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LEGAL SERVICE DIVISION
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31 July 2020

Mr HO Tze-ao, Ronald
Assistant Secretary for Food and Health (Health)1A
Food and Health Bureau
19/F, East Wing
Central Government Offices
2 Tim Mei Avenue
Tamar
Hong Kong

Dear Mr HO,

**Prevention and Control of Disease (Regulation of Cross-boundary
Conveyances and Travellers) Regulation (L.N. 142 of 2020) and
Prevention and Control of Disease (Wearing of Mask)
(Public Transport) Regulation (L.N. 143 of 2020)**

We are scrutinizing the captioned Regulations with a view to advising Members on their legal and drafting aspects. To facilitate Members' consideration of the captioned Regulations, we would be grateful if you could clarify the following issues.

L.N. 142

Under section 3(1) of L.N. 142, a health officer or an authorized officer acting on the advice of a health officer may exercise any power prescribed under section 3(2) (e.g. prohibiting an aircraft from landing in Hong Kong and the disembarkation of any person from a specified conveyance) if any condition specified under section 5(1) ("specified condition") is not met in relation to any relevant traveller on the conveyance. Section 4(1) of L.N. 142 makes it an offence for each of the operators (e.g. the owner, pilot in command, or the person in charge) of a conveyance arriving from a place outside Hong Kong if any

specified condition is not met in relation to any relevant traveller on the conveyance. Under section 5(1) of L.N. 142, for the purposes of sections 3(1) and 4(1), the Secretary for Food and Health ("the Secretary") may, by notice published in the Gazette, specify conditions for relevant travellers.

By G.N.(E.) 83 and G.N.(E.) 87 of 2020 published in the Gazette on 17 and 22 July 2020 respectively, the Secretary has, among others, specified the following conditions:

- (a) for relevant travellers of a civil aviation aircraft ("specified aircraft") - to provide (i) documentary proof of a negative COVID-19 nucleic acid test result and (ii) a confirmation of a room reservation in a hotel in Hong Kong for not less than 14 days starting from the date of their arrival in Hong Kong; and
- (b) for operators of a specified aircraft - to submit to the Department of Health before the specified aircraft arrives at Hong Kong a document in a specified form confirming that each relevant traveller has, before being checked-in for the flight to Hong Kong on the specified aircraft, produced for boarding on the aircraft the above documentary proof.

Please let us have your response to the following:

- (a) as stated in paragraph 23 of the Legislative Council Brief issued by the Food and Health Bureau on 17 July 2020 (with no file reference), the regulatory regime empowers the Secretary to impose conditions based on the public health grounds for relevant travellers coming from high-risk places. Please clarify the legislative intent as it appears that the imposition of a condition on the operators of the specified aircraft under the abovementioned notices is not within the scope of section 5(1) of L.N. 142 which only empowers the Secretary to specify conditions for relevant travellers; nor does section 6 which relates to the duty of an operator of a specified conveyance to provide information as required appear to empower the Secretary to specify any conditions for an operator of a specified conveyance by way of a notice published in the Gazette; and

- (b) section 6(1) of L.N. 142 empowers a health officer or an authorized officer acting on the advice of a health officer to require an operator of a specified conveyance to provide, among others, information in a specified form confirming the meeting of the conditions specified under section 5(1) of L.N. 142 for the relevant travellers on the conveyance. Failure to comply with a requirement under section 6(1) is an offence punishable by a fine at level 5 (\$50,000) and imprisonment for six months. Please let us know the reason(s) for the Secretary to impose a condition similar to the above requirement on the operator of a specified aircraft under the abovementioned notices.

L.N. 143

Section 4 of L.N. 143 requires a person to wear a mask (including any covering worn over the nose and mouth to provide protection against infection or air pollution) at all times when he/she is boarding or on board a public transport carrier; or entering or present in an MTR paid area during any specified period except for a person under two years old or with lawful authority or reasonable excuse for not doing so. Under section 6 of L.N. 143, a person who fails to comply with the requirement to wear a mask commits an offence punishable by a fine at level 2 (i.e. \$5,000).

Please let us have your response to the following:

- (a) L.N. 143 imposes a mandatory requirement to wear a mask at all times on a public transport carrier or in an MTR paid area during a period specified by the Secretary, failing which, a person may be denied boarding to a public transport carrier or entry to an MTR paid area; or be removed from such carrier or paid area (with reasonable force if the police officer considers necessary and proportionate to ensure compliance). In light of Article 28 of the Basic Law and Article 8 of the Hong Kong Bill of Rights in section 8 of the Hong Kong Bill of Rights Ordinance (Cap. 383), please clarify whether (and, if so, why) the requirements/restrictions imposed under L.N. 143 could satisfy the four-step proportionality test as laid down in the case of *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372;

- (b) it is noted that under section 3 of the Prohibition on Face Covering Regulation (Cap. 241K),¹ a person must not use any face covering (e.g. a mask) that is likely to prevent identification while the person is at, among others, an unlawful assembly (whether it is a riot or not) or unauthorized assembly (section 3(1)(a) and (b)). Contravention of such prohibition is an offence punishable by a fine at level 4 (i.e. \$25,000) and imprisonment for one year. In the event that a person is at an unlawful or unauthorized assembly in an MTR paid area or on a public transport carrier, the requirement to wear a mask under L.N. 143 and the prohibition against using any face covering under Cap. 241K would come into conflict. Please let us know the Administration's position in relation to the enforcement of the abovementioned provisions under such circumstances;
- (c) under sections 4(2) and (3) of L.N. 143, a person would have a reasonable excuse for not wearing a mask if the person cannot put on, wear or remove a mask (i) because of any physical or mental illness, impairment or disability; or (ii) without severe distress. In such circumstances, please let us know whether it is necessary for the person concerned to prove such illness, impairment, disability or distress (in particular those illnesses/disabilities which are not observable) when he/she boards a public transport carrier or enters an MTR paid area. Please also let us know whether the person bears a legal or evidential burden of proof in relation to any such illness, impairment, disability or distress if he/she is prosecuted for the offence; and
- (d) section 4(3)(f) of L.N. 143 provides for another reasonable excuse for not wearing a mask where the person is required by a public officer (who is performing a function of the officer) to remove a mask the person is otherwise wearing. Please explain in what circumstances section 4(3)(f) would apply and let us know the relevant statutory provisions.

¹ In the Court of Appeal's Judgment in CACV 541, 542 & 583/2019 handed down on 9 April 2020, the constitutionality of section 3(1)(a) and (b) was upheld.

We would appreciate if you could let us have your reply (in both English and Chinese) by 10 August 2020.

Yours sincerely,



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