



中華人民共和國香港特別行政區政府總部食物及衛生局

Food and Health Bureau, Government Secretariat  
The Government of the Hong Kong Special Administrative Region  
The People's Republic of China

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Assistant Legal Adviser  
(Attn: Mr. Cliff IP)  
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Legislative Council Secretariat  
1 Legislative Council Road  
Central, Hong Kong

28 September 2018

Dear Mr IP,

**Conservation of Antarctic Marine Living Resources Bill**

Thank you for your letter dated 31 August 2018 seeking our clarifications on a number of issues relating to the captioned Bill. Our responses are set out in the Annex for your information.

Yours sincerely,

( Ben GURUNG )

for Secretary for Food and Health

cc

Clerk to Bills Committee  
(Attn: Ms. Josephine SO)

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Director of Agriculture, Fisheries and Conservation  
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Administration's response to questions raised by  
Assistant Legal Advisor on Conservation of Antarctic Marine Living Resources Bill

Clause 2

1. *Under clause 2 of the Bill, Antarctic marine organism ("AMO") is defined to mean an organism (live or dead) that belongs to any species of living organisms that is found in the "Convention Area", including any part (whether raw, or in any way processed or preserved) of the organism.*

(a) *Please clarify whether organisms which live naturally both inside and outside the Convention Area would be considered as AMOs under clause 2.*

(b) *Please clarify whether it is the legislative intent that AMOs would include human beings under clause 2. If not, please consider whether it is necessary to exclude "human being" from the definition of AMOs under clause 2, as in the definition of "living organism" under section 2(1) of the Genetically Modified Organisms (Control of Release) Ordinance (Cap. 607).*

(c) *Please explain why the definition of "Antarctic marine living resources" under Article I(2) of the Convention on the Conservation of Antarctic Marine Living Resources ("Convention") as "the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds ..." is not adopted in the Bill.*

(a) The Convention Area is an area defined under Article I of the Convention on the Conservation of Antarctic Marine Living Resources ("CCAMLR") but there does not exist a physical barrier.

The objective of CCAMLR is to conserve Antarctic marine living resources in the Convention Area. Living organisms set out in Article I(2) of CCAMLR found in the Convention Area are the subjects for conservation under CCAMLR. That said, living organisms can move freely between the Convention Area and the surrounding water bodies of the Southern Ocean. It is impractical and unnecessary to define whether an organism lives naturally inside or outside the Convention Area.

(b) The foundation of the CCAMLR, as set out under its Preamble, is "the increased interest in the possibilities offered by the utilization of [marine living resources in Antarctic waters] as a source of protein". It should be very clear that the intent of the CCAMLR is not to include human beings. In addition, it should be a common understanding that conservation refers to the protection of plants, animals, natural areas and resources from human activities. As a corollary of the above, it is not necessary to expressly exclude human beings from the definition of AMO under clause 2 of the Bill.



- (c) In formulating the definition for “Antarctic marine living resources”, we aim at reflecting the intent of coverage of “Antarctic marine living resources” under Article I(2) of the Convention, rather than directly referencing to the said Article that sets out a non-exhaustive list of examples.

### **Clause 3**

2. *It is noted that Article VIII of the Convention states that the "privileges and immunities to be enjoyed by the Commission ... shall be determined by agreement between the Commission and the State Party concerned". Please clarify whether and how this provision would be implemented in Hong Kong.*

The Ministry of Foreign Affairs of the People’s Republic of China has advised that there is no agreement signed between the Central People’s Government (“CPG”) and the Commission for the Conservation of Antarctic Marine Living Resources (“Commission”) on privileges and immunities to be enjoyed by the Commission and its staff. The Bill has already provided the Commission with legal personality for it to enjoy in Hong Kong the necessary legal capacity to perform its function. We understand that the Secretariat of the Commission (“Secretariat”) is based in Australia without a presence in the Hong Kong Special Administrative Region (“HKSAR”). While we do not anticipate that the Commission will engage in any activities in the HKSAR that would call for the exercise of privileges and immunities after the CCAMLR is extended to Hong Kong, we are prepared to liaise with the CPG to make provision for the same under a separate legislative exercise should such a need arise. Reference may be drawn from the International Organizations (Privileges And Immunities) (World Trade Organization) Order (Cap. 558B), which was enacted when the World Trade Organization (“WTO”) held its Ministerial Conference in Hong Kong in 2005, ten years after the establishment of the WTO (of which Hong Kong, China is one of the founding members).

