

Product Eco-responsibility Bill

The Administration's Response to Views and Questions Raised at the Bills Committee Meeting on 13 May 2008

Clause 2(1)(b)

The Administration agrees to include the reference to the polluter-pays principle and to replace the last “and” with “or” in clause 2(1)(b) of the Product Eco-responsibility Bill (the Bill). The Administration will propose committee stage amendments for this purpose.

Authorized officers

2. Under clause 6(1) of the Bill, the Director of Environmental Protection (Director) may authorize in writing any public officer to perform certain statutory functions under the Bill. In making such authorization, the Director will appoint public officers of the appropriate ranks based on such considerations as the nature of the functions to be performed, the level of skills or knowledge required, the sensitiveness of the issues, etc. In accordance with the established practice, the ranks of public officers to be appointed will be clearly set out in an Instrument of Authorization signed by the Director.

3. Among the environmental legislation enforced by the Environmental Protection Department¹, only the Water Pollution Control Ordinance (Cap. 358) specify the minimum ranks of public officers for exercising certain enforcement powers (section 36). In the recently enacted Energy Efficiency (Labelling of Products) Ordinance (Cap. 598), section 22 also specifies the minimum rank of public officers to be authorized.

4. In the light of Members' request, the Administration agrees to

¹ I.e. the Air Pollution Control Ordinance (Cap.311), the Waste Disposal Ordinance (Cap.354), the Water Pollution Control Ordinance (Cap.358), the Noise Control Ordinance (Cap. 400), the Ozone Layer Protection Ordinance (Cap.403), the Dumping at Sea Ordinance (Cap.466), the Environmental Impact Assessment Ordinance (Cap.499) and the Hazardous Chemicals Control Ordinance (Cap.595).

specify the rank of *environmental protection inspector* as the minimum rank of public officers to be authorized by the Director under the Bill. The Administration will propose committee stage amendments for this purpose.

Parts 2 and 3

5. In line with the approach of a framework legislation, Part 2 of the Bill sets out the general provisions that supplement any regulation-making provision on specific products, the enforcement powers and the appeal mechanism. Since the Bill is a piece of framework legislation, the provisions under Part 2 *may* be extended to apply to other producer responsibility schemes (PRS's) as and when they are introduced through amendment bills in future.

6. As the proposed environmental levy on plastic shopping bags is the first PRS introduced under the Bill, the current wording of clause 4 restricts the application of Part 2 to plastic shopping bags *only*. All provisions in Part 2 are relevant to the implementation of the PRS on plastic shopping bags. As stated clearly in LC Paper No. CB(1) 1391/07-08(02) and explained by the Secretary for the Environment at the meeting of this Committee on 29 April 2008, any new statutory PRS's will have to be introduced through amendment bills. If the application of Part 2 is to be extended to other products, the relevant amendment bills must contain an amendment to specify those products as additional prescribed products under clause 4. The amendment bills may also propose amendments to other provisions in Part 2 in order to modify them where appropriate, having regard to the requirements for different products. All such proposals will be subject to Members' scrutiny as the future amendment bills are introduced into the Legislative Council.

7. As reiterated by the Secretary, the framework legislative approach underlines the Administration's commitment to introduce producer responsibility schemes beyond the environmental levy on plastic shopping bags. As such, the Administration considers it necessary to preserve the current structure of Part 2 and Part 3, whereby the former provides for the general provisions applicable to any statutory PRS

contained in the principal Ordinance (if enacted) (including those that may be introduced by amendment bills in future), while the latter sets out the specific contents of the first PRS on plastic shopping bags. Having said that, in the light of Members' views expressed at the last meeting, the Administration agrees to propose committee stage amendments to suitably revise the provisions in Part 2 (e.g. clauses 4 and 5) so as to make it clearer that Part 2 currently applies in relation to plastic shopping bags only.

Persons assisting authorized officers

8. According to clause 6(3), an authorized officer performing a function under the Bill may take with him such persons as he **reasonably requires** to assist him in the performance of the function. The objective requirement of reasonableness is embodied in the expression "reasonably requires". In other words, the authorized officer may not take with him persons whom a reasonable man would not consider as required for assisting him in the performance of the function in the circumstances. Neither may the authorized officer bring such an excessive number of assistants as are disproportionate to what would be necessary for the performance of his function.

9. The power in clause 6(3), as constrained by the reasonableness test, is necessary when, for instance, an authorized officer needs to review the retail transaction records that are kept by a registered retailer in electronic form. The authorized officer himself may not have adequate expertise in operating electronic database and may need to bring with him a computer technician to assist him in performing such duties. Similarly, an authorized officer may need to audit the procurement records of plastic shopping bags, and the assistance of a person with accounting expertise may be required. Without such assistance, enforcement effectiveness may be severely undermined.

