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Paper for the House Committee

**Report of Subcommittee on Business Registration Ordinance
(Amendment of Schedule 2) Order 2013**

Purpose

This paper reports on the deliberations of the Subcommittee on Business Registration Ordinance (Amendment of Schedule 2) Order 2013.

Background

2. The Protection of Wages on Insolvency Fund ("PWIF") was set up in 1985 to provide timely relief in the form of ex-gratia payment to employees of insolvent employers. Employees who are owed wages, wages in lieu of notice, severance payment ("SP") and/or pay for untaken annual leave and untaken statutory holidays by their insolvent employers may apply for ex-gratia payment from PWIF. Under section 16 of the Protection of Wages on Insolvency Ordinance (Cap. 380) ("PWIO"), the maximum amount that an employee may receive from PWIF is \$289,000, comprising four months' wages up to \$36,000, one month's wages in lieu of notice up to \$22,500, SP up to \$50,000 plus 50% of the remainder of the entitlement¹, and a maximum of \$10,500 in respect of pay for untaken annual leave and untaken statutory holidays.

3. Currently, PWIF is mainly financed by a levy at the rate of \$450 per annum on each BRC issued under the Business Registration Ordinance (Cap. 310) ("BRO"). Other sources of income for PWIF include money recovered from the remaining assets of insolvent

¹ On the basis of the maximum amount of severance payment under the Employment Ordinance at \$390,000, the cap of ex gratia payment payable from the PWIF for SP is \$220,000.

employers through subrogation as well as bank deposit returns. The Labour Department ("LD") is responsible for processing the applications for and the operation of PWIF. The Protection of Wages on Insolvency Fund Board ("the PWIF Board"), established under PWIO, has the statutory functions of administering PWIF and making recommendations to the Chief Executive with respect to the rate of BRC levy.

4. When PWIF was set up in 1985, the BRC levy rate was set at \$100 per annum. Since then, the levy rate has been revised three times. The first revision took place in July 1991 when the annual levy rate was raised from \$100 to \$250. In May 2002, the levy was further increased from \$250 to \$600 per annum as the upsurge in claims for ex-gratia payment after the Asian financial crisis had led to rapid depletion of PWIF. In March 2008, the levy was reduced from \$600 to the current rate of \$450 per annum.

The Business Registration Ordinance (Amendment of Schedule 2) Order 2013

5. The Business Registration Ordinance (Amendment of Schedule 2) Order 2013 (" the Order") amends item 3 in the Table in Schedule 2 to BRO to revise the levy rates payable in relation to the registration of a business and a branch of a business under BRO. The levy will be reduced from \$1,350 to \$750 if an election is made for a three-year certificate, and from \$450 to \$250 if there is no such election.

The Subcommittee

6. At the meeting of the House Committee on 31 May 2013, members agreed that a subcommittee should be formed to study the Order. The membership list of the Subcommittee is in the **Appendix**.

7. Under the chairmanship of Hon WONG Ting-kwong, the Subcommittee held one meeting with the Administration.

Deliberations of the Subcommittee

Proposed amendment to the BRC levy rate

8. The Subcommittee notes that PWIF registered a surplus of \$536.5 million for the 2012-2013 financial year and an accumulative surplus

reaching \$3,287.2 million by the end of March 2013. According to the Administration, the financial position of PWIF has continued to improve. The PWIF Board together with LD has therefore reviewed the level of BRC levy. The PWIF Board proposed to reduce the levy rate from the current \$450 per annum to \$250 per annum. The proposed levy reduction was unanimously endorsed by the Labour Advisory Board ("LAB"). The Subcommittee also notes that the PWIF Board has proposed to reduce the levy rate after considering, apart from the financial position of the Fund, other relevant factors including the impact of the cyclical ups and downs of the economy on the applications and payouts of the Fund, PWIF as a safety net for employees affected by business closures and the impact of the implementation of the Protection of Wages on Insolvency (Amendment) Ordinance 2012 ("the Amendment Ordinance") on the Fund, which expands the scope of the Fund to cover pay for untaken annual leave and untaken statutory holidays.

9. Members have sought information as to whether a mechanism has been put in place for triggering reviews of the levy rate. The Administration has explained that the PWIF Board, together with LD, will monitor closely the financial position of PWIF to ensure that there is sufficient reserve. Apart from the amount of reserve, the number of applications and the amount of claims payment to be made will also be taken into account when assessing the financial position of PWIF. In April 2008, the PWIF Board, in discharging its statutory function of making recommendations on the rate of BRC levy, agreed on an objective mechanism for triggering its future reviews of the levy rate. In accordance with the mechanism, where the accumulated surplus falls below \$800 million by 20% or more for four consecutive quarters or where it exceeds \$1,200 million by 20% or more for four consecutive quarters, the PWIF Board will consider whether to review the rate of levy to recommend a levy increase or reduction.

10. In view of improved financial position of the Fund, members support or raise no objection to the proposed reduction of BRC levy rate. Some members have stressed that the BRC levy rate should be adjusted in accordance with the established review mechanism whereby the levy rate can be adjusted upwards or downwards if so justified.

Scope of coverage of PWIF

11. Some members are of the view that the current scope of PWIF is not adequate to protect the interests of employees. These members consider it unreasonable for those employees affected by the insolvency of their employers not being able to receive the full or higher amount of

wages in arrear and outstanding payment of other statutory entitlements as provided for under EO, i.e. wages in lieu of notice, SP, and pay for untaken statutory holidays and untaken annual leave. They have called on the Administration to review the scope of PWIF in view of its sound financial position, so as to accord the employees concerned with better coverage or the full statutory entitlements.

