

**FRED KAN & CO.**

*Solicitors & Notaries*

**URBAN PLANNING AND ENVIRONMENTAL LAW QUARTERLY**

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**The role that Hong Kong's Ombudsman does and could play in facilitating greater protection of the environment is the subject of the main article in this Report.**

**The prosecution data included (courtesy of the EPD) once again reflect the judiciary's lack of understanding of the seriousness of environmental offences, in terms of harm caused to the community. The situation of demonstrably low penalties for crimes against the environment is likely to continue unless and until appeal courts provide realistic tariff guidelines.**

**The Editors**

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**SHOULD HONG KONG HAVE AN ENVIRONMENTAL OMBUDSMAN?**

In 1989, the Office of the Commissioner for Administrative Complaints was established under the *Commissioner for Administrative Complaints Ordinance* (Cap. 397) ("the Ordinance"). The Commissioner's title was changed to *Ombudsman* in 1996, to bring Hong Kong into line with Ombudsman systems existing in numerous other countries, particularly those which are members of the Commonwealth. Mr. Andrew So has been Hong Kong's Ombudsman for the last five years, in which time he and his staff have raised the profile and importance of the office by their fine work in objectively investigating numerous complaints of alleged maladministration on the part of government officials.

The office of the Ombudsman recently stated its mission to be:

*To serve the community of Hong Kong by redressing grievances and addressing issues arising from maladministration in the public sector, and through independent, objective and impartial investigations, to bring about improvements in the quality and standard of and promote fairness in the public administration [Maladministration and Redress, March 1998]*

With increasing community awareness of the severe pollution problems faced by Hong Kong, and the lack of action taken by public agencies to reduce the causes of pollution where they have power to do so, it is likely that complaints to the Ombudsman concerning environmental issues within the public administration domain will increase.

The Ombudsman, who is appointed for 5 years and may not hold any other "office of profit" (S. 3(3) and

S. 4) is responsible for investigating any action taken by government agencies (there are a small number of important exceptions, such as the Department of Justice and the Office of the Chief Executive) in the exercise of their administrative functions. Investigations are initiated by the Ombudsman, or occur as a result of a complaint by someone who claims to have suffered injustice from maladministration by a government official. In either case, the Ombudsman investigates all the circumstances of the decision/action to decide whether (i) maladministration has occurred, and (ii) a person has suffered as a consequence (S. 7(i)).

'Maladministration' is defined as 'inefficient, bad or improper administration' including unreasonable conduct, abuse of power, discriminatory action or application of 'unreasonable, unjust, oppressive or improperly discriminatory procedures' (*inter alia*) (S. 2(i)).

Complaints may not be made anonymously, and there are several other common sense threshold criteria for the Ombudsman's jurisdiction to apply. These include the requirement that a complainant should first exhaust all other statutory remedies (if any) before the complaint need be acted upon, unless the Ombudsman is satisfied that in the circumstances it is not reasonable to expect the complainant to resort to that remedy (S. 10). Importantly, the Ombudsman no longer has to wait for a complaint in order to investigate alleged maladministration. He may initiate or continue an investigation, following 1994 amendments to the Ordinance (S. 7(1) and S.11). These are known as "direct investigations".

The Ombudsman views the power to initiate or continue investigations (where the complaints is withdrawn) as allowing his office "to be more proactive" in dealing with problems of public interest and concern. The power is likely to be exercised where the Ombudsman considers it useful to:

- (a) follow through related problems which investigation of the complaint alone may not be able to resolve;
- (b) nip problems in the bud; and
- (c) resolved repeated complaints, once and for all, by addressing the fundamental problems which may not be the subject of complaint, but are believed or suspected to be the underlying reasons for complaints.

A total of 15 direct investigations have been carried out since June 1994. [*Ombuds News*, Issue No. 10]

The scope of the Ombudsman's investigatory powers is very wide. He may, for example, summon witnesses and require them to furnish information and produce documents, on oath if he thinks that is necessary (S. 13), and has the power of entry into private premises (S.20). Legal practitioners are not permitted to represent persons in the investigation proceedings without leave of the Ombudsman (S. 12(4)).

The Ombudsman has jurisdiction to make recommendations requiring virtually any action - such as reversal of decisions, or that 'other steps should be taken' where appropriate - with or without a formal finding of maladministration (S. 16). Agencies are not mandated to adopt the recommendations, but the Ombudsman's report may be published, and must be considered by the Chief Executive, and laid before the Legislative Council if he considers it appropriate. The Ombudsman may also refer an agency's response to the Chief Executive (S. 16(3)).

Whilst the Ombudsman's jurisdiction to give relief to a complainant is recommendatory only, in practice his recommendations are usually followed. Decisions under investigation stand until changed by the agency (S. 19). Ombudsman's investigation reports may

severely embarrass any agency which is named. Thus, the Ombudsman has power to be able to provide significant and realistic assistance to any member of the community --- or the community at large --- who is prejudiced by government agencies' action or inaction.

The present Ombudsman has consistently made it clear that he and his office are committed to investigating complaints of a broad, public interest nature, such as complaints against Hong Kong's environmental protection agencies -- the Environmental Protection Department and the Agriculture and Fisheries Department. The *Ombudsman's Administrative Ethics Checklist*, which was first released in 1995, indicates that he and his staff will apply a criterion of public accountability to agencies' operations. For example, the *Checklist* begins with the observation that the community expects public officers "in providing a fair and reasonable public administration, will always perform their duties to the highest possible standard". One of the ethical principles listed is: *Are you not afraid of admitting your mistakes and do you take positive steps to prevent their*

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recurrence?

