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政府總部
勞工及福利局
香港下亞厘畢道
中區政府合署

LABOUR AND WELFARE BUREAU
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2 December 2008

Clerk to the Legislative Council
Legislative Council Building
8 Jackson Road
Hong Kong
(Attention: Ms Miranda HON)

Dear Ms Hon,

**Proposed Resolution under section 34(2)
of the Interpretation and General Clauses Ordinance**

Thank you for your letter dated 28 November 2008 inviting the Administration's comments on the proposed resolution to be moved by Hon Mrs Regina IP LAU Suk-yee to amend the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008. Please find attached our detailed submission to the President of the Legislative Council.

Yours sincerely,

(Ms Karyn CHAN)
for Secretary for Labour and Welfare

Encl.

c.c. Director of Administration

立法會議員對《2008年僱員再培訓條例(修訂附表3)(第2號)公告》的擬議修正案

政府當局提交立法會主席的意見書

1. 本意見書旨在回應以下問題：

由立法會議員提出決議案，對《2008年僱員再培訓條例(修訂附表3)(第2號)公告》(2008年第244號法律公告)作出修正案，修訂第2條以指明就外籍家庭傭工徵收的僱員再培訓徵款(下稱"徵款")數額爲0元，而就其他外來工人徵收的徵款數額爲400元，是否合法？

2. 政府當局堅信這個問題的答案是"否"，理由如下。

共識

3. 就本文而言，我們假定各方對下列觀點並無爭議－

(a) 《第244號法律公告》屬《釋義及通則條例》(第1章)第34(1)條所指的"附屬法例"；

(b) (在符合下文第3(c)段的規定下)第34(2)條賦予立法會作出修訂的權力的範圍，與行政長官會同行政會議根據《僱員再培訓條例》(第423章)第31(1)條所獲授的釐定徵款數額的權力相同；

(c) 就立法會作出的修訂而言，上述立法會的權力受《立法會議事規則》第31(1)條所限制；

(d) 任何有關修訂的決議案一經於會上提交，立法會主席就不得不考慮該決議案的"目的或效力"是否"可導致動用香港任何部分政府收入或其他公帑，或須由該等收入或公帑負擔"，並對這個主要關於法律的問題得出其意見；以及

(e) 倘若主席的意見爲"是"，則任何議員如未經行政長官書面同意，是不能合法地提出這樣的修正案的。

爭議事項

4. 因此，目前須處理的爭議，是對《第 244 號法律公告》作出修正案，修訂第 2 條以指明就外籍家庭傭工徵收的徵款數額爲 0 元，而就其他外來工人徵收的徵款數額爲 400 元，是否 —

(a) 屬第 1 章第 34(2)條涵義所指的"符合訂立"《2008 年第 244 號法律公告》"的權力"的修正案；以及／或

(b) 屬《立法會議事規則》第 31(1)條涵義所指的"目的或效力可導致動用香港任何部分政府收入或其他公帑，或須由該等收入或公帑負擔"的修正案。

越權行為與第 1 章第 34(2)條

5. 第 1 章第 34(2)條賦予立法會權力，可將提交其席上省覽的附屬法例修訂，"修訂方式不限，但須符合訂立該附屬法例的權力。"

6. 修訂《2008 年第 244 號法律公告》第 2 條以指明就外籍家庭傭工徵收的徵款數額爲 0 元，而就其他外來工人徵收的徵款數額爲 400 元的擬議修正案，如下文所述，超越了第 423 章第 31(1)條的權力，因此與訂立附屬法例《2008 年第 244 號法律公告》的權力不符，並超越了第 1 章第 34(2)條賦予立法會的權力，所以必須反對 —

(a) 這項擬議修正案超越行政長官會同行政會議作出上述法律公告所行使的制定附屬法例的權力。行政長官會同行政會議只是擬暫時紓緩外來工人包括外籍家庭傭工的僱主在某一段有限時間的負擔；鑑於僱員再培訓基金目前的結存狀況，此舉是有充分理由支持的。建議修訂的目的遠不止於此，其目的在於無限期完全免向外籍家庭傭工的僱主徵款，此舉與《僱員再培訓條例》本身有抵觸。

