

# 立法會 *Legislative Council*

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## **Paper for the House Committee meeting on 30 May 2008**

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

#### **Purpose**

This paper reports on the deliberations of the Bills Committee on Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 (the Bill).

#### **Background**

2. The Mandatory Provident Fund Schemes Ordinance (Cap. 485) ("MPFSO") was enacted in 1995 to provide a statutory framework for the establishment of mandatory, privately managed retirement schemes for the retirement protection of the workforce. It is supplemented by subsidiary legislation passed in 1998, 1999 and 2000. The Mandatory Provident Fund (MPF) System was launched on 1 December 2000. As at end March 2008, around 2.4 million employees and self-employed persons were enrolled in MPF schemes. The total assets of the MPF constituent funds amounted to over \$248 billion.

3. The MPF System is subject to review from time to time to ensure that it continues to serve the retirement needs of existing and potential scheme members. For this purpose, the Mandatory Provident Fund Schemes Authority (MPFA) set up the MPF Schemes Operation Review Committee (the Review Committee) in August 2001<sup>1</sup> to undertake a comprehensive review of the MPF legislation in relation to the administrative and operational aspects of MPF schemes, analyze proposals put forward by relevant parties to amend the MPF legislation in connection with the administration and operation of MPF schemes and make recommendations to the MPFA on legislative amendments. Based on the recommendations of the MPFA, the Administration introduced the Mandatory Provident Fund Schemes (Amendment) Bill 2007 into the Legislative Council (LegCo) on 27 June 2007, which was subsequently

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<sup>1</sup> The Review Committee comprises representatives of employer and employee bodies, MPF service providers, professional organizations, the HKSAR Government and the MPFA.

passed on 9 January 2008. As a further step to improve the MPF System and protect the interests of employees, the Administration introduced the current Bill into LegCo on 9 January 2008.

## **The Bill**

4. The Bill seeks to amend the MPFSO and the Mandatory Provident Fund Schemes (General) Regulation (the General Regulation). The main proposals include the following :

- (a) to increase the maximum penalty for failure to enrol a relevant employee in an MPF scheme or to make mandatory contributions for the employee, and to impose a heavier penalty on an employer who, having deducted an employee's mandatory contribution from the latter's relevant income, fails to pay the contribution to the approved MPF trustee;
- (b) to impose an obligation on an employer to pay mandatory contributions to the MPFA even if the relevant employee has not been enrolled in an MPF scheme, and to provide for relevant procedures for handling such contributions;
- (c) to add a new Part to the General Regulation for regulating controllers, including indirect controllers and substantial shareholders, of approved trustees; and
- (d) to create a new offence against an employer participating in an MPF scheme for providing false or misleading information in the pay-records given to employees.

## **The Bills Committee**

5. At the House Committee meeting on 11 January 2008, Members agreed to form a Bills Committee to study the Bill. Hon James TIEN Pei-chun and Hon CHAN kam-lam were elected Chairman and Deputy Chairman of the Bills Committee respectively. The Bills Committee has held nine meetings, including a meeting with deputations. The membership list of the Bills Committee is at **Appendix I**. A list of organizations/individuals that have submitted views to the Bills Committee is at **Appendix II**.

## **Deliberations of the Bills Committee**

6. In principle, the Bills Committee supports the Bill which seeks to improve the operation, in particular the enforcement, of the MPF System. It also notes that generally speaking, most of the deputations submitting views to the Bills Committee support the Bill, although some of them have expressed reservation or disagreement on certain proposals such as those seeking to increase the maximum penalties for MPF-related offences. In the course of scrutiny, concern has been expressed on whether the proposed amendments are adequate in deterring unscrupulous employers from evading their responsibilities under the MPF legislation.

### Non-payment of mandatory contributions in non-enrolment cases (Clause 5 of the Bill)

#### *Payment of retrospective mandatory contributions*

7. Currently, under section 7(1) of the MPFSO, every employer of a relevant employee is required to ensure that the employee becomes a member of an MPF scheme within a prescribed period. Section 7(1A) of the MPFSO further stipulates that an employer is required to ensure the enrolment of its employee in an MPF scheme throughout his employment. The Administration has also advised that under sections 7A(1) and 7A(2) of the MPFSO, it is the responsibility of the employer to make mandatory contributions to the MPF scheme for the employee.

8. However, under the existing legislation, where an employer has failed to enrol an employee in an MPF scheme, the legal obligation to make mandatory contributions for the employee does not arise. Hence, prosecution action can only be brought against the employer for the offence of non-enrolment. No legal action can be taken against the employer for non-payment of mandatory contributions. To plug this loophole and ensure that employees in non-enrolment cases will not be deprived of their entitlement to mandatory contributions, the Bill has proposed to add a new section 7AA to the MPFSO to make it clear that an employer who does not enrol its relevant employee in an MPF scheme is still liable to pay mandatory contributions. The proposed amendments will also provide for both criminal and civil routes of actions to deal with default contributions in respect of non-enrolled employees, which are similar to those stipulated under the existing legislation in respect of enrolled employees. Pursuant to the proposed section 7AE of the Bill, an employer's obligation to pay default contributions for a non-enrolled employee will have retrospective effect from 1 December 2000 or the date of the employment of the employee, whichever is the later, for mandatory contributions which should have been payable had the employee been enrolled in an MPF scheme in accordance with section 7 of the MPFSO, irrespective of whether the employee is still in the employment of the defaulting employer on the commencement date of the Bill, if enacted. The Bill also proposes a mechanism to facilitate the depositing of the contributions received by the MPFA into an MPF scheme for the benefit of the employee concerned.

