

**From:** bc\_04\_12/LEGCO

**To:**

**Date:** Wednesday, June 05, 2013 11:58AM

**Subject:** Fw: Air Pollution Control (Amendment) Ordinance

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To: "'bc\_04\_12@legco.gov.hk'" <bc\_04\_12@legco.gov.hk>  
From: David Renton <>  
Date: 05/31/2013 08:02PM  
Subject: Air Pollution Control (Amendment) Ordinance

I fully support the proposed new Air Quality Objectives (AQOs) and the 19 measures that the Administration is proposing to take to achieve them. I am concerned however that this piece of legislation could make it more difficult, if not impossible, to make further progress towards bringing Hong Kong's AQOs into line with the health-based standards recommended by the World Health Organization.

The main purposes of the Bill are blatantly contradictory. The Bill proposes to take away the Secretary for the Environment's power to amend the AQOs by issuing a technical memorandum - all future amendments will require primary legislation - yet it imposes a new duty on the Secretary to review the AQOs at least once every five years. Today, if the Secretary thinks that more should be done to improve air quality, he can tighten the AQOs by issuing a technical memorandum. If the Bill is enacted, all the Secretary can do if he thinks air quality should be improved to protect public health is report his findings to the Advisory Council on the Environment (ACE), a body that, like the Secretary himself, will be powerless to do anything about the AQOs.

The role of the ACE, according to its terms of reference, is to advise the Government, through the Secretary for the Environment, on appropriate measures for combating pollution and protecting and sustaining the environment. This assumes that the Government is responsible for combating pollution and protecting and sustaining the environment. The ACE's role in this piece of legislation is to act as window dressing, disguising the fact that the Government is proposing to absolve itself of all responsibility for combating air pollution by passing the controls over the AQOs to LegCo, a body in which business interests (i.e. polluters) exercise disproportionate influence.

The EPD's notorious "bucket theory", which it first floated in the Hong Kong-Zhuhai-Macau Bridge case, should have forewarned us of what was to come. As Fok JA described the theory in *Chu Yee Wah v Director of Environmental Protection*, HCAL 9/2010, "is the environment to be treated like a bucket into which pollutants may be introduced so long as there is still space within the bucket to accommodate them? Or, is it the case that any pollutant introduced into the bucket must be identified and measured and then, if possible, mitigated?" [para 73] Firmly embracing the first of these views, the EPD argued that since the AQOs established under the Air Pollution Control Ordinance (APCO) define the air quality that ought to be achieved and maintained and, therefore, the size of the bucket, what legal basis does the Director of Environmental Protection have for limiting the amount of air pollution that a project should be allowed to emit under its environmental permit if the project's EIA report predicts that the bucket will be able to accommodate all of the air pollution the project will produce?

In the Bridge case, the Court of Appeal as well as Fok JA found a legal basis for requiring project proponents to minimise the environmental impact of their projects in provisions of the Technical Memorandum established under s. 16 of the EIA Ordinance (the TM). However, once the AQOs are established under primary legislation, they will override any inconsistent provisions of the TM. In the Bridge case, the Government argued that there is an inconsistency between the Director's duty under the APCO to achieve and maintain the AQOs and her purported duty under the TM to ensure that air pollution is kept to a minimum. The Bills Committee should ask the Administration whether it is their intention to try to use the Bill to reverse the Court of Appeal's judgment in the Bridge case regarding the duty to minimize pollution in and, if not, to amend the Bill to preclude this outcome.

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