

**For information on
28 February 2008**

**Bills Committee on the
Prevention and Control of Disease Bill**

**Requisition of private properties in a public health emergency and
matters related to compensation**

PURPOSE

This paper explains why the power of requisition under clause 8(2)(c) of the Prevention and Control of Disease Bill (the Bill) complies with the property right guarantee under Articles 6 and 105 of the Basic Law (BL 6 and 105). It also addresses the questions raised by Members at the Bills Committee meeting on 1 February 2008 on whether compensation would be provided to the owners of premises and conveyances, as well as people ordered to be quarantined or isolated for public health purposes, if they suffered financial loss as a result.

BACKGROUND

The scheme of requisition and compensation under the Bill

2. Under clause 8 of the Bill, the Chief Executive in Council may make regulations on an occasion of a public health emergency. Clause 8(2)(c) provides that the regulation may provide for the requisitioning of property and matters relating to compensation for such requisition. The purpose of the regulation is for preventing, combating or alleviating the effects of the public health emergency and protecting public health. Under clause 8(4), “public health emergency” is defined to mean-

- (a) the occurrence of or the imminent threat of a disease, an epidemic or a pandemic;
- (b) the occurrence of a novel, or highly infectious, agent or matter;
or
- (c) the widespread exposure or the imminent threat of widespread

exposure of human beings to an infectious agent,

that has a high probability of causing a large number of deaths in the population or a large number of serious disabilities (whether or not long-term) in the population.

3. Clause 12(1) of the Bill provides that the Director of Health may order the payment of such compensation as is just and equitable in the circumstances where any article is damaged, destroyed, seized, surrendered or is submitted to any person pursuant to the Bill. Clause 12(2) further provides that any disputes as to whether compensation is payable or the amount of compensation may, in default of agreement, be resolved or determined by arbitration in accordance with the Arbitration Ordinance (Cap 341). Such compensation does not apply to compensation which is provided for by regulations made under clause 8.

4. Compensation for requisitioning of properties in a public health emergency will therefore be provided separately in a set of regulations to be made under clause 8 (Public Health Emergency Regulation). It is the policy intent of the Government that under the Public Health Emergency Regulation, any person who sustains loss or damage in consequence of or arising out of the exercise of any requisition power, or is entitled to the use of or rent from any requisitioned property, is entitled to recover such compensation as is just and equitable in the circumstances. It will also include a provision similar to clause 12(2) providing for resolution or determination of any dispute as to whether compensation is payable or the amount of compensation.

PROTECTION OF PRIVATE PROPERTY RIGHTS UNDER BL 6 AND 105

The Provisions

5. BL 6 provides:

“The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law.”

6. BL 105 provides:

“The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law.”

Property

7. Both BL 6 and 105 are concerned with the protection of property rights. In the case of *Michael Reid Scott v the Government of the HKSAR*, HCAL 188/2002, Hon Hartmann J considered the notion of “property” in BL 105. He said (at paragraphs 71 – 72):

“... The word ‘property’ has not been defined [in BL 105] but is qualified by the fact that its ‘acquisition, use, disposal and inheritance’ is protected. Those qualifications, in my view, constitute an aid in interpreting the meaning and extent of ‘property’ as it is used in the article.

If ‘property’ within the meaning of ...[Article] 105 may be acquired, used and disposed of, including disposal by way of inheritance, then it must surely be capable of being brought into possession and being transferred out of possession. In short, it must in most cases have two features: it must be capable of being possessed and of being transferred. I have qualified those attributes with the phrase ‘in most cases’ because I accept of course that in common law the word ‘property’ is of very wide import and when used in a document of constitution demands wide and purposive interpretation.”

