

HONG KONG ENVIRONMENTAL LAW ASSOCIATION COMMENTS

**Directors Liability for Noise Offences
The Noise Control (Amendment) Bill 2001**

Supplemental Points

There were two points in respect of which further assistance was requested at the meeting on 22 March 2002:

1. clarification of the basis upon which it was argued that the provisions as drafted were capable of having potential human rights implications.
2. the position with regard to Mr Bachner's letter to the South China Morning Post dated 27 February 2000.

1. Human Rights

- (1) We explained that under the proposed drafting the prosecution would no longer need to show a "guilty mind". The statutory defence is not available for directors of companies to offences under Sections s.6(1)(a), s.6(2)(a) or s.6(3)(a) NCO, namely regarding noise from construction sites. Under the present drafting, a director or other officer is guilty of a criminal offence merely by virtue of his office as a director in the company and receipt of a s.28B notice.
- (2) For other offences there is no need to show knowledge or consent, connivance, negligence or omission as with air and water offences, and many other Ordinances imposing a personal liability on directors/officers for offences committed by their companies, (alternatively there is no defence of lack of knowledge or that the offence was committed without consent, connivance etc). (Attachment 1 is a marked up version of the examples provided by the administration to the Bills Committee in Paper No. 2 showing common defences requiring knowledge or consent. Attachment 2 contains further examples of offences of personal liability.)

- (3) As presently drafted the defence provided is that the director took reasonable precautions and exercised due diligence to prevent the commission of the offence by the company. However, in practice, not every director has responsibility for establishing a proper system or control over the operation of the system at every site or specified place or even has any knowledge of the measures required. For example, the finance director could be charged and might be unable to argue that he was in a position to establish a system to prevent noise at a site.
- (4) The concern was that individuals could be potentially liable to personal conviction and to receive a criminal record for the offences of their companies without their knowledge or guilt. Our concern was that this might be capable of having human rights implications.

2. Letter of SCMP

The points raised are legal concerns rather than environmental matters. The concern is that it is necessary to show that an individual is in some way culpable, ie by showing their knowledge or consent, connivance, negligence or omission (or provide a defence of lack of knowledge or that the offence was committed without connivance, consent etc), and that the basic principles in respect of noise offences should be consistent with air, water and other legislation regarding liability for offences committed by corporate bodies. You will note that various suggestions were also contained in the paper. The letter written to the South China Morning Post by Mr Bachner briefly set out his understanding of the effect of the proposed amendments at the time. However having considered the potential legal effect of these amendments in detail, Mr Bachner shares the concerns set out in the paper which was submitted. The Tang Committee have also made various recommendations since the Bill was originally presented. Finally, we would like it to be reflected that our comments were provided at very short notice and prepared with the aim of helping the Committee, and to assist in the consideration and formulation of any amendments to the NCO.

Annex B

**Examples of Legislations Holding the Management Liable
for Offences Committed by the Body Corporate**

1	Chapter 60 Section 36A	<p>IMPORT AND EXPORT ORDINANCE</p> <p>Where an offence under section 36 is committed by a body corporate, <u>every person who, at the time of the commission of the offence, was a director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity</u>, shall be guilty of the like offence <u>unless he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of the offence.</u></p>
2	Chapter 137 Section 10	<p>ANTIBIOTICS ORDINANCE</p> <p>(2) Where an offence under this Ordinance has been committed by a body corporate, <u>every person who at the time of the commission of the offence was a director, general manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity</u>, shall be deemed to be guilty of that offence <u>unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.</u></p>
3	Chapter 173 Section 2(2)	<p>CIVIL AVIATION (BIRTHS, DEATHS AND MISSING PERSONS) ORDINANCE</p> <p>Where such an offence as aforesaid has been committed by a body corporate, <u>every person who at the time of the commission of the offence was a director, general manager, secretary or other similar officer of the body corporate, or was purporting to act in any such capacity</u>, shall be deemed to be guilty of that offence, <u>unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.</u> In this subsection the expression "director" (董事) includes any person occupying the position of director by whatever name called.</p>

