



5 February 2007

Miss Eva Cheng, JP  
Permanent Secretary for Economic Development and Labour  
Economic Development Branch (Division A)  
2/F, Main Wing, Central Government Offices  
Lower Albert Road  
Central, Hong Kong

Dear Miss Cheng,

### **Submission on Hong Kong Competition Policy**

I am the Chief Executive of LEXTON ASIA, a Hong Kong-based regulatory consulting firm that specializes in competition law and economic regulation projects.

I am grateful for this opportunity to submit my views on Hong Kong's future competition policy. Having worked in the area of competition policy and law enforcement for over 15 years, both as a competition official and in private practice in Hong Kong and overseas, I have a long-standing professional interest in these issues.

The aspects of the present consultation that I consider most challenging include:

- Identifying the changes and consequential effects that are likely to – or should – accompany the introduction of new competition law in Hong Kong, if this is the decision ultimately taken by the Government;
- Drafting an effective regulatory framework for any new law, with particular reference to previous experience in the telecommunications and broadcasting sectors as well as overseas precedents;
- Understanding the central role of competition officials in ensuring the success of any new law and the need for enforcement priorities to facilitate better and more focused use of resources;

- Optimising the functions of the courts and appellate bodies within an efficient regulatory hierarchy that encourages good regulatory decision-making;
- Managing the expectations of consumers and, in this context, considering how the Consumer Council might play its part in the changing policy environment; and
- Encouraging businesses to look after their own interests and in the process ensure that Hong Kong gets the best possible results should it proceed to introduce new competition laws.

The opinions expressed in this submission, which are adapted from my own personal weblog on Hong Kong competition law,<sup>1</sup> are not necessarily held by any of my colleagues or clients – although their generous insights have enhanced my understanding of key issues.

I should be very pleased to follow up on any aspect of this submission or provide further information as requested.

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## **Introduction**

The advocates of more competition law talk about the prospects of real and substantial efficiency gains for the Hong Kong economy. This potentially means lower prices for consumers and improved competitiveness for local businesses in international markets.

But these benefits will not result automatically from the passing of new competition laws alone. Much more is needed, not just from the Government, but also from law enforcement officials, the courts (and appellate bodies), consumer groups and the business community.

The ever-present risk will be that even with the best intentions, new competition laws could misfire, cooling the competitive drive of key industry players and becoming a brake on the economy.

If the Government does intend to introduce new competition laws, we must focus on how to make such laws work for Hong Kong so that we enjoy the promised benefits and minimize the potential downsides.

Lower prices and more efficient business practices are the ideal, but these goals lie at the end of a pathway strewn with traps and obstacles that threaten to slow reform and in some instances to punish efficient business behaviour.

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<sup>1</sup> [www.hkcomplaw.wordpress.com](http://www.hkcomplaw.wordpress.com)

In this submission I describe what I see as the key challenges for various sections of our community as we move into a new era of economic and industrial policy in Hong Kong. I have chosen to look in turn at the roles, responsibilities and expectations of the Government, competition officials, our courts (and appellate bodies), consumers and businesses.

## 1. The Government

The Government must ensure that any further competition laws introduced into Hong Kong are truly state-of-the-art by building thoughtfully on the achievements and lessons learned in other leading jurisdictions as well as in our own telecommunications and broadcasting sectors where competition laws already exist.

In my opinion, this means – as a minimum – ensuring that we incorporate into any future competition law framework the following elements:

- **Few if any *per se* offences so as to avoid an overly mechanical approach to law enforcement.**

There are many examples in other jurisdictions where *per se* or strict liability prohibitions have become little more than a means for competition authorities to obtain victories in cases which, if competition-tested, they would struggle to win.

This is rarely a reflection of the evidentiary difficulties involved and more because competition officials are unable to mount compelling economic arguments as to why certain practices should be prohibited.

*Per se* offences offer a convenience that over time weakens the ability of competition officials to grapple with the commercial realities of how markets really work. They are an easy fix that can bring otherwise balanced competition laws into disrepute and lead to bad regulatory decisions.

That said, some *per se* offences may be worth considering where a strong presumption of illegality can be justified. Examples from other jurisdictions where practices like price-fixing and market sharing are prohibited on a strict liability basis (often with an efficiency or public interest defence available) are useful models.

