

# Hong Kong

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## REGULATORY FRAMEWORK

### 1. Please briefly set out the key environmental legislation and regulatory authorities in your jurisdiction.

The Environmental Protection Department (EPD) (*see box, The regulatory authority*), and various related Hong Kong government departments, regulate different aspects of environmental law under the authority and provisions set out in numerous ordinances. All trade and industrial activities in Hong Kong must operate in accordance with these statutory standards and requirements. The principal environmental legislation in Hong Kong is set out below.

#### Air Pollution

The Air Pollution Control Ordinance (Cap. 499) (APCO) is the principal law on managing air quality in Hong Kong. There are over 28 regulations covering specific areas related to air pollution such as:

- Power plant emissions.
- Motor vehicle fuel and emissions.
- Asbestos control.
- Construction dust.
- Industrial emissions.

The APCO allows the EPD to control air pollution from industry, commercial operations and construction work (motor vehicle emissions are controlled under the Road Traffic Ordinance). Legislative amendments were made to the APCO in July 2008 to include emission cap stipulations for power plants, from 2010.

#### Water pollution

The Water Pollution Control Ordinance (Cap. 358) (WPCO) controls effluent discharge from all types of industrial, commercial, institutional and construction activities into public sewers, rain-water drains, river courses or water bodies. Industries and trades generating wastewater discharge (except domestic sewage) are subject to licensing control by the EPD.

#### Waste disposal

The Waste Disposal Ordinance (Cap. 354) (WDO) provides a comprehensive framework for managing waste from cradle to grave, enforced by the EPD. This includes the production, storage, collection, treatment, recycling and disposal of wastes. Currently, livestock waste and chemical waste are subject to specific controls, while the general import and export of waste is controlled through a permit system. The WDO differs from

the Producer Responsibility Scheme (*see below, Producer Responsibility Scheme*), which attempts to reduce the production of materials that are difficult to dispose of (for example plastics).

#### Noise pollution

The Noise Control Ordinance (Cap. 400) (NCO) applies to noise from construction, industrial and commercial activities. Construction noise and using powered mechanical equipment in populated areas is prohibited between 7pm and 7am from Monday to Saturday, or at any time on general holidays, unless prior approval has been granted by the EPD through the Construction Noise Permit System. Industrial and commercial noise must comply with statutory limits specified in the Technical Memorandum issued by the EPD in accordance with the NCO.

#### Hazardous chemical control

The Hazardous Chemicals Control Ordinance (Cap. 595) (HCO) regulates, through an activity based permit system, the import, export, manufacture and use of non-pesticide hazardous chemicals that have potentially harmful or adverse effects on human health or the environment. They include those regulated by the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

#### Marine pollution

The Dumping at Sea Ordinance (Cap. 466) (DSO) promotes the protection of the marine environment in areas of sea under Hong Kong jurisdiction. Anyone involved in the dumping of waste at sea and related loading operations, requires a permit from the EPD. Materials controlled by permit under the DSO are mostly large quantities of sediment arising from dredging works. All vessels involved in these operations must be equipped with a self-monitoring system, recording their position and dumping operations.

#### Ozone

The Ozone Layer Protection Ordinance (Cap. 403) (OLPO) prohibits manufacturing substances that deplete the ozone layer and imposes control on the import, export and production of these substances. Through delegated authority from the EPD, the Trade and Industry Department manages the import and export licensing system. Subsidiary regulations of the OLPO also impose control on certain refrigerants, and import and export of controlled products containing ozone-depleting substances. The OLPO gives effect to Hong Kong's international obligations under the 1985 Vienna Convention and the 1987 Montreal Protocol.

### Producer Responsibility Scheme

The Product Eco-Responsibility Ordinance (Cap. 603) (PERO) provides the legal basis for introducing producer responsibility schemes, with the environmental levy on plastic shopping bags introduced in July 2009 as the first scheme under the PERO. The Producer Responsibility Scheme (PRS) is a key policy initiative in the Policy Framework for the Management of Municipal Solid Waste (2005-2014) for waste reduction, recovery and recycling. PRS includes elements of the polluter pays principle and eco-responsibility. PRS requires manufacturers, importers, wholesalers, retailers and consumers to share the responsibility of reducing, recovering and recycling certain products, to minimise their environmental impact. The EPD administers and enforces the PRS in Hong Kong.

