

**For discussion  
on 30 June 2014**

**Bills Committee on Competition (Amendment) Bill 2014**

**Responses to follow-up questions arising from the previous meeting**

**Purpose**

This paper responds to questions raised by Members at the meeting of 12 June 2014.

**Views of the Hong Kong Bar Association and the Law Society of Hong Kong on the proposed legislative amendments to the Competition Ordinance**

2. At Members' request, views of the Hong Kong Bar Association and the Law Society of Hong Kong on the proposed legislative amendments to the Competition Ordinance ("CO")(Cap. 619) are set out in full at **Annex**.

**General powers of the Tribunal**

3. As we have explained in our letter of 11 June 2014 to the Assistant Legal Advisor (LC Paper No. CB(1)1602/13-14(01)), the reasons for introducing the proposed provisions conferring specific powers on the Competition Tribunal ("Tribunal") into the CO is that despite the general approach adopted in the CO, there are several areas in the CO where it is not entirely clear as to whether the Tribunal would have the specific powers of the Court of First Instance ("CFI") in discharging its functions. For the sake of certainty and clarity, the proposed provisions in the Bill are introduced into the CO to specifically provide for the Tribunal's powers to be exercised in particular circumstances.

4. Against the above background, the proposed provisions should be interpreted as to supplement the existing provisions which set out the general powers of the Tribunal, rather than to limit their generality. For this reason, it is considered that the proposed provisions would not affect the existing scope of the general powers of the Tribunal. We therefore do not see it necessary to expressly state that the proposed provisions are made “without limiting” or “without affecting” the general powers of the Tribunal.

5. It should be noted that a similar approach was adopted in the Lands Tribunal Ordinance (“LTO”) (Cap. 17), where provisions providing for the general powers of the Lands Tribunal are supplemented by provisions conferring specific powers. An example is section 12B of the LTO, which provides that the Lands Tribunal shall have the specific power to include interest in any debt or damages for which judgment is given. Notwithstanding that section 8(9) of the LTO confers on the Lands Tribunal general power as the CFI in the exercise of its jurisdiction to grant remedies and reliefs, section 12B of the LTO was made with no express wording that the provision is “without limiting” or “without affecting” the general powers of the Lands Tribunal.

### **Order prohibiting departure from Hong Kong**

6. The proposed sections 151A, 151B and 151C on the order prohibiting departure from Hong Kong (“prohibition order”) are modelled on section 21B of the HCO. The policy intent is that the Tribunal would follow the existing practice of the CFI with regard to the operation of section 21B of the HCO in the exercise of the Tribunal’s powers under the relevant proposed sections.

7. It should be noted that a prohibition order could only be made against a natural person. As regards the circumstances in which a prohibition order would be made by the Tribunal, it is noted from case authorities on the application of section 21B of the HCO that a prohibition order may be made against a person associated with a company (e.g. director or shareholder) only if he is also a party to the cause of action against the company, i.e. he is joined as a defendant to the proceedings<sup>1</sup>. In other words, a person associated with a company cannot be made subject to a prohibition order under the proposed section

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<sup>1</sup> See *REM Assets Ltd v. MIR Investments Ltd*, HCA 626 of 2008

151A simply because there is an order or a civil claim against the company arising from its contravention of a competition rule.

### **Prohibition order under section 21B of the HCO**

8. The procedural requirements for the operation of section 21B of the HCO are set out in Order 44A of the Rules of the High Court (“RHC”) (Cap. 4A). In considering the making of a prohibition order under section 21B of the HCO, two key conditions must first be satisfied. First, there should be a probable cause for believing that the person against whom the order is sought is about to leave Hong Kong. Secondly, for this reason, satisfaction of the judgment or order is likely to be obstructed or delayed.

9. An application for a prohibition order under section 21B of the HCO must be made without undue delay. Such application is made *ex parte* (i.e. on or from one party only) by the judgment creditor, with an affidavit in support. As with all *ex parte* applications, the applicant is under an obligation to make full and frank disclosure in the application.

