

立法會
Legislative Council

LC Paper No. LS25/02-03

**Paper for the House Committee Meeting
on 6 December 2002**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 29 November 2002**

Date of Tabling in LegCo : 4 December 2002

Amendment to be made by : 18 December 2002 (or 22 January 2003 if
extended by resolution)

PART I MISCELLANEOUS AMENDMENTS

Import and Export Ordinance (Cap. 60)

Import and Export (General) (Amendment) Regulation 2002 (L.N. 179)

Import and Export (Fees) (Amendment) Regulation 2002 (L.N. 180)

Under section 31 of the Import and Export Ordinance (Cap. 60) ("the Ordinance"), the Chief Executive in Council may make regulations to prohibit the import and export of any article and issue licences to import or export any article upon such terms and conditions as may be specified. The Import and Export (General) (Amendment) Regulation 2002 ("the General (Amendment) Regulation") is made under this section to amend the Import and Export (General) Regulations (Cap. 60 sub. leg.) for the implementation of an international certification scheme for rough diamonds ("the Scheme") in Hong Kong.

2. The Scheme has been developed by the Kimberley Process ("KP"), an international negotiating forum that seeks to stop trade in "conflict diamonds" from fuelling armed conflicts, activities of rebel movements and illicit proliferation of armament. "Conflict diamonds" is defined to mean rough diamonds used by rebel movements or their allies to finance conflicts aimed at undermining legitimate governments as described in the relevant United Nations Security Council resolutions.

3. Hong Kong cannot join the Scheme as a participant as it is not a state or a regional economic integration organisation comprising sovereign states. The Trade and Industry Department ("TID") and Customs and Excise Department ("C&ED") will be designated as importing and exporting authorities of the People's Republic of China for the purposes of implementing the Scheme in Hong Kong.

4. The General (Amendment) Regulation requires that on or after a date to be appointed by the Director-General of Trade and Industry ("the Director-General") by notice published in the Gazette ("the appointed date"):

- (a) rough diamonds shall only be imported, exported, bought, sold or carried by a rough diamond trader registered under the General (Amendment) Regulation, who is required to keep an accurate and up-to-date daily trade record as prescribed under the General (Amendment) Regulation. Disclosure of the record kept or information obtained under the General (Amendment) Regulation is prohibited except for the specified purposes;
- (b) rough diamonds shall only be imported from, or exported to, a specified country or place as set out in the Seventh Schedule, which the Director-General is empowered to amend. The Seventh Schedule is left blank for the time being and is expected to be amended and come into operation on the appointed date by the addition of a list of countries or places which operate the Scheme and other countries or places with which the trade of rough diamond is permitted by the KP;
- (c) rough diamonds that are in transit or air transshipment cargo shall be subject to licensing requirements unless they are not tampered with; and
- (d) the Commissioner of Customs and Excise is empowered to appoint a person to assist the examination of rough diamonds in any place or premises which he is empowered to enter.

5. The Import and Export (Fees) (Amendment) Regulation ("the Fees (Amendment) Regulation") amends the Schedule to the Import and Export (Fees) Regulations (Cap. 60 sub. leg.) to prescribe the fees payable for registration and the issue of licences for the import and export of rough diamonds. The Fees (Amendment) Regulation shall come into operation on a date to be appointed by the Director-General by notice published in the Gazette.

6. Members may refer to the LegCo Brief issued by the Commerce, Industry and Technology Bureau on 27 November 2002 (File Ref: CIB CR15/46/1) for background information and the implementation arrangement, which is broadly in line with the control regimes on rough diamonds to be put in place by the European Union. According to the LegCo Brief, the Diamond Federation of Hong Kong ("DFHK") and a few other industry associations have been consulted and have indicated general support for the implementation arrangement.

7. At the meeting of the Panel on Commerce and Industry on 11 November 2002, Members supported the Scheme in general but raised concern that the control regime and the fees should not become a burden to the industry. The Administration was urged to ensure the confidentiality of the information obtained

and make reference to the practices of overseas jurisdictions in implementing the Scheme.

8. The Administration expects to bring the General (Amendment) Regulation and the Fees (Amendment) Regulation into operation on 1 January 2003 or as soon as possible thereafter.

