

THE HONG KONG CONSTRUCTION ASSOCIATION'S FURTHER SUBMISSIONS ON NOISE CONTROL (AMENDMENT) BILL 2001

Position of “public officers” under the existing Noise Control Ordinance (Cap. 400) and Non-imposition of criminal liability on heads and responsible officers of government departments acting by way of “Trading Funds”

The existing Noise Control Ordinance (Cap. 400)

1. Section 38(2) of the existing NCO bars criminal proceedings against “*public officers*” when they are acting in the course of their duty, and hence exempts them from any formal control under the NCO.
2. This blanket exemption in favour of government departments and civil servants is understandable when they are the public regulators protecting the broader interests of the public. They supervise the private sector and ensure that private sector organisations would comply with the law. They have discretion to commence prosecutions against companies or individuals in the private sector when those companies or individuals commit acts and/or omissions against the law.
3. However, when the government departments are not acting the regulator role but providing a service to other government department or the public, they should be bound by the law like any other body and should not be exempted from criminal proceedings.

The Trading Funds

3. A bigger anomaly arose with the establishment of “Trading Funds” under the Trading Funds Ordinance (Cap. 430), enacted by the Legislative Council on 10th March 1993.
4. A “trading fund” is a financial and accounting arrangement which enables a government department, or part of a government department, to operate as a private and commercial business whilst remaining as part of the SAR Government. These trading fund operations will remain as government departments. Their assets will remain as government assets. Their staff will remain civil servants.
5. There are at present :-
 - a Companies Registry TF
 - a Land Registry TF
 - 4 Sewage Services TFs

- a Electrical and Mechanical Services TF
 - a Office of the Telecommunications Authority TF
 - a Post Office TF.
6. The stated aims of these trading funds are to improve the quality of service to the customers, and to inject commercial imperatives into where is perceived to be a civil service/bureaucratic culture, by making government departments (operating as trading funds) to compete against private sector organisations in the provision of services to the public and to other SAR Government departments.
 7. An example is that the Electrical & Mechanical Services TF has recently won a contract from the Airport Authority to manage and maintain E&M hardwares in the Chek Lap Kok Airport against competition of other private sector contractors.
 8. Whilst the HKCA applauds all government initiatives to improve efficiency in the public sector, in connection with commercial activities undertaken by the trading funds there should, the HKCA submits, be a level playing field.
 9. Being a government department, or being part of a government department, means that a trading fund enjoys all privileges and exemptions granted in favour of the SAR Government by all public statutes, even though it is a commercial operation competing against the private sector. These privileges include exemption from prosecutions granted by Section 38(2) of the Noise Control Ordinance (as well as exemptions from other statutes such as the Air Pollution Control Ordinance, Water Pollution Control Ordinance, Waste Disposal Ordinance, etc).
 10. In other words, private sector contractors are competing against a trading fund with one hand tied behind their backs, notwithstanding both sides are competing and tendering for the same business on a commercial basis. This appears to be a fundamental inconsistency outlawed by Article 25 of the Basic Law, namely, “*All Hong Kong residents shall be equal before the law*”.

The Noise Control (Amendment) Bill 2001

11. Broadly, a new **Section 28A** “*Liability of directors*” is proposed to be inserted into the existing NCO, to make the executive directors and managers personally and automatically liable for the same statutory criminal offence committed by the body corporate.
12. Thus, the existing anomaly is further aggravated. If a private contractor contravenes the NCO, the company itself is liable for prosecution under the

existing NCO, and its directors and officers will also be automatically and personally liable for the same criminal offence if the Amendment Bill is to be enacted.

13. By contrast if a trading fund, say E&M Services Trading Fund, contravenes the NCO, not only will it be exempted from any criminal liability, there shall also be no automatic criminal liability imposed on the Manager of the E&M Services Trading Fund, or more higher up to the Director of E&M Services.
14. The HKCA respectfully submits unless the SAR Government obeys the same law as the private sector - at least in this regard - the Amendment Bill should be dismissed.