

Product Eco-responsibility Bill

The Administration's Response to the Questions raised by the Assistant Legal Advisor (17 March 2008)

Clauses	Questions raised by ALA	Response by the Administration
Part 1		
2	<p>Clause 2(1) provides that the purposes of Bill are to minimize the environmental impact of various types of product and to that end, “to introduce <i>producer responsibility schemes or other measures</i> that may require manufacturers, importers, wholesalers, retailers, consumers or any other parties to share the responsibility for the reduction in the use, and the recovery, recycling and proper disposal of those products”.</p> <p>Please explain the meaning of “producer responsibility schemes”.</p>	<p>“Producer responsibility scheme” is a term commonly used in the arena of environmental protection and refers to a waste management approach that requires manufacturers, importers, wholesalers, retailers, consumers or any other parties to share the responsibility for the management of certain products throughout their lifecycle to minimize the impact on the environment.</p>
2	<p>The validity of other provisions of the Bill must confine to the vires as provided in clause 2(1) (the purpose clause). Since the other provisions of the Bill must fall within or incidental to such “producer responsibility schemes”, will the Administration, for the sake of clarity, add a definition of “producer responsibility schemes” in the Bill?</p>	<p>The purpose clause is an express statement of the objectives of the Bill. It is not the empowering section in relation to the operative provisions of the Bill. “Producer responsibility schemes” are mentioned in the purpose clause because this term is commonly used in the arena of environmental protection and will help statute readers to understand the overall objectives of the Bill. It is not necessary to define “producer responsibility</p>

		<p>scheme” in the purpose clause because this term is not used in the operative provisions of the Bill. As “other measures” are also mentioned in clause 2(1)(b), the current wording is sufficiently wide for the purposes of this Bill.</p>
2	<p>Please clarify the difference, if any, between the phrase “which may include (plastic shopping bags ...)” which is not qualified by “but not limited to” in clause 2(1)(a) and the same provision which is qualified by “may include (but not limited to) (the following - ...)” in clause 2(2)(a).</p>	<p>In clause 2(2), the phrase “(but are not limited to)” is included to make it clear that the examples of schemes and measures set out in clause 2(2)(a) to (e) are not exhaustive. In clause 2(1)(a), the expression “various types of products” (不同種類產品) is used, followed by the non-defining relative clause “, which may include ...” in the English text, and the words “有關產品的種類可包括” in the Chinese text. It is sufficiently clear from the context of clause 2(1)(a) that the list of specified products that follows is also non-exhaustive.</p>
2	<p>Please explain the precise meaning of the terms “waste management” and “proper waste management” in sub-clauses 2(2)(a) and (c).</p>	<p>“Waste management” is a term commonly used in the arena of environmental protection and deals with various measures that may be used in the management of waste from its generation to its disposal, such as waste avoidance and reduction at source, waste separation, collection, storage and transfer, and treatment and disposal. The term “proper waste management” is used in clause 2(2)(a) and (c) to further explain some possible measures that may be introduced in future. For example, the purpose of requiring a manufacturer, importer, wholesaler or retailer to</p>

		collect certain products under a take-back scheme is to facilitate the adoption of appropriate measures in the waste management of the collected products, while the purpose of imposing a recycling fee is to finance the adoption of appropriate measures in the waste management of recyclables.
Part 2		
7	Clause 7(1)(b) provides that an authorized officer may, in relation to any record or document required to be kept by a person under the Bill, require the person to “provide all reasonable assistance, information or explanations in connection with the record or document”. Please explain what is expected from the person keeping the document in providing “all reasonable assistance”, a duty additional to the duty of providing information and explanations, in connection with such record or document.	What "reasonable assistance" may be required would depend on the varying circumstances in each case. <i>For example</i> , as records and documents are increasingly kept in electronic format, an authorized officer may need to know what kind of software is required to view, process and verify the records and documents provided. If the software is proprietary or self-developed, an authorized officer may need to be given the permission to use the proprietary or self-developed software to view, process and verify the records and documents provided.
7	Please also advise whether that person will be required to give assistance, information or explanations which may include self-incriminating information.	The rules concerning self-incrimination are governed by common law principles. Statutory provisions will not be construed to abrogate a common law right unless a clear legislative intent to do so is indicated by express words or necessary implication.

