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THB(T) PML CR 8/10/150/8
本局檔號 Our Ref. LS/B/13/12-13
來函檔號 Your Ref.

14 June 2013

Ms. Clara Tam
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
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By Fax – 2877 5029

Dear Ms. Tam,

Merchant Shipping (Seafarers) (Amendment) Bill 2013 (the Bill)

Thank you for your letter of 6 June 2013. Our responses to questions in your letter are set out below –

(a) Proposed definition of “seafarer”

- (i) The definition of “seafarer” is based on the wording used in the Maritime Labour Convention, 2006, and covers persons who work on board a ship in whatever capacity, whether as a seaman, a workman or the master. The term must be interpreted in context and will not cover a person whose work does not in any way relate to the operation of the ship. This is the case for the “carer employed by passenger” or

“tourist guide”, as referred to in your letter. They are not “seafarers” but passengers of the ship.

- (ii) In the Merchant Shipping (Local Vessels) Ordinance (Cap.548) and the Shipping and Port Control Ordinance (Cap. 313), “port” is defined as “any area of the waters of Hong Kong which is declared to be a port” under section 56 of the latter Ordinance. It is intended to cover specified areas of the waters of Hong Kong only.

Item 6 of the newly added Schedule 1A is intended to cover persons who work on board a ship only within a port or at a port facility, irrespective of whether the port or port facility is within or outside Hong Kong. In the absence of a definition, the ordinary meaning of “port” and “port facility” will apply.

(b) Direct Reference Approach

- (i) Section 112B of the Merchant Shipping (Safety) Ordinance (Cap.369) and section 3A of the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap. 413) were enacted in 1996 and 1999 respectively. They deal with the drafting approach for subsidiary legislation under those Ordinances that seeks to give effect to “any international agreements applicable to Hong Kong”.

While both of these sections also refer to specific conventions or protocol (i.e., the International Convention for the Safety of Life at Sea, and the International Convention for the Prevention of Pollution from

Ships and their protocols), the references do not define or limit the international agreements that could be referred to in the subsidiary legislation under these Ordinances.

The scope of new subsection (3A) to be added to section 134 of the Merchant Shipping (Seafarers) Ordinance (Cap.478) (“principal Ordinance”) is the same as section 112B of the Merchant Shipping (Safety) Ordinance (Cap.369) and section 3A of the Merchant Shipping (Prevention and Control of Pollution) Ordinance (Cap.413). It deals with the drafting approach for subsidiary legislation under the principal Ordinance that seeks to give effect to international agreements that are applicable to Hong Kong. It is considered not necessary to refer to any specific conventions or protocols.

- (ii) There is no difference in coverage between the formulation “as amended from time to time and as applied to Hong Kong” (as used in the definition of “Convention” in section 2 of the Freight Containers (Safety) Ordinance (Cap.506) and “that is applicable to Hong Kong and amended from time to time” (as referred to in the new subsection (3A)). Legislation is regarded as always speaking. The new subsection will not cover a provision of an international agreement that is not applicable to Hong Kong at the time concerned.
- (iii) It is the legislative intention that subsidiary legislation made under section 96 of the principal Ordinance may also refer directly to a provision of an international agreement.

(c) Repeal of offence provisions

The Marine Department has no intention to change the penalty level for the offences concerned. Section 134(6) of the principal Ordinance empowers subsidiary legislation made under it to provide for offences that carry a fine at level 6 (\$100,000) and imprisonment for 2 years. The penalty for the offences under sections 97(6) and 100(2) may be kept at the same level when they are provided in the subsidiary legislation after passage of the Bill.

(d) Technical amendments to improve operation and presentation of the Ordinance

- (i) Thank you for pointing out the discrepancy. The reference to “section 15(3)” should be “section 15”.
- (ii) The new section 27(3) is intended to simplify the original section 27(2). The policy and the effect remains the same: the Superintendent may refuse to continue an inquiry and has to withdraw a registered person’s suspension of registration if there is insufficient evidence or no evidence to justify the Superintendent to take the action under sections 28(1) or 29(1) or 29(3). It does not matter whether the insufficiency or absence of evidence is due to the contravention of a notice under section 24(1). It should also be noted that the words “to justify him the subject of the inquiry” in the current section 27(2)(b) should qualify both paragraphs (a) and (b) (and not just paragraph (b) as they currently appear).

(iii) The new section 60 removes the reference to section 57(1) which will be repealed; and simplifies the drafting. It should be noted that the references to sections 55 and 56(2) in subparagraphs (i) and (iv) in the current section 60 relates to the giving of notices. These references are no longer necessary as subparagraphs (i), (ii) and (iv) are replaced by a new subsection (2) which provides that the appeal must be lodged within 28 days of receiving notice of the relevant decision. There is no change to the legal effect.

The new subsection (1)(c) adds a reference to section 56(1) to clarify the provision under which a permit may be cancelled. The original section 60(d) does not mention the source provision.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Desmond Wong', written over a horizontal line.

(Desmond WONG)
for Secretary for Transport and Housing

c.c. DoJ (Attn: Ms Mabel Cheung, SGC & Ms Carmen Chan, GC)
– By fax: 2845 2215)
Clerk to Bills Committee