4	Chapter 211 Section 27B	<p>AERIAL ROPEWAYS (SAFETY) ORDINANCE</p> <p>Where an offence under this Ordinance has been committed by a body corporate, <u>any person who at the time of commission of the offence was a director, manager, secretary or other similar officer thereof, or who was purporting to act in any such capacity</u>, shall also be guilty of such offence <u>unless he proves that the offence was committed without his consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.</u></p>
5	Chapter 262 Section 9	<p>CHIT-FUND BUSINESSES (PROHIBITION) ORDINANCE</p> <p>(1) If an offence under this Ordinance has been committed by a body of persons, whether corporate or unincorporate, any person who was, at the time of the offence, <u>a director, partner, member, manager, secretary or principal officer of or employed by such body, or who was purporting to act in any such capacity</u>, shall be guilty of a like offence.</p>
6	Chapter 295 Section 16	<p>DANGEROUS GOODS ORDINANCE</p> <p>Where a person by whom an offence under this Ordinance has been committed is a company, <u>every director and every officer concerned in the management of the company</u> shall be guilty of the like offence <u>unless he proves that the act constituting the offence took place without his knowledge or consent.</u></p>
7	Chapter 303 Section 23	<p>RADIATION ORDINANCE</p> <p>Where a person by whom an offence under this Ordinance has been committed is a company, <u>every director and every officer concerned in the management of the company</u> shall be guilty of the like offence <u>unless he proves that the act constituting the offence took place without his knowledge or consent.</u></p>
8	Chapter 327 Section 31	<p>LIFTS AND ESCALATORS (SAFETY) ORDINANCE</p> <p>Where a person by whom an offence under this Ordinance has been committed is a company, <u>every director and every officer concerned in the management of the company</u> shall be guilty of the like offence <u>unless he proves that the act constituting the offence took place without his knowledge or consent.</u></p>

9	Chapter 355 Section 4	PYRAMID SELLING PROHIBITION ORDINANCE
		<p>(1) Where an offence under this Ordinance has been committed by a body corporate or member of a body unincorporate, any person who at the time of the offence-</p> <p>(a) <u>in the case of a body corporate, was a director, secretary, principal officer or manager of that body corporate; or</u></p> <p>(b) <u>in the case of a member of a body unincorporate, was a partner or office holder in or member or manager of that body unincorporate,</u> or who, in either case, was acting or purporting to act in any such capacity commits a like offence.</p>
10	Chapter 384 Section 5	DANGEROUS GOODS (CONSIGNMENT BY AIR)(SAFETY) ORDINANCE
		<p>Where a person by whom an offence under this Ordinance is committed is a company, <u>every director and every officer concerned in the management of the company</u> may be convicted of the like offence unless he proves to the satisfaction of the court or magistrate that -</p> <p>(a) <u>the act or omission constituting the offence occurred without his knowledge or consent; and</u></p> <p>(b) <u>he exercised all such reasonable supervision and reasonable diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.</u></p>
11	Chapter 406 Section 56(8)	ELECTRICITY ORDINANCE
		<p>Where a corporation commits an offence under this Ordinance, <u>each director and officer of the corporation</u> is guilty of the offence unless he <u>proves that the offence was committed without his consent or connivance and that he exercised all such due diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.</u></p>
12	Chapter 449 Section 36	AMUSEMENT RIDES (SAFETY) ORDINANCE
		<p>Where an offence under this Ordinance has been committed by a body corporate, <u>any person who at the time of commission of the offence was an officer of the body corporate, or who was purporting to act in any such capacity,</u> shall also be guilty of such offence unless he proves that <u>the offence was committed without his consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.</u></p>

13	Chapter 221 Section 101E	<p>CRIMINAL PROCEDURE ORDINANCE</p> <p>Where a person by whom an offence under any Ordinance has been committed is a company and it is proved that the offence was committed <u>with the consent or connivance of a director or other officer concerned in the management of the company, or any person purporting to act as such director or officer, the director or other officer shall be guilty of the like offence.</u></p>
14	Chapter 311 Section 47A	<p>AIR POLLUTION CONTROL ORDINANCE</p> <p>(1) Where a person convicted of an offence under this Ordinance is a body corporate and it is proved that the offence was committed with <u>the consent or connivance of, or was attributable to any neglect or omission on the part of, a director, manager, secretary or other person concerned in the management of the body corporate,</u> the director, manager, secretary or other person also commits the offence.</p>
15	Chapter 354 Section 39	<p>WASTE DISPOSAL ORDINANCE</p> <p>(1) Where a person convicted of an offence under this Ordinance is a body corporate and it is proved that the offence was committed with <u>the consent or connivance of, or was attributable to any neglect or omission on the part of, any director, manager, secretary or any other person concerned in the management of the body corporate,</u> the director, manager, secretary or other person also commits the offence.</p>



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COMPANIES ORDINANCE - SECT 168N

Offences by body corporate

(1) Where a body corporate is guilty of an offence of acting in contravention of a disqualification order, and it is proved that the offence occurred with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate. (Added 30 of 1994 s. 5)

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BIOLOGICAL WEAPONS ORDINANCE - SECT 4

↔Offences by bodies corporate↔

Where an offence under section 2 which is committed by a body corporate is proved to have been committed with the consent and connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly. (Enacted 1996)

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TRAVEL AGENTS ORDINANCE - SECT 49

Liability for offences by bodies corporate↗

When at any time a body corporate commits an offence under this Ordinance with the consent or connivance of, or because of neglect by, any individual, the individual commits the like offence if at that time-

- (a) he is a controller of the body corporate; or
- (b) he is a director, manager, secretary or similar officer of the body corporate or is purporting to act as such officer or as agent of such body corporate; or
- (c) the body corporate is managed by its members, of whom he is one.