### Environmental Impact Assessment

The Environmental Impact Assessment Ordinance (Cap. 499) (EIAO) aims to avoid, minimise and control the adverse impact of designated projects (as specified in schedule 2 of the EIAO), through applying the environmental impact assessment process (EIA) and the environmental permit system before construction and operation. The regulatory authority for the EIAO is the EPD.

#### 2. To what extent are environmental requirements enforced by regulators in your jurisdiction?

The EPD is the principal department responsible for enforcing environmental legislation in Hong Kong. In light of this, the EPD has been granted a wide range of powers (in particular, see *Question 26*). Some EPD powers are exercised through the Director of Environmental Protection (DEP). Further, along with its duties of inspection, licensing and responding to complaints, the EPD is responsible for prosecuting offenders who have breached an ordinance relating to environmental laws in Hong Kong (see *Question 1*).

According to EPD statistics available on its website, it handled 22,826 complaints in 2008 and 11,043 for the six first months of 2009. 513 cases were prosecuted in 2008 and 170 during the first six months of 2009. The total amount of fines imposed in 2008 was HK\$3,413,900 (about US\$440,000), with individual fines between HK\$200 (about US\$26) and HK\$100,000 (about US\$12,900). A total of 90 months' imprisonment was imposed in 2008, with individual sentences ranging from two to five months.

#### 3. To what extent are environmental non-governmental organisations (NGOs) and other pressure groups active in your jurisdiction?

There are many active green groups in Hong Kong. The possibility to respond to frequent consultation papers issued by the Hong Kong government, as well as different publications often available on their websites, help to make their voices heard. A list of environmental NGOs active in Hong Kong is available on the EPD website ([www.epd.gov.hk/epd/english/links/local/link\\_greengroups.html](http://www.epd.gov.hk/epd/english/links/local/link_greengroups.html)).

### EMISSIONS

#### 4. Is there an integrated permitting regime or are there separate environmental regimes for different types of emissions? Can companies apply for a single environmental permit for all activities on a site or do they have to apply for separate permits?

Hong Kong does not have an integrated pollutant discharge or emissions permit and licensing system. There are different permits and licences for different forms of pollution. The current discharge and emissions permit and licensing regime is spread among a number of ordinances and subsidiary regulations. For example, the air pollution discharge permit system is regulated by the Air Pollution Control (Furnace, Ovens and Chimneys) Regulation and the Air Pollution (Specified Processes) Regulation. The Construction Noise Permit falls within the NCO, while the Licence for Effluent Discharge is contained in the WPCO. The validity period for licences and permits can vary greatly. Although there is no fixed standard, a period of between three to five years is quite common.

Trade and industry practices falling within designated projects under the EIAO are required to apply for numerous permissions, permits and licences, depending on the activities in question. The EIAO further requires those falling within its scope to provide EIA reports. To determine whether a company must apply for a number of licences depends on the activity the company intends to carry out.

#### 5. If there is an integrated permitting regime, please provide a brief overview of it, in particular:

- What permits are needed and which regulator issues them?
- How long do permits last?
- Are there restrictions on transferring permits?
- What are the penalties for non-compliance?

There is no integrated system for issuing permits (see *Question 4*). Different permits are required for different activities, however the application and issuing process itself is similar and is centralised by the EPD.

The EPD is the sole authority responsible for issuing permits and licences and is the main authority responsible for the enforcement of environmental legislation in Hong Kong.

The restrictions on transfers/assignments of licences, and permits depend on the type of transfer and the nature of restrictions on the licence or permit. In most cases, transfers are subject to the prior approval of the EPD.

In addition to fines and sentences, the EPD has the power to name and shame businesses on their website, by listing their name, conviction, fine and district on a monthly convictions listing.

**6. Please summarise the regulatory regime for water pollution (whether part of an integrated regime or separate). In particular:**

- **What permits or other authorisations are required and which regulator issues them?**
- **Are any activities prohibited (such as causing or failing to prevent water pollution)?**
- **Can the regulator require a polluter to clean up or pay compensation for water pollution?**
- **What are the penalties for non-compliance?**

The WPCO and its subsidiary regulations regulate water pollution in Hong Kong. The legislative framework was originally established in 1980 with further amendments made in 1990 and 1993. The amendments aim to tighten controls on effluent discharge and to improve maintenance standards for private communal sewage treatment plants. In addition, the Secretary for the Environment can issue Technical Memoranda setting out permissible limits for water discharges, which will be treated as subsidiary regulation. To date, the only Technical Memorandum published is the Technical Memorandum on Effluent Standards (1990), which sets standards for acceptable levels of effluent discharge into storm drains, sewers and inland and coastal waters.

