

NEW WORLD TELEPHONE LIMITED

**Submission to Leg Co Panel on Proposed Charging and
Penalty System for Street Excavation Works under
the Land (Miscellaneous Provisions) Amendment Ordinance**

Imprisonment

1. Section 10Q of the proposed Land (Miscellaneous Provisions) (Amendment) Bill 2002 (“the Bill”) imposes criminal liability to permittee and nominated permittee. More particularly, section 10Q(2) provides that

[a] permittee and nominated permittee who contravenes subsection (1) shall each be guilty of an offence and shall each be liable on conviction to a fine at level 5 and to imprisonment for 6 months.

The industry raised concern on this provision but the Government assured that it would not be applicable to the directors of utility companies during the past public hearings before the Legislative Council.

2. During the briefing sessions held by the Government on 27 September, 18 and 22 October 2002, the Government finally admitted that the Justice Department is prepared to prosecute the directors of the utility undertakers under the proposed section 10Q(2) pursuant to section 101E of the Criminal Procedure Ordinance (Cap. 221) (“CPO”) which provides that

[w]here 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.

3. The Government tried to comfort the industry by offering the statutory defence set out in section 10(3) of the Bill which provides that

[i]t is a defence in a proceeding against a person for an offence under subsection (2) if the person charged shows that he took all reasonable steps and exercised all due diligence to avoid committing the offence.

4. In the first place, we do not think imprisonment is necessary. The fine of HK\$50,000 is a sufficient deterrent in the present economic situation. Besides, there are a whole other provisions contained in other ordinances that impose imprisonment onto offenders of similar nature which can be charged against the directors of the utility undertakers through the operation of section 221 of CPO.

5. In drafting the Bill, the Government has failed to take into consideration of the practice of the utility undertakers. The utility undertakers are not familiar with construction works. They retain licensed or approved contractors. Once the construction works are contracted to the contractors, utility undertakers will rely on their expertise and would not fetter or intervene with their management of the work sites because utility undertakers simply do not have the expertise to do so. Therefore, all the safety precautions mentioned in section 10Q(1) have to be put in place by the contractors. It is inequitable to held the utility undertakers, as a permittee, liable for any breach of safety measures. The contractor, as the nominated permittee, should be solely responsible for any default in the safety measures.
6. The defence in section 10Q(3) is not too particularly helpful. The Government holds the view that the directors or the officers in charge will be liable under section 10Q(2) if they only sign a contract to qualified contractors but do not supervise the contractors' work. The directors or the responsible officers of the utility undertakers have to exercise ALL due diligence. Leaving aside the definition of all due diligence; this defence is not available to utility undertakers in real life for two reasons: 1. utility undertakers do not have the expertise to perform the due diligence; 2. the directors simply do not have the time to do such things. After all, one starts to query what is the basic reason for the utility undertakers to retain contractors.
7. The standard for all due diligence is also a concern. The utility undertakers prefer to have some guideline or code of practice to rely on. In fact, this suggestion was echoed by the lawyer from the Justice Department. It was recommended by most utility undertakers that a code of practice for this Ordinance should be prepared and compliance of this code of practice shall be a sufficient defence to section 10Q(2). For no particular valid reason, this was turned down by the Highways Department.
8. We recommend that the imprisonment clause of section 10Q(2) should be deleted. In the event that the imprisonment clause is here to stay, then we recommend a code of practice should be adopted as the standard for the performance of "all due diligence" prior to the enactment of the Bill.

One-Stop-Shop

9. At present, the utility operators have to apply for different types of licences or permits from various Government Departments including without limitation Transport Department, Environmental Protection Department, Leisure and Cultural Services Department besides the excavation permit (EP). The whole process is complicated and inefficient. Worse still, conflicting objectives of different Government Departments may prolong the time period of road opening. An example is that the Police Department requires the operators to proceed with

the work at night to avoid traffic jam whereas Environmental Protection Department demands that no civil work whatsoever should be carried out at night.

10. To smoothen the road opening process and avoid disturbance to the public, the Government should coordinate and balance the needs of different departments by means of a dedicated working group stationed in the Works Bureau. This working group shall coordinate all the needs of the Government Departments for a particular road-opening project and provide a One-Stop-Shop service to the utility operators with respect to different licences and permits required by government departments.
11. The advantages of One-Stop-Shop service are multi-folds. First, the Government could balance the needs of its different departments, the public and the utility operators by means of this working group. Secondly, with the expertise of the said working group, the different Government Departments will be released of the burden to liaise with different utility operators. The efficiency of the Government as a whole would be enhanced. Thirdly, the cost of liasing with the Government by the utility operators will be lowered. As a result, the public would be benefited by the overall enhancement of efficiency of the Government and operators, which are translated into lower tax and utility charges.

Level of Charge

12. The EP fee is calculated based on the salaries of the Government employees involved in the task. NWT notes that the salary levels of the Government employees are much higher than those comparables in the fair labour market. It would only be fair to charge the EP fee based on the adjusted current fair labour costs instead of the actual Government employees' salaries.

New World Telephone
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