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22 September 2005

Hon. Wong Ting-kwong, BBS
Legislative Council
Room 423, West Wing
Central Government Offices
11 Ice House Street
Central
Hong Kong

Dear Hon. Wong,

Protection of Endangered Species of Animals and Plants Bill

Thank you for your letter of 18 July 2005.

Regarding your comments on the Protection of Endangered Species of Animals and Plants Bill (the Bill), our responses are as follows:

Restriction on import of specimens of scheduled species

Under clause 2(1) of the Bill, "import" means to bring, or cause to be brought, into Hong Kong but does not include introduce from the sea. According to clauses 5 and 11, importing specimens of scheduled species will be lawful if certain circumstances are satisfied or certain documents are produced and surrendered upon landing. As the act of importation and the need to produce and surrender the documents are different elements of the relevant requirements under clauses 5 and 11, they should not be mingled in the definition of "import".

The provisions restricting importation of scheduled species in the Bill follow and re-enact the basic ingredients of the offence in section 4 of the existing Animals and Plants (Protection of Endangered Species) Ordinance (Cap. 187) ("the existing Ordinance"). The interpretation of the law should be the same as the corresponding parts in the existing Ordinance and the Administration does not propose to make any amendment. In order to

implement the Convention and to achieve the objective of protecting endangered species from the threat of extinction due to trading, it is necessary for our legislation to impose a strict requirement. Those responsible for importing specimens of animals and plants into Hong Kong should ensure that the items contained in the shipment tally with the particulars in the licences and Convention export permits or certificates in lieu concerned. We are of the view that knowledge should not be included as an element in the offences under clauses 5 and 11, otherwise it would be difficult to enforce the law. However, the common law defence of reasonable but mistaken belief should be available to a defendant.

Restriction on introduction from the sea of specimens of schedules species

The term "introduce from the sea" targets scheduled species that are harvested or caught and are brought, or caused to be brought, into Hong Kong directly from a marine environment that is not under the jurisdiction of any state. As in the case of restricting importation of scheduled species, the persons introducing specimens of scheduled species from the sea should act strictly in accordance with a licence issued prior to the introduction. We consider that knowledge should not be included as an element in the offences under clauses 6 and 12. Nevertheless, the common law defence of reasonable but mistaken belief should be available to a defendant.

Restriction on export and re-export of specimens of scheduled species

"Export" means to take, or cause to be taken, out of Hong Kong but does not include re-export. "Re-export", in relation to a specimen of a scheduled species, means to take, or cause to be taken, out of Hong Kong that specimen after it has been imported. According to clauses 7, 8, 13 and 14, exporting or re-exporting specimens of scheduled specimens will be lawful if certain circumstances are satisfied or the relevant documents are produced before the removal of the specimens from Hong Kong. As the act of exportation or re-exportation and the need to produce the documents are different elements of the relevant requirements under the above clauses, they should not be mingled in the definition of "export" or "re-export".

Restriction on possession or control of specimens of scheduled species

The provisions restricting possession or control of scheduled species in the Bill follow and re-enact the basic ingredients of the offence in section 6 of the existing Ordinance. The interpretation of the law should be the same as the corresponding parts in the existing Ordinance and the Administration does not

propose to make any amendment. The common law defence of reasonable but mistaken belief should be available to a defendant.

Regulation of scheduled species

The offences to be re-enacted and the new offences similarly formulated in the Bill adopt the basic ingredients of the offences in the existing Ordinance. This together with the defence of reasonable but mistaken belief have been explained in details above.

Should a company be convicted of an offence under clause 5(3), 6(3), 7(3), 8(3), 9(2), 11(3), 12(3), 13(3), 14(3) or 15(2) of the Bill (if enacted), it cannot be imprisoned and hence, the court can only impose a fine, the amount of which would depend on the gravity of the offence. That said, a director of the company may be held liable, depending on the available evidence, under any of those provisions for an offence committed by the company by virtue of section 101E of the Criminal Procedure Ordinance (Cap. 221), which provides that "[w]here a person by whom an offence under any Ordinance has been committed is a company and it is proved that the offence was committed with the consent or connivance of a director or other officer concerned in the management of the company, or any person purporting to act as such director or officer, the director or other officer shall be guilty of the like offence.".

Power to require scientific names and common names

The aim of clause 29 is to empower an authorized officer to require a person in possession of a suspected specimen of scheduled species to provide information that will assist in verifying compliance with the Bill. If a person failing to so assist the authorized officer alleges that the scientific name or common name of the species concerned is unknown to him, the court will take into account all relevant factors in the circumstances of the case, including for example how that person had come into possession of the specimen and his responsibility in relation to the specimen, to determine whether his allegation can be accepted as a reasonable excuse to his failure to provide the name of the specimen to the authorized officer.

Power to inspect place or premises

If a person considers that an authorized officer exercises his power under clause 31(1) without "reasonable" suspicion, that person can make a complaint to the officer's department. If the complaint is found to be valid, the

officer will be subject to disciplinary action. Moreover, the aggrieved person may lodge a civil claim.

The "reasonable hours" referred to in clause 31(1)(a) should include daytime and the opening hours of trading premises.

Power of search and detention and power to require identification

The reference to "a ship of war, military aircraft or military vehicle" in clauses 32(1) and 36(1) should include any military transport, whether it is in the course of carrying out its duty or not.

The power of detention provided in clause 32(2)(b) is modeled on similar provisions in existing laws such as section 54(2)(b) of the Police Force Ordinance (Cap. 232) and section 25(1)(b) of the Marine Parks Ordinance (Cap. 476). An authorized officer exercising this power must confine the duration of detention to a reasonable period according to the particular facts and circumstances of each individual case in order to ensure that he does not exceed his power authorized under this clause.

Power of seizure

The term "in good faith" used in clause 34(3) is a common law expression. It refers to anything done or omitted to be done by an authorized officer honestly and with no ulterior motive in the exercise or purported exercise of any power under that clause.

Yours sincerely,

(Eric Chan)
for Director of Environmental Protection

c.c. Clerk to Bills Committee (Attn: Mrs. Mary TANG) – 2869 6794