

23 October 2002

Your Ref.: CB1/BC/10/01

Our Ref.: HKC/JUPG/L059-02

The Honourable Mr. Lau Ping-cheung  
Chairman, the Bills Committee on the  
Land (Miscellaneous Provisions) (Amendment) Bill 2002  
Legislative Council Secretariat  
3/F., Citibank Tower,  
3 Garden Road,  
Central,  
Hong Kong

**BY FAX & BY POST**

(Fax No. 2121-0420)

**Total pages: 6 pages**

(Including 4 pages attachment)

Dear Mr. Lau,

**Re: Land (Miscellaneous Provisions) (Amendment) Bill 2002 (the "Bill")**

We understand that the next Bills Committee meeting for the captioned Bill will be held on 24 October 2002 and that utility companies and the construction industry will not be invited to the meeting. However, there is still significant difference in the view between the industry and the Government in certain provisions of the Bill, in particular, the penalty of imprisonment for 6 months in the proposed section 10Q concerning provision of safety precautions and support. For this reason, we strongly request the Bills Committee to allow the utility companies and the construction industry to express their views again to the Bills Committee at its forthcoming meeting on 24 October 2002 or any subsequent meetings. At the latest meeting with the Environment, Transport and Works Bureau ("Bureau") and the Highways Department on 22 October 2002, the Government is still unable to give a definitive response to our request to remove the penalty of imprisonment in section 10Q.

Unlike what the Government had appeared to represent to the Bills Committee in the meeting on 19 September 2002 that directors of companies would not be liable for imprisonment under section 10Q, the Government, in the meetings with the utility companies on 27 September 2002, pointed out that it might prosecute directors of a company for contravention of section 10Q pursuant to section 101E of the Criminal Procedure Ordinance (Chapter 221 of the Laws of Hong Kong). We are of the view that such apparently conflicting information given by the Government on the enforcement of section 10Q, together with other issues in the Bill that have not been settled so far, should immediately be brought to the attention of the Bills Committee for its urgent consideration.

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Hong Kong Cable Television Limited has prepared a submission in this respect per attached and looking forward to your urgent reply. Should you require additional information, please do not hesitate to contact our Mr. William Chow at 2112 6221.

Yours sincerely,

Allen Law  
General Manager  
OSP Engineering and Construction

Encl.

AL/WC/jc

c.c. All members of the Bills Committee on the Land (Miscellaneous Provisions)  
(Amendment) Bill 2002 via Legislative Council Secretariat

Clerk to the Bills Committee on the Land (Miscellaneous Provisions)  
(Amendment) Bill 2002 (Attn: Ms. Alice Au)

## **Submission by Hong Kong Cable Television Limited (“HKCTV”) on the Land (Miscellaneous Provisions) (Amendment) Bill 2002 (the “Bill”)**

### **I. Introduction**

- 1.1 We refer to our earlier submission dated 12 September 2002 on the Bill. The purpose of this submission is to draw the attention of the Bills Committee members to the grave concern of HKCTV on the penalty of imprisonment for 6 months in the proposed section 10Q concerning provision of safety precautions and support. Unlike what the Government has apparently represented to the Bills Committee that directors of companies will not be liable for imprisonment under section 10Q, the Government, in the meeting with the utility companies on 27 September 2002, pointed out that it might prosecute directors of a company for contravention of section 10Q pursuant to section 101E of the Criminal Procedure Ordinance (Chapter 221). We therefore urgently request the Bills Committee to allow the utility companies and the construction industry to express their views again to the Bills Committee at its forthcoming meeting on 24 October 2002 or any subsequent meetings in particular on the penalty of imprisonment in section 10Q(2).

### **II. The proposed section 10Q: Provision of safety precautions and support**

- 2.1 As you may be aware, the proposed section 10Q(1) of the Ordinance is related to provision of safety precautions and support. A summary of section 10Q is now enclosed in the Appendix of this submission. Under the proposed section 10Q(2), a permittee and nominated permittee who contravenes section 10Q(1) shall each be liable to a fine at level 5 (currently at \$50,000) and to imprisonment for 6 months.
- 2.2 It is HKCTV’s submission that a fine of \$50,000, under the current difficult economic environment, is already a sufficient penalty to ensure compliance with section 10Q(1) and to prevent inadvertent violation of the Ordinance. In other words, the absence of imprisonment in the proposed section 10Q(2) will not weaken the deterrent effect of the Bill significantly.
- 2.3 During the meeting of the Bills Committee on 19 September 2002, it appeared that the Government assured the Bills Committee that, for example, the directors of a company in the private sector would not be held personally liable for a contravention of section 10Q. In fact, the Government explained to the Bills Committee members in the meeting on 19 September 2002 that the penalty of imprisonment for 6 months in section 10Q(2) was included because there might be individual who carried out excavation.

