

**Bills Committee on
Smoking (Public Health) (Amendment) Bill 2005**

**Administration's response to issues raised
at the Bills Committee meetings
on 14 February, 31 March, 4 April and 10 April 2006**

PURPOSE

This paper sets out the Administration's response to issues raised by the Bills Committee at its meetings on 14 February, 31 March, 4 April and 10 April 2006.

BACKGROUND

2. At the above meetings, Members raised the following issues and requested the Administration to provide a response in writing -

(a) Whether inspectors appointed under the proposed new section 15F could assist in the enforcement of the smoking ban under existing section 3(3)(c), having regard to the fact that it was mentioned in section 3(3)(c) that the manager of no smoking area could only call a police officer for assistance in the enforcement of the smoking ban;

ADMINISTRATION'S RESPONSE

3. The wording of section 3(3)(c) does not restrict the manager of a no smoking area from making a complaint to the Tobacco Control Office. Under the new section 15G, inspectors of the Office will be authorized to collect evidence in connection with smoking offences and to require a person to give his name and address and to produce proof of identity.

(b) whether there were ways to ascertain the exact boundaries of primary and secondary schools, post-secondary institutions and universities; if so, what they were;

4. As designated no smoking areas, the relevant statutory requirements would apply to the premises in or in any part of which a school is operated. Under Section 3(1) of the Education Ordinance, "school premises" includes school recreation rooms, residential facilities, playing fields and playing grounds, and any other places used for the purposes of a school. The premises in which a school may be operated are shown and described on the layout plan deposited with and approved by the Education and Manpower Bureau during school registration.

5. For “specified educational establishment” defined under the Smoking (Public Health) Ordinance (Cap. 371) (the Ordinance), their boundaries are not elucidated in their respective Ordinances (if applicable). We have therefore written to them to attain their boundary details.

(c) whether the deeming provision under the existing section 14(2) was a rebuttable presumption or an irrebuttable presumption;

6. The purpose of section 14(2) is to provide a further meaning for the defined term "tobacco advertisement" and does not raise a rebuttable presumption. When "deemed" is used in statutory definitions to extend the denotation of the defined term, it is a convenient device for reducing the verbiage of the legislation. This drafting technique is used in Part IV of Cap. 371, which regulates the printing, publication, display and distribution of certain materials and objects used for promoting tobacco products. All these materials and objects are referred to as "tobacco advertisements", the meaning of which is provided by section 14.

7. Section 14(1) first of all gives the basic meaning of a "tobacco advertisement". Section 14(2) extends the meaning by providing that certain advertisement or object is also deemed to be a tobacco advertisement unless it falls within the provisions in subsections (3) to (5). The effect of section 14(2) is not to presume certain act to have been done when in fact it is not done. Section 14(2) is simply an indisputable statement of an additional meaning of "tobacco advertisement".

(d) what was the existing number of non-tobacco products displaying the name/logo of a tobacco product in Hong Kong;

8. We are aware that tobacco companies of brands like Salem, Dunhill, Marlboro etc. have also produced non-tobacco products. However, we do not have an exhaustive list or exact number of such products.

(e) how did overseas jurisdictions handle non-tobacco products which included a tobacco brand and/or logo, whether for sale or otherwise;

9. Some research findings of overseas practices in this regard are excerpted at the [Annex](#) for reference.

(f) whether the policy intent that all staff quarters and student dormitories of primary and secondary schools located within the school boundaries must be smokefree was clearly reflected in the Bill;

10. The revised Schedule 2 at clause 20 of the Bill designates any school to be a no smoking area. Residential facilities are clearly part of the school premises according to section 3 of the Education Ordinance (Cap. 279). Indoor staff quarters and student dormitories therefore will become smokefree if it is situated within the school boundaries. Under the new section 3(5) at clause 5(c) of the Bill, any exemption for quarters or living accommodation will only be available to an indoor workplace or indoor public place designated under new section 3(1AA) at clause 5(a). Such exemption will not be applicable to a school, which is to be designated under section 3(1) and listed in the revised Schedule 2.

(g) whether the fact that a residential care home for the elderly was located in a domestic building would be treated as “domestic premises” and hence be exempted from the smoking ban;

11. An indoor area of any residential care home is to be listed as a no smoking area in the revised Schedule 2 at clause 20 of the Bill. Under the new section 3(5) at clause 5(c) of the Bill, any exemption for domestic premises will only be available to an indoor workplace or indoor public place designated under new section 3(1AA) at clause 5(a). Such exemption will not be applicable to the indoor area of a residential care home, which is to be designated under section 3(1) and listed in the revised Schedule 2.