However, relying too heavily on presumptions of this kind can too easily lead to lazy and inefficient regulatory enforcement.

- **An efficient and effective authorization process for recognizing and allowing socially desirable (though anti-competitive) conduct.**

Policy makers often talk of the importance of “harmony” within Hong Kong society. However, encouraging more competitive markets is more likely to lead to friction and injury than to encouraging a more comfortable existence.

As has been noted, “Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to ‘injure’ each other in this way.”<sup>2</sup>

Dynamic markets dislocate and disrupt the social order. Most of the time this results in increased productivity, greater choice and lower costs. But sometimes the benefits will not outweigh the harm. In these situations we need an override or “safety valve” mechanism to avoid the pursuit of competition at all costs.

I have spoken previously about the “overriding public need test” set down by Hong Kong’s Court of Final Appeal in its 2004 protection of the harbour decision,<sup>3</sup> and I commend it to the Government as a versatile and authoritative home-grown solution.

- **A clear statement of the law’s fundamental intent or purpose, whether this be the enhancement of economic efficiency, greater competition, consumer protection or something else.**

The importance of this requirement cannot be overstated. If the Government fails to make clear what its competition laws are intended to do and how they integrate with its broader economic and social policies, we risk conflicts and inconsistent decision-making resulting in increased business uncertainty.

Moreover, only when competition law makes sense within the broader policy environment does it have a chance of being effective.

My suggestion would be to include a section just following the preamble in any new competition law ordinance which states, “This is an Ordinance to enhance the welfare of the Hong Kong community through the promotion of competition.”

<sup>2</sup> *Queensland Wire Industries Proprietary Limited v. The Broken Hill Proprietary Company Limited* (1989) 167 CLR 177. This Australian High Court decision has been cited with approval in the Telecommunications Authority’s Merger Guidelines and Draft Competition Conduct Guidelines.

<sup>3</sup> *Town Planning Board v Society for the protection of the Harbour Limited* (Decision of the Court of Final Appeal, 9 January 2004), which I discussed in my presentation “*Protecting the Public Interest under a Hong Kong Competition Law*” at the Asian Competition Law & Policy Conference, 11 & 12 December 2006 in Hong Kong.

Notwithstanding its apparent simplicity, this statement is capable of taking into account instances where competition may *not* enhance our welfare thereby ensuring our competition policy remains subordinate to higher social and economic policies.

At the same time, this formulation makes clear that the legislation should only be used to deal with competition issues, which, in my opinion, is all it should be used for. An ordinance of this kind should not be seen as a tool to deal with distributional or social equity issues.

I discuss further below the interface between competition law and higher community values.

- **A competition authority staffed by experienced competition professionals with an appropriate degree of independence from Government.**

In some instances, deficiencies in the formal regulatory framework can be overcome or ameliorated by the actions of experienced and capable competition officials who possess a deeper understanding of their role.

The worst outcome would be officials that merely implement the letter of the law while undermining its spirit. Competition law cases are commonly ambiguous and subjective judgment is unavoidable.

This is no bad thing if a clear framework exists and sufficient accountability is built in. It is far worse to assume that all the thinking that ever needs to be done was done by the legislators that passed the law and now every complaint case can be filtered using a cookie-cutter approach.

Our competition officials will need to be able to explain their decisions with cogent reasoning and resist ever saying something is anti-competitive simply because that is what the law says. Such officials will need formal independence as well as independence of mind to withstand the pressures that will try to force them to adopt unoriginal thinking.

Turning to more technical issues, I am particularly concerned about the precise form of any new competition law, based on my experience with existing laws in the telecommunications and broadcasting sectors. I refer specifically to my previous appointments as a senior member of the Competition Affairs Branch of the Telecommunications Authority and as the *ex officio* Senior Competition Consultant (Economics) to the Broadcasting Authority.

In the Telecommunications Ordinance, there presently exists a complete set of competition laws extending from prohibitions against collusive behaviour to abuses of market power to anti-competitive mergers and acquisitions. Being sector-specific legislation, these prohibitions only apply to telecommunications licensees.