9. The Bills Committee welcomes the proposal to plug an existing loophole. Members note that the criminal offence of non-payment of MPF contributions in a

non-enrolment case will not have retrospective effect. The outstanding contributions in a non-enrolment case which should have been payable since 1 December 2000 or the date of employment of the employee concerned, whichever is later, can be recovered from the employer by the MPFA through civil proceedings.

10. The Bills Committee notes the Law Society of Hong Kong's query on whether the requirement on employers in non-enrolment cases to make mandatory contributions in respect of their employees' past period of service is constitutional and consistent with the general legal principle against the introduction of retrospective legislation. The Administration's view is that the employer has been under an obligation to make MPF contributions for its employees since the commencement of the MPFSO. It is only because of the employer's own failure to enrol the employee in an MPF scheme in accordance with the existing section 7 of the MPFSO that it has not paid the MPF contributions which it should have paid. The proposed section 7AE does not seek to impose a new obligation on an employer to pay MPF contributions, but to require the employer to fulfil an obligation which it should have fulfilled if it has complied with the existing law. The Administration therefore considers that the proposed section 7AE does not contravene the general principle against retrospective legislation.

#### ***Mandatory contributions payable by the employer***

11. Mandatory contributions payable to an MPF scheme comprise the portion sourced from the employer's funds and the portion deducted from the employee's relevant income. The Bills Committee notes the view of its legal adviser that under section 7A of the MPFSO and the proposed section 7AA of the Bill, it appears that the employer is not under an obligation to pay the employee's portion of MPF contributions if it has not made any deduction from the employee's relevant income. It also appears that the effect of the proposed section 7AA is that the employer will have no obligation to pay the employee's portion of the MPF contributions under the proposed section 7AE. The Administration however takes the view that the employer has the responsibility to make the required MPF contributions (both the employer's and the employee's portions) to the trustee. This is spelt out under section 7A(8) of the MPFSO and the proposed section 7AA(6A) of the Bill. Members note the difference in interpretation.

12. The Administration has advised that under the proposed section 7AE of the Bill, an employer is liable to pay retrospective mandatory contributions comprising both the employer's and the employee's portions for a non-enrolled employee as early as from 1 December 2000. The Bills Committee has discussed whether it is fair to hold the employer responsible for settling the employee's portion of retrospective contributions if it has not made any deduction from the employee's relevant income during the latter's period of employment. Some members consider that this may be tantamount to requiring the employer to pay the employee's portion of MPF contributions twice.

13. The Administration / MPFA have referred to the underlying principle of the MPF System which holds an employer responsible for making both the employer's

and employee's mandatory contributions to an MPF scheme trustee. Where the employer has not in the past made any deduction from the non-enrolled employee's relevant income as the latter's MPF contributions but has paid such contributions after the enactment of the Bill, the Administration / MPFA consider that the employer may recover the amount paid as a civil debt from the employee concerned. Some members including Hon LEE Cheuk-yan, Hon CHAN yuen-han and Hon WONG Kwok-hing are gravely concerned about the liability and financial hardship faced by employees if their employers file civil claims against them. They also doubt whether such litigation is in the interest of both parties.

14. The Bills Committee has studied an alternative proposal submitted by the Administration to limit the employer's liability for payment of outstanding contributions for non-enrolled employees to the employer's portion of mandatory contributions only, provided that the employer has not made any deduction from the employee's relevant income in respect of the retrospective period in question. While some members consider the alternative proposal a pragmatic option, some members are concerned about the unfairness to employees, given that it is the employer's responsibility under the existing MPF legislation to enrol its employees, and employees are often in a weaker bargaining position over their terms and conditions of service. The Bills Committee also notes that the alternative proposal appears to be inconsistent with the existing recovery mechanism in respect of enrolled employees under which the defaulting employer is liable to pay both the employer's and the employee's mandatory contributions. In the light of members' views, the Administration has not pursued this alternative proposal.

15. While members do not have strong objection to the proposal of requiring the employer to settle both the employer's and employee's portions of retrospective mandatory contributions for the non-enrolled employee, there has been considerable discussion on whether and how the employer may recover the employee's portion of mandatory contributions paid under the proposed section 7AE from the employee. Members' main concern is the need to devise an equitable and enforceable arrangement. In this connection, the Bills Committee notes the view of its legal adviser that the MPFSO, in its current form, does not explicitly impose an obligation on the employee to make MPF contributions. Hence, where an employer has paid the employee's portion of MPF contributions in non-enrolment cases, it may not be able to recover the amount paid from the employee as a civil debt, even if it has not made any deduction from the employee's relevant income. The Administration however is of the view that in such cases, the employer has a cause of action to recover the paid amount from the employee. Members note the difference in legal opinion.

