



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



CB(1) 966/08-09(20)

立法會秘書處 法律事務部
LEGISLATIVE COUNCIL SECRETARIAT
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By Fax (2511 3658) and By Post

25 February 2009

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 (Plastic Shopping Bags) Regulation

I refer to your reply dated 16 February 2009 and enclose herewith some further questions on the legal and drafting aspects of the abovenamed regulation. I wonder if you could let me have your reply in bilingual form before 2 March 2009.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

Encl

cc. Legal Adviser
CCS(1)

Product Eco-responsibility (Plastic Shopping Bags) Regulation

Sections 4, 7 and 9 - General observations

Determination of application for registration, deregistration, exemption and variation of exemption

1. Does the Administration agree that, for certainty and as a matter of public policy, a law which provides for a right or obligation to make an application under that law should clearly state *who* (whether the applicant or any other person) has the responsibility of proving the factual circumstances supporting the application (burden of proof)?

2. Does the Administration agree that, for certainty and as a matter of public policy, *what* is required from the applicant should also be clearly set out in the law (standard of proof)?

3. The same drafting formula is used in sections 4, 7 and 9. These sections provide the following -

(a) The Director of Environmental Protection ("the Director") "*must approve*" an application unless it is rejected by him.

(*Question:* Does this provision give a right or legitimate expectation to the applicant that his application will be approved?)

(b) The Director "*may reject*" an application if he considers that --

(i) the application is not properly made;

(ii) the information provided is incorrect or misleading, or

(iii) the applicant is not a prescribed retailer (section 4(2)(b)) / none of the circumstances for deregistration exists (section 7(2)(b)) / the retail outlet does not meet the criteria for exemption (section 9(2)(c)).

(*Question:* The Director seems to have a discretion to decide whether to reject the application. Does he have to satisfy himself on the evidence obtained from his own investigation, or is it up to the applicant to produce evidence to support his application?)

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4. In addition to the requirements under sections 3, 6 and 8, is it permissible for the Director to take into account other factors when he considers whether an application made under sections 4, 7 or 9 is "properly made"?

5. The applicant will be required to make a "declaration" to be provided administratively in the specified forms (para. 5 and 9 of your reply, LC Paper No. CB(1)829/08-09(04)). Will the "declaration" be taken as the applicant's proof to the satisfaction of the Director of the factual circumstances supporting his application?

6. Under the Regulation, does the Director have power to require the applicant to provide information supplemental to those provided in the specified form or declaration?

7. In terms of natural justice, will the applicant be given an opportunity to respond to the alleged grounds of rejection before the Director makes a decision of rejecting the application?

8. Section 13 of the Ordinance provides for a right of appeal against *decisions* made by the Director under sections 4, 7 or 9. The Appeal Board should rule on the lawfulness of the Director's decision and it may determine its procedure. However, the Appeal Board should not be expected to fill in the substantive or procedural gaps in the decision-making mechanism if these matters can easily be dealt with in the Regulation.

9. Sections 4, 7 and 9 purport to provide for the Director's decision-making mechanism. Would the Administration consider it desirable to include, as far as possible, provisions of burden of proof, standard of proof and natural justice safeguards in the mechanism?

Section 9

Determination of application for exemption or variation of exemption

10. Section 9(5)(a) provides a continuing power to the Director to impose, from time to time, other conditions even after exemption or variation of exemption has been granted. If the Subcommittee accepts the Administration's explanation that the power is "to tackle the possible emergence of new practice that may circumvent the levy scheme and abuse the exemption mechanism so as to avoid the objects of the legislation being defeated" (para. 14 of CB(1)829/08-09(04)), would the Administration consider adding provisions to afford a chance of hearing to the retailers who are exempted from the levy scheme before any change of conditions?

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11. You may note that, for example, section 20(12) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) provides that where the Mandatory Provident Fund Authority has decided it is appropriate to amend any conditions imposed with respect to the conduct of an approved trustee's business, it has an obligation to give to the approved trustee - (a) not less than 30 days' advance notice of its decision, specifying its grounds, and (b) an opportunity to make written representations as to why the conditions should not be amended (*Appendix I*).

Section 12

Submission of quarterly returns

12. Section 12(3)(b) provides that the quarterly returns to be submitted by a registered retailer must contain the total number of plastic shopping bags provided directly or indirectly to customers during that quarter from the retail outlet. According to the Administration's explanation, "if a person who does not purchase any goods obtains a plastic shopping bag and passes it to another customer, the bag is provided 'indirectly' to that customer" (para. 15 of CB(1) 829/08-09(04)). Please advise that whether this person (recipient of the plastic shopping bag) is a customer of the retail outlet.