7	<p>Under clause 7(4) –</p> <p><i>“If required by the person having the lawful custody of such products, the authorized officer shall pay for –</i></p> <p>(a) the market price of the samples he proposes to take; or</p> <p>(b) if the market price is unknown or not readily ascertainable, a reasonable price of those samples.”</p> <p>“如合法保管上述產品的人作出要求，獲授權人員須—</p> <p>(a) 就他擬取去的樣本，繳付市價；或</p> <p>(b) (如市價不詳或並非可輕易確定)為該等樣本繳付一個合理價錢。”</p> <p>What is the meaning of “lawful custody” of a product in law?</p>	<p>A person having the lawful custody of a product is one who has the right to keep safe and control the product in the circumstances of the case concerned.</p>
7	<p>It seems that the English text will be much improved and the accurate meaning of the Chinese text will be carried if clause 7(4) is changed to read as follows –</p> <p>“Upon the demand of the person having lawful custody of such products, the authorized officer shall pay for - ...”.</p>	<p>The English text of clause 7(4) accurately reflects the policy intent and does not require any revision.</p>

8	<p>Clause 8 provides for the power of entry and search by an authorized officer.</p> <p>Clause 8(2) provides that except with the consent of the occupier or person in charge of any domestic premises, an authorized officer shall not enter or search those premises without a warrant issued by a magistrate. Why is the power of entry and search of premises other than domestic premises is not subject to the judicial scrutiny of a search warrant?</p>	<p>As entry and search is more intrusive in the case of domestic premises than non-domestic premises, except with the consent of the occupier or person in charge concerned, an authorized officer should only enter and search domestic premises with the authorization of a warrant issued by a magistrate.</p>
8	<p>Under clause 8(8), “domestic premises” means any premises that are constructed or intended to be used for habitation. Please advise whether premises which are used partly for domestic purpose and partly for non-domestic purpose will be treated as “domestic premises”.</p>	<p>For multi-purpose premises, only the parts that are constructed or intended to be used for habitation will be treated as domestic premises.</p>
8	<p>Please also explain the reason why the physical construction or the intended use but not the actual use of the premises determines whether a search warrant is required for the exercise of the power of entry and search.</p>	<p>If the need for search warrant is determined by the actual use of the premises, it will create enforcement difficulties because authorized officers may not be able to confirm in advance whether premises that are not constructed to be used for habitation have actually been misused as domestic premises.</p>
9	<p>The offence under clause 9(1) is for producing any false, incorrect or misleading record, document or information. It is a</p>	<p>Some elements of the defences in clauses 9(2) and (4) are different because they should correspond to the different</p>

	<p>defence that the accused person - (a) did not know and had no reason to believe the record, document or information to be false, incorrect or misleading; or (b) he exercised due diligence to avoid the commission of the offence (clause 9(2)).</p> <p>The other offence under clause 9(3) is for omission of any material particular from any record, document or information. It is a defence that the accused person did not know and could not with due diligence have ascertained the material particular (clause 9(4)).</p> <p>Why are different defences provided in clause 9(2) and clause 9(4)?</p>	<p>ingredients of offences in clauses 9(1) and (3) respectively.</p>
9	<p>What is meant by “<i>ascertained</i> the material particular” and in what way it prevents or avoids an omission of the material particular?</p>	<p>To ascertain the material particular is to find out the particular with certainty. Clause 9(4) provides that it is a defence for a person charged with the offence of omission to prove that he did not know and could not with due diligence have ascertained the material particular. The person is not required to prove that by ascertaining the material particular, he could have prevented the omission.</p>
10	<p>A person wilfully “obstructs or delays” an authorized officer in the performance of any of his functions under the Bill commits</p>	<p>The reference to “delay” is included to avoid unnecessary arguments on whether “obstructing” also includes delay through</p>

