

Hong Kong Bar Association
Tai Po Fire Taskforce on Law Review
Report

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TABLE OF CONTENTS

Chapter 1 General Introduction and Summary of Recommendations	1
Chapter 2 Competition Law	15
A. Introduction	15
B. A Disclosure-Based Exclusion for Bid-Rigging	16
C. Prosecution Immunity and Cooperation Interface	20
D. Procurement Consequences	22
Chapter 3 Building Management / Incorporated Owners	25
A. Introduction	25
B. Legal Redress under the Building Management Ordinance: Cases Where Existing Powers Are Available but Not Necessarily Invoked in Practice	27
C. “Three-Nil” Buildings	29
D. Defunct or Inactive or Dysfunctional Management Committee	32
E. Difficulties in Enforcing Deed of Mutual Covenant	45
F. Delegations to Contractors	47
G. Meeting Procedures	60
H. Dealing with Emergencies	61
Chapter 4 Criminal Law	65
A. Introduction	65
B. Competition Ordinance’s Provisions on Bid-Rigging and Other Anti-Competitive Conduct	66
C. Jurisdictions Outside Hong Kong	68
D. Reform: Guiding Principles, Issues and Recommendations	69
E. Issues for Further Study	94
Chapter 5 Construction Law	98
A. Introduction	98
B. Early Identification and Commissioning of Necessary Work	100
C. Procurement of Building Maintenance and Renovation Works Contracts	101
D. Performance of Building Maintenance and Renovation Works Contracts: Safety	108
Annex Criminalisation of Bid-Rigging in Other Jurisdictions	112
Acknowledgements	140

CHAPTER 1 GENERAL INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

1. The Tai Po Wang Fuk Court fire of 26 November 2025 has revealed, tragically, many failings and shortcomings, systemic, operational or personal, in many aspects in the maintenance and renovation of multistorey building estates in Hong Kong.
2. The Hong Kong Bar Association (“**HKBA**”), like many individuals and organisations in Hong Kong and beyond, was saddened by the destruction of the fire, the loss of 168 lives and the physical and mental suffering of many others, and the loss of a home to thousands of owners and occupiers of the housing estate, and their property, tangible and intangible, in or connected with their homes. The HKBA was further appalled by the revelations, emerging first through the news media (which were thereafter largely confirmed by testimonies heard by the Independent Committee in relation to the fire at Wang Fuk Court in Tai Po (“**Independent Committee**”), of mistakes, malpractices, omissions, possibly regulatory failures, and potential culpable conduct that contributed, directly and indirectly, to the ferocity of the fire at Wang Fuk Court and the avoidable deaths and injuries to the occupants in the affected buildings at the time. As the oral evidence of Professor Asif Sohail Usmani and Professor Jiang Liming before the Independent Committee had confirmed, the Wang Fuk Court fire was unprecedented only in its magnitude.
3. In January 2026, the Bar Council resolved to establish the Tai Po Fire Taskforce on Law Review (“**Taskforce**”) to study and make legal recommendations for reforms in the laws of the Hong Kong Special Administrative Region (“**HKSAR**”) that may serve to address and remedy the failings and shortcomings that had been identified or were in the course of being identified by investigations then underway. Members of the Taskforce were invited for their respective expertise to the study in the fields of building management law and practice, competition law, construction and industrial safety law, and criminal law.

4. Progress in the work of the Taskforce coincides with the efforts of the Independent Committee, the Government, and the Competition Commission (“**Commission**”) to address cognate matters. The HKBA does not have access to the vast quantities of evidential materials made available to the Independent Committee in the preparation of this Report, although reference was made during the HKBA’s study of the materials uploaded onto the Independent Committee’s website. Against this background, this Report has been prepared independently and without the benefit of the findings of the Independent Committee’s Inquiry Report. The recommendations are therefore intended to provide broad legal and policy directions based on the materials available to the HKBA at the time of writing and may warrant further refinement as additional facts emerge. The HKBA offers these recommendations primarily from a legal and technical perspective, recognising that law reform must also take into account practical, administrative, resource and broader policy considerations. The implementation and prioritisation of any reforms will ultimately be matters for the Government and relevant authorities to determine.

5. The HKBA is also aware that the Government announced on 29 October 2026 and 30 October 2026 that amendments to six ordinances will be made soon, namely: the Buildings Ordinance (Cap. 123), the Building Management Ordinance (Cap. 344), the Fire Services Ordinance (Cap. 95), the Competition Ordinance (Cap. 619), the Organized and Serious Crimes Ordinance (Cap. 455) and the Independent Commission Against Corruption Ordinance (Cap. 204). Amongst all the law amendments and new measures announced, a new criminal offence of bid-rigging in building maintenance projects will be introduced and the civil responsibilities of bid-rigging under the Competition Ordinance will also be amended. The HKBA’s Report was concluded without the above information and before the aforesaid announcements and the HKBA hopes that this Report will serve as useful reference in considering and drafting the relevant amendment bills. The HKBA looks forward to seeing the proposed bills of all the aforesaid law amendments and taking part in the public consultations when needed.

6. Prior to the finalisation of this Report, the HKBA had responded on 11 September 2026 to the Government’s Consultation Paper on “Building Management Ordinance (Cap. 344) (**“BMO”**): Proposed Amendments” (**“Consultation Paper”**) and on 14 October 2026 to the Commission’s proposed draft legislative amendments to criminalise bid-rigging by amending the Competition Ordinance (Cap. 619) (**“CompOrd”**). This Report refers to, and, at times, incorporates the discussion and recommendations in those responses.
7. This Report makes the following recommendations, as summarised below by reference to the Chapters they are discussed below:
 - 7.1. **Competition Law (Chapter 2):** The HKBA makes recommendations on three aspects of the enforcement of competition law in Hong Kong, especially in light of the definition of “bid-rigging”:
 - 7.1.1. If “bid-rigging” is to be criminalised, the element of “not made known” in the definition of “bid-rigging” in section 2(2) of the CompOrd should remain an element of the offence, with the prosecution bearing the burden of proving non-disclosure beyond reasonable doubt, as under the Canadian bid-rigging offence. If the legislature nonetheless decides to relieve the prosecution of proving a negative, the “made known” element should be recast so as to place no more than an evidential burden on the defendant. A persuasive burden would be difficult to justify under the Hong Kong Bill of Rights.
 - 7.1.2. If “bid-rigging” is to be criminalised, there is a reasonable case for clarifying the element of “not made known” in the definition of “bid-rigging” as to the content and quality of the disclosure required.

7.1.3. The leniency policy currently in use in Hong Kong is designed for the present civil competition regime and does not provide a coordinated route to immunity from prosecution. If criminalisation of certain serious anti-competitive conduct is to be introduced, it must be accompanied by a clear, published policy that explains how civil leniency interacts with, and offers a predictable pathway to immunity from criminal prosecution. Without proper integration with the exercise of prosecutorial discretion, criminalisation risks unwittingly affecting one of the Commission's most important existing detection tools.

7.1.4. Procurement design, with exclusionary consequences against undertakings that are confirmed cartel participants or confirmed to have made false declarations in the tender process, should be considered as part of the overall response to bid-rigging with a view to making use of the commercial realities of tender markets.

7.2. **Building Management / Incorporated Owners (Chapter 3):** The HKBA supports most of the proposed legislative changes set out in the Consultation Paper. The following points are particular or additional issues that need to be noted:

7.2.1. There is merit in imposing higher attendance requirements and voting thresholds for meetings concerning high-value procurement and large-scale maintenance works. But the HKBA does not recommend applying the same in-person threshold to every Type 2 high-value procurement without qualification. And any tiered threshold for meetings concerning large-scale maintenance works should be accompanied by a proper safeguard or fallback mechanism.

- 7.2.2. With respect to the reform of the proxy regime, the HKBA addresses the practical difficulties in enforcing a ceiling of proxy holding by recommending that any excess proxy instrument should not invalidate all proxies held by that person. The statutory rule should specify which proxies remain valid and which have no legal effect. One fair and workable approach is to treat proxies as valid in the chronological order of lodgement.
- 7.2.3. With respect to the suggestion in the Consultation Paper that not only the owner but the proxy should sign the proxy instrument, the HKBA underlines that the legal act of appointing a proxy is completed when the form is both signed by the owner and lodged.
- 7.2.4. The HKBA does not support a general rule restricting proxies to relatives or other owners of the same estate, as such a limitation would unduly curtail owners' freedom and autonomy to appoint a proxy who is able and willing to represent their interests. Instead, verification measures should be strengthened. The Government may consider introducing a centralised electronic voting platform for statutory voting above defined thresholds.
- 7.2.5. In relation to the proposals to grant the Authority (i.e. the Secretary for Home and Youth Affairs) additional powers to intervene in the affairs of Owners' Corporations ("OCs"), the HKBA reserves its views on the proposal to establish an Appeal Board (Building Management), as it is subject to a fundamental question of jurisdiction reconciliation with the jurisdiction of the Lands Tribunal.
- 7.2.6. Regarding emergency procedures for meetings, the HKBA recommends that such procedures should also apply in

exceptional circumstances where strict compliance with notice or service requirements has become impracticable.

7.2.7. The HKBA supports conferring an express power on the Lands Tribunal to deal with arrangements for OCs meetings in exceptional circumstances.

7.2.8. The Government should consider further reform concerning enforcement of obligations under a Deed of Mutual Covenant (“DMC”). It may be worth exploring whether the BMO should have a mechanism enabling relevant owners to seek permission to bring an enforcement action in the name of the OC where the OC or the Management Committee (“MC”) unreasonably refuses to act on a safety-critical breach of the DMC.

7.3. **Criminal Law (Chapter 4):** The HKBA supports in principle the introduction of a criminal cartel offence, with its scope confined at the beginning to bidding. In respect of this criminal offence and its enforcement, the HKBA makes the following further recommendations:

7.3.1. The offence-creating provision should state an express fault element.

7.3.2. The offence should rest on object or per se conduct only. Effects-based liability is not endorsed.

7.3.3. There should be enacted a disclosure safe harbour for bidding arrangements made known to the procurer at or before the time the bid is made, drafted as an exclusion rather than as a defence.

- 7.3.4. There needs to be resolved the interface between compelled material under sections 41, 42, 45 and 148 of the CompOrd and the criminal track by providing expressly for derivative use, for the exceptions in section 45(3)(b) (in particular section 55 of CompOrd and Part V of the Crimes Ordinance (Cap. 200) (“**CrimesOrd**”), for use against persons other than the maker, and for criminal disclosure, with statutory firewalls operating in both directions.
- 7.3.5. There should be established a criminal leniency and immunity framework capable of binding the Secretary for Justice, aligned with section 80 of the CompOrd and any proposed Secretary for Justice’s consent mechanism. Leniency materials should be protected by confidentiality and protective orders.
- 7.3.6. The double-jeopardy architecture should be completed; the bars to the punitive remedy should be confined and the protective and compensatory provisions should be expressly preserved, the bars to conspiracy to defraud and section 36 of the CrimesOrd should be extended, and the Secretary for Justice’s consent mechanism should be confined to natural persons.
- 7.3.7. The proposed maximum penalty should be justified solely on penological grounds independent of the criteria for triggering the thresholds for the application of the Interception of Communications and Surveillance Ordinance (Cap. 589).
- 7.3.8. There should be formulated and published a prosecutorial or enforcement policy indicating when the criminal track will be pursued, its status, the body that issues it, and its

relationship to the Department of Justice (“DoJ”)’s prosecution policy.

7.3.9. There should be sufficient public advocacy to establish the offence as serious wrongdoing rather than a regulatory formality.

7.3.10. The Commission and the DoJ should, together, formulate the investigation and prosecution model, including whether the Commission investigates and refers under a published protocol, whether there is a joint enforcement arrangement, or whether the Commission prosecutes under authorisation, and whether any powers of arrest and detention are to be conferred.

7.3.11. The Commission and the DoJ should, together, coordinate the granting of leniency with the exercise of prosecutorial discretion.

7.3.12. The Commission and the DoJ should, together, formulate the charging practice as between the CompOrd and conspiracy to defraud.

7.3.13. The Commission should align the Non-Collusion Clause materials with the mutual-exclusivity principle.

7.4. **Construction Law (Chapter 5):** Maintenance and renovation issues are becoming prevalent as estates and buildings age. The HKBA thus recommends that the Government and other relevant statutory authorities and bodies address the current systemic issues in a holistic and serious manner. The requisite expenditure is an important and necessary investment. Tackling bid-rigging and other anti-competitive practices in itself will not be sufficient to create a safe and effective environment for the public in connection with building

maintenance and renovation works. Other reforms will only be partially successful unless there is also a change in the culture surrounding expenditure on maintenance and renovation. Accordingly, the HKBA makes the following recommendations:

7.4.1. Reforms should seek to incentivise and facilitate an environment in which (i) necessary building maintenance and renovation work is identified and then carried out at an appropriate time rather than the current tendency to defer work and expenditure until, or beyond, the point at which the building condition has become serious or dangerous; (ii) building maintenance and renovation work is carried out by professional and reputable contractors and sub-contractors using appropriate standards of workmanship, materials, temporary works and safety measures; (iii) building maintenance and renovation work is carried out for a proper and reasonable price so that contractors and sub-contractors neither price gouge nor are incentivised to cut corners; (iv) the procurement and bidding process is transparent, fair and complies with competitive law and norms; (v) there are clear and identified points of responsibility for standards/compliance; (vi) there is an effective regulatory system both to incentivise standards/compliance, and also to identify and address breaches before, rather than after, an accident or failure or tragedy occurs; and (vii) there is an effective regulatory and criminal justice regime in order to prosecute and punish those who commit breaches.

7.4.2. Few housing estates / OCs maintain sinking funds, so that decisions to commission works usually also require agreements for funds to be raised for that work. The HKBA recommends that consideration be given to introducing a statutory requirement for housing estates / OCs to maintain a sinking fund contributed to by all owners. Also,

consideration should be given to introducing a statutory levy to be paid by developers of new-build residential properties so as to create a public fund to help finance safety critical building maintenance and renovation work where the housing estate / individual owners cannot afford to bear the whole cost.

- 7.4.3. OCs and MCs are at a severe disadvantage when procuring building maintenance and renovation works. It is difficult for them to assess bids and proposals received by contractors. The market of independent consultants serving this sector of construction is limited and some of them are not independent. In addition to the eradication of anti-competitive practices discussed above, the HKBA welcomes improvements to the Smart Tender Scheme, including the Urban Renewal Authority (“URA”)’s gatekeeping role in the pre-qualification and tender processes. The HKBA considers that consideration be given to amending the Urban Renewal Authority Ordinance (Cap. 563) so as to make it clear that the URA is exercising a public regulatory function with respect to at least some of its responsibilities under the Smart Tender 2.0 Scheme. Also, the HKBA suggests that an appeal mechanism be set up whereby parties not included or excluded from pre-qualification can appeal to an independent panel of experts outside the URA. Further, the HKBA recommends the setting up of a proper and transparent procedure for the Company Performance Review. On the other hand, the HKBA urges caution in designing and introducing price review by the URA of tenders. Consideration also needs to be given as to whether the URA should be entitled to reject tenders or simply to give indicative information to owners for their consideration. Given that a building maintenance project contract is strictly between the contractor and property owners, it is unclear on

what basis the URA could or would be acting as a third-party advisor to review project variations and give advice to owners. The role of the URA in this regard must be clarified.

7.4.4. The Smart Tender 2.0 Scheme will not remove the need for housing estates and OCs to review and evaluate tenders for building maintenance and renovation works. The tendency in Hong Kong to focus on the lowest cost brings with it significant risks with respect to quality and safety considerations. The HKBA in this relation suggests that the BMO be amended so that where an incorporated owners' project exceeds a prescribed value, tenders must be submitted in two separate envelopes: one with the technical proposal and the other with the price proposal. "Two-envelope" tendering requires the price proposal envelope only to be opened after an evaluation of the technical proposal and then only if the technical proposal meets a prescribed minimum score based on pre-agreed valuation criteria and weightings. The tender documents must disclose these criteria and weightings and they shall be made known to all owners. "Two-envelope" tendering must be coupled with measures, possibly through the Smart Tender 2.0 Scheme, to tackle the existing problem concerning lack of independent and conflict-free consultants, including requiring consultants to declare all potential conflict of interests prior to appointment.

7.4.5. The HKBA suggests that the Buildings Ordinance (Cap. 123) ("**BOrd**") be amended to include a statutory requirement that Registered Structural Engineers and Authorized Persons ("**APs**") and other similar professionals should disclose actual and potential conflicts both before and after appointment for a project. For major or high-risk works,

there could be considered a statutory obligation for these classes of professionals to be conflict-free.

- 7.4.6. The HKBA suggests that in the medium and longer term, modern standard form contracts for use in building maintenance and renovation works should be developed.
- 7.4.7. The current statutory regime classifies minor works by the nature of individual items of work to be carried out and not by the cumulative risk of the project. There is no register for OCs and others to find out the safety register of building maintenance and renovation contractors and consultants. There is no effective disbarment or suspension mechanism for building maintenance and renovation contractors and consultants who have performed poorly on safety. The HKBA recommends amendments be made to the BOrd and the Building (Minor Works) Regulation (Cap.123N) to reclassify works as “prescribed high-risk building works” where one of several thresholds prescribed in terms of total project value, the total number of flats potentially affected and percentage of coverage of external wall area of a block of flats affected is met. A “prescribed high-risk building works” would require the appointment of an AP, pre-commencement risk assessment and fire safety plan and a supervision plan with periodic reporting and defined inspection milestones. Contract-splitting deliberately for the object of remaining below the threshold should be a criminal offence and ground for disciplinary action.
- 7.4.8. The HKBA recommends amendments be made to the BOrd to establish a safety points system under which safety convictions and disciplinary findings attract points, and a contractor exceeding a prescribed limit is barred for a defined period from incorporated owners’ projects or minor

works above a prescribed value. A particular feature of the safety points system is a public, searchable register that extends to related companies and controlling minds.

7.4.9. The HKBA recommends amendments be made to the BMO that for tenders above a prescribed value, every tenderer (including consultants) must disclose prescribed safety records in a standard form, and a tender falling below a prescribed standard must not be considered. False disclosure should be a criminal offence and a ground for avoiding the contract.

7.4.10. There is a lack of plain language safety standards for use by housing estates and OCs. There is also a lack of recognisable standards and regulation regarding temporary works. There should be wider development standards to apply to temporary works that have potential fire risks.

7.4.11. There is a need to review and strengthen the regulatory and criminal justice penalties for safety breaches. The relevant approach should be to disincentivise breaches as opposed to simply punishing them. This review may entail amendments of the Fire Services Ordinance (Cap. 95), the BOrd and the BMO.

8. Through these recommendations, the Taskforce seeks to contribute to ongoing discussions on strengthening Hong Kong's legal framework and enhancing the governance, management and safety of multi-owned buildings.

9. The HKBA recognises that the issues arising from the Wang Fuk Court fire extend beyond the subjects addressed in this Report. Certain areas of the law that are closely connected to the broader objectives have not been included within the present review, including the Fire Safety (Buildings) Ordinance (Cap. 572), the Factories and Industrial Undertakings Ordinance (Cap. 59), the

Construction Sites (Safety) Regulations (Cap. 59I), and the Factories and Industrial Undertakings (Lifting Appliances and Lifting Gear) Regulations (Cap. 59J). Their omission should not be regarded as diminishing their significance. Given the scope of the Taskforce's work, priority has been given to issues considered most pressing and amenable to immediate reform. The HKBA will continue to monitor developments in these areas and remains committed to contributing further to potential law reform initiatives where appropriate.

10. In closing, although this Report is primarily concerned with the present state of the laws of the HKSAR and how they may be improved, it must not be forgotten that the reason for this collective effort on the part of many barristers here in Hong Kong is the Wong Fuk Court fire. The HKBA remembers the deceased and the suffering living and echoes paragraph 5 of the Written Closing Submission of Counsel for the Independent Committee:

“... A disaster of this scale should never have occurred and should never occur again. ... Lessons need to be urgently learned and measures implemented to abate the extreme fire risks of building renovation works which are now readily apparent to all. The work of this Committee cannot undo the loss and suffering experienced by those who have been affected by the fire, but we hope that its findings and recommendations will bring some measure of solace and closure.”

CHAPTER 2 COMPETITION LAW

A. Introduction

11. This Chapter identifies additional reforms that Hong Kong may wish to consider if the Competition Ordinance (Cap. 619) (“**CompOrd**”) were to be amended to criminalise bid-rigging and related tender-focused cartel activity. It is intended to build on, and not repeat, the positions set out in the Competition Commission (“**Commission**”)’s draft paper on Dual-Track Enforcement (Civil and Criminal) of Competition Law in Hong Kong dated 23 April 2026 (“**Briefing Paper**”) and the Commission’s Report to the Independent Committee in relation to the fire at Wang Fuk Court in Tai Po (“**Independent Committee**”) dated 14 May 2026 (“**IC Report**”). Specifically:
 - 11.1. The Briefing Paper advances a dual-track model under which criminalisation operates as an additional track alongside the current civil regime, with the new offence focused on serious anti-competitive conduct affecting calls for bids or tenders and reliance where possible on the existing section 91 concept of persons “involved” in a contravention. It recognises the need to preserve the effectiveness of the Commission’s civil leniency system, but leaves open questions of how immunity and cooperation should operate across the two tracks.
 - 11.2. The IC Report is directed more squarely at the building maintenance sector and the problems exposed by the Tai Po fire. It emphasises that anti-competitive conduct in large-scale building maintenance tenders is widespread, systematic and longstanding and that the conduct often extends beyond narrow bid-rigging to price-fixing, market sharing, information exchange and phantom bidding. It recommends, among other things, amendments to the CompOrd on the standard of proof and the current “not made known” element in the section 2 bid-

rigging definition and the introduction of statutory presumptions and non-collusive clauses in procurement contracts. The IC Report examines the factual and industry context, but leaves statutory defences or procurement-linked sanctions within the industry to be further explored.

12. The Commission has since then consulted on proposed amendments to the CompOrd in July 2026 for the purpose of introducing a criminal cartel offence into the CompOrd. The HKBA has studied the proposed amendments and submitted its response on 14 October 2026. Chapter 4 of this Report below addresses this dimension of criminalisation: the proper design of a criminal cartel offence.
13. Against the background above, this Chapter focuses on reforms that have yet to be fully developed, with particular emphasis on: (a) issues relating to a disclosure-based exclusion for bid-rigging; (b) a single framework which integrates the existing civil leniency regime with immunity from prosecution in respect of any new criminal cartel offence; and (c) possible procurement sanctions such as exclusion from public tenders to reinforce the deterrent effect of civil and criminal sanctions.

B. A Disclosure-Based Exclusion for Bid-Rigging

14. In the IC Report, the Commission recommended that for civil enforcement purposes, specifically in relation to establishing “bid-rigging” as defined in section 2 of the CompOrd, the Commission should not be required to prove that the agreement was “not made known” to the person calling for or requesting bids or tenders; rather, a respondent who relies on the fact of disclosure should bear the burden of proving that the arrangement was made known to the customer. From an enforcement perspective, proving the negative may be evidentially cumbersome and time-consuming.
15. This raises two relevant questions if bid-rigging were to be criminalised. The first is the allocation of burden: whether the “not made known” requirement

(if relevant) should be proven by the prosecution or whether disclosure should be a matter to be affirmatively established by the defendant. The second is whether the present “not made known” requirement should itself be reformulated to specify precisely what is required to be disclosed to satisfy this threshold.

16. On the **first** issue, the Canadian model retains the “not made known” requirement as an element of the bid-rigging offence, which is an indictable criminal offence punishable by a term of imprisonment of up to 14 years. Section 47 of the Competition Act (R.S.C., 1985, c. C-34) [Canada] defines bid-rigging by reference to an agreement or arrangement that “is not made known” to the person calling for or requesting the bids or tenders at or before submission or withdrawal of the bid; the prosecution bears the burden of proving non-disclosure beyond reasonable doubt. In assessing whether this has been established, the Canadian courts proceed on the basis of the totality of the evidence, including direct testimony from representatives of the procuring entity that disclosure of the agreement was received, documentary and other evidence of communications between the alleged cartel participants and the procurer (or the absence of any communication amounting to disclosure) and circumstantial material inconsistent with disclosure, such as internal documents emphasising secrecy, instructions not to inform the customer or other concealment measures directed at avoiding detection by the procurer.
17. Within Hong Kong’s existing competition regime, the “not made known” element is relevant primarily to establishing the existence of “bid-rigging” under section 2(2) of the CompOrd, which in turn is a form of “serious anti-competitive conduct” under section 2(1), in respect of which no warning notice under section 82 needs to be issued to the undertaking (providing it with notice of the alleged contravention and the opportunity to cease the contravening conduct) before the Commission may bring proceedings in the Competition Tribunal. As such, for the purpose of assessing whether a warning notice is required, the relevant point in time for determining whether the Commission had reasonable cause to believe that the agreement was “not made known” to

the customer is *before* the commencement of the proceedings.¹ Only the evidential position before the commencement of the proceedings is relevant, irrespective of the ultimate findings on a customer's knowledge based on all the evidence at trial.