In my view, these laws are too complicated and reflect a mish-mash of approaches based on parts of laws from other jurisdictions. I would not recommend they be viewed as models for any new competition law.

Consider, for example, the first subsection of section 7L. It clearly states that abuses of dominance are prohibited following the EU model. However, unlike the EU approach the following four subsections introduce additional considerations and offer examples which, despite the continued use of the legal phrase “including, but not limited to,” only create confusion and uncertainty.

Without wanting to get too technical, it is far from helpful to include a deeming provision within such a broad prohibition (subsection 7L(4)), particularly when it has the effect of merely duplicating another prohibition (subsection 7K(1)). If conduct has the demonstrable purpose or effect of preventing or substantially restricting competition, it will always be pursued under section 7K (since there is no need to prove dominance) thereby rendering section 7L(4) redundant.

Additionally, trying to distinguish between ‘good’ and ‘bad’ price discrimination (see subsection 7L(5)(b)) is arguably too much detail for this kind of prohibition and only perpetuate outdated concepts. It is now widely acknowledged that most forms of discrimination are more likely to be efficient than harmful to competition.

Section 7K is generally consistent with overseas best-practice, yet it also suffers from an over-generous list of confusing examples, some of which are arguably in conflict with the general principles established in section 7K(1).

The prohibition against related-party transactions in section 7K(3)(c) – which featured prominently in the Telecommunication Authority’s 2004 investigations into service bundling at the Banyan Garden Estate at Cheung Sha Wan<sup>4</sup> – is directly at odds with approaches in most other countries where transactions within a corporate group are treated as non-events for most competition law purposes. Punishing inter-group activities is almost universally viewed as unnecessary interference.

Section 7P contains an incredible loophole arising from the fact that only acquisitions of shares can be investigated under this provision. Acquisitions of assets (as raised in

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<sup>4</sup> *Complaints about Arrangements for the Provision of Telephone and Internet Access Services at Banyan Garden Estate*, Office of the Telecommunications Authority, Case T261/03 CDN0173, July 2004.

connection with proposed deals involving PCCW Limited late last year<sup>5</sup>) are completely ignored, which is difficult to understand given that section 7P contains no less than 18 sub-sections. (Why do we even need so many sub-sections?)

Then there are the 15, 30 and 50% share acquisition thresholds in section 7P(16), which are both conceptually confusing and in practice wholly unhelpful. I am not aware of any other jurisdiction in the world that has codified this kind of mechanism.

The lack of any formal information gathering powers to assist with section 7P inquiries will inevitably lead to endless legal games and deficient regulatory decisions. A similar situation exists in relation to the other competition law provisions in the Ordinance which must rely on section 7I to require the provision of information.

Section 7I establishes the classic ‘catch 22’ situation of only allowing information requests for the purpose of ensuring a business’ compliance with the law. This means the Telecommunications Authority must have a “reasonable suspicion” of non-compliance before making a section 7I request. Yet such an assessment will often only be possible *after* the requested information has been reviewed.

Returning to section 7P, the economic test it uses is whether or not a merger or acquisition is likely to result in a substantial lessening of competition. This formulation is based on the Australian *Trade Practices Act 1974*, and inexplicably differs from the tests in sections 7K and 7N, which require either the prevention or substantial restriction of competition.

Section 7L is different again in that it deems preventions and substantial restrictions of competition to be sufficient, but not necessary, to establish a contravention. Ironically, as noted above, any time this kind of evidence is found, section 7K will be used, not section 7L.

The main problem with the Broadcasting Ordinance’s competition laws is their inflexibility and narrow focus, which I suspect reflects a mishandled intention to restrict the application of these laws to within the broadcasting sector. These problems are compounded by a “tick the box” approach adopted in the Broadcasting Authority’s investigation guidelines.

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<sup>5</sup> Initial offers were made by two investment bank consortia for the assets of PCCW Limited’s fixed-line telephone business. These offers were rejected after a consortium led by Mr Francis Leung bid for shares in the company. This bid, too, was ultimately rejected thereby precluding the need for any competition assessment by the Telecommunications Authority, which released its first official statement on 12 November 2006 and referenced a number of competition law provisions in the Telecommunications Ordinance – including section 7P. That statement is available at [www.ofta.gov.hk](http://www.ofta.gov.hk)

The prominence given to pre-defined markets in the sections 13 and 14 of the Ordinance as well as in the guidelines is despairingly inconsistent with the practices adopted in most other modern competition law jurisdictions.