16. Some members have asked the Administration to consider adding a new provision to the effect that the employer does not have the right to recover the amount paid by him from the employee as a civil debt or through wage deductions, if the non-enrolment and non-payment of contributions has been due to the fault of the employer concerned. There is also a suggestion to stipulate in the legislation that it would be for the court to decide whether the employer has such a right. However, Hon Andrew LEUNG and some other members consider that the matter should be

settled by the employer and employee concerned through negotiation and mutual agreement. According to the MPFA, operational experience has indicated that most of the employers and the employees can settle the matter through negotiation among themselves. The Administration does not consider it appropriate to propose amendments to the Bill to provide for the circumstances under which an employer will or will not have a right to recover the employee's portion of MPF contributions from the employee.

### Proposed increases in maximum penalties for MPF-related offences

#### ***Increasing the maximum penalty for non-payment of contributions and non-enrolment***

(Clause 3 of the Bill)

17. An employer who fails to enrol its employees in an MPF scheme in accordance with section 7 of the MPFSO or who fails to make mandatory contributions in accordance with section 7A of the MPFSO commits an offence under section 43B of the MPFSO and is liable, upon conviction, to a fine at level 6 (\$100,000) and imprisonment for six months on the first occasion, and to a fine of \$200,000 and imprisonment for 12 months on each subsequent occasion.

18. For years, some labour unions and legislators have questioned the deterrent effect of the existing penalty provisions against non-compliant employers. They share the concern that default payment of MPF contributions is akin to default in wage payment. To address such concern, the Bills Committee notes that the Bill has proposed to increase the maximum penalty for default in MPF contributions (as well as for non-enrolment) so that it aligns with that for default in payment of wages under section 63C of the Employment Ordinance (Cap. 57) (EO), i.e. a maximum fine of \$350,000 and imprisonment for three years.

#### ***Increasing the maximum penalty for failure of employers to remit the deducted wages as employee's mandatory contributions***

(Clause 11 of the Bill)

19. The MPFA's enforcement experience has revealed that it is not uncommon for some employers to have made deductions from employees' relevant income but without remitting the deducted sum to the MPF schemes. Such an act severely jeopardizes employees' interests, particularly if the employer later runs into financial difficulties and is unable to settle the outstanding MPF contributions. The employees not only lose the employer's mandatory contributions to which they should be entitled but also suffer from deductions made from their wages<sup>2</sup>.

20. The existing MPF legislation however does not distinguish between cases where an employer has made deductions from the employee's relevant income for its own use and cases where no such deduction has been made. It is generally agreed

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<sup>2</sup> Where the insolvent employer has deducted employees' wages for making employee mandatory contributions and defaults on these sums, such arrears of wages are already covered by the Protection of Wages on Insolvency Fund.

that the former type of default contributions is of a more severe nature and should be subject to a heavier penalty. It is proposed in the Bill that such an offence should be subject to a maximum fine of \$450,000 and imprisonment for four years. The Bills Committee notes that this higher level of penalty has taken into account the maximum penalty for default in payment of wages under section 63C of EO (i.e. a fine of \$350,000 and three years' imprisonment) and that for unlawful deductions of wages under section 32 of EO (i.e. a fine of \$100,000 and one year's imprisonment).

### ***Views on the proposed increases in penalties***

21. The Bills Committee notes the concern of some labour unions that despite the proposed increases in maximum penalties, the sentences imposed by the court have been on the low side and lack deterrence. These deputations have questioned whether the court should adopt an appropriate minimum sentence and whether the MPFA should take the initiative to appeal against lenient sentences on recalcitrant employers. The Administration has explained that the penalty imposed on individual cases is a decision for the court which would take into account, among other things, the increases in maximum penalties when passing sentences. The Department of Justice (DoJ) will submit previous conviction records of repeated offenders for the court's consideration when sentencing. Where there are justifiable grounds, the MPFA can discuss with DoJ on whether an appeal on sentence should be made to a higher court.

22. The Bills Committee notes the reservation or objection expressed by some organizations representing the business sectors. Since the default MPF contributions, if any, is only a small proportion (i.e. 5%) of the employee's relevant income, these deputations consider it unfair to increase the maximum penalty for non-payment of mandatory contributions to align with that for default in payment of wages which usually involves a much larger sum. They are also concerned about employers committing the offence inadvertently or due to temporary financial difficulties. The Administration/MPFA have reiterated the need for sending the right message to employers by pitching the penalties at an appropriate level to achieve deterrent effect. Nevertheless, every case will be carefully investigated before a decision to prosecute is made. Moreover, any mitigating circumstances will be taken into account by the court in passing sentences.

### ***Criminal liability on individual directors of companies***

23. The Bills Committee notes that where an employer committing an offence is a body corporate, it cannot be sentenced to imprisonment. At present, section 44(1) of the MPFSO provides, inter alia, that when an offence committed by a company 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, such officer or person is also liable to be proceeded against and punished accordingly. The MPFA has informed members that in 2006-07, it applied for 430 summonses in respect of default in contribution cases, among which 105 were laid against 15 directors/managers of limited companies. A

total of 13 directors/managers were convicted for default in contributions and each was imposed a fine ranging from \$8,000 to \$37,000.

