

Bills Committee on Construction Industry Council (No.2) Bill

**Administration's Responses to Follow-up Actions
Arising from Discussions at the Meetings on 3 and 10 October 2005**

	Follow-up actions	Administration's responses
(1)	<ul style="list-style-type: none"> - To refine the drafting of new 7A(2)(b)(ii) in Schedule 2 to reflect the policy intention that meetings of CIC would not be open if the matter to be discussed in relation to levy was case specific. - To provide the case law concerning the meaning of "reasonableness" (new 7A(2)(c) in Schedule 2) in consultation with the Legal Advisor to the Bills Committee. 	<ul style="list-style-type: none"> - A proposed refinement to the drafting of section 7A(2)(b)(ii) in Schedule 2 of the Bill is at Annex A. - Extract of some similar provisions applicable to other statutory bodies and case law on the meaning of "reasonableness" are at Annex B.
(2)	<ul style="list-style-type: none"> - To advise in writing the outcome of the voluntary exit scheme launched by Construction Industry Training Authority (CITA) and the impact on its financial position. - To consider providing a written undertaking concerning smooth transition of CITA staff upon the amalgamation of CITA and CIC. 	<ul style="list-style-type: none"> - We will provide an updated financial assessment once CITA has completed the screening process of applications to join the voluntary exit scheme. - Continuity of employment for serving staff of CITA upon its amalgamation with CIC has already been explicitly covered in clause 82(1) of the Bill. As long as no undue encumbrance is imposed on the future operation of CIC, we are prepared to consider providing such an undertaking.

	Follow-up actions	Administration's responses
(3)	<ul style="list-style-type: none"> - To review the definition of “construction operation” to address operational difficulty, if any, encountered in collecting levy. - To advise the channels/mechanism to ensure construction operations which are subject to levy are traceable and that the contractors concerned are made aware of the liability for payment of levy. - To provide a breakdown by year of the value of construction works subject to levy and the levy income in the 90s. 	<ul style="list-style-type: none"> - The definition of “construction operations” in Schedule 1 of the Bill sets out the scope of construction activities subject to levy and is imported from the Industrial Training (Construction Industry) Ordinance (Cap. 317) which has thus far been operating effectively. - Major sources through which CITA could keep track of construction operations subject to levy are at Annex C. <li style="padding-left: 20px;">We will also actively assist CITA in strengthening its collaboration with regulatory authorities, government departments and trade associations to facilitate levy collection. - The requested breakdown on annual value of construction works subject to levy is at Annex D.
(4)	<p>To state the expectations in relation to nomination for appointment to the Construction Industry Council (CIC) and the need for a report back system at the Second Reading Debate on the Bill.</p>	<p>We will state at the Second Reading Debate our requirement for nominating organizations to put in place a system for their candidates to report regularly to all stakeholder groups.</p>

	Follow-up actions	Administration's responses
(5)	To review the drafting of clause 5(j). A member is concerned how CIC could monitor improvements made by the construction industry through compilation of performance indicators.	After careful consideration, we propose an amendment to clause 5(j) as at Annex E .
(6)	To review the Chinese rendition of "Objections Committee". One suggested version is "處理反對事宜委員會".	We have accepted the suggestion made by Members and submitted Committee Stage Amendments under separate cover.
(7)	To advise in writing the timeframe contemplated by the Administration with respect to the establishment of the Construction Industry Council (CIC) and the dissolution of the Construction Industry Training Authority (CITA).	<p>We have lost no time in preparing for the early formation of CIC and are aiming to do so after six to nine months following enactment of the Bill.</p> <p>However, it would be difficult to commit on a firm date for the amalgamation of CITA and CIC to take effect since this exercise calls for detailed operational planning and transitional arrangements. The Provisional Construction Industry Co-ordination Board will soon be forming a task force to tackle this issue.</p>
(8)	To consider the strategic framework governing the relationship between the Environment, Transport and Works Bureau (ETWB) and CIC.	Apart from provisions in the Bill catering for submission of annual reports by CIC on core activities and financial position, a liaison framework will be established by the Administration to maintain an effective interface with CIC.

7A. Meetings of Council to be held in public

(1) Subject to subsection (2), a meeting of the Council shall be open to the public.

