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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

12 June 2006

Dear Mr LEE

Hazardous Chemicals Control Bill ("the Bill")

I am now scrutinizing the legal and drafting aspects of the Bill and have the following comments:

1. Section 7(1) provides that "Except under and in accordance with a permit, a person shall not export any scheduled chemical.".

Section 8(1) provides that "Except under and in accordance with a permit, a person shall not import any scheduled chemical.".

As Section 2(3) of Part 2 of Schedule 2 provides that "Sections 7(1) and 8(1) do not apply to a Type 2 chemical if the chemical is, or is a part of, an article in transit.", Type 2 chemical will not be subject to the requirement of import and export permit if it is, or is a part of, an article in transit. This appears to be inconsistent with the policy mentioned in the LegCo Brief issued by Environmental Protection Department on 10 May 2006 (File Ref: EPD CR 9/30/18V) ("the LegCo Brief") that "the import into Hong Kong, the export from Hong Kong, or the manufacture or use of any Type 2 chemical is not allowed except where it is carried out under and in accordance with a permit issued under the Bill.". Please clarify.

2. Section 10(4)(a)(i) provides that "The Director may not issue or renew a permit authorizing the manufacture of any Type 1 chemical unless the chemical is only for −

(a) use for laboratory-scale research purpose;

(b) use as a reference standard for chemical analysis; or

(c) use for laboratory-scale research purpose and as a reference standard for chemical analysis.".

The Chinese version provides that:

"署長不得發出授權製造任何第1類化學品的許可證或將該許可證續期，但在以下情況下則屬例外−

(i) 該化學品僅是 −

(A) 爲實驗室規模的研究的目的而使用；

(B) 用作化學分析的參照標準；或

(C) 爲實驗室規模的研究的目的而使用並用作化學分析的參照標準；"。

It appears that in the English version, the Director has a discretion when he issues or renews the relevant permits while in the Chinese version, subject to the exceptions provided, it is mandatory for the Director not to issue or renew the permits. However, the provision does not elaborate on the Director's obligation in the exceptional circumstances.

(a) Please clarify the inconsistency between the English and Chinese versions.

(b) The provisions seem to be inconsistent with the policy intent mentioned in the LegCo Brief that "the manufacture of any Type 1 chemical is <u>not allowed</u>, except where the chemical is for use for laboratory-scale research purpose or as a reference standard and the manufacture of the chemical is carried out under and in accordance with a permit issued under the Bill.". Please clarify.

3. Section 13(2) provides that "When considering whether to vary the conditions of a permit under subsection (1), or the variation to be made under that subsection, the Director is to have regard to −

(a) other enactments that govern the activity authorized under the permit; and

(b) the requirements under the Rotterdam Convention and the Stockholm convention.".

Section 13 provides that "The Director may not vary the conditions of a permit if the variation would be inconsistent with any of the requirements under the Rotterdam Convention and the Stockholm Convention, but may vary the conditions of

a permit even if the variation may result in a more stringent measure than any of those required by the Conventions.".

Section 18 provides that a permit holder who contravenes the condition of his permit commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 6 months.

In these circumstances, the Director is empowered to incorporate the requirements under the Rotterdam Convention and the Stockholm Convention ("the Requirements") as conditions of a permit without the Requirements being scrutinized by the Legislative Council. The scope of the Requirements to be incorporated (i.e. the obligations to be imposed under the Bill) is uncertain and the Requirements may have to be applied to Hong Kong subject to the necessary modification. Please clarify the policy intent.

4. Section 34(1)(b) provides that "A court may issue a warrant in respect of any premises if it is satisfied by information on oath that there are reasonable grounds for believing that there is or may be at the premises any thing that is or contains, or is likely to be or contain, evidence of the commission of an offence under section 6, 7, 8 or 9.".

Please clarify the "reasonable grounds for believing that there may be at the premises any thing that is likely to be or contain evidence of the commission of offence".

5. Section 41(a) provides that "In any proceedings against a person under this Ordinance for or in connection with an act of his employee, it is not a defence for that person to show that his employee acted without his authority.".

This section appears to be inconsistent with the common law that where the relationship of employer and employee exists, the employer is liable for the torts of the employee so long only as they are committed in the course of the employee's employment. The most frequently adopted test for the question whether a wrongful act is within the course of employment is: a wrongful act is deemed to be done in the course of the employment if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.[1] Please clarify.

6. Section 41(b) provides that "In any proceedings against a person under this Ordinance for or in connection with an act of his employee, in the absence of evidence to the contrary, any material fact that is known to the employee is to be regarded as having been known to the employer.".

Sections 6(3), 7(3), 8(3) and 9(3) provide that "In any proceedings for an offence under subsection (1), it is a defence for the person charged to prove that he

[1] Clerk & Lindsell on Torts, 19th edition paragraphs 6-26 and 6-27.

did not know and could not with reasonable diligence have known that the chemical was a scheduled chemical.".

Please clarify how the defence be raised by an employer in the light of Section 41(b).

7. Section 44(c)(i) 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 in the case of a body corporate 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.".

Please clarify the meaning of "person apparently concerned in the management of or apparently employed by a body corporate".

It is appreciated that your reply in both Chinese and English could reach us by close of play, 19 June 2006.

Yours sincerely

(Monna LAI)
Assistant Legal Adviser