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**Report of the Bills Committee
on Land (Miscellaneous Provisions) (Amendment) Bill 2002**

Purpose

This paper reports on the deliberations of the Bills Committee on Land (Miscellaneous Provisions) (Amendment) Bill 2002 (the Bill).

Background

2. The subject of excavation permit (EP) fee was first raised in 1987 following a study on the subject. In October 1991, the Director of Audit invited attention to the need to reduce incidences of delay in the completion of utility works on roads and the substantial financial implications on the Government due to the delay in implementing the EP fee. In his Report No. 24 of March 1995, the Director of Audit reiterated that a penalty should be imposed on promoters (e.g. a utilities company or a Government Department) who delayed their works without good reasons and that an EP fee should be introduced as soon as possible.

3. The Administration introduced its first proposal for a permit fee scheme to the Panel on Planning, Lands and Works in 1996. The subject was brought back to the Panel in January 2000. Upon further consideration by the Administration, the Administration consulted the Panel again in December 2001 on the present EP fee scheme which aims at recovering administrative costs based on the “user-pays” principle and encouraging promoters and contractors to complete their excavation works within the permit period. As a further incentive to achieve timely completion, the Administration also proposes a charge based on the economic cost of traffic delay for excavation works affecting a carriageway after expiry of the original permit period without good reason.

The Bill

4. The main purpose of the Bill is to amend the Land (Miscellaneous Provisions) Ordinance (Cap. 28) to improve the regulation of excavation in unleased land. The following main changes are proposed to the existing Ordinance for the purpose of

amending the EP system:

- (a) The regulation will be strengthened by empowering the relevant Authority to enforce EP conditions against the permittee, and his contractor (if he is a nominated permittee), and bring contractors and all tiers of subcontractors under control, and to levy an economic cost of traffic delay for excavation works affecting a carriageway not completed on time;
- (b) The EP system will bind Government departments which carry out excavation works in streets maintained by the Director of Highways; and
- (c) The fine for any breach of permit conditions will be increased from \$5,000 to Level 5 (\$50,000) to take into account of inflation over the years. The six months of jail sentence for making or maintaining an excavation without an EP remains unchanged.

The Bills Committee

5. The House Committee agreed at its meeting on 26 April 2002 to form a Bills Committee to study the Bill. Chaired by Hon LAU Ping-cheung, the Bills Committee held a total of 14 meetings to discuss the Bill. The Bills Committee also made a site visit on 22 February 2003 to better understand the audit inspections carried out by the Highways Department in relation to the performance of promoters and contractors in excavation. The membership list of the Bills Committee is in **Appendix I**.

6. The Bills Committee has conducted rounds of consultation with the utility undertakers, including CLP Power Hong Kong Limited, The Hongkong Electric Co Ltd, Hong Kong Cable Television Ltd, Hutchison Global Crossing Ltd, New World Telephone Ltd, PCCW Limited, The Hong Kong and China Gas Company Limited, Wharf New T&T and Hong Kong Tramways Limited. It also received views from the construction industry, professional bodies and other interested parties. The list of parties which have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

7. Members of the Bills Committee fully appreciate that disruption to traffic and inconvenience to the public caused by road excavation works have long been a matter of public concern. Members consider the social cost of such disruption in terms of both time and money can be quite substantial. Notwithstanding the examination by the Public Accounts Committee on issues relating to the control of utility openings based on the Reports of the Director of Audit in 1991, 1995 and 2001, some members

are concerned about the lack of progress on the matter and consider that an overhaul of the existing approach for tackling the problem is necessary.

8. The Bills Committee notes that utility undertakers and the construction industry object strongly to the proposed charging and penalty system for street excavation works. Apart from the financial burden imposed on them, they consider that the charging and penalty system would also create unnecessary disputes and administrative works, and hence cost and time, to both Government and utility undertakers. The deputations claim that these may eventually need to be borne by the public. They have also expressed the view that utility undertakers are already making their best effort to carry out excavations by working co-operatively and closely with government departments. Thus, the proposed charging system would not provide any incentive for shortening the excavation period. Instead of imposing a tedious and unfair scheme like what is being proposed, the Government should consider other means or measures such as one-stop-shop EP application, better road infrastructure design and planning, development of common utility trench and provision of incentive scheme for early completion of excavation works.

9. In the course of deliberation, the Bills Committee has examined, inter alia, the following issues:

- (a) proposed charging and penalty system for street excavation works including the EP fee system and charging of economic costs during the extended period of excavations (paragraphs 10 - 25);
- (b) mechanism for reviewing the assessment made by the Highways Department (paragraphs 26 - 33);
- (c) scope of the application of the Ordinance to the Government and other promoters/contractors (paragraphs 34 - 48); and
- (d) penalty and defence provisions for failure to provide safety precautions and support to adjacent structures or erections (paragraphs 49 - 56).

Proposed charging and penalty system for street excavation works

10. The Bill provides the legal framework for the Administration to introduce a charging and penalty system for street excavation works. The proposed charging scheme would recover the full administrative costs incurred by government departments in processing and monitoring EPs based on the “user-pays” principle. The Administration believes that this would also provide incentive for utility undertakers and contractors to complete their excavation works without delay and to reduce the number of street excavations. To provide further incentive, a charge based on the economic cost of traffic delay would be levied for excavation works affecting a carriageway after expiry of the original permit period without good reason.

EP fee system

11. The Bills Committee has examined the proposed fee structure and the basis of cost calculation for the EP fee system. It also looks into the possibility of outsourcing the administration of the EP system. The proposed fee structure for the administration of the EP system is set out below. The basis of cost calculation is in **Appendix III**.