24. With a view to ascertaining the criminal liability of company directors under other Ordinances, members have examined relevant provisions under the Copyright Ordinance (Cap. 528) and the Unsolicited Electronic Messages Ordinance (Cap. 593). They note that to substantiate an offence committed by a company director under the MPFSO and the two Ordinances, the mental state of the director or person charged is required to be proved by evidence. To facilitate prosecution and achieve a greater deterrent effect, some members have suggested that consideration be given to reversing the onus of proof or imposing an evidential burden on the defendant director as to his not having knowledge of or consented to the offence committed by the company. Some other members however have reservation on such an approach and are concerned about its implications on the common law principle of presumption of innocence.

25. As the Administration will not propose any amendment to this effect, members have considered a proposal to amend section 44(1) of the MPFSO to provide that unless there is evidence to the contrary, an offence committed by a company is presumed to have been committed with the consent or connivance of the officers and managers concerned. Based on the decision reached by a majority of members voting, Hon CHAN Kam-lam, Deputy Chairman, will move a Committee Stage amendment (CSA) to the Bill (at **Appendix IV** - proposed clause 12A) on behalf of the Bills Committee. Hon James TIEN, Chairman, has stated that he does not support the proposed CSA.

26. The Administration has not proposed in the Bill any amendment to the existing section 44(1) and does not consider it appropriate to introduce an amendment which may change the evidential onus of proof, taking into account that the various proposals in the Bill and the further amendments to be moved to the Bill (such as the CSA to the proposed section 43BA) would enhance the deterrent effect against non-compliance.

27. Regarding members' concern about prosecution action against overseas directors and corporate directors, the Administration has advised that the company law regime in Hong Kong is not dissimilar to that of other international financial centres where it is permissible for corporate directors and individual directors who are not domiciled in the host country to operate in respect of companies registered in the host country. Such directors of companies registered in Hong Kong are subject to the same legal requirements and sanctions as individual directors who are natural persons and residing in Hong Kong.



## Recovery of mandatory contributions in arrears

### ***Proposal to empower the court to make a court order*** (Clause 12 of the Bill)

28. Under the proposed section 43BA of the Bill, in cases of non-enrolment or non-payment of mandatory contributions, the court will have a discretionary power to make an order to compel an employer to enrol its employees in an MPF scheme and to pay the outstanding contributions and contribution surcharges as appropriate. Some members have questioned the appropriateness of the proposed arrangement as this may have the effect of shifting the enforcement responsibility from the MPFA to the court. Members have also enquired about the level of court that can make the order under the proposed section 43BA.

29. In clarification, the Administration has advised that the use of the word "court" in the context of the proposed section would mean that the power to make the orders is given to any criminal courts, including the Magistrates' Court, which may convict or acquit the employer of the offence. On concerns about how the court order can be enforced and the sanction, if any, for non-compliance with the court order, the Administration has advised that the application for a court order under the proposed section 43BA may be made by the MPFA immediately after conviction or acquittal of the employer. The Magistrate who has heard the case would decide whether the order should be made and the terms of the order. Non-compliance of a court order (including one issued by the Magistrates' Court) may amount to "contempt of court". However, since the Magistrates' Court, where MPF-related offences are normally tried, has no jurisdiction to deal with "contempt of court" cases, they will have to be heard by the Court of First Instance. Members are thus gravely concerned about the court procedures and whether this arrangement is conducive to the effective recovery of outstanding mandatory contributions.

30. To address members' concern, the Administration will move a CSA to the proposed section 43BA of the Bill to provide that non-compliance of the court order is an offence which would be subject to a maximum penalty of a fine of \$350,000 and imprisonment for three years, and to a daily fine of \$500 for each day during which the offence is continued. Given that it is for the judge to decide whether a breach or non-compliance of a court order would amount to "contempt of court", the Administration considers that its revised proposal is more effective as it can provide greater certainty on the actions that can be taken against an employer for non-compliance of a court order.

### ***Enforcement measures and civil proceedings***

31. Referring to the case of Sing Pao Newspaper Management Limited, members have noted with concern the difficulties encountered by the MPFA in recovering outstanding MPF contributions from non-compliant and/or insolvent employers even if the court has ruled in favour of the MPFA.

32. The MPFA has confirmed that the recovery of default contributions is its major enforcement strategy as the contributions so recovered will benefit the employees directly. Where the defaulting employer does not pay the outstanding MPF contributions and the required surcharge, the MPFA will, depending on the amount in arrears, file 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 not settled by the employer, the MPFA will enforce the court judgment by applying for bailiff action, or applying to the court for a charging order or a garnishee order for recovery of the arrears. As the MPFA has taken on the responsibility to pursue civil claims against defaulting employers on behalf of the employees, the Bills Committee notes that all legal costs associated with the recovery of outstanding contributions and enforcement of court awards are borne by the MPFA and not the employees concerned.

33. On the question of whether the fines paid by the convicted employers can be used to settle the outstanding MPF contributions, the Administration has advised 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 MPF contributions on behalf of the defaulting employer, the aforesaid arrangement will be tantamount to requiring the Government to assume an additional liability and incur additional expenditure. The Administration is not aware of any existing arrangement under which fines are used to fulfil the financial obligation of the convicted party.