13. For the purpose of providing information in the quarterly return under section 12, how far should a registered retailer go after each recipient of a plastic shopping bag to ascertain -

- (a) whether the plastic shopping bag is passed to a second person, and
- (b) whether this second person is a customer?

Section 14

Record keeping

14. The registered retailer's obligation under section 14 is to ensure records are kept in order to enable the Director to readily verify, amongst other things, the number of plastic shopping bags provided to a customer in each retail transaction of the retail outlet (section 14(a)).

15. Please explain the reason for the different requirements of -

- (a) record keeping under section 14(a), and
- (b) the additional obligation on the registered retailers to provide information on the number of plastic shopping bags provided indirectly to customers in the quarterly returns under section 12.

Section 16

Specified forms

16. You may recall that at the Bills Committee meetings, members pointed out that implementation and operational details of the Bill indeed were subjects to contentions and hence they would need more time for discussion. At members' repeated requests, Committee Stage Amendments were moved by the Administration to specify that the regulations to be made by the Secretary for the Environment ("the Secretary") under section 29 of the Ordinance would be subject to the approval (positive vetting) of the Legislative Council (Bills Committee's Report to House Committee on the Product Eco-responsibility Bill, LC Paper No.CB(1)2022/07-08, at para. 46-47).

17. Section 29(1) of the Ordinance also imposes a mandatory duty on the Secretary to consult the Advisory Council on the Environment ("ACE") before he makes regulations with respect to the matters set out in section 29(1)(a) to (f). The intention and effect of section 29(1) of the Ordinance are that ACE will be consulted on the implementation and operational details of the Ordinance and the Legislative Council will scrutinize them by way of positive vetting.

18. Section 29 of the Ordinance empowers the Secretary to make regulations. Section 16 sub-delegates the Director to specify the forms to be used under this Regulation. Although section 16 purports only to provide for specified forms, these specified forms seem to impose requirements of a nature which is more than purely administrative, ancillary or incidental to this Regulation and they have a bearing on the outcome of the respective applications, for example -

- (a) information or documents to be included in the forms for application for exemption from levy payment (sections 8 and 16(2)(b)),
- (b) a declaration on the relevant circumstances for applying for deregistration (para. 5 of your reply).

19. As observed in one of the leading authorities on constitutional and administrative law, where a legislation delegates legislative power to a minister, exercisable by subsidiary legislation, it may be assumed that the legislature intends the subsidiary legislation itself to contain the rules. Is it a proper use of such powers for the subsidiary legislation to sub-delegate legislative power, by authorising rules to be made by another body or by another procedure? The legal maxim, *delegatus non potest delegare*, means that a delegate may not sub-delegate his power, though the principal legislation may override this by authorising sub-delegation. Without express authority in the principal legislation, it is doubtful whether sub-delegation of legislative powers is valid. Where sub-delegation occurs, control by the legislature becomes more difficult. (A. W. Bradley and K. D Ewing, Constitutional and Administrative Law, 14th ed., at p. 678) (*Appendix 2*).

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20. Please explain whether or not the effect of section 16 is compatible with the legislative intent of section 29 of the Ordinance in the light of -

- (a) the mandatory requirement to consult ACE, and
- (b) the Committee Stage Amendments with regard to the positive vetting procedure of regulations made under section 29 of the Ordinance.

第 IV 部

強制性公積金計劃

20. 受託人的核准

- (1) 任何人均可向管理局申請，核准其成為本條例所指的受託人。
- (2) 除非公司的董事之中有至少一名獨立董事，否則該公司無資格根據本條提出申請。《規例》可為本款的施行訂明獨立董事的資格。
- (3) 任何自然人如——
 - (a) 屬公職人員；或
 - (b) 按照《精神健康條例》(第 136 章) 被原訟法庭裁斷為精神不健全及無能力照顧自己和處理其事務；或
 - (c) 屬未獲解除破產的破產人，或已在沒有全數償付其債權人債務的情況下與其債權人訂立債務重組協議，
 則無資格根據本條提出申請。
- (4) 申請必須——
 - (a) 符合管理局所批准的格式；及

