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By Fax (2575 1009)
21 May 2014

Miss Linda LEUNG
Assistant Director of Home Affairs (5)
Home Affairs Department
Headquarters, Division V
31/F, Southorn Centre
130 Hennessy Road
Wan Chai, Hong Kong

Dear Miss LEUNG,

Property Management Services Bill (the Bill)

To assist my scrutiny of the Bill, I should be grateful if you would please clarify the matters set out in **Annexes 1 and 2**. I should appreciate your reply in both languages as soon as possible, preferably **by 4 June 2014**.

Yours sincerely,

(Mr Bonny LOO)
Assistant Legal Adviser

c.c. HAD (Attn: Mr Indiana WONG, SAO(5) (By Fax: 2575 1009))
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Observations on the provisions of the Bill

Interpretation (Clause 2)

1. "Property" is proposed to mean a building as defined by section 2 of the Building Management Ordinance (Cap. 344). In view of the definition of "building" in Cap. 344 and that Cap. 344 applies to the management of multi-storey buildings but not house developments, please clarify whether the Bill is intended to apply to house developments managed by property management companies and, if not, why not.
2. If a property development consists of multi-storey buildings and houses and is managed by the same property management company, is that company subject to the licensing scheme under the Bill?
3. "Property management company" (PMC) would mean a business entity (whether a company, partnership or sole proprietorship) that carries on the business of providing property management services. Please clarify whether the word "business" is intended to cover a non-profit or charitable organization that provides such services otherwise than for gain or reward.
4. "Property management practitioner" (PMP) is proposed to be defined as an individual who assumes a managerial or supervisory role in a PMC in relation to property management services provided by the PMC. According to paragraph 8 of the LegCo Brief (File Ref.: HAD HQ CR/20/3/5(C)), frontline staff would not be required to obtain PMP licences because they do not take up a supervisory or managerial role. In a sizeable PMC where frontline staff (e.g. security guards, cleaners, porters etc.) may comprise multiple ranks, would the more senior frontline staff (e.g. Chief or Senior Security Officers) fall within the proposed definition of PMP if they also have subordinates?

Property management services (Clause 3 and Schedule 1)

5. Under clause 3(2), the Property Management Services Authority (the Authority) must prescribe a service as a property management service with reference to the categories of services set out in Schedule 1.
 - (a) Are these categories mutually exclusive or do they overlap?
 - (b) What is the reason for including legal services which are already regulated under the Legal Practitioners Ordinance (Cap. 159)?

Prohibition against unlicensed activities (Part 2)

6. The prohibition under clause 6(2)(c) and 3(c) seems to be restricted to the use of the specified descriptions in English and Chinese only.
 - (a) Please clarify whether clause 6(2)(c) and (3)(c) is also intended to apply to situations where a person describes himself as a registered professional property manager or a licensed property management officer in a language other than Chinese or English (e.g. Japanese or Italian). If so, is it necessary to amend the clause to reflect the legislative intent?
 - (b) Please also consider whether the formulation of the offence under clause 6(2)(c) and (3)(c) is too narrow, having regard to the formulation under section 46(1) of Cap. 159 which prohibits anyone from pretending to be, or taking or using any name, title, addition or description implying that he is qualified or recognized by law as qualified to act as, a solicitor.
7. It is noted that the prohibition against acting as a PMC or PMP without a licence would not apply to the Hong Kong Housing Authority or its employees. Please clarify whether this exception is also intended to apply to the Hong Kong Housing Society.
8. The prohibition also would not apply to a PMC whose business does not involve the provision of more than one category of services or (if there are more than one type of service under a category) more than one type of service:
 - (a) Please clarify whether this exception is also intended to apply to a PMP working for such a PMC. If so, does clause 7(2) need to be amended to make this clear?
 - (b) According to paragraph 5 of the LegCo Brief, companies providing only stand-alone (e.g. cleansing or security) services need not obtain licences. Please provide more examples to illustrate the application of clause 7(2)(a) and (b) with reference to the categories and types of services set out in Schedule 1.
9. The prohibition also would not apply to an owner's organization or individual owners who provide their own property with property management services without engaging a PMC or PMP. Please clarify whether owner's organizations or individual owners who engage licensed PMCs or licensed PMPs to provide property management services to their own properties would themselves be required to obtain a licence and, if so, why.

