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11 March 2004

Dear Ms Fung,

**Merchant Shipping (Local Vessels)
(Certification and Licensing) Regulation ("Regulation")**

Thank you for your letter of 4 March. Our views are set out below-

Section 18(2) and 20(2)

It is our intention that the Director may amend any condition or restriction attached to a full licence or a temporary licence at any time while the licence concerned is in force. Section 39(1) of the Interpretation and General Clauses Ordinance (Cap. 1) provides that, "*Where any Ordinance confers any power or imposes any duty, then the power may be exercised and the duty shall be performed from time to time as occasion requires*". In view of section 39(1), we believe that sections 18(2) and 20(2) of the Regulation should be sufficient for our purpose even though they do not contain the words "at any time".

Appeal against decisions made by the Director of Marine

- (a) We believe that it is good practice to give reasons for important decisions, whether or not the law expressly requires it. We have reviewed the Regulation and have no objection to adding an express requirement for the Director to give reasons for his actions under sections 19, 23 and 26. However, the Director's decisions/actions under sections 33, 34 and 44 are self-explanatory and should require no explanation. As for section 35, there is already an express reference to reasons for the Director's action.

- (b) We agree that a decision under section 18(2) or 20(2) may be appealed against. The present section 53(1)(c) reflects this policy intent. The reference to "*a decision made under ...section 18 or 20*" includes the subsections under them.
- (c) Section 28 empowers the Director to cancel a person's status as interim owner if the Director ceases to be satisfied that the person should be named as such. If the Director has doubts about the entitlement of a person, an appeal to the Administrative Appeals Board will not help remove the doubt. Only a grant of representation by the Court can determine who can dispose of the vessel. In the case of section 31, cancellation is made at the request of the owner, the question of "grievance" should not arise. Hence, we believe there is no need for an appeal provision for section 28 and 31.
- (d) Necessary consequential amendments, including amendments to the Administrative Appeals Board Ordinance (Cap. 442), will be made under the Local Vessels (Miscellaneous Provisions) Bill (MP Bill), which is currently under preparation.

Immunity

Section 89 of the Merchant Shipping (Local Vessels) Ordinance (Cap. 548) empowers the Secretary for Economic Development and Labour to make regulations to provide for the certification and licensing of vessels and the renewal of licences. The scheme of certification and licensing is provided for under the subject Regulation. The implications of certification and licensing (and the need for immunity) are incidental to the scheme and should be provided for as part of the same Regulation. Instead of providing an immunity clause in Cap. 548, which may cover functions performed under more than one Regulation, we choose to do so in this Regulation.

In this Regulation, the Director of Marine is empowered to issue certificates of ownership (COO). Questions may arise as to whether a certificate should be an exhaustive and accurate record of interest in the vessel or should reflect every detail of the vessel. For example, a person is eligible to be certificated as the owner if a vessel is let to him under a hire-purchase agreement. It is possible that he makes use of the COO to willfully mislead someone to believe that he is the property owner of the vessel, and the person so misled suffers loss or damage as a result. Under the immunity clause, the Government will be immune from liability in respect of the loss or damage provided that the COO was issued in good faith and in accordance with the law.

Another example is that a COO holder who has created mortgage over his

vessel is free to choose whether to show this piece of information on the COO. Again, it is possible that he willfully misleads someone with a COO which does not show the mortgage. Under the immunity clause, the Government will be immune from liability in respect of any loss or damage suffered by the person so misled.

The provision of an immunity clause is not uncommon in Hong Kong legislation. For example, section 23A of the Land Registration Ordinance (Cap. 128) excludes liability of the Land Registrar or any of his officer for registering in good faith, any deed, conveyance or other instrument in writing, or judgment, notwithstanding any error, omission or defect therein.

Section 57- Transitionals

An existing licence issued under Merchant Shipping (Pleasure Vessels) Regulations has been saved under section 91(4) of Cap. 548.

Drafting matters

- (a) The “length” referred to in section 11(2)(h) includes the “length overall” of a local vessel and other measurements of length. For clarity, we agree to include the same definition of the term “length overall” as set out in the Merchant Shipping (Local Vessels) (Typhoon Shelters) Regulation.
- (b) The agent is required to provide the Director with the shore address under section 7(4)(e). Naturally, the address that the Director will include in the certificate of ownership will be that same address (i.e. the shore address). We consider the meaning in the existing provision clear.
- (c) We agree to add “of the vessel” in section 10(4)(a)(v).
- (d) The following suggestions are accepted:
 - ♦ to amend section 6(3) by deleting “有效” before “檢查”;
 - ♦ to amend section 49(2) by adding “有關” before “船隻”; and
 - ♦ to amend section 54(1) by adding “書面” after “作出的”.
- (e) For section 55(2)(a), we propose to amend the English text by adding "the provisions of" before "this Regulation".

Consequential amendments

Necessary amendments to section 5 of Cap. 104 have been included in the Schedule to Cap. 548.

We are also drafting the MP Bill to incorporate consequential amendments to other Ordinances and subsidiary legislation affected by Cap. 548 and its subsidiary legislation. Any necessary amendments to this Regulation (such as those proposed above) will also be included in the MP Bill. This Regulation will not commence until the MP Bill is enacted.

Yours sincerely,



(Miss Florence Chan)

for Secretary for Economic Development and Labour

c.c.

DoJ (Attn.: Ms Betty Cheung)

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MD (Attn: Mr. Y N Chan)

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