In this respect, the following description of the “integrated approach” to competition analysis as adopted by the US Department of Justice (“DoJ”) and Federal Trade Commission (“FTC”) and other leading competition authorities (including OFTA) simply cannot be reconciled with the legislated and procedural approaches followed by the Broadcasting Authority, *vis*:

“... The [DoJ and FTC] do not apply the [merger review] guidelines as a linear, step-by-step progression that invariably follows the exact order in which the various analytical elements appear in the guidelines, i.e., an order that necessarily starts with market definition and necessarily ends with efficiencies or failing assets. For example, the agencies do not settle on a market definition before proceeding to address other issues. Rather, the process of defining the market is directly linked to a competitive effects analysis. As part of the integrated analysis, market definition can help inform competitive effects and competitive effects can help inform market definition.”<sup>6</sup>

It is also apparent that the responsible officials have neither the authority nor the experience to apply more sophisticated techniques in an effort to overcome the institutionalized shortcomings of the broadcasting sector competition law regime.

In neither of the above ordinances – nor in any of the consultation documents I have read concerning future competition laws – is there a definitive statement as to the purpose of the competition laws contained within them.

Without a clear legislative intent within competition legislation, there is the risk of willful and innocent misapplication of the law by competition officials, adjudicatory bodies and private interests.

One problem seems to be that including a clear written statement of purpose in a new competition law first requires a clear understanding of what we want the law to achieve. This is a problem because it involves difficult and sometimes confusing policy choices.

There is discussion in the consultation documents of the merits of improving consumer welfare and enhancing economic efficiency. These are not always

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<sup>6</sup> *Commentary on the Horizontal Merger Guidelines*, US Department of Justice and Federal Trade Commission, March 2006. See also “*Why Bother?: On Market Definition under the Merger Guidelines*,” William Blumenthal, Statement before the FTC/DoJ Merger Enforcement Workshop, Washington, DC, 17 February 2004.



consistent objectives, however, particularly when, for instance, public safety and social values are concerned.

Similarly, a push for the protection of SMEs could lead to a future competition law that protects inefficient business practices while efficient ones (by larger corporations with greater economies of scale and cheaper financing costs) are penalized to the detriment of the wider community.

In Hong Kong we have learned hard lessons about commercial practices that have exploited laissez-faire ideologies and diminished community values. By way of illustration, I refer to the 1983 Melhado decision,<sup>7</sup> which arguably led to the defiling of New Territories' land by allowing rural plots to be used for storing containers and other commercial purposes.<sup>8</sup>

If competition for competition's sake (or for the sake of economic efficiency) is the sole rationale of any new competition law, then we could face the prospect of more Melhado-type cases where negative externalities are imposed on the broader community in the name of economic progress.

Most other competition law jurisdictions went through the process of refining the purpose of their legislation over many decades. We do not have the same luxury. But nor is there the need for us to take so long given what we can learn from others and our understanding of what works best for Hong Kong.

I should point out that my earlier suggestion for including a simple statement in a future competition ordinance evincing an intention "... to enhance the welfare of the Hong Kong community through the promotion of competition," is entirely consistent with addressing these kinds of concerns.

We should make it clear that enhancing the welfare of the Hong Kong community is our primary goal, and that the promotion of competition is a way of achieving this – but not the only way nor necessarily the best way.

A reduction in competition can, in some circumstances, increase community welfare. The challenge is to ensure that the mechanisms within our competition law – principally the intent provision and the authorization framework – work together to facilitate rather than obstruct the identification of such circumstances and allow them room.

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<sup>7</sup> *Attorney General v Melhado Investments Limited* [1983] HKLR 327.

<sup>8</sup> I have written previously about the Melhado Case and its relevance to competition policy. See *Competition, but not at any price* and *Harmony and market order Hong Kong-style* at the following links: <http://hkcomplaw.wordpress.com/2006/09/05/competition-but-not-at-any-cost/> and <http://hkcomplaw.wordpress.com/2006/09/06/harmony-and-market-order-hong-kong-style/>

On more general issues, the Government must be careful not to neglect its broader competition agenda after deciding whether or not to enact new competition laws.