3. *Please clarify whether it is necessary to specify that the Commission for the Conservation of Antarctic Marine Living Resources ("Commission") would have "all the powers of a natural person of full age and capacity including power — (a) to enter into contracts; (b) to acquire and dispose of movable and immovable property; and (c) to institute and defend legal proceedings" or similar powers, as in section 5 of the International Organizations (Privileges and Immunities) (Bank for International Settlements) Order (Cap. 558D).*

The enjoyment of “legal capacity” by a subject normally refers to the conferment of the legal personality of a body corporate and all the powers of a natural person of full age and capacity. As the CCAMLR does not specify the details of the “legal capacity” to be conferred on the Commission, providing a general provision for conferring legal personality on the Commission in the Bill by adopting the wording of the first sentence of Article VIII of the CCAMLR should suffice. Such formulation has also been adopted with reference to Article 2 of the Schedule to the International Organizations (Privileges and Immunities) (Permanent Court of Arbitration) Order (Cap. 558I).



## Clauses 4 and 5

### *Extra-territorial effect*

4. *Clause 4(2) seeks to empower the Secretary for Food and Health to make regulations with extra-territorial effect, and such regulations, pursuant to clause 5(3), could contain offence-creating provisions. Please explain why the offence-creating provisions would only be provided for in the regulations to be made, but not in the Bill.*

It is the Government's policy intent that the Ordinance will provide the legal basis for implementing the CCAMLR, and provide for the general powers of the Director of Agriculture, Fisheries and Conservation ("Director") and his or her authorized officers. Regulations will be made to implement the relevant Conservation Measures ("CMs"). Parts 4 and 5 of the Bill provide for offences related to general enforcement. Other offence-creating provisions would be provided for in the regulations for implementing the specific requirements of relevant CMs, e.g. the offence related to movement of toothfish.

### *"Direct reference approach"*

5. *Please explain the reason(s) for adopting the "direct reference approach" in the regulations to be made under clause 4, i.e. an approach of making direct reference to a provision in the Convention, or in a Conservation Measure ("CM"), that applies to Hong Kong in making regulations under the Bill in future.*

In adopting the direct reference approach, we have considered a number of factors, including -

- (i) the Commission has adopted a basket of CMs to achieve the objectives of conservation of Antarctic marine resources. CMs are reviewed and developed at each annual meeting of the Commission, and thus adopting the "direct reference approach" will ensure that the local legislation could keep pace with any changes made to CMs by the Commission;
- (ii) CMs are readily available on the official website of the Commission, which provides a direct and convenient means for those who are required to comply with the requirements to access to the updated CMs; and
- (iii) majority of CMs are very specific and technical in nature, such as vessel inspection requirements and vessel monitoring system. Adopting the "direct reference approach" ensures that the local legislation could reflect fully the Convention's technical requirements in a timely manner.

### *"Any other document" under clause 4(4)*

6. *Clause 4(4) seeks to provide that "[r]egulations made under this section may set out or refer directly to any requirement or provision in any other document adopted or issued by the Commission". Please clarify whether the phrase "any other document" in clause 4(4), read together with clause 4(3), means a document other than the Convention and CM. If so, please clarify what such other document(s) would be.*



Currently the key instruments for the Commission to achieve its conservation objectives are its CMs. That said, the Commission has not ruled out the use of other vehicles, and the Commission may adopt other documents in the future, for examples, various guidelines, manuals, list(s) of illegal, unreported and unregulated (“IUU”) vessels and circulars. It is important for the law to have the necessary provision to cater for possible future development, hence the inclusion of the phrase “any other document”.

