

政府總部
運輸及房屋局
運輸科
香港添馬添美道2號
政府總部東翼



**Transport and
Housing Bureau**
Government Secretariat
Transport Branch
East Wing, Central Government Offices,
2 Tim Mei Avenue,
Tamar, Hong Kong

本局檔號 OUR REF.: THB(T)CR 1/1136/2015
來函檔號 YOUR REF.: LS/B/20/18-19

電話Tel. No.: 3509 8214
傳真Fax No.: 3912 4816

By Fax (2877 5029)
23 October 2019

Mr CHUI Ho-yin, Alvin
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong

Dear Mr Chui,

Franchised Taxi Services Bill

Thank you for your letter to the Transport and Housing Bureau dated 3 September 2019 (File ref.: LS/B/20/18-19) concerning the Franchised Taxi Services Bill (“Bill”). This note sets out the Government’s responses to the various matters raised in your letter.

Clause 3

2. The restrictions regarding the use of franchised taxis as stipulated under clause 3 aim to reflect the Government’s policy intent to prohibit (i) any franchisee from using a franchised taxi to provide a passenger service without a franchise in force (i.e. before the franchise commences and during the suspension of franchise) and (ii) any person from, except with written approval of the Commissioner for Transport (“C for T”), using a franchised taxi to carry out other activities that are not connected with the provision of a franchised taxi service. A franchisee or a person would commit an offence if the franchisee or the person carries out the unlawful acts mentioned above, no matter whether such service and activities are provided for reward or not. Apart from “using” a franchised taxi, the offence should also cover the case if a franchisee or a person “causes or permits the use of” a franchised taxi in the prohibited way mentioned in (i) and (ii) above.

3. As for the engagement relationship between the franchisee and its drivers of franchised taxi services, paragraph 9 of the Legislative Council (“LegCo”) Brief (File ref.: THB(T)CR 1/1136/2015) seeks to explain that employer-employee relationship would not be a mandatory requirement. In this regard, we would like to supplement that should a franchisee choose not to maintain an employer-employee relationship with its drivers, it will be required, under the franchise, to engage the drivers in a principal-agent relationship such that the drivers are appointed as agents to provide franchised taxi services on behalf of the franchisee (i.e. the principal). Such arrangement will be clearly specified as a tender requirement, under which the franchisee (who does not have an employer-employee relationship with its drivers) must enter into an agency agreement with its drivers. The agency agreement shall specify clearly the obligations of the principal (i.e. the franchisee) and the agent (i.e. the franchised taxi driver) as part of the agreement terms. The requirement of either maintaining an employer-employee relationship or a principal-agent relationship between the franchisee and its drivers is different from the existing practice of ordinary taxi, where a rentor-rentee relationship is commonly found between the ordinary taxi owner and drivers, and the latter would not be treated as an agent of the former. The requirement imposed on the proposed franchised taxi service can thus help ensure that the franchisee is responsible for controlling and monitoring their drivers who will be providing franchised taxi service on behalf of the franchisee.

4. It is a well-established legal principle that the words of a statute are to be construed in the light of their context and purpose. Along this principle, it is noted that in legislation concerning the regulation of road traffic and motor vehicles, where statutory provisions create offences by reason of the words “use”, “cause” or “permit” appearing in juxtaposition, “cause” or “permit” generally requires the prosecution to prove *mens rea* (in the sense that the prosecution has to prove the defendant’s knowledge of the facts rendering the use unlawful), while “use” will create an offence of absolute liability (in the sense that the prosecution does not have to prove the defendant’s knowledge of the unlawfulness of the use)¹. A person may “use” a vehicle vicariously through the agency of another person who is driving or using it but, in such a case, a restricted construction of “use” will be applied so that the user is limited to the employer of the person driving or actively using the vehicle if the driving or use is for the business of the employer². It is not necessary for the prosecution to prove the employer’s knowledge of the use in such a case.

¹ Please see *Wilkinson's Road Traffic Offences* (28th edition, 2017), paragraphs 1-161, 1-162, 1-166 & 1-176.

² Please see *HKSAR v Cheung Wai Kwong* (2017) 20 HKCFAR 524, paragraph 69(7).

