

本署檔號
OUR REF: EP381/10/11
來函檔號
YOUR REF: LS/B/21/2025
電話
TEL. NO.: 3150 8183
圖文傳真
FAX NO.: 3121 5752
網址
HOMEPAGE: <http://www.epd.gov.hk>

Environmental Protection Department
Waste Management Division

21/F, High Block,
Queensway Government Offices,
No. 66 Queensway, Hong Kong



環境保護署
廢物管理科

香港金鐘道 66 號
金鐘道政府合署
高座 21 樓

By Email (ahychui@legco.gov.hk)

28 April 2025

Mr Alvin CHUI
Assistant Legal Adviser 3
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Mr CHUI,

Promotion of Recycling and Proper Disposal of Products (Miscellaneous Amendments) Bill 2025

Thank you for your letter of 17 April 2025 on the captioned Amendment Bill. Our response to the issues raised in your letter is set below.

Regulations made by the Secretary for Environment and Ecology under section 29 of Part 3 of Cap. 603

2. In the proposed Amendment Bill, amendments are made to section 29 of Part 3 of Cap. 603 to empower the Secretary for Environment and Ecology, after consultation with the Advisory Council on the Environment, to make regulations with respect to all or any of the following matters:

- “29(1)(db) payment of fixed penalties, additional penalties and other amounts payable under this Part;
- (e) such supplemental provisions as are necessary or expedient for giving full effect to the provisions of this Part;
- (f) any matter ancillary or incidental to those specified in this section.”

3. The regulations made under the power conferred by section 29 of Cap. 603 as proposed to be amended by the Amendment Bill are primarily procedural, technical, or administrative in nature and do not involve controversial or politically sensitive issues. Therefore, it is more appropriate to adopt a

“negative vetting” approach, where such regulations are enacted first and then subject to the Legislative Council (“LegCo”)’s review, allowing for more efficient scrutiny.

4. Although the vetting procedure is simplified, the “negative vetting” process still allows the LegCo to exercise its supervisory powers. The LegCo may amend the subsidiary legislation by passing a resolution at a sitting held not later than 28 days after the sitting where the subsidiary legislation was laid on the table of the LegCo. The regulation making power under section 29 of Cap. 603 as proposed to be amended by the Amendment Bill aligns with that under similar circumstances in Part 6 of the same Ordinance i.e. section 100 of Cap. 603.

Meaning of “distribute” under the proposed new Part 7 of Cap. 603

5. For the meaning of “distribute”, a person does not “distribute” a Schedule 12 product merely by entering into an agreement to distribute because an agreement to distribute is only a contractual commitment that outlines the terms under which future distribution may occur, but it does not, by itself, involve the actual act of distributing the product to another party. It is also possible that the agreement terms may still be subject to further modification or cancellation before the product is distributed. Therefore, the proposed new section 103(2)(b) serves to state clearly that a person would not be regarded as distributing the Schedule 12 product merely because the person enters into an agreement to distribute. Although the definitions of “distribute” under section 31 of Part 4 (for the producer responsibility scheme (PRS) for regulated electrical equipment) and section 47 of Part 5 (for the PRS for regulated articles) of Cap. 603 do not contain such provision, a similar provision “entering into an agreement to distribute does not constitute distribution” does exist in the extant sections 35(3) and 40(2) for the PRS for regulated electrical equipment, and also section 54(2) for the PRS for regulated articles.

Assessment notices on contravention of the proposed new sections 106, 134 and 135 of Cap. 603

6. The provisions for serving assessment notices under the proposed new section 107 for contravention of the proposed new section 106 and under the proposed new section 136 for the failure of meeting recovery targets under the proposed new sections 134 and 135 are proposed with reference to the extant sections 40 and 54 of Cap. 603. Pursuant to the extant section 40 (for the PRS for regulated electrical equipment) and section 54 (for the PRS for regulated articles) of Cap. 603, recycling levies are recovered from suppliers who distribute the products without registering as registered suppliers or from suppliers who distribute or use/consume the products without having paid the required recycling

levies through assessment notice.