9. No difficulties in relation to the legal and drafting aspects of the General (Amendment) Regulation and the Fees (Amendment) Regulation have been identified.

Trade Marks Ordinance (Cap. 559)

Trade Marks Ordinance (Amendment of Schedule 1) Regulation 2002 (L.N. 181)

10. The Trade Marks Ordinance ("the Ordinance") was passed by the Legislative Council on 31 May 2000 and shall come into operation on a day to be appointed by the Secretary for Commerce, Industry and Technology.

11. Section 92 of the Ordinance provides that the Chief Executive in Council may by regulation add to Schedule 1 of the Ordinance the name of any country which has acceded to the Paris Convention and any country, territory or area which has acceded to the World Trade Organization Agreement. By this Regulation, Schedule 1 of the Ordinance is amended by adding the lists of countries which have acceded to the Paris Convention and countries, territories or areas which have acceded to the World Trade Organization Agreement to which the Ordinance applies.

12. This Regulation shall come into operation on the day appointed for the commencement of section 92 of the Ordinance.

Marine Parks Ordinance (Cap. 476)

Marine Parks and Marine Reserves (Amendment) Regulation 2002 (L.N. 182)

13. Section 20 of the Marine Parks Ordinance (Cap. 476) provides that the Secretary for the Environment, Transport and Works may make regulations to provide for the management and control of (including the specification of zones within) marine parks and marine reserves. The Marine Parks and Marine Reserves (Amendment) Regulation 2002 ("the Amendment Regulation") amends the Marine Parks and Marine Reserves Regulation (Cap 476 sub. leg.) to prohibit:

- (a) fishing (except with permit or in a special zone in the Tung Ping Chau Marine Park) or hunting, injuring, removing or taking away any animal or plant in or from a marine park and marine reserve; and
- (b) water-skiing in a marine park and marine reserve.

14. Members may refer to the LegCo Brief issued by the Environment, Transport and Works Bureau in November 2002 (File Ref: ETWB(E) 55/21/38) for background information. According to the LegCo Brief, fishing in the special zone of the Tung Ping Chau Marine Park will be carried out on a trial basis for one year. The Country and Marine Parks Board has been consulted and indicated support. The Administration has also taken into account the views of the local villagers and angling enthusiasts when formulating the trial scheme and undertakes to review the trial scheme in consultation with all the relevant parties around mid-2003.

15. The Amendment Regulation shall come into operation on 2 January 2003.

16. We have written to the Administration to clarify some drafting issues in the Amendment Regulation and a copy of our letter (Annex A) and its reply (Annex B) are enclosed.

PART II OTHER SUBSIDIARY LEGISLATION

Census and Statistics Ordinance (Cap. 316)

Census and Statistics (Survey of Innovation Activities) Order (L.N. 183)

17. Section 11 of the Census and Statistics Ordinance (Cap 316) empowered the Secretary for Financial Services and the Treasury ("the Secretary") to direct that a statistical survey be carried out in the manner as specified by him.

18. By this Order, the Secretary directs that a statistical survey be carried out by the Commissioner for Census and Statistics for the purpose of compiling statistics relating to the innovation activities of business undertakings. It provides for the matters and manner in respect of which the information is to be obtained, the persons required to give the information, the survey period, the sampling methods, the scope of the Order and the date for destruction of information collected or received in the survey.

19. Members may refer to the LegCo Brief issued by the Financial Services and the Treasury Bureau on 21 November 2002 (File Ref: FSTB EAD 8/5141/87 Pt4) for background information. According to the LegCo Brief, people in the industry have been consulted. They indicated no problem in providing the data and their specific comments on the questionnaire have been taken into account by the Administration when the questionnaire are finalized.

20. No difficulties in relation to the legal and drafting aspects of the Order have been identified.

Legal Practitioners Ordinance (Cap. 159)
Practising Certificate (Special Conditions) Rules (L.N. 184)

21. The Rules have been made by the Council of the Law Society of Hong Kong under section 73 of the Legal Practitioners Ordinance (Cap 159).

22. The Rules set out the conditions which the Law Society may impose when issuing or amending an already issued practising certificate to a solicitor and the matters to be considered by the Law Society when imposing the conditions.

23. The Rules have been approved and signed by the Chief Justice and circulated to the members of the Panel on Administration of Justice and Legal Services on 28 November 2002 for information.

