



中華人民共和國香港特別行政區政府總部食物及衛生局

Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

本局檔號 Our Ref : FH CR 1/2576/18
來函檔號 Your Ref : LS/B/21/17-18

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Assistant Legal Adviser
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5 October 2018

Dear Mr IP,

Conservation of Antarctic Marine Living Resources Bill

Your letter of 3 October 2018 seeking further clarifications on the captioned Bill refers. Our responses are set out below.

Clause 15(3)(b)

2. As a matter of administrative law principles, a decision/act of a public officer is normally amenable to judicial review on the ground (amongst others) that it is *Wednesbury* unreasonable. In the event an authorized officer, when exercising the power under clause 15(3)(b), uses necessary force in an unreasonable manner, that exercise of the power may be held by courts as unlawful. In other words, it can never be lawful to use unreasonable force for the purpose of clause 15(3)(b). Furthermore, as to whether/how the courts would interpret a necessary power to be (also) a reasonable one, we would like to refer to two relevant court cases below.

3. In *R v Chief Constable of Devon and Cornwall exp Central Electricity Generating Board* [1982] QB 458, the electricity board was empowered by the legislation to enter upon and survey any land for purposes of the functions of the

board¹. It was held that the board was entitled to use force no more than is reasonably necessary so as to prevent any unlawful obstruction of the exercise of the power. Such common law basis to use reasonably necessary force in exercising public powers to avoid obstruction was acknowledged and applied in Hong Kong, see *Lai Man Lok v Director of Home Affairs* HCAL 183/2013.

4. In *HKSAR v Osunwoke* [2018] 2 HKC 575, the issue in dispute was whether there was a lawful arrest effected under section 50(2) of the Police Force Ordinance (Cap. 232), which empowers police officers in the circumstances to ‘use all means necessary to effect the arrest’. The court held that the arrest was unlawful because the force used by the police in the case was unreasonable. It appears that, besides construing that a necessary power has to be used reasonably, this case shows the judicial view that a statutory provision for a necessary power does not displace the common law basis that the power may be used with reasonably necessary force.

5. Based on the above judicial authority, we consider it not necessary to particularly refer to ‘reasonable force’ in the clause.

Clause 18(1)

6. Clause 18(1) provides for the necessary enforcement powers to stop a person or, if the person is in or on a transport, stop and board the transport, to require the person to state the person’s name and address and produce the person’s proof of identity for inspection. The power to verify a suspect’s identity and obtain his or her address is an essential part of enforcement action; and the enforcement department considers that such power is necessary for the purposes of enforcement of the Ordinance. On the other hand, it is believed that, unlike an inspection under clauses 13(2) and 14(3), invasion of privacy of persons that may possibly be entailed by clause 18 is comparatively low. Similar provisions are also found in section 36 of the Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586) and section 35 of the Genetically Modified Organisms (Control of Release) Ordinance (Cap. 607). We consider that it is not necessary to have a provision similar to clauses 13(2) and 14(3).

¹ Obstruction of the board’s exercise of power in the case was a criminal offence under the legislation, which was similar to clause 27(1) of the Bill.

Clauses 31(4) and 32

7. We will consider moving Committee Stage amendment to expressly make it clear that only evidential burden is required.

Yours sincerely,



(Ben GURUNG)

for Secretary for Food and Health

cc

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