Under the WPCO, Hong Kong is divided into ten fresh Water Control Zones (WCZs). The control of discharge in the WCZs is exercised through a licensing system, which controls all discharges other than domestic sewage or unpolluted water to a storm drain. Although the licence itself specifies the permitted quality of effluent a business can discharge, it is complemented by the general guidelines set out in the Technical Memorandum on Effluent Standards, which state that any effluent discharged must not damage sewers or pollute inland or inshore marine waters.

The authority responsible for licensing and controlling water discharges is the EDP, through the DEP. Before making a licence application to the DEP, the applicant must first register with the EPD, and make a public statement through a local newspaper, in English or Chinese. Within 30 days following the publication, any person can object to the granting of the licence by giving notice to the DEP in writing. Within 40 days following publication, depending on whether any objections have been raised, the DEP will issue a new licence. Generally, licences are valid for up to five years. Controlled discharges requiring a licence include effluents from all types of industrial, manufacturing, commercial, institutional and construction activities, as well as discharges from sewerage treatment plants and septic plants. Prohibited activities include discharging polluting, poisonous or noxious matter into a WCZ, or any effluent not covered by a valid licence.

Failure to comply with the licensing requirement, that is, not obtaining a licence for specific activities, or failure to comply with conditions specified under a licence, can result in initial fines of up to HK\$200,000 (about US\$25,800) and imprisonment for up to six months, and subsequent fines of HK\$400,000 (about US\$51,600) for secondary or subsequent offences. A further fine of HK\$10,000

(about US\$1,290) per day can be imposed for each day the offence is continued. Greater fines for the discharge of poisonous or noxious matter can reach HK\$1 million (about US\$129,000) in addition to a maximum of two years' imprisonment.

The EPD has further powers to refuse to grant, revoke or vary licences and to require those convicted under the WPCO to restore or partially restore waters damaged by the offending discharge. If the offender fails to clean up, the EPD can undertake restoration work and recover the costs from the offender. The EPD can also carry out clean-up operations in an emergency situation where it suspects an offence has occurred, and recover the costs from those responsible for the damage, regardless of whether they have been convicted.

**7. Please summarise the regulatory regime for air pollution (whether part of an integrated regime or separate). In particular:**

- **What permits or other authorisations are required and which regulator issues them?**
- **Are any activities prohibited (such as discharging certain substances into the air without a permit or causing air pollution)?**
- **Can the regulator require the polluter to clean up or pay compensation for air pollution?**
- **What are the penalties for non-compliance?**

The APCO regulates the regulatory regime on air pollution, establishing seven Air Quality Objectives (AQOs) for the EPD to monitor and maintain. Pollutants such as sulphur dioxide, nitrogen dioxide, carbon monoxide, photochemical oxidants and lead are covered by the APCO.

Statutory controls over stationary sources include:

- Licensing control on specified processes, such as cement works, chlorine works, mineral works and incinerators (*Schedule 1, APCO*).
- Control of the installation and modification of the design of furnaces, ovens and chimneys.
- Control of dust emissions from constructing activities.
- Control of emission from petrol filling stations and dry cleaning plants.
- The prohibition of the open burning of construction waste, tyres, cable and wire.

If the EPD or an authorised officer is satisfied that emissions from a polluting process or activity are causing air pollution, the EPD can serve an Air Pollution Abatement Notice, verbally or in writing, to the owner of the premises or the person carrying on the activity. This may require emissions to be reduced or that the activity ceases. Owners of premises used for specified processes such as power plants, incinerators, and concrete batching and electricity works (set out in Annex 1 of the APCO) are subject to more stringent controls, and must use the best practical means to prevent noxious or offensive emissions being released from their

premises, in addition to applying for (and holding) a valid licence. Licence applications for specified processes should be made to the EPD in much the same format as those for water discharges, that is, registration and public notification. The validity period of the licence is a minimum of two years, with the length ultimately being determined by the EPD. Further applications can be made to the EPD to transfer, vary or renew licences.