Proposed Fees for Excavation (Recovery of Administrative Costs)		
Description	In streets maintained by Highways Department	In other unleased lands maintained by Lands Department
For issue of an EP	\$1,860	\$3,060
For an extension of an EP, if required	\$590	\$400
Daily charge for the duration of the EP, including any extension, if required	\$32 per day	not applicable

Levels of Fee

12. The Bills Committee notes that utility undertakers and the construction industry are of the view that the proposed fees for excavation are too high. The deputations are of the view that fees should not be based on government staff cost as their salaries are higher than market rates. Some members also concur with the deputations' view that there is no reason to include a daily charge of \$32 for audit site inspection carried out by the Highways Department as inspection forms part of the duties of the Department.

13. The Administration points out that the hidden cost in running the existing system is being subsidized by taxpayers. Generally it is a long-established Government policy of adopting the "user-pays" principle for setting Government fees and charges to recover the full cost of services provided. The staff cost is worked out on the basis of the time spent by different departments for the processing of EPs and salaries of Government employees are following market trend.

14. The Bills Committee notes the Administration's advice that the daily charge of \$32 is for audit site inspection and where necessary for providing advice to utility undertakers and their contractors on how to maintain their work in a law abiding manner. It is not something optional but an integral part of the EP system for maintaining good order in street excavation works. Indeed, staff cost relating to law enforcement and prosecution-related activities have been excluded from the cost calculation of the daily charge. This is in line with the general principle applied to other Government Departments such as Food and Environmental Hygiene Department, Buildings Department, Electrical and Mechanical Services Department and Labour Department, etc. All Government fees and charges are subject to regular review to ensure that the "user-pays" principle and full cost recovery basis are maintained. If the

performance of street excavation is improved in future, resulting in decrease in demand for monitoring and advisory service, the savings will be reflected in the fee review.

Outsourcing the administration of the EP system

15. The Bills Committee accepts the Administration’s explanation that outsourcing is not worth pursuing in the present case. Even if the paper work of EP issuance is outsourced, Highways Department still needs to deploy resources to monitor the activities of the private agent and carry out co-ordination work with other Government Departments. Utility undertakers also do not support outsourcing of the law enforcement part of the EP system (that is, audit inspection and prosecution), as they have no confidence in the impartiality of the private agent.

Charging of economic costs during the extended period of excavations

16. The Bill empowers the Administration to charge an additional economic cost based on the likely traffic impact on carriageway caused by an excavation. The economic cost will be charged on an extension of the permit and may be refunded if the extension is not the fault of the permittee or his contractors (that is, where the extension is ‘reasonable’, or the excavation is completed before the extended expiry date).

Calculation of economic costs relating to excavation works on streets

17. On the calculation of economic costs relating to excavation works on streets, the Bills Committee notes that all streets maintained by Highways Department in Hong Kong are to be divided into 3 categories, namely, “strategic streets”, “sensitive streets” and “remaining streets”. The classification is based on the likely traffic impact caused by an excavation in that category of street. The levels of charge are as follows:

Type of Street	Charge
Category 1 (strategic streets)	\$18,000/day
Category 2 (sensitive streets)	\$7,000/day
Category 3 (remaining streets)	\$1,500 day

18. The Bills Committee notes the deputations’ views that the proposed penalty system does not have effect of speeding up work, as utility undertakers and contractors are already keen to complete them early in their own interests. The deputations are of the view that the calculation of economic charges is unsubstantiated and the proposed levels of charge are too high.

19. The Bills Committee has divided views on the proposed penalty system for charging an economic cost on street excavations not completed on time. Some members concur with the deputations' views and consider that the Government should

introduce a one-stop shop mechanism for receiving and processing applications for EPs. In some cases, the delay is caused by interference by other parties. If a penalty system is proposed, the Government may also consider introducing an incentive scheme to achieve the same purpose of encouraging utility undertakers and their contractors to complete their works on time. After all, utility undertakers are of the view that the majority of the excavations works (based on the number of EP issued) are carried out by the Government.

20. Some other members however hold the view that as the problem has dragged on for years, it is necessary to introduce a charging scheme to enable a better control on street excavations and reduce unnecessary delay in the completion of such works for the overall benefit of the community at large. Some members suggest that the Administration may even explore the possibility of extending the proposed economic charge to delay in completion of excavations on footpaths beyond the initial permit period as footpath excavations also affect pedestrians and near-by shop operators.

21. In the course of deliberation, the Bills Committee has examined the methodology for the calculation of additional EP daily charge based on economic cost due to traffic delay, the criteria for determining the initial permit period, the appeal mechanism and the exemption provision. It also invites the Research and Library Services Division to conduct a research on the methodology for the calculation of economic costs relating to excavation works on footpaths in overseas places.

Basis of calculation

22. The Bills Committee notes the Administration's advice that economic cost associated with street excavations consists of many components. Besides the "time charge" of traffic delays, there are other factors such as loss of business to road side shops, loss of amenity, inconvenience, and increase of traffic accidents. As there are relatively mature mathematical models for the calculation of traffic delay, the Administration decides to adopt the "time charge for traffic delay" as the basis for estimating economic cost. The charging of economic cost on this basis is considered relatively fair as it can differentiate the effect of delay on various types of roads. The proposed charge is also within the affordability of those who are required to pay (in case an unreasonable delay is incurred) whilst maintaining the necessary deterrent effect. The methodology in assessing the additional EP daily charge based on economic cost due to traffic delay is set out in **Appendix IV**.