(b) 該條例(第 423 章)設立了機制，使行政長官會同行政會議可批准某項輸入僱員計劃；凡屬計劃範圍內的僱主均須向入境事務處處長申請僱用外地工人的許可。僱主取得許可後，必須爲所僱工人繳付徵款，徵款的數額已在該

條例附表 3 指明。該條例並無註明可同時訂出多個不同數額的徵款。第 423 章第 14(2)條提到"附表 3 所指明的款額"，第 423 章第 31(1)條則只賦權行政長官會同行政會議修訂附表 3，即修訂"爲配合第 14(2)條的施行而指明的徵款**數額**"。第 31(1)條並未授予行政長官會同行政會議權力，使其可就不同類別的外來僱員或根據第 14(3)條所批准的不同計劃，指明不同的徵款數額。如要這樣做，就必須修訂條例。

《立法會議事規則》第 31(1)條

7. 《立法會議事規則》第 31(1)條訂明，立法會主席或全體委員會主席如認爲任何議案或修正案的目的或效力可導致動用香港任何部分政府收入或其他公帑，或須由該等收入或公帑負擔，則議員只可在行政長官書面同意該提案的情況下，提出該議案或修正案。

8. 政府當局堅信，修訂《2008 年第 244 號法律公告》第 2 條以指明就外籍家庭傭工徵收的徵款數額爲 0 元，而就其他外來工人徵收的徵款數額爲 400 元的擬議修正案，具有對公帑造成負擔的效力，因此受議事規則第 31(1)條規限，不可在未得到行政長官的書面同意的情況下提出。

9. 爲便於討論，可把爭議事項細分爲兩部分－

(a) 有關的修正案是否關乎"香港任何部分政府收入或其他公帑"？

(b) 若然是的話，則該項修正案的目的或效力是否可能導致動用上述款項，或須由上述款項負擔？

政府當局對爭議事項(a)部分(即第 9(a)段)的意見：

10. 政府當局認爲，僱員再培訓基金(下稱"基金")的資產明顯屬

"政府收入或**其他公帑**"的概括描述範圍。

11. 我們想指出，基金目前歸屬於僱員再培訓局(下稱"再培訓局")，而再培訓局須向立法會負責(第 423 章第 13 條)。

12. 此外，我們亦想指出基金本身 –

(a) 部分財政來源是由政府提供(自 1992 年再培訓局成立以來共提供 40 億元，包括在 2001-02 年度至 2007-08 年度期間每年約 4 億元)(第 423 章第 6(3)(e)條)，及

(b) 包括先由一名公職人員(入境事務處處長)收取然後轉交予基金的徵款(第 423 章第 14(1)、15(1)及 16 條)，及

(c) 可由審計署署長審核(第 423 章第 12 條)，及

(d) 如不再需要使用其資產，該等資產屆時可轉入政府一般收入(第 423 章第 27(2)條)。

13. 我們已研究《公共財政條例》(第 2 章)(主要處理立法會核准政府開支的程序和管制人員的責任)和《核數條例》(第 122 章)(涵蓋審計署署長的職務)內的各項定義。該等適用於該兩條法例條文的定義，本意並非適用於一般情況，遑論用以規管《立法會議事規則》第 31(1)條的涵義。

14. 把基金及其資產視作不屬"政府收入或**其他公帑**"的廣闊涵意，理據並不足夠。簡而言之，再培訓局設立的目的是爲了推行一項公共政策，而基金正是爲了促進這項公共目的而設立。不論是來自僱主的法定徵費，還是來自政府一般收入的資助金，基金的資產只能視爲公帑(而非私人財產)，雖然該等資產基於法定用途目前歸屬於再培訓局。正是基於這個理由，第 423 章才會有第 12、13、14(1)、15、16 及 27(2)條等條文。