Failure to comply with the statutory provisions outlined in the APCO provisions can result in fines of up to HK\$200,000 (about US\$25,800) and imprisonment of six months.

## CLIMATE CHANGE

### 8. Please provide a brief overview of emissions trading schemes in your jurisdiction, including any national targets and carbon allowances systems. Is your jurisdiction party to international agreements on this issue and how have they been implemented into your national law?

Hong Kong has been a party to the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol since 8 April 2003. In line with the status of China, Hong Kong is defined as a Non-Annex 1 Party and is not required to commit to any limits or reduction of greenhouse gas emissions.

As such, Hong Kong has no domestic emissions trading scheme. However, an Inter-departmental Working Group on Climate Change (IWGCC) has been set up in an attempt to implement a reduction of emission of 25% by 2030. Hong Kong is working with other Asia-Pacific Economic Co-operation (APEC) countries to promote the reduction of greenhouse gas emissions in the region.

### 9. Are there targets to reduce greenhouse gas emissions from buildings in your jurisdiction? Is there legislation requiring buildings to meet certain minimum energy efficiency criteria? If yes, please give brief details.

Guidelines on greenhouse gas emissions on all commercial, residential or institutional buildings have been published by the Electrical and Mechanical Services Department (EMSD). Through voluntary audits and reporting, the EMSD aims to improve the awareness of entities, such as schools, universities and commercial centres, on the level of greenhouse gas emissions produced by buildings.

In addition to the guidelines, the Hong Kong Energy Efficient Registration Scheme for Buildings (HKEERSB) was introduced in 1998. The scheme is voluntary and sets out Building Energy Codes (BEC) used to measure the overall energy efficiency of buildings. Since 2007, applications were able to be made to the HKEERSB for a certificate, certifying the energy efficiency of a building. The EMSD is responsible for all operations of the HKEERSB, and maintains a list of all voluntary participants.

## ENVIRONMENTAL IMPACT ASSESSMENTS

### 10. Please provide a brief overview of the requirements to carry out environmental impact assessments (EIAs) for certain projects (for example, construction of an oil and gas facility). In particular:

- What type of projects and impacts are covered?
- Are permits or other documents required before the project can start and which regulator issues them?
- What are the penalties for non-compliance?

Under the EIAO, certain significant designated projects such as roads, railways, airports and port facilities, reclamations of land and hydraulic facilities require environmental permits. The DEP can approve the EIA report submitted by the applicant subject to conditions, or reject it. Appeals on DEP decisions can be made to the Appeal Board, as stipulated in the EIAO.

The DEP can issue an order to cease working on the project and take direct action against the offender to remedy the identified environmental damage. The DEP can identify the names of the persons liable for the costs, apportioning the costs if appropriate. A person who breaches the EIAO commits an offence which can result in a maximum penalty of HK\$2 million (about US\$258,000) and six months' imprisonment.

## WASTE

### 11. Please provide a brief overview of the regulatory regime for waste. In particular:

- What permits or other authorisations are required and which regulator issues them?
- What activities are prohibited (such as storing or disposing of waste without a permit)?
- Do operators need to meet certain criteria (such as having sufficient financial means to operate landfills and other waste disposal sites)?
- Are there special rules for certain types of waste (such as hazardous waste or electrical equipment)?
- What are the penalties for non-compliance?

The WDO allocates power to the DEP to award licences for the collection of waste, and permits for the disposal and import and export of waste. However, the Food and Environmental Hygiene Department is responsible for refuse collection in Hong Kong. The refuse transfer stations or landfill sites are managed by the EPD.

Under the WDO, waste means any substance or article which is abandoned and includes animal, chemical, construction,

household, livestock, street and trade waste. Some specific waste such as clinical, radioactive and waterworks/sewage sludge are also regulated by subsidiary legislation.

Those wishing to collect waste must apply for a licence to the DEP. The DEP must be satisfied that the applicant can dispose of a minimum quantity of chemical waste in a given period of time. Those wishing to dispose of, or import or export waste (as specified in schedule 6 of the WDO, such as certain types of electrical waste, metal, inorganic constituents, rubber and plastics) must apply for a licence to the DEP. The DEP has absolute discretion to decide whether to issue permits or licences, and details of the proposed activity must be disclosed to the authority before beginning the activity.