The Ombudsman has always been prepared to consider complaints relating to environmental issues - as, indeed, he is obliged to do under the Ordinance. A recent example of this is the Ombudsman's direct investigation into the performance of the Drainage Services Department and the EPD in protecting our beaches from pollution by sewage discharges. (*Ombuds News*, Issue No. 1, 1997/98).

Hong Kong's environment is already severely degraded, and is getting worse, which the Director of the EPD recently acknowledged (SCMP 19th March 1998, and see EPLQ Report, Winter 1996). Conservation of ecological reserves is tenuous, due to inadequate legislation and the lack of commitment by enforcement agencies, where laws do exist. We do little to conserve habitat, such as remains, for wild life. *The Mai Po Marshes Reserve* is a prime example. Recent articles in the SCMP (e.g. "Muddying the waters of Mai Po", 9/3/98) remind us of the continuing degradation of Mai Po's ecological systems due to inappropriate human activities within the immediate vicinity.

Hong Kong has a long nurtured governmental culture, with respect to environmental protection, of saying the right things but actually doing far less, or even the opposite. Failure to take action, as required under its governing legislation, is arguably "maladministration" on the part of an agency. The "no action" decision might be arbitrary, capricious or unreasonable, in which case it is "maladministration". Our environmental laws are not always enforced vigorously. The sad absurdity of this is highlighted by a comparison with road traffic offences. In respect of the latter, if you speed and are caught, you get a ticket. In respect of environmental offences - which arguably represent a greater harm to the community - the enforcing agencies have in the past often preferred to "educate" wrong doers into changing their ways,

instead of applying the law objectively and resolutely as is their responsibility.

The Ombudsman provides the only inexpensive, accessible avenue for concerned citizens to step into the vacuum where agencies cannot, or will not, restrain illegal activities which damage the environment.

Hong Kong could go further by establishing a dedicated Environmental Ombudsman's Office, as has occurred in several countries, e.g. Columbia. Environmental problems Hong Kong people face justify such a step, and we have vastly more financial resources than most countries to enable it to be done.

The right to a healthful, clean environment should be treated as a fundamental, human right [see UPELQ, Winter 1997/98]. The Ombudsman has recently stated that he and his office are committed to upholding human rights: see *The Ombudsman And The Protection of Human Rights In Hong Kong*, Office of the Ombudsman, April 1998. It is both logical and necessary that the Ombudsman expressly includes, *environmental rights* in his perception of *human rights*. So far, this has not been acknowledged.

One way of reinforcing and applying that concept to Hong Kong's public administration is to have an Ombudsman's office dedicated to investigation of alleged maladministration affecting public, fundamental rights, such as the right to a clean environment. The present Ombudsman has shown he is willing to do this, but his role could be strengthened by the provision of express powers of investigation in respect of public environmental issues.

## Digest of LEGISLATION

Recent amendments include the following:

### *Foreshore and Sea-bed (reclamations) (Amendment) Ordinance No.17 of 1998*

Section 8(1) of the Foreshore and Sea-bed (Reclamations) Ordinance (Cap.127)

is amended by repealing everything after "section," and substituting -

"the Director shall, within a period of 9 months after the expiry of that time, or within such further period of not more than 6 months after the expiry of that period as may, upon the application of the Director, be allowed by the Chief Executive having regard to the circumstances of the case, submit to the Chief Executive in Council for consideration the proposed reclamation and any such objection, and the Chief Executive in Council shall consider the proposed reclamation and every objection and may -

- (a) decline to authorize the reclamation;
- (b) authorize the reclamation in part only and defer for further consideration at such future time as the Chief Executive in Council shall specify, any objection which relates to the remaining part of the reclamation not so authorized; or
- (c) authorize the whole of the reclamation."

Section 20 is amended by adding -

"(3) Where immediately before the commencement of the Foreshore and Sea-bed (Reclamations) (Amendment) Ordinance 1998 (17 of 1998), a notice had been published under section 5 in respect of a proposed reclamation, the period of 9 months as specified in section 8(1) shall be calculated as from -

- (a) the commencement of that Ordinance; or
- (b) the expiry of the time for the making of objections under section 6, whichever is the later."

### *Protection of the harbour (Amendment) Ordinance No.9 of 1998*

The long title to the Protection of the Harbour Ordinance (106 of 1997) is repealed and the following substituted -

"An Ordinance to protect and

preserve the harbour by establishing a presumption against reclamation in the central harbour."

Section 2 is amended by repealing the definition of "reclamation" and substituting -

"reclamation" means any works carried out or intended to be carried out for the purpose of forming land from the sea-bed or foreshore;"

The heading to section 3 is amended by adding "central" before "harbour".

*Air pollution control (vehicle design standards)(Emission) (amendment) Regulation 1998 (L.s. No.2 to gazette No.8/1998 L.n. 96 of 1998)*

This Regulation comes into operation on a day to be appointed by the Secretary for Planning, Environment and Lands by notice in the Gazette. Regulation 2 of the Air Pollution Control (Vehicle Design Standards) (Emission) Regulations (Cap.311 sub.leg.) is amended -

(a) in the definition of "強制點火式引擎", by repealing "氣缸" and substituting "汽缸";

(b) by adding -  
"engine of direct-injection type" (直接噴射式引擎) means a compression-ignition engine in which the fuel is injected directly into the combustion space above the piston crown;"

Schedule 4: "vehicle design standards (emission) for private cars equipped with compression-ignition engines and registered on or after 1 April 1998" and schedule 5: "vehicle design standards (emission) for certain motor vehicles registered on or after 1 October 1998" are added by the regulation.