Initial permit period

23. One of the concerns raised by utility undertakers and the construction industry is that they cannot start work immediately after obtaining an EP since further approvals from other government departments may be necessary. Sometimes, diversion of underground utilities by other utility undertakers would also lead to delay in the completion of works. The deputations are of the view that there should be a fair, transparent, and flexible mechanism for the determination of the initial permit

period. Economic charge, if adopted, should also be waived for uncontrollable factors.

24. In this respect, the Bills Committee has examined the factors which affect the duration of an excavation. The Bills Committee notes that Highways Department is working together with utility undertakers to devise a standardized methods for determining the initial permit period. According to the Administration, the setting of the permit period will be fair and open. A balance will be struck between the industry's and the society's interests. In assessing the proposed EP period, the Authority will take into account the time restrictions set for the proposed excavation works by various Government departments. The Bill also provides for a mechanism to grant extension for factors beyond the control of the permittee such as inclement weather, suspension order from Government (provided that it is not due to the fault of the permittee), unexpected change in the physical conditions, and other reasons that the Authority considers reasonable.

25. On improving the EP application procedure, the Bills Committee notes under the current practice, new roadwork and road reconstruction work proposals are circulated to utility undertakers at the planning and design stage so that utility undertakers can lay new service and spare ducts during the roadwork construction. The Highways Department is implementing a streamlined approach so that approvals from all relevant Government departments will be sought once the permit is issued. The Administration points out that this have effectively achieved the objectives of the one-stop shop proposed by the deputations. To reduce the need of road openings, the Administration will also look into the feasibility of implementing common utility enclosures in new development areas.

Mechanism for reviewing the assessment made by the Highways Department

26. The Bill provides for a statutory review mechanism in the Highways Department to handle reviews on certain decision made by the Authority including the durations of EP periods and waiver of economic charges. Under section 10L of the Bill, when an application for EP or waiver of economic charge is received, a person at the rank of an Engineer will make an initial assessment on the permit period or the economic charge. If the applicant is not satisfied with the assessment result, he may present the case within a specified time to the Chief Highway Engineer for review. If the applicant is still not satisfied, he may seek a final review within a specified time by the Director of Highways. On receipt of an application, the Director of Highways shall set up a Review Board in accordance with section 10M of the Bill. The Director of Highways shall invite members of the Review Board to give their individual advice. The Director shall make his decision after taking into consideration of the advice of members of the Review Board.

27. Section 10N of the Bill provides that the Secretary for the Environment, Transport and Works (the Secretary) may appoint a panel of not more than 20 persons whom he considers to be suitable to act as members of a Review Panel to advise the

Director of Highways on an application for review of a decision made by the Chief Engineer under section 10L(4). Section 10M of the Bill provides that the Director of Highways shall be the Chairman of the Review Board. The Secretary shall appoint not less than three but not more than five other persons to constitute the Review Board. The composition of the Review Board is as follows:

- (a) at least one public officer of the rank of Government Engineer or above from the Highways Department;
- (b) at least one member from the Review Panel appointed under section 10N; and
- (c) not more than three other persons as the Director of Highways thinks fit.

28. The Bills Committee is concerned about the drafting of section 10M and 10N, particularly the relationship between the Review Board and the Review Panel. Since the Review Panel only serves to provide a pool of candidates for appointment as members of the Review Board, the Bills Committee considers it necessary to refine the drafting of the relevant provisions to improve their clarity. There is also a need to review the composition of the Review Board to increase the number of non-public officers in the Board.

29. To address the Bills Committee's concern, the Administration agrees to move a Committee Stage amendment (CSA) to the effect that the majority of the persons constituting a Review Board, excluding the Chairman, shall be persons other than public officers so that the Director of Highways can hear more outside views. The Administration also proposes to move a CSA to introduce a new section 10M so as to set out clearly the relationship between the Review Board and the Review Panel. The amended new section 10M(1) reads as "The Secretary may appoint a panel of not more than 20 persons ("the Review Panel") whom he considers suitable to sit as members of a Review Board to review the Chief Engineer's decision under section 10L(4)". A person so appointed shall not hold office for more than six consecutive years.

30. The Bills Committee has also reviewed the operation of the Review Board. Taking into account members' views, the Administration also agrees to move CSAs to improve the operation of the Review Board to ensure its fairness. The essential features of the amended system are as follows:

- (a) the Review Board will comprise public officers and non-public officers, with non-public officer members as majority;
- (b) the Director of Highways will chair the Review Board but he shall not vote at the hearing of the Review Board; and
- (c) all the matters for determination at a hearing of the Review Board shall be decided by a majority of vote of the members present.

Further, as the Review Board is to vote for a decision, and if there is an equality of vote, the Review Board will be discharged, and another Review Board will be formed

to hear the review concerned. If again there is an equality of vote, the result of the permittee's assessment shall be taken to be the decision of the Review Board provided that he has set out his own assessment in an application made under the relevant provision.

31 The Bills Committee notes that section 18B provides that a person who is aggrieved by a decision of the Review Board relating to an assessment on matters relating to the refund of economic costs may appeal to the Administrative Appeals Board within a specified time.

Declaration of interest

32. The Bills Committee is also concerned about the mechanism for declaration of interest by members of the Review Board. Having considered the Bills Committee's view, the Administration agrees that before the Secretary is to nominate a person to the Review Board, he will ask such person to make a declaration as to whether they have any direct or indirect interest in the review concerned. Such information will be forwarded to the permittee concerned. Prior to appointment, the Secretary will take into consideration the declaration of interest of the members and the objection raised by the permittee concerned, if any. If at any time during the review proceedings, it is discovered that any member of the Review Board has a direct or indirect interest in the review concerned, the Chairman may adjourn the proceedings. The Secretary shall terminate the appointment of the member and appoint another member for rehearing the application wholly or in part.