5. On the basis of the usual legal construction of the word “use”, “cause” or “permit” as mentioned in paragraph 4 above, the franchisee can commit an offence of “using” or “causing or permitting to use” a franchised taxi if its franchised taxi was used by its **employee** for its business in a way prohibited under clause 3. In the situation where a franchised taxi was used by an **agent** of the franchisee for its business in a way prohibited under clause 3, the franchisee cannot be prosecuted with the offence of “using”. However, the franchisee can still be prosecuted with the offence of “causing” or “permitting” if it is proved that the franchisee has knowledge of the unlawful use.

Clause 8

6. As the regulation of point-to-point personalised public transport service under a franchise model is a novel concept in Hong Kong, reference had been made to various existing legislations including the Public Bus Services Ordinance (Cap. 230) as appropriate when we prepared the Bill. That said, with the differences in the scale and mode of operation between the new franchised taxi service and the franchised bus service, coupled with the fact that Cap. 230 was enacted decades ago, we consider it not appropriate to simply adopt the approach and copy direct from the provisions in Cap. 230 to the Bill.

7. As mentioned in paragraph 17 of the LegCo Brief on the Bill, the Government proposes that the franchisee shall furnish to the C for T a guarantee of \$5 million before the franchise period commences. Pursuant to clause 17, the Government may deduct from the guarantee any financial penalty (imposed in accordance with clause 16) unpaid by the franchisee before the deadline. Upon completion of the franchise, the guarantee will be discharged after deducting any overdue penalty. The proposed guarantee requirement aims to enable the Government to recover the unpaid financial penalty from the franchisee should the latter fails to pay the penalty in full before the deadline specified by C for T. Such arrangement can help in the monitoring of the performance of the franchisee through ensuring that the franchisee would fulfil its obligation of settling the financial penalty imposed on it arising from non-compliance before the due date.

Clause 13

8. As mentioned in paragraph 6 above, while we may make reference to similar provisions in existing legislations when drafting the Bill, we consider it more appropriate to adopt a different form of drafting of legal provisions, as and where appropriate, to reflect our policy intent more closely. In view of

the trial nature of the new franchised taxi service as well as its flexible mode of operation, we consider that it would be a more desirable approach to include an explicit provision in the Bill (i.e. clause 13) to provide general power for the CE-in-Council, the Secretary for Transport and Housing or the C for T, after consulting a franchisee, to give directions or requirements to the franchisee in respect of its franchise or the franchised taxi service as and when necessary. On the other hand, similar to Cap. 230, there are specific provisions in the Bill to empower the C for T to issue certain directions or requirements to the franchisee in respect of some of the most prominent and important areas relating to the franchise or the franchised taxi service. For example, clause 14 provides that C for T may inspect any franchised taxi of a franchisee and require the franchisee to carry out specified maintenance or other work for a specified franchised taxi; clause 15 provides that C for T may require a franchisee to keep relevant document and provide C for T with a copy of the relevant document.

Clause 16

9. The policy intent of clause 16 is to provide a mechanism to impose financial penalty on the franchisee if the franchisee fails to comply with the Ordinance or the franchised taxi service is not provided in conformity with the franchise. The provisions on “reasonable opportunity” seek to, through due notification, ensure that the franchisee will be given a fair chance to do what it is required or invited to do before further enforcement action is taken by the Government. It should be noted that the term “reasonable opportunity” is commonly found in the provisions of different statutes (e.g. section 22(4)(a) of Cap. 230, section 23(1) of the Ferry Services Ordinance (Cap. 104)) and whether a reasonable opportunity has been given in a particular case is a question of fact depending on the particular circumstances of each case. In other words, whether a reasonable opportunity has been given should be determined on a case-by-case basis.

10. In relation to compliance with the franchise, since a franchise will be granted by open tender, the franchisee should be fully aware of the requirements set out in the franchise terms (including the requirements of the Ordinance/Regulation referred to in the tender document and those commitments proposed by the franchisee in its application for the franchise) during the tender application process. For example, a franchisee shall be well aware of the number of vehicles needed to be acquired to meet the fleet requirement and be obliged to comply with such requirement at all times during the franchise. The franchise document will also indicate when the franchise is intended to commence. Thus, by the time the franchise comes into force, the franchisee shall have already been given a reasonable opportunity to comply with such fleet requirement or other requirements

under the franchise, and the requirement under clause 16(1)(b) should be satisfied.

11. Similarly, in relation to compliance with a written direction or requirement given by the CE-in-Council, the Secretary for Transport and Housing or C for T in respect of a matter that relates to the franchise or the franchised taxi service provided by the franchisee, for a reasonable opportunity to be provided for the franchisee to comply, the franchisee will be notified of the direction or requirement as well as the specified timeframe (to be set with reference to the facts and circumstances of the case) for compliance when such written direction or requirement is given.