(2) Subsection (1) does not apply to a meeting of the Council or a part of a meeting of the Council in the following circumstances –

- (a) if, in the opinion of the Council, it is likely that the application of subsection (1) would result –
 - (i) in premature release of information concerning any financial matter or investment of the Council; or
 - (ii) in a disclosure of information in breach of any law, order or direction of a court or tribunal, duty of confidentiality, or other legal obligation or duty;
- (b) if, in the opinion of the Council, it is likely that any matter to be discussed or considered at the meeting or part of the meeting -
 - (i) concerns personnel matters; or
 - (ii) concerns a particular case and is relevant to the carrying out of any provision of this Ordinance that relates to the levy, surcharge, penalty or further penalty; or
- (c) if the Council, having regard to all the circumstances of a particular case, reasonably considers that subsection (1) should not apply to the meeting or part of the meeting.

* The new contents are underlined and shown in italic print.

Extract of Relevant Provisions in Local Statute and the Case Law

(A) Independent Commission Against Corruption Ordinance (Cap.204)

13. Powers of the Commissioner

- (1) For the purpose of the performance of his functions under this Ordinance the Commissioner may-
 - (a) authorize in writing any officer to conduct an inquiry or examination;
 - (b) enter any Government premises and require any prescribed officer to answer questions concerning the duties of any prescribed officer or public servant and require the production of any standing orders, directions, office manuals or instructions relating thereto;
 - (c) (Repealed 45 of 1992 s. 3)
 - (d) authorize in writing any person to perform any of his duties and to exercise such powers under this Ordinance and the Prevention of Bribery Ordinance (Cap 201) as he may specify.
- (2) The Commissioner or any officer authorized for the purposes of this subsection in writing by the Commissioner shall have the following powers, namely-
 - (a) as regards the performance of any of the Commissioner's functions under this Ordinance, access to all records, books and other documents relating to the work of any Government department in the possession or under the control of any prescribed officer;
 - (b) in so far as is necessary for the performance of any of the Commissioner's functions under section 12(d) or (f), access to such records, books and other documents in the possession or under the control of a public body as the Commissioner or such officer reasonably considers will reveal the practices and procedures of that public body;*
 - (c) as regards any such records, books and other documents, power to photograph or make copies of them.
- (3) In this section "documents" (文件) has the meaning assigned to "document" in section 2 of the Prevention of Bribery Ordinance (Cap 201).

* Relevant provisions are highlighted in italic print for easy reference.

(B) Occupational Retirement Schemes Ordinance (Cap.426)

78. Disclosure by Registrar

- (1) Notwithstanding section 77, the Registrar may disclose information-
- (a) in the form of a summary compiled from information provided by persons under this Ordinance if the summary is so compiled as to prevent particulars relating to the business or identity of any such person being ascertained from it;
 - (b) with a view to the institution of, or otherwise for the purposes of, any criminal proceedings or any investigation in Hong Kong;
 - (c) in connection with any civil proceedings to which the Registrar is a party;
 - (d) subject to subsection (2), to the Chief Executive, the Financial Secretary or the Commissioner of Inland Revenue;
 - (e) *relating to an offshore scheme domiciled in a country, territory or place outside Hong Kong to a supervisory authority which in the Registrar's opinion-*
 - (i) *performs in that country, territory or place functions which are generally analogous to the functions conferred on the Registrar by this Ordinance; and*
 - (ii) *is subject to adequate secrecy provisions in that country, territory or place,*
if the Registrar reasonably considers that such disclosure is in the interests of the members of the scheme as a whole;
 - (ea) to the Authority, within the meaning of section 2 of the Mandatory Provident Fund Schemes Ordinance (Cap 485), if, in the opinion of the Registrar, the disclosure will enable or assist the Authority to perform a function conferred or imposed on the Authority by that Ordinance or any other law;
 - (f) to such bodies as then have been specified for the purpose of this paragraph by the Registrar in a notice published in the Gazette if, and only if, the Registrar-
 - (i) is satisfied that the information will be used only for the purposes of disciplinary proceedings regarding a member of that body or for the purpose of considering the institution of such proceedings; and
 - (ii) is of the opinion that such disclosure is desirable or expedient.
- (2) The Registrar shall not disclose any information to the Commissioner of Inland Revenue under subsection (1)(d) unless the Registrar is satisfied that the information is required by the Commissioner for the purpose of assisting him to

determine a question or matter which under the Inland Revenue Ordinance (Cap 112) is for the Commissioner to determine.

