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Secretary for the Environment, Transport  
and Works

By Fax (2511 6775) and By Post

Environmental Protection Department

11 January 2007

(Attn: Mr Esmond LEE,

Dep Dir of Env Protection(4))

46/F, Revenue Tower

5 Gloucester Road

Wan Chai, Hong Kong

Dear Mr LEE

### **Hazardous Chemicals Control Bill (“the Bill”)**

I refer to your letter dated 10 January 2007 purporting to answer my queries raised in my letter dated 5 December 2006 and have the following comments:

#### Section 10(4)(a)(i)

Doubt on the inconsistency between the English and Chinese versions is not removed.

Sections 10(3) and (4), 11(2) and (3), 13(2) and (3), 19(1)(d), 22(2) and (3), 23(2) and (3) and 27(1)

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The queries raised in my letter dated 5 December 2006 have not been answered. Despite repeated requests for clarification from members, the extent of the power of the Director by reference to the requirements under the Rotterdam Convention and the Stockholm Convention remains unclear.

#### Sections 41(a) and 41(b)

Your comment that “The wording of section 41(a) and 41(b) is similar to that of section 33(2) of the Pharmacy and Poisons Ordinance (Cap. 138).” does not remove my doubt as:

- (a) the similarity of wording between a provision in a Bill and another provision in an existing Ordinance does not necessarily mean that the provision in the Bill is in order in the legal and drafting aspects; and

- (b) the provisions, contraventions of which shall be an offence, referred to in section 33(1) of the Pharmacy and Poisons Ordinance (Cap. 138) are different from some of the provisions referred to in section 41 of the Bill, namely, sections 6, 7, 8 and 9 in that the provisions in the Bill provide for “a defence for the person charged to prove that he did not know and could not with reasonable diligence have known that the chemical was a scheduled chemical”. The provision of the defence can be interpreted to imply that criminal intent is considered as an element of the offence under these sections. Thus, it appears that the drafting of section 41 and the consideration of criminal intent under sections 6(3), 7(3), 8(3) and 9(3) are inconsistent with general rule that no act or default on the part of agent imposes any criminal liability on the principal in respect thereof unless the principal himself takes part in, authorizes, or connives at the commission of such act or default, except a particular statute may, by its express terms or by implication, impose a criminal liability upon the principal in respect of the acts or defaults of his agent by imposing a liability which can exist **without proof of any criminal intent**. Please clarify.

#### Binding Effect – Section 4

Section 4 provides that-

- (a) Subject to subsection (2), this Ordinance binds the Government.
- (b) No prescribed fee is payable by the Government.

The Chairman of the Bills Committee has requested the Administration to clarify whether a fine imposed on a public officer when he is in breach of a provision of the Bill will be paid by him or the Government. The Administration’s reply as set out in paragraph 5 of CB(1)2287/05-06(03) is that “If the criminal liability under the Bill is interpreted by the court as applying to individual public officers, any fine imposed on the public officer concerned will be payable by the public officer convicted.”.

Upon my request for further clarification of the policy intent on the respective criminal liability of the Government and the public officer if they are in breach of the obligations imposed by the Bill, your reply is that “The policy intent is that the Government and public officers in the course of carrying out duties in the service of the Government will not be held criminally liable for offences under the Bill. This is in line with the Government’s legal policy.”. Your reply to my query appears to be inconsistent with your reply to the query of the Chairman of the Bills Committee. Please clarify your replies and how the policy intent is reflected in the Bill, in particular in section 4.

Clause 26

The Chairman of the Bills Committee has requested the Administration to clarify whether the offence provided under clause 26 is an “absolute liability offence” and whether a defence of reasonable excuse will be introduced.

Your reply to her query is that “This provision imposes a strict liability offence. Given the seriousness of the offence, we do not consider it appropriate to introduce a defence of reasonable excuse.”.

I have raised the query whether a body corporate is liable for breach of the obligations imposed under section 26 if the notice served under sections 22 and 23 has not actually been received by it in the light of section 44(c)(i) which provides that “A notice or other document (however described) required or permitted to be served or sent (however described) under this Ordinance is to be regarded as having been duly served or sent if-

- (c) in the case of a body corporate-
  - (i) it is delivered to any place in Hong Kong at which the body carries on business and giving it to a person **apparently** concerned in the management of, or **apparently** employed by, the body;”.

Your reply to my query is that “With Clause 44, it is irrelevant as to whether a person actually receives a notice under section 44. As long as the Director of Environmental Protection adopts the mode of service prescribed by the Bill, the notice will be regarded as having been duly served. That said, it is always open to the defence to argue that the Director has failed to comply with Clause 44 and hence the deeming provision could not be applied”. This reply appears to be inconsistent with your reply to the Chairman of the Bills Committee. Please clarify your meaning of “a strict liability offence” and “a defence of reasonable excuse”. Under what circumstances can a defence be raised for “a strict liability offence”? What are these defences? Is a defence of reasonable excuse be included in this category of defences?

It is appreciated that your reply in both Chinese and English could reach us by close of play, 18 January 2007.

Yours sincerely

(Monna LAI)  
Assistant Legal Adviser