18. On the other hand, if the “not made known” element in criminal proceedings were to be assessed based on all the evidence available at trial, there may be considerable force in the Commission's concern that requiring the prosecution to prove a negative may be difficult, resource-intensive or even unfeasible in certain circumstances. This is particularly the case in long-running cartels which involve multiple possible points of contact within the tendering body and with customers, or cases in which the relevant tender took place years ago, such that customer-side witnesses are no longer employed or available. Whether the agreement was “made known” to the customer is a matter uniquely within the knowledge of the bidder. In such circumstances, it may be reasonable to consider relieving the prosecution of the burden of proving a negative by recasting the “not made known” element such that the “made known” becomes a matter to be affirmatively established by the defendant, even if only evidentially.
19. The **second** issue is whether the existing requirement should be clarified to spell out expressly the elements that must be “made known” to the customer.
20. Here, the United Kingdom (“UK”) provides a more explicit drafting model. Rather than leaving the matter at a broad “not made known” formula, section 188A of the Enterprise Act 2002 [UK], headed “Circumstances in which cartel offence not committed”, provides for a statutory exclusion to the bid-rigging offence if, under the arrangements, “*the person requesting bids would be given relevant information about them at or before the time when a bid is made*”. The requirements of “*relevant information*” are defined in section 188A(2). They include, amongst others, the names of the undertakings to which the

¹ *Competition Commission v Nutanix Hong Kong Ltd & Ors (No. 3)* [2019] 3 HKC 307 at [432F]–[435A], [464]–[477].

arrangements relate, “*a description of the nature of the arrangements which is sufficient to show why they are or might be arrangements of the kind to which section 188(1) [i.e. cartel offence] applies*” and the products or services to which they relate.

21. Under existing Hong Kong law, the Competition Tribunal has held, following Canadian authority, that the “made known” element requires express notification of the agreement or arrangement to the person calling for bids or tenders. It is insufficient for an agreement to be inferred from the circumstances; such a rule would “*introduce much uncertainty and create scope for unmeritorious argument such as that the person calling for bids or tenders must have believed, or could have guessed, or should have suspected, that the impermissible agreement existed*”.²
22. Even so, a Hong Kong provision moving in the direction of section 188A of the Enterprise Act 2002 [UK] could provide greater clarity as to the content and quality of the disclosure required, reducing scope for argument over the sufficiency of vague or partial communications. Express disclosure on “*a description of the nature of the arrangements which... show why they are or might be arrangements of the kind to which [the cartel offence] applies*” could further assist procurers in appreciating the practical implications of the arrangement before evaluating the bids and deciding on the party to whom the contract is to be awarded.
23. As indicated above, the “not made known” element only concerns the definition of bid-rigging under section 2(2) of the CompOrd. It does not determine whether other conduct may nevertheless fall within the wider scope of the draft section 91A as proposed by the Commission, which contemplates a criminal offence directed at serious anti-competitive conduct contravening the First Conduct Rule. “Serious anti-competitive conduct” in section 2(1) of the CompOrd encompasses not only bid-rigging, but also other anti-competitive conduct such as price-fixing, market allocation and customer

² *Nutanix* at p.444A-G and [514]–[516].

allocation. As observed by the Commission, in practice, such types of conduct often accompany acts of bid-rigging.

C. Prosecution Immunity and Cooperation Interface

24. Hong Kong's existing leniency policy, as reflected in the Commission's Leniency Policy for Undertakings Engaged in Cartel Conduct ("**Leniency Policy**"),³ applies to cartel conduct contravening the First Conduct Rule, including bid-rigging. It recognises that, in respect of serious cartel offences, it is in the public interest to incentivise, and offer immunity to, a party who is willing to be the first to break ranks with other cartel participants by exposing and stopping the illegal conduct and fully cooperating with the Commission in proceedings against others.
25. The Leniency Policy is available only to the first qualifying undertaking, operates through a marker system and proffer process through which the undertaking is asked to provide a detailed description of the cartel, the entities involved, the role of the applicant, a timeline of the conduct and the evidence the applicant can provide, requires full and truthful cooperation, and, where the conditions are met, commits the Commission not to seek a pecuniary penalty subject to continued cooperation. It ordinarily extends leniency to current officers and employees, and to specifically named former officers, employees and agents.
26. However, that policy was designed for Hong Kong's present civil competition regime, whose protection is directed to proceedings before the Competition Tribunal and related consequences. It does not provide a coordinated route to immunity from criminal prosecution as no such offence yet exists in Hong Kong. As the Briefing Paper identified, once criminalisation is introduced, the prospect of custodial sanction and a criminal record can increase the perceived downside of self-reporting and cooperation if cartel participants fear that approaching the Commission could trigger parallel criminal investigation,

³ See also, section 80 of the CompOrd.

prosecution and personal liability. Unless an integrated immunity mechanism is implemented, the bifurcation between civil leniency and criminal exposure poses a serious risk of uncertainty which may reduce the willingness of insiders to self-report and thereby impede authorities' ability to detect covert cartel conduct. Any new criminal offence should thus be accompanied by a clear, published policy that explains how civil leniency interacts with, and offers a predictable pathway to, immunity from criminal prosecution.

27. Australia provides an example as to how such integration may be achieved. The Immunity and Cooperation Policy for Cartel Conduct of the Australian Competition and Consumer Commission (“ACCC”) sets out a structured process — including a marker, proffer, cooperation agreement, confidentiality obligations, conditional immunity and final immunity — which provides transparency and certainty for applicants. In parallel, the Memorandum of Understanding between the ACCC and the Commonwealth Director of Public Prosecutions (“CDPP”) and Annexure B to the Prosecution Policy of the Commonwealth (“**Prosecution Policy**”) hard-wire that policy into the criminal enforcement system. Both civil and criminal exposure are addressed through a single integrated framework. The following features of the Australian model are instructive:

- 27.1 The ACCC is the sole point of contact for parties seeking civil and/or criminal immunity, creating a practical “one-stop shop” for applicants.
- 27.2 The ACCC is responsible for granting civil immunity, while the CDPP is responsible for criminal immunity, thereby preserving prosecutorial independence. Agreed procedures (summarised below) facilitate a timely and coordinated decision.
- 27.3 An application to the ACCC is assessed pursuant to published criteria. Where the ACCC concludes that those criteria are met, it may grant conditional civil immunity and recommend criminal immunity to the CDPP.

- 27.4 The criteria applied by the CDPP under Annexure B to the Prosecution Policy mirror those used by the ACCC. The CDPP will ordinarily issue a letter of comfort where the ACCC advises that the conditions are met. Both the letter and the eventual formal undertaking under section 9(6D) of the Director of Public Prosecutions Act 1983 are subject to ongoing obligations, including continued cooperation and truthful disclosure throughout the investigation and any ensuing prosecutions. Final immunity is conferred after the conclusion of proceedings against non-immunised participants, provided the applicant has complied fully with its obligations.
28. Those features would translate well to Hong Kong. If a criminal bid-rigging or broader cartel offence were to be enacted, the Commission should remain the gateway for initial immunity applications in cartel matters, sparing applicants from having to make parallel approaches to multiple agencies from the outset. The Commission would continue to assess whether the applicant satisfies the criteria for civil leniency, while the Department of Justice (“**DoJ**”) would retain independent authority over any grant of criminal immunity or non-prosecution assurance. To mirror the Australian model, a published protocol or memorandum of understanding should provide that an application for leniency to the Commission will also, where the matter may involve serious cartel criminality, be treated as an application for criminal immunity, with the Commission making a recommendation to the DoJ on the basis of agreed criteria. Without such integration, criminalisation risks weakening one of the Commission’s most important existing detection tools.

D. Procurement Consequences

29. Hong Kong may also wish to consider procurement consequences for cartel conduct, including exclusion, debarment and self-cleaning, particularly in public procurement and publicly supported projects. The Hong Kong papers focus mainly on criminalisation, non-collusion clauses or non-collusive tendering certificates, statutory declarations and the relationship with

conspiracy to defraud, but do not yet set out sanctions tools that directly affect future access to tenders. Such a framework may function as a strong deterrent in tender-driven sectors.

30. In the UK, bid-rigging is treated not only as a competition or criminal law issue but as a ground for exclusion from public procurement. Past infringements or a compliance history, decisions of the Competition and Markets Authority (“CMA”) and a central debarment register can be taken into account in the assessment of bids and the awarding of contracts.
31. Under the Procurement Act 2023 [UK], a supplier found by the CMA to have infringed the UK equivalent of Hong Kong’s First Conduct Rule — for example, by colluding with competitors to rig bids, fix prices or share markets — or who was convicted of the criminal cartel offence under section 188 of the Enterprise Act 2002 [UK] faces mandatory exclusion from procurement in relation to specified public contracts, where the circumstances giving rise to the exclusion ground are continuing or likely to recur.⁴ In such cases, contracting authorities must treat the supplier as an “excluded” supplier and, if the supplier is placed on the central debarment register,⁵ may be barred from covered procurements for up to five years.
32. The Procurement Act 2023 [UK] also provides a structured “self-cleaning” mechanism. In deciding whether the circumstances giving rise to the application of an exclusion ground are continuing or likely to occur again, a contracting authority must provide the supplier with a reasonable opportunity to demonstrate otherwise, and must assess that evidence by reference to the factors set out in section 58. These include evidence that the supplier has taken the matter seriously (for example, by paying compensation), steps taken to prevent recurrence (such as changes in staff or management, or implementing procedures and training), commitments to allow monitoring or verification, the time elapsed since the conduct, and any other relevant evidence or explanation.

⁴ Procurement Act 2023 [UK] Section 57; Schedule 6.

⁵ *Ibid*, Section 62.

Applying for and being granted leniency, or entering into a settlement agreement with the CMA, may be relied on as relevant self-cleaning evidence. A supplier who can satisfy section 58 may avoid exclusion or be removed from the debarment list despite past cartel activity.

33. Hong Kong may wish to consider whether confirmed cartel participation or false declarations in the tender process should similarly trigger a structured debarment framework for public procurement, subject to safeguards and a possibility of rehabilitation or self-cleaning. Such a framework would make procurement design and exclusion an integral part of the overall response to bid-rigging and align sanctions more closely with the commercial realities of tender markets.

CHAPTER 3 BUILDING MANAGEMENT / INCORPORATED OWNERS

A. Introduction

34. This Chapter acknowledges the significant public concern regarding building management and maintenance and calls for reform of the building maintenance regime, including strengthening inspection mechanisms and taking more robust action against bid-rigging.⁶ The Wang Fuk Court fire had demonstrated how critical proper and effective building management is to district governance, the living environment, and broadly speaking, the cohesion in community.
35. Against that backdrop, the HKBA has undertaken a review of the Building Management Ordinance (Cap. 344) (“**BMO**”) and its operation in practice. A substantial body of reported and unreported decisions of the Lands Tribunal in building management disputes was reviewed. These cases provide a detailed and practical picture of the recurring difficulties faced by owners and Management Committees (“**MCs**”) in administering multi-storey buildings. For ease of reference, the difficulties identified have been organised into broad thematic categories below.
36. The BMO has recently been amended⁷, and the Government has advanced further proposals in a Consultation Paper published in August 2026 (“**Consultation Paper**”). The HKBA has responded to the Consultation Paper. The HKBA supports the Government’s commitment to enhancing transparency, accountability and governance standards in building

⁶ See Home and Youth Affairs Bureau and Home Affairs Department, Legislative Council Paper No. CB(3)83/2026(03) for the Meeting of the Panel on Home Affairs, Culture and Sports on 9 February 2026 (“**Administration’s Paper**”), paragraph 11 (at: <https://www.legco.gov.hk/yr2026/english/panels/ha/papers/ha20260209cb3-83-3-e.pdf>) and Legislative Council Secretariat, ‘Background Brief on the Government’s efforts in facilitating building management’ (“**Background Brief**”) (Legislative Council Paper No. CB(3)83/2026(04), 3 February 2026) paragraph 18) (at: <https://www.legco.gov.hk/yr2026/english/panels/ha/papers/ha20260209cb3-83-4-e.pdf>).

⁷ Building Management (Amendment) Ordinance 2024, which came into operation on 13 July 2025.

management, and we agree with the overall direction of reform. The Wang Fuk Court fire highlighted several systemic deficiencies in building management and reinforced the need for a more proactive and responsive statutory framework. In the past, the Government's role in building management focused primarily on providing advice and supporting or assisting owners in discharging their responsibilities. This approach is understandable, since private residential buildings are private properties and that individual circumstances differ, giving rise to a delicate need to maintain an appropriate balance between statutory regulations on the one hand and owner autonomy on the other. The Government's proposals address some of the issues revealed in practice but do not resolve all of the structural weaknesses identified in the Lands Tribunal decisions. In light of the unresolved matters, further consideration of the building management framework remains necessary.

37. This Chapter consists of an overview of the BMO, a review of Legislative Council materials, and an examination of the selected Lands Tribunal decisions. Unless otherwise indicated, all statutory references are to the provisions of the BMO. The materials reviewed indicate that management failures may broadly be grouped into two categories:

37.1. The first category comprises situations in which the BMO already provides legal redress, such as dissolution of a MC under section 31 or orders requiring compliance with financial record-keeping or handover obligations. The difficulty in these cases lie not in the absence of statutory powers but in the fact that they are at times under-used or invoked too late, and in the concern for legal costs and delays that arise once matters must be resolved through court proceedings.

37.2. The second scenario concerns situations where the BMO is silent or deficient, and where no satisfactory remedy is available without statutory intervention.

38. The HKBA fully recognises and respects owners’ discretion in deciding how their Owners’ Corporation (“OC”) operates, and therefore supports reform that generally would: (i) give owners better information before decisions are made; (ii) provide the Authority (i.e. the Secretary for Home and Youth Affairs) with carefully defined intervention powers before governance failure becomes acute; (iii) reduce the need for individual owners to commence costly legal proceedings; and (iv) empower the Lands Tribunal to address exceptional procedural difficulties, etc. where strict compliance with the BMO has become impracticable. The HKBA refers to the Consultation Paper and indicates that the intended reforms proposed therein do not merely refine procedural requirements. If successfully implemented and enforced, they would help reduce proliferation of building-management-related litigation and the consequential problems of costs and delay, which are matters all too familiar to practitioners in the legal profession. By equipping owners with better information, enabling earlier intervention by the Authority, and empowering the Lands Tribunal to address exceptional procedural obstacles, the proposed reforms directly respond to recurring problems and would help reduce unnecessary disputes and litigation.

B. Legal Redress under the Building Management Ordinance: Cases Where Existing Powers Are Available but Not Necessarily Invoked in Practice

39. The Lands Tribunal’s Building Management (“LDBM”) cases show that a substantial proportion of recurring building management disputes fall within the scope of existing statutory provisions. In many of these cases, the BMO already provides a clear mechanism for redress, yet those mechanisms are not invoked timely in practice. The table below summarises the principal categories of difficulty, the statutory powers available, and the limitations of those powers as they are often perceived or experienced by the public:

Category of Problem	Existing Statutory Provisions	Limitation of Existing Remedy
MC defunct or inquorate (vacancy of membership, resignation, or removal)	Section 31: dissolution of MC and appointment of administrator; Schedule 2 paragraph 1 (minimum membership requirement); Government proposal to empower Authority to appoint a person to convene a meeting on 10% application (see Administration's Paper, paragraph 12(e))	Remedy is reactive; requires a positive application by owner or Authority; there is no automatic trigger; Government's proposed 10% threshold may be unachievable in apathetic buildings
Failure to convene AGM or GM on 5% request within statutory timeframes	Schedule 3 paragraphs 1(1)(b) and 1(2): obligation to convene; Lands Tribunal has jurisdiction to order compliance; section 31 dissolution as ultimate sanction	No clear intermediate sanction short of dissolution; no summary procedure; no liability for individual officers causing delay
Invalid resolutions / proxy fraud / procedural defects at meetings	Schedule 3 (procedural requirements for meetings); Lands Tribunal's jurisdiction to declare resolutions void or grant declaratory relief	No pre-meeting validation mechanism; no independent returning officer regime; disputes require full trial at owners' expense or at least with costs implication
Financial record-keeping failures and lack of transparency	Section 27 and Schedule 7 paragraph 2 (record-keeping obligations);	Enforcement depends on individual owners taking proceedings; no proactive

	Schedule 6 (owners' inspection rights); Land Tribunal's jurisdiction to order compliance	audit mechanism; no civil penalty for non-compliance
Failure of outgoing MC members or managers to hand over records and assets	Schedule 2 paragraph 5A (outgoing MC members, 14-day obligation); Schedule 7 paragraph 8 (outgoing managers); contempt jurisdiction for breach of court orders	Obligation exists but is widely disregarded without litigation; contempt proceedings (as in Hin Keng Estate (顯徑邨) are cumbersome; no clear interim power to freeze assets pending handover short of Court order

C. “Three-Nil” Buildings

40. As of December 2024, there are 3,067 “three-nil” buildings in Hong Kong, i.e. buildings without an OC, any form of residents’ organisation, or a Property Management Company (“**PMC**”) (see Background Brief, paragraphs 4 and 7). The number is significant.
41. In the absence of any organised management structure, such buildings are particularly vulnerable to the safety and maintenance failures identified above. Without a body capable of coordinating inspections, repairs or compliance with statutory obligations, risks may accumulate unnoticed and unresolved.
42. To assist owners of such buildings, the Government launched the Pilot Scheme on Joint Property Management (“**JPM**”) in June 2025, encouraging owners of old single-block buildings to jointly engage a single PMC (see Administration’s Paper, paragraph 7). However, the JPM Scheme relies on voluntary consensus among owners, and securing sufficient agreement in buildings with low participation or internal disagreements may be a persistent

obstacle. Legislative Council Members have accordingly recommended adopting a more “government-led approach” to assist owners (see Background Brief, paragraph 10).

C1. Statutory Framework for Joint Property Management

43. Issue: The JPM model provides incentives by consolidating the management needs of multiple buildings so that they may share management costs (see Background Brief, paragraph 15). It remains to be clarified how this concept aligns with the BMO, which provides a legal framework for incorporating owners governed by a Deed of Mutual Covenant (“DMC”) (see BMO, section 8).

44. Matters for further consideration: It may be useful to explore whether it is feasible to develop a statutory framework under the BMO to support the JPM model, which the Government envisages as enabling multiple adjacent buildings to share management costs:

44.1. One possible approach, subject to further study, would be to permit owners of adjacent single-block buildings to incorporate as a “joint owners’ corporation” under the BMO, with appropriate safeguards to protect the rights and autonomy of each individual building within the joint body.

44.2. Such a framework would allow those buildings to lawfully pool resources into a shared general fund (as provided under section 20; see e.g. 鄧應峰 v 福群大廈業主立案法團[2020] HKLdT 13 at [19]), thereby making collective management by a single PMC both commercially viable and legally coherent.

44.3. Any such arrangement would need to prescribe governance and financial reporting requirements for the joint body, addressing the transparency concerns identified in the Lands Tribunal decisions.

- 44.4. These are preliminary ideas only, and the details would require careful consideration.

C2. Streamlining Building Management Agent Appointment

45. Issue: Under section 40B, the Authority may order the appointment of a Building Management Agent (“BMA”) if there is a danger, or risk of danger, to owners or occupiers. The statutory threshold is therefore safety-based and requires the Authority to form a view that a danger exists.
46. The process of making and enforcing a BMA appointment order may be prolonged, particularly where the building owners are disorganised or unresponsive. For “three-nil buildings” that have failed to comply with mandatory inspection or maintenance obligations, but where a safety-based threshold has not yet been triggered, the BMA jurisdiction may, in practice, be unavailable as a preventive measure.
47. Matters for further consideration: It may be worthwhile to consider whether a more streamlined mechanism could be developed to address situations where “three-nil buildings” repeatedly fail to comply with mandatory inspection or maintenance obligations but have not yet met the safety-based threshold under section 40B:
- 47.1. One possibility, subject to further examination, would be to introduce a rule-based trigger that enables the Authority to appoint a BMA when defined non-compliance persists, e.g. where a mandatory building inspection or maintenance order has not been complied within a specified period.
- 47.2. Such a mechanism would allow the existing reactive BMA jurisdiction to operate proactively rather than solely in response to an identified danger, and would reduce reliance on the Authority forming a view of risk on a case-by-case basis.

- 47.3. Consideration could also be given to whether, in certain clearly defined circumstances, the Authority should be required, rather than merely empowered, to appoint a BMA. This may help address situations in which the existing discretionary power is difficult to exercise or may be under-utilised.
- 47.4. These ideas are preliminary and would require careful study to assess feasibility, safeguards, and operational impact.

D. Defunct or Inactive or Dysfunctional Management Committee

48. Even where an OC has been duly incorporated, its MCs may subsequently become defunct or inactive. The causes are varied: members may sell their units and thereby automatically cease to be members under paragraph 4(2)(e) of Schedule 2; members may resign; or members may be removed following three consecutive absences from MC meetings under paragraph 4(2)(c) of Schedule 2:
- 48.1. The resulting vacancies may render the MC unable to function. In particular, since the BMO requires the chairman to initiate general meetings (Schedule 3, paragraph 1(2)), a vacant chairmanship can effectively paralyse the entire governance structure of the OC (see the Background Brief, paragraph 10);
- 48.2. The existing mechanism under section 31, which allows an aggrieved owner or the Authority to apply to the Lands Tribunal for dissolution of the MC and the appointment of an administrator, provides legal redress in these situations (see Background Brief, paragraph 11; section 31);
- 48.3. However, it operates only after someone takes active steps to invoke it. In practice, the process may involve not insignificant costs and delay before the position can be remedied, and it therefore functions

as a reactive measure rather than a means of preventing governance paralysis.

49. The Lands Tribunal decisions provide concrete illustrations of how dysfunction within a MC manifests in practice and how section 31 has been applied to provide relief. In a number of LDBM decisions, the Lands Tribunal ordered the dissolution of the MC and the appointment of an administrator under section 31. These orders were made in circumstances where the MC had become defunct, inquorate or otherwise unable to discharge its statutory functions:

- 49.1. In *Smart Wealth Asia Pacific Ltd v The Incorporated Owners of Kelly Court* (unrep., LDBM 251/2013, 31 December 2013) (“**Kelly Court**”) at [14], [17], the chairman, secretary and treasurer of the MC had sold their flats, ceasing to be members under paragraph 4(2)(e) of Schedule 2, and all offices of the MC were vacant (at [6]–[7]).
- 49.2. In *Asia Turbo Development Ltd & Anor v The Incorporated Owners of Tai Chi Factory Building* (unrep., LDBM 286/2013, 24 February 2014) (“**Tai Chi**”) at [10], all members of the MC had assigned their units to the applicant, thereby ceasing to be members of the MC under paragraph 4(2)(e) of Schedule 2 (at [4]–[5]).
- 49.3. In *Kannix Ltd v The Incorporated Owners of On Hing Building* (unrep., LDBM 57/2014, 30 May 2014) (“**On Hing Building**”) at [10], the chairman, secretary and treasurer had sold their units (and thus ceased to be members of the MC under paragraph 4(2)(e) of Schedule 2) (at [4]), the building had been served with orders from the Fire Services Department under the Fire Safety (Buildings) Ordinance (Cap. 572) (at [5]), and no general meeting could be convened because paragraph 1(2) of Schedule 3 requires the chairman to initiate the meeting (at [8]).

- 49.4. In *周春燕 & Ors v 富嘉花園業主立案法團* (unrep., LDBM 300/2013, 22 August 2014) (“富嘉花園”), the chairman resigned (at [7]), making it impossible to convene a general meeting (at [8]–[9], [13]). The Lands Tribunal rejected a last-minute attempt to re-elect a chairman as an obstruction (at [19]) and ordered dissolution under section 31 (at [23]).
- 49.5. In *富林財務有限公司 & Anor v 東蘭閣業主立案法團* (unrep., LDBM 168 & 170/2015, 22 September 2015) at [3], [44], the order was made where the MC had failed to comply with its duties (at [6]).
- 49.6. In *寶利實業有限公司 v 豐明大樓業主立案法團* (unrep., LDBM 140/2016, 26 September 2016) (“豐明大樓”), the MC had no chairman, making it impossible to convene general meetings (at [2], [14], [16]).
- 49.7. In *方滄婷 v 甄國楚 & Ors* [2022] HKLdT 25, the order was made where there were insufficient members of the MC, which had failed to properly manage and maintain the building (at [1], [7]–[8], [12], [27]).
- 49.8. In *So Kwok Wan Richard & Ors v The Incorporated Owners of Hoi Tao Building & Ors* [2024] HKLdT 96, resolutions had been invalidated due to forged proxy forms (at [41]–[87]), and the respondents had acted in bad faith by illegally signing major repair contracts and ignoring statutory meeting requests (at [89]–[111]). The Tribunal dissolved the MC under section 31 (at [4], [133]).
- 49.9. In *Wing Ming Garment Factory Ltd v The Incorporated Owners of Wing Ming Industrial Centre* [2025] HKLdT 20 (“**Wing Ming**”), the Tribunal dissolved the MC under section 31 (at [364]), finding that the MC had been unwilling and unable to perform its statutory duties (at [1], [363(1)–(2)]). The Tribunal held that selective non-

enforcement of the DMC (against its own members) justified dissolution (at [363(3)]) and noted systematic breaches of the DMC that the MC refused to address (at [221]).

49.10. In *民政及青年事務局局長 v 宏福苑業主立案法團 & Ors* [2026] HKLdT 4 (“**Wang Fuk Court**”), the Lands Tribunal granted the application due to unprecedented and complex management issues arising from fire (at [11]–[14]), doubts about the MC’s ability to manage the estate (at [15]–[17]), and conflict of interest arising from potential legal liability (at [18]–[21]).

