HONG KONG RETAIL MANAGEMENT ASSOCIATION

Submission on Occupational Safety and Occupational Health Legislation (Miscellaneous Amendments) Bill 2022

18 July 2022

Background

1. Hong Kong Retail Management Association ("**HKRMA**") received a letter from the Hon. Mr. Shiu Ka-fai dated 30 June 2022 to give written views to the Bills Committee on Occupational Safety and Occupational Health Legislation (Miscellaneous Amendments) Bill 2022 ("**the Bill**").

2. The first public consultation on the proposed amendments to the Occupational Safety & Health Legislation ("**OSH Legislation**") took place in or around April 2019 where relevant stakeholders in the business sectors submitted various responses to the Government. After the first public consultation, the Government revised the proposed amendments to the OSH Legislation and conducted a "targeted consultation" ("**Second Consultation**") with selected stakeholders in January 2021. The HKRMA took the opportunity during the Second Consultation to express our response on 6 January 2021 to the revised proposed amendments to the OSH Legislation ("**Response to the Second Consultation**").

3. Further to the Second Consultation, the Government has made further revisions to the proposed amendments to the OSH Legislation, incorporating them to the Bill and gazetted the Bill on 13 May 2022.

4. We set out in this submission HKRMA's key views on the Bill.

HKRMA's submission

5. We are pleased to see that the proposed change to the maximum fine on conviction on indictment has been revised to HK$10M since the Second Consultation. This is a welcome development in line with our view as expressed in the Response to the Second Consultation that this cap represents a meaningful sum of financial penalty with a deterrent effect.

HKRMA

Requirement for the courts to consider turnover in determining the amount of fines

6. We respectfully submit to the Bills Committee that the courts should not be required under the Bill to consider the turnover of a company's business in determining the amount of fine to be imposed:

    a. As indicated in our Response to the Second Consultation, the linking of a company's turnover with non-compliance of any legislation is rare and primarily used for (i) data protection (for example in Mainland China and in the European Union), and (ii) competition law compliance (for example under the Competition Ordinance). In each case, non-compliant practices directly result in an economic benefit to the company (e.g., bid rigging can lead to higher prices and higher profits), whereas arguably this is not the case with respect to OSH Legislation.

    b. The reason that the courts must consider the turnover of a liable company in legislations such as the Competition Ordinance is because the maximum fine under such legislations is calculated based on turnover. For example, the maximum fine for a contravention of the Competition Ordinance is 10% of the undertaking's annual Hong Kong turnover for a maximum period of three years. On the other hand, the maximum fine under the Bill is not based on turnover. It would be arbitrary to require the courts to consider turnover when it has no connection whatsoever to the calculation of fine.

    c. Furthermore, in legislations such as the Competition Ordinance which link a company's turnover to fine, the courts are not required to have regard to turnover or the size of the company when determining the amount of fine. Instead, the courts are required to have regard to matters such as:

        i. the nature and extent of the conduct that constitutes the contravention;
        ii. the loss or damage, if any, caused by the conduct;
        iii. the circumstances in which the conduct took place; and
        iv. whether the person has previously been found to have contravened the legislation.[1]

[1] This is the list of matters which the Competition Tribunal must have regard to in determining the amount of pecuniary penalty under section 93(2) of the Competition Ordinance, which does not include the turnover nor the size of the liable company.

d. These are the matters which the courts should instead focus on when determining the amount of fine. As stated in our Response to the Second Consultation, penalties must be proportionate to the severity and culpability of the offence.

e. In any event, the courts have broad residue discretion to consider what matters to consider when determining the amount of fine. It is not appropriate nor proportionate to mandatorily require the courts to consider turnover when it has no relation to the offence in question.

f. We understand the inclusion of this new requirement is with a view of facilitating the courts to impose a fine that is sufficiently deterrent and commensurate with the seriousness of the offences.[2] We consider the 20-fold increase in the maximum fine for indictable offence from HK$500,000 to HK$10M, and the significant increase in the maximum imprisonment terms from six months to two years, to have more than sufficient deterrent effect.

g. As we pointed out in our Response to the Second Consultation, companies which breach the Bill (including repeated offenders) could be smaller businesses with smaller turnovers which spend less effort in embedding work procedures to ensure compliance with the requirements under the Bill. Tying the amount of fine to turnover of such companies would have little deterrent effect. On the other hand, larger businesses generally have more resources to provide detailed work procedures complying with the requirements under the Bill. It would be disproportionate for companies which in fact spend more resources and effort on compliance to be exposed to a higher level of fines for occasional and unintentional breaches simply because of their turnover.

<u>Introducing a general defence in maintaining adequate measures to comply with the Bill</u>

7. We implore the Bills Committee to consider introducing a general defence against corporate and personal liability for offences under the Bill where the employer can show that despite the breach it nonetheless had adequate measures in place established under a compliance programme to comply with the relevant requirements under the Bill.

8. This is a common defence for corporate liability (extending to the company and its directors and key management) in other common law jurisdictions, such as Bribery Act

[2] Paragraph 12 of the Legislative Council Brief File Ref.: LD LRT/1-75/MT/2/C.

2010 of the United Kingdom [3] and the Malaysian Anti-Corruption Commission (Amendment) Act of Malaysia[4].

9. As we noted in our Response to the Second Consultation, given the significant increased risk of personal liability under the Bill, we consider appropriate and proportionate to introduce such general defence to provide a strong incentive for businesses to establish and maintain adequate compliance programmes to comply with the Bill. At the very least, having an adequate compliance programme in place should afford certain credit, either in the form of a partial defence or mitigating factor when determining penalty. This would ultimately help achieve the goal of the public policy to further reduce number of cases involving OSH offences arising from the lack of relevant compliance measure.

Conclusion

10. HKRMA thanks the Bills Committee for the opportunity to comment on the Bill. We would be pleased to respond to any questions the Bill Committee may have on these comments, or to provide additional comments or to participate in any further consultations with the Bills Committee.

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[3] Please refer to the Bribery Act 2010 Quick Start Guide for further information: http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-quick-start-guide.pdf

[4] Please refer to the Guidelines on Adequate Procedures pursuant to Sub-Section (5) of Section 17A under the Malaysian Anti-corruption Commission Act: https://f.datasrvr.com/fr1/119/75252/Prime_Ministers_Department_-_Guidelines_on_Adequate_Procedures.pdf