10. Upon the hearing of the application for a prohibition order, the court may make such order subject to conditions it thinks fit, including the condition that the prohibition order shall have no effect if the judgment debtor satisfies the judgment or provides such security as the court orders. The prohibition order must be made in the prescribed form as set out in Form No. 106 in Appendix A of the RHC, and a copy must be served on the Director of Immigration, the Commissioner of Police, and the judgment debtor if he could be found.

11. If the judgment debtor, having been served with the prohibition order or who is otherwise informed of its effect, attempts to leave Hong Kong in contravention of the order, he may be arrested by an immigration officer, a police officer or a bailiff. If he is brought before the court, the court may, in the event that the prohibition order is made under the circumstances where the judgment is for a specified sum, make an order for the examination or imprisonment of the debtor as is appropriate. In the case where the prohibition order is made under other circumstances, the court may make an order for the imprisonment of the debtor until the lapse or discharge of the prohibition order. Alternatively, the court may make an order discharging the debtor from arrest either absolutely or upon compliance with such conditions as the court thinks fit.

## **Meaning of “property” in the proposed new section 151A(1)(b)(ii)**

12. The CO does not provide for a definition of "property". Under such circumstances, the relevant definition in the Interpretation and General Clauses Ordinance (“IGCO”)(Cap. 1) applies. Section 3 of the IGCO defines "property" as follows:

*"property (財產) includes-*

- (a) money, goods, choses in action and land; and*
- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition;"*

13. Section 3 of the IGCO only provides a non-exhaustive list as to what “property” includes. Notwithstanding the absence of an express reference to “intellectual property”, the definition of “property” in section 3 of the IGCO could be interpreted as to cover intangible, personal and moveable property such as intellectual property.

## **Advice sought**

14. Members are invited to note the content of this paper.

**Commerce and Economic Development Bureau  
The Judiciary Administration  
June 2014**

**Views of the Hong Kong Bar Association  
and the Law Society of Hong Kong  
on the proposed legislative amendments  
to the Competition Ordinance**

**Introduction**

This note sets out the comments of the Hong Kong Bar Association and the Law Society of Hong Kong on the proposed legislative amendments to the Competition Ordinance (Cap. 619) and the Judiciary's responses.

**Background**

2. On 11 October 2013, the Judiciary sent a consultation paper at **Appendix** to the two legal professional bodies to seek their views on the proposed legislative amendments now included in the Competition (Amendment) Bill 2014.

**The Hong Kong Bar Association**

*The Hong Kong Bar Association's Views*

3. On 11 November 2013, the Hong Kong Bar Association made the following comments on the consultation paper –

*“1. The Judiciary Administration consults on a number of proposed amendments to the Competition Ordinance (Cap 619) (“CO”) relating to the Competition Tribunal (“**Tribunal**”) that are considered essential to the proper functioning of the Tribunal. The Hong Kong Bar Association (“**HKBA**”) submits its views on the consultation paper.*

*2. The consultation paper does not enclose a draft Bill for consideration. Proposed amendments are described together with justifications for them. The HKBA accordingly comments on the proposed amendments on the basis of the terms described in the*

*consultation paper and sees the need to submit further comments when the draft Bill is gazetted or otherwise made public.*

*3. The HKBA agrees with the approach described in paragraph 8 of the consultation paper to amend the CO to make clear the jurisdiction and powers of the Tribunal notwithstanding the general provision in the CO for the Tribunal to follow the rules of practice and procedure of the Court of First instance.*

*4. The HKBA agrees with the proposal in paragraph 9 of the consultation paper to amend the CO to clarify that the Tribunal will have in the exercise of its jurisdiction (including the enforcement of its orders) the same powers, rights and privileges of the Court of First Instance.*

*5. The HKBA agrees with the proposal in paragraphs 10 and 11 of the consultation paper to amend the CO to make explicit provision therein for the Tribunal to order the payment of interest on debts/damages and to determine the rate of interest and the manner of payment of such interest.*