10. Similar powers can be found in other environmental legislation, including the Air Pollution Control Ordinance (Cap. 311)², the Water

² Section 28(5)

Pollution Control Ordinance (Cap. 358)³, the Noise Control Ordinance (Cap. 400)⁴, the Dumping At Sea Ordinance (Cap. 466)⁵ and the Environmental Impact Assessment Ordinance (Cap. 499)⁶. Such a power can also be found in the recently enacted Energy Efficiency (Labelling of Products) Ordinance (Cap. 598)⁷.

Request for reasonable assistance, information or explanations

11. Under clause 7(1)(b), authorized officers may require a person to provide all reasonable assistance, information or explanations in connection with any record or document **required to be kept** by him under the Bill. In the case of plastic shopping bags, retail transaction records and procurement records are increasingly kept in electronic form only. An authorized officer may need to know what kind of software is required to view, process and verify the records provided. If the software is proprietary or self-developed, an authorized officer may need to be given the permission to use the proprietary or self-developed software to view, process and verify the records provided.

12. Various ordinances require the rendering of assistance to authorized officers, including the Air Pollution Control Ordinance (Cap. 311)⁸, the Noise Control Ordinance (Cap. 400)⁹ and the Environmental Impact Assessment Ordinance (Cap. 499)¹⁰. Similar power can also be found in the Inland Revenue Ordinance (Cap. 112)¹¹. Moreover, any reasonable assistance required under clause 7(1)(b) must be related to the records or documents required to be kept under the Bill. Hence, as compared to similar provisions in other Ordinances, the power under clause 7(1)(b) is more restrictive, and should provide sufficient safeguard for the persons concerned. Without this requirement, enforcement effectiveness may be severely undermined.

³ Section 36(3)

⁴ Section 24(2)

⁵ Section 5(2)

⁶ Section 22(2)

⁷ Section 30

⁸ Section 28(1)(ivd)

⁹ Section 25(5)(b)

¹⁰ Section 23(5)(b)

¹¹ Section 51

Power of entry and search

13. There may be circumstances where an authorized officer will need to enter domestic premises. For instance, a registered retailer may submit false records to the Director, and deliberately hide the true records in domestic premises. Without the power to enter and search domestic premises under warrant, the Director would not be in a position to collect evidence for the offence of providing false information even if a magistrate is satisfied that a piece of evidence is reasonably suspected to be hid in domestic premises. The Administration therefore considers it necessary to retain the power to enter and search domestic premises in order to ensure effective enforcement. It should, however, be noted that the exercise of the power is subject to all the conditions laid down in clause 8(1), (2), (3), (4) and (7), including the requirement for the issue of a warrant by a magistrate.

14. Similar powers can be found in other environmental legislation, including the Air Pollution Control Ordinance (Cap. 311)¹², the Noise Control Ordinance (Cap. 400)¹³, the Environmental Impact Assessment Ordinance (Cap. 499)¹⁴ and the Hazardous Chemicals Control Ordinance (Cap. 595)¹⁵. The Inland Revenue Ordinance (Cap. 112)¹⁶ also contains similar powers.

15. On the other hand, in view of Members' concern, the Administration agreed at the last meeting that the power to enter and search *non-domestic* premises should also be subject to the issue of a warrant. The Administration will propose committee stage amendments for this purpose.

16. In order to ensure the effective enforcement of the environmental levy scheme, however, the Administration proposes to include a power for authorized officers to carry out *routine inspection at non-domestic*

¹² Section 28(2)

¹³ Section 25(1)

¹⁴ Section 23(1)

¹⁵ Section 33(1)

¹⁶ Section 51B(1)

premises (e.g. the public area of registered retail outlets in the case of the environmental levy for plastic shopping bags), to ensure that the relevant regulatory requirements are complied with (e.g. that registered retailers do not provide free plastic shopping bags from their retail outlets). It would be inappropriate to require an authorized officer to apply for a warrant for the purpose of routine inspection.

17. Similar powers of inspection can be found in all environmental legislation, namely the Air Pollution Control Ordinance (Cap. 311)¹⁷, the Waste Disposal Ordinance (Cap. 354)¹⁸, the Water Pollution Control Ordinance (Cap. 358)¹⁹, the Noise Control Ordinance (Cap. 400)²⁰, the Ozone Layer Protection Ordinance (Cap. 403)²¹, the Dumping at Sea Ordinance (Cap. 466)²², the Environmental Impact Assessment Ordinance (Cap. 499)²³ and the Hazardous Chemicals Control Ordinance (Cap. 595)²⁴. The recently enacted Energy Efficiency (Labelling of Products) Ordinance (Cap. 598)²⁵ also contains similar powers. Subject to Members' comments, the Administration will propose committee stage amendments for this purpose.

Vetting of amendments to Schedules and regulation

18. The Administration notes Members' views on the vetting of the amendments to Schedules, as well as the regulation made under clause 27.

