

Bills Committee on Energy Efficiency (Labelling of Products) Bill

The Administration's response to comments made by
the Hon CHOY So-yuk in her letter of 1 June 2007

Commencement

If a prescribed product bears an energy label of the voluntary energy efficiency labelling scheme (EELS) (i.e. the product model has been registered under the voluntary EELS) before the commencement of the Energy Efficiency (Labelling of Products) Bill (the Bill) and the product has met the requirements under clause 54(1) of the Bill, the manufacturer or importer can follow the transitional arrangement under clause 54(1) of the Bill so that the product is deemed to have complied with the relevant requirements of the Bill.

Second-hand product

2. The expression “second-hand product” is defined in clause 2 of the Bill as a prescribed product that has previously been used by a consumer. Whether a prescribed product has previously been used is a matter of fact and depends on the circumstances of each individual product, such as the appearance of the prescribed product and the date of purchase, etc. An unused prescribed product returned by a consumer after purchase does not fall within the definition of “second-hand product”.

Test report

3. It takes more time to conduct a full test on a compact fluorescent lamp that includes testing on its lamp life (the duration of the test depends on the life of the lamp, ranging from 6 000 hours to 12 000 hours). The Bill proposes that a manufacturer or importer of compact fluorescent lamps can first submit an “interim test report” on the compact fluorescent lamps (an interim test takes only 2 000 hours) in accordance with clause 6(4) of the Bill and obtain a reference number for the product. This is aimed to facilitate the trade to launch their products as soon as possible. If a specified person has under clause 6 of the Bill submitted an interim test report in respect of a compact fluorescent lamp, the person is required to submit additional documents (i.e. progress test reports and a full test report upon completion of the test) in accordance with clause 7 of the Bill. Similar arrangements for room air conditioners and

refrigerating appliances are not necessary as the lifespan tests are not required, and the relevant tests take a shorter time.

Energy efficiency and performance characteristics

4. The Electrical and Mechanical Services Department (EMSD) will set out in details the “energy efficiency” calculation method and the items referred as “performance characteristics” for each category of prescribed product, in the code of practice to be issued under clause 40 of the Bill.

Supply

5. The definition of “supply” in clause 2 of the Bill covers various situations: to sell or hire out the prescribed product; to offer, keep or exhibit the prescribed product or any part of the prescribed product for sale or for hiring out; to exchange or dispose of the prescribed product for consideration; to transmit, convey or deliver the prescribed product in pursuance of a sale, a hiring out or an exchange or disposal for consideration; to give the prescribed product as a prize or to make a gift of the prescribed product for commercial purposes. The above coverage reflects our policy intent, and is similar to that in section 2 of the Electricity Ordinance (Cap. 406), section 2 of the Consumer Goods Safety Ordinance (Cap. 456) and section 2 of the Toys and Children’s Products Safety Ordinance (Cap. 424).

Specified premises

6. According to clause 2 of the Bill, “specified premises” means newly completed premises, whether domestic or not, the first disposition of which has not been made; or (if the first occupation of which is made before the first disposition) the first occupation of which has not been made. If a developer sells a newly completed flat to a buyer (the sale constitutes the first disposition of the flat), and after completing the purchase and before occupation, the buyer has the flat fitted out and installed with the prescribed product and then resells it, the flat is not a “specified premises” as the disposition is not “the first disposition”. The Bill does not target flats in the secondary market.

Disposition

7. Clause 2 of the Bill defines “disposition” in relation to any

specified premises. Therefore, it has to be interpreted in conjunction with the definition of “specified premises” in clause 2. The definition reflects our policy intent and does not cover an offer to sell, an offer to lease, an offer for approval to occupy or an offer for permission to occupy.

Application

8. The definition of “disposition” in clause 2 of the Bill refers to any specified premises rather than any prescribed product. According to clause 3(1) of the Bill, the Bill applies to a prescribed product that is supplied as part of or in connection with the disposition of any specified premises. If a developer supplies a prescribed product on a premise under a “long term lease”, the “long term lease” will fall within the meaning of “a licence to occupy” and “permission to occupy” the specified premises under the definition of “disposition”.

Scrap

9. We consider that in situations where certain scrap has been transformed, it is no longer scrap and falls outside the exemption of clause 3(2)(c) of the Bill and thus can be regulated under the Bill. We are of the view that clause 3(2)(c) of the Bill has already reflected our policy intent, and no amendment is necessary.