- (b) 載有指引所訂明的資料，並附有指引所訂明的文件；及
- (c) 附有《規例》所訂明的款額的申請費用。

(5) 管理局可藉書面通知，要求申請人提供為使管理局能夠就其申請作出決定而合理地需要的進一步資料及文件。如該項要求在該通知所指明的合理時間內未獲遵從，則管理局可拒絕該項申請。

- (6) 管理局只有在信納申請人符合以下條件的情況下，方可批准其申請——
 - (a) 申請人相當可能有能力以恰當方式執行本條例所規定的核准受託人須就註冊計劃而執行的職責；及
 - (b) 申請人已以契據或管理局所接受的具有同等效力的文件，向管理局作出承諾，承諾就申請人成為核准受託人的任何註冊計劃而言，申請人不會拒絕——
 - (i) 由參與僱主的有關僱員提出或代該僱員提出或由年滿 18 歲但未達到退休年齡的自僱人士提出或代該自僱人士提出的要求成為該計劃的成員的申請，而該僱員或自僱人士——
 - (A) 沒有因本條例任何條文，而不能成為該計劃的成員；及
 - (B) 在本條例的規定下，須成為一項註冊計劃的成員；
 - (ii) 由某僱主提出或代該僱主提出的要求參與該計劃的申請，而該僱主的僱員——
 - (A) 沒有因本條例任何條文，而不能成為該計劃的成員；及

PART IV

MANDATORY PROVIDENT FUND SCHEMES

20. Approval of trustees

- (1) A person may apply to the Authority for approval as a trustee for the purposes of this Ordinance.
- (2) A company is not eligible to make an application under this section unless at least 1 of the company's directors is an independent director. The regulations may prescribe the qualifications of independent directors for the purposes of this subsection.
- (3) A natural person is not eligible to make an application under this section if the person—
 - (a) is a public officer; or
 - (b) is, in accordance with the Mental Health Ordinance (Cap. 136), found by the Court to be of unsound mind and incapable of managing himself or herself and his or her affairs; or
 - (c) is an undischarged bankrupt or has entered into a composition with the person's creditors without paying the creditors in full.
- (4) An application must—
 - (a) be in a form approved by the Authority; and

- (b) contain such information, and be accompanied by such documents, as may be prescribed by the guidelines; and
- (c) be accompanied by an application fee of such amount as may be prescribed by the regulations.

(5) The Authority may, by written notice, require an applicant to provide additional information and documents as is reasonably necessary to enable it to determine the application. If such a requirement is not complied with within a reasonable time specified in the notice, the Authority may reject the application.

- (6) The Authority may approve an application only if satisfied that the applicant—
 - (a) is likely to be able to perform, in a proper manner, the duties that an approved trustee is required by this Ordinance to perform in relation to registered schemes; and
 - (b) has given an undertaking to the Authority by deed, or by a document of like effect acceptable to the Authority, that the applicant will not, in relation to a registered scheme of which the applicant becomes the approved trustee, refuse—
 - (i) an application for membership of the scheme made by or on behalf of a relevant employee of a participating employer, or by or on behalf of a self-employed person who is 18 years

- (B) 在本條例的規定下，須成為一項註冊計劃的成員；或
- (iii) 由符合以下說明的人僅為了在該計劃內維持一個保留帳戶而提出的要求成為該計劃的成員的申請——
- (A) 該人沒有因本條例任何條文，而不能成為該計劃的成員；及
- (B) 該人在本條例的規定下，須成為一項註冊計劃的成員；及
(由 2008 年第 1 號第 15 條代替)
- (c) 申請人符合《規例》所訂明的規定。