- 2.4 At the same meeting on 19 September 2002, the Bills Committee urged the Government to consult the utility companies and the construction industry on the Bill. However, in the meeting held by the Environment, Transport and Works Bureau (“Bureau”) and Highways Department with the utility companies and the construction industry on 27 September 2002, the Government indicated that it might prosecute directors of a company for contravention of section 10Q pursuant to section 101E of the Criminal Procedure Ordinance (Chapter 221 of the Laws of Hong Kong). In other words, the intention of the Government to make the directors of permit holders (for example directors of utility companies) liable for imprisonment for 6 months for contravention of section 10Q, as explained to the utility companies in the meeting on 27 September 2002, is strikingly different from the assurance given by the Government at the public meeting of the Bills Committee on 19 September 2002. We are concerned whether the Government has fully explained the implication of the penalty of imprisonment in section 10Q(2) to the members of the Bills Committee.

Section 101E of the Criminal Procedure Ordinance provides:

“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 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.”

- 2.5 HKCTV is concerned that the directors of an excavation permit holder which is a company (for example HKCTV) may be subject to criminal prosecution under section 101E of the Criminal Procedure Ordinance and hence sentenced to imprisonment for 6 months for contravention of safety precautions provision in section 10Q although this breach may be due to the fault of the contractors only. It is practically impossible for an utility company which holds an excavation permit to assign its staff on each excavation site round the clock to ensure its contractors to comply with section 10Q. This is particularly unfair to the non-executive directors of the permit holders who do not oversee the excavation projects on a full time basis. For this reason, HKCTV has repeatedly urged the Government at the meeting on 27 September and 7 and 18 October 2002 with the Bureau and Highways Department that the penalty of imprisonment in section 10Q should be deleted. However, at the latest meeting with the Bureau and the Highways Department on 22 October 2002, the Government was still unable to give a definitive response to our request to delete the penalty of imprisonment in section 10Q.

- 2.6 The fact that the directors of an utility company may be subject to prosecution for the fault of its contractor in relation to safety precautions further reinforces the concern of the utility companies over unequal treatment of Government officers and the directors of a company in the private sector in the Bill. According to the proposed section 2A, if there is a breach of section 10Q by a Government officer (for example due to inadequate supervision of the contractors of the Highways Department for an excavation for the Government), the Government is only required to report the matter to the Secretary for Environment, Transport and Works. In other words, the Government and its officer are not subject to prosecution under section 10Q. At the same time, there is no provision similar to section 101E in the Criminal Procedure Ordinance which will make, for example, the directorate staff of a Government department liable as in the case of directors of companies in the private sector. This unequal treatment in the proposed section 2A, which was raised with the Bills Committee in its earlier meetings, is repugnant to the fundamental principle of equality before the law especially given that a substantial proportion of the excavation works is carried out by the Government. For this reason, HKCTV suggests that the penalty of imprisonment in section 10Q should be deleted.
- 2.7 We understand that the Legislative Council House Committee has recently decided that the issue of criminal liability of Government officers should be referred to the Panel on Administration of Justice and Legal Services for detailed study. We submit that in order to ensure equality before the law, the Government should not impose the penalty of imprisonment in section 10Q. In any event, the Government should wait for the result of the above-mentioned review of the Legislative Council.

### III. Conclusion

- 3.1 In short, while HKCTV supports the spirit of the proposed section 10Q(1) and the Government's initiative in ensuring safety of the public and other persons near an excavation site, the imposition of imprisonment for 6 months in section 10Q(2) is unnecessarily harsh. The fact that the Government is not subject to prosecution for contravention of section 10Q highlights the unequal treatment between Government officers and directors of a company in the private sector. It is HKCTV's submission that the fine of \$50,000 is already a sufficient penalty to prevent inadvertent violation of section 10Q(1). Bearing in mind the unequal treatment in section 10Q in view of section 2A, the Government should wait for the result of the review of the Legislative Council on the criminal liability of Government officers. We recalled that in the last meeting on 19 September 2002 members of the Bills Committee had asked utility companies to come to attend the forthcoming meeting to express their further comments on the Bill. **Given that section 10Q may give rise to potential penalty of imprisonment for the directors or senior executives of a company in the private sector, HKCTV would like to give an oral presentation of the above-mentioned view to the Bills Committee at its meeting on 24 October 2002 or any subsequent meetings.**

## **Appendix**

### **Summary of the proposed section 10Q(1)**

According to the proposed section 10Q(1) of the Ordinance, the permittee and nominated permittee of a principal excavation permit or principal emergency excavation permit shall adopt all necessary safety precautions to protect the public or any person making or maintaining an excavation to which the permit relates from any danger or injury. The proposed section 10Q(1) also requires the permittee and nominated permittee of a principal excavation permit or principal emergency excavation permit to provide adequate support for the structural stability of buildings, roads, slopes, structures, pipes, lighting posts, utility services or similar installations adjacent to the excavation so as to prevent the public or any person from being endangered by a fall or displacement of earth, rock or other material. In its excavation work, HKCTV will be the permittee, that is the holder of a principal excavation permit or principal emergency excavation permit.