50. These cases reveal several recurring categories of dysfunction with MCs. Each category is one that the existing jurisdiction under section 31 is capable of addressing, but only in a reactive manner and only when an owner takes the initiative to invoke the statutory mechanism:

50.1. Vacancy of MC membership (e.g. Kelly Court, Tai Chi and On Hing Building);

50.2. Resignation or prolonged absence of the chairman, rendering it impossible to convene general meetings (e.g. Tai Chi, On Hing Building, 富嘉花園 and 豐明大樓). Under paragraph 1(2) of Schedule 3, only the chairman may convene a general meeting upon a request by owners holding 5% of the shares. The same difficulty arises where the chairman refuses to act upon a valid 5% request within the statutory timeframes;

50.3. Selective enforcement of the DMC and failure to perform statutory duties, particularly where the MC acts in the interests of its own members (e.g. Wing Ming); and

- 50.4. Conflicts of interest arising from the MC's dual position as governing body and potential defendant in litigation (e.g. *Wing Ming and Wang Fuk Court*).
51. Beyond cases involving dissolution of MC, other LDBM decisions reveal a further range of recurring management failures across buildings of all types and sizes. These failures concern compliance with procedural, governance and record-keeping requirements under the BMO. In each instance, a mechanism for legal redress exists, but enforcement depends on individual owners commencing litigation at their own cost and risk, a reliance that is frequently inadequate in practice:
- 51.1. Vacancy of MC membership falling below the statutory minimum under paragraph 1 of Schedule 2: e.g. *Leung Wai Ching & Ors v The Incorporated Owners of Hip Lee Building* (unrep., LDBM 196/2013, 5 November 2013) at [4], [7]. The remaining members were insufficient in number to conduct valid business, yet no mechanism required the Authority to intervene. Paragraph 1 of Schedule 2 prescribes a minimum membership requirement but provides no consequence for falling below it other than the dissolution under section 31;
- 51.2. Failure to convene an AGM as required by section 1(1)(b) of Schedule 3: e.g. *Wong Tak Keung, Stanley v The Incorporated Owners of Grenville House* (unrep., LDBM 180/2011, 9 September 2011) at [2], [8]. The Lands Tribunal could order compliance but had no proportionate sanction short of e.g. dissolution under section 31;
- 51.3. Failure to convene an owners' meeting: e.g. *劉紹邦 & Ors v 伍長球* [2022] HKLdT 19 at [3];
- 51.4. Disputes concerning the validity of voting or resolutions at meetings. Examples include *Good Castle Holding Ltd v The Incorporated*

Owners of Hoi Luen Industrial Centre & Anor (unrep., LDBM 289/2010, 26 January 2012) at [1]; *Tsang Wing Lam v Incorporated Owners of King Tin Court & Anor* (unrep., LDBM 189/2012, 16 August 2012) at [16]; *順豐大廈(嘉禾街)業主立案法團 v 香港仔街坊福利會有限公司* (unrep., LDBM 16/2012, 30 November 2012) at [9] (service of notice); *海景花園業主立案法團 v 賴韻詞 & Anor* (unrep., LDBM 209/2013, 24 January 2014) at [1]; *Kwan Pui Sin v The Incorporated Owners of Mandarin Court (Shanghai Street)* (unrep., LDBM 253/2014, 23 October 2015) at [3]; *Woo Man Fong v Incorporated Owners of Broadview Court (Shum Wan Road) & Ors* [2019] HKLdT 52 at [10] (but where there was no application under section 31 to dissolve the MC and appoint an administrator: see [15]); *蔡建平 v Leung Po Ling & Ors* [2021] HKLdT 18 at [34], [37]–[46]; *Wealth Knight Ltd v 立德大廈業主立案法團* [2024] HKLdT 60 at [3]–[4].

These cases collectively illustrate that the procedural requirements of Schedule 3 generate persistent and frequently costly disputes. The BMO currently provides no summary or low-cost mechanism for pre-meeting validation of proxies or appointment of an independent returning officer, with the result that allegations of proxy fraud and voting manipulation regularly require a full trial, with significant costs and time implications;

- 51.5. Inquorate meetings, whether MC meetings or general meetings, and disputes concerning whether a meeting that failed for want of a quorum can be taken to have caused a member's deemed resignation under paragraph 4(2)(c) of Schedule 2: e.g. *彭國友 v 梁潤根 & Ors* (unrep., LDBM 265/2011, 7 June 2012) at [6];
- 51.6. Failure of the OC to keep meeting minutes under, *inter alia*, paragraph 6 of Schedule 3, and related disputes concerning whether the minutes accurately record what transpired. Examples include *Li*

Bark Shing & Anor v The Incorporated Owners of Hong Yuen Court (unrep., LDBM 149/2013, 13 December 2013) at [7], [19]; *羅麗珍 v 李厚華* (unrep., LDBM 299/2013, 7 October 2014) at [18]–[21];

- 51.7. Failure of the OC or manager to keep books of account and other financial records, and related failures of financial transparency, under, *inter alia*, section 27. Examples include *Simon Patrick Michael Durrant v Incorporated Owners of Southorn Development* (unrep., LDBM 230/2013, 18 November 2013) at [8]–[19]; see also *曹國新 v 龍蟠苑 (A-F 座) 業主立案法團 & Anor* (unrep., LDBM 68/2015, 14 June 2017) at [21]–[22], [24], [28] (discussing the rationale behind section 27 of and Schedule 6 to the BMO); *賈秉仁 v 富城物業管理有限公司* [2021] HKLdT 65 at [5] (concerning the manager’s obligation to keep accounts under paragraph 2(1) of Schedule 7, though the Lands Tribunal ultimately dismissed the application).

These cases show that financial transparency is a persistent concern. Although the BMO provides inspection rights under Schedule 6 and record-keeping obligations under section 27 and Schedule 7, enforcement depends, in practice, on individual owners invoking the Lands Tribunal’s jurisdiction, a process many find prohibitively costly and slow;

- 51.8. Failure of outgoing members of the MC to hand over the OC’s books and records under paragraph 5A of Schedule 2. Examples include *元朗怡豐花園業主立案法團 v 譚競賢 & Ors* (unrep., LDBM 5/2011, 6 September 2011) at [1]; *長城大廈業主立案法團 v 曾文華* (unrep., LDBM 197/2015, 7 February 2017) at [2]; and
- 51.9. Failure of the manager to deliver books and records after his appointment has ended under paragraph 8 of Schedule 7. Examples include *The Incorporated Owners of Yuen Long Wah On Villa v*

Guardway Security Guarding Service Ltd t/a Guardway Property Management (unrep., LDBM 224/2010, 21 August 2012) at [5]; *百誠大廈業主立案法團 v 合豐物業管理有限公司* (unrep., LDBM 128/2012, 8 February 2013) at [3], [31].

These cases expose a gap in the statutory framework, in the sense that, although the handover obligation under paragraph 8 of Schedule 7 is mandatory, departing managers frequently fail or refuse to cooperate with a handover audit, leaving the incoming managers or OC to compel production through litigation.

52. Where the MC becomes defunct or otherwise unable to function, the practical consequences for the building can be severe. In the most acute cases, the building may be left unable to comply with statutory safety requirements, such as fire services improvement orders or mandatory building inspection notices, exposing all co-owners to potential criminal or regulatory liability (e.g. On Hing Building at [5]). Even short of that extreme, a paralysed OC cannot authorise maintenance works, collect management fees or enforce the DMC, creating a governance vacuum that deteriorates over time.
53. As noted at the outset, the Lands Tribunal decisions illustrate two distinct categories of management failure. In the first category, exemplified by the dissolution, record-keeping and handover cases mentioned above, the BMO already provides legal redress. Section 31 empowers the Lands Tribunal to dissolve the MC and appoint an administrator; paragraph 5A of Schedule 2 and paragraph 8 of Schedule 7 impose mandatory handover obligations on outgoing MC members and managers respectively; and section 27 together with Schedule 6 establish financial record-keeping and inspection rights.
54. Taken together, those provisions form a reasonably comprehensive framework. The difficulty lies not in the content of the law but in the architecture of enforcement. The remedies are reactive: owners must identify a dysfunction, gather evidence, commence proceedings, and bear the cost and delay of

litigation before relief is obtained. By the time an application is brought, the building may already be experiencing the governance vacuum described above.

55. For failures in the first category, the principal recommendations are: (a) improved guidance to OCs and owners on the existing remedies available under the BMO; (b) the potential introduction of proactive or objective triggers for the Authority intervention that do not require an aggrieved owner to commence individual proceedings; and (c) refinement of specific procedural mechanisms to reduce the cost, complexity and delay of enforcement.
56. In the second category, which is addressed in Section E below on enforcement of the DMC by appropriate owners and in Sections F and G on contractor procurement and procedural emergencies, the existing BMO is generally deficient. Unlike the first category, where the substantive framework exists but enforcement is reactive, these failures arise in areas where the BMO provides no targeted remedy.

D1. Trigger for Authority Intervention

57. Issue: The problem of defunct or inactive MCs, as illustrated in the LDBM cases above, is already capable of legal readdress under the existing statutory mechanism (see section 31). The difficulty is that owners must incur the cost and delay of invoking these remedies, and buildings most vulnerable to management failure are often least able to mobilise owners to take action.
58. Apart from section 31, the Government proposes granting the Authority power to appoint a specified person to convene a meeting to re-elect a new MC, but only upon application by not less than 10% owners (see Administration's Paper, paragraph 12(e)). This proposal is welcome but may still be insufficient. Building with an inactive or dysfunctional committees frequently exhibit a culture of owner apathy that makes the 10% threshold difficult to reach. The proposed mechanism relies on owners taking the initiative even where the failure is obvious and the harm to the building is already occurring. There is no mechanism for the Authority to intervene on its own motion.

59. Matters for further consideration: It is worth exploring whether it should be provided, whether under the BMO or otherwise, that where an OC fails to fulfil one or more of its core statutory duties for a continuous period, and in circumstances where enforcement is plainly required, this could constitute an additional ground for the Authority to intervene on its own motion, without any requirement for an owner application. The Consultation Paper has included a proposal to consider granting the Authority additional powers to intervene and provide assistance in special circumstances where the MC cannot function normally or fails to handle the affairs of the OC, and in circumstances where the OC chairman refuses to convene a general meeting at the request of 5% of the owners or cancels a meeting without reasonable cause (see Consultation Paper, paragraphs 6.8–6.15 and Chapter 9(4)):

59.1. Core duties could be expressly defined to include, for instance, submitting audited financial statements under the recently amended section 27, convening an AGM within the statutory period, maintaining a functioning committee with quorum, complying with statutory safety notices, and enforcing essential DMC obligations. Failure to file the required documents with the Authority or repeated non-compliance notices from enforcement departments could serve as objective indicators of dysfunction.

59.2. It must also be useful to explore whether the Authority should have a graduated set of intervention powers in such circumstances, including the ability to issue compliance directions, require the corporation to engage an independent facilitator, convene a meeting, suspend individual committee members, or appoint a temporary administrator, according to the gravity of the failure.

59.3. To support early detection, OC could be required to file an annual compliance declaration confirming adherence to key statutory duties, and limited statutory indemnification could be provided to facilitators or administrators appointed by the Authority to encourage qualified professionals to accept appointments.

- 59.4. A remaining MC member who is not the chairman should be allowed to convene a meeting to fill vacancies. The HKBA supports the proposal in the Consultation Paper for amending Schedule 2 section 6A for this purpose (see Consultation Paper, paragraph 6.8).
- 59.5. The HKBA supports empowering the Authority to appoint a specified person where all MC positions are vacant or where all MC members cannot be contacted within a reasonable period. The present proposal requires an application by not less than 10% of owners. The HKBA welcomes this mechanism, but it may be in need of further consideration. The Lands Tribunal cases show that a building with a defunct or inquorate MC may be precisely the kind of building in which owners are least able to submit a 10% application promptly. Thus, the HKBA recommends that the Authority should have an own-motion power to intervene where objective statutory triggers exist. Such triggers may include the absence of all office-bearers, failure to convene an AGM within the statutory period, refusal to convene a meeting on a 5% request, repeated non-compliance with statutory safety notices, or failure to keep or provide books and records, etc (see Consultation Paper, paragraphs 6.2–6.4, 6.9; Schedule 2 paragraph 1; Schedule 3 paragraph 1; sections 18(1)(b), 27 and 36A).
- 59.6. The HKBA supports intervention by the Authority where the MC chairman refuses to convene a meeting requested by not less than 5% of owners.
- 59.7. The HKBA also supports intervention by the Authority where the chairman cancels a meeting without reasonable cause. As a matter of caution, any such power should be framed to respect the chairman's proper procedural discretion. At the same time, it must be capable of addressing plain cases where cancellation is used to manipulate the agenda or disrupt the meeting process, which would amount to cancellation without reasonable cause (see Consultation Paper, paragraphs 6.11–6.13).

- 59.8. Taken together, these measures would create a more proactive intervention framework that reduces the cost and delay borne by the individual owners and prevents governance failures from escalating into building-wide paralysis.
- 59.9. On the other hand, the HKBA finds the proposal in the Consultation Paper of establishing an Appeal Board (Building Management) raises, and is subject to, most importantly, a fundamental question of jurisdiction. Until it is clear how the jurisdiction of any appeal board would be reconciled with that of the Lands Tribunal, the HKBA is not in a position to express any view on the establishment of such a body. The proposal further suggests that decisions of the appeal board would be “binding and conclusive” to avoid protracted litigation. This requires careful consideration. In particular, it is unclear whether such decisions would be insulated from judicial review and, if so, whether that would be legally permissible. These are complex questions with significant legal implications, and they must be examined and resolved before any proposal for an appeal board can properly be taken forward.

D2. “Alternate” Management Committee Members

60. Issue: Schedule 2 governs the composition and procedure of the MC, including the statutory minimum member requirements. As the LDBM cases demonstrate, MC may become inquorate or entirely defunct when members sell their flats or resign, as seen in cases like Tai Chi, On Hing Building and 富嘉花園. The current BMO provides no mechanism for filling such vacancies except by convening a general meeting, but a general meeting can only be convened by the chairman (see Schedule 3 paragraph 1(2)). If the chairmanship itself is vacant, the OC is placed in procedural deadlock because no person has statutory authority to initiate the process of replacing the absent member.

61. Matters for further consideration: It may be worth exploring whether the BMO should permit the election of “alternate” members during general meetings alongside the election of substantive MC members:
- 61.1. Under this approach, if a substantive member vacates his seat, whether by selling his flat, resigning or otherwise, an alternate could automatically fill the vacancy without the need to convene a fresh general meeting.
- 61.2. This mechanism would prevent the structural deadlock that arises when multiple substantive officers vacate their positions simultaneously and could reduce the costs and delay associated with convening additional general meetings to fill casual vacancies.
- 61.3. The terms governing alternates, including eligibility, tenure and the relationship between an alternate and the substantive member whom he replaces, could be explored and specified in a new Schedule or set of regulations made under the BMO.

D3. Eligibility Criteria for Non-Member Secretaries and Treasurers

62. The Consultation Paper has proposed the extension of MC-member eligibility criteria to non-member secretaries and treasurers. Schedule 2 provides that a person may be appointed as secretary or treasurer even if he or she is not an MC member. It also prescribes eligibility criteria for MC members, including disqualification on grounds such as bankruptcy and serious criminal convictions (see Consultation Paper, paragraphs 8.2–8.5). The HKBA considers that the proposed extension of eligibility criteria is justified. Such office holders may handle tender documents, procurement contracts and bank account records. Their functions directly engage financial accountability, transparency and compliance. The HKBA supports this proposal; applying consistent eligibility standards to all individuals performing key roles or functions would therefore strengthen governance, reduce risk and support effective enforcement of the BMO.

E. Difficulties in Enforcing Deed of Mutual Covenant

63. A persistent difficulty identified in the LDBM cases arises where an owner commits a breach, for instance unauthorised alterations or fire hazards in common areas, but the OC refuses to take enforcement action. This scenario is most acute where the person in breach is an owner-member of the MC, but it also arises where the OC majority is unwilling to expend the resources necessary to pursue enforcement.
64. Under section 18, the OC has a statutory duty to enforce the DMC relating to the management and control of the building. However, this has been interpreted as not imposing an absolute duty. In the recent case of *Centre Chase Investment Limited v The Incorporated Owners of Castle Peak Road International Industrial Building and STL Company Limited* [2026] HKCFA 26, the Court of Final Appeal clarified that an OC may acquiesce in a breach of the DMC, which may substantially limit the legal leverage available to dissenting owners. It was held that enforcement of the obligations in a deed of mutual covenant involves a delicate balancing of priorities, having regard to resource constraints, neighbourhood harmony and overall fairness between the competing interests of the owners and tenants in a multi-storey building. Management of the common parts of a building is therefore primarily a matter for the management committee, which would make a collective decision for the owners.
65. A co-owner lacks the locus to enforce the DMC directly and can only ask the OC to enforce it. Such gap may allow structural or fire safety breaches to persist if a compliant OC majority refuses to act. The principal remedy currently available is to seek dissolution of the MC under section 31, but this is a disproportionate response to what may be a straightforward enforcement failure.
66. Matters for further consideration: It may be worth exploring whether the BMO should introduce a mechanism enabling relevant owners to seek permission to

bring an enforcement action in the name of the OC in situations where the OC or MC unreasonably refuses to act on a safety-critical breach of the DMC:

- 66.1. Such a mechanism would be analogous to the principles underlying derivative actions in company law, allowing one or more owners to step into the position of the OC solely for the purpose of enforcing essential obligations relating to building safety.
- 66.2. The pre-conditions for such an application could include that:
 - 66.2.1. a breach of a safety-critical provision has occurred or is continuing; and
 - 66.2.2. the OC has unreasonably refused or failed to take enforcement action.
- 66.3. The court or Lands Tribunal could be empowered to grant injunctive relief, order remedial works, and award costs against the person in breach.
- 66.4. Safeguards against vexatious or low-value claims could also be examined, such as requiring the applicant to demonstrate that the breach poses a material risk to the health or safety of occupants.
- 66.5. It may also be useful to consider complementary mechanism, such as a statutory notice-to-comply procedure enabling the relevant owners to require the OC to consider enforcement formally; targeted Tribunal powers to direct the OC to take enforcement action in defined circumstances; or an escalation mechanism allowing the Authority to intervene where safety-critical breaches persist for a specified period.
- 66.6. These options could be examined together to determine the most effective and proportionate means of protecting building safety where the OC declines to act.

F. Delegations to Contractors

67. Issue: While the OC can engage independent contractors to carry out its obligations, statutory liability for maintenance remains primarily with the OC and is “*non-delegable*”: see *Rainbow More Ltd v The Incorporated Owners of The Arcadia* [2018] HKLdT 30 at [46]. Negligent or corrupt conduct by a contractor therefore does not relieve the OC of responsibility. The LDBM cases demonstrate that allegations of inflated pricing, connected-interest arrangements and opaque tender processes are not uncommon, as illustrated in *正好工業大廈業主立案法團 v 傑迅有限公司 & Anor* [2025] HKLdT 39 at [6], [7], [54], [122]–[123] (allegations of a scam tender exercise with price inflation, though ultimately rejected by the Lands Tribunal at [131]).
68. These cases confirm that once a resolution approving works is validly passed at a general meeting, it may be difficult for the Lands Tribunal to have sufficient basis to intervene in the OC’s decision to engage a particular contractor. Procurement integrity must be ensured before a resolution is passed, because challenges afterwards may be unlikely to succeed and do not protect owners from the consequences of defective or compromised tender processes.
69. The Independent Committee is conducting an investigation into the Wang Fuk Court fire as to “*whether there were systemic problems such as undue connected interests ... and whether bid-rigging corruption, or irregularities were involved*”: see *Tsang Ho Ming v Lee Ka Chiu, John & Anor* [2026] HKCFI 3168 at [27]. After the evidential hearings, Counsel for the Independent Committee highlighted structural weaknesses in the BMO relating to proxy use and voting procedures, as set out in Chapter 10, Section D of their Written Closing dated 13 July 2026.⁸

⁸<https://www.ic-wangfukcourtfire.gov.hk/pdf/docs/Closing-Submissions-of-Counsel-for-the-Independent-Committee.pdf>

70. The risk that an OC's maintenance decisions may be compromised by conflicts of interest is not hypothetical. Some owners sought to challenge resolutions approving major works on the basis that the procurement process was opaque or that connected contractors were favoured. However, where such allegations could not be established to the legal standard required, the Lands Tribunal will uphold the works contracts despite the owners' concerns:
- 70.1. This outcome, while legally defensible, illustrates the systemic risk created by the absence of mandatory procurement standards under the BMO.
- 70.2. It also reinforces the point that procurement integrity must be ensured before resolutions are passed, as once a resolution is validly approved, the Tribunal has limited ability to intervene.
71. The practical difficulty is that the statutory framework treats building maintenance as a matter of private governance, leaving OCs free to structure their tendering processes as they consider appropriate, subject only to the general requirements of the DMC and the fiduciary obligations of the MC:
- 71.1. This model may be adequate where MC members are vigilant and disinterested, but in practice the same connected-interest and bid-rigging risks that have attracted regulatory attention in the public procurement context are equally present in OC procurement, with no equivalent oversight framework.
- 71.2. The LDBM cases and the Wang Fuk Court investigation both suggest that opaque tendering, information asymmetry, proxy manipulation and potential conflicts of interest can arise in private building management with significant financial and safety implications.
- 71.3. The absence of mandatory procurement standards therefore creates a structural vulnerability that cannot be addressed effectively under the current framework.

72. Matters for further consideration: It may be worth exploring whether the BMO should introduce stricter mandatory oversight protocols for the procurement of independent contractors by OCs, so that the non-delegable duty to maintain safe premises is not compromised by opaque tendering practices:
- 72.1. These protocols could include minimum procedural requirements for tender specification, comparative pricing, disclosure of connected interests, and clearer rules governing proxy use in procurement-related resolutions.
 - 72.2. A failure to comply with such requirements might render any consequential resolution voidable at the instance of an aggrieved owner, subject to appropriate safeguards to prevent abuse.
 - 72.3. Consideration could also be given to whether independent oversight should be required for high-value or safety-critical works, or whether enhanced record-keeping obligations should be imposed to ensure transparency in tender evaluation.
 - 72.4. These measures could be examined together to determine the most effective and proportionate means of strengthening procurement integrity and reducing the risk that conflicts of interest or irregularities will compromise maintenance decisions.
73. Further, in light of the proxy and voting issues also seen in the LDBM cases, it may be useful to consider the relevant suggestions made by Counsel for the Independent Committee, including the following:
- 73.1. In-person voting under the BMO: Major voting contracts can be approved through paper proxies, making it easy for organised groups to manufacture quorums and push through inflated tenders without meaningful resident participation. Recent amendments introduce an in-person voting requirement for large-scale maintenance procurement, but the Government may consider further increasing the

in-person threshold for major procurements (see Closing Submissions of Independent Committee dated 13 July 2026⁹ (“**IC’s Submissions**”), paragraphs 1577–1581);

73.2. Statutory cap on proxies: The BMO imposes no limit on how many proxies a single individual may hold. The Government may consider introducing a statutory cap for large-scale maintenance procurements (see IC’s Submissions, paragraphs 1582–1583);

73.3. Notice-board posting of “proxy registry schedule”, voting instructions, and emergency intervention powers: This measure would make proxy fraud easier to detect and enhance transparency (see IC’s Submissions, paragraphs 1584–1588);

73.4. Verification protocols and PMC liability: The experience at Wang Fuk Court shows how easily an unguarded proxy system can be abused. The Government may consider strengthening statutory verification duties imposed on PMCs to safeguard against proxy-harvesting (see IC’s Submissions, paragraphs 1589–1593); and

73.5. Transitioning to centralised electronic voting: The Government may consider moving towards a centralised digital voting system (see IC’s Submissions, paragraphs 1594–1595).

74. The Government has proposed under the Consultation Paper to consider imposing higher attendance requirements and voting thresholds for meetings concerning high-value procurement and large-scale maintenance procurement. The relevant questions are: (i) whether a voting-in-person threshold should be imposed for Type 2 high-value procurement; (ii) whether a tiered quorum and voting-in-person system should be introduced for large-scale maintenance procurement; and (iii) whether briefing sessions should be required before

⁹<https://www.ic-wangfukcourtfire.gov.hk/pdf/docs/Closing-Submissions-of-Counsel-for-the-Independent-Committee.pdf>

owners' meetings on large-scale maintenance procurement (see Consultation Paper, paragraphs 3.6, 3.11, 3.14 and Chapter 9(1)).

- 74.1. The HKBA supports the policy objective of further increasing owners' participation in building management and enhancing transparency and accountability of OCs in procurement. To this end, we propose that the Government considers imposing higher attendance requirements and voting thresholds for meetings concerning high-value procurement and large-scale maintenance works.
- 74.2. The BMO already classifies high-value procurement into three categories based on the nature and value of procurement, namely: (i) Type 1 high-value procurement; (ii) Type 2 high-value procurement; and (iii) large-scale maintenance procurement, and sets out the corresponding tendering and declaration requirements.
- 74.3. However, the HKBA does not recommend applying the same in-person threshold to every Type 2 high-value procurement without qualification. While procurement decisions involving higher value generally warrant stronger safeguards, it is neither realistic nor practical to assume or treat all procurement decisions as carrying the same level of risks. It is advisable that the statutory scheme should avoid an undifferentiated approach and ensure that safeguards are proportionate to the nature and implications of the procurement in question. The value of Type 2 high-value procurement exceeds 20% of the building's average annual expenditure for the last three financial years, yet it may cover ordinary service contracts, such as lift maintenance, cleaning and security. As noted in the Consultation Paper, imposing a mandatory voting in-person threshold for such routine yet essential services may make procurement more difficult and could adversely affect daily building operations (see Consultation Paper, paragraphs 3.5–3.6).

- 74.4. In view of the above considerations, and to avoid giving rise to practical and operational difficulties, any in-person voting threshold should be introduced for Type 2 high-value procurement contracts that involve material safety considerations, potential conflicts of interest, or exceptional financial implications. For contracts involving routine service renewals, but which nonetheless still carry relatively high value, it would be appropriate to consider imposing requirements of enhanced notice, disclosure and record-keeping to ensure that owners receive adequate information and sufficient time for scrutiny before the vote, rather than leaving them having to litigate after the event. The case of *正好工業大廈業主立案法團 v 傑迅有限公司 & Anor* (above) is an example illustrating that challenges to procurement resolutions are often evidentially difficult to establish.
- 74.5. The HKBA agrees, in principle, with a tiered system for large-scale maintenance procurement. The proposed tiers of HK\$30,000, HK\$80,000 and HK\$120,000 per flat in the works project would progressively raise the quorum and in-person voting requirements as the average apportioned procurement value increases (see Consultation Paper, paragraphs 3.7–3.11).
- 74.6. However, the tiered system should incorporate appropriate safeguards to avoid any risk of paralysis in the decision-making process. When quorum and in-person voting requirements rise, convening owners' meetings for work-related resolutions can become more cumbersome, with the potential to slow down or stall project timelines. Elevated thresholds may also create opportunities for dissenting owners or affiliated interest groups to block or frustrate necessary works by discouraging attendance, a concern or risk already identified in the Consultation Paper (see Consultation Paper, paragraph 3.10).