### *Regulations to be made*

7. *It is noted from paragraphs 3 and 6 of the Legislative Council Brief (File Ref: FH CR 1/2576/18) issued by the Food and Health Bureau and the Agriculture, Fisheries and Conservation Department in June 2018 that only six CMs are relevant to Hong Kong and two regulations would be made after the Bill is passed. Please clarify whether and how the two regulations to be made would/could implement the six CMs which are relevant to Hong Kong.*

As explained in the said Legislative Council Brief, some Contracting Parties to the CCAMLR have expressed concerns over the lack of regulation of trading of toothfish in Hong Kong, and requested us to consider implementing the Catch Documentation Scheme for toothfish under the CCAMLR. To this end, aside from implementing CM 10-05 (Catch Documentation Scheme for *Dissostichus* spp.), other related CMs including CM 10-03<sup>1</sup>, CM 10-04<sup>2</sup>, CM10-06<sup>3</sup>, CM 10-07<sup>4</sup> and CM 10-08<sup>5</sup> should also be implemented. The two Regulations, regarding the Toothfish Catch Documentation Scheme and port inspections for fishing vessels, together will contain the necessary legislative provisions for implementing the six CMs mentioned above that are related to regulating the trading of toothfish and deterring IUU fishing activities in the Convention Area.

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<sup>1</sup> CM 10-03 (Port inspections of fishing vessels carrying Antarctic marine living resources) requires the inspection of fishing vessels carrying AMOs (including toothfish), and prohibits the landing and transshipment of any AMOs involved in any illegal, unreported and unregulated (IUU) activities.

<sup>2</sup> CM10-04 (Automated satellite-linked Vessel Monitoring Systems) CM10-04 sets out requirements in respect of the installation of satellite-linked vessel monitoring devices, monitoring of the movements of such vessels, and the use of vessel monitoring system (VMS) data for inspection purposes. Contracting Parties (CPs) may verify the information contained in catch documents, by using VMS data in respect of toothfish landed at its territory.

<sup>3</sup> CM10-06 (Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures) CM10-06 is to draw up a monitoring list to keep track of vessels of CPs that have engaged in IUU fishing activities. CPs should prohibit the landing or transshipment of toothfish without a *Dissostichus* catch document from these vessels.

<sup>4</sup> CM10-07 (Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures) CM10-07 is to draw up a monitoring list to keep track of vessels of Non-Contracting Parties that have engaged in IUU fishing activities. CPs should prohibit the landing or transshipment of toothfish without a *Dissostichus* catch document from these vessels.

<sup>5</sup> CM10-08 (Scheme to promote compliance by Contracting Party nationals with CCAMLR conservation measures) CM10-08 requires CPs to take measures to verify if any of its nationals has engaged in IUU fishing activities to prevent such illegal activities. The materials obtained from trade information related to CM10-05 may fall within the requirement.



## Clause 8

8. *Please clarify whether the Director of Agriculture, Fisheries and Conservation ("Director") would make the specified form(s) under clause 8 available on the Internet. If so, please consider stating this expressly in the Bill. Reference can be made to section 35(5)(b) of the Competition Ordinance (Cap. 619).*

Apart from making the specified form(s) available at the office of Agriculture, Fisheries and Conservation Department ("AFCD") for public access during office hours, the Director would also make the form(s) available online for easy access. To allow for flexibility for any changes to the means of accessing to the forms in the future, we consider it not necessary to state this expressly in the Bill.

## Clauses 9(1) and 10(1)

9. *Please consider whether the minimum rank(s) of the public officers to be appointed as authorized officers under clause 9(1) and to be delegated with the Director's functions under clause 10(1) should be clearly provided for in the Bill. Reference can be made to section 27 of the Buildings Energy Efficiency Ordinance (Cap. 610), section 79(3) of the Merchant Shipping (Seafarers) Ordinance (Cap. 478) and section 52 of the Public Order Ordinance (Cap. 245).*

Given that, other than officers of AFCD, those from other departments (e.g. Marine Department, Customs and Excise Department) may be appointed as authorized officers in carrying out certain duties under this Ordinance, we do not consider it practical to specify the minimum rank(s) of the public officers in the Bill.

## Clause 11

10. *Please clarify whether any person assisting the public officer to whom any function is delegated under clause 10(1) or an authorized officer could perform any of the functions of the Director or the authorized officer as stated in Part 4 of the Bill.*

A person to give help or support to a public officer with delegated functions / authorized officer under clause 11 is to be reasonably required by the latter for assistance. The person is not a public officer to whom a function is delegated under section 10(1) or an authorized officer, and thus has no capacity to perform any of the functions of the Director or an authorized officer as stated in Part 4 of the Bill.