8. Hon Hartmann J also held, at paragraphs 77 and 79, that BL 6 and 105

protect only existing property rights, not anticipated rights (e.g. the amount of pay not yet earned). They do not extend their protection to what in effect is no more than an expectation. This approach is consistent with the European jurisprudence on Article 1 of Protocol No. 1 of the European Convention of Human Rights, which protects property rights.¹ As commented in Jessica Simor and Ben Emmerson QC, *Human Rights Practice*, at paragraph 15.009:

“Article 1 of ...[Protocol] No. 1 relates only to ‘existing possessions’. Thus the possibility of acquiring a possession in the future is unlikely to constitute a property right protected by ...[Article 1 of Protocol] No. 1. Nor is any right to acquire or inherit property at some time in the future protected. ... Future income is only a ‘possessions’ once it has been earned, or an enforceable claim to it exists. ...”

9. Under European jurisprudence, the term “possessions” has been held to include intellectual property such as patents: see Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2000), paragraph 18.35.

Deprivation

10. In the light of the local court decisions referred to in the **Annex**, the question of whether there is any “deprivation” of property for the purpose of BL 105 would involve consideration of the following –

- (a) whether any property is formally expropriated by the Government or a Government agency (i.e. where there is a transfer of the title to the property), noting the meaning of “property” discussed in paragraphs 7 – 9 above;
- (b) whether as a matter of substance there is any *de facto* deprivation of property;
- (c) the question (b) above is case specific, a question of fact and

¹ Article 1 of Protocol 1 provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

degree. The primary consideration is whether the measures complained of affect the substance of the property to such a degree that all meaningful use or all economically viable use of the property has been removed or denied.

Compensation – real value

11. BL 105 provides for a right to compensation for lawful deprivation of property and such compensation shall correspond to the real value of the property concerned at the time. In *Penny's Bay Investment Company Limited v Director of Lands*, LDMR23/1999 and LDMR 1/2005 (a case concerning compensation under the Foreshore and Sea-bed (Reclamations) Ordinance (Cap. 127)), Hon Lam J, at paragraphs 42 – 45, held that there was no difference in substance between the real value test laid down in BL 105 and the fair compensation generated from the principle of equivalence succinctly set out by Lord Nicholls in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 2 AC 111 at 125 –

“The purpose of these provisions, in Hong Kong and England, is to provide fair compensation for a claimant whose land has been compulsorily taken from him. This is sometimes described as the principle of equivalence. ... a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a claimant is not entitled to receive more than fair compensation: a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail.”

12. Hon Lam J cited with approval the following three conditions referred to by Lord Nicholls as ones that must be satisfied in the assessment of a fair compensation (at paragraph 45):

- (a) there must be a causal connection between the resumption or acquisition and the loss in question;
- (b) to qualify for compensation the loss must not be too remote;

- (c) those who claim recompense are expected to behave reasonably to eliminate or reduce the loss and to avoid unreasonable expenditure being incurred.

13. Before the case of *Penny's Bay*, the principle of equivalence was applied by the Court of Final Appeal in *Director of Lands v Yin Shuen Enterprises Ltd* [2003] 2 HKLRD 399, a case concerning the issues of whether compensation for land resumed under the Lands Resumption Ordinance (Cap. 124) could include an element of speculation and whether the relevant provision under Cap. 124 which excluded such an element was consistent with BL 105. The Court of Final Appeal held in *Yin Shuen* that BL 105 did not require compensation to be based on the open market value of a property concerned but on its real value. In general, the open market value of a property reflected its real value but this was not always the case. Sometimes the market was prepared to pay a speculative price which exceeded the true value of the property. BL 105 did not require compensation of speculative element. The Court of Final Appeal also held that compensation was only required to be paid for "the property concerned", that is to say for the interest acquired.

Non-deprivation cases

14. For cases of interference with property rights falling short of deprivation, it is arguable that a "fair balance test" developed under the European jurisprudence would apply as an implicit requirement under BL 6 and 105, although there are not yet any local court decisions embracing this test in relation to such non-deprivation cases. Under this test, any interference with property rights would need to strike a fair balance between the demands of the general interest of the society (which any interference with property rights must aim to serve) and the requirements of the protection of the individual's rights. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized. In the European jurisprudence, there is no inherent right to compensation for controls of use, nor, by extrapolation, for interferences with peaceful enjoyment that do not amount to "deprivations". However, when assessing the proportionality of the regulation in question, it will be of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation: see Jessica Simor and Ben Emmerson QC, *Human Rights Practice*, paragraph 15.060.