政府當局對爭議事項(b)部分(即第 9(b)段)的意見：

15. 議事規則第 31(1)條旨在反映由來已久的議會尊重行政機關財務主導權的議事原則。

16. 修訂《2008 年第 244 號法律公告》第 2 條以指明就外籍家庭傭工徵收的徵款數額爲 0 元，而就其他外來工人徵收的徵款數額爲 400 元的擬議修正案，就外籍家庭傭工而言，會令其至關重要的時間要素消失或延長；把原來只在盈餘期間對外籍家庭傭工僱主實行的短期紓緩措施，一變而成爲永久或長期的紓緩措施。行政長官會同行政會議決定把法定徵款減至零而爲期僅五年是有特別原因的。但上述做法會推翻行政長官會同行政會議的決定，把法定徵款的紓緩措施，就外籍家庭傭工而言，永久或繼續延用下去。這正正是一種沒有尊重行政機關財務主導權的越界行爲。此舉干預行政長官的憲制責任，也就是他須確保基金在任何時間都足以讓再培訓局能履行其法定職務。

17. 修正案的"目的或效力"同樣顯而易見。修訂《2008 年第 244 號法律公告》第 2 條以指明就外籍家庭傭工徵收的徵款數額爲 0 元，而就其他外來工人徵收的徵款數額爲 400 元，會令基金在 2013 年 8 月 1 日起失去第 423 章第 14 條所定立的一項重要收入來源。第 14 條(與該法律公告一併理解)現時規定由 2013 年 8 月 1 日起，外籍家庭傭工僱主須繳付並由基金收取每月 400 元的徵款。擬議修正案的目的或效力是由 2013 年 8 月 1 日起，"動用"(即取消)該項就外籍家庭傭工徵收的徵款。該項修訂勢必將會減少該基金以後的收入，以致其資產也因而減少。

18. 除上文所述修正案的目的或效力是什麼外，我們另外也要指出一點，就是修正案的目的或至少其效力可(第 31(1)條用語)導致有關開支須由政府收入負擔。政府當局極有可能須向基金提供未有預計的資助金，以填補因再無徵款而損失的收入來源。

先前的裁決

19. 我們檢討過先前立法會主席根據議事規則第 31(1)條所作的裁決。我們認爲，立法會主席在 1998 年就肺塵埃沉着病補償基金作出的裁決，對議事規則第 31(1)條所指"政府收入或其他公帑"的看法太過狹窄。上述詞語顯然比"政府收入"所涵蓋的範圍更廣。此外，如把基金內的資產視爲"公帑"的一部分，只不過它是撥作用於特定的公共目的(此處用作提供職業技能的培訓，以配合轉變中的就業市場情況)，那麼，指稱法定基金是自成一類的理據，並不充分。

20. 此外，正如第 423 章本意所屬(第 6(3)(e)條)，亦正如近年的情況所見，若因失去來自徵款的收入而導致基金出現結存不足，政府就必須填補這不足之額，以實施其勞工及培訓政策中的重要一環。雖然基金目前累積有相當數額的盈餘，但如果在 2013 年以後就外籍家庭傭工採取零徵款的做法，則政府很有可能需要恢復提供資助金，從政府一般收入調撥款項注入基金，使能繼續履行第 423 章的目的(立法會議員亦對此表示憂慮)。主席在就擬議修正案的目的及效力得出其意見前，理應考慮這個因素。屆時，不僅需要動用公帑(因再無徵款而損失收入所致)，更須由政府一般收入負擔，以填補這項損失。

21. 此外，我們認爲無論如何，1998 年裁決的內容與目前的個案，可作如下區別。對《2008 年第 244 號法律公告》作出的擬議修正案，其目的或效力會減少基金的收入，以致其資產也因而減少。因此，修正案會"動用公帑"。另一方面，修正案對再培訓局運用基金的方式，不會造成影響。1998 年修正案的不同之處，在於因提高補償水平而影響到法定基金的支出(一個假設的對等情況可能是建議提高再培訓局應發放的培訓津貼)。政府收入並無絲毫注入肺塵埃沉着病補償基金中。政府除了在 1980 年作出初步貸款融通(已於 1983 年悉數清還)外，過去並沒有對肺塵埃沉着病補償基金提供任何財政資助。