- (3) Where information is disclosed to any person under subsection (1)(f) neither that person nor any person obtaining or receiving the information, whether directly or indirectly, from that person shall disclose the information to any other person without the written consent of the Registrar.
- (4) Any person who contravenes subsection (3) commits an offence and shall be liable on summary conviction to a fine of \$20000.

(C) Personal Data (Privacy) Ordinance (Cap.486)

43. Proceedings of Commissioner

- (1) Subject to the provisions of this Ordinance, the Commissioner may, for the purposes of any investigation-
 - (a) be furnished with any information, document or thing, from such persons, and make such inquiries, as he thinks fit; and
 - (b) regulate his procedure in such manner as he thinks fit.

- (2) *Any hearing for the purposes of an investigation shall be carried out in public unless-*
 - (a) the Commissioner is of the opinion that, in all the circumstances of the case, the investigation should be carried out in private; or*
 - (b) if the investigation was initiated by a complaint, the complainant requests in writing that the investigation be carried out in private.*

- (3) Counsel and solicitors shall not have any right of audience before the Commissioner at any hearing for the purposes of an investigation, but may appear before him if he thinks fit.

- (4) It shall not be necessary for the Commissioner to hold any hearing for the purposes of an investigation and no person shall be entitled to be heard by the Commissioner.

- (5) If at any time during the course of an investigation it appears to the Commissioner that there may be sufficient grounds for him to make any report or recommendation that may criticize or adversely affect any person he shall give to the person an opportunity to be heard.

(D) The Ombudsman Ordinance (Cap.397)

11B. Dealing with Complaints by Mediation

- (1) The Ombudsman may decide to deal with a complaint by mediation under this section if he is of the opinion, having regard to all the circumstances of the case, that the subject matter of the complaint involves no, or only minor, maladministration.*
- (2) The Ombudsman may authorize any person appointed under section 6(1) as a mediator in any mediation.
- (3) The person appointed to be the Ombudsman under section 3(3) shall not participate as a mediator in any mediation.
- (4) Participation in the mediation by the complainant and the organization affected is voluntary, and any party may withdraw at any time.
- (5) The mediator may terminate the mediation at any time.
- (6) If an attempt to deal with a complaint by mediation under this section is unsuccessful-
 - (a) the complaint is to be treated under this Part as if the mediation had not taken place; and
 - (b) the mediator is excluded from participating as an investigating officer in any subsequent investigation of the complaint.
- (7) Anything said or admitted during the mediation and any document prepared for the purposes of such mediation-
 - (a) shall not be admissible in evidence in any subsequent investigation of the complaint concerned unless the person who said or admitted the thing, or to whom the document related, consents to its admission;
 - (b) shall not be admissible in evidence against any person in any court or at any inquiry or in any other proceedings,
and no evidence in respect of the mediation may be given against any person.
- (8) Nothing in this section prevents a complaint from being dealt with otherwise than in accordance with this section.

(E) R v The English Schools Foundation [2004] 3 HKC

In the Hong Kong Court of First Instance case of R v The English Schools Foundation [2004] 3 HKC, Hon Hartmann said in his judgment: - “It is of course well settled that a public body such as the ESF invested with statutory powers must take care not to exceed or abuse its powers. It must therefore act in good faith and must ensure that decisions made by it, which have or may have a material consequence, are reasonable in the sense they are not perverse or capricious; in short, that they are not decisions which a reasonable decision-maker, taking account of all relevant circumstances, could ever make.”

(F) Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948]1 KB 223

In the English Court of Appeal case of Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948]1 KB 223, Lord Greene MR said in his judgment : - “It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey these rules, he may truly be said, to be acting “unreasonably.”

(G) Nakkuda Ali v Jayaratne [1951]AC 66

If a licensing authority has power to revoke a trader's licence if it has "reasonable cause to believe" that the licensee has committed malpractices, the authority must show causes which the court judges to be reasonable. Regulation 62 of the Defence (Control of Textiles) Regulations 1945 of Ceylon stipulated: - "Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence or textile licences issued to that dealer". In *Nakkuda Ali v Jayaratne [1951]AC 66*, the Privy Council held that the words in Regulation 62, "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer", were to be treated as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he could validly exercise the power of cancellation.

