



LC Paper No. CB(2)2092/05-06(06)

**Smoking (Public Health) (Amendment) Bill 2005
Submission to the Bills Committee, Legislative Council, Hong Kong
on the proposed Committee Stage amendments (CSAs) to the Bill.**

21 May 2006

Dear Honourable Members,

We note the following problems in the revised CSA (detail in subsequent pages)

1. Giving tobacco products free for use in “cigar tasting rooms” is already illegal under existing law.
2. Giving tobacco products free for use in “tobacco tasting” rooms for R&D or quality control is already illegal.
3. 45% of all restaurants can legally claim to be bars and so escape the ban – yet the public expectation is that 100% of restaurants will be smoke-free starting 1 Jan 2007.
4. Government cannot legally take action to place names on any “list” which will serve to make Government an active, knowing accomplice to the crime of depriving employees of their existing legal right, under the Occupational Safety and Health Ordinance to clean air at work and a safe and healthy workplace.

Therefore, we ask that you have the CSAs changed in the following ways:

- Remove the two illegal “tasting room” exemptions
- Explicitly state in the relevant definition that a “bar” that it does not include premises with a full restaurant license.
- Remove all references to any “lists” or appeal processes or decisions whereby Government becomes a willing accomplice to the crime of “intentionally, knowingly and recklessly” exposing employees to tobacco smoke which Government knows “causes death, disease and disability”

Regards,

Annelise Connell
Chairperson, Clear The Air



Cigar Tasting rooms.

- (c) by adding –
“(4A) Subsection (1) does not apply to a room
designated for cigar tasting in a shop if all the following
requirements are complied with -

Government Justification (LC Paper No. CB(2)962/05-06(01))

cigar sellers “sales mode involves allowing customers to taste cigars in the premises before making any purchase.”

However, Tobacco Control has ruled (Appendix A)

According to Section 15A(2) of Cap. 371, no person shall, for the purposes of promotion or advertisement, give any cigarette, cigarette tobacco, cigar or pipe tobacco to any person. As such, **a cigar salesperson could not take the initiative to give a cigar to a potential customer, with a view to “promote” cigars.** However, there **may** not be a case if the customer makes the request for cigar tasting before making any purchase in a cigar shop.

To determine if there had been a contravention of the ordinance by the seller, the intention of the cigar seller would be the defining factor – not the actions of the customer.

Conclusion:

Government is proposing a loophole that they already know to have been ruled by Tobacco Control to be in contravention of existing law.



Tobacco tasting rooms

- (g) a room designated for tobacco tasting in the manufacturing or business premises of a business engaged in the tobacco trade if all the following requirements are complied with –
- (ii) the tobacco tasting is carried out for the purpose of conducting research and development or quality control of tobacco products in the normal course of the business;

No Government justification offered.

There is no exemption for research and development, or quality control on the existing prohibition of giving tobacco products to induce people to smoke.

We ask that the Honorable Members kindly wait until you have a ruling from Tobacco Control on the request we have made (Appendix B):

It is the current practice of the tobacco industry to hire market research firms to solicit people to participate in product trials. This involves contacting people who may be interested and giving them money for travel costs. When they arrive they are given cigarettes not only to induce them to smoke, but they are not given the cigarettes unless they agree to smoke them. The brand is not listed.

Conclusion:

Since a previous Tobacco Control ruling upheld the ban on actively giving tobacco products to induce people to smoke, it is likely that the ban will also be upheld because for research and development, or quality control it is the intention of the tobacco company to induce people to smoke.

Until Tobacco Control has made a ruling on existing law, this proposed loophole must be assumed to be illegal.



“Bar” definition is faulty

“bar” (酒吧) means any place that is exclusively or mainly used for the sale and consumption of intoxicating liquors as defined in section 53(1) of the Dutiable Commodities Ordinance (Cap. 109);

Note: 45% of all restaurants – those that hold a liquor license - can apply for and get a bar endorsement by just ticking a box (Appendix C)

Relevant facts:

FEHD: Of the 10,475 restaurants in Hong Kong 4,639 – or about 45% can declare themselves to be a “bar” just by ticking a box on an application for a liquor license where they claim they fit the definition above. (Appendix D)

The FEHD has, over Clear The Air’s strong objections, continued to state without proof, *on behalf of the applicant*, that such premises are a “restaurant cum bar” without any legal proof or legal authority to make such a representation to the Liquor Licensing Board.

Liquor Licensing Board: Knowing that this endorsement will be used within the period of the license to “intentionally, knowingly and recklessly” injure employees’ health, the LLB continues to grant “bar endorsements” to “restaurants” despite the strong objections of Clear The Air. We have made a total of about 1,600 objections since May 2006 – establishing that all the license holders are “intentionally, knowingly and recklessly” harming their employees health.

Public: It is the expectation of the public that it will be illegal to smoke in ANY restaurant in Hong Kong after 1 Jan, 2007. Yet, since most of the liquor license holders state to the LLB that they will not go smoke free unless they are required to by law, it is likely that these 4,639 restaurants, or 45% of all restaurants in Hong Kong will continue to allow smoking if they can do so just by ticking the “bar endorsement” box on a Liquor License application form.