This Regulation amends the Air Pollution Control (Vehicle Design Standards) (Emission) Regulations (Cap.311 sub.leg.) by -

(a) imposing a more stringent vehicle design standard for emission of air pollutants for private cars equipped

with a compression-ignition engine and first registered on or after 1 April 1998; and

(b) imposing more stringent vehicle design standards for emission of air pollutants applicable to certain motor vehicles first registered on or after 1 October 1998.

*Fixed penalty (traffic contraventions) Amendment Ordinance (L.s. No.2 to gazette No.4/1998 L.n. 45 of 1998)*

The Provisional Legislative Council under section 20B(3) of the Fixed Penalty (Traffic Contraventions) Ordinance (Cap.237) on 21 January 1998 resolved that, with effect from 1 March 1998, section 20B(1) of the Fixed Penalty (Traffic Contraventions) Ordinance be amended by repealing "\$440" and substituting "\$500".

*Public health (animals and birds) (Amendment) Regulation 1998 (L.s. No.2 to gazette No.4/1998 L.n. 44 of 1998)*

Regulation 4(3) of the Public Health (Animals and Birds) Regulations (Cap.139 sub.leg.) is amended by repealing "China" and substituting "the Mainland".

Regulation 7A "Imported birds to be accompanied by valid health certificate" is added to the Regulation.

Regulation 57 is amended -

(a) by renumbering it as regulation 57(1);

(b) by adding -

"(2) Any person who acts in contravention of regulation 7A shall be liable on summary conviction to a fine of \$25,000 as well as to suffer any forfeiture."

Schedule 4 "matters to be certified in health certificate issued by competent veterinary authority to satisfaction of director" is added to the regulation.

Explanatory Note

This Regulation prohibits the importation into the Hong Kong Special Administrative Region of any bird without a health certificate, issued by a

competent veterinary authority at the place from which the bird is exported, certifying as to the good health of the bird. Contravention of the prohibition is an offence.

*Animals and plants (protection of endangered species) Ordinance (Amendment of Schedules) Notice 1998 (L.69 of 1998) (commencement) Notice 1998 (L.s. No.2 to gazette No.12/1998 L.n. 193 of 1998)*

Under section 1 of the Animals and plants (Protection of Endangered Species) Ordinance (Amendment of Schedules) Notice 1998, Secretary for Economic Services appoint 20 March 1998 as the day on which the Notice shall come into operation.

## HONG KONG

### Briefing

A dilapidated river barge has been dumped on the muddy bottom of Hoi Ha Wan Marine Park, which was the initial step in establishing Hong Kong's first artificial reef. The barge is intended to provide feeding grounds, a nursery and shelter for fish species which have been over-exploited. The Agricultural and fisheries Department (AFD) plans to sink another nine boats in two marine parks.

Uncontrolled trawling has denuded Hong Kong's waters of all but the smallest fish. Many species have been wiped out locally, including lobsters. Studies have been carried out to identify suitable sites elsewhere, possibly around the Sokos, Ninepin Islands and Po Toi for the second phase of their five-year programme.

Senior Fisheries officer, Keith Wilson, pointed out that dredging, dumping and reclamation had affected fisheries resources, and combined with over-fishing the fisheries resources were at a low level. There was a need to address this problem and one of the ways of doing this is deploy artificial reefs.

But the success of artificial reefs depends on how they are managed. A

free-for-all approach to harvesting will benefit neither fish nor fishermen in the long term. Local fishermen have agreed to a voluntary ban on working artificial reefs for at least for the first year, which is essential if stocks are to be rejuvenated.

Fisheries officer Albert Leung Wai-yin points out that indigenous fishermen with permits are allowed to fish in marine parks and no legislation exists to prevent them plundering the fruits of artificial havens. As a result, AFD cannot put a stop to it.

Fishermen's organisations in Tai Po, Sai Kung and North District admit there will always be "bad apples", while AFD officers say they can only remind transgressors of the self-imposed ban. But Mr Wilson says laws against fishing on artificial reefs are unnecessary in view of the fishermen's agreement. However, if industry groups and AFD officers cannot prevent plundering of the reefs, the Government may have to legislate. Mr Wilson admits that if the voluntary ban fails, the situation may have to be reconsidered.

Mainland raiders are another problem; this is an issue which was raised at meetings of the Hong Kong Guangdong Environmental Protection Liaison Group, said Marine Parks Officer Edward Wong. Since the marine reserve at Cape D'Aguiar opened - the only protected area where fishing is banned outright - mainlanders have been harvesting its sea urchins. Mr Wong said the suspects were repatriated, but there had been no prosecutions so far because of immigration complications.

Marine biologist, Frazer McGilvray, points out the need to ban spear-fishing. Although recreational fishing of all kinds is outlawed in marine parks, constant enforcement is needed; otherwise the fishermen's gentlemen's agreement amounts to nothing because recreational divers blindly ignore it.

The AFD hopes that between 10 and 20 per cent of Hong Kong waters will

comprise artificial reefs and protected areas in the long term. (23 January 1998, SCMP)

Five years ago the Environmental Campaign Committee began a programme to teach school children how to separate their waste for recycling. A total of 200 schools is involved in the programme now. During the first few years of the project, recycling companies would pick up the rubbish and take it to a depot on a monthly basis. As this exercise became economically less viable for the companies, the waste was picked up every two to three months.

As a result, rubbish is accumulating on the grounds at schools. One school in Ma On Shan has simply run out of room for the "recyclable" rubbish and is now discouraging their students from recycling at all.