24. No difficulties in relation to the legal and drafting aspects of the Rules have been identified.

Securities and Futures Ordinance (Cap. 571)
Securities and Futures (Unsolicited Calls - Exclusion) Rules (L.N. 185)
Securities and Futures (Recognized Counterparty) Rules (L.N. 186)
Securities and Futures (Registration of Commission Disciplinary Orders) Rules (L.N. 187)
Securities and Futures (Professional Investor) Rules (L.N. 188)
Securities and Futures (Leveraged Foreign Exchange Trading - Exemption) Rules (L.N. 189)
Securities and Futures (Leveraged Foreign Exchange Trading) (Arbitration) Rules (L.N. 190)
Securities and Futures (Exempted Instruments - Information) Rules (L.N. 191)

Introductory

25. The seven sets of Rules are made by the Securities and Futures Commission (SFC) under the Securities and Futures Ordinance (Cap. 571) (the Ordinance). The Ordinance was enacted in March 2002 but has not yet been commenced. One of the reasons is that the provisions of the Ordinance have merely stipulated the legal framework of the regulatory regime for the financial markets in Hong Kong, leaving detailed rules and regulations necessary for the functioning of the regime to be made by way of subsidiary legislation. The Administration has identified about 37 sets of Rules that are required to be made before the Ordinance may come into operation. The current seven sets of Rules constitute the first batch to be tabled for Members' scrutiny. The remaining subsidiary legislation will probably be tabled in two further batches in the coming weeks.

26. The House Committee was informed of the large volume of subsidiary legislation required to be made under the Ordinance. On 22 February 2002, the

House Committee resolved to establish the Subcommittee on Draft Subsidiary Legislation to be made under the Securities and Futures Ordinance (the Subcommittee) to study the draft subsidiary legislation in advance of their gazettal.

27. The seven sets of Rules described in the following paragraphs have been studied by the Subcommittee. Prior to the scrutiny by the Subcommittee, public consultation has been conducted in respect of each set of the Rules in their draft form. The conclusions of such public consultations have also been published with the written responses of SFC to the comments received set out in table form attached as an annex. Members may wish to refer to the relevant paragraphs in the Report of the Subcommittee to the House Committee (Ref: CB(1) 434/02-03) for further information on matters and issues considered by the Subcommittee.

Securities and Futures (Unsolicited Calls - Exclusion) Rules (L.N. 185)

28. These Rules specify the excluded calls to which the prohibition against unsolicited calls under section 174 of the Ordinance would not apply. These excluded unsolicited calls are:-

- (a) calls in relation to an agreement for the sale or purchase of securities of a corporation made with a person who is already a holder of the securities of that corporation;
- (b) calls that are permissible communication; and
- (c) calls made by a registered institution in relation to a leverage foreign exchange contract in compliance with the relevant Monetary Authority guidelines.

29. Permissible Communication is defined as any communication that is not made in the course of a personal visit, a telephone conversation or any other interactive dialogue in the course of which statements and responses to them are exchanged immediately.

Securities and Futures (Recognized Counterparty) Rules (L.N. 186)

30. These Rules are entirely new rules and prescribe the institutions which are within paragraph (c) of the definition of "recognized counterparty" in section 1 of Part 1 of Schedule 1 of the Ordinance. They include:-

- (i) a licensed corporation that deals in currency futures contracts on any specified futures exchange listed in Part 2 of Schedule 1 of the Ordinance;
- (ii) a corporation that has and maintains shareholders' funds of not less than \$30,000,000 or equivalent in any foreign currency and is authorized in a

specified jurisdiction listed in column 2 of Schedule 1 of the Rules to carry on the business of dealing in currency futures contracts, and deals in currency futures contract on any specified futures exchange listed in Part 2 of Schedule 1 of the Ordinance;

- (iii) a bank incorporated in a specified jurisdiction listed in column 2 of Schedule 1 of the Rules and regulated by a bank regulator in that jurisdiction as specified in column 3 of Schedule 1 of the Rules;
- (iv) a corporation that has issued debt instruments which continue to attract a credit rating specified in Part 5 of Schedule 1 of the Ordinance or its equivalent in the opinion of the SFC; and
- (v) an institution that has satisfied SFC that recognition as a counterparty is appropriate and would not prejudice the interest of the investing public and is specified in Schedule 2 of the Rules.

