

立法會
Legislative Council

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(These minutes have been
seen by the Administration)

**Subcommittee on
Ozone Layer Protection
(Controlled Refrigerants) Regulation (Commencement) Notice 1998**

**Minutes of meeting held on
Thursday, 21 January 1999, at 2:30 pm
in Conference Room B of the Legislative Council Building**

Members present : Hon Ronald ARCULLI, JP (Chairman)
Hon LEE Kai-ming, JP
Hon LAW Chi-kwong, JP

Members absent : Hon Cyd HO Sau-lan
Hon WONG Yung-kan

**Public officers
attending** : Mr Howard CHAN
Principal Assistant Secretary for Planning,
Environment and Lands (Environment)

Mr PANG Sik-wing
Principal Environmental Protection Officer
(Air Management)
Environmental Protection Department

Mr D J MORRIS
Deputy Law Draftsman (Legislation)
Department of Justice

Clerk in attendance : Miss Odelia LEUNG, Chief Assistant Secretary (1)1

Staff in attendance : Mr Jimmy MA, Legal Adviser
Ms Pauline NG, Assistant Secretary General1
Miss Anita HO, Assistant Legal Adviser 2

Mrs Mary TANG, Senior Assistant Secretary (1)2

I Election of Chairman

Nominated by Mr LAW Chi-kwong and seconded by Mr LEE Kai-ming, Mr Ronald ARCULLI was elected Chairman of the Subcommittee.

II Meeting with the Administration

2. The Chairman said that the Subcommittee's concern was not about the provisions of the Ozone Layer Protection (Controlled Refrigerants) Regulation (the Regulation) but the validity or otherwise of the Ozone Layer Protection (Controlled Refrigerants) (Commencement) Notice 1994 (Commencement Notice 1994) which was issued as a General Notice and had not been laid in the former Legislative Council. The Subcommittee noted the different views held by the Legal Service Division of the LegCo Secretariat and the Administration on the validity of the Commencement Notice 1994 and the inconsistent stance of the Administration on the subject. He drew members' attention to a list of subsidiary legislation (tabled at the meeting) compiled by the Legal Service Division which were gazetted on 27 June 1997 and 30 June 1997 but not tabled in the Provisional LegCo. He said that the issue now at stake was the validity or otherwise of not just the Commencement Notice 1994 but of all the 25 items of subsidiary legislation which were not tabled in the Provisional LegCo. The Chairman said that some of the subsidiary legislation in question specified the operative dates of very important legislation. In examining the question of validity, the Subcommittee had to consider whether any member of the public had been prejudiced by the laws enforced against them which had no legal effect. He was of the view that re-gazettal of a commencement notice which appointed a different operative date might not solve the problem because the laws in question would not have retrospective effect.

3. The Principal Assistant Secretary for Planning, Environment and Lands (Environment) (PAS/PEL(E)) explained the background leading to the making of a second commencement notice in respect of the Regulation. He said that the Regulation was made by the then Governor in Council on 11 May 1993. Section 1 of the Regulation provided that the Regulation should come into operation on a day to be appointed by the Secretary for Planning, Environment and Lands by notice in the Gazette. The original intention was to put the Regulation into operation on 1 January 1994. Due to an oversight, the Commencement Notice 1994 was inadvertently published as a General Notice No. 4794 in the Gazette on 23 December 1993 instead of as a Legal Notice and was therefore not tabled in the former LegCo. This oversight was not revealed until recently. The legal advice obtained by the Administration

was that another commencement notice must be published to give the Regulation legal effect. The Administration therefore published the Commencement Notice 1998 which appointed 1 January 1999 as the day on which the Regulation was to come into operation. PAS/PEL(E) apologized on behalf of the Planning, Environment and Lands Bureau for the error and the inconvenience that such an error might have caused.

Tabling of subsidiary legislation

4. The Deputy Law Draftsman (Legislation) (DLD) elaborated on the Administration's view on the necessity of tabling of subsidiary legislation in the law making process. He said that section 34 of the Interpretation and General Clauses Ordinance, Cap. 1 clearly required that all subsidiary legislation should be laid on the table of LegCo at the next meeting thereof after the publication of that subsidiary legislation in the Gazette. He had made reference to a number of overseas law books, including Canadian and Australian law books, the authors of which held the view that tabling of subsidiary legislation was mandatory. Judging from the number of resolutions passed under section 34 of Cap. 1 in the past four years which amounted to about 30 per year, LegCo, in delegating the power to the Administration in making subsidiary legislation, had all along regarded the tabling of subsidiary legislation an essential part of the legislative process to enable Members to supervise the exercise of such a power. The law required the Administration to publish the subsidiary legislation in the Gazette. The Gazette was delivered to LegCo by the Government Printer. While he was not fully aware of the laying process, he understood that the actual laying of the subsidiary legislation was not done by the Administration but the LegCo Secretariat.

