Bills Committee on the
Product Eco-responsibility (Amendment) Bill 2013

This note sets out the Administration's response to the issues arising from the deliberations at the eighth meeting of the Bills Committee on the Product Eco-responsibility (Amendment) Bill 2013 ("the Amendment Bill") held on 29 November 2013 –

(a) to provide the legal clarification that was sought in paragraph 6 of LC Paper No. LS17/13-14;

(b) in relation to members' view that those retailers with the administrative capability should be required to submit information or returns on the distribution of plastic shopping bags to the Government with a view to facilitating the assessment of the effectiveness of the proposed extension of the Environmental Levy Scheme on Plastic Shopping Bags ("the extended Scheme"), to reconsider proposing Committee Stage amendments to this effect;

2. We have been following the framework below in considering the constitutionality issue relating to proposals of having "dual" systems for the extension of the Environmental Levy Scheme on Plastic Shopping Bags ("PSB Levy Scheme") –

(a) It is necessary to consider the right to equality and non-discrimination protected by Article 22 of the Hong Kong Bill of Rights ("HKBOR") and Article 25 of the Basic Law ("BL").

(b) Under Hon Wu Chi-wai's preliminary proposal, by imposing certain compliance requirements on "big retailers" only, the "big retailers" would arguably be treated less favourably than other smaller retailers. In LC Paper No. LS17/13-14, the Legal Service Division of the Legislative Council Secretariat raised questions on whether the aforementioned differential treatment is on the ground of "other status" in Article 22 of the HKBOR. If Article 22 of the HKBOR and/or BL 25 are engaged, the differential treatment in question must satisfy the "justification test" outlined vide LC paper CB(1)2667/11-12(01).

Applicability of Article 22 of the HKBOR

3. In LC Paper No. LS17/13-14, it was suggested that business turnover, retail floor area of retail establishments and number of business outlets in Hong Kong are ***not*** personal characteristics of the retailers, and hence do ***not*** fall under the ground of "other status" in Article 22 of the HKBOR.

4. As advised by the Department of Justice, there have been conflicting authorities on whether the difference in treatment needs to be based on an innate and immutable "personal characteristic", or whether it is sufficient that the different treatment is based on any sort of distinguishing characteristic[1]. The United Nations Human Rights Committee ("HRC") has not provided an exhaustive definition of "other status" in Article 26 of the International Covenant on Civil and Political Rights ("ICCPR"), which has been incorporated into the laws of Hong Kong by Article 22 of the HKBOR[2]. Rather, the HRC prefers to decide on a ***case-by-case*** basis whether a complaint amounts to discrimination[3].

5. The case of *Financial Services and Systems Ltd v Secretary for Justice*[4] decided by Mr Justice Fung was cited in LC Paper No. LS17/13-14. While the court in *Financial Services and Systems Ltd* interpreted the term "other status" in Article 22 of the HKBOR as meaning a "personal characteristic", it does not appear to have precluded the courts from holding in a subsequent case that differential treatments between "big retailers" and other smaller retailers on the grounds of their size and scale of operation may fall under the ground of "other status". It is noteworthy that –

(a) Mr. Justice Fung merely held that the differential treatment

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1 Ref: "*Human Rights Practice*", by Simmor & Emmerson (looseleaf, March 2012), at para. 14.013.

2 Both ICCPR 26 and Article 22 of the HKBOR provide that –

> *"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

3 Ref: "*The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*", by S Joseph, J Schultz and M Castan (3rd edn, 2013), para. 23.27.

4 Case Ref. HCAL 101/2006.

between "Registered Chinese Medicine Practitioners" and "Listed Chinese Medicine Practitioners" was not based on any "personal characteristics", and hence Article 22 of the HKBOR was not engaged. He did not further elaborate on what constituted "personal characteristics" in the context of Article 22 of the HKBOR.

(b) The case of *Financial Services and Systems Ltd* was a decision of the Court of First Instance decided in July 2007. Mr Justice Fung's observations on the scope of "other status" do not appear to have been cited or applied in any subsequent cases, nor have they been considered by the appellate courts.

(c) Mr Justice Fung considered the decision of the House of Lords in *R (S) v. Chief Constable of South Yorkshire Police* [2004] 1 WLR 2196, which in turn referred to the decision of the European Court of Human Rights ("ECtHR") in *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (1976) 1 EHRR 711. However, there appears to have been developments in both UK and ECtHR caselaw on the scope of "other status" in the context of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")[5]. For details, please refer to Annex.