THE PRESENT CASE

15. It is the policy of the Government that such compensation as is just and equitable in the circumstances of the case will be paid where there is any requisition of property under the Public Health Emergency Regulation, whether such requisition amounts to “deprivation” of property for the purpose of BL 105 or mere interference with property rights (see paragraph 4 above).² The provision of such compensation as is just and equitable in the circumstances is consistent with the principle of equivalence discussed above, i.e. a claimant is entitled to be compensated fairly and fully for his loss. Therefore, the power of requisition and related compensation provisions under clause 8(2)(c) are in conformity with the real value compensation requirement under BL 105.

16. Where any requisition of property under the Public Health Emergency Regulation falls short of “deprivation” for the purpose of BL 105, the Administration is of the view that it is likely to satisfy the fair balance test discussed in paragraph 14 above for the following reasons –

(a) public interest

the Public Health Emergency Regulation will only be made in an occasion of a public health emergency as defined in clause 8(4)(see paragraph 2 above). It is for the purpose of preventing, combating or alleviating the effects of the public health emergency and protecting public health. Further, any power of requisition under the Public Health Emergency Regulation shall be for the purpose of handling a public health emergency;

(b) payment of just and equitable compensation

in the case of any public health emergency requisition, it is the policy of the Government that such compensation as is just and equitable in the circumstances of the case will be paid;

² An example of interference with property rights would be an owner being put out of use of his landed property for a short period as a result of the Government exercising the requisition power. While the owner’s right over his landed property will be interfered with, he is not deprived of his title over the same.

(c) procedural safeguard

The Public Health Emergency Regulation will include a provision similar to clause 12(2) to provide for the resolution or determination of any dispute as to whether compensation is payable or the amount of compensation (see paragraph 4 above).

17. However, it is the Administration's policy that the Public Health Emergency Regulation will not provide for the requisition of intellectual property protected by the Patents Ordinance (Cap. 514). Part IX of the Patents Ordinance has already provided for the use of patents by the Government during a period of extreme urgency as declared by the Chief Executive in Council under the Ordinance for maintaining or securing sufficient supplies and services essential to the life of community and the compensation for such Government use. The Patents (Amendment) Ordinance 2007, which will come into operation on 22 February 2008, further provides for, among other things, the granting of a compulsory import licence for patented pharmaceutical products, and the related remuneration to the proprietor of the patent, if any, to import, put on the market, stock, use or otherwise the generic version of a patented pharmaceutical product, or perform any other act which would amount to an infringement of the patent concerned during a period of extreme urgency as declared by the Chief Executive in Council under the Ordinance to address any public health problem. Unlike the general "Government use" as provided for in the current Part IX, the Amendment Ordinance does not restrict the use to Government, subject to the compulsory licence, and that no remuneration would need to be paid at the importing end if adequate remuneration has been paid to the proprietor of the patent at the exporting end.

COMPENSATION FOR FINANCIAL LOSS

18. As regards any financial loss suffered by owners of premises and conveyances ordered to be isolated, as well as people ordered to be isolated or quarantined, no compensation will be provided for such loss since the relevant isolation or quarantine orders will only last for a short period of time so that the health authority can carry out disease control measures and / or medical

surveillance to prevent the spread of disease. It is unlikely that the premises and conveyances under isolation or affected by the quarantine are suitable for usual economic use (such as carrying out business activities) because of, for example, their being infected and/or the presence of persons detained under isolation or quarantine. In view of these considerations and the importance of the public interest which such isolation or quarantine orders serve to advance (namely, the protection of public health), we consider that notwithstanding the absence of compensation for such financial loss, any interference with property rights arising from the making of these isolation or quarantine orders meets the fair balance requirement referred to in paragraph 14 above.