The judgment of the Privy Council was delivered by Lord Radcliffe. Lord Radcliffe said in the judgment: - "After all, words such as these are commonly found when a legislature or law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing. No doubt he must not exercise the power in bad faith: but the field in which this kind of question arises is such that the reservation for the case of bad faith is hardly more than a formality. Their Lordships therefore treat the words in reg. 62, "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation."

(H) Inland Revenue Commissioners v Rossminster Ltd [1980]AC 952

Section 20C of the Taxes Management Act 1970 stipulated: - "(1) If the appropriate judicial authority is satisfied on information on oath given by an officer of the board that - (a) there is reasonable ground for suspecting that an offence involving any form of fraud in connection with, or in relation to, tax has been committed and that evidence of it is to be found on premises specified in the information; the authority may issue a warrant in writing authorising an officer to enter the premises, if necessary by force, at any time within 14 days from the time of issue of the warrant, and search them (3) On entering the premises with a warrant under this section, the officer may seize and remove any things whatsoever found there which he has reasonable cause to believe may be required as evidence for the purposes of proceedings in respect of such an offence as is mentioned in subsection (1) above" In *Inland Revenue Commissioners v Rossminster Ltd [1980]AC 952*, the House of Lords held that under section 20C(3) the existence of "reasonable cause to believe" that any things found on the premises might be required as evidence for the purposes of proceedings in respect of the suspected offences was a question of fact.

Lord Wilberforce said in his judgment: - "The second matter, on which the intervention of the court may be called for, arises under section 20(3). This confers a statutory power independent of any authority in the warrant to seize and remove. Like all statutory powers conferred on executive officers it is subject to supervision by the courts exercising their classic and traditional power of judicial review. It is undisputed that the words "has reasonable cause to believe" are open to examination in spite of their subjective form: see *Nakkuda Ali v Jayaratne [1951]AC 66 et al.* The existence of this reasonable cause and of the belief founded upon it is ultimately a question of fact to be tried on evidence."

(I) Coleen Properties Ltd v Minister of Housing and Local Government [1971] 1 WLR 433

If a sound building may be included in a clearance area if that is "reasonably necessary", a minister's decision to include it will be quashed by the court if there is no evidence of any necessity. Section 43 of the Housing Act 1957 stipulated: - "(2) Where the local authority determine to purchase any land comprised in the area declared by them to be a clearance area, they may purchase also any land which is surrounded by the clearance area and the acquisition of which is reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions, and any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or use of the cleared area". In *Coleen Properties Ltd v Minister of Housing and Local Government* [1971] 1 WLR 433, the English Court of Appeal held that since there was no evidence that the acquisition of the building was "reasonably necessary for the satisfactory development or use of the cleared area" within section 43(2), the Minister's decision was ultra vires.

Buckley LJ said in his judgment : - "As I think that the Minister has no sufficient material upon which to reach the decision which he did reach, it follows that he acted ultra vires the section and that his decision is one which should not be permitted to stand."

(J)Leung Kwok Hung and others v HKSAR [FACC Nos 1 & 2 of 2005]

Section 14(1) of the Public Order Ordinance (Cap.245) stipulates: - "Subject to subsection (5), the Commissioner of Police may object to a public procession being held if he reasonably considers that the objection is necessary in the interest of national security or public safety, public order (ordre public) or the protection of the rights and freedoms of others." Section 14(5) stipulates: - "The Commissioner of Police shall not exercise his right under subsection (1) to object to holding of a public procession if he reasonably considers that the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedoms of others could be met by imposing conditions under section 15(2)." Section 15(2) stipulates: - "The Commissioner of Police may, where he reasonably considers it necessary in the interests of national security or public safety, public order (ordre public) or for the protection of the rights and freedom of others, impose conditions in respect of any public procession notified under section 13A,"

In the Court of Final Appeal case of Leung Kwok Hung and others v HKSAR [FACC Nos 1 & 2 of 2005] , the court decided that the test of "reasonably considers" imposed is an objective test. In the judgment, Chief Justice Li, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ said: - "The Commissioner's discretion to object to a notified public procession and his discretion to impose conditions are expressed in identical terms and will simply be referred to collectively as "the discretion to restrict". The test for its exercise is if the Commissioner reasonably considers that the objection or the condition is necessary for the statutory legitimate purposes, including "public order (ordre public)" ("the statutory test of necessity"). The test imposed is an objective test."