An offence is committed if waste is deposited in any place, except with lawful authority or excuse, or except with the permission of any owner or any lawful occupier of the land concerned. Any person possessing waste in the manner prescribed in the WDO must notify the DEP.

Unlawful collection or disposal of waste can result in a fine of HK\$200,000 (about US\$25,800) and imprisonment for six months. Similarly, the unauthorised import or export of waste is an offence under the WDO, and can result in fines of up to HK\$200,000 and imprisonment for six months for primary offences.

## ASBESTOS

### 12. Please provide a brief overview of the regulatory regime for asbestos in buildings. In particular:

- What activities are prohibited?
- What are the main obligations (such as investigating the presence of asbestos and risk assessments for employees) and who is liable to carry them out?
- What permits or other authorisations are required and which regulator issues them?
- What are the penalties for non-compliance?

The regulatory regime governing asbestos control work is contained in Parts VIII to IX of the APCO and The Factories and Industrial Undertakings (Asbestos) Regulations. According to the EPD (the authority for licensing and controlling asbestos work), an individual or business that needs to carry out maintenance, renovation, demolition or any other work on a given premises must, before work commences, remove asbestos containing material in accordance with the APCO.

If an individual or a business knows or suspects that asbestos is present, a duty arises to employ a registered asbestos consultant to conduct and compile an asbestos investigation report and an asbestos abatement plan, both of which must be submitted to the EPD 28 days before beginning work. Notification must be given to the EPD of the proposed start date of the work and the individual or business must employ a registered asbestos contractor (to carry out the work), a consultant (to supervise the work) and a lab technician to conduct sampling and analysis.

The Factories and Industrial Undertakings (Asbestos) Regulations aim to protect employees working in an environment likely to expose them to asbestos and its associated risks. The owner or occupiers must carry out an assessment of the potential risks employees or visitors may be exposed to. The APCO includes provisions for the:

- Prevention and reduction of exposure to asbestos.
- Prevention of the spread of asbestos.
- Air monitoring.
- Maintenance of control measures.

Employers are under a duty to implement the various safety measures and controls set out in the APCO, such as providing respiratory protection equipment and protective clothing for those likely to be exposed.

No licence or permit is required by the business or individual owning the premises in question. However the contractors, consultants and laboratories used must be registered with the EPD under Part VIII of the APCO, and vetted by the Asbestos Administration Committee (ACC). The ACC assists the EPD on applications for registration and hears complaints of a disciplinary nature.

Under the APCO, it is an offence for any individual or business to carry out asbestos abatement work without prior written notification to the EPD, or for an individual or business that fails to appoint a registered asbestos contractor, consultant or lab technician to carry out the asbestos removal. Contractors and laboratories must also be registered with the EPD and are subject to additional requirements in the EPD guidelines. In addition, the APCO prohibits asbestos spraying, the use of asbestos for insulation purposes and the use of amphibole asbestos in any process.

Any person or company who commits an offence is liable to prosecution. Penalties range from between HK\$100,000 (about US\$12,900) and HK\$500,000 (about US\$65,000), and include a prison sentence of between six to 12 months. In addition, any company secretary, director or manager can be liable if the offence was contingent on their negligence, omission or consent.

## CONTAMINATED LAND

### 13. Please provide a brief overview of the regulatory regime for contaminated land. In particular:

- Which regulator is responsible and which legislation applies?
- In what circumstances can a regulator require the investigation and clean-up of contaminated land?
- What are the penalties for non-compliance?

The relevant ordinances concerning land contamination in Hong Kong are the APCO, WDO, WPCO, OLPO and DSO.

The EPD is the main regulator for contaminated land, which recently compiled guidance notes on contaminated land assessment and

remediation. The guidance notes are incorporated in the land use planning process as conditions of planning permission and special conditions in relevant land lease documents.

The EPD is responsible for carrying out investigations on site and, as yet, there is no specific offence for failing to disclose pollution discovered on site to the EPD. However, the contamination could give rise to an offence under the relevant ordinance in Hong Kong or at common law. In addition, overall liability may increase if, in failing to disclose the pollution, greater harm is caused as time progresses.

The legislative basis for clean-up operations in Hong Kong is found in the EIAO. Hong Kong does not adopt the polluter pays principle in its strictest sense, since those wishing to develop a contaminated site are responsible for clean-up operations.