*6. The HKBA agrees with the proposal in paragraphs 12 to 14 of the consultation paper to amend the CO to empower the Tribunal to order the payment of interest in respect of non-payment or late payment of pecuniary and financial penalties under ss 93, 169 of the CO as well as costs under ss 63(2)(b), 96 of the CO. The HKBA considers that further comments may be necessary in respect of the detailed amendments when they are published.*

*7. The HKBA disagrees with the proposal in paragraphs 15 and 16 of the consultation paper to amend the CO to empower the Tribunal to make prohibition orders like those made under s 21B of the High Court Ordinance (Cap 4). Prohibition orders in aid of enforcement of orders of the Tribunal can be sought and determined in the ordinary manner by the Court of First Instance under s 21B.*

*8. The HKBA agrees with the proposal in paragraphs 17 and 18 of the consultation paper to amend the CO to empower a member of the Tribunal to make an order for reimbursing a witness in respect of expenses reasonably and properly incurred by him/her.*

9. *The HKBA agrees in principle with the proposal in paragraphs 19 to 26 of the consultation paper to amend the CO to enable the Tribunal's registrars to perform judicial work that is similar to that performed by their counterparts in the High Court. However, the HKBA notes that rule 62 of the United Kingdom Competition Appeals Tribunal sets out the acts of that tribunal that are to be exercised to be done by the president of that tribunal acting alone or done by the registrar if so authorized by the president. The HKBA suggests that a similar provision be incorporated in either the CO or the Tribunal's rules to demarcate the judicial work that the registrars may not do, the judicial work that the registrars may do if so authorized by the president or vice-president of the Tribunal and the judicial work that the registrars are generally authorized to do.*

10. *The HKBA agrees with the proposal in paragraphs 27 and 28 of the consultation paper to amend the High Court Ordinance s 55 to provide for detailed rules governing transfer of proceedings from the Court of First Instance to the Tribunal.*

11. *The HKBA agrees with the proposal in paragraphs 29 and 30 of the consultation paper to amend the Legal Practitioners Ordinance (Cap 159) to make provision for solicitor advocates granted with the higher rights of audience for the High Court and the Court of Final Appeal in civil proceedings should also be granted similar rights in respect of the Tribunal.*

12. *The HKBA agrees with the proposal in paragraphs 31 and 32 of the consultation paper to amend the Evidence Ordinance (Cap 8) to empower the Tribunal to make an order to bring up persons in custody to give evidence before it.*

13. *The HKBA agrees with the proposal in paragraphs 33 and 34 of the consultation paper to amend the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap 591) to ensure the extension of the jurisdiction of the Tribunal and the territorial limit of its orders to the Hong Kong Port Area.*

14. *The HKBA agrees with the proposal in paragraphs 35 to 38 of the consultation paper to amend the Electronic Transactions Ordinance (Cap 553) to add the Tribunal to Sch 2 of that Ordinance."*

### Judiciary's Response

4. On 27 November 2013, the Judiciary responded to the Hong Kong Bar Association's comments as follows –

*“We note your reservation about our proposal for empowering the Competition Tribunal (“Tribunal”) to make prohibition orders as set out in paragraph 7 of your submission. We would like to clarify that the powers to impose prohibition orders are currently available in the Court of First Instance (“CFI”) and the District Court. Such powers enable the judge(s) concerned, who should be in the best position to assess the situation, to make a prohibition order (pre-judgment or post-judgment) against a debtor or potential debtor. With the establishment of the Tribunal, we consider that it would be most desirable to follow the above arrangements in that the Tribunal may make such prohibition orders on its own, instead of referring to the CFI.*