19. Under the current human rights law, the Government is also not obliged to provide compensation to a person who is lawfully detained for the prevention of the spreading of infectious diseases for any financial loss incurred by him as a result of the lawful detention. Under Article 5(5) of the Hong Kong Bill of Rights, only a person who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Any person who claims that he has been subjected to arbitrary detention in violation of Article 5(1) of the Hong Kong Bill of Rights may apply to the court under section 6 of the Hong Kong Bill of Rights Ordinance (Cap. 383) for such remedy or relief as the court considers appropriate and just in the circumstances.

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Food and Health Bureau
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Notion of “Deprivation” under BL 105

The Court of Appeal considered the notion of “deprivation” in BL 105 in *Kowloon Poultry Laan Merchants Association v Director of Agriculture Fisheries and Conservation* [2002] 4 HKC 277. In that case, the appellants were prohibited by new subsidiary legislation to sell water birds in their rented stalls. The Court of Appeal held that this was not deprivation but rather control of use of land. The following observations made by the European Commission in *Baner v Sweden* (App No.11763/1985, 60 DR 128) were cited with approval (at paragraph 17):

“As regards the question whether the applicant has been deprived of property, the Commission recalls that, according to the established case-law, deprivation of property within the meaning of Article 1 of Protocol No.1 is not limited to cases where property is formally expropriated, i.e. where there is a transfer of the title to the property. ‘Deprivation’ may also exist where the measure complained of affects the substance of the property to such a degree that there has been a *de facto* expropriation or where the measure complained of ‘can be assimilated to a deprivation of possessions’ (cf. Eur. Court H.R., Sporrang and Lonnroth judgment of 23 September 1982, Series A no.52 p. 24 para 63).

It is clear that the applicant has not been formally deprived of his property. He still retains the title to it. The applicant has also not been deprived of his right to fish, including the right to fish with hand-held tackle. What he has lost is his right to exclude others from fishing with hand-held tackle.

Legislation of a general character affecting and redefining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away. There are many examples in the Contracting States that the right to property is redefined as a result of legislative acts. ...”

2. The Court of Appeal, at paragraph 18, further held:

“... If the appellant be correct in the view that they have taken, then it follows that future legislative restrictions on land use, such as planning control and zoning, can amount to ‘deprivation of property’ and would have to be compensated for under art 105. That cannot be correct and underlines the fallacy of the argument presented by the appellants.”

3. In *Kaisilk Development Ltd v Urban Renewal Authority* [2004] 1 HKLRD 907, the Court of Appeal considered again the effect of restrictions imposed by general regulatory laws on the use of property. The case concerned the now repealed Land Development Corporation Ordinance under which the Land Development Corporation (“LDC”) could prepare development scheme for approval by the Town Planning Board and request the Secretary for Planning, Environment and Lands to make a recommendation that land be resumed if the LDC was unable to acquire the land which was subject to the urban renewal project.

4. The plaintiff there argued that it was deprived of the right to use and dispose of its property by the “blighting effect” of the LDC scheme approved by the Town Planning Board in 1995 by reason of which it could no longer develop, mortgage or sell the property under the threat of resumption. The plaintiff sought to argue that BL 105 supported its claim that the blighting effect of the LDC’s development scheme on its property assisted in creating a cause of action against LDC for breach of statutory duty. The Court of Appeal rejected this argument.

5. The Court of Appeal (para 33 at 920I) referred to the following opinion of the Privy Council given by Lord Hoffmann in *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583C:

“It is well settled that restrictions on the use of property imposed in the public interest by general regulatory laws do not constitute a deprivation of that property for which compensation should be paid. The best example is planning control ...

The give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest.