33. The Bills Committee notes that a person who just conceals an interest to gain nomination to the Review Board is not an offence. The Administration however points out that if a person deliberately conceals an interest in order to gain nomination to the Review Board in return for benefits or remuneration (for example, a refund of economic cost by the Director of Highways), he may commit an offence of fraud under section 16A of the Theft Ordinance (Cap. 210) or an offence for obtaining pecuniary advantage by deception under section 18 of Cap. 210. The Bills Committee is satisfied with the Administration's explanation and suggested that such information should be made known to the nominees before they agree to accept the appointment.

Scope of the application of the Ordinance to the Government and other promoters/contractors

34. The Bill provides that Part III of the Ordinance will be substituted by new provisions on matters including the control of excavations in unleased land and provision of safety precautions and support. Part III binds the Government in so far as excavations in a street maintained by Director of Highways is concerned, but it is set out in the new section 2A(2) that "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”. The new section 10 in Part III, in particular, revises the penalty for making or maintaining an excavation in unleased land in contravention of the conditions of the relevant permit. It also defines the liability of a permittee for the breach of conditions of the permit concerned. The maximum fine for making or maintaining an excavation without a permit or in breach of a permit condition will be increased from \$5,000 to \$50,000 to reflect the inflation over the past 30 years. The penalty of 6 months imprisonment for excavating without a permit will remain the same.

35. On the question of imposing ‘criminal liability’ on the Government, the Administration is of the view that the question of liability of Government or public officer, as presently drafted in the Bill, is not significant, as in practice the only contravention that can be committed by the Government is in the breaching of excavation permit conditions to be observed by the permittee, which only results in a fine (new section 10(3)). The Administration also sees no commercial interest to induce a Government department to excavate without an excavation permit. As regards the permittee's obligation under the new section 10Q(1) to adopt safety precautions and provide support to adjacent structures or erections, the offence will only result in a fine as in practice the Government, like any company permit holder, cannot be imprisoned. The Administration's view is that imposing a fine on the Government is meaningless as the money to pay the fine would be from the public coffers. The proposed reporting mechanism under the new section 2A, which is a statutory procedure ensuring that these matters are brought to the attention of and dealt with by the Secretary would have more deterrent effect on public officers.

36. The Bills Committee considers that it is of paramount importance to ensure that a fair system is maintained. There is a need to examine issues relating to the mechanism for dealing with contravention of statutory requirements by public officers. However, as the examination would raise questions of wider policy concerns relating to the criminal justice system as a whole, the Bills Committee considers that it might be more appropriate for Members to take up the subject matter on the imposition of criminal liabilities on Government at other forum. The Bills Committee submitted a report to the House Committee on 4 October 2002 to seek its view on the way forward. The House Committee agreed that the subject matter should be taken up by the Panel on Administration of Justice and Legal Services.

Application of the provisions relating to control of excavations to Government and private street excavation promoters

37. Members and the industry strongly believe that Government Departments like their counterparts in the private sector should be subject to the same degree of control in carrying out excavations. If Government Departments have committed any criminal act or serious offence, they should be prosecuted. As utility undertakers and other road works promoters will be prosecuted for breach of EP conditions, it is not fair if Government Departments are exempted from prosecution.

38. The Bills Committee notes the Administration's view that under the current proposal, the Government will be issued EPs and charged for fees in the same way as other private sector utility undertakers and road works promoters. The only difference lies in the treatment in case of contraventions .

39. The Bills Committee notes the following comparison provided by the Administration which shows how private street excavation promoters and Government street excavation promoters are treated under the Bill:

Aspect	Private Street Excavation Promoters	Government
To get an excavation permit	√	√
To pay fees	√	√
To pay economic charges	√	√
To nominate his contractor to share the responsibilities	√	√
Breaching permit conditions and safety requirements	<ul style="list-style-type: none"> • individuals are unlikely to be liable unless there is obvious evidence to prosecute an individual • fines only, paid by the company unless the permittee is an individual 	<ul style="list-style-type: none"> • individual officers may, subject to the relevant rules under the Civil Service Regulations etc., face disciplinary proceedings • Government departments not required to pay fines
Causing injury in the course of street excavation	may be liable to civil suit	may be liable to civil suit
Causing death in the course of street excavation	may be liable to civil suit and if the individual involved is identified, may be liable to a charge of manslaughter out of gross negligence if so proved	may be liable to civil suit and if the individual involved is identified, may be liable to a charge of manslaughter out of gross negligence if so proved

40. The Bills Committee notes the Administration's view that the imposition of criminal liability on the Government or Government Departments would raise complex questions of procedure and efficacy. There is also no precedent in the Laws of Hong Kong which clearly and unequivocally renders Government or Government Departments liable to criminal prosecution. To enforce statutory requirements through the machinery of prosecution in courts would therefore be a departure from the usual practice. With the implementation of the proposed reporting mechanism under new section 2A, the Administration believes that there are effective means such as accountability to the Legislative Council, and monitoring of alleged mal-administration by the Ombudsman, the media and non-Government organizations to ensure the Government's compliance with applicable statutory requirements.

41. Some members share the concern expressed by the depositions that while the Highways Department would be the Authority for processing and monitoring EPs, it would also be a permittee and the Authority for taking law enforcement action against breach of EP conditions, thereby leading to possible role conflict.

42. The Administration's view is that it does not envisage any role conflict of Highways Department. The team in the Highways Department responsible for enforcement of EP conditions is entirely separate from those responsible for road works. Furthermore, it should be noted that while Highways Department is the issuing authority of EPs, it is Department of Justice to decide whether a particular case should be prosecuted if there is any contravention of the law or the EP conditions. This is also similar to legislation for application of license to discharge into a water control zone under the Water Pollution Control Ordinance (Cap. 358), or, a construction noise permit under the Noise Control Ordinance (Cap. 400), where in both cases, the Environmental Protection Department is the licensing authority, the Department of Justice is the prosecuting authority.