Rather it should continue looking for and addressing restrictive practices in those areas of the economy that may not be exposed to scrutiny under a general competition law. This includes, for instance, restrictive licensing/approval regimes established by Government and official bodies.

Much could be said about this aspect of our competition policy. However, the focus of this submission – and indeed of the present consultation itself – is about competition law, even though this is just one aspect of our broader economic and industrial policy.

I hope that we will have the opportunity to discuss the broader policy issues further in due course.

Another important part of the Government's work will be to "co-opt" all stakeholders into making any new competition laws work efficaciously.

The success of the competition policies implemented in the telecommunications sector has largely resulted from the Telecommunications Authority's active engagement with industry players on both policy and enforcement issues. The Authority also maintains a close working relationship with the Consumer Council and thereby enjoys a balance of view when undertaking its competition law work.

The Government would be well advised to develop a comprehensive strategy to engage stakeholders on an economy-wide basis.

The essential first step, in my opinion, is for officials to clearly articulate the reasons why Hong Kong needs a general competition law. To date, this has not been possible given the Government's stated neutral position on these issues. However, if new laws are to be introduced, it will be essential not only to articulate but to advocate the need for change.

## **2. Competition Officials**

Competition officials must enforce any new law with a genuine understanding of the competitive processes involved in each case. The pursuit of theoretical ideals and attempts to apply overseas case law without a full appreciation of local conditions will ultimately prove counterproductive.

This is particularly important in predatory pricing, product bundling and exclusive dealing cases, for example, where the line between anti-competitive behaviour and efficiency-enhancing practices can be extremely fine – yet critically important.

Fortunately, the telecommunications and broadcasting authorities – as well as the telecommunications competition appeals board – have established a number of useful precedents in these areas (notwithstanding the deficiencies in their legislation as noted above).

Future competition officials must demonstrate at least the same degree of rigour and self-confidence.

Another important initiative for future competition officials will be the publication of enforcement priorities every 2 to 3 years. This will focus resources on high-priority cases and make clear that left-field complaints (even those deserving in themselves) will be rejected. The publication of such priorities will also make it easier to assess the performance of our competition authority.

The quick rejection of unsuitable cases seems to me to be particularly significant in light of the Competition Policy Review Committee's report in June 2006, which recommended, in part, that any future competition authority should have discretion to dismiss "inappropriate" complaints that might cause the law to be "... used to stifle legitimate competitive business activity."

In my view, a competition authority should have this discretion as of right – although there should also be checks and balances on its assessment of what is inappropriate and what is not. Even so, how can the authority know if a complaint is inappropriate unless it is obviously unmeritorious or is found to be so after at least some degree of scrutiny?

To me, what is more important is for the authority to have set itself a clear focus to build momentum in a particular direction. For example: to target areas of widespread consumer detriment and areas where enforcement action will improve overall compliance with the law; or simply to target all forms of cartel behaviour covering price-fixing, bid-rigging, market-sharing and collective output restrictions.

Setting enforcement priorities is a pro-active activity which requires forward thinking, rather than approaching things in a reactive way, which is what I read into the Committee's recommendations.

Setting priorities also means that the rejection of complaints can be justified on strategic grounds, not just on whether or not the complaint itself "looks" like it might

not be worth pursuing. This can avoid wasting resources in endless debates over the minutiae of individual cases.

Effective priority-setting means we can more easily assess the success or otherwise of a future competition authority in achieving its goals. If it doesn't achieve its stated priorities, then it has a chance to explain why with reference to its original expectations. If it does succeed, that's great, now set some more – possibly more ambitious ones – next time.

This creates a golden opportunity for assessing the effectiveness of the whole regulatory framework and for identifying problem areas.

Simply giving the competition authority the power to dismiss apparently undesirable complaints risks encouraging reactive, short-term thinking. In my opinion, that's not what Hong Kong should want its competition officials to be doing.

Community education is another area of responsibility for a future competition authority. I mention below the role that bodies like the Consumer Council can play in explaining to members of the public what competition laws can and cannot achieve.