5. The Chairman explained the procedure for tabling of subsidiary legislation. He said that after the publication of the subsidiary legislation in the Gazette, the subsidiary legislation would be included in the agenda for the next LegCo meeting. The subsidiary legislation were physically tabled at a meeting of the Council. Even if it was accepted that tabling of subsidiary legislation was mandatory, the question still remained as to whether non-tabling of subsidiary legislation would render the legislative process incomplete. The purpose of the tabling of subsidiary legislation was to allow LegCo the opportunity to amend it. If LegCo had not been made aware of the making of the subsidiary legislation, it could not exercise its power to amend the subsidiary legislation within the specified period. The Chairman said that in his opinion, LegCo Members would prefer to go along with the idea that tabling of subsidiary legislation was mandatory, otherwise they would forego their power to scrutinize the subsidiary legislation.

6. The Legal Adviser (LA) said that the problem lay with the meaning of "mandatory". In his view, if the tabling requirement was held as mandatory in so far as the validity of a piece of subsidiary legislation was concerned, then

sections 20 and 34 of Cap. 1 could not be reconciled. Section 20 of Cap. 1 provided that an Ordinance commenced at the beginning of the day on which it was published. In other words, an Ordinance came into operation upon the publication of it in the Gazette. In LA's view, section 34(1) imposed a mandatory duty on the part of the Government official who had been delegated with the authority to make subsidiary legislation to table the subsidiary legislation in LegCo. The tabling of subsidiary legislation would trigger off section 34(2) which allowed LegCo to scrutinize and amend the subsidiary legislation. Tabling of subsidiary legislation was mandatory in the sense that it was mandatory on the part of the Administration to table it in LegCo. The provisions of section 34 was silent on the consequences of failing to table the subsidiary legislation. It would be for the Administration to justify the failure of tabling of the subsidiary legislation. How to address the failure was a political rather than a legal question.

7. The Chairman said that if the understanding of LA was correct, then constitutionally the Government did not have to lay anything on the table of LegCo. If LegCo sought to amend any subsidiary legislation, it would have to do so by way of a Member's Bill. He enquired if there had been cases where a person had been prosecuted for having committed an offence under a newly introduced subsidiary legislation during the scrutiny period. This question was relevant as it would shed light on when a piece of subsidiary legislation was to take effect; whether it should be the date of gazettal, or the date of tabling in LegCo, or the expiry date of the scrutiny period.

8. DLD said that there was no conflict between sections 20 and 34 of Cap. 1. While section 20 of Cap 1 provided that any subsidiary legislation would come into operation on the day when it was published in the Gazette, section 34(2) was a condition subsequent and laid down the power of LegCo to amend a piece of subsidiary legislation. Should LegCo pass a resolution to amend a piece of subsidiary legislation, the subsidiary legislation should be deemed to be amended as from the date of publication in the Gazette of such resolution.

9. Members agreed that where LegCo did not pass any resolution to amend the subsidiary legislation, the effective date of that subsidiary legislation should be the date of gazettal. The effective date of a subsidiary legislation which had been duly amended by LegCo under 34(2) was the day of publication of such resolution, not the date when the resolution was passed. If the tabling requirement was held as mandatory and the subsidiary legislation was not tabled, then the subsidiary legislation was never effective from day one. Members noted that any resolution passed by LegCo should be published in the Gazette not later than 14 days after the passing thereof as provided for in section 34(5).

10. Referring to the list of subsidiary legislation which were not laid on

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the table of the Provisional LegCo, LA advised that none of them were subject to the positive vetting procedures under section 35 of Cap. 1. He drew members' attention to the commencement notices in respect of certain substantive legislation, such as the Official Secrets Ordinance (62 of 1997) (Commencement) Notice 1997 (LN 369 of 1997) and Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997) (Commencement) Notice 1997 (LN 378 of 1997).

11. PAS/PEL(E) said that he would bring back the list of subsidiary legislation in question to the Director of Administration and legal advice would be sought from the Department of Justice on how the situation should be handled.

12. Summing up the issue, the Chairman said that there were two possible scenarios as follows -

- (a) if the Department of Justice confirmed LA's view that the tabling of subsidiary legislation was directory, this could still be subject to legal challenge; and
- (b) if the Department of Justice re-affirmed the Administration's view that the tabling requirement was mandatory, then the question of rectification would arise and would have to be dealt with.

The Chairman said that the conclusion should apply not just to the Regulation but to all the 25 items of subsidiary legislation alike.

13. DLD said that the court would distinguish between simple matters and those which would have serious consequences in determining the validity or otherwise of a piece of law. He quoted an example in New Zealand where the court had ruled that an instrument was valid because of the serious general inconvenience that would occur if it were held to be null and void.

14. The Chairman did not accept that the consequences of a law should be considered by the court when deciding on its validity. LA said that irrespective of which conclusion the Administration arrived at, it must be clearly reflected in the statute. If a piece of subsidiary legislation which had not been tabled was regarded as invalid, this had to be so stated in the law. The law should also provide clearly when the subsidiary legislation was regarded as having no legal effect; whether it was the day when it should be tabled, or retrospectively from the very beginning when it was first published upon the court's ruling that the subsidiary legislation was void. He pointed out that clarity and certainty were important.