74.7. The HKBA therefore recommends that any tiered threshold be accompanied by a proper safeguard or fallback mechanism to ensure that essential building projects or management are not unduly hindered. Such a mechanism should address situations where the statutory threshold prevents a decision from being made despite proper notice being given, adequate information being served, and there being a genuine safety or compliance need for owners. For instance, where proposed works relate to building safety or compliance with a statutory notice, such as those issued by the Building Authority or the Fire Services Department, an affected owner or interested party should be able to seek directions from the Lands Tribunal, thereby providing a proper avenue for timely resolution. Cases before the Tribunal have shown that practical difficulties arise when there is no operative OC able to authorise necessary works, deploy funds, or appoint contractors to comply with statutory safety requirements, and they also show that the section 31 provides a means of redress through the existing mechanism for appointing an administrator.

74.8. The HKBA supports the Government's proposal to introduce a mandatory briefing session before owners' meeting held for large-scale maintenance procurement. The briefing should be held sufficiently in advance to allow owners to understand the scope of the works, the proposed tender evaluation, the financial implications, any conflicts and the voting consequences. A minimum of seven days' notice is appropriate, with longer periods required for more complex projects (see Consultation Paper, paragraphs 3.12–3.14).

75. The Government has also proposed under the Consultation Paper the introduction of a mandatory ceiling on the number of proxy instruments a person may hold and to enhance transparency in the handling of proxy instruments (see Consultation Paper, paragraphs 4.6, 4.9, 4.15, 4.18 and Chapter 9(2)). The HKBA supports the Government's initiative to reform the proxy regime.

75.1. Imposing a ceiling on the number of proxy instruments a person may hold: The HKBA supports the introduction of a cap on the number of proxy instruments a person may hold as an appropriate and proportionate safeguard for meetings involving large-scale maintenance procurement. In practice, there are buildings which have encountered situations where substantial concentrations of proxy holdings in the hands of a few individuals have given rise to concerns about the fairness of decision-making and the legitimacy of decisions involving substantial expenditure. Cases before the Lands Tribunal also frequently involve challenges to the validity of voting, proxy forms, meeting notices and resolutions, including cases where proxy irregularities or procedural defects have required litigation after the meeting has already taken place (e.g. *Woo Man Fong v Incorporated Owners of Broadview Court (Shum Wan Road) & Ors* (above) at [10]; 蔡建平 *v* *Leung Po Ling & Ors* [2021] HKLdT 18 at [34], [37]–[46]; *Wealth Knight Ltd v 立德大廈業主立案法團* (above) at [3]–[4]). If a proxy cap is not adopted, there are alternative measures that could be considered, including enhanced disclosure of proxy instruments, earlier lodgement requirements, and strengthened verification procedures. However, in comparison, while such measures would improve transparency and reduce disputes, they do not address the underlying concern about undue concentration of voting power as effectively as a statutory cap. A statutory cap would help address this concern while ensuring, on the other hand, that owners who cannot attend in person may still participate through an authorised representative. As to how the ceiling should be set, it is desirable that the cap reflect the size and characteristics of the development. For instance, for larger developments, a percentage-based cap may be appropriate. With respect to the practical difficulties in enforcing such a ceiling as noted in the Consultation Paper, the HKBA recommends that any excess proxy instrument should not invalidate all proxies held by that person (see Consultation Paper, paragraphs 4.5–4.6). The statutory rule should specify which

proxies remain valid and which have no legal effect. A fair and workable approach, among others, would be to treat proxies as valid in the chronological order of lodgement until the cap is reached, unless the owner subsequently revokes or replaces the proxy before the statutory deadline. Whichever approach is chosen, it should be clearly set out in the meeting notice or proxy guidelines. The MC should ensure that the handling of excess proxies is properly recorded and available for inspection.

- 75.2. Public disclosure of proxy instruments: The HKBA supports requiring the public display of proxy instruments to enhance transparency. The schedule identifying the unit, the registered owner and the appointed proxy holder should be posted in a prominent location 48 hours before the meeting. This allows owners sufficient time to identify any irregularities before the meeting takes place, rather than only being able to discover them after votes are counted. The HKBA recognises the personal data concern noted in the Consultation Paper at paragraph 4.8 (see the Data Protection Principles in Schedule 1 to the Personal Data (Privacy) Ordinance (Cap. 486) (“PDPO”)). To address these concerns, the legislation should specify the minimum information required to be displayed, ensuring compliance with the statutory requirement that collected data is “*adequate but not excessive in relation to that purpose*” (see the Data Protection Principle 1). Further, the legislation should limit the use of the information strictly to meeting-related verification, as data protection principles prohibit data being “*used for a new purpose*” without the data subject’s prescribed consent (see the Data Protection Principle 3). The legislation should also impose sanctions for misuse, aligning with the existing regime that criminalises the act when a person “*discloses any personal data of a data subject which was obtained from a data user without the data user’s consent*” to obtain financial gain or cause loss (see the PDPO, section 64(1)). Finally, the need for transparency does not require unrestricted copying or dissemination of full proxy instruments. The courts have established

that objectives of public transparency do not automatically override privacy rights, and a proportionate approach should be taken: see *Junior Police Officers' Association of The Hong Kong Police Force & Anor v Electoral Affairs Commission & Ors* [2020] 3 HKLRD 39 at [96]. The HKBA also supports requiring proxy instruments to be lodged 96 hours before meetings involving large-scale maintenance procurement. The longer lodgement period is justified if it is used to verify proxy instruments and to disclose the proxy before votes are cast. It is generally accepted that post-meeting challenges to proxies and resolutions are costly, slow and disruptive. A longer lodgement period should therefore operate as a preventive measure to reduce disputes, rather than serving unduly as an additional procedural hurdle (see Consultation Paper, paragraphs 4.7–4.9).

- 75.3. Optimising the format of proxy instruments: The HKBA considers that adding an optional section for owners to specify voting instructions may be beneficial in some circumstances, particularly where owners wish to ensure that their proxy votes are cast in accordance with their stated preferences. Such section should be voluntary. Subject to the terms of the proxy form, it is possible that, unless otherwise directed or instructed by the owner, the proxy holder may vote at his or her own discretion (*Re Allied Properties (H.K.) Ltd* [2020] HKCFI 2624 at [88] (in the context of a meeting approving a scheme of arrangement)). However, where specific directions are provided by the owner, a proxy is bound by them (*Lo Kai Shui v HSBC International Trustee Ltd & Ors* [2021] 5 HKC 337 at [224] (in the companies context)). Owners should retain the flexibility to appoint a proxy to vote generally on their behalf and at the proxy's discretion, especially in meetings where discussions and amendments may affect the final resolutions. The Consultation Paper has raised consideration on requiring not only the owner but the proxy to sign the proxy instrument, including the potential benefits of confirming that the proxy is aware of and accepts the appointment. However, the legal act of appointing a proxy is completed when the form is both

signed by the owner and lodged: see Schedule 3 paragraph 4(4); *Good Castle Holding Ltd v The Incorporated Owners of Hoi Luen Industrial Centre & Anor* (above) at [114]. It is also noted that pre-meeting disclosure of the proxy and inspection of proxy instruments at the meeting should provide adequate means to verify proxy appointments. Should there be concerns as to whether the proxy is aware of, and genuinely accepts, the appointment, these existing measures are capable of addressing them. The HKBA also supports these measures: (i) The adding of a section in the proxy instrument requiring owners to confirm that they have noted the meeting agenda and have appointed the proxy; and (ii) The inclusion in the proxy instrument a clear statement that providing a false proxy instrument constitutes a criminal offence, together with a reference to the applicable penalties.

- 75.4. Imposing restrictions on the identity of Authorized Persons: The HKBA does not support a general rule restricting proxies to relatives or other owners of the same estate, as such a limitation would unduly curtail owners' freedom and autonomy to appoint a proxy who is able and willing to represent their interests. The Lands Tribunal has indicated that a proxy "*has a very important role to play and represents the stance of the appointing corporation*", acting as more than a mere messenger (嘉居樂物業管理有限公司 v 家安花園業主立案法團 (unrep., LDBM 188/2004, 21 October 2004) at [28]). The Consultation Paper itself recognises that there are practical concerns, including in verifying whether a proxy is a relative, and that such a requirement may create inconvenience for owners who live overseas or do not reside in the estate (see Consultation Paper, paragraphs 4.16–4.18). If the concern underlying a restriction that limits proxies to relatives or other owners of the same estate is the risk of false or forged proxies, the HKBA recommends strengthening verification measures rather than imposing identity-based restrictions. PMCs should be required to examine signatures, conduct random audit calls

on a defined proportion of submitted proxies, escalate to full review if irregularities appear, and refer suspected fraud to the Police Force for investigation. These steps should be taken prior to the meeting.

76. The Government has also proposed under the Consultation Paper the further improvement of the mechanism of declaration of interests for large-scale maintenance procurement by requiring declaration by works consultants and contractors. The Consultation Paper asked whether persons involved in large-scale maintenance procurement should be required to disclose interests among themselves; whether declared information should be made known to all owners; and whether the declaration form should state that a false declaration constitutes a criminal offence (see Consultation Paper, paragraphs 5.5–5.9 and Chapter 9(3)). The HKBA supports the proposal and makes the following further comments:

- 76.1. Requiring the mandatory declaration of interests by persons involved in the works: Schedule 6B contains provisions that for any procurement that falls within the categories of high-value procurement or large-scale maintenance procurement, the members of the MC and the responsible persons for the procurement, being the manager, or a person acting under the manager's direction in relation to the procurement must comply with before entering into a procurement contract. The present gap is that certain persons involved in the works such as registered inspectors, works consultants and contractors are not mandatorily required to publicly disclose their interests before the large-scale maintenance works commence (see the Consultation Paper, paragraph 5.2). Such gap may prevent owners from identifying potential conflicts and may facilitate bid-rigging, thereby undermining the fairness of the procurement process. It is justified, and indeed necessary, to strengthen monitoring and disclosure requirements as proposed, particularly in view of the frequent complaints and disputes concerning procurement cases (see, e.g. 輝振有限公司 v 何耀興 & Ors [2024] HKLdT 34 at [1], [114]

(noting that litigation triggered by tenders for maintenance works is a common occurrence in the Lands Tribunal); *正好工業大廈業主立案法團 v 傑迅有限公司 & Anor* (above). Once owners have approved a works contract, allegations of inflated pricing, connected-interest arrangements, opaque tendering or bid-rigging cannot be readily resolved without costly legal proceedings, and further bearing in mind the evidential difficulties involved. The HKBA supports the proposal and recommends that the declaration duty expressly covers direct and indirect interests, including shareholdings, common directors, family relationships, business co-operation, referral or rebate arrangements, and any arrangement that may reasonably affect independent judgment. A “nil interest” declaration should also be required where no interest exists. The duty should arise early enough for owners to consider the declarations before voting (see Consultation Paper, paragraph 5.5).

- 76.2. Requiring the disclosure of information on declared interests: The HKBA supports the disclosure of all declarations to owners. Schedule 6B already requires declaration notices to be displayed and declarations to be kept and made available for inspection in existing procurement contexts.
- 76.3. Setting out the legal consequences of making false declarations: The HKBA supports the proposed requirement that the specified declaration form must expressly state that making a false declaration constitutes a criminal offence and set out the relevant penalties. A false declaration completely compromises the basis on which owners make decisions and prejudices financial interests. It is appreciated that some argue that connections between contracts are often highly concealed, making it difficult even for law enforcement agencies to prove illegal links and secure convictions. However, this does not justify dispensing with declaration requirements. Complementary measures to combat illicit bid-rigging activities should operate

alongside clear and enforceable declaration obligations (see Consultation Paper, paragraphs 5.7–5.9).

G. Meeting Procedures

77. The Government proposes under the Consultation Paper the further clarification of the provisions concerning the procedures for holding owners' meetings, the arrangements for agenda setting, and the mechanisms for proposing to adjourn or suspend a meeting during its course, so as to protect the rights of owners and to ensure that OCs act according to the law. The HKBA supports clarification of meeting procedures. Disputes about meeting procedures recur frequently in the Lands Tribunal case law. The purpose of any legislative amendment should accordingly be the prevention and minimisation of disputes. Clear rules would allow owners and chairmen to know, before the meeting, what can validly be done and what cannot, thereby reducing uncertainty and avoiding disputes (see Consultation Paper, paragraphs 7.1–7.2).

77.1. Addressing repeated issues: The HKBA supports the introduction of reasonable restrictions on repeated requests, but only if the term “repeated request” is defined narrowly (see Consultation Paper, paragraphs 7.3–7.5). A request should be regarded as “repeated” only where it concerns substantially the same resolution, based on substantially the same facts, within a clearly defined period. The definition should not extend to a request prompted by new information, materially changed circumstances, or non-compliance with a previous duly passed resolution.

77.2. Altering the meeting agenda: The HKBA supports prohibiting a chairman from altering or excluding a 5% owners' agenda item without reasonable cause, provided the item falls within the powers conferred by the BMO (see Consultation Paper, paragraphs 7.6–7.10). This aligns with the established Lands Tribunal authorities which confirm that upon a 5% owners' request, the chairman has little

alternative but to convene the meeting as required of him statutorily; he has no discretion in the circumstances (兆軒苑業主立案法團 v 馮志昌 & Anor (unrep., LDBM 262/2013, 16 October 2014) at [25]). The concern is not theoretical. The Lands Tribunal cases show owners resorting to litigation only after meeting irregularities have already occurred. It is far preferable to define the chairman's powers clearly at the outset, so that owners and chairmen alike know what may or may not be done, rather than leaving owners having to seek declaratory relief after a resolution has been passed or a meeting has failed.

- 77.3. Postponing or suspending a meeting: The HKBA supports clarifying that a chairman may not unilaterally postpone or suspend an owners' meeting after its commencement without reasonable cause. There have been occasions in practice where an MC chairman has unilaterally declared the adjournment or postponement of an owners' meeting after it had begun, refused to preside over the meeting, and departed from the venue. The statutory position should be made clear. If the chairman leaves and the owners wish to continue, the owners present should be able to elect one of themselves to chair and conduct the meeting (see Consultation Paper, paragraphs 7.11–7.14; Schedule 3 paragraph 3(1)(c)). This would reduce the risk that the statutory meeting machinery is defeated by the absence, resignation or refusal of a single office-holder, a problem which has appeared in the Lands Tribunal cases concerning vacant chairmanship and defunct MCs.

H. Dealing with Emergencies

78. Issue: The immediate aftermath of the Wang Fuk Court fire exposed a specific and previously unaddressed procedural rigidity within the statutory framework:
- 78.1. The BMO prescribes detailed and mandatory timeframes and notice requirements for convening general meetings under Schedule 3 and

for serving documents on owners. These requirements are designed for normal operating conditions and make no provision for situations in which a disaster or emergency renders strict compliance impracticable or impossible.

78.2. Following a disaster, the OC or an administrator may face significant hurdles in complying with these requirements, including difficulties in accessing the premises, identifying affected owners, or serving notices in the prescribed manner.

78.3. The fire at Wang Fuk Court was an unprecedented event that disrupted the building's governance in ways that the law drafters could not have anticipated. It revealed that the existing framework has no mechanism for managing the aftermath of such events or for enabling essential governance functions to continue when ordinary procedural requirements cannot be met.

79. In *Hop On Management Company Ltd, as the administrator of the Incorporated Owners of Wang Fuk Court, in the capacity of the chairman of the management committee of the Incorporated Owners of Wang Fuk Court v All Owners of Wang Fuk Court* [2026] HKLDt 35 at [1], the applicant, being the administrator appointed in the aftermath of Wang Fuk Court fire, sought an extension of time to convene and hold a general meeting under Schedule 3 to the BMO:

79.1. The administrator argued that the prescribed methods of serving meeting notices were “*impracticable and/or ineffective following the tragic fire*”;

79.2. Despite recognising the severe practical difficulties, the Lands Tribunal held that it had no jurisdiction to extend the statutory timeframes (at [86]);

79.3. This decision is significant not only for Wang Fuk Court but also as a clear statement of the current limits of the Tribunal's power to adapt procedural requirements in crisis situations; and

79.4. The Tribunal's inability to provide practical relief in those circumstances is a direct consequence of the absence of any legislative mechanism enabling temporary procedural flexibility during emergencies.

80. Matters for further consideration: The Consultation Paper proposes the introduction of emergency meeting procedures in the BMO. The HKBA supports this proposal. The Consultation Paper rightly recognises that emergency requires a clear and workable definition (see Consultation Paper, paragraphs 7.15–7.20). A properly framed emergency mechanism would allow owners' meetings to be convened and conducted lawfully despite urgent conditions, while maintaining safeguards against misuse. Clear criteria and procedures would promote certainty, reduce potential disputes and ensure that all essential decisions can be made promptly when the building or its owners face immediate risk. The HKBA recommends that emergency procedures should not be confined to procurement-related meetings. They should also apply in exceptional circumstances where strict compliance with notice or service requirements has become impracticable, e.g. in situations involving fire, structural collapse or other disaster affecting the building or its occupants.

81. The BMO currently lacks an emergency mechanism. The HKBA supports conferring an express power on the Lands Tribunal to deal with arrangements for OC meetings in exceptional circumstances (see Consultation Paper, paragraphs 8.6–8.8). Under the express power, the Tribunal would be able:

81.1. to extend statutory timeframes prescribed under the BMO for a defined period where strict compliance has been rendered impracticable by a prescribed emergency event, including but not limited to a fire, structural collapse, or other disaster affecting the building or its occupants;

81.2. to authorise alternative methods of giving notice or serving documents on owners where the prescribed methods are impracticable in the circumstances of the emergency.

82. Any such mechanism would need to specify or address:

82.1. the categories of emergency that trigger its application;

82.2. the maximum extensions and alternative service methods that may be authorised;

82.3. the persons who may apply;

82.4. the principles to be applied by the Lands Tribunal in exercising the discretion; and

82.5. the position of any administrator appointed under section 31 who faces the same procedural difficulties, given that the administrator's statutory powers derive from and are constrained by the same statutory framework as those of the OC.

CHAPTER 4 CRIMINAL LAW

A. Introduction

83. This Chapter includes research on the experience of jurisdictions outside Hong Kong that have criminalised bid-rigging (whether specifically or as part of anti-competitive behaviour generally), the guiding principles for reforming Hong Kong’s competition law through the introduction of a criminal cartel offence, and matters that require further study before the features of the criminal cartel offence can be settled, with options for each such matter.
84. By way of background, on 9 March 2026, the Competition Commission (“**Commission**”) informed the Independent Committee that:
- 84.1. Based on the Commission’s investigations, there is a widespread, systematic, and longstanding practice among a sizable number of building maintenance contractors to affect the outcome of tenders for building maintenance works, partly facilitated by supposedly independent consultants engaged by owners of relevant buildings.
- 84.2. These practices extend beyond “bid-rigging”, almost always involving other anticompetitive practices such as price fixing, market sharing, and other means which unfairly influence the outcome of tenders, carried out by syndicate-led cartels consisting of both building maintenance contractors as well as consultants.
- 84.3. While the Commission believes that the existing legal framework enables it to tackle building maintenance related anticompetitive conduct, it also believes that there is room for legislative change, as well as additional measures which could facilitate criminal prosecutions in appropriate cases.

- 84.4. In the short and medium run, the law could mandate the execution (as well as a statutory declaration confirming the contents therein) of “non-collusive tendering certificates” in all large-scale building maintenance tenders, which would enable those who falsely execute and/or declare contents of such certificates to be liable to prosecution under conspiracy to defraud and/or making of false declarations.
- 84.5. In the long run, the Commission believes that the CompOrd may be amended to introduce a criminal regime, namely a statutory offence created to target natural persons engaging in anticompetitive behaviour (including but not merely limited to bid-rigging) in large scale building maintenance works. The offence should be complementary to existing avenues of criminalising the conduct of would-be cartelists (such as conspiracy to defraud and/or making of false declarations).

B. Competition Ordinance’s Provisions on Bid-Rigging and Other Anti-Competitive Conduct

85. At present, the CompOrd defines “serious anti-competitive conduct” as:

“serious anti-competitive conduct (嚴重反競爭行為) means any conduct that consists of any of the following or any combination of the following —

- (a) fixing, maintaining, increasing or controlling the price for the supply of goods or services;*
- (b) allocating sales, territories, customers or markets for the production or supply of goods or services;*
- (c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services;*
- (d) bid-rigging”*

86. Bid-rigging is specifically defined under the CompOrd as:

“bid-rigging (圍標) means —

(a) an agreement —

(i) that is made between or among 2 or more undertakings whereby one or more of those undertakings agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement; or

(b) a submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by an agreement —

(i) that is made between or among 2 or more undertakings; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement”

87. In short, bid-rigging refers to the situation where, without the knowledge of the person calling for bids or requesting a tender, two or more competitors agree not to compete with each other, thereby determining the ultimate winner of the tender. This may be achieved by reaching an agreement to refrain from bidding, withdrawing a bid, or to submit bids at specified prices.

88. Bid-rigging is one of many ways for cartels to avoid competition. This can also take the form of manipulating the price of certain goods and services (price fixing), as well as allocating sectors of the market (whether by geographical areas, customers, suppliers, etc) to different rival companies and agreeing not to intervene in said sectors (market sharing), both of which are covered by the present definition within the CompOrd.

C. Jurisdictions Outside Hong Kong

89. The HKBA has studied the criminalisation of cartels in these jurisdictions outside Hong Kong (see the Annex to this Report for details):

- 89.1. United States (“US”) (via the Sherman Act (15 U.S.C. s 1));
- 89.2. Canada (via the Competition Act 1985 ss 45(1), (1.1) and 47(2));
- 89.3. the United Kingdom (“UK”) (via the Enterprise Act 2002 s 188, with amendments made under the Enterprise and Regulatory Reform Act 2013);
- 89.4. Australia (via the Competition and Consumer Act 2010 ss 45AF, 45AG and 79);
- 89.5. Ireland (via the Competition Act 2022 ss 4(1) and 6);
- 89.6. South Korea (via the Monopoly Regulation and Fair Trade Act arts 19, 22 and 66); and
- 89.7. Japan (via the Antimonopoly Act arts 2(6), 3, 7-2 and 89(1)).

90. Enforcement by criminal prosecutions in the UK,¹⁰ Australia,¹¹ and Ireland¹² are considered to be of particular interest. It needs to be noted that the UK’s

¹⁰ See *R v Whittle Brammer & Allison* [2008] EWCA Crim 2560 (in which the defendants, who had first pleaded guilty in the US under US plea bargains, received prison sentences); *R v George, Burns, Burnett and Crawley* (the Air Passenger Fuel Surcharges case, which collapsed in mid-trial on evidential/disclosure grounds); *R v Stringer and Dean* CE/9623/12 (the Galvanised Steel Tanks case, in which one defendant pleaded guilty and was sentenced to a suspended sentence of imprisonment and two other defendants were acquitted after trial for want of “dishonesty”); *R v Cooper* CE/9705/2 (the Supply of Precast Concrete Draining Products case, where, in the only prosecution to date after the 2013 amendment, the defendant pleaded guilty and was sentenced to a suspended sentence of imprisonment, a curfew order and director disqualification).

¹¹ See *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876 (in which the defendant pleaded guilty to giving effect to cartel provisions on shipping services supplied to ten major vehicle manufacturers).

¹² See *Director of Public Prosecutions v Patrick Duffy* (2002) (the Citroën Dealers Association Cartel case, in which all defendants pleaded guilty to price fixing regarding the price of vehicles); *Director of*

criminal cartel offence was amended in 2013 to remove “dishonesty” from the element of offence and that Ireland’s criminal cartel offence does not require proof of dishonesty or intent to defraud.

D. Reform: Guiding Principles, Issues and Recommendations

D1. Criminal Cartel Offence Supported in Principle

91. The HKBA supports in principle the introduction of a criminal cartel offence in Hong Kong.
92. The HKBA shares the Commission’s objective of strengthening deterrence against bid-rigging, particularly in building maintenance and other high-value procurement. The HKBA believes that the introduction of a criminal cartel offence would serve as a clear and strong warning to the market and/or would be cartelists, who would now be at risk of criminal liability should they continue in their anti-competition misconduct. On the other hand, the HKBA also agrees with the Commission’s premise in its papers that even within the existing civil framework, the Commission is already able to tackle building maintenance cartels through its investigatory powers, and that criminalisation is intended as an additional track that must neither supplant the civil regime nor jeopardise those powers.

D2. The Nature of the Commission’s Proposed Criminal Cartel Offence

93. The provisions of the CompOrd set out above indicate that the definition of bid-rigging, a serious anti-competitive conduct contrary to the First Conduct Rule, refers to an arrangement that is not made known to the person calling for or requesting the bids or tenders. That definition turns on concealment from

Public Prosecutions v Pat Hegarty (2003) (the Home Heating Oil Cartel case, in which all defendants were convicted after trial by a jury of price fixing regarding retail prices of home heating oil); the *Ford Dealer Cartel* case (in which the defendant was convicted in 2004 of aiding and abetting a cartel relating to the distribution of guide prices of vehicles to members of a trade association); the *Commercial Flooring Cartel* case (in which two defendants pleaded guilty in 2014 to bid-rigging); and the *School Transport Cartel* case (in which all defendants were convicted after trial by a jury of bid-rigging).

the procurer, a point of importance both to the safe harbour proposed to be provided by the Commission and to the treatment of conspiracy to defraud.