43. The sites of Highways Department are open at the roadside and subject to surveillance by the public. Any contravention of the law or permit conditions can be picked up by the industry, media or the public.

Reporting mechanism

44. The new section 2A of the Bill provides that if the Authority considers that a public officer, in carrying out his duties in the service of the Government, had done an act or made an omission in contravention of Part III, the Authority shall, if the act or omission is not immediately terminated to his satisfaction, report the matter to the Secretary. On receiving such report, the Secretary shall inquire into the matter and, if his inquiry shows that a public officer is continuing to contravene Part III or is likely to contravene that Part again, the Secretary shall ensure that the best practicable steps are taken to stop the contravention or avoid the recurrence (as the case may be).

45. The Administration emphasizes that the reporting system in the new section 2A can impose quite a severe penalty on Government officers contravening the Ordinance.

Under the Bill, offences likely to be committed by the permittee of an EP are only punishable by a fine as the permittees are often companies. In the case of a private company, the company is required to pay a fine, and whether its staff will be punished by the company is a matter for the company to decide. In case of the Government, paying of fines by departments is meaningless, and therefore the Administration proposes the reporting mechanism. The reporting mechanism can result in investigations pinpointing the individual officer involved, and have him punished, albeit not by the court.

46. The Bills Committee notes that the draft outline procedures governing the reporting mechanism has to be further refined before it is adopted by the Administration. The Administration advises the Bills Committee that the draft procedures are just a guideline on how to apply the existing disciplinary framework to situations where breaches of the requirements in the Bill are involved. As there already exists a comprehensive set of regulations and guidelines for disciplinary procedures for civil servants, the procedures will be developed on this basis. The Administration is of the view that in principle, there should be the following procedures under the reporting mechanism:

- (a) procedures for the Secretary to immediately stop the continuation of a contravention;
- (b) procedures for investigation to prevent recurrence;
- (c) procedures for punishing any officers identified to be personally responsible for the contravention, which will be based on the existing Civil Services Regulations, Public Services (Disciplinary) Regulations and Public Services (Administration) Order;
- (d) if the investigations show that the officer concerned contravenes some other law on a personal capacity at the same time, then that other contravention will be passed to the relevant authorities; and
- (e) the Secretary will also require the case be made known to all Government Departments likely to come across similar situation so as to avoid similar mistakes.

47. The Bills Committee has examined whether the investigation undertaken by the Secretary under new section 2A should be completed within a certain time limit so that a contravention by a Government department could be stopped at the earliest opportunity and the concerned public officers be subject to appropriate disciplinary actions. The Administration advises that all investigation actions required in new Section 2A should be done without unreasonable delay. The Administration also advises that according to section 70 of Interpretation and General Clauses Ordinance, (Cap. 1), “where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises”. The Administration therefore considers it impractical and unnecessary to prescribe any time limit in the new Section 2A as the nature of the cases may vary.

48. Having considered members’ view, the Administration agrees to move a CSA

to amend the new section 2A to make every contravention by public officers reportable to the Secretary, instead of only those cases which are not stopped on intervention by the Authority.

Provision of safety precautions and adequate support and the related penalty

49. The new section 10Q under the Bill imposes a duty on a permittee and nominated permittee of a excavation permit to provide safety precautions, and adequate support to adjacent structures. The Bill provides that any failure to comply with this safety requirement is an offence and shall be liable on conviction to a fine at level 5 and to imprisonment for 6 months.

Level of penalty

50. Whilst supporting 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 deputations are concerned that the imprisonment penalty of 6 months as provided for in the Bill is unnecessarily harsh. The fact that the Government is not subject to prosecution for contravention of section 10Q reinforces the concern of the utility undertakers over unequal treatment of public officers and the directors of a company in the private sector. Utility undertakers highlight that the Government may prosecute directors of a company for contravention of section 10Q(1) pursuant to section 101E of the Criminal Procedure Ordinance (Cap. 221) which states that "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." Given that section 10Q(1) in the Bill may give rise to potential penalty of imprisonment for directors, particularly when the breach may be due to the fault of the contractors only, utility undertakers strongly request that the imprisonment penalty be repealed.

51. Having taken the views of the deputations, the Administration proposes to replace the imprisonment penalty for contravention of the new section 10Q(1) in the Bill by raising the originally proposed fine from \$50,000 to \$200,000 in order to maintain the necessary deterrent effect, out of consideration that imprisonment is not effective against companies, but a more heavy fine would be more effective.

52. Regarding the raising of the fine to \$200,000, the Bills Committee conducted another round of consultation with the utility undertakers and the construction industry. The Bills Committee notes that the deputations are of the view that a fine of \$200,000 is too high under such an economic environment.

53. In this respect, the Bills Committee has made reference to other local legislation, in particular, fines for offences involving unsafe work place or construction sites, which are somewhat similar to the targets of control under section

10Q(1). The Bills Committee notes the examples under the Construction Sites (Safety) Regulations (Cap. 59 sub. leg. I) which provides for fines ranging up to \$200,000 with or without imprisonment term. Regulation 68(2)(a) provides that a person guilty of contravening regulation 39(1) (prevention of workmen from being endangered by fall or displacement of earth etc) and regulation 41 (prevention of material falling into an excavation or collapse of edge of excavations) shall be liable to a fine of \$200,000. The Bills Committee notes the Administration's view that the trend is, where the offences relates to construction and safety that endanger life, a fine of \$200,000 should be appropriate in order to maintain the deterrent and punitive effect. The Administration will move a CSA to increase the fine for contravention of the new section 10Q(1) from \$50,000 to \$200,000. The imprisonment penalty will be removed.