Securities and Futures (Registration of Commission Disciplinary Orders) Rules (L.N. 187)

31. These Rules seek to prescribe the manner in which an application by SFC to register with the Court of First Instance of the High Court an order to pay pecuniary penalty made by it under section 194(2) or 196(2) of the Ordinance may be made. The provisions of the Rules stipulates that the application is made by producing a written notice requesting the registration of the order together with the original order and a copy of it.

Securities and Futures (Professional Investor) Rules (L.N. 188)

32. These Rules prescribe the additional classes of persons to be included as "professional investors" under paragraph (j) of the definition in section 1 of Part 1 of Schedule 1 of the Ordinance. The classes of persons are:-

- (a) any trust corporation being a trustee of a trust or trusts with total assets not less than \$40 million or its equivalent in any foreign currency;
- (b) any individual who either alone or together with his spouse or child or children has securities and money of a value not less than \$8 million or its equivalent in any foreign currency;
- (c) any corporation or partnership that has securities and money of a value not less than \$8 million or its equivalent in any foreign currency or assets not less than \$40 million or its equivalent in any foreign currency; and

- (d) any corporation whose sole business is to hold investment for an individual who wholly owns that corporation and who together with his spouse or child or children has securities and money of a value not less than \$8 million or its equivalent in any foreign currency.

33. For a trust corporation or corporation or partnership, the value of the assets or securities and money is ascertained by what is stated in its most recent audited financial statement or statements or by referring to the custodian statement or statements issued to it. For an individual, the value of securities and money is ascertained by what is stated in a certificate issued by an auditor or by referring to the custodian statement or statements issued to him.

Securities and Futures (Leveraged Foreign Exchange Trading - Exemption) Rules (L.N. 189)

34. These Rules supplement paragraph (xiii) in the definition of "leveraged foreign exchange trading" in Part 2 of Schedule 5 to the Ordinance. Paragraph (xiii) provides for a person, either by reason of his belonging to a class or carrying on a type of business prescribed by the rules made by SFC, whose acts performed for or in connection with any contract or arrangement or proposed contract or arrangement are for the purposes of SFO excluded from the meaning of "leveraged foreign exchange trading". Such exclusion means that such person may carry on a business of leveraged foreign exchange trading without obtaining a relevant licence in compliance with SFO.

35. The Rules list three classes of persons. The first is a corporation either itself or where its shares are wholly owned by another company or a partnership, such company or partnership has a qualifying credit rating (defined in section 1 of Part 1 of Schedule 1) or any of its debt instruments has such a rating, and either its principal business is not leverage foreign exchange trading, or the average principal amount of each of its leveraged foreign exchange spot transactions is not less than \$7.8 million. The second is a licensed corporation or a client of a licensed corporation (but only when such client deals with the corporation) performing an act in connection with the sale, purchase or transfer of a listed currency warrant. The third is an issuer of a listed currency warrant or a corporation in the same group of companies as the issuer performing an act in connection with the sale, purchase or transfer of the listed currency warrant within the same group or with a licensed corporation.

36. The Rules also require each of the persons in the first class to notify the SFC within 4 months of the end of its financial year that it has satisfied the conditions above stated and if it has ceased to satisfy such conditions, notify the SFC within 7 business days of the cessation. Such person also has the obligation to supply the SFC such information as it may require to verify whether the person has satisfied the conditions.

Securities and Futures (Leveraged Foreign Exchange Trading - Arbitration) Rules (L.N. 190)

37. These Rules largely replicate the provisions of the Leveraged Foreign Exchange Trading (Arbitration) Rules (Cap. 451, sub. leg. C) except the existing section 16. There is no change in policy.

38. The Rules provide for the purpose and the establishment of an arbitration panel, the appointment and replacement of arbitrator, the procedural rules for the commencement, conduct and termination of arbitration proceedings. Also provided for are the following incidental matters: arbitrator's power to award interest on any damages or costs, power to order certain information to be kept confidential, manner of service, calculation of time periods, the law applicable to arbitration proceedings, and immunity for panel chairmen and members, clerk and representative of HKIAC.

