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DOC ID HKG907322/4+
OUR REF PPY/SHL PMF-070490
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Clerk to Bills Committee
Legislative Council Secretarial
3/F, Citibank Tower
3 Garden Road
Central, Hong Kong

25 September 2009

Dear Sir

Hong Kong Minimum Wage Bill (*the Bill*)

We are pleased to enclose Freshfields Bruckhaus Deringer submission in relation to the Bill.

Our submission focuses on matters that would be of concern to our clients generally, namely international businesses in a diverse range of industries, including banking and financial services, transport and logistics and the entertainment and leisure industry.

Due to standing commitments, we regret that we will not be able to attend the Bills Committee hearing on 7 October 2009. However, please do not hesitate to contact Som Leung of our office if we can be of assistance in the development of the Bill.

Yours sincerely,

Freshfields Bruckhaus Deringer

25 SEPTEMBER 2009

SUBMISSION TO BILLS COMMITTEE ON MINIMUM WAGE BILL

FRESHFIELDS BRUCKHAUS DERINGER

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1. EXECUTIVE SUMMARY

The Bill is focused on setting and enforcing a statutory minimum wage (***SMW***) for Hong Kong employees. Our recommendations and comments intend to assist the Legislative Council achieve this without undermining to Hong Kong's dynamic workplace culture and introducing unnecessary compliance burdens.

Recommendation Reference #	***Recommendation***
#1	To the extent the Legislative Council seeks guidance from foreign laws, it should be cautious about importing principles from working hours law into the Bill. Working hours legislation is aimed at employee health and safety, whereas the Bill is aimed at setting and enforcing a SMW.
#2 (Alternative A)	The recordkeeping obligations referred to in section 20 of the Bill could be phrased to exclude employees who earn more than the "24/7 SMW Rate" during a wage period. For example, if the SMW were $30, the "24/7 SMW Rate" would be: 24/7 SMW Weekly Rate = $30 x 24 hrs x 7 days = $5,040 24/7 SMW Monthly Rate = $5,040 x 52 wks ÷ 12 cal mths = $21,840.
#2 (Alternative B)	The recordkeeping obligations referred to in section 20 of the Bill could be phrased to oblige employers to keep in respect of each employee "sufficient records" to establish that it is remunerating the employee at a rate at least equal to the SMW in respect of each wage period.
#3	The Legislative Council should be aware that the way in which the Bill is drafted changes the common law of Hong Kong and it is in conflict with certain provisions of the Employment Ordinance (CAP 57). Under current Hong Kong law, wages are due/payable under a contract of employment, and not pursuant to statute. The Bill is phrased in a way which suggests that wages are due under the legislation itself.
#4	An attempt to define "work" could be problematic due to the dynamic nature of modern Hong Kong employment and it may be difficult to accommodate the customs and practices across different industries. Usually, what amounts to remunerable services would be obvious based on the nature of the individual's employment and their contract of employment..
#5	There are broader practical implications if travelling time to a place of employment outside of Hong Kong (in the sense described in section 3(2)(b) of the Bill) is regarded as service for which an employee must be remunerated. In particular, this can adversely impact on the availability of development opportunities for junior staff members. Further, it may cause employers to inadvertently breach the restrictions/requirements in the Employment Ordinance relating to "work" on "rest days" and "statutory holidays".

Recommendation Reference #	*Recommendation*
#6	In terms of refining its definition of "hours worked", we respectfully suggest that the Legislative Council note that minimum wage laws in the United Kingdom and Australia do not necessarily take "travel time" into account as "work time" for the purposes of determining whether an individual has been paid the minimum wage in respect of their work.

2. THE BILL IS AIMED AT SETTING AND ENFORCING THE SMW

Our clients are concerned that the enactment of this Bill should not adversely impact upon Hong Kong's dynamic workplace culture and discourage employees from taking an entrepreneurial approach to their work. Therefore, in reviewing this piece of proposed legislation, we respectfully suggest that the Legislative Council be mindful that the aim of the Bill is to ensure employees receive the SMW for their services, which is an economic and wealth distribution concern. The Bill should not seek to regulate hours of work, which is a health and safety issue.[1] Despite popular debate on the subject, Hong Kong law is not silent as to working hours,[2] but it is beyond the scope of this submission to comment on these.