(7) 第 (6)(c) 款所提述的《規例》可包括關於以下事宜的規定——

- (a) 申請人必須具備的資格；
- (b) 申請人必須具有的財政資源 (包括資本充裕程度)；
- (c) 如屬由公司提出的申請——
- (i) 該公司的成員組織；及
- (ii) 該公司章程所列的公司宗旨；及
- (iii) 該公司的控權人是否適合人選 (包括他們的聲譽及品格以及他們在管理公積金計劃方面的知識、經驗及資格)；及
- (iv) 就屬非香港公司的公司而言，則指以下規定：該公司成立為法團的所在地方須有就法團及信託的設立與運作而作出規定的有效法律，而且該地方必須有一有效的規管當局以監管該等法團及信託以及強制執行該等法律； (由 2004 年第 30 號第 3 條修訂)
- (d) 如屬由自然人提出的申請——
- (i) 申請人是否核准受託人的適合人選 (包括申請人的聲譽及品格以及申請人在管理公積金計劃方面的知識、經驗及資格)；及
- (ii) 是否需要提供履行職能擔保，以及該項擔保的內容。
- (8) 管理局在核准申請人成為核准受託人時，可就成為某項註冊計劃的核准受託人的該申請人業務的運作，施加該局認為適當的條件。
- (9) 管理局在核准申請人成為核准受託人後，必須向申請人發出核准證明書，如管理局已根據第 (8) 款向申請人施加條件，則必須在該證明書內或在附隨該證明書的文件內指明該等條件。
- (10) 如管理局沒有給予申請人機會就其申請為何不應被拒絕而作出申述 (不論是口頭或書面或口頭兼書面的申述)，該局不得拒絕根據本條提出的申請。
- (11) 管理局如拒絕根據本條提出的申請，則必須給予申請人拒絕其申請的書面通

- of age or over and below retirement age, who—
- (A) is not precluded by a provision of this Ordinance from being a member of the scheme; and
- (B) is required by this Ordinance to be a member of a registered scheme;
- (ii) an application for participation in the scheme made by or on behalf of an employer whose employee—
- (A) is not precluded by a provision of this Ordinance from being a member of the scheme; and
- (B) is required by this Ordinance to be a member of a registered scheme; or
- (iii) an application for membership of the scheme made only for the purpose of maintaining a preserved account within the scheme by a person who—
- (A) is not precluded by a provision of this Ordinance from being a member of the scheme; and
- (B) is required by this Ordinance to be a member of a registered scheme; and (Replaced 1 of 2008 s. 15)
- (c) complies with such requirements as are prescribed by the regulations.

(7) The regulations referred to in subsection (6)(c) may include requirements as to the following matters—

- (a) the qualifications that an applicant must have;
- (b) the financial resources that an applicant must have (including capital adequacy);
- (c) in the case of an application by a company—
- (i) the membership of the company; and
- (ii) the objects of the company as set out in its constitution; and
- (iii) the suitability of the company's controllers (including their reputation and character and their knowledge of, experience in and qualifications for administering provident fund schemes); and
- (iv) in the case of a company that is a non-Hong Kong company, requirements that the place where the company is incorporated has in force laws that provide for the establishment and operation of corporations and trusts and that there must be in that place an effective regulatory authority to supervise those corporations and trusts and to enforce those laws; (Amended 30 of 2004 s. 3)
- (d) in the case of an application by a natural person—
- (i) the suitability of the applicant to be an approved trustee (including the applicant's reputation and character and the applicant's knowledge of, experience in and qualifications for administering provident fund schemes); and
- (ii) the need to provide a performance guarantee and the contents of such a guarantee.

知，並必須在該通知內包括一項陳述，列明拒絕的理由。

(12) 如管理局——

(a) 已決定下述事實是適當的——

- (i) 修訂根據第(8)款或本款就核准受託人業務的運作施加的條件；或
- (ii) 就核准受託人業務的運作施加條件；及

(b) 已給予有關的核准受託人——

- (i) 關於該決定的不少於 30 日的預先通知，指明該局所持的理由；及
- (ii) 作出書面申述的機會，說明為何不應修訂或施加該等條件。

則管理局可藉送達該核准受託人的書面通知——

- (c) 修訂根據第(8)款或本款就該核准受託人業務的運作施加的條件；或
- (d) 就該核准受託人業務的運作施加條件。(由 2002 年第 2 號第 10 條增補)

(13) 如管理局根據第(8)或(12)款對任何人施加條件，則該局可在——

- (a) 個別個案中；及
- (b) 該人令該局信納就該個案各方面而言，在當時或一直以來，要遵守該等條件並不屬合理地切實可行的情況下，

免除該人遵守該等條件。(由 2002 年第 2 號第 10 條增補)

(由 1998 年第 4 號第 2 條代替)

(8) In approving an applicant as an approved trustee, the Authority may impose such conditions with respect to the conduct of the applicant's business as it considers appropriate.

(9) On approving an applicant as an approved trustee, the Authority must issue the applicant with a certificate of approval and, if the Authority has imposed conditions on the applicant under subsection (8), must specify those conditions in the certificate or in a document accompanying the certificate.

(10) The Authority must not reject an application under this section without giving the applicant an opportunity to make representations (either orally or in writing or both) as to why the application should not be rejected.