Second-hand product

10. Under clause 2 of the Bill, a “second-hand product” is defined as a prescribed product that has previously been used by a consumer. Whether a prescribed product is a “second-hand product” is a question of fact and depends on the circumstances of each individual product, such as the appearance of the prescribed product and the date of purchase, etc.

Importer

11. Under clause 3 of the Interpretation and General Clauses Ordinance (Cap. 1), “import” means to bring or cause to be brought into Hong Kong by air, land or water. For the purposes of the Bill, “importer” adopts the definition of “import” and means a person who brings or causes to be brought prescribed products into Hong Kong by air, land or water. The term “importer” includes “parallel importer”.

Reasonable excuse

12. Clauses 19, 23, 24 and 26 of the Bill empower the Director of Electrical and Mechanical Services (“the Director”) and authorized persons to exercise certain enforcement powers to facilitate investigation. For example, the provisions empower the Director to serve a notice on a person to provide the relevant information, if he has reasonable grounds to believe that the person has the information. In those circumstances, we consider it appropriate to allow deployment of reasonable explanations for not complying with the requirement, as a defence.

“Ensure”

13. Clause 5 of the Bill prohibits the supply of prescribed products without a reference number and energy label by a person who is not a manufacturer or importer of the products (“supplier”). In any proceedings against a supplier for an offence under clause 5, the defence under clause 45 may be available if the supplier can show that he took all reasonable steps and exercised all due diligence (e.g. he has inspected the record kept by the Director under clause 13 of the Bill to verify whether the prescribed product is a product of a listed model, or has checked whether the prescribed product bears an energy label before supplying the product) to ensure that the prescribed product supplied complies with the requirements of clause 5(1) of the Bill. As the situation of each case varies, we do not consider it appropriate to issue guidelines on this aspect.

Submission of specified information and specified documents for product model

14. “The institution that carries out the test” shall meet one of the following criteria:

The institution is a laboratory, and

- (a) the laboratory must be:
 - (i) accredited under the Hong Kong Laboratory Accreditation Scheme (HOKLAS) operated by the Hong Kong Accreditation Service (HKAS) for the relevant test; or

- (ii) accredited under an accreditation scheme operated by a laboratory accreditation body in other economies with which HKAS has concluded a mutual recognition agreement / arrangement for the relevant test.
- (b) the laboratory has been assessed and evaluated by a recognized independent accreditation body, and is certified by the accreditation body to be competent in carrying out the relevant tests.
- (c) the laboratory has been assessed and recognized by the Director under the voluntary EELS for conducting the relevant test, and is certified under ISO 9001 or equivalent standards for quality system.

The above criteria will be set out in detail in the code of practice approved and issued under clause 40 of the Bill.

15. The term “standing” means whether the testing institution has the qualifications set out in clause 6(3) of the Bill. Under clause 6(4)(b), the specified person has to provide documentary proof for the above qualifications.

Notification of change in submission including specified information

16. Clause 9 of the Bill provides that a specified person shall, within 21 days after there is any change in the specified information or a specified document submitted to the Director, notify the Director of the change. The term “specified information” and “specified document” have been defined in clauses 6(3) and (4). The intent of clause 9 is to cover changes arising from new circumstances, such as a change of company name where the specified person is a company. Clause 9 of the Bill does not cover errors or omissions in the specified information or specified documents.

For errors or omissions that are minor or clerical in nature, the Director may make rectification by administrative means. If the Director considers that the error or omission has significant impact on consumers’ choice, he may refuse to assign a reference number under clause 8(2) of the Bill to the product model to which the information or document is related. Furthermore, if there is any error or omission in the specified information or specified documents, the prescribed products of the listed model will not conform with the specified information or

specified documents submitted to the Director. The Director may then remove from the record the reference number of the listed model under clause 16(1) of the Bill accordingly. Clause 11 of the Bill imposes certain duties on a specified person to whom a reference number has been assigned. The specified person shall, inter alia, ensure that the prescribed products of the listed model conform with the specified information or specified documents that he has submitted to the Director. If there is any error or omission in the specified information or specified documents, the prescribed products of the listed model will not conform with the specified information or specified documents submitted to the Director. The Director may, accordingly, serve an improvement notice on the specified person or remove the reference number of that model from the record under clause 11(4) of the Bill. We consider that the above measures are adequate to encourage specified persons to submit accurate information and to rectify any error or omission in the specified information or specified documents.

