

For discussion on
10 April 2008

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

Recovery of Arrears – Difficulties and Remedies

Purpose

At the meeting of the Bills Committee held on 13 March 2008 to discuss the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 (“the Bill”), the Mandatory Provident Fund Schemes Authority (“MPFA”) was requested by Members to prepare a paper setting out the difficulties it encounters in the recovery of arrears. This paper sets out the information requested.

Background

2. The MPFA takes enforcement actions against employers defaulting on MPF contributions according to the Mandatory Provident Fund Schemes Ordinance (“MPFSO”). Overall, the MPFA observes that there is a downward trend in the number of default contribution complaint cases received each year, while the successful recovery rate of default contributions is on the rise.

3. The number of complaints received in 2006/07 is 5,102, representing a decrease of 15.2% from 2004/05¹. In terms of the amount in arrears, 94% of the amounts were successfully recovered in 2006/07, compared with 83% in 2004/05.

Recovery of Arrears

4. Non-compliant employers are liable to criminal actions and civil proceedings.

Criminal Court Proceedings

5. An employer who fails to make mandatory contributions in accordance with the requirements of the MPFSO commits an offence. Under section 44 of the MPFSO, any officer or person concerned in the management of the company also commits an offence if the offence is committed with the consent or connivance of that person. In 2006/07, the MPFA applied for 430 summonses in respect of default contribution cases. Amongst these summonses, 105 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.

6. The service of a summons on a body corporate under the MPFSO used to be solely governed by the Companies Ordinance (Cap.

¹ The number of complaints in 2006/07, 2005/06 and 2004/05 are 5,102, 5,598 and 6,018 respectively.

32) which provides that a summons may be served on a company by leaving it or sending it by post to the registered office of the company. The service would not be effective if the registered address of a company is not valid and there is nobody to acknowledge receipt. Moreover, if an employer has been wound up or can no longer be located, prosecution cannot be initiated as it would not be possible to serve the summons.

7. With the enactment of the Mandatory Provident Fund Schemes (Amendment) Ordinance 2008 by the Legislative Council in January 2008, the summons can now be served on the employer's business address in addition to the registered address so as to increase the chance of successful service of summons.

8. To increase the deterrent effect against non-payment of outstanding contributions in prosecution cases, we have proposed in the Bill to introduce a court order so that a convicted or acquitted employer can be ordered by the court to pay the outstanding amount. We have also proposed to increase the maximum penalty for an offence where an employer fails to make contribution payments to a fine of \$350,000 and imprisonment for 3 years, and for an employer who fails to remit deducted wages as mandatory contributions, to a fine of \$450,000 and imprisonment for 4 years. The proposed increase in maximum penalty will increase the deterrent effect against non-compliant employers and send a clear message that employers must pay contributions on time.

9. The proposal to create an offence such that an employer who does not comply with a court order mentioned in paragraph 8 would be liable to a maximum penalty of a fine of \$350,000 and imprisonment for three years, and a daily fine of \$500 for each day during which the offence is continued, will provide certainty that the employer concerned would be subject to criminal liability for non-compliance of the court order. This will enhance the deterrent effect against non-compliance with the court order.

Civil Action

10. Pursuant to section 18 of the MPFSO, a mandatory contribution that is in arrears becomes due to the MPFA. The MPFSO empowers the MPFA, by proceedings brought in a court of competent jurisdiction, to recover as a debt due to the MPFA a mandatory contribution that is in arrears. The court will rule whether the amount of arrears claimed by the MPFA is due and payable to the MPFA.

11. In order to be able to successfully enforce the order / judgment or award from the court, it is necessary for the MPFA to be able to obtain details of the assets of the employers. Previously, the MPFA faced difficulties in identifying the assets of the defaulting employers if employees concerned are not able to provide such information to the MPFA. The enactment of the Mandatory Provident Fund Schemes (Amendment) Ordinance 2008 in January 2008 which empowers the MPFA to require the production of records by employers has facilitated

the MPFA's work in this regard.

12. There may be cases where the court has ordered the employer to repay the contributions by instalments but the employer concerned has become liquidated or untraceable during the debt repayment period. In these rare cases, the MPFA will file proof of debt in respect of the outstanding contributions to the liquidators of the employers.

Looking ahead

13. Subject to the passage of the Bill, the effectiveness of the arrears recovery action will be further enhanced. The MPFA will review the recovery of arrears process in future with a view to making further improvements.

Mandatory Provident Fund Schemes Authority

April 2008