Competition officials should have a similar responsibility, but will also need to focus as much (if not more) of their time on ensuring that the business community (both big and small) become acquainted with the subtleties of effective competition law administration.

I have written before about how people in Hong Kong are only now beginning to use the language of competition law,<sup>9</sup> even though in other countries such as the US, most European jurisdictions, Australia, South Korea and increasingly Singapore, this language is second nature.

Like any language, it will be misused at first and the right words will be used to describe the wrong things. It will also be used as a smoke-screen by people who hope that their audience knows less about what they are talking about than they do.

Because we will be starting late, we will need to move up this learning curve as quickly as possible, and competition officials will have to lead us case by case for much of the way.

The need for competent professionals in our competition authority is, in my view, a priority for this reason alone.

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<sup>9</sup> <http://hkcomplaw.wordpress.com/2006/09/16/its-only-words/>

### 3. Courts and appellate bodies

The courts and competition law appellate bodies will need to perform their functions robustly, yet with sophistication and nuance. They should be prepared to embrace the economic technicalities of competition law, yet not shy away from a common-sense approach when appropriate.

These bodies, like competition officials, must learn how to make the best use of expert economic testimony while also dealing with the real-life situations faced by business people and consumers. Competition law deals with complex, yet ultimately real-world, issues.

Whether there should be a specialist appellate body for competition law cases is an important issue. Getting this part of the overall framework right is critical. Binding precedent has the power both to correct investigatory mistakes and to perpetuate misguided regulatory interventions.

In other countries, the judiciary is given (and in more enlightened places requests) education on competition law issues. Acknowledging shortcomings in their own backgrounds, especially in terms of economic training, is a first step towards solid analysis in written decisions by judges and tribunal members.

Without this step, there is a risk that over-confidence will lead to decisions that are subsequently distinguished or ignored as aberrant or just plain wrong.

The courts will have additional responsibilities for ensuring that the principles of natural justice and *ultra vires* are consistently followed by law enforcement officers.

The importance of judicial oversight cannot be overstated. A healthy tension between the courts and competition officials is to be expected if not encouraged.

If competition officials always try to second-guess the courts, they will avoid hard cases and miss opportunities to refine the law for future inquiries.

If the courts fail to maintain a hard line on strict compliance with administrative procedures, competition officials will become a resented burden on the backs of the business community.

I would be concerned if the Government proposes a regulatory framework that does not directly address these kinds of issues.

#### 4. Consumers

Consumer groups and consumers themselves must maintain a balanced perspective and recognize that competition law cannot solve all their problems.

Market forces are by nature impersonal. Businesses have a legal responsibility to chase profits for their owners. They can be expected to injure their competitors and take every opportunity to increase their margins when demand outstrips supply.

Limiting extreme behaviour must not stifle the natural, capitalistic drive of the business community, especially at the bigger end of town. At the same time, competition law should not fail to restrain abusive or collusive behaviour that threatens the long-term efficiency of the marketplace.

Consumer education and expectations should reflect these realities. Moreover, we should not waste our effort in trying to assuage various interest groups by extending the reach of competition law beyond its inherent capabilities.

It seems to me that the Consumer Council has a particularly important role to play in these contexts. However, this role will not be a mere extension of the Council's present functions as competition laws are largely absent from our law books.

Over time, the Council will lose the luxury of yearning for non-existent laws and enjoying the ambiguities that presently exist. If it makes too many allegations that are ultimately found not to have merit, its credibility will suffer.

At present there is minimal accountability for Council proclamations. A system that permits the proper investigation of claims and requires accusers to make their case to a high standard of proof is a completely different environment. The Council will need to strengthen its own internal procedures if it is to retain its standing in the community.

I refer again to the Banyan Garden case decided by the Telecommunications Authority in 2004.

It was widely reported at the time that the main reason why that case failed to find any wrong-doing was because the Telecommunications Ordinance could not be extended to cover businesses outside the telecommunications industry. While this limitation is a reality, relying on it to explain the outcome of the Banyan Garden case is, in my view, misleading.