34. Members are gravely concerned whether the Administration/MPFA have exhausted all existing tools in the recovery of outstanding mandatory contributions before seeking to introducing new proposals under the Bill. They consider that instituting liquidation proceedings against a defaulting employer is a much more effective tool to compel compliance. The MPFA has advised that liquidation has been used as the last resort, given its implications on existing employees. Hon Alan LEONG has suggested that if the judgement debt (i.e. the outstanding contributions and surcharge as ruled by the court) is not settled before the expiry of a three-month period after the court judgement, the MPFA should proceed to serve a statutory demand on the defaulting employer, to be followed by a winding-up petition if the employer still fails to settle the debt three weeks after the service of the statutory demand. In this connection, the Bills Committee has also passed a motion moved by Hon WONG Kwok-hing urging the MPFA to set a definite timeframe for its actions to follow up a court judgement, such as reminding the employer to make payment and ascertaining the financial position and business operations of the employer etc. Members' main concern is the need for the MPFA to take expeditious action to commence liquidation proceedings within a reasonable period of time if other recovery actions have been futile.

35. Responding to members' concern about the timeliness of action, the MPFA has clarified that under the existing arrangement, it will commence investigation and obtain necessary evidence after it is notified by an approved trustee that an employer has failed to settle the arrears and surcharge in accordance with the payment notice issued by the MPFA. Such investigation serves the immediate purpose of enabling

the MPFA to file a civil claim against the employer for recovery of arrears and surcharge as well as the subsequent purpose of facilitating the MPFA to take action to execute the court judgement if the employer still fails to pay the judgement debt. Hence, as early as the investigation stage, the MPFA would have already started the process of obtaining information to ascertain the financial status and available assets of the employer. The MPFA has also confirmed that within 14 days after the due date for payment of the judgement debt, the MPFA will check whether the employer has made payment. Within around 10 working days after confirming that the employer has not settled the payment and having updated previous findings on the employer's financial status, the MPFA will decide on the most appropriate enforcement strategy of enforcing the court judgement, such as applying for bailiff action, taking garnishee proceedings and/or taking a charging order.

36. In response to members' concern, the MPFA has agreed to change its practice and procedures to give consideration to the use of statutory demand at the same time as making a decision on the enforcement strategy to be used. In cases where bailiff action, garnishee proceedings and/or charging order have been taken, the MPFA will review the effectiveness of those actions and consider the merits of issuing statutory demands in the light of circumstances of individual cases. The MPFA has assured the Bills Committee that where circumstances so warranted, the MPFA will not hesitate to proceed to issue statutory demands and file winding-up petitions against persistent defaulting employer companies. Members generally welcome and are satisfied with the MPFA's improved approach.

37. The Bills Committee has also examined the situation in which a defaulting employer may use different tactics to transfer assets of the company to other companies, thereby stripping the employer company of assets out of which the outstanding MPF contributions can be settled. The MPFA has advised that under the existing liquidation process applicable to companies, the appointed liquidator may trace the assets transferred before liquidation and take them into account as realized assets of the wound-up company for settlement of debts if such transfer was inappropriate or unlawful. Currently, outstanding MPF contributions are admitted as preferential debts which have priority over other unsecured debts. Where the MPFA is aware of any suspected fraudulent assets transfer, it would report the matter to the Police for investigation.

38. With a view to examining how existing enforcement measures can be strengthened, members have requested the Administration/MPFA to make reference to the proposed improvement measures recently considered by the Labour Advisory Board (LAB) to assist employees in enforcing Labour Tribunal (LT) awards. In this regard, the MPFA has reported that arrangements similar to the proposed improvement measures in respect of legal costs, imposition of surcharge and the power to require production of records by employers are already in place under the existing MPF enforcement regime. Members note that the Labour Department will conduct an overall review of the enforcement of court judgement in civil cases and that the MPFA has undertaken to facilitate the review. On whether the scope of the Protection of Wages on Insolvency Fund should be expanded to cover defaulted sums awarded by LT, the Bills Committee has been advised that LAB has not reached an agreement.

In this regard, Hon LEE Cheuk-yan has suggested that consideration may be given to extending the coverage of the Compensation Fund set up under section 17(1) of the MPFSO<sup>3</sup> to include default mandatory contributions. Members agree that the proposal should be further considered at the Panel on Financial Affairs.

*Personal liability of controllers of a persistent defaulting corporate employer*

39. After considerable discussion as set out in paragraphs 31 to 38, some members including Hon CHAN Yuen-han, Hon WONG Kwok-hing and Hon LEE Cheuk-yan remain concerned that despite criminal charges and fines, some corporate employers have persisted in failing to make contributions required under the MPFSO. Recovery actions by the MPFA are often unsuccessful because the defaulting companies have no assets. The members consider that neither the existing legislation nor the Bill seem to contain any effective remedy against such corporate employers. With a view to achieving greater deterrence and recovering the MPF contributions, the Bills Committee has considered a proposal to hold the directors (including a shadow director) and shareholders of a persistently defaulting company personally liable for the unpaid contributions, along the following lines:

"Where-

- (a) Any employer, which is a company, has been convicted more than once under section 43B;
- (b) Recovery action by the 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 the MPFA, make an order that the directors and shareholders of the employer or any of them (including a shadow director) shall personally pay to the 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."

40. The proposal has the support of the majority of members voting. Hon James TIEN, Chairman, does not support the proposal. The Bills Committee has agreed that Hon CHAN Kam-lam, Deputy Chairman, will move a CSA to add a new provision to the Bill (**Appendix IV** - proposed clause 12B) on behalf of the Bills Committee.