12. The Administration has explained that PWIF is set up to provide timely financial relief to employees affected by the insolvency of their employers, instead of seeking to recover all the outstanding wages and entitlements in arrears from insolvent employers in accordance with the employment contracts. The scope of coverage and the maximum amount of the ex-gratia payment for the outstanding wages and other statutory entitlements are clearly specified under PWIO, whereas employees can seek to recover all the wages in arrears and outstanding payment of statutory entitlement under EO through other established channels. The Administration takes the view that making ex gratia payment from PWIF in respect of wages in arrears owed to an applicant by his insolvent employer and recovery of outstanding wages owed to an employee from his employer are separate issues.

13. Members' attention is also drawn to the fact that consequent upon LD's vigorous effort in combating wage offences, wages applied by an applicant for PWIF in respect of services rendered to his insolvent employer will seldom exceed the prescribed limit of four months, or the payment ceiling of \$36,000. In 2011-2012, 75% and 99% of the applicants were paid ex-gratia payment from PWIF to fully cover their respective claims of outstanding wages and wages in lieu of notice respectively.

14. Some members share the view of the Administration that PWIF is a safety net for employees affected by business closures. As such, recovery of outstanding wages owed to employees from their employer should not be fully met by PWIF. These members consider that the Fund should adopt a prudent approach and strictly adhere to its objective in managing the Fund to ensure a comfortable level of accumulated reserve to effectively cope with justifiable needs of ex gratia payment from PWIF.

15. As regards the claims payment for SP from PWIF, the Administration has advised that employees of insolvent employers can receive ex-gratia payment from PWIF for SP of \$50,000 plus 50% of the remainder of the entitlement, where the SP entitlement should be calculated in accordance with the provisions in EO. Within the

prescribed limit of ex-gratia payment from the Fund, the claims for SP made by an employee affected owing to the insolvency of his employer will first be met by the employee's accrued benefits derived from employer's contribution under the Mandatory Provident Fund schemes, and the ex-gratia payment made from PWIF in respect of SP would cover the remainder of entitlement of the employee. The Administration has stressed that the protection of employees' entitlement for claims payment from PWIF will remain unchanged after the proposed reduction of the BRC levy rate.

16. On the review of the scope of PWIF, the Administration has stressed that the PWIF Board has previously undertaken to review the coverage of PWIF in respect of pay for untaken annual leave, pay for untaken statutory holidays and the payment ceiling of \$10,500 one year after implementation of the Amendment Ordinance which took effect on 29 June 2012. Having regard to members' views on a review of expanding the scope of the Fund to also provide employees affected by the insolvency of their employers with full amount of SP and raise the ceiling for claims payment, the Administration has advised that it will commence the review of the scope of PWIF, including the issues of concern raised by members, in the second half of 2013.

17. Noting that employees may need to present a winding-up or bankruptcy petition against their insolvent employer in order to recover debts owed by an insolvent employer, such as arrears of wages, pay for untaken annual leave and untaken statutory holidays, and SP, some members have expressed concern about the legal expenses on presenting such a petition. The Administration has advised that where employees need to present a winding-up or bankruptcy petition against their insolvent employer, it will usually be with the assistance of the Legal Aid Department. The Administration has further advised that by virtue of section 18 of PWIO, of the approved applications for PWIF in 2012, ex gratia payment was made to about 30% of applicants where presentation of a bankruptcy or winding-up petition was not required.

18. Some members have cautioned that the calculation of ex gratia payment for SP entitlement under EO is being challenged in an ongoing proceedings for judicial review, the Administration should take into account the likely impact on the increased payout from PWIF for SP in the event that the court rules in favour of the applicant. Some members have expressed concern that the Administration will use the judicial review proceedings as an excuse to delay the review of the scope of PWIF. The Administration has assured members that it will start the review of the scope of PWIF in the second half of 2013, irrespective of

whether or not the court has handed down judgment on the judicial review case.

19. In response to members' concern about the completion date of the review of the scope of PWIF, the Administration has advised that while it is not in a position to give an undertaking on the matter without consulting the PWIF Board and LAB, it will convey members' views to the PWIF Board and report the outcome of the review to the Panel on Manpower at an appropriate time.

Recommendation

20. The Subcommittee raises no objection and does not propose any amendment to the Order.

Advice sought

21. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
19 June 2013

**Subcommittee on Business Registration Ordinance
(Amendment of Schedule 2) Order 2013**

Membership list

Chairman	Hon WONG Ting-kwong, SBS, JP
Members	Hon LEE Cheuk-yan Hon LEUNG Yiu-chung Hon Tommy CHEUNG Yu-yan, SBS, JP Hon Andrew LEUNG Kwan-yuen, GBS, JP Hon Cyd HO Sau-lan Hon CHEUNG Kwok-che Hon IP Kwok-him, GBS, JP Hon Alan LEONG Kah-kit, SC Hon YIU Si-wing Hon LEUNG Che-cheung, BBS, MH, JP Hon SIN Chung-kai, SBS, JP Hon POON Siu-ping, BBS, MH Hon Tony TSE Wai-chuen (Total : 14 members)
Clerk	Miss Betty MA
Legal Adviser	Mr YICK Wing-kin
Date	13 June 2013