22. 在 2001 年就《公共收入保障(收入)令》所作裁決確認了一個

共識，即根據第 1 章第 34 條作出的修正案須受議事規則第 31 條約束。該項裁決亦確認議事規則第 31(1)條適用於"根據法定權力可收取的收入"(我們認爲目前的個案正是這個情況)。除此以外，此兩個個案都是可以區別的。該項裁決關乎一項爲增加臨時收入提供唯一權力來源的命令。就目前的個案而言，爲基金提供資金的徵款是一條已獲通過的條例的內容(第 423 章第 14 條)，而有關徵款是根據法定權力收取的。公告只是關乎訂定未來五年的徵款金額。

勞工及福利局

律政司

2008 年 12 月 2 日

Member's Proposed Amendments to the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008

Administration's Submission to the President of the Legislative Council

This submission addresses the following question:

Is it lawful for a Member of the Legislative Council ("LegCo") to propose a resolution to amend the Employees Retraining Ordinance (Amendment of Schedule 3) (No. 2) Notice 2008, L.N. 244 of 2008, by amending section 2 to specify the amount of Employees Retraining Levy ("the levy") imposed in relation to foreign domestic helpers to be $0 and the amount of levy imposed in relation to other imported workers to be $400?

2. The Administration is firmly of the view that the answer to the question is "no" for the reasons that follow.

Common grounds

3. For present purposes, we assume the following propositions not to be in dispute:

(a) that L.N. 244 is "subsidiary legislation" within the meaning of section 34(1) of the Interpretation and General Clauses Ordinance (Cap. 1);

(b) that (subject to paragraph 3(c) below) the power of amendment conferred by section 34(2) upon LegCo is as broad as the power of the Chief Executive in Council under section 31(1) of the Employees Retraining Ordinance (Cap. 423) to fix the amount of the levy;

(c) that power, so far as amendment by LegCo is concerned, is limited by Rule 31(1) of the Rules of Procedure of LegCo;

(d) that upon the tabling of any amending resolution, the President of LegCo is bound to consider and to form an opinion on what is essentially a matter of law, namely whether its "object or effect".... "may be to dispose or charge any part of the revenue or other public moneys of Hong Kong,"; and

(e) that if the President forms that opinion, it will follow that no amendment can be lawfully proposed by a member without the written consent of the Chief Executive.

The issues

4. The current issue to be addressed is, therefore, whether an amendment to section 2 of L.N. 244 to specify the amount of levy imposed in relation to foreign domestic helpers to be $0 and the amount of levy imposed in relation to other imported workers to be $400 is –

   (a) an amendment "consistent with the power to make" L.N. 244 of 2008 within the meaning of section 34(2) of Cap. 1; and/or

   (b) an amendment "the object or effect of which may be to dispose of or charge any part of the revenue or other public moneys of Hong Kong" within the meaning of the words of Rule 31(1).

Ultra vires and section 34(2) of Cap. 1

5. Section 34(2) of Cap. 1 empowers the LegCo to amend subsidiary legislation tabled before it "in any manner whatsoever consistent with the power to make such subsidiary legislation".

6. The proposed amendment to section 2 of L.N. 244 of 2008 to specify the amount of levy imposed in relation to foreign domestic helpers to be $0 and the amount of levy imposed in relation to other imported workers to be $400 is objectionable because it is ultra vires section 31(1) of Cap. 423, and hence is not "consistent with" the power to make the subsidiary legislation L.N. 244 of 2008 and goes beyond the power conferred by section 34(2) of Cap. 1 in the following way –

   (a) The proposed amendment exceeds the power that the Chief Executive in Council was exercising in making subsidiary legislation by the aforesaid L.N. He merely sought to give temporary relief to employers of imported workers including foreign domestic helpers for a limited time, that being justified by the current balance of the Employees Retraining Fund. The suggested amendment goes far further. It would seek to dispense altogether with the need to impose a levy on employers of foreign domestic helpers for an indefinite period, contrary to the Ordinance itself.