Defence provision

54. The Bill provides that it is a defence in a proceeding against an offence for failure to provide safety precautions, and adequate support to adjacent structures if the person charged shows that he took all reasonable steps and exercised all due diligence to avoid committing the offence. In this respect, the Bills Committee has examined the adequacy and clarity of the defence provision as well as its scope of application. The Bills Committee has also considered whether it is necessary for the Administration to issue codes of practice and guidelines or introduce new administrative measures to facilitate the trades to comply with the safety precaution and support requirements.

55. The Bills Committee notes the Administration's view that it is unnecessary to issue guidelines to handle such matters as they are already widely known and in existence. The Administration encourages and expects those involved in street excavations to seek professional advice as regard what are "necessary safety precautions". Engineers, architects and related professionals should be well aware of the requirements of "necessary safety precautions" under different situations. These are embodied in the knowledge acquired by these professionals through continuing education, training and practical experience and there is already consensus within the trade and profession about what safety requirements are. Street excavation promoters are expected to, if they themselves are not professionals in this field, to hire such professionals either as in-house staff or consultants. This service is widely available in Hong Kong.

56. Notwithstanding the above, the Administration has proposed to include a list of factors that the court may take into consideration in deciding whether a person charged under section 10Q(1) has taken all reasonable steps and exercised all due diligence to avoid committing the offence. A CSA will be moved to this effect.

Criminal record

57. The question of whether convictions of offences under the Bill would be

included in the List of Recordable Offences which forms the basis for considering whether or not to issue a Certificate of No Criminal Conviction by the Police has been examined by the Bills Committee.

58. The Bills Committee notes that as a matter of policy, the Administration has no intention to request the police to record any offence committed under provisions of the Bill. It is still the practice of the Police to determine which convictions are to be recorded in the List of Recordable Offences for the purpose of issuance of Certificate of No Criminal Conviction. The List of Recordable Offences will be reviewed annually by the Police. The Administration reiterates that it has no intention to request the Police to record any offence committed under the Land (Miscellaneous Provisions) Ordinance (Cap. 28) and the provisions of the Bill in the List of Recordable Offences. Hence, such offences would not be relevant for a Certificate of No Criminal Conviction to be issued by the Police.

59. Notwithstanding the fact that offences under the Ordinance and the Bill will not be recorded by the Police in the List of Recordable Offences, members of the Bills Committee are concerned that under the existing administrative arrangement, there is no express statutory provision which prohibits the Police from doing so in future. The Administration's view is that it is not necessary to add an express statutory provision in the Bill to prohibit the Director of Highways from requesting the Police to make a record of conviction under the Bill, bearing in mind there is no similar express provision in any other ordinance. The Administration says that it is a principle of legal policy that law should be coherent and self-consistent, the departure from the norm may require justification, but there is no such justification in the present case. It would be inconsistent with the overall scheme as no ordinance contains such a provision.

60. Members of the Bills Committee consider it necessary to discuss further on the mechanism of the review of the List of Recordable Offences and disclosure of review of the List of Recordable Offences by the Police. As the subject matters touch on a wider policy issue, the Bills Committee has referred the matter to the Panel on Security for follow-up.

Concept of secondary permit

61. At present, an EP was issued to an utility undertaker, not the contractor engaged by the company to carry out the works. The contractor is theoretically excavating without a permit. Also, as the contractor was not the permittee, it was difficult for the Highways Department to prosecute the contractor for breaching the EP conditions. To address the problem, the Bill provides that where a person employs a contractor to carry out excavation works, he would himself need a principal excavation permit and his contractor as well as any other subcontractors would each be deemed to have been issued with a secondary permit on similar terms and conditions so that enforcement against any breaches can be made against any of them.

62. The Bills Committee considers the legal concept of the deemed issue of secondary EP or secondary emergency EP to contractors undesirable as the approach may cause confusion. Taking into account the views of the Bills Committee, the Administration agrees to move CSAs to remove the concept of “secondary excavation permit” and “secondary emergency excavation permit”. Under the revised proposal, a person shall not make or maintain any excavation in unleased land unless he is the holder of an EP/emergency EP or he is the contractor of an EP/emergency EP holder.

Nominated permittee

63. The Bills Committee notes that under the Bill, a permittee may nominate his contractor as a nominated permittee by sending a notice of nomination to the Authority. If the contractor consents to such nomination and the Authority approves the nomination, then the contractor becomes a nominated permittee. The permittee and the nominated permittee shall be liable for any breach of their respective conditions as stated in the EP, but if there is no nominated permittee, the permittee himself will remain liable for all breaches. Highways Department will make it clear in future which conditions are to be observed by the permittee, or the nominated permittee, or both at the time when the permit is issued.

Issue of emergency excavation permit

64. The Bills Committee notes that under the new section 10B, the Authority may issue an emergency excavation permit, authorizing the making and maintaining of emergency excavations. An emergency excavation permit shall be valid for 6 months. During the period for which an emergency excavation permit is valid, the permittee of the permit may make and maintain an emergency excavation for each emergency incident during a period of 7 days from the date of the report of the incident to the Authority. No fee will be charged for issuing such an emergency excavation permit as the permittee concerned may not carry out any emergency excavation at all over the period. However, if the permittee actually needs to make use of the emergency excavation permit to carry out any emergency excavation works, the permittee is required to pay the EP fee as well as the daily charge in accordance with the prescribed rates as set out in clause 14 of the Bill. If the permittee of an emergency excavation permit anticipates that he has to make or maintain an emergency excavation for more than 7 days, the permittee shall apply to the Authority for the issue of an excavation permit before the expiry of the initial period of the excavation. The Bills Committee is satisfied that this arrangement is to avoid the situation whereby utility undertakers are forced to make excavations without a valid permit for emergency repairs and to provide a flexible mechanism on the control of excavations for emergency purposes.

