

LS/B/30/01-02
2869 9457
2877 5029

Mr C S Wai By Fax (2536 9299) and By Post
Prin AS (W)3
Environment, Transport and Works Bureau 18 September 2002
11 Murray Building
Garden Road
Hong Kong

Dear Mr Wai

Land (Miscellaneous Provisions) (Amendment) Bill 2002

I am in the course of examining the legal and procedural aspects of the above Bill on behalf of the LegCo Bills Committee and would be pleased if you provide information on the following matters:-

Government's liability in relation to street excavation

In the paper prepared by the Department of Justice, "Overseas Legislation - Exemption of Criminal Liability of Government and Public Officers: Overview of the Criminal Liability of the Crown", annexed (Annex B) to your information paper (LegCo ref: CB(1)2514/01-02(05)), the Department of Justice has the following comments:-

"3. Our research into these common law jurisdictions indicates that the Crown will not be criminally liable for regulatory offences unless there is a clear indication in the relevant legislation that the legislature intended to create an offence of which the Crown could be guilty.... Accordingly, we submit that the appropriate way to formulate the current issue is in terms of the imposition of criminal liability on the Government, rather than the exemption of the Government from criminal liability."

I quite agree with this opinion of the Department of Justice. Will the Administration, in view of the above legal advice, consider reformulate the provisions in the proposed section 2A in the Bill?

New section 10E - Deemed issue or extension of secondary excavation permit or secondary emergency excavation permit

Section 10E(1) makes provisions for the deemed issue of secondary excavation permit with respect to contractors. It provides that where a principal excavation permit is issued or deemed to be issued for an excavation, a permit on the same terms and conditions as the principal excavation permit, which is to be known as the secondary excavation permit, is deemed to be issued to any contractor who makes or maintains all or any part of the excavation.

This provision will render contractor(s) and sub-contractor(s) for a particular excavation job responsible for the various duties under the Bill. Given that the Authority is not required to issue a copy of the secondary excavation permit (section 10E(4)), please clarify when or on which date the deeming provision is to take effect.

New section 10K - Refund of daily fee and economic costs paid for extension of principal excavation permit

Section 10K(1)(b) provides that the Authority may refund the economic costs paid for an extension of a principal excavation permit if it is satisfied that the extension is caused by "reasons other than the fault of a permittee of the permit".

Please explain the precise meaning of "fault" of a permittee. Who has the burden to prove that the reason for extension is or is not a "fault"?

New section 10L - Review of assessment

A permittee who is aggrieved by an assessment of the Engineer under new section 10L(1) or by a decision of the Chief Engineer under new section 10L(4) may apply for a review of the decision "within 28 days from the date of being notified of" the assessment or the decision.

Please clarify which form of notification or service of notice will be

provided to the relevant permittee. Does the time start to run from the date on which notification is actually received by the permittee?

It is noted that the drafting of these provisions is quite different from new section 18B which provides that an appeal shall be made "within 28 days after the aggrieved person has received a notice of the decision".

Clause 6 - No claim to lie against Government, Authority or Secretary for Works

New section 18(1A) gives protection to the Government and the Secretary for Works against claims in respect of any loss suffered by any person in consequence of anything done under new section 10M or 10N. Section 10M provides for the establishment and constitution of the Review Board. Section 10N provides for the appointment of a panel for the Review Board. Please explain the rationale for giving protection to the Government and the Secretary for Works in these respects.

Please let me have a reply as soon as possible. Thank you.

Yours sincerely,

Kitty Cheng
Assistant Legal Adviser

c.c. LA
CAS(1)2