   (b) The Ordinance, Cap. 423, establishes a framework under which the Chief Executive in Council may approve a labour importation scheme which requires employers of workers covered by that scheme to apply to the Director of Immigration for permission to engage workers from abroad and, having obtained that permission, to pay a

levy in respect of any such worker. The amount of the levy is specified in Schedule 3 to the Ordinance. There is nothing in Cap. 423 indicating that differential levies may be set. Section 14(2) of Cap. 423 refers to the "sum specified in Schedule 3" and section 31(1) of Cap. 423 only empowers the Chief Executive in Council to amend Schedule 3, i.e. "the amount of levy specified for the purposes of section 14(2)". It does not empower the Chief Executive in Council to specify different sums in relation to different classes of imported employees or in respect of different schemes approved under section 14(3). An amendment Ordinance would be required for this purpose.

Rule 31(1) of the Rules of Procedure of the Legislative Council

7. Rule 31(1) of the Rules of Procedure of the LegCo provides that a motion or amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall only be proposed by a Member if the Chief Executive consents in writing to the proposal.

8. The Administration is firmly of the view that the proposed amendment to section 2 of L.N. 244 of 2008 to specify the amount of levy imposed in relation to foreign domestic helpers to be $0 and the amount of levy imposed in relation to other imported workers to be $400 has charging effect and hence is caught by Rule 31(1). It may not be proposed without the written consent of the Chief Executive.

9. For the purpose of discussion, it is convenient to sub-divide that issue into two parts:

   (a) does the amendment relate to "any part of the revenue or other public moneys of Hong Kong"?

   (b) if so, may its object or effect be to dispose of or charge any part of that?

The Administration's submission on part (a) of the issue (viz. paragraph 9(a)):

10. It is submitted that the assets of the Employees Retraining Fund ("the Fund") plainly fall within the broad description of "revenue or **other public moneys**".

11. We note that the Fund is currently vested in the Employees Retraining Board ("the Board") which in turn is accountable to LegCo (Cap. 423, section 13).

12. We also note that the Fund itself -

(a) is partly sourced from moneys provided by Government (a total of $4 billion since the establishment of the Board in 1992 including some $400 million paid annually between 2001-02 and 2007-08) (Cap 423, section 6(3)(e)), and

(b) includes the levy collected by a public officer (the Director of Immigration) and remitted to the Fund (Cap. 423, sections 14(1), 15(1) and 16), and

(c) is subject to examination by the Director of Audit (Cap 423, section 12), and

(d) if and when its assets are no longer required, the assets may be transferred to general revenue (Cap. 423, section 27(2)).

13. We have examined the definitions in the Public Finance Ordinance (Cap. 2) (dealing primarily with the process of LegCo's approval of Government expenditure and the responsibility of controlling officers) and those in the Audit Ordinance (Cap. 122) (which covers the work of the Director of Audit). Those definitions, applicable in the context of those particular statutory provisions, do not purport to be of general application, still less to govern the meaning of LegCo's Rule 31(1).

14. There is no good reason for treating the Fund and its assets as beyond the wide meaning of the words "revenue or **other public moneys**". Put simply, the Board is there to carry out a facet of public policy. The Fund is there to facilitate that public purpose. Whether sourced from employers by way of the statutory levy, or by subvention out of general revenue, the assets of the Fund can only be regarded as public (not private) moneys, albeit presently vested in the Board for statutory purposes. It is surely for that reason that Cap. 423 contains the provisions of sections 12, 13, 14(1), 15, 16 and 27(2).

The Administration's submission on part (b) of the issue (viz. paragraph 9(b)):

15. The purpose of Rule 31(1) is to reflect the long-established Parliamentary principle of respecting the Executive's financial initiative,

16. The proposed amendment to section 2 of L.N. 244 of 2008 to specify the amount of levy imposed in relation to foreign domestic helpers to be $0 and the amount of levy imposed in relation to other imported workers to be $400 removes or extends the all-important temporal element in relation to foreign domestic helpers. It turns what would have been short-term relief for employers of foreign domestic helpers during the period of surplus into permanent or long-term relief. It would override the decision of the Chief Executive in Council that there were special reasons to justify reducing the statutory levy to zero for five years only, and would perpetuate or extend relief from the statutory levy in relation to foreign domestic helpers. This is exactly the kind of infringement that fails to respect the Executive's financial initiative. It interferes with the Chief Executive's constitutional responsibility to ensure the Fund is at all time adequate to ensure the Board can fulfil its statutory responsibilities.