*In fact, in accordance with section 135 of the CO, all members of the Tribunal will be CFI judges. They should be well aware of the human rights and other considerations for such prohibition orders. Moreover, as we are adapting the relevant provisions on prohibition orders in the High Court Ordinance (Cap 4) (i.e. section 21B) into the CO, there would be the same procedural protections afforded to the person affected by the prohibition orders. For instance, there must be sufficient proof that the person is about to leave Hong Kong and satisfaction of the Tribunal's judgment or order is likely to be obstructed or delayed. Further, in accordance with section 154 of the CO, there is a mechanism for as of right appeals to the Court of Appeal against any decision, determination or order of the Tribunal, including such prohibition orders.*

*We appreciate your suggestion of including in the CO or the Tribunal's rules a provision similar to rule 62 of the United Kingdom Competition Appeals Tribunal Rules to demarcate more clearly the judicial work that the registrars may and may not do (see paragraph 9 of your submission). We have no difficulty with this suggestion in principle and will carefully consider this in detail when we prepare the procedural rules for the Tribunal later.*



*We hope that we have addressed your concerns. You may wish to note that the Administration intends to consult the relevant Panels of the Legislative Council on 16 December 2013.”*

#### Hong Kong Bar Association’s Reply

5. On 2 December 2013, the Hong Kong Bar Association replied to the Judiciary’s above responses of 27 November 2013 as follows –

*“The Bar Association is pleased to note that the Judiciary has taken account of the Bar’s concerns over the proposals to empower the Competition Tribunal to issue prohibition orders and to empower the Registrar of the Competition Tribunal undertake certain judicial work. The Bar Association is assured that the proposed amendment regarding prohibition orders will ensure that the same procedural safeguards as those applicable in the High Court (including as of right appeal to the Court of Appeal) will be in place in the legislation.”*

#### **Law Society of Hong Kong**

##### Law Society of Hong Kong’s Views

6. On 19 November 2013, the Law Society of Hong Kong made the following comments on the consultation paper –

*“In principle, and subject to considering the proposed wording of the amendment bill, we agree with:-*

- (i) the proposed amendments to the Competition Ordinance, which serve to clarify the powers of the Tribunal, ensure it has the ability to enforce compliance with its orders, and allow the Tribunal to run smoothly with the appropriate use of Registrar, so that the Tribunal (a superior court of record) is treated in the same way as other existing courts of law currently under the Judiciary; and*
- (ii) the proposed consequential revisions to various other Ordinances, for the sake of consistency.*

*However, although section 156 provides that every Registrar, senior deputy registrar, deputy registrar and any other officer such as a Bailiff of the High Court, by virtue of that appointment, holds the corresponding office or position in the Tribunal, the term ‘Registrar’ is not itself defined in the Competition Ordinance. It is not wholly clear to us that only those persons identified in section 156 are to be entitled to take up equivalent roles with the Tribunal (this is, we anticipate, the intention), although we accept that this could be said to be implicit in the current wording of section 156.*

*Given the extensive powers that the proposed amendments will confer on the Tribunal’s Registrar (and other officers) to perform judicial duties (similar to their counterparts in the High Court), we suggest that amendments be introduced to make it very clear that no person other than the Registrar of the High Court will be entitled to be, or to exercise powers as, the Tribunal’s Registrar (and similar provision be made in relation to other officers of the Tribunal, by reference to their counterparts in the High Court). To deal with this, we suggest that consideration be given to introducing amendments to section 2 of the Competition Ordinance to define the terms “Registrar of the Tribunal”, “senior deputy registrar of the Tribunal”, etc. by reference to their counterparts at the High Court. Alternatively, or additionally, an amendment might be introduced to section 156 to provide that no person other than the Registrar (and other equivalent officers) of the High Court is entitled to hold the position of Registrar (or other equivalent officer) of the Tribunal.*

*If, on the other hand, it is intended that persons other than the Registrar (and other officers) of the High Court should be entitled to take up the role of Registrar (or other equivalent officer) of the Tribunal then, in light of the nature of the powers to be conferred on the Registrar (and other officers) of the Tribunal, we would suggest that the requisite qualifications of those officers ought to be clearly specified in the Competition Ordinance.*