12. If C for T intends to impose financial penalty on a franchisee under clause 16, C for T must notify the franchisee in writing of the non-compliance and its details in accordance with clause 16(1)(c). To provide a reasonable opportunity for the franchisee to explain the case or to show cause why a financial penalty should not be imposed, the written notice issued by C for T would also indicate the deadline for the franchisee to submit a representation in writing in response to C for T's notice of intention to impose financial penalty issued under clause 16(1)(c). If the franchisee has not made a written representation before the deadline specified by C for T, or C for T is of the opinion that the franchisee, having made a written representation, has not shown reasonable cause why the penalty should not be imposed, C for T may then impose a financial penalty on a franchisee and specify the amount concerned and the deadline for payment in a written notice.

Clause 37

13. We agree that there should be no comma after "taxis" in item 2. We will propose relevant committee stage amendment to clause 37(1).

Clause 56

14. The Government proposes that a person who is eligible for a full driving licence for a franchised taxi must (i) be a holder of a valid full driving licence for a taxi; and (ii) attend and complete the pre-service course for franchised taxis (relevant consequential amendments are set out at clauses 78, 79 and 80). The proposed amendments under clause 56 seek to extend the current provisions to cover a person who has applied for or passed a taxi driving test³, and a person who holds a full driving license for a taxi or a

³ A person who applies for a full driving licence for a franchised taxi is required to pass the taxi driving test during the course of obtaining a full driving licence for a taxi, which is a pre-requisite of applying for a full driving licence for a franchised taxi. There will be no separate driving test dedicated to franchised taxi.

franchised taxi, such that he/she will be eligible to attend the pre-service course for franchised taxi. This arrangement is similar to the existing practice of pre-service course for public light bus (“PLB”) drivers where a person who has applied or passed the private/public bus driving test or private light bus/PLB driving test⁴, or holds a full driving licence to drive a PLB, private light bus, public bus, private bus or franchised bus, is eligible to attend the pre-service course for PLB.

15. Incidentally, the Government has also proposed (outside the context of the franchised taxi proposal) to require applicants for full driving licence for a taxi and a non-franchised public bus to complete and pass a pre-service course designated and approved by C for T with a view to enhancing the service quality. The Government is preparing for the relevant legislative proposal which will be submitted to LegCo in due course.

Clause 60

16. As a matter of legislative drafting, the use of a conjunction between paragraphs is not necessary if “the following” (“以下”) is used in the lead-in of a provision. After the amendments by clause 60 of the Bill, “the following” (for the English text) and “以下” (for the Chinese text) are used in the lead-in of regulation 37(2) of the Road Traffic (Construction and Maintenance of Vehicles) Regulations (Cap. 374A), and we consider that the context of the provision does not give rise to a particular need to add a conjunction to enhance clarity.

Other requirements

17. The proposed requirements relating to vehicle types, compartment facilities and vehicle age of franchised taxis as well as other requirements relating to service standard and service level are operational in nature, which will be specified in the franchise terms to be imposed by the CE-in-Council on granting the franchise in accordance with clause 4(4) of the Bill. The Transport Department will monitor the operation of the franchised taxi service after a franchise is granted. If a franchisee fails to comply with the franchise terms, C for T may impose financial penalty on the franchisee in accordance with clause 16 of the Bill. In addition, if the CE-in-Council, having regard to whether a franchisee maintains a franchised taxi service in conformity with the franchise terms, considers that the franchisee has failed to maintain a proper and efficient service, the CE-in-Council could suspend

⁴ Under existing practice, a person who passes the private/public bus (code 9, 10) driving test or private light bus/PLB driving test (code 4, 5) can be issued with a full driving licence for a PLB (code 5) if he/she has completed the pre-service course for PLB.

or revoke the franchise in accordance with clause 19 and 20.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'Ann Chan', written in black ink.

(Miss Ann CHAN)

for Secretary for Transport and Housing

c.c. Department of Justice

(Attn: Mr Michael LAM, Senior Assistant Law Draftsman)

(Attn: Mr Manuel NG, Senior Government Counsel)

(Attn: Ms Rosanne LEUNG, Senior Government Counsel)

Transport Department

(Attn: Miss Janet HO, Chief Transport Officer)

Clerk to Bills Committee