

立法會
Legislative Council

LC Paper No. LS23/19-20

**Further Report by Legal Service Division on
Conservation of Antarctic Marine Living Resources
(Toothfish Catch Documentation Scheme) Regulation (L.N. 150) and
Conservation of Antarctic Marine Living Resources
(Port Inspection and Control) Regulation (L.N. 151)
Gazetted on 25 October 2019**

Members may recall from LC Paper No. LS12/19-20 which was issued to Members via LC Paper No. CB(2)187/19-20 that the Legal Service Division ("LSD") was scrutinizing the legal and drafting aspects of L.N. 150 and L.N. 151 and would make a further report if necessary.

2. To recap, L.N. 150 and L.N. 151 are made by the Secretary for Food and Health under section 4 of the Conservation of Antarctic Marine Living Resources Ordinance (Cap. 635) to implement Conservation Measure 10-05 ("CM10-05") and Conservation Measure 10-03 ("CM10-03") respectively adopted under the Convention on the Conservation of Antarctic Marine Living Resources ("Convention"). Under section 4(2) of Cap. 635, regulations made under section 4 may have extra-territorial effect, i.e. they may be expressed to apply to Hong Kong vessels, Hong Kong persons, and Hong Kong companies, wherever they may be/may be acting. Under L.N. 150 and L.N. 151, owners and masters of vessels are subject to criminal liability for doing certain prohibited acts in relation to toothfish items. It is also noted that some of the offences in section 6 of L.N. 150 apply to Hong Kong vessels (which could be outside Hong Kong) and hence have extra-territorial effect. However, L.N. 150 and L.N. 151 do not provide that the relevant offences have extra-territorial effect in relation to Hong Kong persons and Hong Kong companies.

3. LSD has sought clarification from the Administration on certain matters relating to L.N. 150 and L.N. 151. Our enquiries and the Administration's response are summarized in the following paragraphs:

Meaning of "owner of a vessel" for the purposes of certain offences under L.N. 150 and L.N. 151

4. LSD has asked whether the term "owner" of a vessel should be defined in L.N. 150 and L.N. 151. The Administration has explained that a specific definition of "owner" is not necessary as they consider it appropriate to rely on the ordinary dictionary meaning of the term (which has not been defined in CM10-05

and CM10-03). According to its ordinary meaning, "owner" in general covers a person in whom is for the time being beneficially the property is vested, or a person who has the occupation, or control, or usufruct, of it.

Reasons for applying certain offences in L.N. 150 and L.N. 151 only to the master and owner of the vessel concerned, but not to other persons working on the vessel

5. The Administration considers that it is sufficient for the relevant offences in L.N. 150 and L.N. 151 (including entry of a denied vessel and landing or transshipment of toothfish without proper Convention documents) to be applicable to the master(s) and the owner(s) of the vessel concerned, as they are the ones who have the overall command and in ultimate charge of the vessel.

Offences having extra-territorial effect

6. LSD has asked the Administration to clarify the following:
- (a) in respect of offences under L.N. 150 and L.N. 151, the reason for not providing for an extra-territorial application on Hong Kong persons and Hong Kong companies;
 - (b) whether the masters/owners of the vessel who are Hong Kong persons doing the act outside Hong Kong as stated in section 6 of L.N. 150 when the vessel is not a Hong Kong vessel would commit a similar offence; if not, why; and
 - (c) how section 6(4) of L.N. 150 would be enforced in practice, e.g. whether, and if so, how an authorized officer would require the owner or the master of the vessel outside Hong Kong to produce the relevant documentation for inspection.
7. In reply, the Administration has explained as follows:
- (a) under international law, flag states generally have jurisdiction over the operations of their vessels on the high seas. Flag states should also generally ensure that anyone, regardless of their nationalities, on board the vessels complies with the relevant international rules;
 - (b) Hong Kong companies or Hong Kong persons engaging in activities contrary to the Convention outside Hong Kong are generally subject to the laws of the flag states of the vessels, or of the jurisdiction of the waters where the activities took place. Currently, the Administration does not intend to use section 4(2) of Cap. 635 to provide for an extra-territorial application to Hong Kong persons and Hong Kong companies; and

- (c) in the case that a Hong Kong vessel is serving as a receiving vessel, the flag state authority of the despatching vessel would have entered the transshipment details in the electronic Catch Documentation Scheme ("e-CDS") managed by the Commission for the Conservation of Antarctic Marine Living Resources and the Agriculture, Fisheries and Conservation Department ("AFCD") will be able to spot the intended transshipment and obtain relevant information in the e-CDS, and request the receiving vessel, which is a Hong Kong vessel, to provide the Administration with a copy of the relevant documentation that covers the toothfish to be transhipped. On the other hand, if a Hong Kong vessel is acting as a despatching vessel, the flag state of the receiving vessel or the transshipment port state will request the documentation from the despatching vessel for the purposes of verifying the transshipment activities and completing the documentation. The despatching vessel, being a Hong Kong vessel, would have to approach AFCD for the documentation and report the intended transshipment. Through this reciprocal monitoring system, the flag states of both the despatching and receiving vessels will be able to follow through the transshipment activities inside and outside the waters of their jurisdictions, and take inspection and enforcement actions if necessary.

Application of the exemption of "personal baggage" under section 7 of L.N. 150

8. Under section 7 of L.N. 150, the offence of importing or exporting toothfish items without a valid licence does not apply to toothfish items which are in the accompanied personal baggage of a person entering or leaving Hong Kong if the items are for the person's personal use or are gifts to another person, and the total net weight of all toothfish items in the baggage does not exceed 15 kg. In reply to LSD's enquiries, the Administration has clarified that in order to abate possible abuse of the exemption, it is not intended that exemption will be granted to a person who acts on behalf of another person to bring in or take out toothfish (not as a gift).

Burden and standard of proof for the defence under section 10(3) of L.N. 150 and the reason for not providing a similar defence for other offences in L.N. 150 and L.N. 151

9. Under section 10(3) of L.N. 150, it is a defence for a defendant charged with the offence of importing toothfish items or taking them out of Hong Kong without a relevant licence in relation to toothfish items being removed from the air cargo transshipment area (as stated in section 10(2)) to show that the defendant (a) took all reasonable steps and exercised reasonable diligence to avoid the removal, or (b) did not know, and had no reasonable ground for believing, that the removal had occurred.

10. In response to LSD's enquiries, the Administration has explained that the burden of proof for the defence provided in section 10(3) is intended to be an evidential burden, which is also the interpretation the court would most likely adopt. Not all defence provisions enacted in recent years have expressly provided for the burden of proof. It may not be necessary to expressly provide for the burden of proof in section 10(3). The defence provision of section 10(3) is intended for the very specific circumstances relating to air transshipment cargoes under section 10(2), and thus no similar defence provisions are provided for other offence provisions in L.N. 150 and L.N. 151.

11. Subject to Members' views on the matters set out in paragraphs 4 to 10 above, no legal and drafting difficulties have been identified in relation to L.N. 150 and L.N. 151.

12. Under section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the period for amending L.N. 150 and L.N. 151 will expire at the Council meeting of 27 November 2019. Members are invited to note that unless the amendment period is extended, the deadline for giving notice of amendment under Rule 29(2) of the Rules of Procedure ("RoP") is **Wednesday, 20 November 2019**, and the deadline for giving notice of a motion under section 34(4) of Cap. 1 to extend the amendment period to the Council meeting of 18 December 2019 under RoP 29(3) is **Friday, 22 November 2019**.

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