## Clauses 13 and 14

11. *Please clarify the meaning of "used wholly or principally for dwelling purposes" in clauses 13(2) and 14(3). Please also clarify whether a vessel used both for the purposes of dwelling and fishing would satisfy this criterion of "used wholly or principally for dwelling purposes".*



The dictionary meaning of the word “wholly” is, amongst others, “as a whole, in its entirety, in full”; “exclusively, solely, only” while “principally” means, amongst others, “for the most part, in most cases”.

Whilst there is no direct case law on the expression of “used wholly or principally for dwelling purposes” in relation to a vessel, it is believed that, for a vessel used both for the purposes of dwelling and fishing, the application of clause 13(2) or 14(3) should be considered on the facts of actual usage of such vessel for determining whether it is used mainly for dwelling purpose under the legislation. For instance, a commercial fishing vessel is principally for conducting fishing operations, but it would usually have rooms for its crew to rest (dwelling purpose). In such case where the rooms on board are only provided so that the crew could perform the primary function of fishing (a fishing operation can last for days) and hence their dwelling function is ancillary in nature, it is not likely that the courts would consider the vessel to be one “used wholly or principally for dwelling purposes”.

#### **Clause 15**

12. *Please clarify whether "necessary force" in clause 15(3)(b) must be "reasonable force", and if so, please consider stating this expressly in the Bill. Reference can be made to the phrase "force reasonably necessary" in section 11 of the Housing Ordinance (Cap. 283) and sections 16(3) and 25(6) of the Cross-boundary Movement of Physical Currency and Bearer Negotiable Instruments Ordinance (Cap. 629).*

According to the judicial authority, for the lawful exercise of the power by an authorized officer under clause 15(3)(b), the “necessary force” must be “reasonable”. We consider it not necessary to state it expressly in the Bill.

#### **Clause 16**

13. *Clause 16 seeks to provide that an authorized officer may seize, remove and detain a "thing" under certain circumstances. Please clarify whether a vessel, aircraft or train could be a "thing" which may be seized under the Bill. Reference may be made to section 17(2) of the Australian Antarctic Marine Living Resources Conservation Act 1981, which provides that:*

*"An inspector may seize any vessel or article that he or she believes on reasonable grounds has been used or otherwise involved in the commission of an offence against this Act and may retain it until the expiration of a period of 60 days after the seizure, or, if proceedings for an offence against this Act in the commission of which it may have been used or otherwise involved are instituted within that period, until the proceedings are terminated".*

Under the Bill, the interpretation of a “thing” is wide enough to cover a vessel, aircraft, vehicle or train (i.e. covered by the “transport” as defined in the Bill), as well as the dictionary meaning of “anything; entity of any kind”.



How wide a ‘thing’ is in a particular case certainly depends on how the courts would consider it necessary to be commensurate with the intention of the statutory provision concerned. For example, in *Re Anson Garment Ltd Ors* [2006] 2 HKC 246, the “things” being seized under the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) were held to be construed widely in order to give effect to the provisions thereunder.

For the present clause 16(a), a vessel, aircraft or train may be a “thing” in respect of which an offence is committed e.g. where an IUU vessel, which the Director has denied entry, enters Hong Kong. For the present clause 16(b), a vessel, aircraft or train may also be a “thing” which contains evidence of an offence e.g. where the vessel contains a toothfish item which is unaccompanied by the relevant convention documents.

- 14. *Please consider whether there should be any provision in the Bill similar to section 27(3) of the Import and Export Ordinance (Cap. 60), which requires that a notice of the seizure be served on the owner of the article seized before a certain date.***

There may be cases that the article seized is an abandoned item and the owner of it is unknown. Hence, issuance of a notice to the owner may not be practical for each and every case. We therefore consider it not appropriate to state this expressly. Should there be a need to inform the owner, we will do so administratively.

#### **Clause 18**

- 15. *Please clarify whether the power under clause 18(1) to stop and board a transport and to require identity proof without warrant may be exercised in relation to a transport (including a vessel) which is used for dwelling purposes. If the answer is in the negative, please consider whether there should be a provision in clause 18 which is similar to clauses 13(2) and 14(3).***

Unlike the provision in clauses 13 and 14 which involve inspection and search, clause 18(1) only seeks to require a person to produce his or her proof of identity upon the request of an authorized officer. The authorized officer may still ask a person to produce his or her proof of identity without entering the part of the transport used wholly or principally for dwelling purpose. As such, it is not necessary to have a provision similar to clauses 13(2) and 14(3).