	<p>an offence (clause 10(a)). The dictionary meaning of the verb “obstruct” includes an act to “retard the passage or progress of; impede , hinder the motion of” (ref: <i>The New Shorter Oxford English Dictionary</i>, edited by Lesley Brown, Vol. 2, 1993 edition). The case law also held that “obstructing” was not confined to physical obstruction and included acts intending to delay, for example, police officers from entering into premises to see whether it was likely an offence would be committed or not (<i>Hinchliffe v. Sheldon</i> [1955] 3 All ER 406).</p> <p>Please explain whether it is necessary in law to provide “delay” in addition to “obstruct” in the offence provision. Please also advise the Bills Committee the other legislation in Hong Kong where “delay” is used in addition to “obstruct” in an offence provision.</p>	<p>inaction (as opposed to “acts” intending to delay). There are many Ordinances containing offence provisions that refer to both “delay” and “obstruct”, such as section 35(3) of the Pharmacy and Poisons Ordinance (Cap. 138) and section 146(3) of the Chinese Medicine Ordinance (Cap. 549).</p>
11	<p>Clause 11 provides that if a body corporate commits an offence under the Bill and the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of “a <i>director</i> of, or a <i>person concerned in the management of</i>, the body corporate”, the director or that person also commits the offence.</p> <p>The word “director” in the Chinese text is rendered as “高級人</p>	<p>(a) References to “director” in clause 11 should have been rendered as “董事” in the Chinese text. The Administration will propose a committee stage amendment to revise the Chinese text accordingly.</p> <p>(b) Section 44(1) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) and section 21(1) of the Drug Dependent Persons Treatment and Rehabilitation Centres</p>

	<p>員” and the “person concerned in the management of, the body corporate” is rendered as “涉及該法人團體的管理的人”. It seems that a “director” of a body corporate in various laws of Hong Kong refers to a director under the Companies Ordinance (Cap. 32) and not just any high ranking officer of a body corporate. Please clarify –</p> <ul style="list-style-type: none"> (a) the exact persons to be covered by this offence provision; (b) examples of other legislative provisions where “a person <i>concerned in the management of</i> a body corporate” is also criminally liable for an offence committed by the body corporate. 	<p>(Licensing) Ordinance (Cap. 566) are examples of other legislative provisions where “a person concerned in the management of a body corporate” may be criminally liable for an offence committed by the body corporate.</p>
13	<p>Clause 13 provides that an aggrieved person may appeal against the decision of a public officer in relation to 4 specified matters –</p> <ul style="list-style-type: none"> (a) rejection of an application for registration or deregistration in respect of a retail outlet; (b) rejection of an application for exemption of part of the area of a registered retail outlet; (c) an assessment notice under section 25 (a replacement assessment notice); and 	<p>Clause 13(2) covers all the decisions of a public officer in the determination of a person’s civil rights and obligations under the Bill.</p>

	<p>(d) any matter that is –</p> <p>(i) provided by a regulation made under the Bill; and</p> <p>(ii) specified in the regulation as a matter on which an appeal may be made (clause 13(2)).</p> <p>As a matter of drafting, does clause 13(2) cover all decisions made by the public officer in the exercise of his functions under the Bill?</p>	
13	If there is a decision of a public officer which falls outside the 4 matters specified for appeal under clause 13, what will be legal remedy available to the aggrieved person?	An aggrieved person may seek public law remedies through an application for judicial review.
14	The Chairman, the Deputy Chairman and a panel member of the Appeal Board shall be appointed for a term of not more than 3 years but may be reappointed (clause 14(5)). Does the Administration intend to follow the convention that appointment of a person to public service of not more than 6 years?	The Administration intends to follow the convention that appointment of a person to public service should generally not be more than 6 years.
14	Will the Administration make an express provision similar to section 10 of the Construction Industry Council Ordinance (Cap. 587) which provides as follows –	While the Administration intends to follow the convention, there might be circumstances where some flexibilities are needed. For instance, when a hearing of an appeal case lasts longer than expected, the appointment of a member may need to be extended