(K) Darlington Borough Council v Malcolm Kaye [2004] EWHC 2836 (Admin)

Section 51 of the Local Government (Miscellaneous Provisions) Act 1976 states that a District Council shall not grant a license unless they are satisfied that the applicant is a fit and proper person to hold a driver's licence. Section 57(1) further states that a District Council may require any application for a licence under the Act of 1847 or under this part of this Act to submit to them such information as they may reasonably consider necessary to enable them to determine whether the license should be granted and whether conditions should be attached to any such license.

In Darlington Borough Council v Malcolm Kaye [2004] EWHC 2836 (Admin), the council reviewed its licensing policy in September 2002 introducing a requirement for any applicant for renewal of hackney carriage and private hire licences whose medical and/or police check are due, to provide a Driving Standards Agency taxi driver pass certificate, to raise the standard driving skills for the benefit of all road users. The English High Court of Justice held that the requirement to supply a DSA pass certificate was a request for information which the council reasonably considered necessary to enable them to determine whether the applicant was a fit and proper person to hold a hackney carriage driver's license.

In his judgment, Mr Justice Wilkie said: - "In my judgment the District Council, in deciding whether it is satisfied that an applicant is a fit and proper person, is entitled to have regard to the applicant's standard of driving.It is a matter for the District Council to set the standard of what will amount to a fit and proper person by reference to, amongst other things, the applicant's standard of driving provided in so doing they take into account all relevant matters and leave out of account irrelevant matters and come to a decision to which a reasonable licensing body would come. Furthermore it is entitled to have a policy which it applies in the generality of cases provided it is prepared to be "willing to listen to anyone with something new to say" (see Lord Reid in *British Oxygen Company versus Board of Trade* (1971) AC 610, 625D).....It further follows that, given that policy, it was entitled to consider that it was reasonably necessary for it, in order to form a view whether a person was a fit and proper person to have a license, to require information from an applicant whether he or she had passed that test."

Major Sources of Information on Construction Operations**(A) Primary Sources**

Types	Coverage	Timeframe	Responsible Party
Appointment of Authorized Persons and contractors	Construction operations subject to levy under the Industrial Training (Construction Industry) Ordinance	Note 1	Employers, Authorized Persons and contractors
Notice of commencement	- ditto -	14 days after commencement of construction operations	Authorized Persons and contractors
Notice of payments	- ditto -	14 days after payment made in respect of construction operations ^{Note 2}	Contractors
Notice of completion	- ditto -	14 days after completion of construction operations	Authorized Persons and contractors

Note 1 Employers are required to serve such notice to the Construction Industry Training Authority (CITA) before commencement of the construction operations concerned, whereas Authorized Persons and contractors should inform CITA of their appointments within 14 days after project commencement.

Note 2 Contractors who carried out construction operations under a term contract should serve such notice within 14 days after the last day of the month in which payment has been made.