12. At the above meetings, the Administration was further requested to provide a written response to the following suggestions made by members -

(a) public transport carriers not carrying members of the public should still be subject to the smoking ban;

13. We have consulted the Environment, Transport and Works Bureau whether it is acceptable to ban smoking in public transport carriers even when they are not carrying passengers. They have no objection to this proposal. We would therefore move a Committee Stage Amendment to the definition clause of “public transport carrier” under section 2 to that effect.

(b) the size of the price board and price marker for tobacco products offered for sale in the premises proposed in the Bill should not apply to cigar products, having regard to the fact that the number and variation of cigar products greatly exceeded those of the cigarette products;

14. Taking into consideration the unique operational mode of cigar shops, we would propose allowing them to have 3 sets of catalog containing the names and prices of cigar products on sale, apart from the use of price markers and the price board inside the shop. The said catalogs could be

offered for customers' sight upon request. We would therefore move a Committee Stage Amendment to Clause 15 of the Smoking (Public Health) (Amendment) Bill 2005 (the Bill).

(c) whether the sale and/or display of any object, other than a tobacco product, which included a tobacco brand and/or logo, should be prohibited, to prevent tobacco companies from making use of such object to promote their tobacco products; alternatively, the prospective sale and/or display of such products be prohibited while existing products are exempted;

15. The existing section 14(3) provides that statutory restriction is not applicable to any advertisement or object if the inclusion of such name, trade mark, brand name or pictorial device or part thereof is exclusively for (a) a non-tobacco product or service; or (b) job recruitment purposes. The Bill has further restricted the requirement in this respect by adding an additional test of “prominence”. This proposal already serves as a reasonable balance between allowing legitimate non-tobacco products bearing the same name or pictorial device of a tobacco product the chance to advertise and minimizing the effect of any publicity on inducing smoking. We do not recommend a total prohibition of the advertising of non-tobacco products having the same brand name as tobacco ones. There is no conclusive evidence showing the relationship between brand extension and smoking behaviour.

(d) meaning of “public lift” referred to in Schedule 2 of the Smoking (Public Health) Ordinance (Cap. 371) should be spelt out to differentiate it from private lift;

16. The meaning of "public lift" is defined in section 2 of the existing Ordinance as "a lift to which the public have access and includes any lift giving access to separately occupied flats, offices or other units of accommodation and a hotel lift". A public lift is distinguished from a private lift that is installed, say, within a multi-storey household unit. Smoking need not be prohibited in such a private lift because it is located within a private dwelling and is not accessible by the public.

(e) to delete clause 5(g);

17. After considering members' views, we are prepared to delete clause 5(g). In other words, no specific exemption to the smoking ban would be applicable to buildings under construction or demolition. Similar to other workplaces, smoking would be banned in indoor areas. During the construction stage, a particular area could therefore fall within the definition of “indoor” one day, and not “indoor” the other day, depending on the

structure at the material time.

(f) provide a legal opinion on whether "litter", as defined under the Public Health and Municipal Services Ordinance (Cap. 132), covered smoke coming from a lighted tobacco product.

18. In the Public Health and Municipal Services Ordinance (Cap.132), section 2 defines "litter" as:

- (a) any earth, dirt, soil, dust, ashes, paper or refuse;*
- (b) any glass, china, earthenware or tin;*
- (c) any mud, clay, brick, stone, plaster, sand, cement, concrete, mortar, wood, timber, sawdust, plastic, construction material or excavated material;*
- (d) any rubble, rubbish or debris;*
- (e) any filth, manure, dung, excreted matter and any other offensive, noxious or obnoxious matter or liquid; and*
- (f) any substance likely to constitute a nuisance.*

19. The definition of "litter" as provided in the Cap. 132, according to its plain meaning, does not cover the "emission of smoke". This interpretation has been consistently adopted since the Ordinance has come into operation. It is highly objectionable to attempt to strain the literal meaning of "litter" by charging a person smoking in the street with the offence of littering.

20. The control of smoking is dealt with under the Smoking (Public Health) Ordinance. Section 2 of the Ordinance defines "smoke" as "inhaling and expelling the smoke of tobacco or other substance." The Smoking (Public Health) Ordinance has been enacted with the clear objective to prohibit smoking in designated no smoking areas.