The Consumer Council has used the Banyan Garden case to support its case for the introduction of general competition law in Hong Kong. Yet at its heart this decision

merely confirmed the lack of consumer protection safeguards in Hong Kong. The Banyan Garden problem was one of consumer choice – for residents to have broadband and fixed-line services included in their management fees only if they wanted – not about any real threat to broader the competitive process.

Unfortunately, the competition law theme in this decision quickly grew a life of its own. This was partly because the relevant prohibition used by the Authority – section 7K(3)(c) which deals with related party transactions – is not truly a competition law provision but it has been dressed up to look like one.

While competitors complained and commentators foresaw the need to prohibit all kinds of efficient bundling practices as a result of this case, the reality was that the conduct in question was arguably more a pro-competitive initiative than anything else when viewed from a competition law perspective.

The Consumer Council's characterization of this case as a competition case, at least initially, may be considered by some to have been disingenuous. As a thought-leader on competition issues, it should have recognized the true nature of the decision.

Within a few weeks the Council's focus had changed, correctly, to how to protect consumers by giving them more and better information about the services covered in their building management fees.

In the future, any misguided or woolly thinking on competition issues will haunt the Council. If it wants to remain a central player in the game, it will need to strengthen its internal analysis and become more circumspect in its public announcements. The introduction of black-letter law will make political point-scoring a much more challenging pursuit.

Of course, this highlights one area where the Consumer Council really comes into its own. That is, consumer protection laws. Hong Kong has very few laws that offer the level of protection enjoyed in most other developed countries.

I mention again that misleading or deceptive conduct is generally not prohibited in Hong Kong, even though we undoubtedly suffer from the same questionable practices as everywhere else. This lack of concern for consumer interests would be considered untenable and unjustified amongst most of our trading partners.

There is no inconsistency with Hong Kong enacting consumer protection laws to complement competition laws even within the same legislation (and have them enforced by the same regulatory authority). Indeed, this arguably makes a good deal of sense given that both laws are concerned with the fair and efficient operation of free markets.

The Government may therefore want to consider the following arguments for enacting parallel consumer protection laws in any new competition law ordinance:

- Enforcing consumer protection laws would give the enforcement authority a higher public profile and allow it to build up goodwill within the community, which experience in other countries suggests would help it in difficult competition cases when it may be labeled as obstructionist and anti-business;
- It would give enforcement staff a chance to develop their investigatory skills. This is not to be underestimated. Hong Kong has very few organisations where local professionals can develop the kinds of forensic and organisational skills so desperately needed by a competition authority. Competition officials in the Telecommunications Authority presently also enforce consumer protection laws and such advantages are acknowledged; and
- Consumer protection laws – which would presumably include a prohibition against misleading or deceptive conduct such as is found in section 7M of the Telecommunications Ordinance (which applies in the telecommunications sector but, strangely, nowhere else) – make markets more efficient by promoting the exchange of accurate information so that consumers can make informed choices and are less reluctant to buy things because of incomplete information.

Australia is one country where such a framework of combined competition and consumer protection laws has worked effectively for over 30 years. Given its historical preference for closely monitoring Australian experience in these areas, the Government may wish to investigate these issues further.<sup>10</sup>

In terms of making sure that the legislative intent of such an expanded competition law ordinance maintains proper focus, it would be feasible to propose something along the following lines (with the incorporation of my earlier suggested intent provision): “An Ordinance to enhance the welfare of the Hong Kong community through the promotion of competition and fair trading.”

Lastly, I want to comment on private rights of action initiated by consumers and others against anti-competitive behaviour. This seems unlikely to be part of any new competition law, at least not initially. This will lead to a degree of frustration in individual cases and more generally across the community whenever the responsible competition authority is seen to ignore deserving cases.

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<sup>10</sup> A useful reference in this context is Rhonda L. Smith and Jeremy Tustin (2005), ‘Joined-up consumer protection and competition policy: some comments’, *Competition and Consumer Law Journal*, Vol. 12, No. 5, April, pp 305-313.



Consumers will of course retain their “rights” to pursue their claims in the media and by political means as many do already in relation to telecommunications services where laws exist but not all complaints can be pursued. While often lacking in precision and strategic sophistication, such actions are likely to continue to be important and potent forces in curbing recalcitrant behaviour.