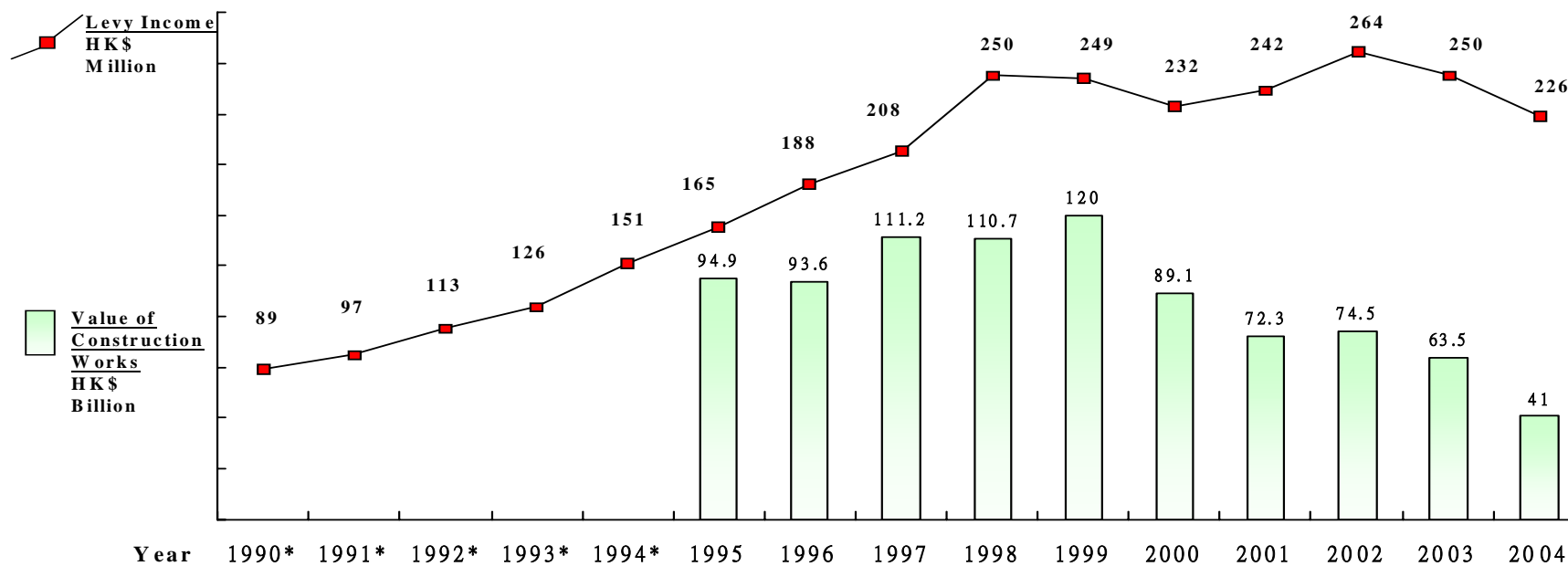
(B) Complementary Sources

Types	Coverage	Timeframe	Responsible Party
Appointment of registered contractor	Building/street works within the scope specified in the Buildings Ordinance	Seven days before commencement of works	Authorized Persons and contractors
Commencement of building/street works	- ditto -	- ditto -	- ditto -
Certificate on completion of building/street works and/or application for Occupation Permit	- ditto -	14 days after completion of works	- ditto -
Monthly digest ^{Note 3}	Building works within the scope specified in the Buildings Ordinance	-	Buildings Department
Government Gazette	Public works contracts	Note 4	Relevant government departments
Electronic announcement/advertisement	Construction projects in the public and the private sectors	-	Public/private sector clients

Note 3 Statistical report compiled by the Buildings Department on its monthly output including approval granted for various applications and submissions.

Note 4 Gazettal requirements of public works contracts are governed by different ordinances.

**Breakdown on
Value of Construction Works and Levy Income**



* Information on construction works commenced is unavailable

5. Functions of Council

The functions of the Council are –

- (a) to advise and make recommendations to the Government on strategic matters, major policies and legislative proposals, that may affect or are connected with the construction industry, and on matters of concern to the construction industry;
- (b) to reflect to the Government the construction industry's needs and aspirations;
- (c) to elevate the quality and competitiveness of the construction industry by promoting the ongoing development and improvement of the industry;
- (d) to uphold professionalism and integrity within the construction industry by promoting self-regulation, formulating codes of conduct and enforcing such codes;
- (e) to improve the performance of in persons connected with the construction industry through establishing or administering registration schemes or rating schemes;
- (f) to advance the skills of personnel in the construction industry through planning, promotion, supervision, provision or coordination of training courses or programmes;
- (g) to encourage research activities and the use of innovative techniques and to establish or promote the establishment of standards for the construction industry;
- (h) to promote good practices in the construction industry in relation to dispute resolution, environmental protection, multi-layer subcontracting, occupational safety and health, procurement methods, project management and supervision, sustainable construction and other areas conducive to improving construction quality;
- (ha) to enhance the cohesiveness of the construction industry by promoting harmonious labour relations and observance of statutory requirements relating to employment, and by facilitating communication among various sectors of the industry;
- (i) to serve as a resource centre for the sharing of knowledge and experience within the construction industry;
- (j) to **monitor assess** improvements made by the construction industry through the compilation of performance indicators;
- (k) to make recommendations with respect to the rate of the levy imposed under this Ordinance; and
- (l) to perform any other functions relevant to the construction industry, including those functions conferred or imposed on it by or under this Ordinance or any other enactment.

* The relevant revision is underlined and highlighted in bold type.