As is the custom of Hong Kong courts and legislatures, our submission refers to experience in England and Australia. To the extent that the Legislative Council wishes to use overseas experience for guidance, it should be mindful about importing into the Bill principles from working hours laws, rather than minimum wage laws. Working hours laws tend to view all time as either working time or rest time, because its focus is to control working hours from a health and safety perspective.[3] What constitutes remunerable service requires different considerations to be taken into account.

Recommendation #1

To the extent the Legislative Council seeks guidance from foreign laws, it should be cautious about importing principles from working hours law into the Bill. Working hours legislation is aimed at employee health and safety, whereas the Bill is aimed at setting and enforcing a SMW.

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1 Cf *Working Time Regulations 1998* (UK) is drafted pursuant to the *Working Time Directive* of the European Union (Council Directive 93/104/EC of 23 November 2003) which is intended to safeguard health and safety.

2 Safe working hours is addressed as part of a common law duty of care: *Johnstone v Bloomsbury Health Authority* [1992] QB 33. It is also covered by the employer's general duty under the Occupational Safety and Health Ordinance (CAP 509).

The Employment Ordinance also deals with working hours by placing limitations on work during "rest days" (section 19) and "statutory holidays" (section 39).

3 Cf *Leung Ka Lau and Ors v the Hospital Authority* [2008] HKCA 17, where Le Pichon JA considered whether "the concepts of 'work' and 'rest day' are mutually exclusive" under Part IV of the Employment Ordinance.

We hope that our comments will assist the Legislative Council to achieve its objective of setting and enforcing a SMW for Hong Kong employees whilst also not generating compliance burdens that undermine Hong Kong's flexible and modern labour market.

3. RECORDKEEPING OBLIGATION TO AFFECT ALL EMPLOYERS

The Bill as presently drafted will impose additional recordkeeping obligations on *all* employers to record "hours worked" by all their employees. This is effected by the amendment to section 49A of the Employment Ordinance, so that employers need to keep a record of "hours worked" by an employee along with all the usual records of annual leave and wage payments for the past twelve months. Breaching the recordkeeping rules is a strict liability offence under section 63D of the Employment Ordinance. There is no defence of "reasonable excuse".

The recordkeeping requirement is broader than is necessary for the enforcement of the SMW. As the Law Society correctly notes in paragraph 8 of their submission, the SMW is irrelevant for certain employees, and that the recordkeeping obligation should not be applicable to employees who earn an amount equal to or above the "24/7 SMW Rate". This is the maximum an individual can earn under the SMW as presently formulated under the Bill. By way of example, if the SMW were $30:

24/7 SMW Weekly Rate	= $30 x 24 hrs x 7 days = $5,040
24/7 SMW Monthly Rate	= $5,040 x 52 wks ÷ 12 cal mths = $21,840.

Recommendation #2 (Alternative A)

The recordkeeping obligations referred to in section 20 of the Bill could be phrased to exclude employees who earn more than the "24/7 SMW Rate" during a wage period.

Hong Kong's employment laws tend to apply the same rights to all employees. For this reason, we propose an alternative to the Legislative Council which would not result in different classes of employees being treated differently, and which would not result in more onerous regulation than is necessary to enforce the SMW.

Recommendation #2 (Alternative B)

The recordkeeping obligations referred to in section 20 of the Bill could be phrased to oblige employers to keep in respect of each employee "sufficient records" to establish that it is remunerating the employee at a rate at least equal to the SMW in respect of each wage period.

The "sufficiency of records" formulation is derived from regulation 38 of the *National Minimum Wage Regulations 1999* (UK). This flexible formulation is in keeping with the principle that the Bill is not about regulating hours of work, rather it is about ensuring a "fair day's pay for a fair day's work".

4. WAGES ARE DUE UNDER CONTRACT AND NOT THE ORDINANCE

Sections 7(1) and (2) of the Bill identifies that "wages" are payable in employment for each "hour worked" as defined in section 3 . In effect, these provisions make wages (of not less than the SMW) payable by operation of the Minimum Wage Ordinance. This departs significantly from existing employment law principles in Hong Kong and other parts of the common law world.