7. The proposed new section 107 applies if a supplier of a type of Schedule 12 product distributes or consumes a product in contravention of section 106(1), i.e. the supplier distributes the products without supplier registration or holding an approved Producer Responsibility Plan which is in force, it is anticipated that the supplier would have very likely evaded the required recovery obligations of the PRS (i.e. to arrange the recovery of product by themselves or to engage the service of a registered scheme operator to fulfill the obligation). To prevent suppliers from evading their recovery obligation and ensure effectiveness of the PRS, the proposed new section 107 serves to demand a payment from the supplier concerned who has evaded the obligation of recovering its distributed products. The determination of the amount of payment is specific to different Schedule 12 products which will be prescribed in the Individual Product Regulation.

8. The proposed new section 136 applies if registered suppliers and registered scheme operators fail to meet recovery targets under sections 134 and 135, i.e. if it is ascertained that there is any shortfall of the recovery quantity in meeting the recovery target identified from the relevant regular return or audit report, the Director of Environmental Protection ("Director") would serve an assessment notice to the concerned registered supplier or the registered scheme operator based on the shortfall in meeting the recovery targets. The determination of the amount of payment will be prescribed in the Individual Product Regulation.

Terms and conditions to be imposed on the registration of suppliers or scheme operators

9. The PRS for regulated electrical equipment and the PRS for regulated articles (i.e. glass beverage containers) are implemented through a "Government-led approach". Once a supplier is registered under section 33 of Part 4 and section 49 of Part 5 of Cap. 603, the Government would collect from such registered supplier recycling levy based on the distribution quantity of the supplier and engage service providers to collect and recycle regulated product waste. The registered supplier must pay the recycling levy under section 37 of Part 4 and section 51 of Part 5. It is considered not necessary to impose any term and condition on the registration for suppliers of regulated electrical equipment and regulated articles as the recovery service is provided by the Government's service providers. However, under the "market-led approach" PRS for Schedule 12 products, there would be a flexibility for registered suppliers to arrange recovery of the regulated product waste on their own or by engaging a service provider in the market to do so, and there is a need to impose appropriate terms and conditions under the proposed new section 109 for the registration of

suppliers and under the proposed new section 118 for the registration of scheme operators to ensure the smooth operation of this new approach. The details of the required terms or conditions will be prescribed in the Individual Product Regulation.

Terms and conditions to be imposed on an approved producer responsibility plan

10. Under the proposed new sections 114 and 115, the intended meaning of “public health” is mainly related to public health impact caused by environmental pollution or nuisance from the perspective of the recovery operation of Schedule 12 products. Some possible examples of the environmental pollution or nuisance from recovery operation that may affect public health include air and noise pollution, odour nuisance, water pollution and improper disposal of waste arising from the recovery process, etc. The Director will decide to exercise the power when there is serious pollution or nuisance from the recovery operation potentially affecting public health.

11. When approving a producer responsibility plan, we will set a validity period for the plan (e.g. 5 years). Before the producer responsibility plan expires, we will remind the plan holder to submit an application for approval of a producer responsibility plan under the proposed new section 112 of the Ordinance if the plan holder wishes to continue the recovery operation such that the plan can take effect timely. The requirements and details for the application for approval of producer responsibility plans will be prescribed in the Individual Product Regulation.

Prohibition under the proposed new section 132 of Cap. 603

12. Under the proposed new section 132(1), a retailer must not distribute, or offer to distribute, a Schedule 12 product of a type to which the proposed new section 132 applies if the retailer knows, or reasonably ought to know, that the product is a non-compliant product according to the proposed new section 132(3). For a non-compliant product to which section 132 applies, once the relevant PRS is implemented, the Government would conduct sufficient publicity and inform the trade sector through various means to clearly outline the specific conditions that would classify a product as a non-compliant product. The Government would also provide ample time for the trade to prepare and adapt to the changes. The above measures would help retailers familiarise with the requirement and avoid distributing non-compliant products. Some circumstances under which a retailer would be considered “reasonably ought to know” include whether the retailer has received any regulatory warning, whether the concerned product exhibits visible non-conformity (e.g. the designated barcode and prescribed logo not printed on or affixed to the surface of the product in the prescribed manner),

whether the retailer has conducted basic checking to verify the product, etc.

Proposed offences without a statutory defence under the proposed new Part 7 of Cap. 603

Para. 9(a) of your letter

13. The proposed offences for contravention of the proposed new sections 106, 107, 108, 109, 117, 118, 122, 123, 124, 125, 126, 127, 136, 138, 140 and 141 are strict liability offences which the prosecution need not prove the existence of *mens rea* of committing the offences. The implied common law defence of “honest and reasonable mistaken belief” will be available.

