



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

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本函檔號 OUR REF : LS/B/11/18-19
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By Fax (2840 0467)

3 June 2019

Miss Carol WONG
Assistant Secretary for Food and Health (Health) 5A
Food and Health Bureau
19/F, East Wing
Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Miss WONG,

Smoking (Public Health) (Amendment) Bill 2019 ("the Bill")

Further to our letter dated 4 April 2019 (LC Paper No. CB(2)1175/18-19(01)) ("Our Letter"), please find attached the following schedules:

- (a) Schedule I, which sets out our clarification sought in respect of the Administration's response as contained in its letter dated 15 May 2019 (LC Paper No. CB(2)1431/18-19(04)) ("the Admin's Letter") to our observations stated in Our Letter; and
- (b) Schedule II, which lists our observations in relation to the Chinese text of the Bill.

We would be grateful if you could let us have the Administration's response in bilingual form as soon as possible, preferably before close of play on 18 June 2019.

Yours sincerely,



(Wendy KAN)
Assistant Legal Adviser

c.c. Department of Justice
(Attn: Mr Manuel NG, Senior Government Counsel and
Miss Celia HO, Government Counsel) (By Fax: 3918 4613)
Legal Adviser
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Schedule I

Clarification sought in respect of the Admin's Letter

Paragraph 2 of the Admin's Letter

1. Please provide the Administration's response to the issues contained in paragraph 15 of the letter from Messrs Herbert Smith Freehills dated 18 February 2019 (LC Paper No. CB(2)830/18-19(01)).

Paragraph 4 of the Admin's Letter

2. Please elaborate the following arguments put forward by the Administration in paragraph 4 of the Admin's Letter for satisfaction of the third and fourth steps of the proportionality test as laid down in *Hysan Development Co. Ltd v Town Planning Board* (2016) 19 HKCFAR 372:
 - (a) the proposed full ban is not disproportionate to the accomplishment of that legitimate aim, as there are no less restrictive measures that can achieve the very high level of public health protection; and
 - (b) the pursuit of the societal benefits of the ban would not result in an unacceptably harsh burden on people who wish to use alternative smoking products ("ASP").

Paragraph 5 of the Admin's Letter

3. Please explain the reason(s) for the Administration's assessment mentioned in paragraph 5 of the Admin's Letter that the Bill would not give rise to deprivation of property requiring real value compensation under the Basic Law.

Paragraph 7 of the Admin's Letter

4. Please explain the grounds for the Administration's view that the proposed full ban under the Bill does not engage Article XI (General Elimination of Quantitative Restrictions) of the General

Agreement on Tariffs and Trade 1994 as stated in paragraph 7 of the Admin's Letter.

Paragraph 8 of the Admin's Letter

5. Please explain the reason(s) for the Administration's views in relation to the Investment Promotion and Protection Agreements as expressed in paragraph 8 of the Admin's Letter.

Paragraphs 26 to 27 of the Admin's Letter

6. Please provide the Administration's response to the observation set out in paragraph 9(a) of Our Letter.

Paragraphs 31 to 33 of the Admin's Letter

7. Pursuant to regulation 8 of the Pharmacy and Poisons Regulations (Cap. 138A), nothing in the Pharmacy and Poisons Ordinance (Cap. 138) or Cap. 138A (except its Parts 6, 7, 8, 9 and 10) shall apply to nicotine in tobacco. In the circumstances, please clarify whether only item 2.3 of Category 2 or any item of Category 2 of ASP, upon registration as a pharmaceutical product, could be sold to any persons in any retail shop (i.e. the restrictions referred to in paragraph 11(b)(ii) and (iii) and (c) of Our Letter do not apply).

Paragraph 34 of the Admin's Letter

8. Please clarify, after an inspector appointed under section 15F of Cap. 371 ("Inspector") has determined to release an article which is removed or detained by him or her pursuant to the proposed new section 15DG(1) of Cap. 371, whether the article will be returned to the person who is entitled to it. If so, please consider providing so, including the relevant procedure involved, in Cap. 371.

Paragraph 35 of the Admin's Letter

9. Please consider providing expressly in Cap. 371, as in other Ordinances, such as section 15B(2)(f) of the Waterworks Ordinance (Cap. 102), that the power of an Inspector to detain a person pursuant to the proposed new section 15DG(2) of Cap. 371 is only for a reasonable time.