Under Hong Kong law, "wages are due under contract and not under the [Employment] Ordinance."[4] This is also reflected in the drafting of sections 22 and 32 of the Employment Ordinance, which refer to "wages due/payable under a contract of employment". The drafting of sections 7(1) and (2) of the Bill override this principle.

More recently, Le Pichon JA of the Court of Appeal noted that what constitutes "work" is a fact sensitive matter and it would depend on what the employee was employed to do.[5] The common law requires the relevant service or "work" to conform with the contract of employment for wages to be due, rather than with a general standard set by statute.

The United Kingdom (*National Minimum Wage Act 1998* (UK) and *National Minimum Wage Regulations 1999* (UK)) and Australia (*Fair Work Act 2009* (Cth)) do not approach the setting of minimum wages in the way contemplated by the Bill, and the approach adopted in those statutes are probably motivated, at least in part, by wishing to preserve some important common law principles about when wages are earned, for example, the "no work no pay" principle.[6] Having said that, we also anticipate that the approaches in those statutes may not be readily adaptable in Hong Kong.[7]

Dislodging these common law principles could have unintended consequences for the development of employment law in Hong Kong.

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[4] *Wong Tak Cheung and Ors v Star Fair Electronics Company Ltd* [1985] 2 HKC 92, Nazareth DJ; and cited with approval in *Laing Agnes and Ors v Lisbeth Enterprises Ltd* [2004] HCLA 133/2003, Cheung J.

[5] *Leung Ka Lau and Ors v the Hospital Authority* [2008] HKCA 17.

[6] Eg. In *Miles v Wakefield Metropolitan District Council* [1987] 2 WLR 795, the House of Lords dealt with a case where an employee imposed a partial work ban. The House of Lords held that in certain circumstances, an employer can refuse the offer of partial performance by an employee and decline to pay wages. "Partial performance" cases tend to arise when employees engage in industrial protests that stop short of a full strike.

[7] The legislation in the United Kingdom and Australia is also informed by their unique political and historical contexts. The United Kingdom is required to comply with its obligations under EU regulatory directives and Australia is transitioning out of over 100 years of labour regulation through a distinct model of federal and state labour arbitration awards.

Recommendation #3

The Legislative Council should be aware that the way in which the Bill is drafted changes the common law of Hong Kong and it is in conflict with certain provisions of the Employment Ordinance. Under current Hong Kong law, wages are due/payable under a contract of employment, and not pursuant to statute. The Bill is phrased in a way which suggests that wages are due under the legislation itself.

5. DEFINITION OF "HOURS WORKED"

Our discussion in section 4 highlighted that what constitutes "work" depends on the contract. Our submissions below respectfully ask the Legislative Council to consider whether a definition of "hours worked" is necessary to achieve the objective of setting and enforcing a SMW.

5.1 Initial comments on definition of "hours worked"

In Hong Kong's high technology and modern labour market, "work" can be delivered in many forms. Adopting a static definition of "hours worked" in the minimum wage legislation may provoke a range of criticism, which distracts from the underlying objective of setting and enforcing a SMW.

These criticisms of section 3 of the Bill include: is mere attendance at a workplace sufficient to constitute an "hour worked"? does the relevant "work" or "travel" need to be done at the request of the employer for it to constitute "work"? what of "work" performed via remote log-in or mobile telephone?

Again, what constitutes "work" (or "services for which an employee is remunerated") depends on the terms of the contract of employment. An attempt to define "work" for the purposes of the Bill may cause the statute to unnecessarily conflict with the contract of employment. In the majority of cases, what constitutes remunerable service is apparent from the nature of an employee's role and the customs and practice within the relevant industry.

Recommendation #4

An attempt to define "work" could be problematic due to the dynamic nature of modern Hong Kong employment and it may be difficult to accommodate the customs and practices across different industries. Usually, what amounts to remunerable services would be obvious based on the nature of the individual's employment and their contract of employment.

We do, however, agree that a meal break should be excluded from the period of remunerated work in the circumstances set out in Section 3(2)(a) of the Bill. This provides useful clarification for employers and employees by addressing a potential area of disagreement.

