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LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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31 August 2018

Mr Bill WONG
Principal Assistant Secretary for Food & Health (Food)3
Food and Health Bureau
17/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Dear Mr WONG,

Conservation of Antarctic Marine Living Resources Bill

We are scrutinizing the legal and drafting aspects of the Conservation of Antarctic Marine Living Resources Bill ("Bill"). We should be grateful if you could clarify the following matters:

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.

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.

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).

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.

"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.

"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.

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.

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).

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).

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.

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".

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).

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".

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.

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).

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.

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.

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).

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)?

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

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).

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

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.

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)?

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.

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.

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.

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).

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

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

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.

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.

We would appreciate your reply in both English and Chinese on or before 21 September 2018.

Yours sincerely,



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