6. It is important for the Administration to ensure that any Government-sponsored policies are not in breach of the guarantees under the BL and HKBOR. Since the Court of First Instance's decision in *Financial Services and Systems Ltd*, the UK courts and ECtHR have clarified that the ground of "other status" under Article 14 of the ECHR is not limited to differential treatment based on personal characteristics which are innate or inherent. It is unclear whether the Hong Kong courts would take a similar approach when considering the scope of "other status" in Article 22 of the HKBOR. Against this background, it is only prudent for the Administration to further consider whether the differential treatment is justifiable.

Applying the "Justification Test"

7. Hon Wu Chi-wai has explained that his proposal (to impose certain compliance requirements) aims to facilitate future assessment on

[5] Article 14 of the ECHR is the European equivalent of Article 1(1) of the HKBOR concerning non-discrimination in the enjoyment of rights recognized in the HKBOR.

the effectiveness of the PSB Levy Scheme after its extension. We understand that Hon Wu Chi-wai has initially proposed to impose these requirements on "big retailers" for reason that they would be able to absorb the associated administrative costs arising from such compliance requirements. In applying the "justification test", we note that –

(a) ***Is the difference in treatment rationally connected to the legitimate aim?*** Statistically, the "big retailers" as defined by Hon Wu Chi-wai do not form a sufficiently representative sample of the entire retail industry, and it will hence be difficult to perform a meaningful statistical analysis for the entire scheme based on the limited data obtained from the "big retailers". Indeed, according to our landfill surveys conducted in 2012, nearly 80% of the plastic shopping bags ("PSBs") disposed at the landfills were "other bags" which their sources of distribution are not identifiable[6]. PSBs distributed by retailers of a bigger scale usually have identifiable logos printed on them, such that it is relatively easier to identify their PSBs in landfill surveys, and these identifiable PSBs would be properly categorized. Even if that 20% identifiable PSBs are all distributed by the "big retailers" as defined by Hon Wu Chi-wai, half of them (over 10% of the total PSB disposal) were in fact distributed by bakery and foodstalls/restaurants categories, which their distribution of PSBs would likely be largely exempted under the proposed extended PSB Levy Scheme.

(b) ***Is the difference in treatment no more than is necessary to achieve the legitimate aim?*** In order to pass the "justification test", the difference in treatment must be proportionate, i.e. no more than necessary to achieve the legitimate aim and, where possible, should be supported by objective evidence. Hon Wu Chi-wai has yet to clarify whether he intends to require the "big retailers" to be registered, nor the details of the information to be submitted or the standard of accuracy under the relevant requirements, and whether any checking or penalty would be imposed for inaccurate or false information provided –

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6 "Other bags" are those PSBs that bear no recognizable prints or logos, and thus they could not be properly categorized into specific retail sales categories. Typical ones being those T-shirt bags in white or red colour. The landfill survey conducted in 2012 revealed that 80% of the PSBs disposed at the landfills are "other bags".

(i) If there is no statutory requirement for registration, compliance checking and penalty for false or inaccurate reporting, the reliability of the data collected cannot be assured, and the data so obtained would provide even lesser reference in assessing the effectiveness of the extension of the PSB Levy Scheme. This would lead to queries under paragraph 7(a) above.

(ii) If there are stringent requirements, the administrative burden and compliance costs on the "big retailers" can be substantial. Justifications on how the differential treatment is "no more than necessary" will be required.

Indeed, we have been referencing to the landfill surveys to monitor PSB disposal from time to time, which is more comprehensive and consistent in terms of scope and methodology. These surveys do not impose differential treatment within the retail sector.

(c) ***Does the dividing line reasonably reflect a rational connection to the legitimate aim rather than being arbitrarily drawn?*** As we have mentioned vide LC Paper CB(1) 112/12-14(01), Hon Wu Chi-wai believes that "big retailers" are all computerized in terms of their operational systems and records, and thus have the operational ability in complying with various requirements to be imposed under his proposal. This assumption is not without problems. In practice, a person may run three retail outlets selling different products; there may be family businesses where individual retail outlets are separately operated by different family members without forming any business network; or the three retail outlets can all be newspaper stalls which operate in a cash-trade mode. At this stage, we have yet to receive further information from Hon Wu Chi-wai on his methodology for identifying "big retailers", and how this differential treatment is rationally connected to the legitimate aim in assessing the effectiveness of the extended PSB Levy Scheme.