The penalty for contaminated land varies depending on the ordinance the offence falls within. For contaminated land through unlawful waste disposal, Part IV of the Waste Disposal Ordinance states that the polluter is liable to an initial fine of HK\$200,000 (about US\$25,800) and imprisonment for six months, and a fine of up to HK\$500,000 (about US\$65,000) and imprisonment for five years, with an additional fine of HK\$1,000 (about US\$129) for each day the offence continues.

#### 14. In relation to liability for contaminated land:

- Which party is liable for carrying out or paying for environmental investigation and clean-up?
- Can an owner or occupier who has not caused contamination be liable for investigation and clean-up of contamination on their land?
- Can previous owners or occupiers be liable for contamination they have caused in the past?
- Are there limits on liability or ways for a party to limit its liability?

Liability for clean-up operations relating to contaminated land in Hong Kong is not clear cut, and is largely driven by practical considerations. Generally, the financial burden of remediation is borne by potential developers, since the vast majority of freehold land is owned by the government, being held by occupiers on a leased or sub-leased basis. The current developer of a site does not generally owe a duty to future developers under common law, although they do owe a general duty to neighbouring current and future owners.

Parties are advised to undertake environmental due diligence to reduce potential liability and purchase an insurance policy to transfer the risk to insurance companies (*see Question 27*).

#### 15. Can a lender incur liability for contaminated land and is it common for a lender to incur such liability? What steps do lenders commonly take to minimise such liability?

Provided lenders do not take part in the management or operations of their borrowers, they do not incur liability as a result of any act or omission of their borrowers.

However, in practice, lenders attempt to minimise potential liability by carrying out environmental due diligence checks. In addition, loan agreements include representations and warranties, stipulating the borrower has complied with all legal requirements and best industry practices (including environmental regulations and standards), breach of which will result in default, giving the lender the option to accelerate repayment of the loan. Further, ethics committees of financial institutions look closely at environmental issues before lending funds to a particular entity or individual.

#### 16. Can a private individual bring legal action against a polluter, owner or occupier (for example, for damage caused by the movement of contamination onto his land)?

Apart from the ordinances relating to environmental laws, there are common law third party environmental claims available to private individuals. For example, an individual may have the following actions.

##### Private nuisance

To bring a claim under nuisance, an individual must prove that an act or omission is an unreasonable interference with the use or enjoyment of their land. The act or omission must be more than temporary.

##### Negligence

An individual must establish the defendant owes a duty of care and, due to the breach of that duty, such individual has suffered foreseeable damage. As a practical consideration, it can be difficult for an individual to establish and evidence a causal link between the damage caused and their complaint.

##### Trespass

Direct interference with personal or proprietary rights must be established, in addition to intent. If the land is contaminated intentionally, trespass is committed. However, if the contaminating substance passes over intermediary land, before contaminating the land in question, trespass cannot be established since the interference is indirect.

## TRANSACTIONS

#### 17. In what circumstances can a buyer inherit pre-acquisition environmental liability in:

- An asset sale?
- The sale of a company (share sale)?

##### Asset sale

In asset sales, the principle is that the buyer does not inherit any liability incurred in relation to the asset before the date of acquisition. Therefore, the new owner of a polluted asset should not be made liable for pollution which occurred pre-acquisition. Proving that environmental liability arose before the transfer of an asset can be difficult. Therefore, it is recommended the buyer enters into a contractual indemnity agreement with the seller.

**Share sale**

When acquiring shares, the buyer inherits all liabilities, even those arising before the date of acquisition. Directors or other such persons concerned in the business of the buyer can be liable. Therefore, it is strongly advised that the buyer undertakes careful and comprehensive environmental due diligence of the target, and obtains specific warranties and indemnities from the seller to cover these liabilities. These indemnities can only protect the directors against financial penalties, and not against criminal liability. Section 165 of the Companies Ordinance voids indemnities given by a company to protect directors against criminal liability. The buyer can obtain cover by taking out specific insurance policies, for example, Pollution Legal Liability policies (PLL), Cleanup Cost Cap policies or Warranty and Indemnity Insurance policies (see *Question 27*).

**18. In what circumstances can a seller retain environmental liability after disposal in:**

- An asset sale?
- A share sale?

**Asset sale**

See *Question 17*.

**Share sale**

See *Question 17*.

**19. Does a seller have to disclose environmental information to the buyer in:**

- An asset sale?
- A share sale?