#### **Clause 20**

- 16. *It is stated in clause 20(1) and (2) that the Director may sell a perishable thing seized or dispose of it in any other way that he considers appropriate. Please clarify whether the Director would need to give a notice to the owner of the thing or the person from whom it was seized in relation to the sale or disposal, and if so, please consider stating this expressly in the Bill.***

Please refer to paragraph 14 above.



## Clause 21

17. *Clause 21 seeks to provide for forfeiture of things seized under the Bill. It is noted that section 102 of the Criminal Procedure Ordinance (Cap. 221) generally governs the disposal of property connected with offences. Section 102(6) of Cap. 221 provides that "[w]here by any other Ordinance it is provided that any particular property or class of property shall or may be forfeited, destroyed or disposed of, then the provisions of such Ordinance shall prevail". Please clarify whether clause 21 would prevail.*

The manifest purpose of section 102(6) of the Criminal Procedure Ordinance is to ensure that where forfeiture is provided for in a specific case, the general power of forfeiture under section 102(2) should not be used. Since clause 21 of the Bill specifically provides for the disposal of property, it will prevail over the general forfeiture provision in section 102 of Cap. 221.

18. *When a person, without reasonable excuse, fails to comply with a requirement under clause 17(1)(b) to provide a sample of the AMOs and is convicted of an offence under clause 17(7) but he commits no other offence under the Bill, please clarify whether all the AMOs seized could be forfeited under clause 21(1).*

Clause 16 provides that an authorized officer may seize a thing that the officer reasonably suspects that an offence under this Ordinance has been, is being or is about to be committed "in respect of the thing". It is possible that an AMO will be seized under clause 16.

If an AMO is seized in connection with the offence under clause 17, it will be liable to forfeiture under clause 21(1). On the other hand, if an AMO is seized not in connection with an offence under clause 17 but some other offences (even though the relevant party is only convicted of the offence under clause 17(7)), the AMO does not fall within the description in clause 21(1).

Therefore, whether an AMO is liable to forfeiture under clause 21(1) will depend on the facts and circumstances of an individual case.

19. *Clause 21(2) seeks to provide that "[i]f a person is convicted of an offence under this Ordinance, the court or magistrate may order a thing, that is not an AMO, seized under section 16 in connection with the offence, or any proceeds from the sale of the thing [to be returned to the owner etc. or forfeited to the Government]". Please clarify whether clause 21(2) would apply in the following situation: an authorized officer, having reasonable suspicion that the fish in a vessel is an AMO, seizes the fish pursuant to clause 16(a). The owner of the fish without reasonable excuse, fails to comply with a requirement to provide a relevant sample of the fish, and is subsequently convicted of an offence under clause 17(7). The fish is subsequently confirmed not to be AMOs upon testing. Would the fish be considered as "seized in connection with the offence" and thus could be forfeited under clause 21(2)?*

Clause 21(2)(a) provides for the return / forfeiture of "a thing (which is not an AMO) seized under section 16 in connection with the offence" (i.e. the offence that a person is



convicted of). As in the scenario in paragraph 18 above, the major issue in the present scenario is whether the subject thing is seized under section 16 in connection with the offence under clause 17(7) (i.e. failure to provide a sample).

If the subject thing is seized in connection with the offence under clause 17, clause 21(2) will apply and it will be for the court or the magistrate to consider, whether in the circumstances of a particular case, the thing should be returned to the owner / the person from whom the subject thing is seized, or to be forfeited to the Government. On the other hand, if the subject thing is seized not in connection with an offence under clause 17 but some other offences (even though the relevant party is only convicted of the offence under clause 17(7)), the subject thing does not fall within the description in clause 21(2) and hence clause 21(2) does not apply. Whether clause 21(2) will apply therefore depends on the facts and circumstances of an individual case.

20. *Please clarify whether a vessel or an aircraft unlawfully containing AMOs could be forfeited to the Government under clause 21(2) or (3).*

As mentioned in paragraph 13 above, the word “thing” in clause 16 can be construed widely to include a vessel or aircraft. In the unlikely event that a vessel or an aircraft is seized under clause 16, clause 21 may apply. Whether clause 21(2) or (3) will apply depends on whether the facts and circumstances of a particular case meet the criteria under clause 21(2) or (3). However, it is not likely that we would seize or forfeit a vessel or an aircraft.