19. As stated in LC Paper No. CB(1)1117/07-08(02) and LC Paper No. CB(1) 1391/07-08(02), Schedules 1, 2, 3 and 4 to the Bill set out the details of the proposed environmental levy on plastic shopping bags. These Schedules are introduced as part of the overall regulatory framework under the Bill, which will be subject to the scrutiny and approval of the LegCo in the first place. Furthermore, the provisions of the main body of the Bill have already set out the parameters within

¹⁷ Section 28(1)

¹⁸ Sections 23C(1) and 23D

¹⁹ Sections 37(1) and 38

²⁰ Section 25(1)

²¹ Section 10

²² Sections 15 and 18

²³ Section 23(1)

²⁴ Section 32

²⁵ Section 24

which the Secretary has to be guided in exercising the proposed power in future to amend the Schedules. Taking reference from similar provisions in other environmental legislation, the Administration considers it appropriate to subject such amendments to negative vetting.

20. Nevertheless, the Administration has critically reviewed the arrangement for the future amendment of each Schedule in view of Members' demand for sufficient time for scrutiny. In this regard, Schedule 4 to the Bill sets out the definition of prescribed retailer, which delineates the scope of the environmental levy scheme. Amendments to Schedule 4 would likely generate some debate within the community. As such, and in view of Members' concerns, the Administration agrees that positive vetting procedure could be adopted for future amendments to Schedule 4. The Administration will propose committee stage amendments for this purpose.

21. On the other hand, Schedules 1, 2 and 3 to the Bill set out the definition of plastic shopping bags, the exemptions and the level of the levy respectively. The Administration considers that there will be sufficient time for Members to consider amendments to those Schedules under the usual negative vetting procedure, as the Administration would have completed the necessary public and LegCo consultation before submitting any proposed amendments.

22. Given that the substantive regulatory provisions for the environmental levy on plastic shopping bags have already been incorporated into the Bill itself, the regulation made under clause 27 would only deal with operational details, such as application for registration, submission of returns and payment, and records and documents to be kept. In line with the usual practice in other environmental legislation, the Administration considers that negative vetting of subsidiary legislation on such procedural matters should suffice. The Administration has set out at the **Annex** an outline of the proposed procedural matters to be covered in the regulation to be made under clause 27 for Members' early reference. These proposals are subject to further refinement and consultation with the retailers concerned.

Environmental Protection Department
May 2008

Outline of the Proposed Procedural Matters to be covered by the Product Eco-responsibility (Plastic Shopping Bags) Regulation

If the Product Eco-Responsibility Bill is enacted, the Secretary for the Environment will propose to make a regulation, to be tentatively known as the Product Eco-responsibility (Plastic Shopping Bags) Regulation, under clause 27 after consultation with the Advisory Council on the Environment. The proposed Regulation will provide for the following matters –

- (a) application for registration and deregistration of prescribed retailers in respect of their qualified retail outlets;
- (b) application for exemption for certain area of a registered retail outlet;
- (c) submission of returns and payments of levies by registered retailers; and
- (d) records and documents to be kept by registered retailers.

Registration and deregistration

2. An application for registration shall be made to the Director of Environmental Protection (Director) in a specified form with the following information -

- (a) name and address of a prescribed retailer;
- (b) name(s) (if different) and address(es) of its qualified retail outlet(s); and
- (c) particulars of an authorized representative.

Upon registration, the Director shall issue a registration certificate for each of the qualified retail outlet(s) of the applicant. A registered retailer shall inform the Director of any changes subsequent to the registration (e.g. addition or deletion of a qualified retail outlet).

3. If a registered retailer ceases to provide plastic shopping bags to customers or ceases to be a prescribed retailer, he may apply to the Director for deregistration.

Exemption of certain area

4. Schedule 4 to the Bill sets out the meaning of prescribed

retailers. The retailers intended to be covered by the first phase of the environmental levy scheme are large or chain supermarkets, convenience stores and personal health and beauty stores. To maintain a level-playing field as far as practicable and taking into account the views previously expressed by some stakeholders, the Administration proposes to allow a prescribed retailer to apply for exemption for certain area of its qualified retail outlet in accordance with specified criteria (e.g. non-supermarket section within a department store).

5. In case a prescribed retailer is not satisfied with the decision of the Director in respect of its application for exemption, it may appeal to an Appeal Board under clause 13 of the Bill.

Submission of returns and payment of levies

6. A registered retailer shall submit a return every quarter, stating –
- (a) the number of plastic shopping bags provided by the retailer to customers within the quarter; and
 - (b) the total amount of levies payable for those bags within the quarter.

The return shall be certified true and correct by an authorized representative of the registered retailer. Payment of the amount of levies shall be made together with the return.

7. A registered retailer shall also submit an annual return, stating –
- (a) the number of plastic shopping bags in stock at the beginning of the year;
 - (b) the number of plastic shopping bags procured during the year;
 - (c) the number of plastic shopping bags distributed to customers during the year; and
 - (d) the number of plastic shopping bags in stock at the end of the year.

The annual return is necessary for the Director to cross-check the returns of the previous four quarters.

Records and documents to be kept

8. To allow for subsequent audits by the Director, registered retailers shall keep records and documents related to transaction records which involve the procurement or distribution of plastic shopping bags.