94. Introduction of a criminal cartel offence would add a criminal track on top of the current civil regime under the CompOrd. The Commission's draft paper on Dual-Track Enforcement (Civil and Criminal) of Competition Law in Hong Kong dated 23 April 2026 ("**Briefing Paper**") records that the Commission has to date successfully brought proceedings against 36 individuals. The Briefing Paper acknowledges that it has done so "even with the criminal standard of proof", which applies to enforcement actions.
95. The Commission's draft criminal cartel offence (known as "section 105A") would make it an offence for a natural person who, in the words presently used, "*(for the purposes of section 91) is involved in a contravention of the first conduct rule involving a serious anti-competitive conduct where the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong relating to a call or request for bids or tenders*". On indictment the offence would carry a fine of the higher of \$10 million or three times the profit gained or loss avoided, together with imprisonment for a maximum term which the draft leaves in square brackets at [10] years; on summary conviction, a fine at level 5 and six months' imprisonment. The offence is deliberately silent on dishonesty, and the amendments contemplate that the Government's Explanatory Memorandum to the Bill would make clear that dishonesty is not an element. It is clear that the maximum penalty proposed is subject to the Government's adoption.
96. The Commission's draft sections 105B to 105D would provide for the requirement of the Secretary for Justice's consent before the Commission brings section 92 proceedings against a person in a bid or tender case, and would make the criminal route under section 105A and the civil pecuniary-penalty route under section 92 mutually exclusive in respect of the same conduct. These provisions are expressly modelled on the Securities and Futures Ordinance (Cap. 571) ("**SFO**") (i.e. ss. 252A, 283 and 307 thereof)

and on the reasoning in *Securities and Futures Commission v Tiger Asia Management LLC & Ors* (2013) 16 HKCFAR 324.

97. In the remainder of this part of this Chapter, the HKBA explains its concerns over several issues in the design and drafting of a criminal cartel offence, using as an example the Commission's draft criminal cartel offence.

D3. Expressed Rationale for Criminalisation Necessary, Because Design Follows from It

98. The HKBA suggests that the Commission and the Government should state the rationale for criminalisation expressly. This is because the principal design choices follow from it and cannot sensibly be settled without it.
99. Deterrence and retribution are different premises and produce different offences. On the deterrence account, imprisonment is justified because it reaches what corporate fines cannot: a custodial sanction cannot be indemnified, insured against or passed on in price, and it corrects the under-deterrence that arises where fines are capped by an undertaking's inability to pay. On the retributive account, criminal punishment is warranted only where the conduct is genuinely morally wrongful and the individual is proved culpable to a demanding standard. The Briefing Paper adopts the vocabulary of deterrence — a substantial maximum sentence will “send a strong message” — without committing to either account. The choice is not academic: it dictates the fault element (see Section D5 below), the mode of trial (see Section D10 below), and the penalty (see Section D13 below).
100. Bid-rigging has an identifiable victim in the person calling for the bids, and it engages widely shared intuitions about cheating and deception, because the essence of the conduct is a concealed arrangement presented to the procurer as though it were genuine competition. Accordingly, the HKBA agrees that the Commission is correct to begin criminalisation with bid-rigging. The HKBA will discuss whether the criminal cartel offence should stop there in the next part of this Chapter.

D4. Constitutional Guarantees and Criminalisation

101. The introduction of any serious criminal offence and the related provisions on proof of it must satisfy the constitutional guarantees of presumption of innocence and fair trial. The presumption of innocence is guaranteed by Article 11(1) of the Hong Kong Bill of Rights (Cap. 383) and reinforced by Article 87 of the Basic Law of the HKSAR. This applies not only to the proposed section 105A but also any statutory inference, deeming provision or reverse onus in the Commission's proposed amendments and the Government's draft legislation.
102. The Commission had stated that its draft section 105A "should go hand-in-hand with the proposal re statutory inference at section 6A", the object being to ensure that "mere recipients" of competitively sensitive information cannot rely on their own silence or subsequent inactivity as a defence. The HKBA has not seen the terms of the draft section 6A but considers that its terms are essential to any proper understanding of the draft amendments. On the present understanding, the HKBA takes the view that this section 6A "statutory inference" proposal is arguably the most constitutionally controversial part of the draft amendments. It needs to be reconciled with the remainder of the design: an inference that deems participation from receipt of information coupled with silence would *displace* the very knowledge and intention that the offence should otherwise require. The HKBA will discuss some options in this regard in the next part of this Chapter. On this matter, the HKBA notes that the CompOrd already provides for inference. Section 7(2) of the CompOrd permits the Competition Tribunal to find that an agreement has as its object the prevention, restriction or distortion of competition even where that object can be ascertained only by inference; and the conditions on which an inference may be drawn where the criminal standard applies have now been stated by the Tribunal in *Competition Commission v Gray Line Tours of Hong Kong Ltd (CTEA 1/2022)* [2026] HKCT 1 at [32] and [87]: the inference must be grounded on clear findings of primary fact, must be a logical consequence of those facts, and must be the only inference that can reasonably be drawn. It is not yet apparent from the description what a new section 6A would add to that;

if the intention is to modify the *Gray Line* conditions, it would assist if that were stated, so that the justification can be considered on its merits.

103. If an inference is to be retained, the distinction between an evidential and a persuasive burden is decisive. A permissive inference which a fact-finder may but need not draw, and which the defendant may displace by raising a reasonable doubt, may be capable of justification. A provision placing a persuasive burden on the defendant in relation to an element of an offence carrying a maximum term of imprisonment of the order proposed is unlikely to be justified without compelling and specific reasons. Hong Kong courts have in any event read statutory reverse onuses down to evidential burdens in order to preserve the presumption of innocence (*HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574; *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614), and any such provision should therefore be drafted as an evidential burden from the outset rather than left to be read down on challenge.
104. The distinction between an inference of fact and a statutory presumption should be kept in view. In *Gray Line* at [37]–[38], Harris J adopted the analysis of the Competition Appeals Tribunal in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] ECC 13 at [110]–[112], that “presumptions” of this kind are no more than inferences which may normally be drawn from certain types of evidence and do not reverse the burden of proof; and the Commission accepted in those proceedings that the presumption on which it relied operated as the drawing of a probable inference and shifted neither the persuasive nor the evidential burden ([36]). An inference of fact is one thing. A statutory presumption which displaces a fault element is another. In *Gray Line* at [48] and [51], Harris J held that passivity alone cannot found an irresistible inference of an agreement. A statutory inference directed at mere recipients would need to be reconciled with that reasoning.
105. Even in the absence of an express inference, statutory silence as to fault does not produce a strict liability offence. It engages the presumption that *mens rea* is required, and the consequence is unpredictability rather than strictness. Following *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142 and *Kulemesin v*

HKSAR (2013) 16 HKCFAR 195, and taking *HKSAR v So Wai Lun* [2005] 1 HKLRD 443 as the starting point, the construction of a statutory offence which is silent as to fault may yield any of five outcomes: full *mens rea* to be proved by the prosecution; an evidential burden on the defendant; a persuasive burden on the defendant; displacement of the presumption by clearly inconsistent statutory defences; or absolute liability. Which of the five applies to draft section 105A cannot presently be predicted. That degree of unpredictability should not be left to attend an offence carrying imprisonment.

106. In this connection, the HKBA cautions against importation of the European Union (“EU”) “public distancing” presumption into Hong Kong’s criminalisation of cartels. The EU “public distancing” presumption — that an undertaking present at a collusive meeting is taken to have participated unless it publicly distances itself — operates within an administrative enforcement regime (*Commission v Anic Partecipazioni*; *Aalborg Portland* (1999) C-49/92). Importing that presumption into a Hong Kong criminal offence is a materially different constitutional proposition and cannot be justified by analogy to EU case law. It would require justification on its own terms against Article 11(1) of the Hong Kong Bill of Rights.
107. Two further constitutional constraints should be addressed. **First**, non-retroactivity: Article 12 of the Hong Kong Bill of Rights prohibits conviction for conduct that was not criminal when committed, and the imposition of a heavier penalty than applied at the time; the treatment of conduct straddling commencement, of continuing agreements, and of existing leniency recipients must be worked through. **Second**, proportionality: the maximum sentence, the fine structure and any ancillary orders must satisfy the established proportionality analysis (*Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372).

D5. The Fault Element

108. The HKBA considers the fault or mental element of the criminal cartel offence is the most important matter. The Commission’s draft section 105A, as

presently described, has no defined mental element. Section 91 of the CompOrd is a definitional provision: it states what being “involved in” a contravention means for the purposes of Part 6, and it enacts no fault requirement of its own. The draft section 105A adopts that definition and is otherwise silent as to fault.

109. The HKBA appreciates the Commission’s intention to avoid dishonesty, which it had stated in the Briefing Paper. But the removal of dishonesty leaves a prior problem unaddressed: an offence with no articulated culpability threshold at all. An Explanatory Memorandum in the Bill can neither supply a mental element that the section omits nor exclude one that the common law would otherwise imply.
110. Since the Briefing Paper draws support from the UK’s removal of the dishonesty element, the relevant comparative record needs to be more fully stated for the benefit of others, including the Legislative Council. Dishonesty was removed only for agreements made on or after 1 April 2014. Most of the convictions obtained to date arose under the earlier, dishonesty-based offence and followed guilty pleas; the one fully contested prosecution, itself brought under the pre-reform offence, ended in the acquittal of the defendants who stood trial. The only prosecution after 2014 concluded without a contested trial as the defendant pleaded guilty. Nor did the UK simply delete dishonesty: exclusions and defences were added, with the consequence that the culpability question migrated into the defences and the practical burden shifted to the defendant.
111. The difficulty is compounded by the fact that the five limbs of section 91 of the CompOrd carry different mental elements, so that adopting section 91 wholesale would produce an offence with several inconsistent fault standards. Section 91(a) (attempt) articulates no fault; section 91(b) (aid, abet, counsel or procure) imports the requirement, familiar from the criminal law of aiding and abetting, of intentional assistance founded on knowledge of the essential matters; section 91(c) (inducement) connotes a subjective intent to bring about the contravention; section 91(d) (“knowingly concerned in, or a party to”)

contains a knowledge requirement in its first branch but leaves the words “party to” textually unqualified; and section 91(e) (conspiracy) requires an agreement coupled with an intention that the contravention be effected. The Competition Tribunal has since put the position in respect of limb (b) beyond argument. In *Gray Line* at [74(4)], Harris J proceeded on the footing that in proceedings brought under sections 92(1)(b) and 91(b) the Commission must prove, to the criminal standard, that the aider or abettor acted with both knowledge and intent. The limbs of section 91 are therefore not of uniform content, which is a further reason for identifying those on which criminal liability is to rest rather than incorporating the section as a whole.

112. The governing principle is accordingly as follows. The new criminal offence should adopt an intention-based standard rather than negligence, constructive knowledge or strict liability; it should be stated in the offence-creating provision rather than left to implication, to construction or to an explanatory note; and if section 91 is used as the vehicle, the limbs that are to found criminal liability should be identified rather than incorporated wholesale. The precise formulation of the standard, and whether thinner formulations should supplement it, as well as the choice of vehicle for it, are addressed in the next part of this Chapter below.
113. Whichever formulation is adopted, it should not be extended to conduct having an anti-competitive effect. The accessory case law requires knowledge of the essential matters constituting the contravention, not knowledge that those matters amount in law to a contravention (*Yorke v Lucas* (1985) 158 CLR 661). Where the offence is confined to the section 2 categories, that standard is workable, because the essential matters are facts — that competitors agreed to rig a bid, allocate a market or fix a price. As Section D6 below explains, it does not survive the extension of the offence to conduct having an anti-competitive effect.
114. The incorporation of section 91 also produces a provision which, in the paradigm inchoate case, cannot operate as intended. Three of its limbs are inchoate, in the sense that they are complete before any contravention occurs:

attempt in (a), attempted inducement in (c), and conspiracy in (e). Draft section 105A(1) attaches the offence to involvement in a contravention “where the object or effect of the agreement, concerted practice or decision” is to restrict competition. The definite article is anaphoric. Nothing earlier in the subsection mentions an agreement, and the phrase can only be a silent cross-reference to the agreement, concerted practice or decision which constitutes the contravention of the First Conduct Rule. Where none has come into being, the clause has no referent and the condition cannot be satisfied. Also, where an agreement already exists — an attempt to give effect to a subsisting arrangement, or an attempt to induce a further participant to join a cartel already operating — the clause has a referent and the difficulty does not arise. It arises in the paradigm case: the attempt which fails, and the conspiracy which never matures.

115. Further, there is another distinct obstacle. The draft offence requires the contravention to involve serious anti-competitive conduct, and bid-rigging is defined in section 2(2) by reference to an agreement between undertakings which is not made known to the person calling for bids. The predicate conduct is therefore itself defined in terms which presuppose an agreement. Recasting the “object or effect” clause would remove the obstacle highlighted in the preceding paragraph but not the present one. It may be said in answer to both that a court would assess the object of the agreement contemplated, by analogy with the approach to statutory conspiracy, under which the question is whether the agreed course of conduct would necessarily amount to the offence if carried out. A criminal statute is construed strictly, and in our view a court should not supply a counterfactual agreement in order to create liability. But the more important answer is that the availability of the argument is itself the objection: whether the offence reaches inchoate conduct should not turn on which of two readings a court prefers in the first contested prosecution. This is the clearest illustration of the principle stated above. Section 91 cannot be incorporated wholesale; the limbs on which criminal liability is to rest must be identified; and if inchoate liability is intended, it must be enacted in terms which do not presuppose the very agreement whose absence defines it.

116. Finally, on this issue, the draft amendments should address defences and the boundaries of the offence, and confirm expressly how they map onto the criminal track: the relationship between the criminal offence and the existing Schedule 1 exclusions and the section 31 (public policy) and section 32 (conflict with international obligations) exemptions, and the disapplication of the conduct rules to statutory bodies and specified persons under sections 3 and 4, including whether each applies to the criminal track; the prior-disclosure safe harbour proposed at Section D7 below; conduct required by law; and the extent to which reliance on legal advice bears on fault, given that ignorance of the law is not a defence but liability turns on a contested characterisation.

D6. Effects-Based Liability Should Be Removed

117. The Commission’s draft section 105A refers to conduct having the “object or effect” of restricting competition. The HKBA is of the view that the prohibition should be narrowed to object alone. Comparative experience consistently indicates that effects-based conduct — conduct whose illegality depends on an economic assessment of market effect — is unsuitable for criminal prosecution. Importing an effects test forces into a criminal trial a counterfactual assessment, that is, an expert reconstruction of what the market would have looked like had the arrangement not been made, corrodes the legal certainty a criminal prohibition demands, and blunts the moral message on which criminalisation depends. Confining criminal liability to hard-core conduct — the small closed group of practices, such as bid-rigging and price-fixing, whose anti-competitive character is established by the nature of the conduct itself — on an object basis, without proof of actual market effect, is both principled and workable, and it is a precondition of any coherent mental element.
118. Deleting “or effect” also removes a redundancy. “Serious anti-competitive conduct” is already a closed list of conduct types defined in section 2. Layering an object-or-effect test on top of that list adds nothing where the conduct is admitted to fall within a listed category, and at worst imports a counterfactual market analysis into a criminal trial. The cleaner course is to

define the offence by reference to the section 2 categories and dispense with the separate effects inquiry.

119. This concern is also the crux of the difficulty with the fault element. If liability rests on effect, the essential matters of which the defendant must be shown to have had knowledge include an anti-competitive effect that is an economic conclusion rather than a primary fact. The prosecution is then forced either to prove that the defendant knew a matter which the court itself can determine only on expert evidence, or to abandon the knowledge requirement and permit the imprisonment of a person who neither knew nor intended that competition would be restricted. Deleting “or effect” dissolves the dilemma; retaining it makes a coherent mental element very difficult to state.
120. The Commission’s draft section 105A, insofar as it is drafted to apply to serious anti-competitive conduct “relating to a call or request for bids or tenders”, compounds the problem above, since it is a phrase that is undefined. Hence, where such drafting is coupled with liability for effect, the resultant offence is capable of catching an overarching market-sharing or price-fixing arrangement that has no more than an incidental effect on a tender. A criminal cartel offence so drafted is therefore wider than what the HKBA takes to be intended. If it is to be confined, the confinement should be precise.
121. The HKBA believes that there is a further reason for the narrowing, which also answers the objection that it would cost the Commission cases. It is that the object route in Hong Kong is not the object route of the EU case law. In *Gray Line* at [87], Harris J explained what the criminal standard means for a case put on object. Because proceedings before the Competition Tribunal fall within Article 11 of the Hong Kong Bill of Rights and every component must be proved beyond all reasonable doubt, a submission that an agreement restricts competition by object is an invitation to the Tribunal to draw an inference. Section 7(2) of the CompOrd expressly permits that inference to be drawn. But unless the agreement is obviously anti-competitive, the Tribunal cannot properly draw it, because an inference of contravention may be drawn

only where it is the only reasonable inference available on the facts found; and the Commission was directed to formulate its case mindful of those conditions.

122. The HKBA considers that two consequences follow. The **first** is that the deletion of “or effect” does not deprive the offence of anything it could realistically have delivered. A case which depends on an economic assessment of market effect is, by definition, not a case in which contravention is the only reasonable inference on the facts found; such a case could not be proved to the criminal standard whether or not the effects limb appears on the face of the proposed criminal cartel offence. The **second** is that the recommendation is not, in the end, a matter of policy preference. It asks the legislature to state in the Bill what *Gray Line* holds the criminal standard already requires. The HKBA believes that that consequence should be stated now rather than discovered in the first contested prosecution, and it is consistent with the legal certainty and the moral message on which the case for criminalisation rests.

D7. Disclosure Safe Harbour Should Be Enacted, Requiring No Economic Assessment

123. Where the arrangement between bidders is disclosed to the person calling for the bids or tenders at or before the time the bid is made, the mischief the offence targets — the concealment that makes bid-rigging a deception — is absent. The UK provides a direct precedent: section 188(5) of the Enterprise Act 2002 defines bid-rigging arrangements, and section 188A disapplies the offence where, in the case of bid-rigging arrangements, the person requesting bids would be given relevant information about them at or before the time a bid is made. A carve-out on those lines would exclude conduct that is not criminal in substance without any economic inquiry, and would align the offence with the section 2(2) definition of bid-rigging, which itself turns on the arrangement not being made known to the procure.
124. The HKBA adds one qualification. The carve-out should be drafted as an exclusion from the offence, so that the prosecution must prove non-disclosure as part of its case, and not as a defence casting a burden on the defendant in

the manner of section 188B of the Enterprise Act 2002. The UK provisions are the model for the substance of the carve-out, not for the allocation of the burden. So drafted, the carve-out is a filter on the *actus reus* rather than a concession on culpability, and it should appear in the text of the CompOrd rather than be left the prosecutorial discretion.

D8. Proof of the Predicate Contravention

125. The First Conduct Rule is contravened by an undertaking without proof of any mental state; section 6 of the CompOrd is, in that sense, a no-fault civil prohibition. It is at least a conceptual difficulty and at worst a palpable objection to build an imprisonable criminal offence on a no-fault civil predicate. Allocation of no-fault civil liability is coherent where the sanction is a pecuniary penalty. It requires separate and careful justification once the sanction is imprisonment, and it reinforces the need for a clearly stated individual mental element.
126. Two further scope questions would benefit from express treatment by the relevant authorities. **First**, facilitators: whether the offence reaches non-competitor facilitators such as advisers and cartel administrators and, if so, on what fault basis. The question is the more pressing because the Competition Tribunal has held in the *Gray Line* case at [73]-[75] that facilitation of a contravention of the First Conduct Rule falls to be brought under section 91 rather than under section 6, the CompOrd containing, unlike the EU Treaty, an express provision addressed to facilitation. The Commission's draft section 105A therefore criminalises the very route by which facilitators are now to be pursued, and the fault basis on which it does so should be stated. Harris J held in the same passage, at [74(5)], that the inclusion of section 91 is a material difference between the Hong Kong and the EU statutory regimes, with the consequence that the EU case law is of limited assistance in construing sections 6 and 91. That conclusion bears on the weight to be given to the EU authorities referred to below, and more generally to comparative material. The European Court of Justice holds that a facilitator need not be active on the affected market to be liable (*AC-Treuhand v Commission* (2015) C-194/14 P),

while the mental threshold for attributing the wider cartel to a participant is the two-limb test that the person was aware of the conduct of the others, or could reasonably have foreseen it and was prepared to take the risk (*Commission v Anic Partecipazioni*; *Aalborg Portland*); the awareness limb and the foresight-and-risk limb should not be conflated. **Second**, the offence targets only natural persons: if the Commission or the Government considers that corporations should be excluded from the criminal track, it should explain in the relevant proposal and then should address whether a corporation may nonetheless be liable at common law as a conspirator or accessory to the criminal cartel offence.

127. The territorial reach should also be settled. The First Conduct Rule applies, under section 8 of the CompOrd, to conduct with an object or effect in Hong Kong even where the arrangement is made or given effect outside Hong Kong and even where a party is outside Hong Kong. If the proposed criminal cartel offence carries that reach, the relevant legislative proposal must address jurisdiction over persons outside Hong Kong, service out, and extradition (see Section D14 below).

D9. Compelled Evidence and the Use-Immunities

128. Criminal cartel regimes depend materially more on direct evidence than civil ones. A legislative proposal to enact a criminal track should assess whether the Commission's detection capability can generate evidence to the criminal standard without reliance on compelled material. That assessment is inseparable from the self-incrimination question, which in our view remains the most serious practical difficulty, although not for the reason most commonly given.
129. The Commission's investigative effectiveness rests heavily on its powers under section 41 of the CompOrd to obtain documents and information and section 42 to require any person to attend and answer questions. Section 45 removes the privilege against self-incrimination for those purposes. In exchange, section 45(2) provides that no statement made in giving an

explanation or further particulars about a document, or in answering a question, is admissible against the person who made it in the proceedings identified in section 45(3). Section 148 makes parallel provision in respect of evidence given by a person appearing before the Competition Tribunal.

130. The scope of that statutory protection should be stated precisely, because it is easily overstated in either direction. Section 45(3) identifies two categories of proceedings: proceedings in which the Commission applies for a pecuniary penalty under section 93 or a financial penalty under section 169; and any criminal proceedings other than proceedings for an offence under section 55, an offence under Part V (Perjury) of the Crimes Ordinance (Cap. 200) (“**CrimesOrd**”), or an offence of perjury. The prohibition therefore operates in identical terms on the civil penalty track and on any criminal track. Criminalisation does not render compelled statements inadmissible: they are already inadmissible against their maker in the proceedings the Commission brings today. The difficulty, we suggest, lies elsewhere.

131. What changes with criminalisation is not the direct-use prohibition but the adequacy, for a criminal process, of a protection calibrated to a civil one. Four matters require attention:

131.1. Section 45(2) prohibits use of the statement. It says nothing about derivative use — the documents located, the witnesses identified or the lines of enquiry opened as a result of a compelled answer. The point has been decided. In *Competition Commission v Nutanix Hong Kong Ltd* [2017] 5 HKLRD 712 at [44], G Lam J held that the scheme of section 45 is to abrogate the privilege, to restrict the direct use of the statements obtained, and to be silent on — thereby inferentially permitting — their derivative use; and it was common ground before the Competition Tribunal that the Commission may use compelled answers to develop new lines of enquiry, to identify sources of independent evidence and to assist in formulating applications for search warrants ([100]). That is tolerable where the outcome is a pecuniary penalty. Where the outcome is imprisonment, it raises a

question under Articles 10 and 11 of the Hong Kong Bill of Rights which should be resolved by the legislature rather than on a voir dire in the first prosecution. We note that no constitutional argument was advanced in *Nutanix*, the Tribunal recording expressly that no remedial construction was contended for ([51]), so the decision does not foreclose the point.

131.2. The exceptions in section 45(3)(b) become materially more significant. A compelled answer is admissible without restriction in a prosecution under section 55, and in a prosecution for any offence under Part V of the CrimesOrd, which includes section 36 (false statutory declarations and other false statements without oath). The person most exposed by that exception is the person on whom detection most depends.

131.3. The prohibition protects only the maker. That too is decided: in *Nutanix* the Tribunal held that the beneficiary of the direct use prohibition is the subject of the compulsion, so that answers compelled from an employee under section 42 are admissible against his employer undertaking ([101]). Before the Tribunal that is unremarkable. In a criminal trial it engages the accomplice-evidence and corroboration questions addressed below, and the fairness of admitting against a defendant an account which its maker gave under statutory compulsion and could not himself have been required to give in evidence. It also revives, in a sharper form, the objection considered and rejected in *Nutanix* at [99]: that the tribunal of fact would be bound to acquit the employee, whose answers are inadmissible against him, while using those same answers to convict his employer. The answer accepted in that case was that the Commission would not proceed against the employee. Once there is a criminal track that answer is no longer available, because the decision to prosecute rests with the Secretary for Justice and not with the Commission.

- 131.4. Criminal disclosure obligations attach to material the prosecution holds whether or not it is admissible. Compelled material that cannot be deployed will still have to be reviewed, scheduled and, where it undermines the prosecution case or assists the defence, disclosed. That obligation differs materially from Tribunal practice, will bear on the Commission's existing case files, and cuts across any firewall designed to keep compelled material away from the prosecuting team.
132. These matters bear directly on the dual-track design. The Briefing Paper presents it as an advantage that the Commission may keep both tracks open and decide, at the end of the investigation, whether to proceed civilly or criminally, in particular where the choice of track would affect the availability of admissible evidence. On the true construction of section 45 the choice of track does not affect the admissibility of compelled statements, and to that extent the advantage is narrower than the Briefing Paper suggests. What deferral does affect is the volume of compelled material accumulated before the election is made, and therefore the scale of the derivative-use, third-party-use and disclosure problems which crystallise if the criminal track is then chosen. The relevant human-rights and comparative authorities (*Saunders v United Kingdom* (1997) 23 EHRR 313; *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170) should be considered, noting that *Saunders* addresses direct use and does not answer the derivative-use question.
133. It is a principle of the reform that this interface must be addressed expressly on the face of the legislation. Whatever mechanism is adopted must resolve the four matters identified above, and must be accompanied by statutory firewalls — express restrictions on which officers and which proceedings may receive particular material — governing the passage of material between the civil and criminal tracks in both directions, and between the Commission and any prosecuting or investigating agency. The mechanism itself requires further study.