*Please also advise on the legislation timetable and when the relevant amendment bill will be introduced into the Legislative Council.”*

### Judiciary's Response

7. On 27 November 2013, the Judiciary responded to the Law Society of Hong Kong's comments as follows –

*“We would like to confirm that this is indeed our policy intent that only the Registrar (and the other registrar-related positions) of the High Court are to be entitled to take up the equivalent roles in the Competition Tribunal. We note your suggestion of making this clearer in the legislation. We have no difficulty with your suggestion in principle and will take your proposed changes into account when drafting the legislative amendments.*

*As regards the legislative timetable, we understand that the Administration intends to consult the relevant Panels of the Legislative Council in December 2013, and introduce the Bill into the Legislative Council in the current legislative session.”*

## **Consultation Paper on the Proposed Legislative Amendments to the Competition Ordinance relating to the Competition Tribunal**

### **PURPOSE**

The paper invites views on the proposed legislative amendments to the Competition Ordinance (“CO”) (Cap. 619) relating to the Competition Tribunal (“the Tribunal”) being set up in the Judiciary.

### **BACKGROUND**

2. The CO, which was enacted by the Administration in June 2012, provides a legal framework to tackle anti-competitive conduct across different sectors. The CO prohibits anti-competitive agreements and abuse of market power that have the object or effect to prevent, restrict or distort competition in Hong Kong. The CO also has a merger control regime which applies only to carrier licenses granted under the Telecommunications Ordinance (Cap. 106).

3. Since the enactment of the CO, the Administration and the Judiciary have been working closely to prepare for the phased implementation of the CO. The first phase involves commencement of provisions relating to the establishment of the Competition Commission (“Commission”) and the Tribunal. The provisions relating to the Commission came into operation on 18 January 2013, while the provisions relating to the Tribunal came into operation on 1 August 2013.

4. One of the major tasks leading to the full implementation of the CO is to prepare for the full operation of the Tribunal, which is a superior court of record established under the CO having primary jurisdiction to hear and adjudicate competition-related cases. In this connection, the Judiciary is formulating Tribunal Rules relating to the operations and proceedings of the Tribunal and making other necessary administrative arrangements to prepare for the full operation of the Tribunal.

5. During the preparations, the Administration and the Judiciary have identified certain amendments to the CO and consequential amendments to other pieces of legislation, which are considered essential to the proper functioning of the Tribunal. These amendments mainly seek to confer on the Tribunal as well as its judges and judicial officers powers similar to those for the judges and judicial officers of the Court of First Instance ("CFI") in respect of civil proceedings. To ensure the operational readiness of the Tribunal in discharging its functions, we consider it essential to introduce these amendments before the full implementation of the CO.

## **PROPOSALS AND JUSTIFICATIONS**

6. The Administration has proposed that the Competition Ordinance be amended by way of a Competition (Amendment) Bill ("Amendment Bill"). The major legislative proposals relating to the Judiciary and their justifications are set out in the following paragraphs.

### **(A) Proposed General Powers for the Functioning of the Tribunal**

7. The CO has adopted a general approach (c.f. section 142, 143, 144 and 158 of the CO) such that the Tribunal may follow generally the rules of practice and procedure of the CFI; has the power to enforce its orders in the same way as a superior court of record (including the CFI), and has the power to grant orders that the CFI is empowered to make, unless specifically provided otherwise by the Tribunal Rules or the CO itself. Generally speaking, the Tribunal would have the jurisdiction of the CFI as provided under the High Court Ordinance ("HCO") (Cap. 4) and the Rules of the High Court (Cap. 4A) ("RHC") as well as the CFI's inherent jurisdiction (legal or equitable).

8. This notwithstanding, we have identified the following proposed amendments to the CO which are necessary to confer specific powers on the Tribunal that either differ from or supplement the jurisdiction of the CFI. Some of the proposed amendments aim to provide greater clarity and certainty given the particular circumstances.