Mr. Frederick Leong, the project officer for Friends of The Earth (FOE) points out that recycling plants are unable to bear the cost of picking the rubbish up as profit margins are decreasing, especially in the recycled paper industry where recycled paper is becoming cheaper all the time.

This year FOE started a project of collecting recyclable waste. So far, 70 schools are participating or supposed an interest in doing so. FOE hopes to get the recycling companies to pay the schools for recyclable materials, such as aluminium, if they can get the waste to the recycling depots. This money will be used to pay for future collections. However, it is most difficult to raise money for the initial collections. The ECC has donated \$50,000 to FOE's project for this purpose but this money will pay for only several collections. (29 November 1997, HKS)

The Conservancy Association has recently approached several property management companies to persuade them to take on the lead role in a recycling programme in shopping malls, housing estates and commercial buildings. "Surprisingly, the property management companies are more than happy to cooperate", said Cheung Lai-ping of the Conservancy Association.

Miss Cheung further points out that several have shown interest in becoming co-organisers of the projects to promote the idea. She hopes that property management companies will assist in educating residents and shop owners, and help organise residential recycling.

To get the ball rolling, the Conservancy Association organised several programs as part of their *Good Property Management - great help in waste reduction* project for the Environmental Protection on Festival. The Conservancy Association held a seminar for mid-level managers in property management on 12 December 1997. They will also conduct a round-table, in-depth discussion with senior managers on their roles in the project. Goodwell Property Management Company, the Hong Kong Institute of Housing and the Hong Kong Association of Property Management have already indicated their support for the project. (29 November 1997, HKS)

## PADS UPDATE

1. Super Terminal 1, the world's largest air cargo facility, moved a step closer to completion when it held its topping out ceremony on 9th December, 1997. The facility, will handle up to 2.6 million tonnes of air cargo each year including express cargo facilities, representing about 85 per cent of cargo throughput at the new airport. It is expected to open for business in July operating at 75% capacity.

The facility will be built on a 17-hectare site and comprises a six-storey main terminal building with a total floor area of 274,000 sqm and a two-storey Express Centre providing a further 46,000 square metres. Total cost, excluding the cost of the land, is approximately HK\$8 billion (US\$1bn).

The automated building is highly functional and will feature many innovations, including two container storage systems that make up the east and west walls of the building. A computerised distribution system will

link the box storage system with the centralised Customs Examination Hall, workstations and truck docks. Storage and handling facilities will be available for all kinds of air cargo, including livestock (*AA's News 1/98*).

2. One design feature, aimed at helping passengers move with ease about Chek Lap Kok's large terminal building, is clear, simple and readable signage. Signage has been an important part of the terminal's design strategy. The building is open and spacious, with abundant light and clear orientation. The signs will comprise contrasting white lettering on a vivid blue background, which will be very visible within the interior's mostly neutral colour scheme. The signs will be written in both English and original complex Chinese characters.

The flight information display system (FIDS) boards will also be highly effective. Three metres high and eight metres long, the liquid crystal display (LCD) readouts will be visible from the entrance ramps in the Departures Hall.

Gate numbering will run in simple numerical order from the East Hall, with gates 1 to 4 in the South Concourse and 15 to 19 in the North Concourse. Gates along the southern sides of the Central, Southeast and Northeast concourses will be odd numbered, and along the northern sides, even numbered (*AA's News 1/98*).

3. Business class facilities will be a feature of the new airport even for economy travellers. A common use lounge and business centre will operate seven days a week and will be available to all passengers. The lounge will operate on a coupon system. Coupons will be available at the facility's entrance, or prepaid through agencies and membership organisations.

The common use lounge will provide special seating areas, snacks and beverages, telephones with international direct dial, postage stamps, prepaid calling cards and

Internet services. The business centre will provide comprehensive business and secretarial assistance networked to Hong Kong's "downtown" office business areas and to other major cities (*AA's News 1/98*).

4. The passenger terminal at the new Hong Kong International Airport was put through its paces during its first two operational readiness trials recently.

More than 500 volunteer "passengers" participated in the first day-long exercise on 18 January, which simulated passenger and baggage flows through key parts of the terminal such as Immigration and Customs, baggage check-in and handling, and security. Some 1,000 volunteers participated in the second trial on 15 February.

Both trials in the passenger terminal went very well. It achieved its main objective of testing the building and its functions in real-life conditions, of monitoring and assessing its level of readiness, and of helping to uncover any unexpected problems (*AA's News 2/98*).

5. The Hong Kong Special Administrative Region Government has approved the Airport Authority's (AA) Scheme of Airport Charges. The Scheme, which came into force on 23 January, will comprise three charges: a Landing Charge (LC), a Parking Charge (PC), and a Terminal Building Charge (TBC).

The LC, for the use of runways and taxiways, will be at a flat rate per aircraft of HK\$2,600 (US\$330) for up to 20 tonnes maximum take-off-weight (MTOW), and HK\$74 per additional tonne.

The PC, for the use of aircraft parking stands, is calculated by the length of the parking period (measured in 15-minute parking units) and the type of parking stand used: terminal building frontal parking stands (HK\$183); terminal building remote parking stands (HK\$147); cargo apron parking stands (HK\$117); and maintenance apron parking stands (HK\$94).

The TBC, for the use of the passenger terminal building and related facilities,

will be HK\$39 per departing passenger, excluding transit passengers.

The charges based on the "user pays principle", and that they are comparable with those at other major international airports.

