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Secretary for Health, Welfare and Food
Health, Welfare and Food Bureau
(Attn: Ms Julina CHAN, PAS(H)3)
19/F, Murray Building
Garden Road
Hong Kong

By Fax (2840 0467) and By Post

3 June 2005

Dear Ms CHAN

Smoking (Public Health) (Amendment) Bill 2005 (“the Bill”)

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

Scope of the smoking ban

Under section 3 of the Bill, the following areas are to be designated as no smoking areas:

- (a) the areas described in Schedule 2; and
- (b) an indoor area in a workplace or public place, other than those areas excluded under section 3(5).

Please clarify the policy intent of the smoking ban in the following:

Indoor area

“Indoor” is defined under section 2 of the Bill to mean:

- (a) having a ceiling or roof, or a cover that functions (whether temporarily or permanently) as a ceiling or roof; and
- (b) completely or substantially enclosed (whether temporarily or permanently), except for any window or door, or any closeable opening that functions as a window or door.

To what extent will an area be enclosed so as to be classified as an indoor area? Will the control or maintenance of temperature inside the area be an index in this aspect?

Public place

“Public place” is defined under section 2 of the Bill to mean:

- (a) any place to which for the time being the public are entitled or permitted to have access, whether on payment or otherwise; or
- (b) *a common part of any premises* notwithstanding that the public are not entitled or permitted to have access to that common part or those premises.

As domestic premises are expressly excluded under section 3(5), it appears that:

- (a) the common area of non-domestic buildings, namely, the corridors, staircases and common toilets etc. are subject to the smoking ban; and
- (b) it is not unlawful to smoke in the common area of domestic buildings.

Please clarify.

Power of manager of a no smoking area

“Manager” is defined under section 2 of the Bill to mean:

- (a) in relation to a no smoking area (other than a lift) or a public transport carrier, includes an assistant manager, any person holding an appointment analogous to that of manager or assistant manager and any person who is responsible for the management, or is in charge or control of the no smoking area or public transport carrier; and
- (b) *in relation to a lift*, includes the *owner, occupier or lessee of the building* in which the lift is situated or the person in charge or control of such building or lift.

If “public place” includes the common area of a non-domestic building, please clarify the policy intent that:

- (a) for the lift(s) of a non-domestic building, manager is defined to include the owner, occupier or lessee of the building, in addition to the person in charge or control of the building or the lift(s); and

- (b) for the common area (excluding the lift(s)) of that non-domestic building, the definition of manager only covers the person who is responsible for the management, or is in charge or control of the building, but not the owner, occupier or lessee of the building.

Section 3(3) of the Bill enables the manager of a no smoking area to:

- (a) require a person who is smoking or carrying a lighted cigarette, cigar or pipe in the no smoking area to extinguish the lighted cigarette, cigar or pipe, give his name and address, produce proof of identity and leave the no smoking area; and
- (b) upon non-compliance of his request, remove the person from the no smoking area by the use of reasonable force if necessary and detain the person and call for the assistance of a police officer to assist in the enforcement of that section.

If an owner or lessee of a non-domestic building smokes or carries a lighted cigarette, cigar or pipe in the common area of the building, it appears that the manager of the building is entitled to exercise the powers set out in section 3(3) and deprive that owner or lessee of his/her right, interest or enjoyment in the common part of his/her property. Please clarify the policy intent in this aspect.

Consequential amendments

In the light of the amendments in the Bill, consequential amendments should be made to regulation 51(1) of the Education Regulations (Cap. 279, sub. leg. A).

Drafting

I enclose my comment on the Chinese text of the definition of “restaurant premises” under section 2 of the Bill.

It is appreciated that your reply in both Chinese and English could reach us by close of play, 8 June 2005.

Yours sincerely

(Monna LAI)
Assistant Legal Adviser

Encl

“公共升降機”(public lift) 指公眾可乘用的升降機，並包括任何可通往個別佔用的樓宇單位、辦公室或其他住宿單位的升降機及包括酒店升降機；

“公共交通工具”(public transport carrier) 指附表 1 所述的任何公共巴士、公共小巴、的士、列車、輕便鐵路車輛、電車、纜車或渡輪，而該公共巴士、公共小巴、的士、列車、輕便鐵路車輛、電車、纜車或渡輪是正在符合附表 1 的情況下運載公眾人士的； (由 1992 年第 9 號第 2 條增補)

“尼古丁量”(nicotine yield) 指調整為小數點後一個位並以毫克表示的每支香煙的尼古丁量； (由 1997 年第 93 號第 2 條增補)

“主要高級人員”(principal officer)

(a) 就某個政府部門而言，指該部門的主管；

(b) 就某個組織或團體而言，指該組織或團體的主管或其他掌管該組織或團體的高級人員； (由 1995 年第 64 號第 37 條增補)

“出售”、“售賣”、“銷售”、“售”(sale, sell) 包括藉以物相易或抽籤的方式處置，但不包括政府透過拍賣對被充公的沒有健康忠告的香煙的處置； (由 1997 年第 93 號第 2 條增補)

“刊登”(publish)，就廣告而言，指以任何方式使人獲悉廣告；

“身分證明文件”(proof of identity) 指為施行《入境條例》(第 115 章) 第 1VA 部的身分證明文件； (由 1997 年第 80 號第 103 條修訂)

“局長”(Secretary) 指衛生福利及食物局局長； (由 2002 年第 106 號法律公告增補)

“吸煙”、“吸用”(smoke) 指吸入與呼出煙草或其他物質的煙；

“食肆”(restaurant) 指依據《公眾衛生及市政條例》(第 132 章) 發發執照的食肆； (由 1997 年第 93 號第 2 條增補)

“香煙”(cigarette) 指用紙或用煙草以外的任何其他物料捲裹，並處於可供即時吸用狀態的煙草；

“香煙煙草”(cigarette tobacco) 指以適合購買者製造香煙自用的方式包裝的煙草；

“規例”(regulations) 指根據第 18 條訂立的規例；

“雪茄”(cigar) 指用煙草捲裹，並處於可供即時吸用狀態的煙草； (由 1994 年第 91 號第 3 條增補)

“商標”(trade mark) 的涵義與《商標條例》(第 559 章) 第 3 條中該詞的涵義相同； (由 1997 年第 93 號第 2 條增補，由 2000 年第 35 號第 98 條修訂)

“牌子”(brand)，除在第 14(3) 條外，包括某一牌子的產品，即牌子相同但作為品類有異於同牌子的另一品種而銷售的品種；

售賣或擬售賣

“食肆處所”(restaurant premises) 指任何符合以下說明的處所——

- (a) 有人在該處所內或從該處所經營《食物業規例》(第 132 章，附屬法例 X) 第 31(2) 條所指的工廠食堂或食肆；或
- (b) 有人在該處所內或從該處所經營符合以下說明的任何其他行業或業務：膳食或非瓶裝的不含酒精飲品(包括涼茶)為或擬為該行業或業務的目的而售賣以供於該處所內進食或飲用(不論該行業或業務是否由持有根據《小販規例》(第 132 章，附屬法例 A1) 發給的牌照的人所經營)；

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