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16 April 2008

Mr Timothy Tso  
Assistant Legal Adviser  
Legislative Council Secretariat  
Legal Service Division  
Legislative Council Building  
8 Jackson Road, Central  
Hong Kong

Dear Mr Tso,

**Statute Law (Miscellaneous Provisions) Bill 2008**

I refer to your letter dated 3 April 2008. Our responses regarding the matters you have raised are set out below.

**Parts 2, 3 and 4**  
**Selection criteria**

The criteria by which the provisions containing “to the satisfaction of” were selected for amendment are set out in the Administration’s paper for the meeting of the LegCo AJLS Panel on 18 December 2003 (LC Paper No. CB(2)693/03-04(01)). Paragraphs 4 and 5 of the paper state –

“4. The Annex to this paper sets out the provisions in subsidiary legislation that contain the drafting formula “to the satisfaction” of an enforcement agency and whose validity may become doubtful because of the Lam Geotechnics case.

5. A number of other provisions also contain the drafting formula. We do not include them in the Annex because we consider that they would not be ultra vires their respective enabling provisions following the judgment in the Lam Geotechnics case. There are three categories of such provisions –

- (a) provisions containing “... or otherwise to the satisfaction” of an enforcement agency;
- (b) provisions where the enforcement agency’s administrative decision does not determine the question whether there is a breach of duty; and
- (c) provisions where there is no uncertainty despite the drafting formula.”

### **Three excluded examples**

Applying the above criteria, we consider that the three examples you have noted of provisions with the drafting formula “to the satisfaction of” may be (or may remain) excluded from the Bill for the following reasons.

Regulation 122 of the Dangerous Goods (General) Regulations (Cap. 295B) provides –

“Except in the case of a tank wagon equipped with a radio communication system to the satisfaction of the Authority, no person shall convey, or cause or permit to be conveyed, on any tank wagon any dangerous goods in category 5 in liquid form unless the wagon is attended by at least one person, in addition to the driver, having reasonable experience in the carriage of such liquids in bulk.”

Criterion (a) applies to regulation 122 since the words beginning “unless the wagon is attended by at least one person” provide the subject person with a specific means of compliance other than equipping a tank wagon “with a radio communication system to the satisfaction of the Authority”.

Regulation 23(1) of the Radiation (Control of Radioactive Substances) Regulations (Cap. 303, sub leg A) provides –

“No proprietor of any affected undertaking or affected industrial undertaking shall cause or permit the use of any stove for the drying of any unsealed radioactive substance, or for the drying of any article to which any such substance has been applied, which is not effectively ventilated to the open air to the satisfaction of the Authority.”

Criterion (c) applies to regulation 23(1). Proprietors know they are under a duty not to carry out the specified activities regarding “any stove” unless such stove is “effectively ventilated to the open air to the satisfaction of the Authority”. The statutory duty is clear and the drafting formula does not create any uncertainty regarding whether there is a breach of that duty.

Regulation 6(1) of the Occupational Safety and Health Regulation (Cap. 509, sub leg A) provides –

“If a platform, pit or opening located within a workplace could be a danger to the safety of persons, the person responsible for the workplace must ensure that the platform, pit or opening –

- (a) is securely fenced to a height of 900 mm (measured from the upper surface of the platform, or of the edge of the pit or opening);  
or
- (b) where it is not so fenced, is sufficiently well protected to the satisfaction of the Commissioner.”

Criterion (a) applies to regulation 6(1)(b) since regulation 6(1)(a) provides clear means by which the person responsible may comply with the regulation. There is no uncertainty since the person can either fence as specified under regulation 6(1)(a) or approach the Commissioner for dispensation under regulation 6(1)(b).

### **List of excluded provisions**

We do not have a list of the many offence provisions which are not included in the Bill after applying the criteria. Our approach was to consult the bureaux/departments concerned by providing the inclusive list and requesting them to go through the legislation under their respective portfolios to make sure that we had not overlooked any provisions that require amendment. While the bureaux/departments suggested some provisions for amendment, these remained excluded after applying the three selection criteria.

This consultation exercise occurred twice, first before drafting instructions for the Bill were issued and second during the drafting process. We would be grateful to know whether this would suffice. The production of an exhaustive list of excluded provisions would be a major and time-consuming task.

### **Clause 57**

Under section 13 of the Magistrates Ordinance (Cap. 227), public prosecutors include court prosecutors, departmental prosecutors and legal trainees, but not Government Counsel. Government Counsel do not require appointment by the Secretary for Justice under section 13 to be able to prosecute. Their right of appearance derives from sections 2, 3(1) and 4(1) of, and Schedule 1 to, the Legal Officers Ordinance (Cap. 87).

Government Counsel will be called public prosecutors in the future, further to Schedule 1 to Cap. 87 as amended under clause 56 of the Bill. Accordingly, to avoid confusion, “public prosecutors” and “public prosecutor” in

section 13 of Cap. 227 are to be replaced with “official prosecutor” and “official prosecutors” respectively under clause 57 of the Bill.

#### **Clause 64**

The proposed new section 13A of the Conveyancing and Property Ordinance (Cap. 219) will only apply to transactions in which the sale and purchase agreement is signed on or after the commencement of the proposed amendment. The proposed new section 13A will therefore have no effect on past transactions completed before commencement nor on transactions in which the sale and purchase agreement has been signed before commencement but is completed after commencement. We consider there is no requirement for transitional provisions.

Regarding the rationale of not referring to section 13(1)(b) in the proposed new section 13A(1)(b), the object of the vendor’s duty to “give” title is the protection of third party interests so that the lack of the relevant original documents will alert the purchaser to the existence of possible adverse equitable claims which should put the purchaser on further inquiry. The main purpose of requiring production of the documents mentioned in section 13(1)(b) is to prove the content of the relevant subsisting rights and, as such, production of their certified copies should be sufficient. The mere lack of the original of the documents mentioned in section 13(1)(b), when the originals of all other title deeds mentioned in section 13(1)(a) and 13(1)(c) relating exclusively to the property will be produced, should not result in any prejudice to third party interests.

Regarding the Chinese rendition of the proposed new section 13A(2) (給予業權), we agree that it should be amended to (給予上述土地的業權) in order to achieve consistency.

We also agree to your suggestion that the Chinese rendition of the English phrase “right or interest” in the proposed new section 13A(4) should be amended from “權力或權益” to “權利或權益”.

Yours sincerely,

(Michael Scott)  
Senior Assistant Solicitor General  
(General Legal Policy)