D10. Mode of Trial and the Maximum Penalty

134. The Briefing Paper adopts as one of its guiding principles that the offence would be “more appropriately tried before a professional judge instead of jury”, on the footing that jury sentiment was a major obstacle to cartel prosecutions in the UK and in Australia.
135. Article 86 of the Basic Law of the HKSAR provides for the maintenance of the principle of trial by jury previously practised in Hong Kong. If a departure from the jury principle is intended, its basis must be identified and justified against Article 86 of the Basic Law and Article 10 of the Hong Kong Bill of Rights. The difficulty juries are said to have had elsewhere with counterfactual economic analysis is not, without more, a sufficient justification, and it is in any event substantially answered by the deletion of effects-based liability recommended above.

D11. Leniency and Immunity

136. The Briefing Paper candidly identifies the risk that criminalisation will render the Commission’s leniency and cooperation regime “wholly unattractive” unless the scope of protection is expanded, because an applicant could no longer be assured against criminal consequences of coming forward. The HKBA regard this as a central gap rather than a peripheral one, because cartel detection depends heavily on leniency.
137. The difficulty is structural. Section 80 of the CompOrd empowers the Commission only to make an agreement that it will not bring or continue proceedings under Part 6 for a pecuniary penalty. It says nothing about criminal proceedings and cannot bind the Secretary for Justice. There is at present no mechanism for criminal immunity, nor for coordinating a grant of leniency with the Secretary’s prosecutorial discretion or with any consent to prosecution regime that may be introduced.

138. Whatever form the framework takes, the HKBA suggests it should contain the following six elements:
- 138.1. Criminal immunity for the first qualifying applicant, honoured through a binding and published policy of the Secretary for Justice, so that the assurance the Commission gives under a reformed section 80 is one the prosecutor will keep.
 - 138.2. Automatic extension of that immunity to the applicant's cooperating officers, employees and agents.
 - 138.3. Protection of the leniency material itself, by confidentiality and protective orders shielding leniency statements from later use against the applicant. Whether such material should be disclosed to civil claimants should be weighed by the court case by case, rather than allowed or refused as a matter of course.
 - 138.4. Use immunity — a bar on the material being used in evidence against the person who provided it — extending to voluntary admissions made in a leniency or cooperation application, and not only to answers given under compulsion.
 - 138.5. A marker system, by which an applicant may reserve first place in the queue while it completes its internal investigation, so as to manage the accelerated race to report once criminal exposure attaches.
 - 138.6. Provision for the accomplice-evidence and corroboration directions that will apply if the prosecution relies on an immunised cartel as a witness.
139. There is a specific interaction with the Non-Collusion Clauses that requires attention. An applicant who has signed a Non-Collusive Tendering Certificate and supporting statutory declaration is already exposed to prosecution for conspiracy to defraud and under section 36 of the CrimesOrd, and the

Commission cannot immunise those offences. That exposure is sharper than it appears. Section 36 is an offence under Part V of the CrimesOrd, and section 45(3)(b)(ii) of the CompOrd excepts Part V offences from the direct-use prohibition. An applicant compelled under section 42 of the CompOrd to answer questions about a certificate he has signed may therefore be prosecuted under section 36 of the CrimesOrd upon his own compelled answers. The offence from which the Commission cannot protect him is the offence in respect of which the CompOrd affords him no use-immunity. A legislative proposal for enacting a criminal cartel offence should assess whether the enhanced clauses have already degraded leniency incentives, and whether any immunity regime must extend, in coordination with the Department of Justice (“DoJ”), to those offences.

D12. The Double Jeopardy Architecture Should Be Completed

140. Although the HKBA welcomes the inclusion of an election and mutual-exclusivity mechanism and the analogy to the SFO, it considers the mechanism to be incomplete in several respects.
141. The premise of the mechanism is sound. Its rationale, as the Commission has explained, is that the criminal cartel offence and the section 92 pecuniary penalty serve a common objective and should therefore be mutually exclusive. But that reasoning carries a corollary which has not been addressed. Section 213 of the SFO stands outside the mutual exclusivity of the market misconduct regimes precisely because it serves a different purpose — the protection of investors rather than the punishment of the wrongdoer — with the consequence that the section 213 route and criminal proceedings are not mutually exclusive. The distinction is drawn by Lord Hoffmann NPJ in *Tiger Asia*, with whom the whole Court of Final Appeal agreed. The penalties which a criminal court or the Market Misconduct Tribunal may impose are imposed in the general public interest and, in the case of criminal sanctions, avowedly to punish; section 213, by contrast, provides remedies for the benefit of the parties involved in the impugned transactions, including injunctions and the appointment of receivers to secure property with a view to recovery by the

victims of market misconduct. Tang VP drew the same distinction in the Court of Appeal. Applied to the CompOrd, that distinction indicates that the bars in draft sections 105C and 105D should be confined to the punitive remedy, and should expressly not extend to the CompOrd's protective and compensatory provisions: director disqualification under section 101, the orders available under Schedule 3, and follow-on claims under section 110. As the Commission has drafted, sections 105C and 105D bar only section 92 proceedings and are silent as to the remainder. That silence should be replaced by express provision, which the reasoning in the *Tiger Asia* case supports.

142. The bars are also incomplete in a second respect. The draft section 105B(2)(b) recognises that proceedings for other indictable offences may be in contemplation, and permits consent to be withheld on that ground; but that provision governs consent alone. The bars themselves operate only as between section 92 proceedings and section 105A proceedings, and do not address conspiracy to defraud or section 36 of the CrimesOrd. An individual could accordingly face penalty proceedings in the Competition Tribunal and a subsequent conspiracy-to-defraud prosecution for the same conduct, defeating the very principle the mechanism is designed to serve.
143. A structural incentive to charge around the Commission's proposed criminal cartel track arises from the penalties. Conspiracy to defraud carries a maximum of 14 years' imprisonment (section 159C(6) of the CrimesOrd, the common law offence being preserved by section 159E(2)), whereas the bespoke offence would carry a maximum of [10] years, or of seven years if the figure proposed in the Briefing Paper is adopted rather than the figure in the draft. The disparity arises on either view and is the wider on the lower figure. The deception-based route would thus be punished more severely than the anti-competitive conduct itself, creating an incentive to prosecute conspiracy to defraud and, in doing so, to bypass the safeguards, election and mutual-exclusivity provisions the Commission has sought built into its proposals. That incentive is the more troubling because the reach of conspiracy to defraud over cartel conduct is itself contested and pleading-sensitive: in *Norris v Government of the United States of America* [2008] UKHL 16 and the

companion appeal *R v Goldshield Group Plc* [2008] UKHL 17, the House of Lords held that price-fixing is not, without more, a criminal conspiracy to defraud, absent aggravating features such as fraud, misrepresentation or positive deception, which must be specifically pleaded and charged. Those are English decisions and only persuasive in Hong Kong, and the local position in respect of the common law offence preserved by section 159E(2) should be confirmed; section 159A, which creates the statutory conspiracy, does not apply to conspiracy to defraud. The qualification cuts both ways for bid-rigging, because the concealment inherent in the section 2(2) definition will often itself supply the requisite deception. It is suggested that if a criminal cartel track is enacted into the CompOrd, then the criminal cartel offence should be the primary charge for bid-rigging, with conspiracy to defraud reserved for cases of genuine aggravated dishonesty, and the election and mutual-exclusivity provisions should be extended to it and to section 36 of the CrimesOrd.

144. There are two further difficulties with the mechanism that the Commission has so far constructed. **First**, although the draft section 105A applies only to natural persons, the draft section 105B requires the Secretary for Justice's consent before the Commission may bring section 92 proceedings against any "person" alleged to have been involved in a contravention. Involvement within the meaning of section 91 is not confined to natural persons. Consent would therefore be required before the Commission could seek a pecuniary penalty against a body corporate alleged to have been involved in another undertaking's contravention, which can never itself be prosecuted under the draft section 105A. This is likely to be unintended, so the requirement of Secretary for Justice's consent should be confined to natural persons. **Second**, the requirement bites whether or not a prosecution is contemplated; given the place of individual bid-rigging cases in the Commission's enforcement work, this has implications for the timeliness and the independence of ordinary civil enforcement which should be weighed against the double-jeopardy protection the provision secures.

145. There is no outer time limit specified on the withholding of consent and no provision suspending the running of the limitation period for section 92 proceedings while consent is withheld. A case could therefore become time-barred while the Secretary for Justice properly holds consent pending a decision on prosecution. A provision suspending the limitation period could be considered.
146. Finally, the Commission's draft legislative proposal does not address parallel corporate liability. Because the offence targets only natural persons, the undertakings that employ them remain exposed to civil pecuniary penalties for the same cartel. The position where an individual is prosecuted criminally while the corporate undertaking is pursued civilly on the same facts, particularly in the case of a sole proprietorship, should be worked through, together with the implications of parallel or sequential proceedings arising from a single course of conduct under Article 87 of the Basic Law of the HKSAR and Article 11(6) of the Hong Kong Bill of Rights.

D13. Maximum Penalty and the Premise for Authorising Interception of Communications and Surveillance

147. The maximum sentence should be derived from the culpability and harm of the conduct, rather than from the interception threshold in the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO"). The Briefing Paper proposes a maximum of at least seven years and \$1,000,000 in order to bring the offence within the definition of "serious crime" in the ICSO, on the footing that this will allow the relevant agencies to apply for interception of communications and covert surveillance. Two features of the ICSO merits attention. **First**, the threshold does not confer the power: applications under the ICSO may be made only by officers of a department specified in Schedule 1 to that Ordinance, which does not currently include the Commission; conferring the capability would require amendment of that Schedule under section 67, a step which, if desired, should be justified on its own merits. **Second**, the seven-year figure is the threshold for interception only; for covert surveillance the threshold is an offence punishable by

imprisonment of at least three years or a fine of at least \$1,000,000, which the proposed offence would satisfy on any of the maxima under discussion.

148. The maximum sentence should be justified on penological grounds. Any interception or covert-surveillance power so obtained must in addition be appropriately controlled and must independently satisfy the constitutional protection of the privacy of communications under Article 30 of the Basic Law of the HKSAR — a proportionality question which a maximum derived from the ICSO threshold does not answer.

D14. Cross-Border Consequences

149. Criminalisation has cross-border consequences that a civil regime does not, and these should be assessed before commencement. Mutual legal assistance is generally confined to conduct that is criminal in both jurisdictions, so the reach of any assistance in cartel cases will be governed by dual criminality. Criminalisation may also reduce the cooperation Hong Kong presently receives, because competition authorities in civil-only jurisdictions may be unable to share information where the conduct could result in imprisonment; the change may therefore reduce the flow of intelligence on which enforcement depends. Given the territorial reach of the first conduct rule under section 8 of the CompOrd, any legislative proposal should address the feasibility and policy of prosecuting, extraditing or otherwise proceeding against persons located outside Hong Kong.

D15. Transitional Provisions

150. Commencement and transition should be provided for expressly, consistently with the non-retroactivity guarantee in Article 12 of the Hong Kong Bill of Rights: the treatment of continuing arrangements, of conduct partly predating commencement, and of existing leniency recipients and parties who have already given evidence in reliance on the current civil regime should all be addressed.

D16. Recommendations

151. The HKBA states the following recommendations in the drafting of legislation introducing a criminal track in the CompOrd and in associated matters:

- 151.1. The offence-creating provision must state an express fault element.
- 151.2. The offence should rest on object or per se conduct only. Effects-based liability is not endorsed.
- 151.3. There should be enacted a disclosure safe harbour for bidding arrangements made known to the procurer at or before the time the bid is made, drafted as an exclusion rather than as a defence.
- 151.4. There needs to be resolved the interface between compelled material under sections 41, 42, 45 and 148 of the CompOrd and the criminal track by providing expressly for derivative use, for the exceptions in section 45(3)(b) (in particular section 55 of CompOrd and Part V of the CrimesOrd), for use against persons other than the maker, and for criminal disclosure, with statutory firewalls operating in both directions.
- 151.5. There should be established a criminal leniency and immunity framework capable of binding the Secretary for Justice, aligned with section 80 of the CompOrd and any proposed Secretary for Justice's consent mechanism. Leniency materials should be protected by confidentiality and protective orders.
- 151.6. The double-jeopardy architecture should be completed; the bars to the punitive remedy should be confined and the protective and compensatory provisions should be expressly preserved, the bars to conspiracy to defraud and section 36 of the CrimesOrd should be extended, and the Secretary for Justice's consent mechanism should be confined to natural persons.

- 151.7. The proposed maximum penalty should be justified solely on penological grounds independent of the criteria for triggering the thresholds for the application of the ICSO.
- 151.8. There should be formulated and published a prosecutorial or enforcement policy indicating when the criminal track will be pursued, its status, the body that issues it, and its relationship to the DOJ's prosecution policy.
- 151.9. There should be sufficient public advocacy sufficient to establish the offence as serious wrongdoing rather than a regulatory formality.
- 151.10. The Commission and the DoJ should, together, formulate the investigation and prosecution model, including whether the Commission investigates and refers under a published protocol, whether there is a joint enforcement arrangement, or whether the Commission prosecutes under authorisation, and whether any powers of arrest and detention are to be conferred.
- 151.11. The Commission and the DoJ should, together, coordinate the granting of leniency with the exercise of prosecutorial discretion.
- 151.12. The Commission and the DoJ should, together, formulate the charging practice as between section 105A and conspiracy to defraud.
- 151.13. The Commission should align the Non-Collusion Clause materials with the mutual-exclusivity principle.

E. Issues for Further Study

- 152. The HKBA wishes to highlight seven issues that may require further study in light of the guiding principles above:

- 152.1. The formulation of the fault element: An intention to prevent, restrict or distort competition corresponds most closely to the guiding principles. Although this formulation is preferred, further study may be useful with reference to two others, arguably less demanding, options, namely, (i) intention as to entry into and operation of the arrangement, together with the knowledge that it is one of the categories of seriously anti-competitive conduct; and (ii) knowledge or belief that the arrangement contains a cartel provision. Another related issue is whether wilful blindness and recklessness should be part of the criminal cartel offence.
- 152.2. The statutory inference provision: A statutory inference that seeks to ensure that “mere recipients” of competition sensitive information cannot rely on their own silence or subsequent inactivity as a defence does not appear to be supplying something the general law withholds by oversight. Rather, it seems to be relaxing a condition which the criminal standard imposes. Such statutory inference needs to be justified under the parameters of Article 11(2) of the Hong Kong Bill of Rights.
- 152.3. Whether a self-contained offence creating provision be enacted or an offence creating provision incorporating section 91 of the CompOrd be enacted: The choice between a self-contained offence and an offence formulated to incorporate section 91 determines how readily a fault element can be accommodated and whether criminalisation will affect the construction of section 91 for civil enforcement. Three options can be studied: (i) a self-contained offence with its own express fault element; (ii) an offence incorporating only selected limbs of section 91; and (iii) an offence incorporating each and every limb of section 91.
- 152.4. Compelled evidence: The choice of a track between civil penalty and criminal prosecution does not determine whether a compelled statement may be used. The present protection given by sections 45

and 148 of the CompOrd appears incomplete in relation to derivative use; three possible options ranging from express bar on derivative use, a statutory discretion to exclude evidence contained in a compelled statement, and no provision (which is the present position) need consideration.

152.5. The scope of the offence: Although it is both orthodox and defensible to begin criminalisation with the serious anti-competitive conduct that is most clearly culpable, it seems useful to consider expansion, say, to all serious anti-competitive conduct, as well as confinement to a specified procurement sector. It must be recalled that confinement is only meaningful with deletion of effects-based liability.

152.6. Institutional design and the prosecution decision: There are three possible modes of enforcement of the criminal offence: (i) the Commission investigates throughout and refers to the DoJ for prosecutorial decision under a published protocol; (ii) the Commission makes referral to the Police Force or the Independent Commission Against Corruption once a criminal track is contemplated; and (iii) a joint enforcement arrangement between the Commission and the prosecutor or investigating agency.

152.7. Leniency and the timing of election: Further study may be needed on how immunity is to be secured, considering these three options: (i) statutory criminal immunity for the first qualifying applicant; (ii) a published no-action or immunity policy of the Secretary for Justice; and (iii) a memorandum of understanding between the Commission and the DoJ (without statutory change).

153. This Chapter discusses matters of concern that the HKBA considers that, unless they are addressed, the criminal cartel offence to be proposed and enacted risks producing an offence that may prove less effective in practice, and more vulnerable to challenge, than the Commission and/or the Government intend: the protections in sections 45 and 148 are calibrated to a

civil penalty regime and are incomplete for a criminal one; the fault element, the mode of trial and the presumption of innocence each require express treatment; and the leniency programme on which detection depends requires a criminal counterpart.

CHAPTER 5 CONSTRUCTION LAW

A. Introduction

154. This Chapter is concerned with legal reforms that might properly address the wide ranging and serious deficiencies and failures in residential building maintenance and renovation works that the Wang Fuk Court fire has brought into sharp relief. Given that Hong Kong's housing stock is ageing, with many large housing estates approaching 30, 40 or even 50 years old, the effects and impacts of these deficiencies and failures are likely to become increasingly severe and are likely to pose increasing levels of risk to the public.
155. The HKBA's first recommendation in this front is a general one. The Government and other statutory authorities and bodies should address the current systemic issues in a holistic and serious manner. Whilst this will require expenditure of both public and private funds, we consider that it is an important and necessary investment. We also consider it concerning that other reforms, such as tackling and eradicating bid-rigging and other anti-competitive practices, will only be partially successful unless there is also change in the culture surrounding expenditure on maintenance and renovation. Thus, the HKBA recommends that the reforms shall seek to incentivise and facilitate an environment in which:
- 155.1. necessary building maintenance and renovation work is identified and then carried out at an appropriate time rather than the current tendency to defer work and expenditure until, or beyond, the point at which the building condition has become serious or dangerous;
- 155.2. building maintenance and renovation work is carried out by professional and reputable contractors and sub-contractors using

appropriate standards of workmanship, materials, temporary works and safety measures;

155.3. building maintenance and renovation work is carried out for a proper and reasonable price so that contractors and sub-contractors neither price gouge nor are incentivised to cut corners in order to make a reasonable return;

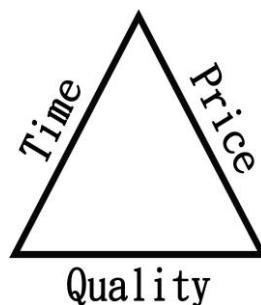
155.4. the procurement and bidding process is transparent, fair and complies with competition law and norms;

155.5. there are clear and identified points of responsibility for standards/compliance;

155.6. there is an effective regulatory system both to incentivise standards/compliance, and also to identify and address breaches before, rather than after, an accident or failure or tragedy occurs; and

155.7. there is an effective regulatory and criminal justice regime in order to prosecute and punish those who commit breaches.

156. An important consideration in reforms of construction matters is the recognition that there are three interdependent factors that affect construction related work: (i) time, (ii) price, and (iii) quality.



157. If, as it is often the case in Hong Kong, cost and time are prioritised, there will inevitably be reductions or compromises in quality. This by itself is neither

objectionable nor problematic. However, it becomes a problem and an increasingly serious concern when cost and time lead to unacceptable reductions in quality or when the quality delivered is less than is appropriate for the time and cost involved. Against this background, the HKBA has identified three strands of legal and regulatory issues in building maintenance and renovation work to which the HKBA identifies problems and suggest solutions.

B. Early Identification and Commissioning of Necessary Work

158. Problem: The commissioning of building maintenance and renovation works in Hong Kong tends to be postponed. The nature and structure of housing estates and Owners' Corporations ("OCs") have made it difficult for agreement to be reached to carry out work. This is exacerbated by the fact that few housing estates / OCs maintain sinking funds. Decisions to commission works usually also require agreements for funds to be raised for that work. This further deters the commissioning of work as individuals not only have to find the funds but also tend to question why they should inject funds for work that they consider will add no value to their individual property. This can lead to important or necessary work being postponed until it carries serious risks. Frequently, this also means that the building maintenance or renovation works needed are more major and more expensive than if they had been carried out earlier. Issues with funding could then lead to housing estates / OCs to reduce the amount of work actually carried out and to reduce budgets in a way that encourages contractors and sub-contractors to cut corners by poor workmanship, poor quality materials, and compromise on safety. This cycle is likely to worsen as the housing stock ages.

159. Recommendation 1 – Mandatory sinking funds: The HKBA recommends that consideration be given to introducing a statutory requirement for housing estates / OCs to maintain a sinking fund contributed to by all owners. Although this proposal is likely to be unpopular and a burden in the short term, it is believed that, over time, having a sinking fund would reduce the need for cash calls for every item of building maintenance and renovation work. This would

both facilitate and encourage the earlier identification and commissioning of building maintenance and commissioning work. It would also enable funds to be built up to be available for works as the housing stock ages.

160. Recommendation 2 – Statutory levy from developers of new residential buildings: The HKBA recommends that consideration be given to introducing a statutory levy to be paid by developers of new-build residential properties so as to create a public fund to help finance safety critical building maintenance and renovation work where the housing estate / individual owners cannot afford to bear the whole cost.¹³

C. Procurement of Building Maintenance and Renovation Works Contracts

161. Problem: OCs and MCs of buildings generally consist of members of the public with no specialist construction or procurement or legal knowledge. They are in a severe disadvantage when procuring building maintenance and renovation works. They are expected to experience difficulty in assessing bids and proposals received from contractors save on the basis of comparative cost. The market of independent consultants serving the building maintenance and renovation works sector is limited. It is common in this sector that consultants have conflict of interest with contractors and sub-contractors. This in turn can mean that the advice that housing estates and OCs receive from a consultant may not be objectively in the best interests of the housing estate / OC. These matters are likely to contribute to these negative consequences in Hong Kong: (i) a propensity to focus on the lowest bid received when procuring work- with the result that contractors and sub-contractors are inclined to compromise inappropriately on standards and safety; (ii) a propensity (often unknowingly) to engage contractors and sub-contractors with poor safety records; and (iii) the facilitation of anti-competitive practices including bid-rigging.
162. Recommendation 1 – Smart Tender 2.0 Scheme: The “Smart Tender” Building Rehabilitation Facilitating Services scheme is a fee-based service scheme that

¹³ Reference is made to the Building Safety Levy (England) Regulations 2025 (SI 2025 No 1236).

offers assistance to owners' organisations in building rehabilitation works, with an electronic tendering platform to facilitate procurement of Authorized Person ("AP") / Registered Inspector (or the consultancy firms that can provide relevant services) and qualified registered contractors to carry out maintenance works for the common parts of the building. Following improvements, a new Smart Tender 2.0 Scheme is expected to be rolled out with the following features:

- 162.1. The Urban Renewal Authority ("URA") will create a more rigorous "pre-qualified list" of consultants and contractors. This will include background checks by the Police Force and the Independent Commission Against Corruption.
- 162.2. The URA will assess company performance, taking into account whether government departments have issued warning letters and whether public complaints are reasonably substantiated. Cases under investigation, even if not yet prosecuted, will also be considered ("**Company Performance Review**").
- 162.3. The URA will manage tendering and tender proposal evaluation procedures on behalf of property owners for the appointment of consultants and contractors.
- 162.4. The URA, acting as a gatekeeper during the tendering stage, will also be cautious about accepting tender prices that fall outside a reasonable range (whether excessively low or high). It will scrutinise maintenance costs to prevent market price inflation and reserves the right to cancel a tender if bid prices are unusually close together or deviate significantly from the price index.
- 162.5. For buildings applying for government maintenance subsidies, once work has commenced, the URA will require consultants and contractors to report any significant variations in scope or increases

in project costs. This enables the URA to provide independent advice to property owners.

162.6. The terms will specify which party holds the final decision-making authority in the event of disputes.

163. Provided that the URA is provided with sufficient funding and resources to carry out its proposed role as an independent consultant for maintenance contracts executed by building owners, the HKBA believes that the Smart Tender 2.0 Scheme would be capable of resolving the problems discussed above. In this connection, the HKBA would suggest these several possible improvements with a view to help turn around the existing practices in the building maintenance and renovation sector:

163.1. The URA's statutory purpose is to prevent the decay of Hong Kong's built environment by promoting building maintenance and improvement. A question may arise as to whether the URA, when it exercises its functions under the Smart Tender 2.0 Scheme, is exercising a public regulatory function so that its legal duty is owed to the public at large, or whether it is exercising a private function such that it may be open to argument that it owes a duty (whether contractual or tortious) to the individuals and commercial entities that it engages with. In light of the importance of reforming the way in which the building maintenance sector acts, it is suggested that consideration be given to amend the Urban Renewal Authority Ordinance (Cap. 563) ("URAO") to make clear that the URA is exercising a public regulatory function with respect to at least some of its responsibilities under the Smart Tender 2.0 Scheme. Further, thought may be given as to whether all of the URA's responsibilities under the scheme should be regarded as the exercise of public regulatory function or whether some aspects (such as tendering evaluation and variation monitoring) are being provided on a commercial or quasi-commercial basis. If the URAO is not amended as suggested, there might be scope of the HKSAR courts to be asked

to determine the legal nature of the URA's functions under the Smart Tender 2.0 Scheme.