Para. 9(b) of your letter

14. Given the offences for the contravention of abovementioned proposed new sections are regulatory in nature rather than a crime in the ordinary sense and the penalty imposed is arguably not severe (compared with a maximum of 4 years’ imprisonment for the indictable offence in the case of *Kulemesin v. HKSAR* (2013) HKCFAR 195 (“*Kulemesin*”)), it is the Administration’s intent that the third alternative referred to in *Kulemesin* represents the appropriate mental requirement of the offences, i.e. the prosecution need not prove *mens rea* but the accused had a good defence if he could prove, on the balance of probabilities, that he acted or omitted to act in the honest and reasonable belief that the circumstances or likely consequences of his conduct were such that, if true, he would not be guilty of the offence.

15. If the defendant claims to have honest and reasonable mistaken belief for contravening the above sections, this is something peculiar to his own knowledge and it is particularly difficult for the prosecution to disprove beyond reasonable doubt. As such, in the present context of regulatory offences, by placing the burden on the defendant to prove on the balance of probabilities that he did in fact act under an exculpatory honest and reasonable mistaken belief will represent the most appropriate balance to be struck between (a) the legitimate aim pursued by the regulatory offences on the one hand, and (b) avoiding a snaring of the blameless, on the other.

16. In summary, having considered the nature and the severity of the offences which are punishable by a fine only, it is the Administration’s intent that the third alternative is applicable.

Para. 9(c) of your letter

17. In *Hin Lin Yee & Anor v. HKSAR* (2010) 3 HKC 403 (“*Hin Lin Yee*”) para. 11, the Court of Final Appeal observed that in appropriate cases “the shifting of burden to the accused to prove on the balance of probabilities something which is peculiar to his own knowledge and which the prosecution is unable to disprove beyond reasonable doubt is not unusual; nor is this any more unfair or inconsistent with human rights provisions than imposing absolute liability on him”.

18. For the reasons that (i) the offences under the abovementioned sections are primarily regulatory in nature, which concern various technical requirements under the producer responsibility schemes applicable for certain regulated products; (ii) the relevant offences do not carry severe penalties, but rather attract a fine at level 5 or 6 (as the case may be); (iii) the matters to be proved by the defendant are peculiarly within his knowledge; and (iv) placing the burden on the prosecution to prove beyond reasonable doubt the absence of an honest belief or the absence of reasonable grounds for such belief on the part of the defendant who contravenes the abovementioned sections is likely to make enforcement ineffective and unworkable, we are of the view that any interferences with the presumption of innocence in this situation are well justified and would be consistent with Article 87 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights.

Proposed offences with a statutory defence under the proposed new Part 7 of Cap. 603

19. Under the proposed new sections 129, 131, 132 and 137 of Cap. 603, if a person is charged with an offence under any of these sections, it is a defence to establish that the person had a reasonable excuse for the contravention.


20. As pointed out by the Court of Final Appeal in *HKSAR v. Ho Loy* (2016) HKCFAR 110, decided in the context of the offence under reg. 50(2) and 61(2) of the Road Traffic (Traffic Control) Regulations, Cap. 374G, the statutory defence of “*reasonable excuse*” is potentially wider than the halfway house defence of honest and reasonable mistaken belief, since a person may have a reasonable excuse for failing to comply with a statutory requirement, even though he deliberately intends that non-compliance. Accordingly, the Court held that the appropriate alternative mental requirement of the offence concerned is the fourth alternative in the case of *Kulemesin*, supra., i.e. only the statutory defence of reasonable excuse could be relied upon.

21. Given the language used in the provisions are similar to those in *Ho Loy*,

supra, we consider that the statutory defence of reasonable excuse in the new proposed sections 129, 131, 132 and 137 is wider than the common law defence of honest and reasonable belief, such that it is inconsistent with the concurrent availability of the common law defence. On such basis, the common law defence of honest and reasonable mistaken belief will not be available to a person charged with an offence under any of the new proposed sections 129, 131, 132 and 137.

22. Please feel free to contact the undersigned at 3150 8183 for further enquiries.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Steve Wong', written in a cursive style.

(Steve WONG)

for Director of Environmental Protection