The AA estimates that the total revenue derived from airport user charges for the financial year 1998-99 will represent 37 per cent of its total commercial and aeronautical revenue (*AA's News 2/98*).

## ADVISORY COUNCIL ON THE ENVIRONMENT (ACE)

### *Review of minutes of recent meetings*

The ACE met on 12th January 1998 to discuss, inter alia, the waste management strategy for Hong Kong. Mr. Benny Wong, Assistant Director (Waste Facilities) of the Environmental Protection Department (EPD), confirmed that the amount of construction waste disposed of at landfills had reduced significantly from 15,000 to 7,000 tonnes per day. He said that the total amount of construction waste having not decreased in the corresponding period indicated that an increasing amount of construction waste was being disposed of at reclamation sites.

Mr. Peter H. Y. Wong, the Chairman, suggested that the two Municipal Councils, which were the largest waste collectors in Hong Kong, had to pay for the disposal of waste at landfills so that the Councils might have more incentive to reduce waste. However, Mr. Steve Barclay, a Principal Assistant Secretary (Environment) of the Planning, Environment & Lands Bureau, said that the Councils could not be charged without changing the relevant provisions in the Memorandum of Understanding, which permitted the Councils to use Government's waste collection facilities without charges. He also informed ACE members that the

Administration had been discussing with the Councils on means to reduce waste in the context of the *Draft Waste Reduction Plan*.

Dr. Leung Che-hung, ACE member, asked whether the Government had already taken account of factors such as future population growth and the target of 85,000 new housing units per year in the next few years, in assessing its waste reduction target. Mr. Benny Wong responded that the *Waste Reduction Plan* would take account of the estimated population of 8.1 million in Hong Kong by 2011, and also the pace of urban development and renewal in the years to come. To cope with this scenario, large-scale waste-to-energy incinerators would be built to incinerate household, commercial and industrial waste, while the allocation of reclamation sites for the disposal of construction and demolition waste, which could not be incinerated, would continue. Mr. Wong added.

As to the use of styrofoam products, Mr. Barclay explained that there were constraints on Hong Kong in banning the use of styrofoam products because of the obligations of its membership of the World Trade Organization. Further, Mr. Benny Wong said that lack of a reliable substitute for styrofoam made it inappropriate to ban the use of styrofoam completely. Mr. Rob Law, Director of EPD, informed ACE members that for the same reason, Guangdong had decided to defer taking enforcement actions against users of non-degradable styrofoam.

[Editors' note: Other countries, such as Australia and the USA, do not appear to have these problems. Surely the time has come for the Hong Kong government to begin to take at least some small steps towards changing on irresponsible packaging practices.]

At its meeting on 24th February 1998, ACE discussed activities of the Hong Kong-Guangdong Environmental Protection Liaison Group. Professor Peter Hills, ACE member, asked Mr. Bowen Leung, Secretary for Planning, Environment

and Lands, whether he considered there was a need to form an institutional establishment between Guangdong and Hong Kong governments with an aim to further promoting their co-operation on the environmental issues. Mr. Leung replied that he would welcome any initiative that could achieve the aim. He commented that in his Policy Address last year, the Chief Executive had announced that he planned to set up a high level liaison mechanism with the Guangdong Government to discuss mutual issues, including environmental matters.

At the same meeting, Miss Alex Yau, ACE member, informed ACE members that the number of migratory birds which visited the Mai Po Ramsar Site (MPRS) in winter had decreased for the second consecutive year. Miss Yau saw the decrease as a warning indicating the deterioration of the general environmental and ecological qualities of MPRS or the whole Deep Bay, though various reasons could have led to the decrease. If the decline was found to have been related to the deterioration of the ecological condition of MPRS or Deep Bay, the Government should notify the Ramsar Bureau, and take all possible actions to remedy the situation in accordance with the requirements of the Ramsar Convention.

Mr. Leung, in his role as Secretary for the Environment, suggested that it would be too early to jump to a conclusion with the current limited data and information. He said bird deaths or some birds having blown to/via other places for winter could have contributed to the decrease in numbers. However, Dr. Ng Cho-nam, ACE member, pointed out that no other places could possibly be more suitable for birds' transit point than Mai Po. He further ruled out the possibility that Mai Po had reached its carrying capacity (which could also cause the fall in the number of birds) because the decline in numbers was so sudden. Miss Yau suggested that the decrease in the benthos population (an important source of birds' food) in Deep Bay last year, might be a reason for the decrease. Mr. Leung did not propose any remedial measures or investigations.

## PLANNING ISSUES

### Final Report of the Territory Development Strategy Review

The northwest New Territories, northeast New Territories, southern Hong Kong Island and Lamma Island have been classified as land banks to meet long-term housing demand, according to the final report of the *Territory Development Strategy Review* (TDSR) which was released on the 26th March 1998. The Government is to continue planning and development studies on the three areas. In releasing the TDSR, Mr. Bowen Leung, the Secretary for Planning, Environment and Lands, said Tseung Kwan O, North Lantau, South East Kowloon, Au Tau/Kam Tin, and Fanling North had also been identified as growth areas.

The TDSR proposes that office developments be located beyond Central, for example, on major transport corridors, so that jobs might be made available near people's homes. The TDSR suggests "employment nodes" be developed around major rail-based transport interchanges. These would include West Kowloon Reclamation and Southeast Kowloon, Mr. Leung said. He also pointed out that recently finished studies indicated a potential surplus of between 115 and 140 hectares of land for general industrial use. This would let the areas to be rezoned for job-generating development and housing.