- 163.2. The URA's creation of a "pre-qualified list" for contractors and consultants should follow a proper and transparent procedure, both in respect of inclusion into and exclusion from the "pre-qualified list". If a consultant or a contractor is rejected for inclusion in the list, it may lose the opportunity to bid for multi-million building maintenance projects. Hence, rejected consultants or contractors should be provided with written reasons for rejection and the opportunity to submit a written explanation or counter-evidence before a final negative decision is made. Consideration could also be given to the establishment of an appeal mechanism whereby rejected parties can appeal to an independent panel of experts outside the URA.
- 163.3. The Government has not clarified whether, and to what extent, the URA will be involved in the daily operation and performance of projects in light of its role in the proposed Company Performance Review. The HKBA considers that these parameters should be clarified. Otherwise, it could create significant practical, contractual and legal confusion and complications. Likewise, a proper and transparent procedure be set up for the Company Performance Review.
- 163.4. The URA's role in tender evaluation should be clarified. The HKBA suggests that it should be made clear in express terms that the URA's tender evaluation is strictly for reference and information only, and that the URA does not guarantee the recommended tenderer's performance, and that property owners bear the sole responsibility to exercise their own independent judgment when deciding which tender to accept. The URA needs to have its own evaluation process and criteria. This process and criteria should be transparent. At the same time, they should be operated with some flexibility, as the

scheme may be used in evaluating a wide range of projects, conditions and contracts.

- 163.5. Tender prices submitted by bidders reflect real-time market conditions at the time of tender close, whilst cost estimates or price indexes are prepared on the basis of historical data. Consequently, it remains uncertain how the URA will determine a “reasonable range” for cost, or on what grounds it can reject, or advise rejecting, tenders falling outside their “reasonable range”. However, the legal basis for the URA to assert a right to cancel a tender is unclear. Close tender prices do not inherently mean that tenderers are engaging in collusion. Similarly, tender prices that deviate from a historical price index do not automatically mean that they are unreasonable.
- 163.6. The price review function is a valuable and useful tool. But caution needs to be exercised when designing and introducing it. The criteria and mechanism used to arrive at a “reasonable range” need to be transparent and published, and need to address the time lag between historical data and current market conditions.
- 163.7. Whether the URA should be entitled to reject tenders or simply give indicative information to owners for their consideration are questions that need further consideration. Nevertheless, there should be a mandatory clarification to allow tenderers to explain their cost breakdown before a decision is made to cancel or reject a tender, as well as allow tenderers to explain their cost breakdowns before a tender is cancelled or rejected or advice is given to cancel or reject a tender.
- 163.8. The Government has not clarified whether, and to what extent, the URA will be involved in the daily operation and performance of projects in light of its role in the proposed Company Performance Review. These matters should be addressed and made clear.

Otherwise, it would create significant practical, contractual and legal confusion and complications.

163.9. A building maintenance project contract is strictly between the contractor and property owners. It is not clear to us the basis on which the URA would be acting as a third-party advisor to review project variations and to advise property owners on their validity and cost.

163.10. The HKBA understands the role of the URA in respect of variation monitoring is as an adviser to the owner for information only, and not as a certifier under the contract or a formal consultant. A much clearer indication of the URA's role is needed since the URA could have acted as: (i) an informal adviser to an owner with no ultimate responsibility akin to a pro-bono legal advice centre assisting a person with a problem; or (ii) a consultant providing consultancy to the owner; or (iii) a certifier under the maintenance contract, certifying entitlements under the contract; or (iv) an expert determiner providing an interim binding decision on the parties. Duties and liabilities on the part of the URA and other parties can arise when the URA makes an evaluation in the variation monitoring service.

164. Recommendation 2 – Mandatory “Two-envelope” tendering: The Smart Tender 2.0 Scheme will not remove the need for housing estates and OCs to review and evaluate tenders for building maintenance and renovation works. Hong Kong's tendency to focus on the lowest cost brings with it significant risks with respect to quality and safety considerations. The HKBA suggests that the Building Management Ordinance (Cap. 344) (“**BMO**”) be amended so that where an OC's project exceeds a prescribed value, tenders must be submitted in two separate envelopes: one with the technical proposal and the other with the price proposal. “Two-envelope” tendering requires the price proposal envelope only to be opened after an evaluation of the technical proposal and then only if the technical proposal meets a prescribed minimum score based on pre-agreed valuation criteria and weightings. The tender documents must disclose these criteria and weightings and they made known

to all owners. The scores, after evaluation, should be made available to all owners. For “Two-envelope” tendering to be successful, it must be coupled with measures, delivered possibly through the Smart Tender 2.0 Scheme, to tackle the existing problem concerning lack of independent and conflict-free consultants, including requiring consultants to declare all potential conflict of interests prior to appointment.

165. Recommendation 3 – Conflicts provisions with respect to professionals carrying out statutory roles: Whilst the regulation of general consultants may be difficult for statutory bodies to police, it should be more realistic to do so in connection with professionals carrying out statutory roles (such as Registered Structural Engineers (“**RSEs**”) and APs). There is currently a lack of an effective system to address conflict of interest issues in relation to these professionals. It would appear that when appointing an RSE for a Project, the focus is often on the applicants / intended RSEs primarily being asked to show their experience and qualifications. There is generally no requirement to disclose potential or actual conflicts. This is of significance since under the Registered Inspector registration system established pursuant to the existing Buildings Ordinance (Cap. 123) (“**BOrd**”) allows RSEs to essentially oversee many projects. Hence, consideration should be given to amending the BOrd to include a statutory requirement that RSEs, APs and other similar professionals disclose actual and potential conflicts both before and after appointment. Further, for major or high-risk works, there could be a statutory obligation for the RSE and the AP (and others) to be conflict-free.
166. Recommendation 4 – Contractual forms: In the medium to longer term, the development of modern standard form contracts for use in building maintenance and renovation works should be encouraged. This could help address concerns about contractors imposing unfair or one-sided contracts on owners. Such standard form contracts would need to be simple and have an objectively reasonable allocation of risk.

D. Performance of Building Maintenance and Renovation Works Contracts: Safety

167. Problem: In order to be cost effective and proportionate, the current regulatory regime distinguishes between major and minor works. However, the regime currently classifies works as minor works by the nature of individual items of work to be carried out, and not by the cumulative risk of the project. This methodology poses a significant risk. It means that the less onerous minor works statutory requirements can apply even when, on a more realistic risk assessment, the risk may be the same or even greater than the risk on a major works project. Also, it is currently difficult for housing estates / OCs to find out the safety records of building maintenance and renovation contractors and consultants. There is no safety register and, generally, no requirement for prospective contractors and consultants to disclose their safety records. Unlike some other sectors of the construction industry such as contractors tendering for public works, there is no effective disbarment or suspension mechanism for building maintenance and renovation contractors and consultants who have poor safety. Further, building standards have become increasingly diverse; housing estates and OCs will generally find it hard to know which standard is the most appropriate or even (given the technical language used) to understand the standards or their differences. Contractors may be faced with a lack of clarity as to the applicable standards or even to inconsistent standards applying.
168. Recommendation 1 – Reclassifying minor and major works: Amendments should be made to the BOrd and the Building (Minor Works) Regulation (Cap. 123N) so as to reclassify works as “prescribed high-risk building works” when any one of a series of prescribed thresholds are exceeded:
- 168.1. the total project value is above [HK\$8 million]; or
- 168.2. more than [25%] of the flats in any block are potentially affected; or
- 168.3. more than [25%] of the external wall area of any block is affected.

As “prescribed high-risk building works”, there would need, by statutory regulation, to be an AP (and a RSE where appropriate) appointed; a pre-commencement risk assessment and fire safety plan; and a supervision plan with periodic reporting and defined inspection milestones. Also, there should be an even more onerous regime (“very high risk”) where thresholds are exceeded by a prescribed wider margin, or the works affect means of escape or fire service installations in an occupied building. In such cases, the full approval and consent system under the BOrd should apply even if the work items are themselves minor. In this connection, works on the same building or estate within a prescribed period ([18] months), or under a common consultant, contractor or instructing party, should be aggregated for threshold purposes. Deliberate contract-splitting to remain below the thresholds should be an offence and a ground for disciplinary action. The proposed statutory threshold should also apply to any building works under way at the date that the proposed changes enter force. As a transitional arrangement, however, where building works are underway on the date that the proposed changes enter force, the contractor should be required within [1] month of that date to file a fire safety plan and supervision arrangement with the Buildings Department if any of the statutory criteria are exceeded. Finally, thought should be given as to whether there should be a discretionary power (to be exercised by either Buildings Department or the Fire Services Department) to designate building maintenance and renovation projects as very-high risk due to the number and density of the projects being carried out concurrently.

169. Recommendation 2 – Statutory points system: Consideration should be given to amend the BOrd to establish a safety points system: safety convictions and disciplinary findings attract points, and a contractor exceeding a prescribed limit is barred for a defined period from OC projects or minor works above a prescribed value. The related register under the system must be public, searchable, and must extend to related companies and controlling minds, so a barred contractor or consultant cannot re-emerge under a new corporate vehicle. A grace period should be introduced before the coming into force of the points system, to allow the safety register to be populated and the industry to adapt.

170. Recommendation 3 – Mandatory safety record disclosure: Consideration should be given to amend the BMO so that for tenders above a prescribed value, every tenderer (including consultants) must disclose prescribed safety records in a standard form, and a tender falling below a prescribed standard must not be considered. False disclosure should be an offence and a ground for avoiding the contract.
171. Recommendation 4 – Recognisable building standards: **First**, clear guidance should be developed as to which building standards are most suitable for adoption in relation to building maintenance and renovation projects — in particular in relation to safety issues. An example is the Buildings Department’s Practice Note for Registered Contractors regarding fire retardant performance of netting and other protective coverings for scaffolding (December 2025). **Second**, thought could be given to producing a guide in plain language for housing estates / OCs to assist them in understanding key issues — in particular in relation to safety — when tendering work. **Third**, there is a lack of recognisable standards and regulation regarding temporary works. Save for some limited situations, temporary works are generally left for the contractor to design and work out. Whilst this might be appropriate on a major construction project, we have concerns about it with respect to building maintenance and renovation projects — especially when it comes to temporary works that have potential fire safety risks. **Fourth**, most building maintenance and renovation projects are carried out whilst the buildings are fully occupied. There is generally an increased fire risk whilst the project is under way. Accordingly, there should be wider development of standards to apply to temporary works that have potential fire safety risks (whether in terms of causing fires or the spread and intensity of fires).
172. Recommendation 5 – Widening and strengthening the penalties for safety breaches: Some contractors and consultants consider that the commercial benefits of cutting corners when it comes to safety outweigh either the risk of being caught or the consequences of being caught. There is therefore a need to review and strengthen the regulatory and criminal justice penalties for safety breaches. This should be done in a manner that disincentivises breaches rather

than simply punishes them. At the same time, neither contractors nor consultants in the building maintenance and renovation sector should be villainised. The tendency for housing estates / OCs to award contracts based on low prices also acts as a disincentive, and sometimes a brake, on the proper application of safety by contractors and consultants. It is therefore suggested that housing estates / OCs will need to consider safety issues more carefully when evaluating tenders and will also need to consider whether price proposals are too low to be confident that the contractor/consultant can afford to, or will, comply properly with safety standards and requirements.

173. The HKBA supports the Government's proposals to amend the Fire Services Ordinance (Cap. 95) ("**FSO**"), the BOrd and the BMO. In light of the discussion in this Chapter, this paragraph focuses attention to the amendments to the FSO. The following proposed amendments to the FSO are important and constructive: (i) the proposed requirement that fire alarm shutdowns should require prior Fire Services Department ("**FSD**") approval; (ii) the proposed introduction of a new mandatory five-year renewal requirement for Registered Fire Service Installation Contractors and a new professional registration regime for Fire Service Installation Technicians; (iii) the proposed enhancement of FSD's powers to abate fire hazards and the introduction of new penalties for breaches; and (iv) the proposed introduction of a statutory responsibility on property management companies (alongside property owners) to maintain fire safety equipment. It is noted that (iv) is more controversial, as the imposition of personal liability on a director or officer is a serious matter and should not be introduced lightly. However, given the seriousness of fire safety risks, we support its introduction with regards to fire safety breaches. Such personal liability should not be a strict liability offence but should depend on knowledge, wilful lack of knowledge, dishonesty or negligence on the part of the director/officer. Similarly, it is considered that professionals certifying or taking responsibility for safety related matters, particularly fire safety, pursuant to statutory regulations should do so personally (as an AP does) with criminal and civil liability for dishonest or negligent certification.

174. This background research note will explore the experience of other jurisdictions that have criminalised bid-rigging (whether specifically or as part of anti-competitive behaviour generally) and how that experience may inform Hong Kong’s legislative proposals in this area.

A. United States

175. The United States (“US”) was the first jurisdiction to create the modern system of “antitrust” or competition law as we understand it today, with the passage of the Sherman Act in 1890. Cartel conduct is criminalised under section 1 of the Sherman Act (15 U.S.C. § 1), which prohibits “*every contract, combination... or conspiracy... in restraint of trade*”. The Act includes criminal penalties which are enforced by the US Department of Justice (“DoJ”), Antitrust Division in the Federal (and not state) courts.¹⁴

176. In the US, cartel conduct i.e. agreements among competitors to fix prices, restrict output, rig bids, or allocate customers or territories are *per se* illegal and may render participants liable to criminal prosecution.

A1. Legislative History

177. The objective of the Sherman Act is “*to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up*”.¹⁵

178. However, the penalties provided for in section 1 of the Sherman Act has changed over time:

¹⁴ Lexology GTDT, Cartel Regulation 2022 — USA (Law Business Research, law stated 1 October 2021) (“GTDT USA”), “Relevant legislation” and “Substantive law”.

¹⁵ <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws>

- 178.1. In 1890, cartel conduct was only a misdemeanour punishable by up to one year's imprisonment or by fine not exceeding US\$5,000;
- 178.2. In 1974, the Antitrust Procedures and Penalties Act 1974 reclassified violations as felonies punishable by up to three years' imprisonment, with fines of up to US\$1 million (for corporations) and US\$100,000 (for individuals). These were subsequently increased incrementally in 1984 and 1990;
- 178.3. In 2004, the Antitrust Criminal Penalty Enhancement and Reform Act 2004 raised the ceiling to the present US\$100 million (corporations), US\$1 million (individuals), and 10 years' imprisonment.

A2. Cartel Offence in the Sherman Act

A2.1. Elements of the Offence

- 179. Section 1 of the Sherman Act provides that:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”

- 180. There are two core elements:

- 180.1. Agreement: Is there a concerted action?

- 180.2. Restraint of Trade: Which concerted acts are illegal?

- 181. Concerning **the Agreement Element**, the terms “*contract*”, “*combination*” and “*conspiracy*” have all been construed to mean an “*agreement*”, i.e.

concerted action between at least two independent economic entities.¹⁶ The agreement itself constitutes the offence: it suffices that there is a “*meeting of the minds*” or mutual understanding that the parties will combine their efforts for a common, unlawful purpose.¹⁷ The agreement needs not be express, formal, or ultimately successful, and no overt act in furtherance of the conspiracy is required.

182. Concerning **the Restraint of Trade Element**, the US Federal courts have rejected a literal reading of section 1; only “*unreasonable*” restraints of trade are unlawful, and the default mode of analysis is the “*rule of reason*”, which balances anticompetitive effects against procompetitive benefits.¹⁸ However, hard-core cartel conduct — price fixing, bid-rigging, and customer, territorial or market allocation — is *per se* illegal: the law provides an irrebuttable presumption that such conduct had an anticompetitive effect on the market, so the prosecution need not prove any actual effect. In practice, only such *per se* offences are prosecuted criminally.¹⁹

A2.2. Penalties for the US Cartel Offences

183. The penalty is contained in the second sentence of section 1 of the Sherman Act which provides that:²⁰

“Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by

¹⁶ *Summit Health, Ltd. v. Pinhas* 500 U.S. 322 (1991), 330 – “the essence of any violation of §1 is the illegal agreement itself”; *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980) (stating that the phrase “contract, combination or conspiracy” is a single concept about common action, not three separate ones, and roughly translated means “concerted action”).

¹⁷ *American Tobacco Co. v. U.S.* 328 U.S. 781, 810.

¹⁸ *Ohio v American Express Co.*, 138 S. Ct. 2274, 2284.

¹⁹ Resource Manual, ‘*Per Se Rule*’ <https://www.justice.gov/archive/usao/usam/1997/1997ATRM.pdf>, p.3.

²⁰ 15 U.S.C. § 1, as amended by the Antitrust Criminal Penalty Enhancement and Reform Act 2004: <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section1&num=0&edition=prelim>

imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”

184. In gist, **corporations** are liable on conviction to a fine of up to US\$100 million per offence, whereas **individuals** are liable to a fine of up to US\$1 million and/or imprisonment for up to 10 years.
185. Notably, the US\$100 million cap has been surpassed in practice: under the alternative fine provision (15 U.S.C. § 1; Criminal Fine Improvements Act of 1987, 18 U.S.C. § 3571(d)),²¹ a defendant may instead be fined up to twice its gross pecuniary gain from the criminal conduct, or twice the victims’ gross pecuniary loss. In *US v AU Optronics Corporation et al.*, the court imposed a criminal fine of US\$500 million on this basis.²²

A2.3. Enforcement Record in the United States

186. According to the US DoJ’s official statistics (through fiscal year 2025), the US DoJ charged between 2 and 19 corporations and between 15 and 52 individuals in each fiscal year between 2016 and 2025 (in fiscal year 2025: five corporations and 29 individuals), while total criminal fines and penalties have fluctuated between US\$2 billion (2017) and US\$6 million (2025).²³
187. Specifically on bid-rigging, since November 2019, the US DoJ has operated the Procurement Collusion Strike Force (“PCSF”), a coordinated national response combatting bid-rigging and related schemes in government procurement at the federal, state, and local levels. As of 30 April 2026, the PCSF had opened nearly 200 investigations (of which around 100 were initiated in fiscal year 2025 alone), secured more than 85 guilty pleas and convictions, and recovered over US\$70 million in fines and restitution; it now

²¹ https://www.govregs.com/uscode/expand/title18_partII_chapter227_subchapterC_section3571

²² No. C 09-00110 SI, 2011 WL 2837418

²³ US DoJ, Antitrust Division, Criminal Enforcement Trends Charts (through Fiscal Year 2025, updated 4 December 2025): <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>

accounts for roughly half of the DoJ Antitrust Division's open criminal investigations.

B. Canada

188. In Canada, there are three *per se* cartel offences under the Competition Act, R.S.C. 1985, c. C-34 (“**the Competition Act 1985**”):

188.1. **Section 45(1)** criminalises three types of hard-core cartel conspiracy (e.g., price fixing, market allocations, or supply/output restriction) between competitors;

188.2. **Section 45(1.1)** criminalises the same in the employment context; and

188.3. **Section 47(2)** criminalises bid-rigging.

B1. Legislative History

189. In force from 12 March 2010, the Budget Implementation Act 2009 outlined the modern form of Canada's criminal cartel provision. It created a “two-track regime”: a *per se* criminal offence under section 45 for hard-core cartels, and a civil review track under section 90.1 for other competitor agreements. The previous section 45 had required proof that the agreement lessened competition “*unduly*” together with objective and subjective intent elements; the amendments dispensed with the need to prove any anti-competitive effects on the market.²⁴

190. Starting from 23 June 2023, under the Budget Implementation Act, 2022, No. 1, the Canadian government has further amended the Competition Act. The relevant amendments are as follows:

²⁴ E Davis and M Liu, ‘*Criminal conspiracy enforcement trends under Section 45 of the Competition Act*’ (Canadian Bar Association) (“Davis & Liu”).

190.1. Increased monetary penalties: The monetary penalties imposed under **section 45(2)** have been changed from CAD\$25 million limit to at the discretion of the Court;²⁵ and

190.2. Addition of section 45(1.1): Wage-fixing and no-poaching agreements between unaffiliated employers are criminally prohibited.

B2. Cartel Offences and Hard-core Cartel Conspiracies (Section 45(1))

B2.1. Elements of the Section 45(1) Offence

191. The relevant parts of the provisions under section 45(1) of the Competition Act 1985 are set out as follows:

“Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.”

192. The elements of section 45(1) are: **(1)** agreement, **(2)** competitor, and **(3)** three types of prohibited agreements.²⁶

193. Concerning **the Agreement Element**, the Competition Bureau treats the question as whether there was a “*meeting of the minds*” between the parties, whether reached explicitly or tacitly. Formality, enforceability, and implementation of the agreement are all irrelevant: the offence is complete at

²⁵ <https://competition-bureau.canada.ca/en/guide-2022-amendments-competition-act>.

²⁶ <https://competition-bureau.canada.ca/en/how-we-foster-competition/education-and-outreach/competitor-collaboration-guidelines#sec02-1> (“CCG”).

the moment of agreement, and it is a continuing offence for the duration of the conspiracy. Additionally, mere “conscious parallelism” (i.e. independently adopting similar conduct with awareness of competitors’ likely responses) is **not** of itself an agreement; but parallel conduct coupled with *facilitating practices* (e.g., exchanging competitively sensitive pricing information or assisting competitors to monitor each other’s prices) may suffice to prove that an agreement was concluded. Pursuant to **section 45(3)**, the agreement may be inferred from circumstantial evidence, with or without direct evidence of communication, but must in any event be proved beyond a reasonable doubt.²⁷

194. Concerning **the Competitor Element**, “*competitor*” is defined as including a person who is reasonable to believe would likely to compete with respect to the product in the absence of the impugned agreement (i.e. include both actual and potential competitors): **section 45(8)**. To establish so does not require a detailed analysis; it suffices if the parties are offering or would likely offer the product.²⁸

195. Concerning **the three Prohibited Agreements**, namely price fixing, market allocations, or supply/output restrictions:

195.1. As for price fixing, “price” is defined as including “*any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product*”: **section 45(8)**. It covers agreements on any component of price (e.g., surcharges or credit terms) and agreements on the means of establishing prices, such as using a common pricing algorithm, formula, or price list (i.e. actual price is not required).²⁹ Notably, it applies only to the price for the **supply** of a product: **section 45(1)(a)**.

²⁷ CCG, §2.2.

²⁸ CCG, §2.3.1.

²⁹ CCA, §2.4.1.

- 195.2. As for market allocation, section 45(1)(b) covers all forms of allocation of sales, territories, customers, or markets between actual or potential competitors, including agreements not to compete for particular customers, regions, or segments, whether as to direct or indirect sales;³⁰ and
- 195.3. As for supply/output restriction, section 45(1)(c) covers agreements fixing or controlling production or supply by any means, including production quotas, plant closures, and reductions in the quantity or quality of products supplied.³¹

B2.2 Penalties for the Section 45(1) Offence

196. Pursuant to **section 45(2)**, every person who commits an offence under **section 45(1)** is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding **14 years** or to a fine in the discretion of the court, or to both.³²

B3. Cartel Offences Concerning Bid-Rigging (Section 47)

B3.1 Elements of the Section 47 Offence

197. Bid-rigging is a distinct offence in Canada under **section 47** of the Competition Act.
198. Under **section 47(1)**, bid-rigging is defined as:

“Definition of bid-rigging

47 (1) In this section, bid-rigging means

³⁰ CCG, §2.4.2.

³¹ CCG, §2.4.3.

³² Prior to the 2022 Amendments, the fine was previously capped at CAD\$25 million.

- (a) *an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or*
- (b) *the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,*
- where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.”*

199. The elements are: **(1)** an agreement or arrangement between two or more persons; **(2)** not to submit a bid, to withdraw a bid, or to submit bids arrived at collusively; and **(3)** **non-disclosure** of the agreement to the person calling for bids at or before the time of submission or withdrawal. Notably, non-disclosure is the gist of this offence since disclosed arrangements fall outside the offence entirely (although a disclosed bid consortium may still be reviewed civilly under section 90.1).

200. Notably, where an agreement between competitors is limited to bid-rigging, the Bureau will generally assess it under section 47 and not section 45.³³

B3.2 Penalties for the Section 47 Offence

201. Pursuant to **section 47(2)**, every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding **14 years**, or to both.

³³ CCG §1.2(d).

202. Between January 2014 and March 2025, the Competition Bureau in Canada disclosed 23 cartel cases, resulting in at least 52 criminal convictions. Among the convictions, 43 were convicted under section 47 for bid-rigging.

C. United Kingdom

203. In the United Kingdom (“UK”), the relevant cartel offence is set out in **Section 188** of the Enterprise Act 2002 (“EA 2002”), which criminalises individuals who agree to cartel conduct, including price-fixing, supply/output restriction, market sharing, and bid-rigging.

204. Prior to 2003, cartel conduct could only be “criminalised” if they were accompanied by aggravating factors. As held by the House of Lords in *Norris v Government of the United States of America* [2008] UKHL 16, price fixing without more did not amount to conspiracy to defraud at common law. However, cartel conduct could be encapsulated by the offence of conspiracy to defraud if it was accompanied by aggravating features such as deliberate misrepresentation or deception.

205. Starting from 20 June 2003, the EA 2002 has introduced cartel offences at section 188. Originally, section 188 required proof that the defendant acted “dishonestly” in its cartel conduct, which served as a significant obstacle to prosecution given the requirements of the *Ghosh* test (which is still applicable in Hong Kong).