	<p>“An appointed member is eligible for reappointment on the expiry of his term of office, but he may not serve as such a member continuously for more than 6 years.”</p>	<p>for a short period beyond 6 years to complete the hearing of the appeal case.</p>
<p>14</p>	<p>The jurisdiction of the Appeal Board on an appeal shall be exercised by the Chairman and such number of panel members as the Chairman may appoint for the appeal (clause 15(1)). The Chairman, the Deputy Chairman and any panel member may at any time resign his office and the hearing of an appeal <i>may be continued</i> notwithstanding any change in the membership of the Appeal Board as if the change had not occurred. Unless the parties to the appeal consent, a person may not be appointed as a member of the Appeal Board before which the hearing of an appeal has been commenced (clause 16(4), 16(5) and 16(6)). What will happen in the following situations –</p> <ul style="list-style-type: none"> (a) The Chairman, the Deputy Chairman who is not involved in a particular appeal, or both of them resign after the hearing of an appeal has commenced; (b) Who is to determine whether or not the appeal may continue; (c) Consent of the parties cannot be obtained for the 	<ul style="list-style-type: none"> (a) If the Chairman, the Deputy Chairman who is not involved in a particular appeal, or both of them resign after the hearing of an appeal has commenced, the Chief Executive shall appoint another Chairman, Deputy Chairman, or both (as the case may be) under clause 14(2) and (4). (b) The Chairman may determine the procedure according to clause 15(8). (c) According to clause 16(6), any additional panel member may not be appointed as a member of the Appeal Board before which the hearing of an appeal has been commenced without the consent of the parties.

	appointment of an additional panel member.	
Part 3		
17	<p>“Levy” as provided in Part 3 of the Bill by definition “means a levy mentioned in section 18(3)” (clause 17(1)). Clause 2 which sets out the purposes of the Bill provides the statutory power to impose an “environmental levy” to discourage the use of certain products (clause (2)(d)). Is the “levy” defined in clause 17(1) same as the “environmental levy” provided in clause 2(2)(d)? If so, should there be consistency in the references?</p>	<p>Clause 2 is a purpose clause and is not the operative provision that actually imposes the levy on plastic shopping bags. The term “environmental levy” is used in clause 2(2)(d) to explain that the nature of levies that may be introduced as possible measures under the Bill should all be environment-related so as to help statute readers to understand the overall objectives of the Bill. It is not necessary for the operative provisions in Part 3 to use “environmental levy” as a defined term to impose the levy on plastic shopping bags.</p>
19	<p>A retailer who falls within the definition of a “prescribed retailer” and his retail outlet falls within the definition of a “qualified retail outlet” in Schedule 4 may apply to the Director of Environmental Protection to become a “registered retailer” in respect of a “qualified retail outlet” (clause 19(3)). A prescribed retailer shall ensure that no plastic shopping bag is provided directly or indirectly to a customer from a qualified retail outlet of that retailer unless the outlet is a registered retail outlet (clause 19(4)). A prescribed retailer who contravenes clause 19(4) commits an offence (clause 19(5)).</p>	<p>There is no need for a prescribed retailer to apply for registration if its qualified retail outlets do not provide plastic shopping bags that are regulated under the Bill.</p>

	Is it mandatory for a prescribed retailer to register as a registered retailer if he does not provide plastic shopping bags to his customer?	
19	Will there be a contravention of clause 19(4) if a prescribed retailer does not provide plastic shopping bags to his customers but sells plastic bags to his customers?	A prescribed retailer's qualified retail outlet that is not registered may not provide a plastic shopping bag to a customer, whether free of charge or as a chargeable item, unless the bag is exempted under Schedule 2, say, because it is sold at a price of \$5 or more.
19	Clause 17(6) provides that a registered retailer may apply for deregistration in respect of a retail outlet on only 2 grounds, i.e. if the retailer ceases to carry on a retail business in that outlet or that outlet is no longer a qualified outlet. Has the Administration considered other possible grounds on which a retailer may apply for deregistration, e.g. the retailer intends to cease to provide plastic bags in the outlet.	The Administration welcomes suggestions on other possible grounds on which a registered retailer may apply for deregistration, eg. if the retailer no longer provides plastic shopping bags from its retail outlets. The Administration may propose committee stage amendments to make further provisions in this respect after considering details of the suggestions further.
22	The levy set out in Schedule 3 (50¢ per plastic shopping bag) is payable by a registered retailer to the Government for each plastic shopping bag that he provides to a customer (clause 18(3)). It seems that the primary duty of payment of the levy rests on the registered retailers.	The Administration does not consider that there is any basis on which a registered retailer may "charge" another party for plastic shopping bags that are provided by the retailer to its customers. If Members consider that further elaboration of the requirement in clause 22(1) is desirable, the Administration may propose a committee stage amendment for clarification.

