

LS/B/6/07-08

2877 5029

By Fax (2511 3658) and By Post

17 March 2008

Mr Alfred Lee
Assistant Director (Waste Management Policy)
Environmental Protection Department
46/F, Revenue Tower
5 Gloucester Road
Wan Chai
Hong Kong

Dear Mr Lee,

Product Eco-responsibility Bill

I enclose herewith some questions on the legal and drafting aspects of the Bill and would be most grateful if you could let me have your response in bilingual form before 20 March 2008.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

Encl.

cc. Legal Adviser
CCS(1)1

Product Eco-responsibility Bill

Part 1 - Preliminary

Clause 2

1. Clause 2(1) provides that the purposes of Bill are to minimize the environmental impact of various types of product and to that end, “to introduce *producer responsibility schemes or other measures* that may require manufacturers, importers, wholesalers, retailers, consumers or any other parties to share the responsibility for the reduction in the use, and the recovery, recycling and proper disposal of those products”.
2. Please explain the meaning of “producer responsibility schemes”.
3. The validity of other provisions of the Bill must confine to the vires as provided in clause 2(1) (the purpose clause). Since the other provisions of the Bill must fall within or incidental to such “producer responsibility schemes”, will the Administration, for the sake of clarity, add a definition of “producer responsibility schemes” in the Bill?
4. Please clarify the difference, if any, between the phrase “which may include (plastic shopping bags ...)” which is not qualified by “but not limited to” in clause 2(1)(a) and the same provision which is qualified by “may include (but not limited to) (the following - ...)” in clause 2(2)(a).
5. Please explain the precise meaning of the terms “waste management” and “proper waste management” in sub-clauses 2(2)(a) and (c).

Part 2 - Prescribed Products: General Provisions

Clause 7

6. Clause 7(1)(b) provides that an authorized officer may, in relation to any record or document required to be kept by a person under the Bill, require the person to “provide all reasonable assistance, information or explanations in connection with the record or document”. Please explain what is expected from the person keeping the document in providing “all reasonable assistance”, a duty additional to the duty of providing information and explanations, in connection with such record or document.

7. Please also advise whether that person will be required to give assistance, information or explanations which may include self-incriminating information.

8. Under clause 7(4) –

“If required by the person having the lawful custody of such products, the authorized officer shall pay for –

- (a) the market price of the samples he proposes to take; or
- (b) if the market price is unknown or not readily ascertainable, a reasonable price of those samples.”

“如合法保管上述產品的人作出要求，獲授權人員須—

- (a) 就他擬取去的樣本，繳付市價；或
- (b) (如市價不詳或並非可輕易確定)為該等樣本繳付一個合理價錢。”

9. What is the meaning of “lawful custody” of a product in law?

10. It seems that the English text will be much improved and the accurate meaning of the Chinese text will be carried if clause 7(4) is changed to read as follows –

“Upon the demand of the person having lawful custody of such products, the authorized officer shall pay for - ...”.

Clause 8

11. Clause 8 provides for the power of entry and search by an authorized officer.

12. Clause 8(2) provides that except with the consent of the occupier or person in charge of any domestic premises, an authorized shall not enter or search those premises without a warrant issued by a magistrate. Why is the power of entry and search of premises other than domestic premises is not subject to the judicial scrutiny of a search warrant?

13. Under clause 8(8), “domestic premises” means any premises that are constructed or intended to be used for habitation. Please advise whether premises which are used partly for domestic purpose and partly for non-domestic purpose will be treated as “domestic premises”.

14. Please also explain the reason why the physical construction or the intended use but not the actual use of the premises determines whether a search warrant is required for the exercise of the power of entry and search.

Clause 9

15. The offence under clause 9(1) is for producing any false, incorrect or misleading record, document or information. It is a defence that the accused person - (a) did not know and had no reason to believe the record, document or information to be false, incorrect or misleading; or (b) he exercised due diligence to avoid the commission of the offence (clause 9(2)).

16. The other offence under clause 9(3) is for omission of any material particular from any record, document or information. It is a defence that the accused person did not know and could not with due diligence have ascertained the material particular (clause 9(4)).

