



18 November 2010

Our Ref.: 0200014691

By fax and post

2978 7569

Clerk to Bills Committee
Bills Committee on Competition Bill
Legislative Council Secretariat
8/F Citibank Tower
3 Garden Road, Central, Hong Kong
Attn: Ms Debbie SIU

Dear Ms Siu,

Competition Bill

We are associations relating to the construction industry in Hong Kong. Whilst we represent different stakeholders and participants of the industry, we share common goals, including the promotion of excellence in all aspects of the construction industry, and the achievement of fair, just and equitable practice within the industry.

We understand that the proposed legislation aims at prohibiting anti-competition behaviour, and would like to take this opportunity to express our collective comments on the Bill as follows:

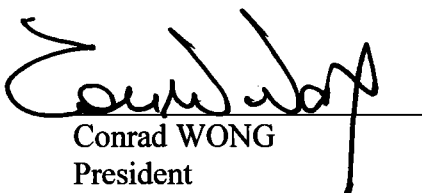
1. **First**, one of the major roles of our associations is to collectively represent our members in pursuing our objective of achieving fair and equitable terms of contracts to be used in projects in Hong Kong (both public and private works). This representation can take a number of forms: for example, our associations are often consulted by various procurers of projects to comment on the terms and conditions of standard form agreements prior to, or even after, the procurement concerned.
2. At other times, where the procuring body requires the use of unfair and harsh terms and conditions, we may be consulted by members and requested to discuss the possible amendment of these terms directly with the procuring body.
3. We do not consider that our collective representation role described above can have the effect of preventing, reducing or distorting competition. On the contrary, we consider this role as absolutely necessary for trying to achieve a fair and equitable basis for tendering, and will therefore tend to produce lower priced tenders. In addition, our collective representation role removes most of the risk of tenderers colluding and engaging in anti-competitive activities. As such, we write to propose that our collective representation role discussed above should be exempted from the operation of the legislation.
4. **Secondly**, under the current draft of the Bill, there are to be two enforcement bodies: the Competition Commission, and the Competition Tribunal. The Commission is empowered to accept a commitment under section 59, to issue infringement notice under section 66, and can bring proceedings in the Tribunal. There is, however, no requirement for the Commission to issue warnings prior to the issue of infringement notice. The request for a

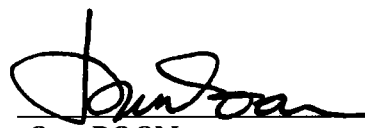
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- commitment is effectively a warning. We propose that the request for and acceptance of a commitment by the Commission should be mandatory before enforcement at a higher level (i.e. the issue of an infringement) would take place.
5. We are concerned that an infringement notice may cause serious consequence for businesses. In particular, the Commission may demand a sum not exceeding \$10,000,000 to be paid to the Government. As such, we propose that the legislation should be amended to the effect that it is a requirement for the Commission to issue warnings after its investigation, and before the issue of an infringement notice.
 6. We consider that this is beneficial to not only the construction industry, but all undertakings regulated by the proposed ordinance.
 7. **Thirdly**, we are aware that under sections 12 and 13 of the UK Competition Act 1998 undertakings may apply to the Director of the Office of Fair Trading ("OFT") for an examination of an agreement with a view to seeking the OFT's guidance on the likelihood of the agreement infringing section 2 of the Act (equivalent to the first conduct rule in the Hong Kong Bill).
 8. The Director of OFT may also indicate the likelihood of the agreement being exempted.
 9. We consider that these are useful mechanism for preventing infringement, and provide certainty. We propose that similar mechanisms should be included in the Bill. This would benefit not only the construction industry, but all undertakings under the legislation. Certainty of the law is also essential for attracting foreign investments to Hong Kong.
 10. **Fourthly**, section 39 of the UK Act provides limited immunity for 'small agreements' which is not currently available in the Bill. We invite the Bills Committee to consider providing similar immunity in Hong Kong. This will benefit undertakings of smaller scale which have less resource in dealing with any anti competition investigation and issues. Again, the benefit is not only limited to the construction industry.

We trust that the Bills Committee will favourably consider our observations above, and we hope that appropriate changes will be made to the Bill. Should further assistance be required, please do not hesitate to contact any of the undersigned.

Yours faithfully,


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Hong Kong Construction
Association
(HKCA)


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Kenneth POON
Chairman
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