Disciplinary offences and codes of conduct (clauses 4 and 5)

10. Should a disciplinary offence under clause 4(d) also include:

- (a) failure to comply with a summons issued under clause 24(1)(b) to give evidence and to provide any relevant information or document (which would be a criminal offence under clause 28(2)), instead of being confined to failing to attend before the Authority or the disciplinary committee when summoned to do so as a witness; and/or
- (b) failure to provide any information or document, to attend before an investigator, or to respond to any written question when required to do so under clause 21(2)(a), (b), (c) or (d) (which would be a criminal offence under clause 22(1))?

11. What criminal offences would bring the profession into disrepute for the purposes of clause 4(e)(i)? Would the criteria be set out in any codes of conduct or guidelines issued by the Authority?

12. The Authority's power to issue codes of conduct under clause 5(1) is limited to specifying matters relevant to the question of misconduct or neglect in a professional respect under clause 4(a). Are such codes of conduct also intended to deal with matters such as what offences would bring the profession into disrepute under clause 4(e)(i)?

13. Under clause 5(6), the codes of conduct are not subsidiary legislation. How would the codes of conduct be published? It is noted that in relation to the list of licensees, registers of PMCs and PMPs, and disciplinary orders, clauses 12(1), 13(5) and 25(3)(b) clearly specify the desired methods of publication. Is it necessary for clause 5(5) to specify how the Authority must publish its codes of conduct?

Application for renewal of licences (clause 10)

14. Is it necessary for clause 10 to provide for situations where a licence expires before an application for renewal is determined by the Authority? In this regard, please refer to section 8(7) of the Karaoke Establishments Ordinance (Cap. 573) which provides that any permit or licence which expires prior to the determination of an application for renewal shall, unless such application is withdrawn, or the permit or the licence is revoked or suspended, remain in force until the determination by the licensing authority of such application.

Registers (clause 13)

15. What is the rationale for clause 13(7) to exclude particulars of a licensee's conviction record from the online registers to be published under clause 13(5)(b), even though the public would be able to inspect the same particulars at the offices of the Authority under clause 13(5)(a), and to obtain a copy under clause 13(8)? If this is based on privacy and/or rehabilitation concerns, it seems that the same considerations should also apply to the inspection and copying of the registers kept at the offices of the Authority. Have you sought the views of the Privacy Commissioner for Personal Data in this regard?

Duties of Licensees (Part 4)

16. Under clause 16, a licensed PMC may be required to provide its accounts and financial statements to its clients. However, there are no requirements regarding moneys received or held by PMCs for or on account of their clients. Should the Bill also include provisions similar to sections 37 and 43 of the Estate Agents Ordinance (Cap. 511)?

Investigation and disciplinary matters (Part 5)

17. Under clause 18(2), the Authority would not be required to investigate a complaint that is misconceived or lacking in substance. Have you considered any other grounds (e.g. if the complaint is trivial, frivolous, vexatious or not made in good faith) on which the Authority may refuse to investigate a complaint? Please see, for example, section 39(2) of the Personal Data (Privacy) Ordinance (Cap. 486).
18. Is it necessary for clause 19(3) to specify how the Authority must publish its guidelines (e.g. in the Gazette and/or through the Internet)?
19. In relation to clause 21:
 - (a) Should clause 21(5)(b) require electronically stored information to be reduced into a written form on paper, similar to section 35A(4) of the Telecommunications Ordinance (Cap. 106)?
 - (b) Should references to "documents" or "document" in the Bill (including clauses 21, 24 and 36, and section 22 of Schedule 3) expressly include electronic documents or information recorded by electronic means?
 - (c) Clause 21(6)(a)(ii) refers to "an employee or partner" of the person who is required to provide information. If the person is a company, should the clause also include "director or officer"?