Though the population prediction for 2011 is 7.8 million, the Government is assuming for planning purposes that it will be 8.1 million. Mr. Leung said the Government would follow the new Commission on Strategic Development for planning beyond 2011.

An average of 95,400 flats could be constructed each year from 2001 to 2006, Mr. Leung said. The construction depended on five land sources: reserved sites in current development plans, redeveloped sites, supplementary housing sites, strategic growth areas and minor sources.

While reiterating the goal was to create an average of 85,000 housing units per year, part of the housing supply will depend on private development. The Government cannot force them to produce more housing units, Mr. Leung pointed out.

## CASELAW UPDATE

### **Ingenuity Limited v Town Planning Board** Town Planning Appeal No.2 of 1996

Application for planning permission for container trailer/tractor parking and use of containers for storage with associated office and storage uses - the planning intention of the draft DPA Plan for the area in which the Site is situate is to encourage the comprehensive improvement and retention of the existing residential communities through physical upgrading and local environmental improvement - whether an appeal lodged by the appellant against a refusal of the application should be allowed.

#### Summary of facts

The Appellant, as occupier of the land, applied to the Rural and New Town Planning Committee (RNTPC) of the Town Planning Board (TPB) on 26 November 1994 under s16 of the Town Planning Ordinance (the "Ordinance") for permission for container trailer/tractor parking and use of containers for storage with associated office and storage uses on Lot No. 2741 RP in DD 124, Tong Yan San Tsuen, New Territories (the "Site").

The Site is within a large woodland to the south of Yuen Long Highway. Access to the Site is from Castle Peak Road, via Tai Kwan Tsuen Road and an unnamed village road which runs under the elevated section of Yuen Long Highway. The surrounding area is predominately rural in nature. The area to the north of the site on the opposite side of the Yuen Long Highway, bounded by Castle Peak

Road, Hung Tin Road and the Yuen Long Highway, is mainly residential. Residential developments here include Tan Kwai Tsuen, Osmanthus Garden and Meadowlands. In time, this area is expected to grow into a major residential area.

The Site falls within the "Unspecified Use" area on the draft Tong Yan San Tsuen Development Permission Area Plan No.DPA/YL-TYST/2, gazetted on 13 June 1993 (the "DPAP"). The Site is now within the "Green Belt" zone on the draft Tong Yan San Tsuen Outline Zoning Plan No. S/YL-TYST/1, gazetted on 14 June 1996. The Appellant failed on the 26 November 1994 application and applied, under s 17 of the Ordinance, for a review of the decision of RNTPC (the "Decision") on 13 January 1995. The review was rejected and the Appellant appealed to the Town Planning Appeal Board (TPAB) under s 17B of the Ordinance.

#### Decision and reasons

The TPAB unanimously dismissed the Appeal and confirmed the decision of the RNTPC of the TPB, for the following reasons:

1. Although the relevant planning provisions to be applied in determining the appeal were those in force at the time of the application (Section 16 of the Ordinance), the TPAB may take into account the Draft Tong Yan San Tsuen Outline Zoning Plan as providing relevant and persuasive information on the current planning intention for the subject area.

2. The application is neither in line with the planning intention of the draft DPAP, nor the land uses of the surrounding area. The TPAB endorsed the policy behind items (c), (f) and (g) of the TPB's Guidelines for Application for Open Storage and Port Back-Up uses, namely :-

(c) planning permission should not be granted for traffic generating activities such as container tractor/ trailer parks where the site has to be accessed by local roads adjoining sensitive receivers,  
(f) port back-up uses such as container tractor/trailer parks which generate the highest traffic per unit area should have good access to the strategic road network,

or to be accessed by means of purpose built roads,

(g) a Traffic Impact Assessment (TIA) should be carried out for those port back-up and open storage uses generating substantial volumes of traffic. TIA for sites served by local roads would need to demonstrate that traffic does not interfere with sensitive receivers, that traffic volumes do not exceed the capacity of the local road network or that proposed mitigation measures such as junction improvements are practical and effective. Sites accessed by unpaved tracks should not be considered for port back-up uses.

3. The Appellant failed to demonstrate that it has any firm plans for providing adequate parking arrangements at the Site, or to allow for vehicles, of all types, to move about the Site.

4. The Appellant failed to provide the TPAB with sufficient information on the environmental impact of the proposed development on the surrounding area. The only proposal put forward by the Appellant to ameliorate the adverse environmental impact was that they would plant 100 trees. Although this may reduce some of the visual blight the proposed development would cause, it would only marginally improve the surroundings.

5. The Appellant admitted that he had not taken advice from a civil engineer, or similarly qualified person, on the proposed development generally or, in particular, as to the effect the paving of the Site would have on the drainage of the surrounding area. The Appellant admitted that, whether the Site was paved or not, there would be some impact on the drainage system. In particular, when asked whether the Appellant knew of the risk of increased surface run-off if the Site was paved, the Appellant referred only to the risk of increased flooding if the Site is unpaved. Despite the Appellant's awareness of a possible drainage problem, the Appellant said it had not addressed the matter because the application did not relate to drainage. To the TPAB, this cast doubt on the Appellant's ability to manage the Site



efficiently.