Enforcement powers

9. Section 143(1)(c) of the CO confers all the powers, rights and privileges of a superior court of record to the Tribunal with respect to, among others, its enforcement of orders. It does not very clearly provide that the Tribunal has the same powers as any specific court such as the CFI. For clarity and avoidance of any doubt, we propose amending the CO to make it clear that the Tribunal will have in the exercise of its jurisdiction (including the enforcement of its orders) the same powers, rights and privileges as the CFI.

Levying interest on debts/damages

10. Section 1(k) of Schedule 3 to the CO stipulates that the Tribunal may order the payment of damages for any loss or damage suffered as a result of any contravention of the competition rules. Unlike the HCO which empowers the CFI to make orders to impose simple interest on any debt or damages for which judgment is given generally from the date of the cause of action to the date of payment/judgment, there is no explicit provision in the CO providing such power to the Tribunal. Although section 142(2) of the CO currently provides that the Tribunal, in exercising its jurisdiction, has the jurisdiction to grant remedies and reliefs as the CFI, it is not entirely clear whether section 142(2) of the CO would cover the imposition of interest and if so, how such interest might be determined and ordered.

11. For the sake of consistency and clarity, we propose adding to the CO a specific empowering provision on the order of payment of interest on debts/damages similar to that applicable to the CFI in the HCO.

Enforcement of pecuniary penalties and financial penalties

12. There are certain provisions in the CO governing the payment of penalties/costs by means of orders of the Tribunal. These include sections 93 and 169 of the CO, which prescribe that the Tribunal may impose a pecuniary penalty for any contravention of the competition rules,

and a financial penalty for contravention of section 168 of the CO concerning the indemnification for any person who is liable for payment of a pecuniary penalty or costs respectively<sup>1</sup>. Moreover, section 63(2)(b) of the CO provides that the Tribunal may order payment of costs as a result of failure to comply with a commitment, and section 96 of the CO provides that the Tribunal may order payment of costs relating to investigation incurred by the Commission in connection with proceedings for the contravention of a competition rule.

13. Unlike some other legislation, the CO does not currently provide for any legal consequences in the event that a party fails to pay or delays the payment of the penalties or costs as decided by the Tribunal. For example, under the HCO, if the payment of penalties/ costs fails to be enforced, the CFI or the Court of Appeal may certify to the Registrar of the High Court the sum payable, and the non-payment or late-payment of that sum could then be enforced by the Registrar as a “judgment debt” and simple interest might be imposed.

14. With a view to incentivising prompt payment of penalties/costs and making reference to the existing arrangements under the HCO, we propose adding provisions to the CO empowering the Tribunal to order the payment of interest in respect of non-payment or late payment of pecuniary and financial penalties under sections 93 and 169 of the CO as well as costs under section 63(2)(b) and section 96 of the CO.

#### *Prohibition of debtors from leaving Hong Kong*

15. Currently, under the HCO, the High Court has power to make an order prohibiting a person from leaving Hong Kong (“prohibition order”) to facilitate the enforcement, securing or pursuance of a judgment against that person for the payment of a specified sum of money, or a judgment or order against that person for the payment of an amount to be

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<sup>1</sup> According to section 168 of the CO, subject to section 170, no person may indemnify another person who is or was an officer, employee or agent of an undertaking against liability for paying (a) a pecuniary penalty under Part 6 of the CO; or (b) costs incurred in defending an action in which that other person is (i) convicted of contempt of the Tribunal; (ii) convicted of an offence under Part 12 or Part 3 of the CO; or (iii) ordered to pay a pecuniary penalty under Part 6 of the CO.

assessed or requiring him to deliver any property or perform any other act. Such prohibition order could also be made to facilitate the pursuance of a civil claim (other than a judgment) for the payment of money or damages, or for the delivery of any property or the performance of any other act.