No longer available in the market

17. Clause 10(2)(c) of the Bill requires a specified person (the manufacturer or importer of the listed model) to notify the Director whether he still supplies the relevant model in the market, so that the Director can reflect its availability in the record. In light of Members' comments, we propose amending clause 10(2)(c) and 10(6) of the Bill to better reflect our policy intent, i.e. if the specified person has notified the Director under clause 10(2)(c) that the listed model supplied by him is no longer available in the market, he is no longer required to update product information according to clause 10(6) of the Bill. According to clause 3(2)(e) of the Bill, the Ordinance does not apply to a "second-hand product".

Responsibility of the specified person to whom a reference number has been assigned

18. Clause 11 of the Bill imposes certain duties on the specified person to whom a reference number has been assigned. The requirements are to ensure that the product's information or the information on its energy label conforms with the information submitted to the Director. The Bill does not specify a time limit for those duties.

Record

19. The Director has the power to amend the record to reflect the revisions or up-to-date information submitted by a specified person under clauses 9 and 10 of the Bill. Moreover, according to section 40(1) of the Interpretation and General Clauses Ordinance (Cap. 1), where any Ordinance confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing. For the purposes of the Bill, clause 13 provides that the Director shall keep a record of listed models of prescribed products. Therefore, by virtue of section 40(1) of the Interpretation and General Clauses Ordinance (Cap. 1), the Director has the power to rectify any error or omission in the record to ensure that the information therein is accurate.

20. The information of the record will be uploaded to the webpage of the Electrical and Mechanical Services Department (EMSD) for public inspection.

Improvement notice

21. The Bill does not set a maximum length of the remedy period, nor does it allow extension of the period. In determining the remedy period to be specified in an improvement notice, apart from complying with clause 14(3) of the Bill, the Director will also take into account the individual nature of each case, the impact of the contravention on the public and the time reasonably required for taking the relevant remedial measures.

Prohibition notice

22. The “person” referred to in clause 15 of the Bill does not include the employee or the agent. The prohibition notice will be served on the manufacturer, importer or supplier, rather than their employee or agent.

Issuing a notice following the removal of a reference number from the record

23. If the Director has exercised his power under clause 16 and removed from the record the reference number assigned to a product model, he will, where appropriate, publish (including uploading the

relevant information to the EMSD's webpage) under clause 30(2)(b) a statement indicating that the reference number has been removed.

Power to obtain information

24. Clause 19 of the Bill empowers the Director to require a person to furnish information if he has reasonable grounds to suspect that a provision of the Bill in relation to a prescribed product has been contravened. The Director may require that person to furnish information relating to the origin of the prescribed product, the person to whom the product has been supplied, and the energy efficiency and performance characteristics of the product. Such information is necessary for enabling the Director to investigate any contravention under the Bill and to take other enforcement actions. As the Director is exercising his power under clause 19 of the Bill for the purpose of preventing and investigating crimes, we consider that the person who provides the requested information that may be regarded as trade secrets or kept confidential under contractual obligation, should not be held legally liable. We shall discuss with the Department of Justice whether amendment is necessary to amend the Bill to reflect the said intent.

The authorized persons shall keep the information obtained in safe custody. Under section 21 of the Official Secrets Ordinance (Cap. 521), a disclosure by a public servant is made with lawful authority, if and only if, it is made in accordance with his official duty.

Power of authorized persons

25. The term "domestic premises" means any premise or place used or intended to be used solely or principally for residential purpose. Whether any premises are domestic premises is to be determined according to the facts of each case. Premises that are used both as a shop and private dwelling are not domestic premises as they are not used solely or principally for residential purpose. In case of doubt, the Director will apply for a warrant under clause 25 of the Bill before entering the premises concerned.

26. The EMSD will draw up internal guidelines for authorized officers in order to regulate the exercise of the enforcement powers conferred under clauses 23 to 26 of the Bill.

Power to require testing

27. The Director will state the reason for requiring the testing in the notice to be served under clause 27 of the Bill.

Action specified by the Director

28. Clause 30(1) of the Bill provides that the Director may take the actions specified in subclause (2). The clause allows the Director to take either one of the two actions or both actions. The Director will take into account the impact of each non-compliance case on the public and the need for extensive publication of it, in deciding the action to be taken.