6. (a) The TPAB are particularly concerned about the adverse effect the proposed development would have on the roads leading to the Site. (b) A Traffic Engineer of the Transport Department (the "Engineer") who gave evidence before the TPAB, said he had visited the Site and found that there was only one properly constructed passing bay on the unnamed village road leading to the Site. That passing bay was only suitable for private cars, not heavy container tractors and trailers. The Appellant disagreed with the Engineer and claimed that there are effectively three passing bays suitable for such container vehicles on the village road. The TPAB are not persuaded that this is the case, but even if it were, the number of passing bay still fall short of the standard minimum requirement, which, according to the Engineer, is four. (c) The Engineer, in his evidence, referred to four locations on the village road which he identified as potentially dangerous because of inadequate curve radii, sightlines and footpaths. To demonstrate his point he referred to one of the photographs produced at the hearing which shows pedestrians waiting at the roadside during the passage of oncoming lorry. This lorry is seen to occupy nearly the whole width of the road. Although the Appellant submitted in evidence a letter signed by representatives of eight households living along Tan Kwai Tsuen Road saying there had never been any accident along the road, this does not mean that there are no potential hazards posed by an increased flow of large container vehicles and trailers along the village road. (d) Further, the increase in the number of heavy vehicles passing along Tan Kwai Tsuen Road, which the grant of the application will undoubtedly cause, will increase the risk of potential hazards to other users of that road. This is especially so because there are several schools and a kindergarten situated along, or near to, that road. A District Planning Officer for Tuen Mun and Yuen Long, a TPB's witness at the hearing,

said that, according to the 1996 census, the number of people living in the area bounded by Castle Peak Road, Hung Tin Road and Yuen Long Highway is 4,200 and is expected to grow to 17,900 on full development of the area. This means that the potential number of users of Tan Kwai Tsuen Road is far more than merely the members of the eight households whose representatives signed the letter produced on behalf of the Appellant.

(e) The Appellant was unable to put forward any measures to deal with any of these traffic problems.

There was no order as to costs.

## REGIONAL & INTERNATIONAL

### AUSTRALIA

#### *Proposed Changes to Australian Environmental Laws*

In February 1988 the Australian Federal Government's Environment Minister, Robert Hill, released a consultation paper on *Reform of Commonwealth Environmental Legislation*. This paper proposes to implement significant changes to the current Australian Commonwealth laws relating to the environment and the nature of the relationship between the Commonwealth and States on environmental matters. These proposals are the results of an agreement made in November 1997 by the Council of Australian Governments on Commonwealth State Roles and Responsibilities for the Environment.

The proposals will include the repeal of most existing Australian Commonwealth environmental legislation and its replacement by three statutes, an Environment Protection Act, a Biodiversity Conservation Act and a yet to be named statute dealing with heritage issues. The Heritage legislation will be prepared following the completion of a joint Commonwealth State National Heritage places strategy. The aim is to ensure that the Commonwealth's Environmental Legislation recognises and implements the principles of ecologically sustainable development.

Insofar as most current Australian

Commonwealth legislation in this area was enacted in the 1970's the changes are warranted. The proposal will, however, restrict the Commonwealth's future role in protecting the environment will be restricted to matters of "National environmental significance". This means the Australian Commonwealth will not become involved in matters of only local or State significance. Thus Commonwealth environmental impact assessment and approval processes will be triggered only by activities of national environmental significance. These activities would include proposals affecting Commonwealth places, world heritage properties, Ramsar Wetlands of International importance, heritage places of National significance, nationally endangered or vulnerable species and endangered ecological communities, migratory species and cetaceans, nuclear activities and management and protection of marine and coastal environments within coastal water. This assessment procedure also area directly within Commonwealth jurisdiction.

The Australian Government also proposes to establish a system of accreditation whereby the Commonwealth can accredit State assessment processes and decisions on environmental matters in order that States can, in appropriate circumstances, deal with proposals of national environmental significance. The paper is silent on the nature of the requirements needed for accreditation; however, it could conceivably mean that ultimately the bulk of Commonwealth assessments and approvals are dealt with at the State level.

The paper also proposed that there be increased efficiency and timeliness in development approvals processes and Nationalisation of the existing arrangements for heritage protection. There is also a promise of eventual increased compliance by the Commonwealth with relevant State environmental and planning legislation (of particular interest given recent problems with Telecommunications carriers and airports), but the current

proposals do not address this issue.

It is understood the Government hopes to have draft bills ready for introduction into Parliament in May this year. Whether or not this deadline is met remains to be seen. There has been some quite stringent criticism of what would appear to be undue haste to bring in these reforms. Whilst reform of the Commonwealth's environmental legislation is overdue, the allocation of less than 4 weeks to the public and special interest groups to provide comments on the consultation paper is unsatisfactory. The proposed paper is very general and more details comment on the nature of the changes and their potential impact will need to await the release of the draft bills.

(James Levinson, Normans Waterhouse, Adelaide)

### ISRAEL

On May 20, Israel Union for Environmental Defence (IUED) and other human rights organization witnessed the conclusion of an intense period of activity which resulted in the passage of Israel's Freedom of Information Act in the Knesset. The set is one of the most important pieces of legislation passed by the Knesset in the last decade, and will have an influence on Israel's upholding of human rights, and its performance in environmental protection.

The new law will greatly affect the environment because of the vast amount of information held by government agencies, which private citizens, seeking court intervention to force agency-action, may now access issues by different governmental authorities.

The most important aspects of the law is its declaration that all citizens and residents in Israel have the right to receive information held by authorities, including central government offices, local authorities, government-owned corporation and others. Under the new legislation, the government will be required to disclose all information it holds

pertaining to emissions or release in any manner of substances into the environment as well as data on noise, odor nuisances and radiation regardless of whether this would disclose trade secrets or privileged business information.

The IUED believes that the law is a change for the better and will put the public in a stronger position to demand information on the environment and other issues (*Environmental Law Alliance Worldwide*, May 1998).

