the partnership, that other partner also commits the offence and is liable to be proceeded against and punished accordingly.

(Amended 4 of 1998 s. 2)

125. Liability of persons other than principal offender

(1) Where a body corporate commits an offence under this Ordinance in respect of any act which is shown to have been committed with the consent or connivance of, or to be attributable to any act on the part of, any director, manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity he, as well as the body corporate, commits the offence.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts of a member in connection with his functions of management as if he were a director of the body corporate.

(3) Where an offence under this Ordinance committed by a partner in a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any act on the part of, any other partner of the partnership or any person concerned in the management of the partnership, that other partner or the person concerned in the management of the partnership commits the like offence.

Annex III

UNSOLICITED ELECTRONIC MESSAGES ORDINANCE

Ord. No. 9 of 2007

60. Liability of directors, partners, etc.

(1) Where an organization has done any act or engaged in any conduct constituting an offence under this Ordinance, the following person shall, unless there is evidence showing that he did not authorize the act to be done or the conduct to be engaged in, be presumed also to have done the act or to have engaged in the conduct—

- (a) in the case of a Hong Kong company or other company or body corporate (“the company”)—
 - (i) any director of the company who, at the time the act was done or the conduct was engaged in, was responsible for the internal management of the company; or
 - (ii) if there was no such director, any person who, at the time the act was done or the conduct was engaged in, was responsible under the immediate authority of the directors of the company for the internal management of the company;
- (b) in the case of a partnership—
 - (i) any partner in the partnership who, at the time the act was done or the conduct was engaged in, was responsible for the internal management of the partnership; or
 - (ii) if there was no such partner, any person who, at the time the act was done or the conduct was engaged in, was responsible under the immediate authority of the partners in the partnership for the internal management of the partnership; and
- (c) in the case of any other organization, any officer of the organization or other person who, at the time the act was done or the conduct was engaged in, was responsible for the internal management of the organization.

(2) A person charged with an offence under this Ordinance by virtue of subsection (1) is taken not to have done the act in question or not to have engaged in the conduct in question if—

- (a) sufficient evidence is adduced to raise an issue that he did not authorize the act to be done or the conduct to be engaged in; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.

**Table of Comparison of
section 44(1) of Cap. 485, section 125(1) of Cap. 528 and section 60(1)(a) of Cap. 593**

Section	Condition 1	Condition 2	Relevant persons	Effect
44(1) (Cap. 485)	Where an offence under this Ordinance is committed by a company	The offence is proved to have been committed with the consent or connivance of, or attributable to any neglect of a person specified in the next column	Any officer , or other person concerned in the management of the company, or any person who was purporting to act in that capacity (“Officer” is defined in section 2 to a director or the chief executive officer of the company.)	The person as well as the company commits the offence
125(1) (Cap. 528)	Where a body corporate commits an offence under this Ordinance in respect of any act	The act is shown to have been committed with the consent or connivance of, or to be attributable to any act of the persons specified in the next column	Any director , secretary, or other similar officer of the body corporate or any person purporting to act in any such capacity	The person as well as the body corporate commits the offence
60(1)(a) (Cap. 593)	Where a HK company or other company or body corporate has done any act or engaged in any conduct constituting an offence under this Ordinance	Unless there is evidence showing that the person specified in the next column did not authorize the act to be done or the conduct to be engaged in	At the time the act was done or the conduct was engaged in, (i) any director of the company who was responsible for the internal management of the company , or (ii) if there was no such director, any person who was responsible under the immediate authority of the directors of the company for the internal management of the company	The person shall be presumed also to have done the act or to have engaged in the conduct

99. Power to sentence person using insulting language to or concerning magistrate

If any person behaves in an insulting manner or uses any threatening or insulting expression to or concerning or in the presence of a magistrate when acting in the discharge of any magisterial duty, the magistrate may summarily sentence the offender to a fine at level 3 and to imprisonment for 6 months.

(Amended 24 of 1949 s. 34; 51 of 1981 s. 9; 21 of 1999 s. 29)

**101. Imprisonment for non-payment of a pecuniary penalty
or amends awarded for an offence under the
Ordinance or any other enactment**

Whenever a magistrate awards a pecuniary penalty or amends for an offence under this or any other enactment and the same is not paid forthwith, the magistrate may, in the absence of express provision to the contrary in any such enactment, commit the offender to prison in accordance with the provisions of section 68: (*Amended 30 of 1958 Schedule*)

Provided that where the enactment creating the offence lays down a term of imprisonment either in addition to any pecuniary penalty or in lieu thereof, the period of imprisonment awarded under this section shall not exceed such a term.

(Replaced 2 of 1955 s. 5)

275. Responsibility of directors for fraudulent trading

(1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the Official Receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the

business in manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

(1A) On the hearing of an application under subsection (1) the Official Receiver or the liquidator, as the case may be, may himself give evidence or call witnesses. (*Added 6 of 1984 s. 191*)

(2) Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the person liable or any such company or person, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection.

For the purpose of this subsection, "assignee" (承讓入) includes any person to whom or in whose favour, by the directions of the person liable under the declaration, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(3) Where any business of a company is carried on with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in manner aforesaid shall, whether or not the company has been or is in course of being wound up, be guilty of an offence and liable to imprisonment and a fine. (*Replaced 6 of 1984 s. 191. Amended 7 of 1990 s. 2*)

(4)-(5) (*Repealed 6 of 1984 s. 191*)

(6) The provisions of this section shall have effect notwithstanding that the person concerned may be criminally liable in respect of the matters on the ground of which the declaration is to be made. (*Amended 76 of 1996 s. 77*)

(7) (*Repealed 6 of 1984 s. 191*)

(*Amended 6 of 1984 s. 191*)
[*cf. 1929 c. 23 s. 275 U.K.*]