Securities and Futures (Exempted Instruments - Information) Rules (L.N. 191)

39. These Rules stipulate the information to be submitted to SFC under section 110 (1) of the Ordinance after the issue of any advertisement, invitation or document referred to in section 103(3)(e), (f) and (g) of the Ordinance by an authorized institution, an exempted body or its wholly owned subsidiary, a multilateral agency or a bank.

40. The Rules provide that the information to be submitted to SFC are those relate to the issue of a certificate of deposit or other instrument referred to in the advertisement, invitation or document in question and specified in the Schedule to the Rules.

LegCo Briefs

41. The SFC has issued LegCo Brief in respect of each set of the above Rules all dated 25 November 2002. Members may wish to refer to them for further information.

Commencement

42. All the above Rules will only come into operation upon the commencement of the Ordinance. The Administration has indicated that the Ordinance will probably come into operation in the first quarter of 2003.

Conclusion

43. Both the contents of and the underlying policies reflected in the above Rules have the support of the Subcommittee. No difficulties in relation to the legal or drafting aspects of the subsidiary legislation have been identified.

PART III NOTICES AND ORDER AND DECLARATION UNDER PUBLIC HEALTH AND MUNICIPAL SERVICES ORDINANCE

Tax Reserve Certificates (Fourth Series) Rules (Cap. 289 sub. leg.)

Tax Reserve Certificates (Rate of Interest) (No. 9) Notice 2002 (L.N. 192)

44. This Notice fixes the rate of interest payable on tax reserve certificates issued on or after 2 December 2002 at 0.0583% per annum. The rate before this Notice was 0.2308% per annum.

Public Health and Municipal Services Ordinance (Cap. 132)

Public Health and Municipal Services (Amendment) Ordinance 2002 (1 of 2002) (Commencement) (No. 2) Notice 2002 (L.N. 193)

45. The object of the Public Health and Municipal Services (Amendment) Ordinance 2002 (1 of 2002) ("the Amendment Ordinance") is to amend the Public Health and Municipal Services Ordinance (Cap. 132) to provide for -

- (a) the making of closure orders in respect of premises used for certain food business purposes without licence, permit or permission; and
- (b) an expedited procedure to make closure orders where the use of premises for certain food business purposes constitutes an immediate health hazard.

46. The Amendment Ordinance has been discussed in detail by Members. Members may refer to the LegCo Brief (File Ref.: EFB CR 10/8/7) issued by the Environment and Food Bureau dated 14 February 2001 and the Legal Service Division report (LC Paper No. LS64/00-01) on the Amendment Ordinance dated 28 February 2001 for further information.

47. Sections 1 and 3 of the Amendment Ordinance, which relate to the establishment of the Appeal Board on Closure Orders (Immediate Health Hazard), came into operation on 15 November 2002.

48. By this Notice, the Secretary appoints 14 February 2003 as the day on which the remaining provision of the Amendment Ordinance that have not come into operation shall come into operation.

Public Health and Municipal Services Ordinance (Public Markets) (Amendment of Tenth Schedule) Order 2002 (L.N. 194)

49. By this Order made under section 79(5) of the Public Health and Municipal Services Ordinance (Cap. 132), the Director of Food and Environmental

Hygiene has renamed the Sam Ka Tsuen Market to which the Ordinance applies as Lei Yue Mun Market. This Order simultaneously amends the Tenth Schedule to the Ordinance by repealing Sam Ka Tsuen Market and substituting Lei Yue Mun Market.

Declaration of Markets Notice (Amendment) (No. 2) Declaration 2002 (L.N. 195)

50. By this Declaration made under section 79(1) of the Public Health and Municipal Services Ordinance (Cap. 132), the Director of Food and Environmental Hygiene has declared the Lei Yue Mun Market (the Market) to be a market to which the Ordinance applies. The Schedule to the Declaration of Markets Notice (Cap. 132 sub. leg.) is simultaneously amended by adding a reference to the Market.