17. Why are different defences provided in clause 9(2) and clause 9(4)?

18. What is meant by “*ascertained* the material particular” and in what way it prevents or avoids an omission of the material particular?

Clause 10

19. A person wilfully “obstructs or delays” an authorized officer in the performance of any of his functions under the Bill commits an offence (clause 10(a)). The dictionary meaning of the verb “obstruct” includes an act to “retard the passage or progress of; impede , hinder the motion of” (ref: *The New Shorter Oxford English Dictionary*, edited by Lesley Brown, Vol. 2, 1993 edition). The case law also held that “obstructing” was not confined to physical obstruction and included acts intending to delay, for example, police officers from entering into premises to see whether it was likely an offence would be committed or not (*Hinchliffe v. Sheldon* [1955] 3 All ER 406).

20. Please explain whether it is necessary in law to provide “delay” in addition to “obstruct” in the offence provision. Please also advise the Bills Committee the other legislation in Hong Kong where “delay” is used in addition to “obstruct” in an offence provision.

Clause 11

21. Clause 11 provides that if a body corporate commits an offence under the Bill and the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of “a *director* of, or a *person concerned in the management of*, the body corporate”, the director or that person also commits the offence.

22. The word “director” in the Chinese text is rendered as “高級人員” and the “person concerned in the management of, the body corporate” is rendered as “涉及該法人團體的管理的人”. It seems that a “director” of a body corporate in various laws of Hong Kong refers to a director under the Companies Ordinance (Cap. 32) and not just any high ranking officer of a body corporate. Please clarify –

- (a) the exact persons to be covered by this offence provision;
- (b) examples of other legislative provisions where “a *person concerned in the management of* a body corporate” is also criminally liable for an offence committed by the body corporate.

Clause 13

23. Clause 13 provides that an aggrieved person may appeal against the decision of a public officer in relation to 4 specified matters –

- (a) rejection of an application for registration or deregistration in respect of a retail outlet;
- (b) rejection of an application for exemption of part of the area of a registered retail outlet;
- (c) an assessment notice under section 25 (a replacement assessment notice); and
- (d) any matter that is –
 - (i) provided by a regulation made under the Bill; and
 - (ii) specified in the regulation as a matter on which an appeal may be made (clause 13(2)).

24. As a matter of drafting, does clause 13(2) cover all decisions made by the public officer in the exercise of his functions under the Bill?

25. If there is a decision of a public officer which falls outside the 4 matters specified for appeal under clause 13, what will be legal remedy available to the aggrieved person?

Clause 14

26. The Chairman, the Deputy Chairman and a panel member of the Appeal Board shall be appointed for a term of not more than 3 years but may be reappointed (clause 14(5)). Does the Administration intend to follow the convention that appointment of a person to public service of not more that 6 years?

27. Will the Administration make an express provision similar to section 10 of the Construction Industry Council Ordinance (Cap. 587) which provides as follows –

“An appointed member is eligible for reappointment on the expiry of his term of office, but he may not serve as such a member continuously for more than 6 years.”

28. The jurisdiction of the Appeal Board on an appeal shall be exercised by the Chairman and such number of panel members as the Chairman may appoint for the appeal (clause 15(1)). The Chairman, the Deputy Chairman and any panel member may at any time resign his office and the hearing of an appeal *may be continued* notwithstanding any change in the membership of the Appeal Board as if the change had not occurred. Unless the parties to the appeal consent, a person may not be appointed as a member of the Appeal Board before which the hearing of an appeal has been commenced (clause 16(4), 16(5) and 16(6)). What will happen in the following situations –

- (a) The Chairman, the Deputy Chairman who is not involved in a particular appeal, or both of them resign after the hearing of an appeal has commenced;
- (b) Who is to determine whether or not the appeal may continue;
- (c) Consent of the parties cannot be obtained for the appointment of an additional panel member.