Incentive scheme

65. The Bills Committee has considered the suggestion of utility undertakers to introduce an incentive scheme to encourage early completion of road excavation

works. The objective of the proposal is to ensure maximum availability of roads to traffic and pedestrians.

66. The Administration's view is that under the permit conditions, the permittee is required to make a road available to users if the excavation cannot be carried out unless otherwise approved by the Authority. Also, when issuing a permit, traffic arrangements are to be approved by the Authority, and the Authority will only approve traffic arrangements which are least disturbing to the traffic and pedestrians. Extending the validity of a permit for a period corresponding to the temporary reopening of a street to traffic as suggested by some members is equivalent to a waiver (by refund) of economic charges in any subsequent extension excavation permit. The Administration is concerned that such waiver or refund, while it may "encourage" temporary reopening during the course of excavation, may dilute the effect of using economic charge as an incentive to encourage the road work promoter to achieve early/timely overall completion. Indeed, an incentive arrangement to encourage utility undertakers for early completion of works has already been proposed under section 10K(2) whereby the Authority may refund the daily fee and economic costs (if any) paid in respect of an excavations completed before the expiry date of the permit or the extended period of the permit.

67. Notwithstanding the above, the Administration has advised that it has consulted the industry on the issue, and generally, the industry could not propose any practicable incentive scheme. The Administration instead proposes to refund the \$32 daily fee in case the permittee can complete earlier than the originally applied for. The Administration also agrees to consider introducing some form of award scheme for the well-performed permittee and his contractors administratively. The scheme may be modeled upon the Considerate Contractors Award Scheme, which includes award presentation ceremonies and publicity. The Administration will discuss further with the industry about such a scheme in the Joint Utilities Policy Group.

Other issues

68. The Bills Committee notes that the Authority controls street excavations through a three-tier liaison system with major private and public street excavation promoters, namely, the Joint Utilities Policy Group, Utilities Technical Liaison Committee (UTLC), and Road Opening Coordination Committee (ROCC); the computerized utility management system which provides the statistics to monitor globally the punctuality of street excavations; and the audit system to monitor the compliance with permit conditions and safety requirements of individual street excavations. A computer system for sharing utility information amongst utility undertakers, subject to an agreed accuracy standard, has also been set up.

69. Currently, the Authority has limited means to control extensions and encourage timely completion other than by passively recording the delays and non-compliance with EP conditions and have them discussed on the UTLC and ROCC, where utilities are urged to improve their performance. With the passage of the Bill, there will be

financial disincentive for unreasonable delays in completion of street excavations and more effective prosecutions to encourage compliance with permit conditions.

70. In the course of deliberation, the Bills Committee has made various suggestions to improve the monitoring of street excavations. Members also urge the Administration to improve the situation of unattended work sites. Where possible, excavation sites should be re-opened to traffic at the earliest opportunity.

71. Some members of the Bills Committee are of the view that disruption to pedestrian traffic, inconvenience to the public and loss of business to road side shops caused by excavation works on footpaths also incur high economic costs in terms of both time and money. The Bills Committee has examined whether it is desirable to introduce a charging scheme for economic costs associated with extended excavation works on footpaths. It has requested the Research and Library Services Division to conduct a research on the methodology for the calculation of economic costs relating to excavation works on footpaths in overseas places.

72. The Bills Committee notes that utility undertakers strongly object to such charging. They point out that delay in completion in any form (whether it is on the carriageway or pavement) would not be in their interest. Therefore there should be no need for any further economic charges. The effect of excavations on shops can never be accurately assessed. Also, effect from excavation on pavement is localized (where it is unlike excavation in the carriageway which may be extensive), and it is rather extreme to charge economic cost for such localized effect. The Administration also points out there is no recognized scientific basis of assessment of economic cost to the pedestrian, who may easily take alternative route, but if they were to charge economic cost, legally, there must be a reasonable basis. The industry also points out that it has been their contractors' practice to schedule their work to avoid inconvenience to shops owners as much as possible, and problems could be solved in an amicable manner without resorting to charging of economic cost. Government's policy of using paving blocks on pavements has also helped shortening the duration of excavations.

73. The Bills Committee notes that the Research and Library Services Division cannot find any relevant overseas practices whereby a charging scheme for economic costs associated with extended excavation works on footpaths.

74. As a general comment, a member has pointed out that in putting forward legislative proposals, the Administration should conduct thorough consultation before formal introduction, taking into account the views expressed by interested parties.

Committee Stage amendments

75. Apart from the major CSAs mentioned in the foregoing paragraphs, the Administration has accepted the Bills Committee's suggestion to move a number of amendments to improve the text of the Bill and the operation of the control system. The Bills Committee notes that the Administration has consulted utility undertakers

on the proposed CSAs.

Recommendation

76. The Bills Committee recommends the resumption of the Second Reading debate on the Bill on 14 May 2003.

Consultation with the House Committee

77. The House Committee at the meeting on 25 April 2003 supported the recommendations of the Bills Committee in paragraph 76.