The seller does not have to disclose environmental information in relation to an asset or a share sale. In Hong Kong, *caveat emptor* (buyer beware) applies.

**20. Is environmental due diligence common in an asset sale or a share sale? If yes:**

- What areas are usually covered?
- What types of environmental assessments are available?
- Are environmental consultants usually used? If so, what issues should be covered in an engagement letter (for example, limit on consultant's liability)?

Environmental due diligence is generally undertaken in relation to transactions involving high environmental risks.

**Areas covered**

A questionnaire tailored to the business concerned should be sent to, and answered by the seller. It generally includes questions on:

- Liabilities that are historical, existing or potential.
- Details of monitoring and reporting procedures of the seller within the company.
- Details of environmental policies implemented and audits carried out by the company.
- Whether the seller is aware of any health and safety matters or environmental issues affecting its business.

**Types of assessment**

Depending on the type of business concerned, a site inspection should be undertaken with qualified professionals, as well as historic searches concerning the land and adjoining properties. Also, if required, a questionnaire should be sent to the seller (see *above, Areas covered*) to assess the level of warranties to be sought when drafting the sale and purchase agreement.

**Environmental consultants**

Depending on the business concerned and the environmental risks involved in the transaction, environmental consultants can be hired to audit the targeted company. There are a large number of consulting firms of international repute operating in Hong Kong, capable of handling complex and detailed environmental due diligence. The engagement letter should be precise on the scope of the audits to be conducted. In addition, other areas to be covered in the engagement letter include unrestricted access to the sites to be audited and the liability of the consultant. Consultants rarely assume any liability. Therefore their terms and conditions usually include a general limitation of liability and/or an indemnity clause.

**21. When are environmental warranties and indemnities usually given and what issues do they usually cover in:**

- An asset sale?
- A share sale?

If warranties are required by the shareholders of a target company (in the context of a share sale), or current owners of an asset (for an asset sale), warranties and indemnities are usually given in relation to:

- Valid licences and authorisations.
- Compliance with environmental regulations.
- Absence of environmental pollution or risk of environmental pollution.
- Absence of existing or potential claims in relation to an environmental matter.

**22. Are there usually limits on environmental warranties and indemnities, for example, time limits or financial caps?**

The time limits of contractual warranties are usually in line with the time prescriptions of the statutory offences that could potentially occur. However, financial caps should be set in accordance

with the maximum amounts insured under the relevant insurance policies entered into by the seller.

## REPORTING AND AUDITING

### 23. Do regulators keep public registers of environmental information (for example, of environmental permits or contaminated properties)? What is the procedure for a third party to search those registers?

Access to public information varies according to each applicable individual statute. The regulatory requirements for keeping registers of environmental information are that:

- The DEP (or another designated authority) should keep a register open to public inspection that contains different documents such as applications for licences, licences and any other document required by regulation (*APCO and WPCO*).
- The DEP should also keep a register containing applications and environmental permits, project profiles, EIA study briefs, and so on (*EIAO*).

However, some statutes like the NCO and the WDO do not provide for maintenance of a register of licences or permits.

In practice, the EPD does not have a centralised database for environmental information, but the majority of licences, permits and other useful information can be found online on its website. There is no regulatory requirement for keeping registers under the NCO and WDO. However, in practice, public access to information can take the form of the display of a construction noise permit at specified locations, when required by the DEP. Further, in practice, a list of construction noise permits in force is available on the EPD website. The WDO provides that once approved, a waste disposal plan is made available to the public free of charge. The EPD website supplies a list of waste collectors and recyclers.

In addition to the information available on the EPD website, any person can request environmental information by calling the EPD hotline or making a written request to the EPD offices in Hong Kong, or addressing the request to the EPD designated Access to Information Officer. Depending on the type of requested information, the EPD or the relevant department may decide to disclose it.

### 24. Do companies have to carry out environmental auditing? Do companies have to report information to the regulators and the public about environmental performance?

There is no statutory requirement for companies to carry out environmental auditing. However, permits granted under the EIAO can stipulate conditions on the conduct of environmental audits.

In practice, environmental audits and subsequent reports appear increasingly common. Since 2000, governmental departments are required to publish annual environmental reports and private companies are strongly encouraged to do the same. The ACCA

## THE REGULATORY AUTHORITY

### Environmental Protection Department (EPD)

**Main responsibilities.** The EPD is in charge of implementing environmental legislation, formulating policies and guidelines on environmental aspects and raising public awareness.