Country / region	Overseas experience in regulating non-tobacco products
<p>Canada (Federal)</p>	<p><i>Tobacco Act 1997</i></p> <p>27. Non-tobacco product displaying tobacco brand element</p> <p>No person shall furnish or promote a tobacco product if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or is used with a service, if the non-tobacco product or service</p> <p>(a) is associated with young persons or could be construed on reasonable grounds to be appealing to young persons; or</p> <p>(b) is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.</p>
<p>New Zealand</p>	<p><i>Smoke-Free Environments Act 1990</i></p> <p>24. Use of trade marks, etc, on goods other than tobacco products, or in relation to sponsored events—</p> <p>(1) No person shall use, otherwise than in a private capacity, a tobacco product trademark—</p> <p>(a) On any article other than a tobacco product or a package or container in which a tobacco product is sold or shipped; or</p> <p>(b) For the purpose of advertising or identifying to the public—</p> <p>(i) Any article other than a tobacco product; or</p> <p>(ii) Any service, activity, or event; or</p> <p>(iii) Any scholarship, fellowship, or other educational benefit,—</p> <p>even though that person would be, but for this Act, entitled to use the trade mark on that article or for that purpose.</p> <p>(2) Where a trade mark includes the company name, or part of the company name, of a manufacturer, importer, or distributor in New Zealand of any tobacco product, no person shall, otherwise than in a private capacity, use that company name for the purpose of advertising or identifying to the public—</p> <p>(a) Any article other than a tobacco product; or</p> <p>(b) Any service, activity, or event; or</p> <p>(c) Any scholarship, fellowship, or other educational benefit —</p>

	<p>even though that person would be, but for this Act, entitled to use that trade mark or company name for that purpose.</p> <p>(3) No person shall distribute, sell, or offer or expose for sale any article, other than a tobacco product or a package or container in which a tobacco product is sold or shipped, that bears a trade mark of a tobacco product that is sold in New Zealand.</p> <p>(4) Nothing in subsections (1) to (3) of this section shall apply to a trade mark or company name that, during the year ending with the 31st day of March 1990, was applied to tobacco products and other articles sold at retail in New Zealand if the estimated retail value of those other articles sold during that year exceeded one-quarter of the estimated retail value of those tobacco products sold during that year.</p> <p>(5) Nothing in subsections (1) to (3) of this section shall apply to the use, by any person (other than a manufacturer, an importer, a distributor, or a retailer of any tobacco products, or a person acting on behalf of any such manufacturer, importer, distributor, or retailer), of a trade mark or company name for any purpose (other than for application to, or for use in connection with, tobacco products or smoking accessories) if the trade mark or company name—</p> <p style="padding-left: 40px;">(a) Was in use in New Zealand for that purpose before the 17th day of May 1990; or</p> <p style="padding-left: 40px;">(b) Was in use for that purpose at any time before that trade mark or company name was first used, in New Zealand, for application to, or in connection with, any tobacco product or smoking accessory.</p>
<p>USA</p>	<p><i>Master Settlement Agreement</i></p> <p>III. (f) Ban on Tobacco Brand Name Merchandise</p> <p>Beginning July 1, 1999, no Participating Manufacturer may, within any Settling State, market, distribute, offer, sell, license or cause to be marketed, distributed, offered, sold or licensed (including, without limitation, by catalogue or direct mail), any apparel or other merchandise (other than Tobacco Products, items the sole function of which is to advertise Tobacco Products, or written or electronic publications) which bears a Brand Name. Provided, however, that nothing in this subsection shall (1) require any Participating Manufacturer to breach or terminate</p>

	<p>any licensing agreement or other contract in existence as of June 20, 1997 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer); (2) prohibit the distribution to any Participating Manufacturer's employee who is not Underage of any item described above that is intended for the personal use of such an employee; (3) require any Participating Manufacturer to retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed, or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer; (4) apply to coupons or other items used by Adults solely in connection with the purchase of Tobacco Products; or (5) apply to apparel or other merchandise used within an Adult-Only Facility that is not distributed (by sale or otherwise) to any member of the general public.</p>
<p>UK</p>	<p><i>Tobacco Advertising and Promotion Act 2002</i></p> <p>11. Brandsharing</p> <p>(1) The Secretary of State may by regulations make provision prohibiting or restricting, in such circumstances and subject to such exceptions as may be specified in the regulations, the use-</p> <ul style="list-style-type: none"> (a) in connection with any service or product (other than a tobacco product), of any name, emblem or other feature of a description specified in the regulations which is the same as, or similar to, a name, emblem or other feature so specified which is connected with a tobacco product, or (b) in connection with any tobacco product, of any name, emblem or other feature of a description specified in the regulations which is the same as, or similar to, a name, emblem or other feature so specified which is connected with any service or product other than a tobacco product. <p>(2) Provision made by virtue of subsection (1) may prohibit or restrict only that use whose purpose is to promote a tobacco product, or whose effect is to do so.</p> <p>(3) If regulations under this section provide for a prohibition or restriction to be subject to an exception, the regulations may also make such provision as the Secretary of State considers appropriate for a corresponding exception to</p>

have effect for the purposes of offences under section 2, 3, 8, 9 or 10.

(4) A person who contravenes a prohibition or restriction contained in regulations made under this section is guilty of an offence.