The principles which underlie the right of the individual not to be deprived of his property without compensation are, first, that some public interest is necessary to justify the taking of private property for the benefit of the state and, secondly, that when the public interest does so require, the loss should not fall upon individual whose property has been taken but should be borne by the public as a whole. But these principles do not require the payment of compensation to anyone whose private rights are restricted by legislation of general application which is enacted for the public benefit. This is so even if, as would inevitably be the case, the legislation in general terms affects some people more than others.”

6. The Court of Appeal (at paragraph 40) further held that:

“There is then the fact that the so-called blight amounts at the most to a restriction: it does not amount to an acquisition by the defendant of the plaintiff’s property. The plaintiff’s property is acquired on resumption.....”

7. In the case of *Weson Investment Ltd v Commissioner of Inland Revenue* [2007] 2 HKLRD 567, the Court of Appeal held that BL 105 has no application to legitimate taxation, which was governed under BL 108 such that when the Government imposes taxation, of necessity it deprived the taxpayer of his property without any right to compensation. It decided that the word “deprivation” in BL 105 was used in the sense of “expropriation” which was the expression used in its original Chinese text (namely, “徵用”). Genuine action taken to assess and enforce payment of tax, even if subsequently found to be wrong, did not come within the scope of lawful expropriation of property under BL 105 (paragraphs 18 – 20, 79 and 82).

8. The above approach of interpreting the meaning of “deprivation” was followed by the Court of First Instance in *Harvest Good Development Ltd v Secretary for Justice & Ors* [2007] 4 HKC 1 and *Hong Kong Kam Lan Koon Ltd v Realray Investment Ltd (No.5)* [2007] 5 HKC 122.

9. However, in *Fine Tower Associates Ltd v Town Planning Board* CACV 356/2006, the Court of Appeal held that the reliance on the Chinese language version of BL 105 (which, in the event of discrepancy between the English and

Chinese versions, must prevail³) was of no consequence for it was to the reality rather than to the form to which the courts would look to see whether there had been expropriation, and that if the effect of regulation was to denude a property of all meaningful economic value, deprivation in the sense intended by BL 105 had occurred even though through no formal act by that name. In its view, it was well established that action adversely affecting use of property, despite falling short of formal expropriation, may in certain circumstances nonetheless properly be described as deprivation in which case there is a right to compensation. To ascertain whether there had been a deprivation, the Court looked to the substance of the matter rather than to the form. Absent a formal expropriation, the question whether there had been a *de facto* deprivation of property is perforce case specific, a question of fact and degree: “The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” (paragraphs 16 – 19).

10. On the above question when will a regulation or other government act be seen as going too far, the Court of Appeal, having reviewed the jurisprudence of the European Court of Human Rights and of the United States courts, held that *de facto* deprivation for the purpose of establishing a right to compensation contemplates the removal or denial of all meaningful use, or all economically viable use, of the property (paragraphs 19 – 25). In this regard, the Court of Appeal, at paragraph 21, cited with approval the following summary in Mulcahy (ed), *Human Rights and Civil Practice* of the approach taken by the European Court on the issue of *de facto* deprivation (at paragraph 16.72):

“A *de facto* expropriation of this kind can only occur where there has been so substantial an interference with the ownership and use of the possession concerned that it effectively equates to the total extinction of ownership notwithstanding the fact that the owner retains legal title. Deprivation may thus occur if the owner is deprived of all meaningful use of his property. However, any form of provisional or temporary loss of rights is very unlikely to constitute deprivation. Equally, interferences which do not affect the value of possession at all, or which affect its value to a severe degree but not so as to render it worthless, are also

³ The decision of the Standing Committee of the National People’s Congress adopted on 28 June 1990 provides: “... the English translation of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China which has been finalized upon examination under the auspices of the Law Committee of the National People’s Congress shall be the official English text and shall be used in parallel with the Chinese text. In case of discrepancy between the two texts in the implication of any words used, the Chinese text shall prevail.”

unlikely to be considered deprivations. A finding of *de facto* expropriation is accordingly, and is likely to remain, extremely rare.”