206. Starting from 1 April 2014, a revised criminal cartel offence was implemented by the Enterprise and Regulatory Reform Act 2013. In gist, section 188 was amended as follows:

206.1. **First**, it removed the dishonesty requirement;

206.2. **Second**, it inserted **section 188A**, excluding certain arrangements from the offence altogether, i.e. where relevant information **(i)** has been given to customers; **(ii)** for bid-rigging, has been given to the

person requesting bids; or (iii) has been published in the London, Edinburgh or Belfast Gazette before the arrangements are implemented, as well as arrangements made to comply with a legal requirement; and

- 206.3. **Third**, it created **section 188B**, laying down three defences where the individual (i) did not intend the arrangements to be concealed from customers; (ii) did not intend the arrangements to be concealed from the Competition and Markets Authority (“CMA”); or (iii) took reasonable steps to ensure the arrangements were disclosed to professional legal advisers for advice before their making or implementation.³⁴

C1. Cartel Offences (Section 188 of the 2002 Act)

C1.1. Elements of the Section 188 Offence

207. The relevant parts of Section 188 of the EA 2002 which sets out the elements of the UK cartel offences are as follows:

“188. Cartel Offence

- (1) An individual is guilty of an offence if he... agrees with one or more other persons to make or implement, **or** to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings (A and B).*
- (2) The arrangements must be ones which, if operating as the parties to the agreement **intend**, would –*
 - (a) directly or indirectly fix a price for the supply by A in the United Kingdom (otherwise than to B) of a product or service,*
 - (b) limit or prevent supply by A in the United Kingdom of a product or service,*

³⁴ Enterprise and Regulatory Reform Act 2013, s 47; Enterprise Act 2002, ss 188A–188B; Whish & Bailey, Competition Law (10th ed.), ch 10.

- (c) *limit or prevent production by A in the United Kingdom of a product,*
- (d) *divide between A and B the supply in the United Kingdom of a product or service to a customer or customers,*
- (e) *divide between A and B customers for the supply in the United Kingdom of a product or service, or*
- (f) *be bid-rigging arrangements.” (“emphasis added”)*

208. The elements of section 188 of the EA 2002 are listed as follows:

208.1. Actus Reus: (1) The individual agrees with one or more other persons; (2) to make or implement, or to cause to be made or implemented, arrangements; (3) relating to at least two undertakings (A and B); (4) of a kind falling within section 188(2)(a)–(f) (i.e. price-fixing, supply/output limitation, market sharing, or bid-rigging); and (5) except for market sharing and bid-rigging under section 188(2)(d)–(f), the arrangements must be *reciprocal* as between A and B: section 188(3). Notably, the offence is complete upon the agreement being made — the arrangements need not be implemented.

208.2. Mens Rea: The individual *intentionally* agreed to make or implement (or cause to be made or implemented) the arrangements, **and** that the arrangements would, *if operating as the parties intend*, have one of the effects in section 188(2).

209. Specifically, for “*bid-rigging arrangements*”, it is defined under **section 188(5)** of the EA 2002:

“(5) ‘*Bid-rigging arrangements*’ are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom —

- (a) *A but not B may make a bid, or*

- (b) *A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements.”*

C1.2. Penalties for the Section 188 Offence

210. Section 190(1) of the EA 2002 outlines the penalty for individuals contravening section 188 of the EA 2002.
211. In gist, for individuals on conviction on indictment, they are liable to imprisonment for up to five years and/or an unlimited fine: **section 190(1)(a)**; whereas on summary conviction, they are liable to imprisonment for up to six months and/or an unlimited fine: **section 190(1)(b)**.
212. Individual, being a director of a company that breaches competition law, may additionally be disqualified from acting as a company director for up to 15 years: see section 204 of the EA 2002 and section 9A of the Company Directors Disqualification Act 1986.³⁵

C1.3. Enforcement Record for the Section 188 Offence

213. The first successful prosecution under section 188 was the *Marine Hose* case (*R v Whittle, Allison and Brammar* [2008] EWCA Crim 2560), in which three individuals were imprisoned for bid-rigging and price-fixing following guilty pleas. The case remains unique in that the defendants had first pleaded guilty in the US under US plea bargains.³⁶
214. However, subsequent enforcement has been notably less successful (without a plea of guilty).³⁷

³⁵ <https://www.legislation.gov.uk/ukpga/1986/46/section/9A>

³⁶ OECD, Criminalisation of Cartels and Bid Rigging Conspiracies: A Focus on Custodial Sentences, DAF/COMP/WP3(2020)1 (“**OECD Criminalisation Paper**”), [https://one.oecd.org/document/DAF/COMP/WP3\(2020\)1/en/pdf?_cf_chl_f_tk=VrPH5MAi1TbHi7tMEjcl0mDEpIQ5vaV5nuIVjRGV1xE-1783354017-1.0.1.1-eeermoy9U8y07yhTFGVuPzIQxoLTZucPkr4DQcna09ds](https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf?_cf_chl_f_tk=VrPH5MAi1TbHi7tMEjcl0mDEpIQ5vaV5nuIVjRGV1xE-1783354017-1.0.1.1-eeermoy9U8y07yhTFGVuPzIQxoLTZucPkr4DQcna09ds), §46 and Box 10.

³⁷ https://www.gov.uk/cma-cases?outcome_type=criminal-cartels-verdict

215. Prior to the 2014 Reform, there were two cases:
- 215.1. In the *Air Passenger Fuel Surcharges* case (*R v George, Burns, Burnett and Crawley* [2010] EWCA Crim 1148), the trial against former British Airways executives collapsed in 2010 on evidential/disclosure grounds,³⁸ reflecting the difficulty of criminal prosecution under the beyond-reasonable-doubt standard;
- 215.2. In the *Galvanised Steel Tanks* case (*R v Stringer and Dean* CE/9623/12), one individual pleaded guilty and received a suspended sentence of imprisonment with community service, while two other individuals who contested the charge were acquitted by the jury for want of “dishonesty”.³⁹
216. After the 2014 Reform (i.e. the abolition of “dishonesty” element), in the *Supply of precast concrete draining products* case (*R v Cooper* CE/9705/12), the defendant pleaded guilty and was sentenced to two years’ imprisonment suspended for two years, a six-month curfew order, and seven years’ director disqualification. As for other individuals, the CMA concluded there was insufficient evidence.⁴⁰
217. To date, there has been **no** conviction after a fully contested trial; custodial sentences have been imposed in only two cases, both following guilty pleas.⁴¹

D. Australia

218. In Australia, cartel conduct is criminalised under the Competition and Consumer Act 2010 (“CCA 2010”) as an indictable offence at:

³⁸ <https://www.gov.uk/cma-cases/air-passenger-fuel-surcharge-criminal-cartel-investigation>

³⁹ <https://www.gov.uk/government/news/cma-statement-following-completion-of-criminal-cartel-prosecution>

⁴⁰ <https://www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage>

⁴¹ OECD Criminalisation Paper, §46 (United Kingdom).

218.1. Sections 45AF, 45AG against corporations for making and giving effect to a contract, arrangement, or understanding containing a cartel provision); and

218.2. Section 79 against individuals for accessorial liability in relation to sections 45AF, 45AG.

D1. Legislative History

219. The Australian cartel offences were inserted into Part IV of the Trade Practices Act 1974 by the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 on 24 July 2009. The cartel offences were numbered as sections 44ZZRF and 44ZZRG. Following the Competition and Consumer Amendment (Competition Policy Review) Act 2017, they were renumbered to sections 45AF and 45AG.

220. The legislative intent was to combat serious cartel conduct as they are “*the most egregious violations of competition law*”.⁴²

D2. Cartel Offences against Corporations (Sections 45AF & 45AG)

D2.1. Elements of the Section 45AF & 45AG Offences

221. The elements of the cartel offences are set out under sections 45AF(1) and 45AG(1) respectively:

“45AF Making a contract etc. containing a cartel provision
Offence

(1) A corporation commits an offence if:

(a) the corporation makes a contract or arrangement, or arrives at an understanding; and

⁴² Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (“**Australia Cartel Offences Bill**”), §§1.2-1.4.

(b) the contract, arrangement or understanding contains a cartel provision.

...

(2) The fault element for paragraph (1)(b) is knowledge or belief.

...

45AG Giving effect to a cartel provision

Offence

(1) A corporation commits an offence if:

(a) a contract, arrangement or understanding contains a cartel provision; and

(b) the corporation gives effect to the cartel provision.

...

(2) The fault element for paragraph (1)(a) is knowledge or belief.

...”

222. The first element is making (section 45AF) or giving effect to (section 45AG) a contract, arrangement, or understanding containing a cartel provision.

223. In this connection, “cartel provision” is defined as a provision that (i) either has the purpose/effect condition or the purpose condition and (ii) the competition condition: section 45AD of the CCA 2010:

223.1. Concerning (i), the “purpose/effect condition” is satisfied if the provision has the purpose or is likely to have had the effect of price fixing in relation to goods or services to be supplied or acquired by any of the parties: section 45AD(2).

223.2. The “purpose condition” is satisfied if the provision has the purpose of (1) products, capacity, or supply prevention, restriction, or limitation; (2) customer or suppliers’ allocation; (3) bid-rigging: section 45AD(3).

- 223.3. Concerning (ii), the competition condition required the parties to be or likely to be in competition in relation to the supply or acquisition of the relevant goods or services: section 45AD(4).
224. The second element is the fault element which requires the corporation to have “knowledge or belief” that the contracts etc. contains a cartel provision.
225. While both sections share common elements, it is noted that unlike section 45AF, section 45AG does not require the corporation itself to have been a party to the making of the contract etc.

D2.2. Penalties for the Section 45AF & 45AG Offences

226. The relevant provisions are set out under sections 45AF(3) and 45AG(3), which shares the same wording:

“Penalty

- (3) *An offence against subsection (1) is punishable on conviction by a fine not exceeding the greater of the following:*
- (a) *\$100,000,000;*
 - (b) *if the court can determine the total value of the benefits that:*
 - (i) *have been obtained by one or more persons; and*
 - (ii) *are reasonably attributable to the commission of the offence; 3 times that total value;*
 - (c) *if the court cannot determine the total value of those benefits—30% of the corporation’s adjusted turnover during the breach turnover period for the offence.”*

D3. Cartel Offences against Individuals (Section 79)

227. Elements: Individuals could be liable to accessorial liability (e.g., attempt, aiding and abetting) to sections 45AF and 45AG under section 79, the relevant sub-sections are set out as follows:

“79 Offences against section 45AF or 45AG

- (1) *A person who:*
- (aa) *attempts to contravene; or*
 - (a) *aids, abets, counsels or procures a person to contravene; or*
 - (b) *induces, or attempts to induce, a person (whether by threats or promises or otherwise) to contravene; or*
 - (c) *is in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of; or*
 - (d) *conspires with others to contravene;*
- a cartel offence provision is taken to have contravened that provision...*”

228. Penalty: Individuals being held liable to the above is punishable:

“a cartel offence provision is taken to have contravened that provision and is punishable:

- (e) *in a case where:*
- (i) *the provision is a cartel offence provision; and*
 - (ii) *the person is not a body corporate;*
- by a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units, or both; or*
- (f) *in any other case — accordingly.”*

D4. Enforcement of the Australian Cartel Offences

229. Notwithstanding criminalisation in 2009, the first criminal conviction under section 45AG took place in 2017 in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876. In that case, the defendant pleaded guilty to giving effect to cartel provisions relating to price fixing, bid-rigging, and customer allocation in respect of shipping services supplied to ten major vehicle manufacturers.

E. Ireland

230. In Ireland, cartel conduct is criminalised under **sections 4(1) and 6** of the Competition Act 2022 (“**the 2002 Act**”), as most recently amended by the Competition (Amendment) Act 2022 (“**the 2022 Act**”).
231. Criminal cases are investigated by the Competition and Consumer Protection Commission (“**CCPC**”) and prosecuted on indictment by the Director of Public Prosecutions (“**DPP**”) through the Irish courts.

E1. Legislative History

232. The 2002 Act prohibits, in terms mirroring Article 101(1) of the Treaty on the Functioning of the European Union, agreements, decisions, and concerted practices having as their object or effect the prevention, restriction, or distortion of competition (section 4(1)), and criminalises breaches thereof (section 6). Criminal penalties were strengthened by the Competition (Amendment) Act 2012, under which individuals convicted on indictment of hard-core cartel offences became liable to a maximum of **10 years’** imprisonment.⁴³
233. The 2022 Act, transposing the ECN+ Directive (Directive (EU) 2019/1), made four principal changes:⁴⁴
- 233.1. Increased criminal fines: The maximum fine on conviction on indictment was raised to the greater of **€50 million or 20%** of turnover in the financial year ending in the 12 months prior to conviction;

⁴³ Whish & Bailey, Competition Law (10th ed.), ch 10 (citing the Competition (Amendment) Act 2012 (Ireland) among cartel criminalisation statutes); OECD Criminalisation Paper, §42 (Ireland).

⁴⁴ OECD, Annual Report on Competition Policy Developments in Ireland, DAF/COMP/AR(2024)17 (“OECD Ireland Report”), §§8–14.

- 233.2. Express criminalisation of bid-rigging: Section 4(1)(f) now expressly lists agreements “*concerned with bid-rigging*”, where previously bid-rigging was only implicitly covered;
- 233.3. A parallel administrative track: Breaches may now also be enforced through administrative actions with fines of up to €10 million or 10% of worldwide turnover, subject to High Court confirmation; and
- 233.4. Leniency: A new leniency programme (with a marker system) operating in parallel with the existing Cartel Immunity Programme run with the DPP.

E2. Irish Cartel Offences

E2.1. Elements of the Irish Cartel Offences

234. The elements of the offence are set out under **section 6(1)** of the 2002 Act:

“An undertaking that—

- (a) enters into, or implements, an agreement,*
- (b) makes or implements a decision, or*
- (c) engages in a concerted practice, that is prohibited by section 4(1) or by Article 101(1) of the Treaty on the Functioning of the European Union, and that —*
 - (i) intentionally or recklessly acts to prevent, restrict or distort competition, or*
 - (ii) intentionally or recklessly makes omissions having the effect of preventing, restricting or distorting competition, shall be guilty of an offence.”*

235. The underlying prohibition is set out under **section 4(1)**:

“Subject to the provisions of this section, all agreements between undertakings, decisions by associations of undertakings and concerted practices which have

as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State or in any part of the State are prohibited and void, including in particular; without prejudice to the generality of this subsection, those which —

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions,*
- (b) limit or control production, markets, technical development or investment,*
- (c) share markets or sources of supply,*
- (d) apply dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage,*
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject of such contracts, or*
- (f) are concerned with bid-rigging.”*

236. The elements of the offence are as follows:

236.1. Actus Reus: **(1)** An undertaking; **(2)** enters into or implements an agreement, makes or implements a decision, or engages in a concerted practice; and **(3)** that is prohibited by section 4(1) or Article 101(1) TFEU — i.e. having as its object or effect the prevention, restriction, or distortion of competition, including expressly price fixing (section 4(1)(a)), output limitation (section 4(1)(b)), market sharing (section 4(1)(c)), and bid-rigging (section 4(1)(f));

236.2. Mens Rea: The undertaking must **intentionally or recklessly** act to prevent, restrict, or distort competition, or intentionally or recklessly make omissions having that effect: **section 6(1)(i)–(ii)**. No dishonesty or intent to defraud is required. It is noted that the OECD

accordingly classifies Ireland among jurisdictions not imposing a strict mens rea requirement.⁴⁵

E2.2. Penalties for the Irish Cartel Offences

237. The penalties for hard-core cartel offences are set out under **section 8(1)** of the 2002 Act (as amended by the 2022 Act):

“(1) An undertaking guilty of an offence under section 6 (being an offence involving an agreement, decision or concerted practice to which subsection (2) of that section applies) shall be liable —

(a) on summary conviction —

- (i) in the case of an undertaking that is not an individual, to a class A fine or*
- (ii) in the case of an individual, to such a fine or to imprisonment for a term not exceeding 6 months or to both such fine and such imprisonment,*

(b) on conviction on indictment —

- (i) in the case of an undertaking that is not an individual, to a fine not exceeding the greater of €50,000,000, or 20 per cent of the turnover of the undertaking in the financial year ending in the 12 months prior to the conviction, or*
- (ii) in the case of an individual, to a fine not exceeding whichever of the following amounts is the greater, namely, €50,000,000, or 20 per cent of the turnover of the individual in the financial year ending in the 12 months prior to the conviction or to imprisonment for a term not exceeding 10 years or to both such fine... and such imprisonment.”*

238. In gist, for **undertakings** (that are not individuals), the maximum is a fine of the greater of €50 million or 20% of turnover; for **individuals**, the same maximum fine and/or imprisonment for up to **10 years** on indictment (or up to

⁴⁵ OECD Criminalisation Paper, §67.

six months on summary conviction). It is further noted that the Probation of Offenders Act 1907 is expressly disappplied: **section 8(11A)**.

E3. Enforcement of the Irish Cartel Offence

239. There are currently five cartel cases (all defendants are convicted) available on the CCPC's website.⁴⁶

240. Before the 2002 Act, there were two cartel prosecutions in which all defendants are convicted.

240.1. The *Citroën Dealers Association Cartel* case (2002)⁴⁷ (*DPP v Patrick Duffy*)⁴⁸ was a price fixing case regarding the prices of vehicles. The outcome is that all defendants pleaded guilty.

240.2. The *Home Heating Oil Cartel* case (2003)⁴⁹ (*DPP v Pat Hegarty*)⁵⁰ was a price fixing case regarding retail prices of home heating oil. The outcome is that all the defendants were all convicted (by jury conviction and guilty plea).

241. After the 2002 Act,

241.1. In the *Ford Dealer Cartel* case (2004), the defendant (as a facilitator) was convicted of aiding and abetting a cartel within the Irish Food

⁴⁶ <https://www.ccpc.ie/enforcement-and-regulation/competition-law/competition-cases>

⁴⁷ <https://www.ccpc.ie/enforcement-and-regulation/competition-law/competition-cases/details/members-of-citro%C3%ABn-dealers-association-cartel-convicted-of-price-fixing>

⁴⁸ https://assets.ccpc.ie/data/docs/default-source/enforcement-and-regulation/competition-law/competition-cases/ccpc-dpp-v-patrick-duffy-judgement.pdf?sfvrsn=d79ce6bf_3

⁴⁹ <https://www.ccpc.ie/enforcement-and-regulation/competition-law/competition-cases/details/members-of-home-heating-oil-cartel-convicted-of-price-fixing>

⁵⁰ https://assets.ccpc.ie/data/docs/default-source/enforcement-and-regulation/competition-law/competition-cases/ccpc-dpp-v-pat-hegarty-judgement-transcript.pdf?sfvrsn=56952bd5_3

Dealers Association relating to the distribution of guide prices for vehicles to its members.⁵¹

241.2. The *Commercial Flooring Cartel* case (2014) symbolises the **first** bid-rigging conviction with all two defendants pleaded guilty.⁵²

241.3. The *School Transport Cartel* case (2016) was a bid-rigging case regarding the publicly funded school transport services. All the defendants were convicted by jury for contravening sections 4 and 6 of the Competition Act.⁵³

F. South Korea

242. Cartel conduct is governed in South Korea by The Monopoly Regulation and Fair Trade Act (“MRFTA”).

243. In particular, regarding cartel conduct (which includes price fixing, bid rigging, and market sharing conduct) (Chapter IV), unless falling within a very narrow exception (prescribed by Presidential Decree and requiring prior authorisation from the Fair Trade Commission), will be met with penalty surcharges not exceeding 10% of the sales, and a penalty not exceeding 2 billion won in the event no sales have been made. Meanwhile, any person who engages in illegal cartel conduct or requires a business entity to engage in illegal cartel conduct would be subject to imprisonment for not more than three years or by a fine not exceeding 200 million won.

F1. Elements of the South Korea Cartel Offences

244. First, Cartel Conduct is defined under Article 19 of the MRFTA as:

⁵¹ <https://www.ccpc.ie/enforcement-and-regulation/competition-law/competition-cases/details/ford-dealer-cartel-conviction>

⁵² <https://www.ccpc.ie/enforcement-and-regulation/competition-law/competition-cases/details/commercial-flooring-cartel-conviction>

⁵³ <https://www.ccpc.ie/enforcement-and-regulation/competition-law/competition-cases/details/school-transport-cartel>

“Article 19 (Prohibition on Illegal Cartel Conduct) (1) A business entity shall neither agree with any other business entity to jointly do the following acts that unfairly restrict competition (hereinafter referred to as "illegal cartel conduct") nor require any other business entity to engage in such illegal cartel conduct under contract, agreement, or arrangement or in any other manners: <Amended by Act No. 4513, Dec. 8, 1992; Act No. 4790, Dec. 22, 1994; Act No. 5235, Dec. 30, 1996; Act No. 5813, Feb. 5, 1999; Act No. 7315, Dec. 31, 2004; Act No. 8631, Aug. 3, 2007>

- 1. Determining, maintaining, or changing prices;*
- 2. Determining terms and conditions for the transactions of goods or services, or for payments thereof;*
- 3. Imposing limitations on production, delivery, transportation, or transaction of goods or limiting transaction of services;*
- 4. Imposing limitations on the area in which it can make transactions or transaction partners;*
- 5. Hindering or imposing limitations on the establishment or extension of facilities or the installation of equipment necessary to produce goods or to provide services;*
- 6. Imposing limitations on kinds of, and standards for, goods or services to be produced or traded;*
- 7. Jointly conducting and managing substantial business activities or establishing a company, etc. to jointly conduct and manage such substantial business activities;*
- 8. Agreeing on a successful bidder, successful auctioneer, bidding price, successful tender or bid price, and other matters prescribed by Presidential Decree in a bidding or auction;*
- 9. Any act substantially restricting competition in a particular business area by means of hindering or imposing limitations on the business activities or business of other business entities (including the business entities that has done such act), other than the acts provided for in subparagraphs 1 through 8.”*

245. Simply put, business entities are prohibited from agreeing with any other business entities to jointly do any of the stipulated acts, or requiring any other business entities to engage in such conduct under any manner.

F2. Penalties for the South Korean Cartel Offences

246. Should any business entity be in contravention of Article 19, the Fair Trade Commission may impose a penalty surcharge not exceeding 10% of their sales, or a penalty surcharge not exceeding 2 billion won in the event no sales have been made (Article 22).
247. Should an individual engage in illegal cartel conduct, or require a business entity to engage in illegal cartel conduct in violation of Article 19, they shall be punished by imprisonment for not more than three years or by a fine not exceeding 200 million won (Article 66).

F3. Enforcement of the South Korean Cartel Offences

248. The Korea Fair Trade Commission has consistently brought charges against corporations in contravention of anti-competition laws.
249. Recent examples include:
- 249.1. On 13 February 2026, surcharges totalling 408.3 billion won were imposed on three sugar manufacturers and sellers for agreeing on, and implementing, the timing and magnitude of price increase and decrease in sugars being sold to beverage and confectionary manufacturers for a period of more than four years.
- 249.2. On 7 July 2026, it was announced that four manufacturers of starch and starch sweeteners were caught fixing prices for more than seven years, and have been fined 747.6 billion won by the Korea Fair Trade Commission (around HK\$3.852 billion).

G. Japan

250. Cartel conduct is governed in Japan by the Antimonopoly Act.

G1. Elements of the Japanese Cartel Offences

251. Article 2(6) of the Antimonopoly Act defines unreasonable restraint of trade, which covers:

“(6) The term ‘unreasonable restraint of trade’ as used in this Act means such business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.”

252. Article 3 prohibits any enterprise from effecting unreasonable restraint of trade:

“An enterprise must not effect private monopolization or unreasonable restraint of trade.”

G2. Penalties for the Japanese Cartel Offences

253. Under Article 7(2), if an enterprise effects unreasonable restraint of trade which is related to the price of goods, services, or substantially restrains supply or purchase volume, market share, or transaction counterparties with respect to goods or services and thereby affects their price, the Fair Trade Commission must order the enterprise to pay to the national treasury a surcharge of 4–10% of their income which is closely related to the violation, depending on the individual circumstances of the corporation.

254. Meanwhile under Article 89(1), any individual who is found to have violated Article 3, i.e. effected unreasonable restraint of trade, is subject to

imprisonment with work for not more than five years, or by a fine of not more than 5 million yen.

G3. Enforcement of the Japanese Cartel Offences

255. In recent years, the Japan Fair Trade Commission has issued surcharge payment orders in various cases where Article 3 of the Antimonopoly Act has been contravened, for example:

255.1. On 14 May 2025, surcharge payment orders were issued against manufacturers and distributors of sesame oil and food sesame for jointly agreeing to raise the delivery price of sesame oil, thus restricting competition in the market. They were fined in excess of 21 million yen.⁵⁴

255.2. On 14 March 2024, surcharge payment orders were issued against participants in biddings for the Official Gazette Paper ordered by the National Printing Bureau due to being found to have conspired and agreed to have decided on a prospective winner and to bid at prices allowing the winners to win the biddings. The surcharge amount was 16.4 million yen.⁵⁵

⁵⁴ https://www.jftc.go.jp/houdou/pressrelease/2025/may/250514_sanjo.html

⁵⁵ <https://www.jftc.go.jp/en/pressreleases/yearly-2024/March/240314.html>

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Tai Po Fire Taskforce on Law Review

Coordinator: Martin Wong SC

Deputy Coordinator: Isaac Chan

Members:

Martin Hui SC	(Criminal Law Section)
Tim Parker SC	(Competition Law Section)
Teresa Wu	(Building Management / Incorporated Owners Section)
Julian Cohen	(Construction Law Section)
Alex Fan	(Special Consultant)
Leticia Tang	(Competition Law Section)

Supporting Members:

Jacqueline Law	(Building Management / Incorporated Owners Section)
Lawrence Pang	(Criminal Law Section)
Kasper Fan	(Criminal Law Section)
Jason Fee	(Building Management / Incorporated Owners Section)
Sean O'Reilly	(Criminal Law Section)

General Editor: P.Y. Lo

Special Thanks:

Competition Commission	
José-Antonio Maurellet SC	(Chairman, HKBA)
Catrina Lam SC	(Co-Chairman, Committee on Competition Law, HKBA)
Alexander Tang	(Deputy Honorary Secretary, HKBA)

<i>The Bar Secretariat:</i>	Chiu Lai Yu Bonnie	Karen Koo
	Amy Lee	Judith Liu
	Melody Lau	Jason Cheng
	Connie Yau	Karin Ip
	Angie Lo	Kelly Lau
	Crystal Lau	