**W** [www.epd.gov.hk/epd/eindex.html](http://www.epd.gov.hk/epd/eindex.html)

Hong Kong Awards for Sustainability Reporting reward the company that has published the most complete and accurate reports on sustainability, to encourage the uptake of environmental reporting.

### 25. Do companies have to report information to the regulators and the public about environmental incidents (such as water pollution and soil contamination)?

There is no statutory obligation to report information about environmental incidents to the EPD or members of the public. However, under common law, there may be grounds of action for private individuals against those causing pollution (*see Question 16*). Environmental incidents are usually reported by the public, though the EPD uses different devices to monitor and detect pollution levels.

In practice, in cases of major pollution or contamination, detailed information about the polluting incident, and the company or individual involved, is posted on the EPD website.

### 26. What powers do environmental regulators have to access a company's documents, inspect sites, interview employees and so on?

As the EPD is responsible for enforcing environmental laws, it is granted a wide range of powers under various ordinances.

The DEP, or any public officer duly authorised by the DEP, has the power to enter and inspect, without a warrant, any premises or vessel. However, a warrant is required if the premises or the vessel is for domestic use. The DEP powers of inspection include:

- Requiring any person (including employees) to give information or to render assistance.
- Requiring delivery of relevant records and documents.
- Taking samples and installing sampling devices.
- Testing, observing, taking photographs or examining any process or procedure used in or in connection with the operation of any air polluting process or the conduct of any specified process or collection, storage, treatment, transportation or disposal of any waste.
- Seizing and detaining anything which appears to be evidence of an offence.

**INSURANCE**

**27. What types of insurance cover are available for environmental damage or liability and what risks are usually covered? How easy is it to obtain environmental insurance and is it usually obtained in practice?**

Companies wishing to deal with potential environmental liability can take out an insurance policy to transfer the risk to insurance companies. There are five main types of environmental policies:

- Pollution Legal Liability Cover (PLL), which provides liability and clean-up cover for pollution conditions arising from an owned or operated property. The policy can also cover a business interruption.
- Pollution and Remediation Legal Liability Cover (PRL), which provides cover for loss, remediation expense and legal defence expense for sudden and gradual pollution conditions at or from covered locations.
- Contractor’s Operations and Professional Services Policy (COPS), which provides broad protection for full-service environmental firms performing field operations and professional services. It combines with Contractors Pollution Liability (on a claims-made or occurrence basis) and Errors and Omissions policies in one package.
- Clean-up Cost Cap Cover (CCC), which provides cover for clean-up cost overruns arising from a planned remediation, while also protecting against newly discovered pollution conditions discovered during implementation of the remedial plan.
- Warranty and Indemnity Insurance policies, which provide cover for financial losses arising from breaches of warranties or indemnities of sale or purchase transactions.

However, insurance companies normally design a tailor-made policy covering the specific risks of a company’s project or activity.

There are a number of factors to take into consideration when determining whether to seek environmental insurance. For example, it can depend on the company’s risk management policy, and a cost benefit analysis will need to be undertaken accordingly. In addition, third parties such as banks may request subscription of insurance before consenting to a transaction. With increasing environmental liabilities, the authors expect to see an increase in obtaining insurance cover in future.

**TAX**

**28. What are the main environmental taxes in your jurisdiction (for example, tax on waste disposal, carbon tax and tax breaks for carrying out clean-up of contaminated land)? For each tax, please briefly state how it is calculated, who pays it and the tax rates.**

There is no environmental tax as such in Hong Kong.

However, the government uses fiscal disincentives to make Hong Kong greener. For example, the first PRS approved on the basis of the PERO came into effect in July 2009. This scheme, resulting from the Product Eco-responsibility (Plastic Shopping Bags) Regulation, provides that retailers must charge at least HK\$0.50 (about US\$0.06) to its customers for each plastic bag issued. The retailers submit a quarterly return to the DEP stating the number of plastic bags delivered, and pay the total amount of levies received.

**REFORM**

**29. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.**

As with any jurisdiction, there is always room for environmental legislative reform. In Hong Kong the development of environmental taxes to cover all solid waste, for example, could be considered, since tax on solid waste only currently exists for construction waste. In addition, the development of the PRS to cover more products could be something to explore in future.

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