17. The "object or effect" of the amendment is equally plain. By amending section 2 of L.N. 244 of 2008 to specify the amount of levy imposed in relation to foreign domestic helpers to be $0 and the amount of levy imposed in relation to other imported workers to be $400, the Fund would be deprived after 1 August 2013 of an important source of its income as enacted by section 14 of Cap. 423. That section, read with the L.N., presently provides for a levy payable by employers of foreign domestic helpers and to be received by the Fund at the monthly rate of $400 from 1 August 2013. The object or effect of the proposed amendment is to "dispose of" (i.e. get rid of) that levy in relation to foreign domestic helpers as from 1 August 2013. It would thereafter inexorably reduce the income of the Fund, and therefore the assets of the Fund.

18. Quite apart from what the object or the effect of the amendment is, we would also make the point that its object or at least its effect may be (the words of Rule 31(1)) to charge the revenue in the future in the all too likely event that it becomes necessary for unforeseen subventions to top up the Fund to make good the loss of the revenue stream from the levy.

Previous rulings

19. We have reviewed previous rulings of the President under Rule 31(1). We respectfully submit that in the 1998 ruling *re* the Pneumoconiosis Compensation Fund, the President took far too narrow a view of the meaning of "revenues or other public moneys" in Rule 31(1). It is clearly a broader term than "revenue of Government". Furthermore, to refer to a "statutory fund" as *sui generis* cannot be justified if it can be seen that the assets in the fund are to be treated as part of "public moneys", although set

aside for specific public purposes (here to provide training in vocational skills to meet changing employment market conditions).

20. Quite apart from that, as Cap. 423 contemplates (section 6(3)(e)) and as history has shown in recent years, the Government would be bound to make up any deficit in the Fund available to implement this important element of its employment and training policies caused by loss of income from the levy. Although there is currently a substantial surplus that has built up in the Fund, it is all too likely (and LegCo Members have shown their anxiety on this account) that a zero levy post-2013 in relation to foreign domestic helpers would necessitate reinstatement of government subventions to the Fund from general revenue if the purposes of Cap. 423 are thereafter to be fulfilled. The President ought properly to take account of this consideration in forming his opinion of the object and effect of the proposed amendment. Public moneys will not only be disposed of (by loss of the income from the levy), but the general revenue will be charged to make good that loss.

21. In addition, the subject-matter of the 1998 ruling is, we submit, anyhow distinguishable in the following way. The object or effect of the amendment contemplated to L.N. 244 of 2008 would reduce the income to and therefore the assets of the Fund. That is why it would "dispose of public moneys". On the other hand, it would not affect how the Fund might be disbursed by the Board. The 1998 amendment was different for it affected out-goings from the statutory fund by raising compensation levels (the imaginary equivalent here might be a proposal to raise training allowances payable by the Board). Nor was any Government revenue paid into the Pneumoconiosis Compensation Fund. The Government had not given any funding support to the Pneumoconiosis Compensation Fund in the past other than the initial loan facility in 1980 which had already been repaid in full in 1983.

22. The 2001 ruling on the Public Revenue Protection (Revenue) Order confirms that it is common ground that an amendment under section 34 of Cap. 1 falls within the constraints of Rule 31. It also confirms that Rule 31(1) applies to "revenue which may be collected under statutory authority" (which we would suggest is exactly the case here). It is otherwise distinguishable. It was concerned with an order that was the sole source of authority for raising temporary revenue. In the present case, the levy sourcing the Fund is already the subject of an enacted Ordinance (Cap. 423, section 14) and is collected under statutory authority. The Notice is only concerned with fixing its rate over the next five years.

Labour and Welfare Bureau
Department of Justice
2 December 2008