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<sup>3</sup> The Compensation Fund is set up for the purpose of compensating MPF scheme members and other persons who have beneficial interests in the schemes for losses of accrued benefits that are attributable to misfeasance or illegal conduct committed by the approved trustees or by other persons concerned with the administration of the schemes. It covers all losses in accrued benefits arising from both mandatory and voluntary contributions without any limit. The claim for compensation shall be determined by the Court of First Instance on the application of the MPFA.

Offence for providing false pay-records to employees  
(Clause 33 of the Bill)

41. Section 139 of the General Regulation requires an employer to give monthly pay-records to its employees who are MPF scheme members not later than seven working days after the payment, or the last payment if there is more than one payment, of mandatory contributions during the month concerned. As the pay-record contains information on the contribution details, it can be used by the employee to verify whether the employer has properly ascertained the amount of relevant income and correctly calculated the amount of contributions. It may also serve as evidence of payment of contributions by the employer to the trustee concerned.

42. There is concern that some employers, though giving monthly pay-records as required under the law, may deliberately provide false or misleading contribution details (e.g. by stating that contributions have been paid when in fact no such payment has been made) to deceive their employees. The Bill has proposed to create a new offence against the employer for providing any information that it knows to be false or misleading in a material respect, or recklessly provides any information that is false or misleading in a material respect in a pay-record given to an employee. Upon conviction, the employer is liable to a fine at level 6 and imprisonment for one year on the first occasion, and to a fine of \$200,000 and imprisonment for two years on each subsequent occasion. The Bills Committee notes that the new provision is modelled on the existing section 43E of the MPFSO which sanctions a person for making a false or misleading statement in any document given to certain prescribed persons, but employees are not included.

Approval of controllers of approved trustees  
(Clause 31 of the Bill)

43. Trustees of MPF schemes play an important role in ensuring that MPF schemes are operated in compliance with the law and that the interests of scheme members are well protected. At present, when applying for the MPFA's approval to conduct MPF business, a trustee company must satisfy the MPFA that, among other things, its controllers are suitable persons. While officers (i.e. a director and the chief executive officer of a company), indirect controllers and substantial shareholders are all controllers as defined under section 2 of the MPFSO, section 28 of the General Regulation only requires any new appointment of a director and the chief executive officer of the trustee to seek the prior consent of the MPFA. No similar requirement in respect of the subsequent acquisition of the status of indirect controllers and substantial shareholders is stipulated. Moreover, the MPFA is not empowered to withdraw the consent given under section 28 of the General Regulation for the appointment of the director or chief executive officer of the trustee, even if the person is no longer suitable. It is also envisaged that a person may have become the controller of a trustee by virtue of his acquiring, without the MPFA's prior consent, the voting shares of an approved trustee exceeding the threshold of 15%. To rectify the above anomalies, the Bill contains proposals to set out clearly the approval requirements in respect of indirect controllers and substantial shareholders and the withdrawal of approval of controllers under specified circumstances.

44. In principle, members have no objection to the proposed amendments. The Administration has also accepted the suggestion to make reference to Schedule 8 to the MPFSO and include an associate of the substantial shareholder under the definition of "substantial shareholder" in the proposed section 42A(2) of the General Regulation. On the suitability requirements on the controllers of an MPF trustee, members have asked whether the requirements should be aligned with the criteria for a "fit and proper person" under section 129 of the Securities and Futures Ordinance (Cap. 571) (SFO). According to the Administration, the detailed criteria set out in the "Fit and Proper Guidelines" issued by the Securities and Futures Commission and the suitability criteria under the "Guidelines for Application for Approvals of Trustees" issued by the MPFA cover essentially similar aspects. The Bills Committee notes the Administration's view that as the two Ordinances were enacted at different times for different purposes, it is not necessary to align the proposed provisions with those under the SFO.

45. Question has been raised on whether it is appropriate to include a provision in the Bill for approving indirect controllers of MPF trustees, given that indirect controllers normally act behind the scene and the proposed arrangement may appear to encourage behind the scene activities which may not be conducive to the effective regulation of MPF trustees. The Administration nevertheless draws members' attention to a similar provision under section 70 of the Banking Ordinance (Cap. 155) which stipulates that the consent of the Hong Kong Monetary Authority is required before a person can become an indirect controller of an authorized institution under that Ordinance. On whether the term "shadow director" should be used in lieu of "indirect controller" in the Bill so that the procedures and sanctions in relation to a "shadow director" under the Companies Ordinance (Cap. 32) will also be applicable to MPF trustees, the Administration has confirmed that as the meaning of the two terms is essentially the same, it will replace the term "indirect controller" with "shadow director" by way of a CSA.

### **Committee Stage Amendments**

46. The full set of CSAs to be moved by the Administration is at **Appendix III**. The Bills Committee has no objection to the proposed CSAs.