16. To ensure that the Tribunal can effectively enforce its judgment or order against payment of pecuniary or financial penalties or other costs and to enable the Tribunal to make pre-judgment orders in a like manner as the High Court, we propose amending the CO to incorporate a provision similar to section 21B of the HCO to provide the Tribunal with such order-making power.

#### Expenses of witnesses

17. A witness in proceedings might incur expenses in order to perform his/her duty (e.g. expenses in travelling to the court), and such expenses should generally be reimbursed. Section 158(2)(e) of the CO empowers the Chief Judge to make rules prescribing the allowances to be paid to witness appearing before the Tribunal.

18. While there might be overlap between “allowance” and “expenses”, for the sake of clarity and certainty and similar to section 52 of the HCO, we propose adding a dedicated provision to the CO to empower a member of the Tribunal to make any order for reimbursing a witness in respect of any expenses reasonably and properly incurred by him/her.

#### **(B) Proposed Amendments relating to Registrars**

19. Sections 144, 156 and 158 of the CO currently provide for a framework on the automatic appointment of the Tribunal’s Registrar and other registrar-related positions (collectively called “registrars” here), and the practice and procedure of the Tribunal that should be followed by these registrars. The CO nonetheless does not confer powers on the Tribunal’s registrars to perform judicial duties as with their counterparts in the High Court under the HCO.



20. To ease the workload of members of the Tribunal and in line with the arrangements for the High Court, the Judiciary considers it essential to provide powers under the CO to enable the Tribunal's registrars to perform judicial work that is similar to that performed by their counterparts in the High Court. Details are set out below.

### Power of Registrars

21. Provisions modelled on sections 38 and 40A of the HCO (regarding jurisdiction, powers and duties of the Registrar of the High Court) are proposed to be added to the CO to empower the Tribunal's registrars to perform judicial work.

### Tribunal Rules in relation to Registrars

22. To provide technical details on the exercise of the powers and jurisdiction of the Tribunal's registrars, the Judiciary intends to make Tribunal rules under section 158 of the CO. While section 158 of the CO currently provides that rules of the Tribunal could be made to regulate and prescribe the practice and procedure to be followed in the Tribunal in all matters with respect to which the Tribunal has jurisdiction, it is not entirely clear whether rules prescribing the jurisdiction of the Tribunal which may be exercised by the Tribunal's registrars are covered under section 158 of the CO.

23. For the sake of clarity and certainty, we propose amending section 158 of the CO to make it clear that rules in relation to the jurisdiction of the Tribunal which may be exercised by the Tribunal's registrars could be made under the section. This proposed amendment follows the formulation adopted in section 54(2)(b) of the HCO which provides that rules prescribing the jurisdiction of the High Court which may be exercised by the Registrar or a Master of the High Court could be made thereunder.

### Protection of Registrars

24. Section 39 of the HCO currently offers certain protection to the Registrar of the High Court so that he/she would be immune from legal actions brought against him/her for any act done by any bailiff without directions from the Registrar, or for any direction given to any bailiff with regard to the execution/non-execution process in accordance with an order for direction and guidance of the High Court where no material fact is wilfully misrepresented by the Registrar.

25. For the sake of consistency, we propose adding to the CO new provisions to extend similar protection to the Tribunal's registrars.

### Temporary Registrars

26. Section 156 of the CO currently provides that "Every Registrar, senior deputy registrar, deputy registrar and any other officer such as a Bailiff of the High Court, by virtue of that appointment, holds the corresponding office or position in the Tribunal". As the HCO provides for the possible appointment of temporary registrars, we propose amending section 156 of the CO to include such positions so that the "temporary registrar", "temporary senior deputy registrar" and "temporary deputy registrar" of the High Court will also automatically hold the corresponding positions in the Tribunal.