	<p>Clause 22(1) provides that “a registered retailer shall charge an amount of not less than the levy for each plastic shopping bag provided directly or indirectly to a customer”. Please clarify whether a registered retailer may “charge” an amount on a person other than his customers (e.g. a plastic shopping bag manufacturer) for providing plastic shopping bags to the customers?</p>	
22	<p>Clause 22(5) provides that “a registered retailer shall ensure that no rebate or discount is offered to any customer with the effect of directly or indirectly offsetting the amount charged under subsection (1)”. If, however, the registered retailer does not “charge” anything on the customer at all, does the question of “rebate or discount” come into play?</p>	<p>The Administration does not consider that there is any basis on which a registered retailer may “charge” another party for plastic shopping bags that are provided by the retailer to its customers. In other words, a registered retailer has to charge its customers in accordance with clause 22(1). It follows that a registered retailer has to observe clause 22(5).</p>
22	<p>In law, will the prescribed levy regarded as a consideration for the purpose of sale and purchase of the plastic shopping bag? Does the law of sale of goods (e.g. Sale of Goods Ordinance (Cap. 26)) apply in the provision of plastic shopping bags?</p>	<p>Since a plastic shopping bag will be provided by a registered retailer to a customer at a money price not less than the amount required under clause 22(1), the law as to the sale of goods will apply to the provision of the plastic shopping bag as a chargeable item.</p>
22	<p>If a registered retailer charges a customer for an amount higher than the prescribed levy of 50¢ (e.g. 80¢), will the difference (i.e. 30¢) be regarded as a consideration in law for the purpose</p>	<p>The whole amount charged by a registered retailer for each plastic shopping bag will constitute consideration for the provision of the bag. Clause 22(1) imposes a legal requirement</p>

	<p>of sale and purchase of the plastic shopping bag?</p>	<p>for the registered retailer to charge an amount at a level not less than the prescribed levy. It does not impose a legal requirement on the customer to pay any levy to the Government. The registered retailer instead of the customer should be liable for payment of the prescribed levy to the Government under clause 23.</p>
<p>24 & 25</p>	<p>A registered retailer shall ensure that records and documents relating to each submitted return are kept for not less than 5 years (clause 24(1)). The Director may at any time replace an assessment notice with another assessment notice (“replacement assessment notice”) if he reasonably believes that any amount of levies stated in a return in respect of a period is false, incorrect or misleading (clauses 25(1) and (2)).</p> <p>You may be aware that similar requirements are imposed under the Inland Revenue Ordinance (Cap. 112). Under IRO, an assessor may issue additional tax assessments within the year of assessment or within 6 years after the expiration thereof (section 60). A person carrying on a trade, profession or business in Hong Kong (thus subject to the relevant profits tax provisions) is required to retain records of their income and expenditure for a period of not less than 7 years after the completion of the transactions to which they relate (section 51C). Similar</p>	<p>The Administration accepts the suggestion to set a time limit for the Director to exercise his power to issue a replacement assessment notice under clause 25(2). The Administration will propose a committee stage amendment in this regard.</p>

	<p>requirements are imposed on property owners with respect to rent records.</p> <p>A registered retailer of course should be afforded a fair opportunity to deal with the Director's replacement assessment notice and/or to prepare for his appeal. Since a registered retailer is required to keep records and documents for 5 years, should there be a similar time limit for the Director to exercise his power to issue a replacement assessment notice under clause 25(2)?</p>	
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Environmental Protection Department
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