(11) If the Authority rejects an application made under this section, it must give written notice of the rejection to the applicant and must include in the notice a statement setting out the reasons for the rejection.

(12) Where the Authority—

(a) has decided that it is appropriate to—

(i) amend any conditions imposed under subsection (8) or this subsection with respect to the conduct of an approved trustee's business; or

(ii) impose conditions with respect to the conduct of an approved trustee's business; and

(b) has given to the approved trustee—

(i) not less than 30 days' advance notice of its decision, specifying its grounds; and

(ii) an opportunity to make written representations as to why the conditions should not be amended or imposed,

then the Authority may, by written notice served on the approved trustee—

(c) amend any conditions imposed under subsection (8) or this subsection with respect to the conduct of the approved trustee's business; or

(d) impose conditions with respect to the conduct of the approved trustee's business. (Added 2 of 2002 s. 10)

(13) The Authority may waive a person's compliance with a condition imposed under subsection (8) or (12)—

(a) in a particular case; and

(b) where the person satisfies the Authority that such compliance is not, or has not been, reasonably practicable in all the circumstances of that case. (Added 2 of 2002 s. 10)

(Replaced 4 of 1998 s. 2)

A. W. Bradley and K. D Ewing, Constitutional and Administrative Law, 14th ed

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more than a licence to legislate'.¹⁹ Such Bills can operate only when extensive regulations are made and MPs may ask to see the regulations that are to be made before approving a Bill in this form. But there are few absolutes in this area and legislative practice is often a compromise between different attitudes to delegation.

Delegation of taxing power

We have seen how vital to the development of parliamentary government was the insistence that Parliament alone could authorise taxation.²⁰ This insistence survives in an attenuated form, but modern pressures, particularly associated with the economy, require Parliament to delegate certain powers in relation to taxation to the government. In particular, the working of a system of customs duties combined with the development of the European Union has made necessary the delegation of power to give exemptions and reliefs from such duties.²¹ The government also has power to vary certain classes of indirect taxation by order of the Treasury.²² These powers are subject to parliamentary control in that orders imposing import duties or varying indirect taxation cease to have effect unless they are confirmed by a resolution of the House of Commons within a limited time.

Sub-delegation

When a statute delegates legislative power to a minister, exercisable by statutory instrument, it may be assumed that Parliament intends the statutory instrument itself to contain the rules. Is it a proper use of such powers for the instrument to sub-delegate legislative power, by authorising rules to be made by another body or by another procedure? The legal maxim, *delegatus non potest delegare*, means that a delegate may not sub-delegate his or her power, but the parent Act may always override this by authorising sub-delegation, as did the Emergency Powers (Defence) Act 1939. Without express authority in the parent Act, it is doubtful whether sub-delegation of legislative powers is valid. However, emergency regulations under the Civil Contingencies Act 2004 may 'make provision of any kind that could be made by Act of Parliament' (s 22(3)), and the breadth of this power may authorise sub-delegation. Where sub-delegation occurs, control by Parliament becomes more difficult. In 1978, the Joint Committee on Statutory Instruments criticised the recurring tendency of departments to seek to bypass Parliament by omitting necessary detail from statutory instruments and vesting a wide discretion in ministers to vary the rules without making further statutory instruments.²³ Under the European Communities Act 1972, sub-delegation is prohibited except for rules of procedure for courts or tribunals.²⁴

Retrospective operation

It follows from the supremacy of Parliament that Acts may have retrospective operation.²⁵ If on occasions retrospective legislation is considered necessary, this should be

¹⁹ See Tudor (note 11 above), p 152: in 1992-9 four Bills were described by the House of Lords Delegated Powers Committee as skeletal, two as near skeletal. The lack of flesh may apply only to one or two limbs of a Bill: HL 112 (1998-9), para 28. The Committee requires full justification to be given for use of skeleton Bills: HL 110 (2004-5), paras 25-9.

²⁰ Ch 4 A.

²¹ Customs and Excise Duties (General Reliefs) Act 1979.

²² Excise Duties (Surcharges or Rebates) Act 1979.

²³ HL 51, HC 579 (1977-8), p 10; and see *Customs and Excise Commissioners v J H Corbit (Numismatists) Ltd* [1981] AC 22.

²⁴ European Communities Act 1972, s 2(2) and Sch 2.

²⁵ Ch 4 B.