### UNITED KINGDOM

On 22nd May 1998, *21st Century Tiger*, a tiger preservation action group in the United Kingdom, established an emergency fund in Britain to raise urgent funds to fight a wild-fire which is raging the Sikhote-Alin Biosphere Reserve in Russia, the principle habitat of the Amur tiger.

There are four major tiger reserves in the Russian Far East, of which Sikhote-Alin is one. A fire is spreading fast through this prime Korean pine forest and is presently out of control. Four thousand hectares have so far been destroyed. Manpower is required, as well as fuel and flying time for a plane and helicopter, and fuel for trucks. With these, a fire prevention strip can be cleared around the fire, some parts of which are inaccessible without use of aircraft.

Exceptionally warm and dry weather is to blame for the fires, some of which have been burning since March. According to weather forecasts, this dry spell is set to continue until the summer, which increases the danger of fires breaking out and becoming uncontrollable very quickly. (*The Tiger Information Centre Press Release*, 27/5/98)

### THAILAND

An experiment to readapt tame animal elephants to the wild by releasing them into the forest may help repopulate dwindling herds and determine the fate of hundreds of animals. If the plan is successful, it would give Asian elephants, left jobless when Thailand banned logging in 1989, both freedom and a future.

Elephants trained for the timber industry were once guaranteed a job until retirement at age 61; but after the logging ban, many were left with nothing to do. Today, Thailand's economy is in recession and keepers can no longer afford to keep their beast in genteel retirement. Most elephant owners now have to walk their elephants on crowded city streets for tourists to feed, or surreptitiously let the animal go free. However, neither forest nor animals are prepared for this newfound freedom.

Elephant habitat in the forest is degraded, and cannot provide enough food or water to support viable elephant populations. Many of the tame elephants do not know how to fend for themselves. They have been fed by human most of their lives, and are often more afraid of beasts than people. There are also predators in the forests, poachers conscious that a pair of ivory tusks can yield more money in a day than they could earn in a year. And demand remains high for baby elephants for the tourist trade where they are, used for riding or for show.

The environmental group World Wide Fund for Nature has organized the release of three tame female elephants into the wild. The freeing of the animals will show scientists whether a large number of domesticated elephant can successfully readapt to a new habitat. (*The Earth Times*, May 1998)

### INDONESIA

Forest fires are once again raging in the Indonesian part of Borneo. The unprecedented drought ravaging parts of Kalimantan is believed to be the primary reason for the new round of forest fires, but analysts warn that the Indonesia's resolve to tackle the problem may be seriously affected by the economic crisis.

According to reports of the Indonesian government, fires have already destroyed 4,000 hectares of forest of East Kalimantan. There is little hope that the drought-stricken regions in Borneo will receive rainfall before duties November.

Indonesian politicians have once again warned that forest fires will taint the country's reputation and

damage economic and political ties. Unfortunately, the economic crisis will make it harder for the Indonesian

government to effectively address pressing environmental issues. (*The Earth Times*, May 1998)

This Quarterly Report does not constitute legal advice given on any particular matter. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors and omissions. Further information and enquiries in respect of this quarterly should be directed to Fred Kan & Co. or any of our following associate firms:

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Comparative Table of Environmental Convictions:  
October - December 1997

	Number	1st Offence	2nd Offence	3rd + Offence	Highest Fine
APCO	11	9	1	1	\$ 25,000
	11	8	2	1	\$ 15,000
	18	9	3	6	\$ 30,000
WPCO	21	15	4	2	\$ 40,000
	23	15	5	3	\$ 60,000
	32	20	7	5	\$100,000
NCO	16	3	3	10	\$66,000
	26	11	5	10	\$150,000
	8	5	-	3	\$45,000
OLPO	1	-	-	1	\$ 10,000
	1	1	-	-	\$ 20,000
	-	-	-	-	-
DASO	1	1	-	-	\$15,000
	-	-	-	-	-
	-	-	-	-	-
WDO	24	21	3	-	\$ 30,000
	35	29	4	2	\$ 20,000
	23	22	-	1	\$ 15,000
Total	74	49	11	14	
	96	64	16	16	
	81	56	10	15	

October figures appear on the first line, November figures on the second, and December figures on the third of each item. Source: EPD, Anti-Pollution Prosecution Figures.

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## ABBREVIATIONS

<b>AFD</b>	Agriculture & Fisheries Department
<b>APCO</b>	Air Pollution Control Ordinance
<b>CFCs</b>	Chlorofluorocarbons
<b>DASO</b>	Dumping At Sea Ordinance
<b>EC</b>	European Community
<b>EE</b>	Eastern Express
<b>EPCOM</b>	Environmental Pollution Advisory Committee
<b>EPD</b>	Environmental Protection Department
<b>EXCO</b>	Executive Council
<b>FEER</b>	Far Eastern Economic Review
<b>HKS</b>	Hong Kong Standard
<b>HKU</b>	University of Hong Kong
<b>JLG</b>	Joint Liaise Group
<b>LDC</b>	Land Development Corporation
<b>LEGCO</b>	Legislative Council
<b>LS</b>	Legal Supplement
<b>NCO</b>	Noise Control Ordinance
<b>NT</b>	New Territories
<b>OLPO</b>	Ozone Layer Pollution Ordinance
<b>FAA</b>	Provisional Airport Authority
<b>PADS</b>	Port and Airport Development Strategy
<b>SCMP</b>	South China Morning Post
<b>SMP</b>	Sunday Morning Post
<b>WDO</b>	Waste Disposal Ordinance
<b>WPCO</b>	Water Pollution Control Ordinance

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