## **Clause 22**

21. *Clause 22(1) seeks to provide that "[i]f a thing is seized under section 16 but no prosecution is brought in respect of the thing under this Ordinance, an authorized officer may apply to the court or magistrate for an order in respect of the thing or any proceeds from the sale of the thing". Please clarify whether:*

- (a) *there is any time limit for the authorized officer to make an application under clause 22(1); and*
- (b) *the officer would need to give an advanced notice and/or an opportunity to be heard to the owner of the thing seized before applying to court for an order under clause 22(1).*

- (a) The enforcement actions such as evidence gathering and investigation may vary from case to case. Some cases may involve personnel or vessels from other countries. Under such circumstances, information might need to be sought from the Secretariat or other Contracting Parties, and the time so required would be beyond our control. It is therefore not practical to set a time limit under clause 22(1) in the Bill.

- (b) An advanced notice and/or an opportunity to be heard to the owner of the thing seized will be given to the person concerned before applying to court for an order under clause 22(1) as is required by natural justice



**22. *Please clarify whether a vessel or an aircraft could be forfeited under clause 22(2).***

As mentioned in paragraphs 13 and 20 above, we do not envisage seizure of a vessel or an aircraft, but in the unlikely event of seizure without prosecution in respect of such vessel or aircraft, clause 22 will apply. Whether the vessel or aircraft would be forfeited or returned to the owner will depend on the court order.

**23. *Clause 22(3) seeks to provide that "[w]ithout limiting subsection (2)(b), the court or magistrate may, if satisfied that the owner of the thing is unknown or cannot be found, order the thing or any proceeds from the sale of the thing to be forfeited to the Government". Please clarify:***

- (a) *the steps, if any, that would need to be taken before the court or magistrate would be satisfied that the owner is unknown or cannot be found; and***
- (b) *whether there would be any hearing for the purposes of clause 22(3), similar to that as stated in section 28 of Cap. 60.***

- (a) and (b) In making an application under clause 22, the authorized officer should take such steps and provide such information as the court or magistrate requires to be satisfied that the owner of the thing is unknown or cannot be found. For example, AFCD would trace the owner by the information on shipping, postal and other relevant documents, and would try to contact the owner by all possible means. A hearing may be held if the court or magistrate considers that, for due administration of justice, a hearing is required in the circumstances of the case in order to be satisfied that the owner of the thing is unknown or cannot be found. We consider it not necessary to include a provision similar to section 28 of Cap. 60 in clause 22.

**Clause 24**

**24. *Please clarify whether clause 24(2)(a) would apply so that the owner could not claim compensation against the Government under clause 24(1) in the following situation: an authorized officer, having reasonable suspicion that the fish in a vessel is an AMO, seizes the fish. The owner of the fish is convicted of an offence under clause 17(7) after he, without reasonable excuse, fails to comply with a requirement to provide a fish sample. The fish is subsequently confirmed to be not AMO upon testing. Would the owner be considered as convicted of an offence in relation to the fish within the meaning of clause 24(2)(a)?***

Clause 24(2)(a) refers to the owner convicted of "an offence under this Ordinance in relation to the thing". So long as the offence (i.e. the offence under clause 17(7) in the present scenario) is related to the thing seized under clause 16 (i.e. the fish in the present case), an owner convicted of clause 17(7) may fall within the meaning of clause 24(2)(a). However, the above situation would very unlikely happen.



25. *Please clarify whether deteriorated living organisms may be returned to their owner after seizure. If so, please clarify whether clause 24(4) would apply in these circumstances.*

Generally speaking, a living organism that is likely to die or be subject to unnecessary suffering if it is kept in captivity would be disposed of by the Director appropriately as stipulated in clause 20 and thus it will not be returned to its owner. If a seized or detained thing is not disposed of by the Director, it would be returned to the owner, under which case clause 24(4)(a) will apply, and the owner may seek compensation if he or she considers that the thing has deteriorated during seizure or detention.

#### **Clause 26**

26. *Concerning the Director's power to exchange information with the Secretariat of the Commission or the competent authority of any place under clause 26, please clarify the scope of information that may be exchanged. Please also clarify if there would be any relevant safeguards relating to such exchange of information.*

The scope of information that may be exchanged is set out under relevant CMs. For examples, CM 10-03 states that Contracting Parties shall provide the Secretariat with a report on the outcome of each inspection conducted; CM 10-05 requires that all catch, export and re-export documents and other data required under the Catch Documentation Scheme for toothfish shall be made available to the Secretariat and Member who has had a role in the completion of such documents.