5.2 Time spent travelling to a place of employment outside of Hong Kong

Section 3(2)(b) purports to include "travel to a place of employment outside of Hong Kong" within the concept of "hours worked" in certain circumstances. Leaving aside concerns relating to the scope of this drafting, we consider that the principle espoused in this provision has deleterious implications for international businesses in Hong Kong. Many international businesses choose Hong Kong to be their headquarters for the Asia Pacific region because of the convenience of travelling between key cities in the region, and its flexible employment laws.

There are two practical issues for many international businesses:

(**Junior staff development**) First, the inclusion of time spent travelling to an overseas workplace (in the sense referred to in section 3(2)(b) of the Bill) as "hours worked" will impact disproportionately on junior staff and reduce their opportunities to develop and train through international travel.

(**Compliance with Employment Ordinance**) Second, if time spent travelling to an overseas workplace (in the sense referred to in section 3(2)(b) of the Bill) were to constitute "hours worked", then travel on rest days or statutory holidays would amount to "work" and cause an employer to breach the Employment Ordinance. For example, travel on a rest day could only occur if it was necessitated by "an unforeseen emergency" (section 19), and travel on a statutory holiday would require the employer to grant an alternative holiday (section 39). To avoid breaching this, an employer may be required to have the employee fly out of Hong Kong on a Friday or Saturday (instead of a Sunday evening) for a Monday morning meeting.

To take this one step further, if hypothetically, an employee were to travel on a Saturday for a Monday meeting outside Hong Kong, an employer might not be entitled to regard the Sunday during which that employee is outside of Hong Kong as a "rest day" for the purposes of Part IV of the Employment Ordinance.[8]

In our experience, employers tend to consider these matters taking factors such as business cost and the employee's welfare into account. This is usually dealt with either on an ad hoc basis or as part of their internal policies, and they regard it as an employee welfare issue, not a remuneration issue.

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[8] This is analogous to the issues considered by the Court of Appeal in *Leung Ka Lau and Ors v the Hospital Authority* [2008] HKCA 17.

Recommendation #5

There are broader practical implications if travelling time to a place of employment outside of Hong Kong (in the sense described in section 3(2)(b) of the Bill) is regarded as service for which an employee must be remunerated. In particular, this can adversely impact on the availability of development opportunities for junior staff members. Further, it may cause employers to inadvertently breach the restrictions/requirements in the Employment Ordinance relating to "work" on "rest days" and "statutory holidays".

Whether time spent travelling to a workplace outside of Hong Kong constitutes "service" for which an employee should be remunerated in wages depends on the contract of employment. In our estimation, it depends on its express and implied terms; and the implied terms may be derived from the custom and practice in the industry.

For example, a person in the transport and logistics industry who on a particular occasion assists in unpacking a truck as it transports goods out of Hong Kong would regard the travel from one point to another, even as a passenger, as service for which he must be remunerated in wages.

Beyond considering the terms of the contract, the common law does not provide further guidance on this issue directly. The common law does, however, require the employer to reimburse the employee for the reasonable costs incurred in the course of travel.

For comparative purposes, we note that under the *National Minimum Wage Regulations 1999* (UK), travelling time for a salaried clerical/office worker would typically only be regarded as time worked if that travel occurred during their ordinary hours of work. By contrast, in Australia, key industrial awards, other than those which operate in the transport and logistics industry,[9] separate "travel time" from an employee's ordinary hours of work. The principal awards surveyed provide for pay during travel time at ordinary hourly rates but cap this pay at 8 or 12 hours within any 24 hour period.[10]

Recommendation #6

In terms of refining its definition of "hours worked", we respectfully suggest that the Legislative Council note that minimum wage laws in the United Kingdom and Australia do not necessarily take "travel time" into account as "work time" for the purposes of determining whether an individual has been paid the minimum wage in respect of their work.

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[9] The transport and logistics industry is excluded because the industry necessarily regards travel as part of working time.

[10] "Awards" in Australia are minimum conditions of employment that apply to a particular industry. We surveyed the *Metal, Engineering and Associated Industries Award 1998* (clause 5.9.4(b)(iii), which is regarded as a standard Australian award, and the *Clerical and Administrative Employees (Victoria) Award 1999* (clause 19.6.4). The latter award is chosen because it regulates white collar employees.