

ETWB(E) 55/03/113B pt.3
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Dear Mr Lam,

Waste Disposal (Amendment) (No.2) Bill 2003

Our responses to the questions raised in your letter of yesterday's date are as follows –

- (1) We consider that on the commencement of new sections 16A and 23EA, the reference in section 23EA(1)(a) to “an offence under section 16A” will be construed as an offence under new section 16A. However, we would like to stress that neither new section 16A nor section 23EA introduces a new criminal offence, and section 23EA(1)(a) merely prescribes the scenario of the offence (which is the same under the existing and new section 16A) as one of the criteria for the Director of Environmental Protection to exercise his power under section 23EA. We consider that given that section 23EA contemplates a situation with on-going facts, it will have immediate application after the commencement of the Amendment Ordinance to a subsisting state of affairs, even though that the state of affairs might have come into existence before the commencement of the Amendment Ordinance.

Whether an offence has actually been committed under the existing or new section 16A is immaterial for the purpose of section 23EA because according to section 19 of the Interpretation and General Clauses (Cap. 1), section 23EA should be deemed to be remedial and should receive a liberal construction to enable the Director to take immediate action in the case of imminent risk of environmental impact. As the Director can only exercise his power of entry under new section 23EA on or after the commencement of the Amendment Ordinance, he cannot enter any domestic premises without first obtaining a warrant issued by a magistrate under new section 23EA(4). We therefore do not consider that an owner of domestic premises will be prejudiced in this respect. New section 42(b) is not applicable to that owner because it deals with the enforcement of expenses awarded to the Director under new section 23EA(2).

- (2) We do not intend that an order under new section 18A(1)(a) or (b) should be made in the case of a conviction under the existing section 16A (to be re-enacted) if the offence is committed before the commencement of new sections 16A and 18A because in our view, new section 18A should not be construed as applicable to impose punitive consequences unknown to a convicted person at the time when he committed the offence under the general presumption against retroactivity.

We consider that new sections 18A and 23EA serve different purposes and will be construed and applied in different scenarios according to their respective objectives.

- (3) We consider that for a person charged with an offence under the existing section 16A (to be re-enacted) for an offence committed before the commencement of new section 16A, he can rely on the new statutory defences under new section 16A if the trial takes place after the commencement of new section 16A because the offence under the existing and the new sections 16A are the same and the statutory defences should become available to the defendant on trial after the commencement of new section 16A.

Yours sincerely,

(Ms Doris Cheung)
for Secretary for the Environment, Transport and Works

c.c. DoJ (Attn: Miss Shandy Liu)