Responsibility of tabling

15. Mr LEE Kai-ming sought clarification on the responsibility for tabling of subsidiary legislation and the availability of established procedures to follow. He said that without proper notice by the Administration on subsidiary legislation to be tabled, members would have to go over each publication of Gazette and identify for themselves which items were subsidiary legislation.

16. DLD said that by publishing the subsidiary legislation in the Gazette and having them delivered to LegCo, the Administration had complied with the provision of section 34(1). The actual tabling was done by the LegCo Secretariat. The Administration should not be held responsible for the non-tabling of the 25 items of subsidiary legislation.

17. The Chairman said that the purpose of discussion was not to identify who should be held responsible for the non-tabling but to work out an arrangement to ensure proper tabling of subsidiary legislation.

18. LA advised that not all Legal Notices published in Supplement No. 2 of the Gazette were subsidiary legislation. Examples included orders made by the Chief Executive and resolution passed by LegCo to amend the Rules of Procedure which were published as Legal Notices but were not subsidiary legislation. It would not be fair to require the Clerk to LegCo to go through all the Legal Notices and to decide which ones were subsidiary legislation. It would be a better arrangement for the maker of subsidiary legislation to give formal notice to the Clerk to LegCo about items of subsidiary legislation to be tabled. Upon receipt of the notice, the Clerk to LegCo would arrange for their tabling at the next LegCo meeting. This proposed arrangement was being discussed by the LegCo Secretariat and the Chief Secretary for Administration's Office. Members agreed that the proposed arrangement provided certainty on items of subsidiary legislation to be tabled.

The way forward

19. PAS/PEL(E) said that the Ozone Layer Protection Regulation (Commencement) Notice 1998 which had been tabled in LegCo would appear to be different from the 25 items of subsidiary legislation in the list and suggested that they be dealt with separately. Members however held that the nature of the problem was the same and they should be tackled jointly. The Chairman said that re-gazettal of a commencement notice to appoint a fresh commencement date might apply to the Ozone Layer Protection (Controlled Refrigerants) Regulation given that the trade had all long complied with the Regulation. This approach, however, might not be applicable to other subsidiary legislation in the list. LA drew members' attention to a point of logic in tackling the issue. He said that if the Commencement Notice 1994 was considered having been made validly, the Administration did not have the power to publish the Commencement Notice 1998. As such, the status of the

Commencement Notice 1998 being a piece of subsidiary legislation would be in question and LegCo could not amend or repeal it. However, if it was concluded that the Commencement Notice 1994 was not made validly, the question still remained as to whether the gazettal of a second Commencement Notice which appointed a different commencement date was the best way to solve the problem.

20. The Assistant Secretary General 1 drew members' attention to the rule which provided that where the Council had taken a decision on a specific question and the question had been decided in the negative, no further action should be moved in relation to that question during the current session. She said that if the Commencement Notice 1998 was repealed, there was doubt as to whether a resolution relating to the Notice could be introduced into LegCo within the current session.

21. To get around the problem, the Chairman suggested that the Administration might consider introducing a validation ordinance to confirm the validity of the Commencement Notice 1994 and the subsidiary legislation in question as from the date of first gazettal.

22. DLD said that if a prosecution was instituted under the Regulation, the defendant could argue that the Regulation was invalid because the Commencement Notice 1994 had not been tabled. The gazettal and tabling of the Commencement Notice 1998 would remove this uncertainty. This would set the matter straight as from present. Moreover, this method had an advantage in that a person's right to seek redress for anything done between the two gazettal would not be affected.

23. The Chairman pointed out that if members did not amend or repeal the Commencement Notice 1998 before the expiry of the scrutiny period, the notice would be taken as passed under the negative vetting procedure. Under such circumstances, there would be two Commencement Notices for the same Regulation. The court would have difficulty in deciding whether 1 January 1994 or 1 January 1999 should be the commencement date of the Regulation. Furthermore, it would not be proper for the legislature to allow two Commencement Notices to co-exist at the same time.

24. LA opined that the gazettal of the Commencement Notice 1998 had created ambiguities which could be avoided by the introduction of a validation ordinance. DLD said that a validation ordinance to re-confirm 1 January 1994 as the effective date of the Regulation would take away the rights acquired by persons between the two commencement dates.

25. LA responded that since the Administration had confirmed that no prosecution action under the Regulation had been taken and the trade had been complying with the Regulation, there should not be any complaint about

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validating the original effective date of the Regulation. He nevertheless pointed out that it was not known whether any private prosecution had been lodged under the Commencement Notice 1994 and that offences were subject to a limitation period.

26. Concluding the discussion, the Subcommittee agreed that the Chairman should make a verbal report to the House Committee at its meeting on 22 January 1999 and request the Chairman of the House Committee to discuss the issue with the Chief Secretary at the following Monday meeting. To allow the Administration more time to sort out the best way to deal with the problem, members agreed that the scrutiny period of the Commencement Notice 1998 should be extended by way of resolution to 10 February 1999.

(Post-meeting note: The House Committee decided at its meeting on 22 January 1999 to set up a Subcommittee to study the issues relating to the tabling of subsidiary legislation in LegCo.)

III Any other business

27. There being no other business, the meeting ended at 3:35 pm.

Legislative Council Secretariat
19 April 1999