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Secretary for the Environment, Transport
and Works

Environmental Protection Department
(Attn: Mr Esmond LEE,
Dep Dir of Env Protection(4))
46/F, Revenue Tower
5 Gloucester Road
Wan Chai, Hong Kong

By Fax (2511 6775) and By Post

26 January 2007

Dear Mr LEE

Hazardous Chemicals Control Bill (“the Bill”)

I refer to your letter dated 24 January 2007 and the Administration’s Responses to the List of follow-up actions arising from the discussion at the meeting on 12 January 2007 (“the Administration Responses”) and have the following comments:

Your letter dated 24 January 2007

Section 10(4)(a)(i) and sections 6(1), 7(1), 8(1), 9(1) and 13(3)

It seems that your reply is that “may not 不得” can be interpreted both as:

- (a) “shall not 不得” which denotes “mandatory”; and
- (b) “may not 不可” which denotes “discretionary”.

Please clarify:

- (i) How can a reader ascertain whether the meaning of “may not 不得” is (a) or (b)?
- (ii) The drafting of section 10(4) is inconsistent with the drafting of other provisions in the Bill in which “may not” is used only to denote a discretion and the Chinese text is “不可”. The drafting of section 10(4) should be amended to maintain consistency of drafting of all

provisions in the Bill.

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)

The Administration believes the Administration's approach of making an express general reference to the requirements of the two Conventions in the provisions of the Bill is preferable to not making any references to the Convention requirements at all from a transparency of law perspective, since it expressly empowers the Director while at the same time imposes a statutory obligation for him to have regard to the Convention requirements when performing his statutory functions. However, such view is not elaborated. I have to reiterate my comment that the queries raised in my letter dated 5 December 2006 have not been answered and despite repeated requests for clarification, the extent of the power of the Director by a general reference to the requirements under the Rotterdam Convention and the Stockholm Convention remains unclear.

Paragraph 3 of the Administration's Responses states that "As to the alternative approach of not making references to the requirements of the two Conventions, it is understood that in this case the Director may continue to perform his statutory functions having regard to and in a manner consistent with the Convention requirements, so long as this does not contradict the express wording of the Bill."

Please clarify the basis of such understanding. Whether the word "may" means that (a) the Director is "mandatory" to perform his statutory functions having regard to and in a manner consistent with the Convention requirements; or (b) "has a discretion" to perform his statutory functions having regard to and in a manner consistent with the Convention requirements? Whether the Administration's understanding is that the Director is empowered to perform all the functions which he regards as within the ambit of the Convention requirements? If the answer is in the affirmative, please clarify the source of authority to give such power to the Director and the extent of such power. If the Director is not expressly empowered under the Bill, how can the requirements of the two Conventions have "the force law of Hong Kong" without going through the law-making process in Hong Kong?

Section 41(a) and 41(b)

I note that the legislative intent is that an offence against an employer for or in connection with an act of his employee under the Bill is a strict liability offence. Does it mean that if the employer knew the relevant facts known to the employee or knew or could with reasonable diligence have known that the chemical was scheduled chemical, he will be liable if his employee is in breach of the provisions of the Bill notwithstanding that the employee acted without his authority?

Under common law, the master is not liable where the servant acts outside the course of his employment. While the master may be liable where the servant does what he is employed to do albeit in an unauthorized manner, he is not liable where the servant does something which he is not employed to do at all¹.

Please clarify whether section 41(a) distinguish (a) the servant does what he is employed to do albeit in an unauthorized manner from (b) the servant does something which he is not employed or authorized to do at all?

Please clarify whether failure to receive actual notice from the Director notwithstanding the notice is regarded as having been duly served or sent by the Director under section 44 and “a defence of reasonable excuse” fall within the common law defence of “honest and reasonable belief” or such defences will be introduced as statutory defences?

The Administration’s Responses

The Administration is of the view that “as possession of the chemicals is an integral component of the four regulated activities (i.e. import, export, manufacture and use), the permits to be issued under the Bill would contain conditions relating to the proper possession of the chemicals. The permits would also contain conditions restricting the transfer of the chemicals to a third party. Moreover, there are existing environmental legislation dealing with environmental pollution, and environmental pollution caused by improperly stored or handled scheduled chemicals may be dealt with under the existing legislation.”.

It appears that mere possession is not an offence and does not require a permit. How can possession be regulated if the scheduled chemicals are possessed before passage of the Bill or acquired by means other than import?

It is appreciated that your reply in both Chinese and English could reach us by close of play, 2 February 2007.

Yours sincerely

(Monna LAI)
Assistant Legal Adviser

¹ Halsbury Vol 11(1) para 56 Note 4.