20. In relation to clause 24:

- (a) Please explain why the Authority would have no power to receive or consider any material that would not be admissible in civil or criminal proceedings, whereas such power is proposed to be conferred on an appeal tribunal under clause 36(1)(d).
- (b) How, if at all, would a public reprimand given under clause 24(7)(b) be published? The same question also applies in relation to clause 36(6)(b).

21. Would the operation of an order be suspended while the Authority is considering an application to revoke, vary or suspend such order under clause 25(6)? Should provisions be included in the Bill to cover this scenario?

22. In relation to clause 31:

- (a) Is the definition of "specified act" intended to include the giving of evidence before the Authority or the disciplinary committee under Part 5? If so, should clause 31(1) be amended to reflect this?
- (b) Should the exception in clause 31(4)(a) apply to an offence under clause 39 as well as clause 28 (e.g. if the person gives false or misleading evidence at both the disciplinary hearing and the appeal)?

Appeal (Part 6)

23. Who would be appointed to the panel to hear appeals under clause 32(1)? What qualifications or experience must they have? Should the selection criteria be specified in the Bill?

24. The provisions in Part 5 regarding immunity and privilege against self-incrimination (PASI) (clauses 30 and 31) have not been replicated in Part 6. Please confirm whether any parties, witnesses, counsel, solicitors and other persons appearing before an appeal tribunal under Part 6 are intended to be protected by PASI, legal professional privilege and other privileges and immunities as they would have if the appeal were civil proceedings in the Court of First Instance.

The Authority (Part 7 and Schedule 3)

25. Clause 47(2) does not include the Authority's powers to issue codes of conduct (clause 5(1)) and guidelines regarding complaints (clause 19(1)). Are these powers intended to be delegable?

26. Please provide examples of the circumstances in which the Chief Executive would give the Authority written directions under clause 48(1) and remove a member of the Authority under section 5 of Schedule 3.

27. In relation to Schedule 3:

- (a) What safeguards would the Authority put in place to ensure that the confidentiality of its meetings would not be compromised as a result of individual members participating by electronic means as mentioned in section 9(2)? Please see section 10(5)(c) of the Communications Authority Ordinance (Cap. 616).
- (b) Since each member assenting to the proposed resolution under section 13(1) is likely to sign their own copy, is it necessary to provide that the resolution may be in the form of one or more documents, each in the same form and signed by one or more members of the Authority? See section 11(3) of Cap. 616.
- (c) For the purposes of section 13(1)(b) and (4), how is the date on which the relevant notice is "given" to be determined? Is it the date when the notice is sent, or the date when it is received by all members of the Authority? Is it necessary to provide for different methods for determining that date depending on how the notice is given (e.g. by post, fax or other electronic transmission)?
- (d) Is it necessary for section 13 to provide that a written resolution assented to under section 13(1)(c) would become void if a meeting is subsequently requested within the 14-day period under section 13(4)? Please see section 12(3) of Cap. 616.
- (e) For the purposes of section 16(1)(a), do "penalties" (罰款) include a fine (罰款) imposed as a disciplinary order under clause 25(1)(b), as well as a penalty (罰款) imposed for a failure to pay the levy under clause 55(1)(a)?
- (f) Should section 17(2) also provide that the tax exemption under section 17(1) would not apply to any remuneration, benefits or expenses paid to an employee or officer of, or any other person appointed or engaged by, the Authority?
- (g) Under section 20(2), is it necessary for the annual report to contain an outline of all disciplinary hearings conducted under clause 23?
- (h) Is it necessary for section 21(2) to specify a time frame in which the Secretary for Home Affairs must table the Authority's annual report and audited accounts before LegCo?

- (i) Under section 22(3), the Director of Audit may report the results of his examination to the President of LegCo. Is the Director of Audit's report intended to be laid on the table of LegCo? If so, please consider specifying who is to cause the report to be so tabled. In this regard, please see section 20(3) of The Hong Kong Institute of Education Ordinance (Cap. 444).
- (j) Is it necessary for section 23(9) also to refer specifically to clause 46(9) which seeks to apply the disclosure of interests requirements to a member of a committee of the Authority?