47. The CSAs proposed to be moved by the Bills Committee in its name are at **Appendix IV**.

### **Recommendation**

48. The Bills Committee supports the resumption of the Second Reading debate on the Bill on 18 June 2008.

**Advice sought**

49. Members are invited to note the Bills Committee's recommendation in the preceding paragraph.

Council Business Division 1  
Legislative Council Secretariat  
29 May 2008

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

**Membership list**

**Chairman** Hon James TIEN Pei-chun, GBS, JP

**Deputy Chairman** Hon CHAN Kam-lam, SBS, JP

**Members** Hon Albert HO Chun-yan  
Hon LEE Cheuk-yan  
Hon CHAN Yuen-han, SBS, JP  
Hon SIN Chung-kai, 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  
Hon Ronny TONG Ka-wah, SC

(Total : 13 Members)

**Clerk** Miss Polly YEUNG

**Legal Adviser** Mr KAU Kin-wah

**Date** 24 January 2008



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

**Organizations/individuals which/who have submitted views on the Mandatory  
Provident Fund Schemes (Amendment) (No.2) Bill 2007 to the Bills Committee**

Business and industry associations

1. The Chinese General Chamber of Commerce
2. Employers' Federation of Hong Kong
3. The Hong Kong Chinese Enterprises Association
4. The Hong Kong Chinese Importers' & Exporters' Association
5. Hong Kong Small and Medium Enterprises Association

Labour unions

6. The Federation of Hong Kong and Kowloon Labour Unions
7. Hong Kong Confederation of Trade Unions
8. The Hong Kong Federation of Trade Unions (Rights and Benefits Committee)

Professional bodies

9. Hong Kong Bar Association
10. Law Society of Hong Kong

Political party

11. The Democratic Party

Individuals

12. Dr CHAN Tung, SBS, JP, Sham Shui Po District Council Chairman
13. Ms KO Po-ling, MH, JP, Yau Tsim Mong District Council member
14. Mr YEUNG Wai-sing, MH, Eastern District Council member

MANDATORY PROVIDENT FUND SCHEMES  
(AMENDMENT) (NO. 2) BILL 2007

COMMITTEE STAGE

Amendments to be moved by the Secretary for Financial Services and the Treasury

<u>Clause</u>	<u>Amendment proposed</u>
3(1)	In the proposed section 43B(1), in the English text – (a) by deleting “, and” and substituting “and,”; (b) by adding “to” before “a daily penalty”.
3(1)	In the proposed section 43B(1B), by deleting “section 7A(7)” and substituting “section 7A(1), (2) or (7)”.
3(1)	By deleting the proposed section 43B(1C)(a) and substituting – “(a) in the case where he has deducted any amount from the employee’s relevant income for the contribution period concerned as the employee’s contribution and the total amount of contribution paid in respect of the employee to the approved trustee for that contribution period is less than the amount so deducted, liable on conviction to a fine of \$450,000 and to imprisonment for 4 years; and”.
4	By adding immediately before subclause (1) – “(1A) Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended, in the definition of “arrears”, by adding “7AE or” after

“section”.”.

- 4(1) By deleting “of the Mandatory Provident Fund Schemes Ordinance (Cap. 485)”.
- 5 In the proposed section 7AA, by deleting subsections (2) and (3) and substituting –
- “(2) The employer must, in the case referred to in subsection (1)(a), for each contribution period ending on or after that commencement during which the employee is not such a member –
- (a) from the employer’s own funds, contribute to a registered scheme that is to be determined in accordance with section 7AC the amount determined in accordance with subsection (4); and
- (b) subject to subsection (6), deduct from the employee’s relevant income for that period as a contribution by the employee to that scheme the amount determined in accordance with subsection (4).
- (3) The employer must, in the case referred to in subsection (1)(b), for each contribution period ending after the date the employee becomes a relevant employee during which the employee is not such a member –
- (a) from the employer’s own funds, contribute to a registered scheme that is to be determined in

accordance with section 7AC the amount determined in accordance with subsection (4); and

- (b) subject to subsection (6), deduct from the employee’s relevant income for that period as a contribution by the employee to that scheme the amount determined in accordance with subsection (4).”.

5 In the proposed section 7AA(4), by deleting “subsection (3)(a) and (b), the amount to be paid by an employer” and substituting “subsections (2) and (3), the amount to be contributed by an employer, or to be deducted from an employee’s relevant income,”.

5 In the proposed section 7AA(5), by deleting “the purposes of subsection (3)(a) and (b)” and substituting “those purposes”.

5 In the proposed section 7AA(6)(a) and (b), by deleting “subsection (3)(b)” and substituting “subsection (2)(b) or (3)(b)”.

5 In the proposed section 7AA, by adding –

“(6A) An employer must ensure that contributions required to be made in accordance with this section in respect of an employee of the employer are paid to the Authority on or before the contribution day.”.

- 5 In the proposed section 7AA(11), by adding “a Saturday,” before “a public holiday” where it twice appears.
- 5 In the proposed section 7AB(2)(h), by deleting “section 7AA(3)(a)” and substituting “section 7AA(2)(a) or (3)(a)”.
- 5 In the proposed section 7AB(2)(i), by deleting “section 7AA(3)(b)” and substituting “section 7AA(2)(b) or (3)(b)”.
- 10 In the heading, by deleting “**mandatory contributions that are in arrears**” and substituting “**arrears and contribution surcharges**”.
- 10(2) By deleting everything after “amended” and substituting “by adding “under subsection (1) or section 7AE” after “due for payment to the Authority”.”.
- 11 By deleting the proposed section 43B(1D).
- 11 In the proposed section 43B(1E), by deleting “section 7AA(6)” and substituting “section 7AA(2), (3) or (6)”.
- 11 By adding after the proposed section 43B(1E) –
- “(1F) An employer who, without reasonable excuse, fails to comply with section 7AA(6A) commits an offence and is –
- (a) in the case where he has deducted any amount from the employee’s relevant income for the contribution period concerned as the employee’s

contribution and the total amount of contribution paid in respect of the employee to the Authority for that contribution period is less than the amount so deducted, liable on conviction to a fine of \$450,000 and to imprisonment for 4 years; and

(b) in any other case, liable on conviction to a fine of \$350,000 and to imprisonment for 3 years.”.