8. As a matter of principle, the Government will NOT pursue any proposals (including Committee Stage amendments ("CSAs")) for which the lawfulness is not clearly established. At this stage, based on the information available to us, there are insufficient justifications to substantiate that Hon Wu's preliminary proposal would satisfy the

"justification test". More importantly, it is also our committed policy intent to maintain a level-playing field in the retail sector as far as practicable.

(c) to consider introducing a grace period upon the implementation of the extended Scheme, during which first-time offenders would only be given a warning instead of being issued with a fixed penalty notice; and

9. We have proposed an alternative legislative approach vide LC Paper No. CB(1)432/13-14(01) under which by way of CSAs, we include in the Amendment Bill essential amendments to the Product Eco-responsibility Ordinance (Cap 603) and the Product Eco-responsibility Regulation (Cap 603A) for the savings and transitional arrangements and other operational matters after the PSB Levy Scheme is extended. Under this alternative approach, we will appoint a specific commencement date instead of leaving it open until the publication of a commencement notice in the Gazette by Secretary for the Environment. A specific commencement date known to the stakeholders and members of the public will give a clear message of imminence and certainty, and will facilitate the planning of necessary preparatory work by the retail trade, the Government and other relevant stakeholders.

10. As we have advised the Bills Committee, we need about 12 months counting from the enactment of the Amendment Bill before the extended scheme can be brought into operation. During this period, we will stage necessary publicity and public education programmes to get the retail trade prepared for the implementation of the extension of the PSB Levy Scheme. This public education period before the commencement of the ordinance can serve the purpose of a "grace period" as suggested by Members. During this period, advice would be given to retail trade in helping them to set up their internal guidelines and in ensuring that their mode of operation would conform to the legal requirements.

11. The Amendment Bill does not provide for a statutory mechanism that requires prior warning before prosecution can be initiated after the commencement date. A prior warning may undermine the deterrence effect since we must issue a warning first even for breaches of serious nature, e.g. systemic contraventions. In practice, "public education" is the most essential element that will lead to the success of the extended scheme. We will continue to promote the "Bring Your Own Bag" culture which will also facilitate compliance.

(d) to review whether the fixed penalty level at $2,000 is reasonable for a specified offence under the proposed section 28A(4).

12. A fixed penalty system is useful in relieving pressures on courts by removing straightforward clear-cut cases from the court systems. It also gives an offender an opportunity to discharge liability by paying a fixed penalty than to attend a court hearing, provided that the offender accepts guilt. As a matter of principle, the fixed penalty should be pitched at a level such reflects the seriousness of the offence, and is also consistent with the penalties for similar offences.

13. The current proposed fixed penalty level of $2,000 corresponds to the level of penalty in all the six convictions under the current phase by May 2013[7]. The Bills Committee did not raise comments on the proposed penalty level during clause-by-clause examination (proposed section 28A(2)) at its meeting on 22 October 2013. We are open to any further views that Members may have.

Environmental Protection Department
December 2013

[7] For Members' information, since the introduction of the Amendment Bill in May 2013, there was a new case of conviction in which the offender was fined $1,500.

Annex

Recent Caselaw on the Scope of "Other Status"

The UK House of Lords

In *R(RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63 , the UK House of Lords held that the decisions of the ECtHR indicate that "other status" should not be too closely limited by the grounds which are specifically prohibited in Article 14 of the ECHR (para. 43). It also recognized that there is no sharp dividing line on what constitutes "personal characteristics" for the purpose of Article 14 of the EHCR:

> "[The expression "personal characteristics" used by the European Court of Human Rights in *Kjeldsen , Busk, Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, and repeated in some later cases] is not a precise expression and to my mind a binary approach to its meaning is unhelpful. "Personal characteristics" are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual's personality... Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 [of the ECHR]… The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify…."

The European Court of Human Rights

In the case of *Clift v United Kingdom*, Application No.7205/07, decision on 13 July 2010, the ECtHR decided that the application made by Clift was admissible:

> "while [the ECtHR] has consistently referred to the need for a distinction based on a "personal" characteristic in order to engage Article 14 [of the ECHR], … ***the***

protection conferred by that Article is not limited to different treatment based on characteristics which are personal in the sense that they are innate or inherent. Accordingly, even if, as the Government contended, a *ejusdem generis* construction were appropriate in the present case, this would not necessarily preclude the distinction upon which the applicant relies." (emphasis added)