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ENTERTAINMENT SPECIAL EFFECTS ORDINANCE - SECT 51

Liability for offences by body corporate, etc.

(1) Where an offence under this Ordinance has been committed by a body corporate, any person who at the time of commission of the offence was a director or an officer concerned in the management of the body corporate shall also be guilty of such offence unless he proves that the offence was committed without his consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Where an offence committed by a partner in a partnership is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any other partner of the partnership, that other partner shall be guilty of the offence and liable to be proceeded against and punished accordingly.

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AERIAL ROPEWAYS (SAFETY) ORDINANCE - SECT 27B

Liability for offences by body corporate↗

Where an offence under this Ordinance has been committed by a body corporate, any person who at the time of commission of the offence was a director, manager, secretary or other similar officer thereof, or who was purporting to act in any such capacity, shall also be guilty of such offence unless he proves that the offence was committed without his consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances. (Added 37 of 1981 s. 17)

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AMUSEMENT RIDES (SAFETY) ORDINANCE - SECT 36

Liability for offences by body corporate↗

Where an offence under this Ordinance has been committed by a body corporate, any person who at the time of commission of the offence was an officer of the body corporate, or who was purporting to act in any such capacity, shall also be guilty of such offence unless he proves that the offence was committed without his consent or connivance, and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances. (Enacted 1994)

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WEAPONS OF MASS DESTRUCTION (CONTROL OF PROVISION OF SERVICES) ORDINANCE -
SECT 13

↖Offences by bodies corporate↗

Where an offence under section 4 which is committed by a body corporate is proved to have been committed with the consent and connivance of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

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PUBLIC HEALTH (ANIMALS AND BIRDS) (CHEMICAL RESIDUES) REGULATION - SECT 21

Liability for offences by body corporate ↗

not yet in operation Where an offence under this Regulation has been committed by a body corporate, any person who, at the time of commission of the offence, was a director or an officer concerned in the management of the body corporate shall also be guilty of such offence unless he proves that-

- (a) the offence was committed without his consent or connivance; and
- (b) he exercised all such diligence to prevent the commission of the offence as he ought to have exercised having regard to the nature of his functions in that capacity and to all the circumstances.

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TRADING WITH THE ENEMY ORDINANCE - SECT 12

Offences by corporations

(1) Where any offence under this Ordinance, committed by a body corporate, is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other officer of the body corporate, he, as well as the body corporate, shall be deemed to be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.

(2) For the purposes of this Ordinance, a person shall be deemed to be a director of a body corporate if he occupies in relation thereto the position of a director, by whatever name called; and, for the purposes of the provisions of this Ordinance relating to [offences by bodies corporate ↗](#), a person shall be deemed to be a director of a body corporate if he is a person in accordance with whose directions or instructions the directors of that body act: Provided that a person shall not, by reason only that the directors of a body corporate act on advice given by him in a professional capacity, be taken to be a person in accordance with whose directions or instructions those directors act. [cf. 1939 c. 89 s. 10 U.K.]

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STAMP DUTY ORDINANCE - SECT 53

Liability for offences by bodies corporate ↗

When at any time a body corporate commits an offence under this Ordinance with the consent or connivance of, or because of neglect by, any individual, the individual commits the like offence if at that time-

- (a) he is a director, manager, secretary or similar officer of the body corporate;
- (b) he is purporting to act as such officer; or
- (c) the body corporate is managed by its members, of whom he is one.

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INSURANCE COMPANIES ORDINANCE - SECT 57

Liability for offences by bodies corporate ↗

When at any time a body corporate commits an offence under this Ordinance with the consent or connivance of, or because of neglect by, any individual, the individual commits the like offence if at that time-

- (a) he is a controller of the body corporate; or
- (b) he is a director, manager, secretary or similar officer of the body corporate or is purporting to act as such officer or as agent of such body corporate; or
- (c) the body corporate is managed by its members, of whom he is one.

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