Compensation for seizure and detention of products

29. The jurisdiction of the Small Claims Tribunal and the District Court under clause 31(3) of the Bill is non-exclusive. Clause 31(3)(b) of the Bill aims to allow the relevant person to make a claim for compensation over the general jurisdiction of the District Court, i.e. \$1,000,000. The relevant person may also choose to make a claim for compensation in a higher level of courts.

Appeal to appeal board

30. Clause 32(2) provides that an appeal made under clause 32 does not suspend the Director's decision or direction that is the subject of the appeal unless he decides otherwise. The appeal board does not have the power to make an order to suspend the Director's decision or direction.

How an appeal is to be commenced

31. "The date on which the appellant was notified" means the date stated on the letter of notification or notice issued or served by the Director under clauses 8, 14, 15 or 16 of the Bill.

Appeal board panel

32. Under clause 37(4) of the Bill, a legal adviser may be present at any proceedings before the appeal board to advise it on any matter. Therefore, we consider it unnecessary to include legal professionals in the appeal board panel. The Secretary will take into account a series of factors when appointing the appeal board panel. With regard to

financial status, the basic consideration for the Secretary is whether the person has become bankrupt or has entered into a voluntary arrangement with his creditors.

Remuneration of member of appeal board

33. Under clause 36 of the Bill, the remuneration, if any, of the chairman and a member of an appeal board is to be paid at a rate that the Financial Secretary determines. The Financial Secretary has been delegated the authority by the Finance Committee of the Legislative Council to approve remuneration of non-official members of boards and committees subject to a ceiling. The ceiling is announced by way of a Financial Services and the Treasury Bureau Circular Memorandum. The maximum rate of remuneration is at present \$705 per member per attendance. The honorarium is taxable income of salaries tax under section 8(1) of the Inland Revenue Ordinance (Cap 112).

Proceedings before appeal board

34. Section 54(1) of the Copyright Ordinance (Cap 528) provides that copyright is not infringed by anything done for the purposes of the proceedings of the Legislative Council or judicial proceedings. The appeal board's proceedings are quasi-judicial, not judicial. It follows that section 54 of the Copyright Ordinance does not apply to the proceedings of the appeal board. As for the exemption to solicitor or barrister under section 118(2E) of the Copyright (Amendment) Bill 2006, it applies to the proceedings of the appeal board under clause 37.

35. Since the appellant and the Director have legal interest in the matter heard before the appeal board, they both enjoy "qualified privilege". The availability of "qualified privilege" does not hinge on whether the proceedings are judicial.

Determination of appeal

36. It is our policy intent that an appeal board member should not be held legally liable for his act if such act is done in good faith in discharging his duty as a member. We shall discuss with the Department of Justice whether amendment is necessary to reflect the said intent.

37. Clause 38(4) of the Bill provides that the appeal board may, after taking into account the circumstances of individual appeals, make

any order it thinks fit with regard to the payment of costs of the proceedings. We consider it necessary to allow the appeal board the discretion to make cost orders according to the circumstances of each appeal.

38. Clause 38(4) and (6) of the Bill provides that the appeal board may, after taking into account the circumstances of individual appeal, make any order it thinks fit with regard to the payment of costs of the proceedings. It follows that the appeal board may make an order against the Director. If the Director defaults on payment, the appellant can take legal action against the Government.

Issue of codes of practice

39. If a code of practice has been revised, the Director shall, under clauses 42(2) and (4) of the Bill, specify the revisions made to it by notice published in the Gazette.

Use of approved code of practice in proceedings

40. Clause 41(1) provides that a failure on the part of any person to observe any provision of an approved code of practice does not of itself render the person liable to any civil or criminal proceedings. However, the code of practice is admissible in evidence in proceedings set out in clause 41(2). The Bill also contains provisions relating to the consequences of failing to comply with the code of practice. For example, by virtue of clauses 6(4)(a), (5)(c) and 8(2), test reports, interim test reports, progress test reports or full test reports of product models not prepared in accordance with the requirements specified in the approved code of practice would not satisfy the definition of “specified documents”. Accordingly, the product model would not be assigned a reference number.

Director may grant exemptions

41. In deciding whether a particular case may be exempted, the Director will consider a series of factors, including the quantity and usage of the product, its impact on energy efficiency, and whether the decision would affect the development of new technology, etc.