Defence for licensed PMP as employee (clause 61)

- 28. What is the required standard of proof for establishing a disciplinary offence? Would it be beyond a reasonable doubt or on a balance of probabilities?
- 29. Clause 61 proposes giving a licensed PMP charged with a disciplinary offence a defence if he can prove certain specified matters.
 - (a) Does clause 61 impose a legal or evidential burden of proof?
 - (b) What standard of proof is required?
- 30. Are the Authority's disciplinary powers under Part 5 and the defence under clause 61 intended to apply to a holder of a provisional PMP licence issued under Schedule 4? If so, should section 2(7) of Schedule 4 be amended to include the proposed Part 5 and section 61?

Observations on the Chinese text of the Bill

Long title

1. While "property management services" is rendered as "物業管理服務", "Property Management Services Authority" is rendered as "物業管理業監管局". Please explain the discrepancy between the two renditions.

Interpretation (Clause 2)

2. In the definition of "company", the phrase "incorporated or otherwise established" is rendered as "成立或設立". The word "otherwise" is not rendered in the Chinese text. Please consider whether that word may be deleted from the English text if it is considered to be redundant.

Licensing of PMCs and PMPs (Part 3)

3. In clause 11(2)(a)(ii), b(iii) and c(iv), and (4)(a)(ii) and (b)(iii), "composition" is rendered as "債務重整", whereas the same word is rendered as "債務重整協議" in section 3(2)(a)(i) of the Estate Agents (Exemption from Licensing) Order (Cap. 511B). Why is "協議" proposed to be omitted from the Bill?
4. In clause 13(7), "PMP (Tier 1) register or PMP register (Tier 2)" is rendered as "物業管理人(第 1 級)登記冊及物業管理人(第 2 級)登記冊". Should "及" be changed to "或" to ensure consistency with the English text?

Duties of Licensees (Part 4)

5. In clause 16(3)(d), "interests" is rendered as "利益", whereas "interest" is rendered as "利害關係" in clause 45(1). Would it be more appropriate to use "利益" in the context of register and disclosure of interests?

Disciplinary Matters (Part 5)

6. In clause 21(2), the phrase "調查員合理地相信攸關該調查的事宜" is abbreviated as "相干事宜", but the phrase "matter the investigator reasonably believes to be relevant to the investigation" is not similarly abbreviated as "relevant matter" in the English text. Please explain why different approaches are adopted in the English and Chinese texts.

7. In clause 21(5)(a), "readily" is rendered as "便捷地", which is also the rendition used in section 41(6)(a) of the Competition Ordinance (Cap. 619). However, "readily" is rendered as "可隨時" in section 9(1)(b) of the Securities and Futures (Keeping of Records) Rules (Cap. 571O), and as "輕易地" in section 77(2) of the Mandatory Provident Fund Schemes (General) Regulation (Cap. 485A). Please explain why different Chinese renditions are used in these various provisions.
8. In clause 21(6)(a)(ii), the expression "or any other person who is or was an employee or partner of that person" is rendered simply as "或是或曾是該人的僱員或合夥人". Please consider whether "的任何其他人" should be added after "合夥人" to correspond with the English phrase "any other person".
9. In clause 31, a person required by an investigator to provide information, answer a question or give an explanation is abbreviated in the Chinese text as "要求對象", but no similar abbreviation is used in the English text which simply refers to that person as "the person". Why does the Chinese text not simply refer to the person as "該人"?

Property Management Services Authority (Part 7)

10. Please explain why "property management services" is rendered as "物業管理業" rather than "物業管理服務" in clause 41(b) and (c).

Miscellaneous (Part 9)

11. In clause 61(d), "in a position" is rendered as "職分", whereas section 53(b) of the Food Safety Ordinance (Cap. 612) renders the same expression as "所處的崗位". Please explain the difference between the two renditions.

Schedule 3

12. Please explain why section 19(1) renders "audit" as "審核" while the heading of section 21 renders "audited" as "經審計".
13. Section 23(1) renders "disciplinary matters" as "違紀事宜", whereas the heading of Part 5 of the Bill renders the same term as "紀律事宜". Please explain the discrepancy.

Schedule 4

14. Is the first reference to "申請" in section 4(1)(a) redundant? Please see how the same meaning is expressed in the Chinese text of section 4(1)(b).