Council Business Division 1
Legislative Council Secretariat
29 April 2003

**Bills Committee on
Land (Miscellaneous Provisions) (Amendment) Bill 2002**

Membership list

Chairman Hon LAU Ping-cheung

Members Ir Dr Hon Raymond HO Chung-tai, JP
Hon Eric LI Ka-cheung, JP
Hon Fred LI Wah-ming, JP
Hon Margaret NG
Hon Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP
Dr Hon TANG Siu-tong, JP
Hon Abraham SHEK Lai-him, JP
Hon Albert CHAN Wai-yip
Hon IP Kwok-him, JP
Hon Audrey EU Yuet-mee, SC, JP

(Total : 12 Members)

Clerk Mr Andy LAU

Legal Adviser Miss Kitty CHENG

Date 5 July 2002

**Bills Committee on
Land (Miscellaneous Provisions) (Amendment) Bill 2002**

List of parties which have submitted views to the Bills Committee

1. CLP Power Hong Kong Limited
2. Hong Kong Cable Television Ltd
3. Hong Kong Tramways Limited
4. Hutchison Global Crossing Ltd
5. New World Telephone Ltd
6. PCCW Limited
7. The Hong Kong and China Gas Company Limited
8. The HongKong Electric Co., Ltd
9. Wharf New T&T
10. Hong Kong General Building Contractors Association
11. The Hong Kong Construction Association
12. The Hong Kong Institute of Planners
13. The Hong Kong Institute of Surveyors
14. Mr YEUNG Wai-sing, Eastern District Council Member

Proposed Fees for Highways Department's Excavation Permits (EPs)
(Cost at 2001-02 Prices)

	<u>Issue of EP</u>	<u>Issue of extension EP</u>	<u>Daily Fee in respect of EP/extension EP</u>
	\$	\$	\$
Staff Costs	59,383,346	4,628,734	43,037,290
Departmental Expenses	2,352,232	302,143	2,413,409
Accommodation Cost	1,704,949	152,878	1,354,845
Depreciation of the computerised UMS	4,625,073	746,584	5,655,072
Cost of Services provided by other departments	31,040,364	2,575,776	5,928,511
Central Administration Overheads	1,559,846	121,585	1,130,478
	<hr/>	<hr/>	<hr/>
Total Cost	<u>100,665,810</u>	<u>8,527,699</u>	<u>59,519,605</u>
Total no of permit/permit-day	54,295	14,427	1,846,590
Unit cost	1,854	591.1	32.2
Approved fees	1,860	590	32

Note :

- 1) The above costs include those of HyD, TD and HKPF.
- 2) The staff cost is calculated based on the time spent by HyD in executing their duties in relation to excavation works on streets maintained by HyD.
- 3) The costs for issue of EP and extension EP are for processing EP and extension EP applications, and the costs for daily fee are for audit site inspections. They do not include the costs for prosecution.
- 4) The total no. of permit/permit-day include those for HyD works orders and excavation permits.

**Proposed Fees for Lands Department's Excavation Permits (EPs)
(Cost at 2001-02 Prices)**

(a)	Issue of EPs for excavation in unleased land other than streets maintained by Highways Department	Extension of EPs for excavation in unleased land other than streets maintained by Highways Department
	\$	\$
Staff Cost	8,964,166	660,396
Departmental Expenses	260,726	17,773
Accommodation Costs	444,869	27,982
Services by Other Departments	-	-
Central Administrative Overheads	323,706	23,848
Total of above costs	<u>9,993,467</u>	<u>729,999</u>
Number of Permits Issued#	4,506	1,817
Unit Cost	2,218	402
Plus Unit Cost for Copying of Land Records	840	-
Total cost	<u>3,058</u>	<u>402</u>
Proposed Fees	3,060	400

Remarks:

The numbers of permits issued in 2001-02 assumed to be the same as that in 1997-98 as the number of EPs issued by Lands Department does not vary greatly from year to year.

Methodology in assessing the Additional EP Daily Charge based on Economic Cost due to Traffic Delay

1. To devise a charging scheme for economic cost, it is essential that we have a classification system of all roads over Hong Kong based on some existing criteria. We identified 3 categories:

Category 1 - Strategic Streets

This category comprises all strategic streets which basically include all red and pink routes.¹ Since expressways are either red or pink routes, they are automatically included in this category.

Category 2 - Sensitive Streets

This category includes all traffic sensitive streets other than those specified in Category 1 above. It includes streets where any excavation would normally require a Traffic Impact Assessment (TIA) and/or Day-time Ban would be imposed, and other streets where the closure of a traffic lane will result in major traffic problems².

Category 3 - Remaining Streets

This category comprises all other streets not included in Category 1 and 2.

2. From each category of streets, Transport Department selected representative road sections and junctions to conduct a computer study to assess the delay to motorists by street excavations.

3. The computer study was done utilizing a transport-modeling package capable of reporting the total travel time for all vehicles passing through a defined road section under different network conditions. For each sample selected, a model run was conducted for the normal road network and a second run was carried out with a road network suitably modified to reflect the loss of road capacity, resulting from the excavation works. By comparing the total travel time experienced by all vehicles through the road section for the scenarios with and without the excavation works, a delay value was derived. This delay was converted to an economic loss in dollars per day by application of a “value of time” factor (\$197.6 /car/ hour) used in the Comprehensive Transport Study.

¹ The existing red routes and pink routes are listed in the Annexes to Highways Department Technical Circular No. 5/2001.

² This list of roads where TIA and/or Day-time Ban requirements shall apply is also given in the Appendix to the “Guidance Notes No. RD/GN/021” issued by Highways Department.

4. Based on the above, the cost of each category of streets is then derived from the weighted average of the sample costs within that particular category, as shown below:

Type of Streets	Charge
Category 1 (strategic streets)	\$18,000/day
Category 2 (sensitive streets)	\$7,000/day
Category 3 (remaining streets)	\$1,500/day