Paragraph 36 of the Admin's Letter

10. Please clarify how ASP is to be dealt with after it has been removed or detained by a Customs and Excise officer ("C&E Officer") pursuant to the proposed new section 15DH(3) of Cap. 371. Would the situation be similar to that as applicable to an Inspector who has removed or detained an article pursuant to the proposed new section 15DG(1) of Cap. 371 as mentioned in paragraph 34 of the Admin's Letter? If so, please note the observations contained in the above paragraph 8 of this Schedule.
11. According to paragraph 36 of the Admin's Letter, a C&E Officer may detain an article suspected to be ASP until the handing over of the article to officers of the Department of Health ("DH") for examination and to determine whether the article should be seized and transferred to DH Inspectors for follow up. However, the proposed new section 15DH(4) of Cap. 371 only provides that if an article which is seized by a C&E Officer may be retained in the custody of a C&E Officer until it is transferred to an Inspector for the enforcement of the proposed new section 15DA of Cap. 371. Please clarify.

Paragraphs 37 and 38 of the Admin's Letter

12. It is noted the proposed new section 15DH(5) of Cap. 371 does not expressly specify the time within which a C&E Officer may detain a person pursuant to that section. Given that a C&E Officer may, as stated in paragraph 37 of the Admin's Letter, detain such person who was found in possession of suspected ASP at any entry point until DH officers arrive at the scene to take over the subject person and ASPs for follow-up investigation and prosecution as appropriate, please consider amending that section to provide so (i.e. a person may only be detained by a C&E Officer for a short period of time).
13. Please provide the Administration's response to the observations set out in paragraph 14(b) and (c) of Our Letter.

Schedule II

Observations in relation to the Chinese text of the Bill

Clause 4(9) of the Bill

1. Under the proposed section 2(1) of the Smoking (Public Health) Ordinance (Cap. 371), it is noted that while a definition of "宣傳" is provided for in the Chinese text, no equivalent definition is provided for in the English text. Please clarify.

Clause 5 of the Bill

2. Under the current section 3(2A) of Cap. 371, "smoking or carrying a lighted cigarette, cigar or pipe" in the English text is rendered as "吸煙或攜帶燃着的香煙、雪茄或煙斗" in the Chinese text. Please consider amending the Chinese rendition to be "吸用或攜帶燃着的香煙、雪茄或煙斗", which is the Chinese rendition of "smoking or carrying a lighted cigarette, cigar or pipe" in the English text of paragraph (a) of the proposed new definition of "smoking act" in the proposed section 2(1) of Cap. 371. That paragraph (a) is the smoking act which the current section 3(2A) of Cap. 371 deals with. The use of "吸煙" as the Chinese rendition of "smoking a lighted cigarette, cigar or pipe" in the English text in the context of the current section 3(2A) of Cap. 371 may not be appropriate, as "吸煙" (i.e. smoking) in the proposed section 2(1) of Cap. 371 also includes the inhaling and expelling of aerosol generated by or from ASP, which is not relevant to the current section 3(2A) of Cap. 371.

Clauses 18(4) and 27(19) of the Bill

3. Under the proposed section 14(1)(b) of, and the proposed section 4(b) of Schedule 5 to, Cap. 371, it is proposed that the Chinese renditions of "promote" in the English texts be changed from "推廣" to "提倡". Please explain the reason(s) for proposing such changes. Please note that "promotion", "promoting" or "promote" in the English texts of the long title of the Bill and other existing, proposed and proposed new provisions of Cap. 371, such as the current section 15B(1), the proposed section 15A(3)(c) and the proposed new section 15DA(1)(d)(i), is rendered as "推廣" in the Chinese texts.

Clause 21(2) of the Bill

4. In the proposed section 15A(3)(a) of Cap. 371, "no person shall sell, offer for sale or give a conventional smoking product ("CSP") to any person in exchange for a token" in the English text is rendered as "任何人不得接受或要約接受換物憑證作為交換，而將傳統吸煙產品售賣或給予任何其他人" in the Chinese text. "No person shall offer for sale CSP to any person in exchange for a token" in the English text is not equivalent to "任何人不得要約接受換物憑證作為交換，而將傳統吸煙產品售賣予任何其他人" in the Chinese text. Please consider amending the Chinese text of the proposed section for the sake of consistency.

Clause 23 of the Bill

5. Under the proposed new section 15DH(2) of Cap. 371, "第(1)(a)條" in the Chinese text should be "第(1)(a)款" instead, as the Chinese rendition of "subsection (1)(a)" in the English text.