Encl

Prepared by
KAU Kin-wah (Legal Notices No. 185 to 191)
LAI Shun-wo, Monna (Legal Notices No. 179 to 184 and 192 to 195)
Assistant Legal Advisers
Legislative Council Secretariat
4 December 2002

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Secretary for the Environment,
Transport and Works
Environment, Transport and Works Bureau
(Attn: Miss Jenny CHAN
AS (E) 4A)
10/F, Citibank Tower
3 Garden Road
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Hong Kong

By Fax (2136 3281) and By Post

3 December 2002

Dear Miss CHAN

**Marine Parks and Marine Reserves
(Amendment) Regulation 2002 (L.N. 182 of 2002)**

We are scrutinising the legal and drafting aspects of the above Regulation. We note that:

- (a) The English version of the new section 3(1) is basically the same as the repealed section 3(1). However the new Chinese version is different from its repealed counterpart. Please clarify the difference and the meaning of "以任何方式從海岸公園或海岸保護區釣魚、捕魚或獵捕、移走或帶走任何動物或植物".
- (b) The new section 3(1A) provides that:
 - "A person may—
 - (a) fish in or **from** a marine park under and in accordance with a permit granted under section 17(3); or
 - (b) fish in or **from** a special zone".

Please clarify the meaning of "fish **from** a marine park" and "fish **from** a special zone".

The Chinese version of clause 3(1A) provides that:

"任何人可—

- (a) 根據和按照在第 17(3)條下批給的許可證在海岸公園內釣魚或捕魚或**從**海岸公園釣魚或捕魚；
或
- (b) **從**該特別區域釣魚或捕魚。".

Please clarify the meaning of "**從**海岸公園釣魚或捕魚" and "**從**持別區域釣魚或捕魚".

The Regulation will be considered in the House Committee to be held on 6 December 2002. It is appreciated that your reply in both languages could reach us by noon, 4 December 2002.

Yours sincerely

(Monna LAI)
Assistant Legal Adviser

c.c. LA

4 December 2002

Urgent by Fax

Ms Monna LAI
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central, Hong Kong
(Fax : 2877 5029)

Dear Ms Lai,

**Marine Parks and Marine Reserves
(Amendment) Regulation 2002 (L.N.182 of 2002)**

Thank you for your letter of 3 December 2002.

According to our existing policy, marine parks and marine reserves are designated under the Marine Parks Ordinance (“the Ordinance”) for protecting the marine environment and marine life in the areas concerned for conservation, education and research purposes. The Marine Parks and Marine Reserves Regulation (“the Regulation”) is made under the Ordinance to facilitate management of marine parks and marine reserves. Both the current sections 3(1) and 17(3) of the Regulation and the new sections 3(1) and 3(1A) are to control activities that are not compatible with the objectives of designating these protected areas.

/The.....

The policy intent of the new section 3(1A) is to protect a marine park from excessive fishing activities so as to protect the marine environment and marine life there. Same as the current sections 3(1) and 17(3), fishing activities are restricted to those who have obtained permits from the Director of Agriculture, Fisheries and Conservation under section 17 of the Regulation with the objective of limiting removal of fish from a marine park and hence controlling the impact on the fisheries resources in the areas to within acceptable levels. The phrase “fish in or from a marine park” is used in the current section 3(1) and the new section 3(1A) to control the fishing activities that may have impact on a marine park, irrespective of whether the subject fishing vessel is physically located inside a marine park (i.e. fish in a marine park) or outside a marine park (i.e. fish from a marine park).

In addition, the new section 3(1A) also allows recreational fishing in a special zone under specified conditions. Similar to the current section 3(1) and the new section 3(1A)(a), the phrase “fish in or from a special zone” is used in the new section 3(1A)(b) such that removal of fish from the special zone by fishing on-shore on a “one-line one-hook” basis is allowed, irrespective of whether the angler is standing inside (i.e. fish in a special zone) or outside (i.e. fish from a special zone) the special zone. We need to cover the scenario that an angler stands on land beyond the high-water mark when fishing and hence is physically located outside the special zone or even the marine park. I would to reiterate that our policy intent is to protect the marine environment and marine life within marine parks.

The corresponding Chinese version “從海岸公園釣魚或捕魚” and “從特別區域釣魚或捕魚” are drafted to reflect the meaning of “fish in or from a marine park” and “fish in or from a special zone” as explained above.

The Chinese version of the new section 3(1) has been slightly revised according to the advice of the Department of Justice in order to more clearly express the meaning of “fish from a marine park”.

I hope that the above has set out our policy intention clearly.
Please contact me if you require further information.

Yours sincerely,

(Jenny Chan)
for Secretary for the
Environment, Transport and Works