AFCD will comply with the Personal Data (Privacy) Ordinance (Cap. 486) when exchanging information with the Secretariat and other relevant parties.

#### **Clause 27**

27. *Under clause 27(1)(a), a person must not wilfully obstruct or resist a person assisting an authorized officer under section 11(a) in the performance of a function under the Bill. Please clarify whether a person could be criminally liable for obstructing or resisting the person assisting the authorized officer under clause 27(2)(a), even though:*

- (a) the assisting person is not a public officer;*
  - (b) the assisting person has not shown his identity proof to that person; or*
  - (c) no authorized officer has introduced the assisting person to that person as someone assisting the authorized officer.*
- (a) There is no requirement in the Bill stipulating that the person assisting the authorized officer under clause 11(a) must be a public officer. Irrespective of whether the assisting person is himself or herself a public officer, depending on the factual circumstances of the case, it is possible that a person may be criminally liable for willfully obstructing or resisting an assisting person.



- (b) and (c) Depending on the factual circumstances, a person will only be criminally liable under clause 27(1)(a) and 27(2)(a) if he or she **willfully** obstructed or resisted a person assisting an authorized officer under clause 11(a), in the performance of a function under the Ordinance.

For clause 27, it is not a necessary element for the offence as drafted that the accused knew of the identity of the assisting person or that the assisting person was assisting the authorized officer, although the accused's knowledge (or the absence of it) may be material in considering whether his or her conduct was willful in the circumstances. All-in-all, whether the person will be criminally liable under the situations (b) and (c) depends on the facts and circumstances of each case.

### **Clauses 31 and 32**

28. *Clause 31 seeks to provide for the liability of employers and principals in relation to acts done or omission made by employees and agents. With respect to the defence under clause 31(4), please clarify the relevant burden and standard of proof, in particular whether the burden on the defendant is only an "evidential burden" (i.e. sufficient evidence is adduced to raise an issue).*

It is our policy intention that the defendant is required to discharge an evidential burden to establish the defence in clauses 31(4) and 32. The defendant has to provide sufficient evidence to raise a potentially exculpatory issue and the legal burden remains on the prosecution to disprove the exculpatory matter and prove the case beyond reasonable doubt.

29. *Please clarify the meaning of "employment", in particular whether an apprentice is an employee, for the purposes of clauses 31 and 32.*

At common law, an apprentice is not an employee; but whether a person is in fact an apprentice or an employee depends on the actual relationship between the two parties. It is always a question of fact for determining if a contract of apprenticeship or a contract of employment exists. The modern approach is to examine all the features of their relationship against the background of the indicia of employment with a view to deciding whether, as a matter of overall impression, the relationship was one of employment. Examples of factors which may be relevant for considering the existence of employment relationship include the degree that the employer may control what the employee may do and the way that the employee may do the same, the method of payment, arrangements for payment of income tax, etc.

30. *Please also clarify the applicable burden and standard of proof concerning the defence for employees under clause 32.*

Please refer to our response in paragraph 28 above.



### Clause 33

31. *Clause 33(1) seeks to provide for a public officer's immunity from civil liability. Please clarify whether it is possible for a public officer to be criminally liable for an act done or omission made by the officer in good faith in performing or purportedly performing a function under the Bill.*

The criminal liability of public officers arising from the performance or purported performance of a function under the Bill depends on the facts and circumstances of an individual case such as the offence(s) potentially or allegedly committed by the officer, nature and ingredient(s) of such offence(s), the act or omission made by the officer etc., and therefore must be assessed on a case-by-case basis

32. *Please clarify whether the persons assisting authorized officers under clause 11(a) (who may or may not be public officers) would be protected from civil liability under clause 33 or any other provision.*

Clause 33 only covers public officer performing or purportedly performing a function under the Ordinance in good faith. Since the person assisting the authorized officers is not a public officer to whom any function is delegated under section 10(1) or an authorized officer, such person has no capacity to perform a function under the Ordinance, and will only perform subsidiary role. Clause 33 therefore does not apply to such person.

**Food and Health Bureau**

**Agriculture, Fisheries and Conservation Department**

**September 2018**