12 In the proposed section 43BA(3), by deleting “(1D)” and substituting “(1F)”.

12 In the proposed section 43BA(4), by deleting “(1D)” and substituting “(1F)”.

12 In the proposed section 43BA, by adding –

“(4A) An employer who, without reasonable excuse, fails to comply with an order made under this section commits an offence and is liable on conviction to a fine of \$350,000 and to imprisonment for 3 years and, in the case of a continuing offence, to a daily penalty of \$500 for each day on which the offence is continued.”.

17(5) In the proposed section 78(6)(c)(i), in the English text, by deleting “members’” and substituting “member’s”.

New By adding –

**“18A. Participating employer to calculate relevant income**

**and pay mandatory  
contributions**

Section 122(4) is amended by adding “a Saturday,” before “a public holiday” where it twice appears.”.

20 By deleting the clause and substituting –

**“20. Rate of contribution  
surcharge**

Section 134 is repealed.”.

22 In the heading, by adding “**or contribution surcharges**” after “**contributions**”.

New By adding immediately before clause 25 –

**“24A. Interpretation**

Section 2(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) is amended –

- (a) in the definition of “associate”, by adding “a natural person referred to in paragraph (d) of the definition of “controller” or” after “in relation to”;
- (b) in the definition of “controller”, in paragraph (d), by repealing “, a close relative, partner or” and substituting “an associate, a close relative or an”.”.

25(1) By deleting “of the Mandatory Provident Fund Schemes

Ordinance (Cap. 485)".

- 31 In the proposed section 42A(2) –
- (a) by deleting the definition of “indirect controller”;
  - (b) by adding –  
““shadow director” (幕後董事), in relation to an approved trustee that is a company, means a person described in paragraph (b) of the definition of “controller” in section 2(1) of the Ordinance;”.
- 31 In the proposed section 42C, in the heading, by deleting “**indirect controllers**” and substituting “**shadow directors**”.
- 31 In the proposed section 42C(1) and (5), by deleting “an indirect controller” wherever it appears and substituting “a shadow director”.
- 31 In the proposed section 42C(4) –
- (a) by deleting “an indirect controller” and substituting “a shadow director”;
  - (b) by deleting “or indirect controller” and substituting “or shadow director”.
- 31 In the proposed section 42D(8)(a), by deleting “close relative, partner” and substituting “associate, close relative”.
- 31 In the proposed section 42E(9) –
- (a) by deleting “an indirect controller” and substituting “a shadow director”;



(b) by deleting “the indirect controller” and substituting “the shadow director”.

31 In the proposed section 42F(4)(a), by deleting “close relative, partner” and substituting “associate, close relative”.

32(b) In the proposed item 12E in Part II of Schedule 4, by deleting “indirect controller” and substituting “shadow director”.

32(b) In the proposed item 12F in Part II of Schedule 4, by deleting “Indirect controller” and substituting “Shadow director”.

32(b) In the proposed item 12M in Part II of Schedule 4, by deleting “Indirect controller” and substituting “Shadow director”.

Mandatory Provident Fund Schemes (Amendment) (No. 2) Bill 2007

**COMMITTEE STAGE**

Amendments to be moved by Hon CHAN Kam-lam

<u>Clause</u>	<u>Amendments proposed</u>
New clauses	<p>By adding—</p> <p><b>“12A. Liability of officers and managers</b></p> <p>Section 44(1) is repealed and the following substituted—</p> <p>“(1) Where an offence under this Ordinance is committed by a company and—</p> <ul style="list-style-type: none"><li>(a) unless there is evidence showing that the following person has not consented to or connived in the offence,<ul style="list-style-type: none"><li>(i) any officer of the company; or</li><li>(ii) any other person concerned in the management of the company, or any person who was purporting to act in that capacity,</li></ul>is presumed to have consented to or connived in the offence; or</li><li>(b) the offence is proved to be</li></ul>

attributable to the negligence on the part of any officer or other person described above,

the officer or person as well as the company commits the offence and is liable to be proceeded against and punished accordingly.” .

**12B. Civil liabilities of company directors and shareholders**

The following is added—

**“44A. Civil liabilities of company directors and shareholders**

(1) Where—

(a) any employer, which is a company, has been convicted more than once under section 43B;

(b) recovery of mandatory contribution that is in arrears by the Authority 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 contribution due,

a court of competent jurisdiction may, upon an application by the Authority and being satisfied that it is just and equitable to do so, make an order that the directors (including a shadow director) or shareholders of the employer or any one or more of them shall personally pay to the Authority within the time specified in such order the mandatory contribution that is in arrears together with any contribution surcharge payable under section 18(2) in respect of those arrears.

(2) For the purpose of this section, “shadow director” has the meaning assigned to the expression in section 2(1) of the Companies Ordinance (Cap. 32).”.”.