Conclusion:

The definition of a bar should explicitly exclude premises that hold a restaurant license.



Shop sign restriction not deterrent.

4. Qualified bar

For the purposes of this Part, an establishment is a qualified bar if all the following requirements are complied with –

- (a) the establishment is a bar in respect of which there is in force a liquor licence relating exclusively to the bar;
- (b) the establishment is permanently and completely partitioned off from any other establishment;
- (c) no displayed name of the establishment contains “酒家”, “酒樓”, “餐廳”, “卡拉 OK”, “網吧”, “restaurant”, “café”, “karaoke”, “internet” or similar expressions; and

To run a smoke-filled restaurant all that is required of a liquor license holder is:

1. Request a bar endorsement
2. Remove the offending words from the shop sign
3. Post this sign international restaurant sign or display fake food in the window

Examples:

Western restaurant



Japanese Restaurant



Conclusion

The definition of a bar must explicitly exclude premises with a restaurant license.



The “Killing List”

11. Appeal to Appeal Board against Director’s decision

The Government is not allowed to contravene the Occupational Safety and Health Ordinance (OSHO) by taking positive action to assist an employer to “intentionally, knowingly and recklessly” harm their employees health.

Since China has signed the FCTC, the Government now accepts “that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease and disability.”

The placing of the name of any premises on a list such as that proposed, together with an elaborate appeals process - whose only purpose is to assist employers to “intentionally, knowingly and recklessly” harm their employees health - contravenes the letter and spirit of the OSHO.

Refusing to enforce the OSHO with regard to tobacco smoke in the workplace – which is Government’s current practice - is one thing.

However, taking active steps and creating a bureaucracy to formalize the practice of depriving employees of clean air at work, which Government knows will be the direct cause of death, disease and disability, would make the Government an accomplice to the crime of failing to provide a safe and healthy workplace.

Conclusion:

1. Clear The Air will submit a full legal argument when we have completed our legal research.
2. If such an illegal scheme is established, Clear The Air will appeal every decision, as we are doing at the Liquor Licensing Board, to add any name to the list. In this case, any member of the public can be identified as the aggrieved party because Government has failed to uphold the letter and spirit of the OSHO. Such an appeal will establish that Government, who acts as a accomplice to the crime, can be held legally liable for all damage to any employee’s health that could have been prevented if the Government had not taken such deliberate action.



Appendix A

Email received by Clear The Air from Tobacco Control on 4.20.2006

Re: Cigar Tasting

Thank you for your email dated 3 March 2006 enquiring whether customers are prohibited from tasting cigars in a cigar shop before making any purchase in relation to the Smoking (Public Health) Ordinance (Cap.371).

According to Section 15A(2) of Cap. 371, no person shall, for the purposes of promotion or advertisement, give any cigarette, cigarette tobacco, cigar or pipe tobacco to any person. As such, a cigar salesperson could not take the initiative to give a cigar to a potential customer, with a view to “promote” cigars. However, there may not be a case if the customer makes the request for cigar tasting before making any purchase in a cigar shop.

Thank you for your interest in tobacco control. We will continue to promote a smoke-free culture in Hong Kong. If you have any further queries, please do not hesitate to contact the undersigned at 2961 8827.

Ms. Agnes LEE)
for Director of Health

Ref.: ENQ/06/00080



Appendix B

Email sent by Clear The Air to Tobacco Control:

Date: 5.2.2006
Subject: Cigarette tasting – rather Urgent

Dear Anges,

Thanks you for this reply. My next question is related and rather urgent - given that the HWFB is planning to exempt "tasting room" for the specific purpose listed below.

It is the practice of the tobacco industry to hire market research firms to solicit people to participate in product trials. This involves contacting people who may be interested and giving them money for travel costs. When they arrive they are given cigarettes not only to induce them to smoke, but they are not given the cigarettes unless they agree to smoke them. The brand is not listed.

We believe this practice is in contravention of the following

Cap 371:

Section: 2 "smoke" (吸煙)、(吸用) means inhaling and expelling the smoke of tobacco or other substance;

Section: 15A (2) No person shall, for the purposes of promotion or advertisement, give any cigarette, cigarette tobacco, cigar or pipe tobacco to any person.

Section: 15D For the purposes of this Part "promotion or advertisement" (推廣或宣傳) means a promotion or advertisement intended as an inducement to purchase, smoke or encourage the use of cigarettes, cigarette tobacco, cigars or pipe tobacco, whether or not with reference to a particular brand.

Can you confirm this for us?



