

ETWB(CR)(W) 150/107 (2002) Pt. 3

LS/B/30/01-02

Tel No.: 2848 2585

Fax No.: 2869 0167

8 October 2002

Ms Kitty Cheng
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central, Hong Kong

Dear Ms Cheng,

Land (Miscellaneous Provisions)(Amendment) Bill 2002

I refer to your letter dated 18.9.2002 reference LS/B/30/01-02.

Taking your questions in turn, I would like to advise as follows:

A) Government's liability in relation to street excavations

The Department of Justice (D of J) has clarified below the main purpose of paragraph 3 of their paper dated 10 September 2002 entitled "Overview of the criminal liability of the Crown" (the paper). The paper was attached as Annex B to the Information Paper for LegCo Bills Committee on Land (Miscellaneous Provisions) (Amendment) Bill 2002 of 19 September 2002 provided by this Bureau. The main purpose of paragraph 3 of the paper was to set out the common law position that the Government (and under

certain circumstances, also certain persons) is not liable for an offence created under the statute unless there is a clear indication in the statute that the legislature intended to make the government liable for such an offence. The fact that a statute expressly binds the Government does not change the position (see paragraph 11 of the paper).

It may seem that there is language in some of the sample legislation set out in the paper which purports to "exempt" the government from criminal liability. For example, in paragraph 16 of the paper, the following UK provisions of section 167 of the New Roads and Street Works Act 1991 are set out:

- "(4) The provisions of Parts III and IV of this Act (street works in England and Wales and road works in Scotland) bind the Crown.
- (5) Nothing in subsection (4) shall be construed as authorizing the bringing of proceedings for a criminal offence against a person acting on behalf of the Crown."

As advised by D of J, the correct way to look at section 167 is that the section "does not impose" criminal liability on any person acting on behalf of the Crown. The section does not "exempt" the Crown/any such person from criminal liability as the Crown/any such person is not liable in the first place (i.e., there is nothing to exempt the Crown/any such person from). The presence of section 167(5) should be taken as *ex abundanti cautela*, i.e. from an excess of caution, in order to avoid misinterpretation.

The proposed sections 2A(1) and (2) in the Bill provide:

- "(1) Subject to this section, Part III binds the Government so far as it relates to an excavation in unleased land which is a street maintained by the Highways Department.
- (2) Part III does not have effect to permit proceedings to be taken against, or to impose any criminal liability on, the Government or a person doing anything in the course of carrying out his duties as a public officer in the service of the Government."

By the same token, the proposed sections 2A(1) and (2) serve a purpose similar to that of sections 167(4) and (5), i.e., sections 2A(1) and (2) should also be taken as *ex abundanti cautela*. Section 2A(2) makes it clear that notwithstanding that Part III of the Ordinance binds the Government in

relation to certain land, neither the Government nor any person doing anything in the course of carrying out his duties as a public officer in the service of the Government will be criminally liable for any offences created under Part III. It may be noted that the wording "does not have effect to ... impose any criminal liability" is used in section 2A(2). The section does not purport to exempt criminal liability.

Accordingly, regarding the matter in question as to whether or not the provisions of the proposed section 2A need to be reformulated, D of J has advised that there is no such need.

B) New Section 10E – Deemed issue or extension of secondary excavation permit or secondary emergency excavation permit

In the absence of any specific provision for the date on which the deeming provision is to take effect in section 10E(1), a secondary excavation permit is deemed to be issued to a contractor at the same time and date as the principal excavation permit is issued. As to the responsibility, the contractor may as a nominated permittee becomes responsible for compliance with those conditions of permit which are to be complied with by the nominated permittee under section 10(5)(e) and (f), because non-compliance with conditions is an offence leading to a fine. In accordance with section 10E(4), the Authority is not required to issue a copy of the secondary excavation permit to the contractor. However, the contractor will find out the terms of the permit before consenting to comply with the conditions of permit, as required under section 10F(b), before the contractor becomes nominated permittee.

C) New Section 10K – Refund of daily fee and economic costs paid for extension of principal excavation permit

As under new section 10K(1)(a)(ii), the permittee is required to state reasons and provide evidence to support his application for refund, it can be said that the permittee has the burden of proof under section 10K(1)(b) that extension is caused by reasons other than "fault" of the permittee its contractors or employees, and such reasons could be those in section 10K(1)(b)(i) -(iii) plus others showing "no fault". "Fault" in Concise Oxford dictionary means "the defect which causes something undesirable", and in the context of extension, "fault" could mean any defect which caused extension. Whether the reasons and evidence show fault or no fault is a matter to be decided by the Authority.

D) New Section 10L – Review of assessment

In section 10L, there is no specific form to give notice to the permittee on the result of assessment or the decision ("the decision"). It could be in any form so long as its effect is to notify the permittee on the decision. In practice, it might be by way of a letter either delivered personally or by post. The date of "being notified" in the phrase "within 28 days of being notified of" the decision is in fact the date the decision is received by the permittee. For the purpose of calculating 28 days period, the date of receipt by the recipient is excluded by virtue of section 71 of the Interpretation and General Clauses Ordinance (Cap. 1). Similarly section 18B makes it explicit that the date of receipt is excluded from the 28 days period. We may use the service of 'double recorded delivery system' provided by the post office, namely the original letter is sent to the recipient by recorded delivery and there is a receipt signed by the recipient which is returned to the sender with a date. By using such service we can avoid any dispute over the date of receipt. As such, there is no practical difference or inconsistency between section 10L(1) and (4) and section 18B, although the wording is not identical. From the drafting point of view, as the sentence structure and the objects of the two provisions are different, different verbs are used.

E) Amendment Bill Clause 6 – No claim to lie against Government Authority or Secretary for Works

Clause 6 of the Amendment Bill is to provide for extension of the scope of existing section 18 to avoid any liability on the part of government or the Authority for any loss or damage suffered by any person in consequence of anything done by the Authority under existing section 8. New section 18(1A) can prevent claim against SETW on his choice of persons to be appointed on the review board and panel under sections 10M(2) and 10N(1) respectively. Without this protection, a scenario of claim may arise where for matters unknown to SETW, a person having interest in the review is appointed by SETW in breach of section 10M(4), then any person who suffers loss or damage by such appointment and review may have a claim against SETW or government.

I trust the above should be of help. But you are always welcome to write to us should you have any further queries.

Yours sincerely,

(S W Chia)
for Secretary for the Environment,
Transport and Works