One advantage that will exist will be that competition and consumer protection laws written in an ordinance will become a reference point that should strengthen individual and political resolve and encourage *de facto* adherence to fair trading rules.

## 5. Businesses

In the article *Competition Law with Hong Kong Characteristics* published in Asian-Council magazine in November last year, I recorded the concerns that many business executives and industry bodies have told me about the current competition policy review and what the outcome of it might be.<sup>11</sup> In particular, I noted:

- Nervousness concerning the intended purpose of any new competition law, with concern that it may be nothing more than an attempt to follow trends in other parts of the world;
- A belief that a general competition law would better support the Government’s “level playing field” ideology than sector-specific laws, which would be highly controversial and politically problematic;
- An acknowledgement of the difficulties (and potential pitfalls) involved in balancing the need for regulatory certainty with much needed flexibility in any new competition law;
- The critical importance of including a public interest exemptions framework in any new law and guaranteeing effective “grandfathering” and grace periods for existing practices;
- A general disinterest in the specifics of the institutional framework that may be adopted to enforce new competition law, but a clear expectation that it would suit the fast-moving, commercial environment in Hong Kong; and
- Concern over the nature and form of sanctions for breaches of competition law rules, with a consensus that businesses should be given the opportunity to remedy their behaviour without penalty.

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<sup>11</sup> <http://hkcomplaw.wordpress.com/2006/12/14/competition-law-with-hong-kong-characteristics-asian-counsel-magazine/> The article can also be accessed directly at [www.pbpress.com](http://www.pbpress.com)

All businesses should by now be coming to grips with the limits of competition law as well as the boundaries new competition laws would set within corporate Hong Kong.

Competition law will not create windfall gains for small business (or at least it should not), although it should improve their access to market opportunities over time. An effective competition law cannot guarantee the existence of inefficient businesses, whatever their size.

Requests by some businesses for a continuation of the Government's sector-specific approach to competition law are invariably self serving. I have yet to hear of such a request accompanied by an invitation for the Government to enact such laws in the requesting business' industry.

Recent suggestions by some SME representatives that all small and medium businesses should be exempt from any competition law reflect a misunderstanding of what this law is meant to target. I am pleased to see that the Government has formally responded to these suggestions by issuing its FAQ statement on 31 January 2007.

In terms of working within the new boundary lines, businesses will need to thoroughly review the nature of any interdependence between themselves and their rivals – and competitors will almost certainly have to reduce their reliance on historical co-operative arrangements designed to protect industry interests.

Larger businesses will face these same challenges, and more. They will need to invest in more sophisticated risk management procedures. They will also need to take on a disproportionate investment of resources in policy matters.

These responsibilities will inevitably include taking the lead in ensuring that competition officials apply the highest degree of rigour and discipline in enforcing the law.

By actively defending their own strategies and accurately characterising the restrictive behaviours of others, established businesses will play a vital role in ensuring that the benefits of an effective competition law regime are fully realized while detriments are minimized.

In this context, I am aware that some of the big oil companies that were subject to a competition investigation 12 months ago<sup>12</sup> remain concerned about how their resistance to surrendering confidential information has been characterized as unco-

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<sup>12</sup> *Study of the Auto-Fuel Retail Market*, Economic Development and Labour Bureau, Government of the Hong Kong Special Administrative Region, 18 April 2006.

operative and, in some circles, viewed as evidence of their guilt in manipulating retail fuel prices.

In the future, the existence of clear competition rules with appropriate investigation guidelines should avoid these situations. However, no-one will come to the aid of businesses caught up in botched or biased investigations unless they stand up for themselves and articulate the shortcomings of the system, even if this means evoking public cynicism.

Many established businesses in Hong Kong are presently presumed to be monopolizing their markets, when in fact this is not true. Ideally, any new competition law should give everyone the opportunity to test these presumptions.

Some targeted businesses will decide to take pro-active steps to clear their names. Others will quietly suffer from regulatory abuse. What each must remember is that their action (or inaction) could have far reaching consequences for the effective administration of any new competition laws.

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I hope that the above comments prove useful in your deliberations over possible changes in our current competition policy.

Should you require any further information, please do not hesitate to contact me.

Yours sincerely,

**Peter J Macmillan**

Chief Executive