Appendix C

Email from FEHD

Our ref. : (58) in L/M(34) to FEHD HQ 80/414XXIX

Dear Ms Connell,

I refer to your email of 7.2.2006 and would like to provide the following information as at 31.12.2005:-

1. General restaurant licence : 7647
2. General restaurant licence with liquor licence : 3653
3. General restaurant licence with liquor licence and bar endorsement : 425

4. Light refreshment restaurant licence : 2828
5. Light refreshment restaurant licence with liquor licence : 986
6. Light refreshment restaurant licence with liquor licence and bar endorsement : 646

7. Club liquor licence : 466
8. Club liquor licence with bar endorsement. : 51

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Yours sincerely,
(Ms WONG Yi-mui)
for Director of Food and Environmental Hygiene



Appendix E – Liquor License Renewal Application

(請填寫一式三份)
(To be completed in triplicate)

酒牌局 LIQUOR LICENSING BOARD 申請酒牌續期/修訂酒牌 APPLICATION FOR RENEWAL/AMENDMENT OF A LIQUOR LICENCE 《牌照條例》(第119章) 牌照局(酒類)規例 DUTYABLE CONDUCTIVITY ORDINANCE (CAP. 119) DUTYABLE CONDUCTIVITY (ALCOHOL) REGULATIONS

致：酒牌局秘書
To: Secretary, Liquor Licensing Board

茲申請酒牌續期，請填寫此表
I am in this part if you are applying for Renewal of a Liquor Licence

- 申請人姓名：
Name of applicant (中文 (Chinese) / 英文 (English))
- 香港身分證/護照* 號碼：
HKID card/Passport* No. 性別： Sex
- 通訊地址：
Correspondence address (電話號碼： Tel. No. / 傳真號碼： Fax No.)
- 如有轉租處所的地址：
Address of licensed premises (電話號碼： Tel. No. / 傳真號碼： Fax No.)
- 如申請人以持牌人身份申請，請列出持有酒牌的年期：
If the applicant was a holder of Liquor Licence, state the length of time of holding Liquor Licence (年 year(s) / 月 month(s))
- 在該處所經營業務的性質：
Nature of business operated at the premises
- 店名：
Shop sign for the business
- (a) 處所的營業時間：
Opening hours (由 From / 至 to)
- (b) 處所的賣酒時間：
Liquor selling hours (由 From / 至 to)
- (c) 處所最繁忙的營業時間：
The peak business hours (由 From / 至 to)
- (d) 申請人當值時間：
Duty hours of applicant (由 From / 至 to)
- (e) 申請人每週例假：
Weekly day-off of applicant

請在適當方格內填上「/」號。
Please tick the appropriate boxes.

填上合適之處。
Please tick where appropriate.

FBIB 106A (12/2005)

9. 說明所擬議的營業方式。Proposed mode of operation of the establishment:
(a) 是否須加蓋酒吧批註？即該處所是否專門或主要用作出售及供人飲用令人釀醉酒類飲品的地方？
Whether a bar endorsement is required? That is, whether the premises are exclusively or mainly used for the sale and consumption of intoxicating liquors? 是 Yes 否 No
(b) 該處所是否會設置酒櫃檯？Whether a bar counter is to be kept on the premises? 是 Yes 否 No
(c) 是否申請或准許處所內跳舞？Whether permission for dancing is required? 是 Yes 否 No
(d) 是否準備將處所用作酒店？Whether the premises are to be used as a hotel? 是 Yes 否 No
10. 你會否因犯罪事而在香港或其他地方被判罪？
Have you been convicted of any criminal offence in Hong Kong or elsewhere?
 有，請提供詳情，包括定罪性質及日期、判罪性質及罰款。
Yes, please give details of convictions including nature and date of conviction, nature of punishments and fine.

11. 你會否因違反與酒類有關的條例而被定罪？
Have you ever been convicted of an offence relating to liquor selling?
 有，詳情： _____
 否
12. 你會否委任指定的人？(填寫此項前，請參閱第4頁的附註。)
Will any nominee be appointed? (Please refer to the notes on page 4 before filling this item).
 會，請指定的人的全部詳情(中英文姓名、出生日期、地址、香港身分證號碼和中文姓名電話)；
Yes, list their full particulars (name in Chinese and English, date of birth, address, HKID card No. and CCC No.);

本人擬為上述處所申請酒牌，本人明白，倘本人未能在此牌照有效期滿前最少兩個月但不超過三個月期間內向酒牌局提交申請，則該局可能不予辦理。
I intend to apply for renewal of the liquor licence in respect of the abovesaid premises. I understand that if I fail to submit my application to the Board not more than 3 months and at least 2 months prior to the expiry of the licence, the Board may not consider the application.

日期： _____ 簽署： _____
Date Signature (申請人) (Applicant)

14. 申請人的諮詢人。References for Applicant
我等為下述簽署人，在上述申請日期前已在香港居住滿十年，並無直接或間接買賣酒牌予申請人，並證明上述申請人聲譽良好，適宜持有酒牌。
We, the undersigned, having resided in Hong Kong during the whole of the ten years immediately preceding the date of this application, and being in no way directly or indirectly connected with the sale of liquor to the applicant, certify that the above-named applicant is a person of good fame and reputation and fit and proper to hold a liquor licence.

FBIB 106A (12/2005)