Part 3 – Plastic Shopping Bags

Clause 17

29. “Levy” as provided in Part 3 of the Bill by definition “means a levy mentioned in section 18(3)” (clause 17(1)). Clause 2 which sets out the purposes of the Bill provides the statutory power to impose an “environmental levy” to discourage the use of certain products (clause 2(2)(d)). Is the “levy” defined in clause 17(1) same as the “environmental levy” provided in clause 2(2)(d)? If so, should there be consistency in the references?

Clause 19

30. A retailer who falls within the definition of a “prescribed retailer” and his retail outlet falls within the definition of a “qualified retail outlet” in Schedule 4 may apply to the Director of Environmental Protection to become a “registered retailer” in respect of a “qualified retail outlet” (clause 19(3)). A prescribed retailer shall ensure that no plastic shopping bag is provided directly or indirectly to a customer from a qualified retail outlet of that retailer unless the outlet is a registered retail outlet (clause 19(4)). A prescribed retailer who contravenes clause 19(4) commits an offence (clause 19(5)).

31. Is it mandatory for a prescribed retailer to register as a registered retailer if he does not provide plastic shopping bags to his customer?

32. Will there be a contravention of clause 19(4) if a prescribed retailer does not provide plastic shopping bags to his customers but sells plastic bags to his customers?

33. Clause 17(6) provides that a registered retailer may apply for deregistration in respect of a retail outlet on only 2 grounds, i.e. if the retailer ceases to carry on a retail business in that outlet or that outlet is no longer a qualified outlet. Has the Administration considered other possible grounds on which a retailer may apply for deregistration, e.g. the retailer intends to cease to provide plastic bags in the outlet.

Clause 22

34. The levy set out in Schedule 3 (50¢ per plastic shopping bag) is payable by a registered retailer to the Government for each plastic shopping bag that he provides to a customer (clause 18(3)). It seems that the primary duty of payment of the levy rests on the registered retailers.

35. Clause 22(1) provides that “a registered retailer shall charge an amount of not less than the levy for each plastic shopping bag provided directly or indirectly to a customer”. Please clarify whether a registered retailer may “charge” an amount on a person other than his customers (e.g. a plastic shopping bag manufacturer) for providing plastic shopping bags to the customers?

36. Clause 22(5) provides that “a registered retailer shall ensure that no rebate or discount is offered to any customer with the effect of directly or indirectly offsetting the amount charged under subsection (1)”. If, however, the registered retailer does not “charge” anything on the customer at all, does the question of “rebate or discount” come into play?

37. In law, will the prescribed levy regarded as a consideration for the purpose of sale and purchase of the plastic shopping bag? Does the law of sale of goods (e.g. Sale of Goods Ordinance (Cap. 26)) apply in the provision of plastic shopping bags?

38. If a registered retailer charges a customer for an amount higher than the prescribed levy of 50¢ (e.g. 80¢), will the difference (i.e. 30¢) be regarded as a consideration in law for the purpose of sale and purchase of the plastic shopping bag?

Clauses 24 & 25

39. A registered retailer shall ensure that records and documents relating to each submitted return are kept for not less than 5 years (clause 24(1)). The Director may at any time replace an assessment notice with another assessment notice (“replacement assessment notice”) if he reasonably believes that any amount of levies stated in a return in respect of a period is false, incorrect or misleading (clauses 25(1) and (2)).

40. You may be aware that similar requirements are imposed under the Inland Revenue Ordinance (Cap. 112). Under IRO, an assessor may issue additional tax assessments within the year of assessment or within 6 years after the expiration thereof (section 60). A person carrying on a trade, profession or business in Hong Kong (thus subject to the relevant profits tax provisions) is required to retain records of their income and expenditure for a period of not less than 7 years after the completion of the transactions to which they relate (section 51C). Similar requirements are imposed on property owners with respect to rent records.

41. A registered retailer of course should be afforded a fair opportunity to deal with the Director's replacement assessment notice and/or to prepare for his appeal. Since a registered retailer is required to keep records and documents for 5 years, should there be a similar time limit for the Director to exercise his power to issue a replacement assessment notice under clause 25(2)?