## **(C) Proposed Consequential Amendments**

### Transfer of proceedings

27. Section 113 of the CO states that the CFI should generally transfer to the Tribunal so much of the proceedings that are within the jurisdiction of the Tribunal. It is necessary to provide detailed rules in the RHC for the exercise of such power by the CFI (e.g. to specify the manner in which and/or the circumstances under which the CFI should invoke the power). The relevant rules will govern the transfer of the whole or part of the proceedings when the proceedings are still with the CFI.

28. To enable the making of such rules, we propose introducing consequential amendments to the HCO to more specifically empower the Rules Committee constituted under section 55 of the HCO to make rules of court for prescribing the procedures in connection with the transfer of proceedings between the CFI and the Tribunal.

Higher Rights of Audience

29. At present, solicitors who satisfy the eligibility criteria under the Legal Practitioners Ordinance ("LPO") (Cap. 159) may apply to the Higher Rights Assessment Board established under the LPO for higher rights of audience, i.e. rights of audience before the High Court and the Court of Final Appeal in civil proceedings, criminal proceedings or both.

30. Given the status of the Tribunal as a superior court of record and the possible transfer of cases (in part or in whole) between the CFI and the Tribunal, it is possible that a case may be handled by the same team of solicitors/barristers even after the transfer. We therefore propose amending the relevant section in the LPO so that solicitor advocates granted with the higher rights of audience for the High Court and the Court of Final Appeal in civil proceedings should also be granted similar rights in respect of the Tribunal.

Power to bring up persons in custody to give evidence

31. Judges and judicial officers at various courts and tribunals are empowered under the Evidence Ordinance ("EO") (Cap. 8) to bring up any person in lawful custody to prosecute, pursue, defend, or to be examined as a witness before those courts/tribunals.

32. To prepare for the possibility that the Tribunal may require persons in lawful custody to give evidence, we propose introducing consequential amendments to the EO so that such powers are also given to the relevant judges and judicial officers of the Tribunal.

Extension of Tribunal's jurisdiction to the Hong Kong Port Area

33. According to the Administration, the Shenzhen Bay Port Hong Kong Port Area Ordinance (Cap. 591) seeks to, among others, apply the laws of Hong Kong in the Hong Kong Port Area in Shenzhen Bay (a Mainland territory) and to provide for the jurisdiction of courts/tribunals in this connection. The term "court" is defined in section 2 of this Ordinance as "a court or tribunal specified in Part 1 of Schedule 4", which sets out a full list of the courts/tribunals currently under the Judiciary, except for the Tribunal.

34. For the sake of completeness, we propose introducing consequential amendments to the above Ordinance to the effect that the Tribunal's jurisdiction will be extended to the Hong Kong Port Area and the territorial limit of the Tribunal's orders would be construed as including the Hong Kong Port Area.

Electronic Transactions Ordinance

35. According to the Administration, the Electronic Transactions Ordinance ("ETO") (Cap. 553) provides a legal framework for the conduct of electronic transactions by giving electronic records and electronic/digital signatures the same legal status as that of their paper-based counterparts and establishes a framework for the operation of certification authorities.

36. Section 13(1) of the ETO stipulates that sections 5, 5A, 6, 7 and 8 therein do not apply in relation to information given, presented or retained, documents served or signatures required for the purposes of any proceedings set out in Schedule 2, which lists out, among others, the court and other proceedings of all existing courts of law under the Judiciary (except the Tribunal). This means that the listed courts will not be required to accept electronic submissions.

37. The Judiciary is undergoing a major computer upgrading exercise called the Information Technology Strategy Plan. This will take time to plan and implement.

38. As the proceedings before the Tribunal will be judicial proceedings and the Judiciary will not be able to provide for electronic services for the Tribunal in the near future, for the sake of consistency, it

is necessary to add the Tribunal to Schedule 2 to the ETO to extend the exemption to the Tribunal.

## **VIEWS SOUGHT**

39. The Judiciary would be grateful for your views on the proposed legislative amendments by close, **11 November 2013**. Unless otherwise specified, your comments will be treated as public information and may be published in the future.

**Judiciary Administration**  
**October 2013**