



PROPERTY MANAGEMENT SERVICES ORDINANCE (CAP. 626)

PROPOSED LICENSING REGIME FOR PROPERTY MANAGEMENT COMPANIES AND PROPERTY MANAGEMENT PRACTITIONERS

Synopsis

1. The Property Management Services Authority (“PMSA”) has formulated proposals regarding a licensing regime for property management companies and property management practitioners. In November 2018 it issued a consultation paper¹ to seek views on these proposals (“Consultation Paper”).
2. The Law Society has reviewed the Consultation Paper, as well as a press release issued by the PMSA on the above consultation on 17 December 2018.
3. We note the PMSA is now proposing to subject the legal profession to the regulation, control and disciplinary proceedings of the PMSA (“Proposal for Licensing Legal Services”). As a matter of principle, that cannot be correct. The Law Society strongly objects to the Proposal for Licensing Legal Services.
4. Apart from the above fundamental issue, we have reservation as to whether the proposals in the Consultation Paper would help implement the policy intent that underpins the Property Management Services Ordinance (Cap. 626) (“PMSO”).
5. Some of the queries we raised in our previous submissions on this matter in 2014 remain unanswered, notwithstanding the open agreement in October 2014 by the Administration to respond.
6. There must be suitable and relevant amendments to the PMSO to address the above.

¹<https://www.pmsahk.org.hk/en/licensing/consultation.html>

Regulatory Regime under PMSO

7. Section 2 of PMSO defines "property management company" to mean "a business entity (whether a company, partnership or sole proprietorship) that carries on the business of providing property management services". "Property management services" means "any service prescribed by regulation made under section 3(1)" of PMSO.
8. Under section 3(1) of PMSO, the PMSA "may, by regulation, prescribe a service falling within a category of services set out in Schedule 1 as a property management service."

The following are found in Schedule 1 to PMSO (italics supplied)

- (1) General management services relating to a property
 - (2) Management of the environment of a property
 - (3) Repair, maintenance and improvement of a property
 - (4) Finance and asset management relating to a property
 - (5) Facility management relating to a property
 - (6) Human resources management relating to personnel involved in the management of a property; and
 - (7) *Legal services relating to the management of a property*
9. The PMSA now proposes to prescribe all the above, including category (7), as property management services – see paragraph 1.2, page 9 of the Consultation Paper.
 10. There is no definition or elaboration for category (7) in PMSO. The Consultation Paper itself sets out the scope of this category:

"[Category (7)] is on the understanding on the general scope of work of government departments and the judiciary system, arrangement of a litigation, arbitration and mediation relating to the management of a property, drafting of building management related contracts and provision of advice on issues relating to the Building Management Ordinance (BMO) (Cap. 344), the Property Management Services Ordinance (Cap. 626), the DMC of a building and relevant legislation or statutory orders." (Chapter 5, paragraph 1.2 (7), page 12 of the Consultation Paper)
 11. Disturbingly, the scope that PMSA proposes to cover in category (7) is too wide - there is no exception for provision of such services by legally qualified professionals. We will show in the following paragraphs that it is fundamentally wrong that they should be subject to the licensing

- requirements simply because their areas of legal practice include provision of any of such services.
12. Following the above, a law firm engaged in for example the review of a DMC, or provision of legal advice on a building management contract, would be a property management company under the regime of PMSO.
 13. Section 2 of the PMSO has a definition for "property management practitioner". It means "an individual who assumes a management or supervisory role in a property management company in relation to property management services provided by the company".
 14. Therefore, a partner or a supervisor in a law firm (as a property management company) engaged in the preparation of a DMC or the review of a DMC with a view to providing legal advice would become a property management practitioner under the PMSO. Lawyers engaged in arbitrating or mediating or in the litigation of property management disputes could similarly fall within the definition.

Policy Justification?

15. When a property management company provides more than one category of property management services, it would be required to hold a property management company ("PMC") licence – see sections 6(1) and 7(2), PMSO. Similarly, no person may act as a property management practitioner ("PMP") without a PMP (Tier 1) or (Tier 2) licence – see section 6(2) and (3) of PMSO.
16. The PMSA is clear that "whether an individual is subject to the licensing requirements does not depend on the post title, but rather on whether the work of the individual concerned" (see the Press Release on 17 December 2018).
17. When a law firm provides legal services relating to property management, it may be engaged in more than one category of property management services, such as helping to prepare house rules of a building [*Law Society comment - according to Chapter 5, paragraph 1.2(1), page 10 of the Consultation Paper, this type of service is a category (1) service*] and advising on the effect of the relevant DMC (see above: a category (7) service). The combined effect of sections 6(1) and 7(2) of the PMSO is such a law firm is required to hold a PMC licence. Even if the law firm provides legal services relating to property management in only one category or sub-category of property management services and hence is exempted from the licensing requirement, all lawyers in that law firm who assume a management or supervisory role in relation to provision of the

property management services are property management practitioners as defined under PMSO and thereby they have to hold either a PMP (Tier1) licence or a PMP (Tier 2) licence.

18. A lawyer providing advisory services to property management can fall under the PMSO and be considered a property management practitioner and thereby subject to the licensing requirements. By way of illustration, when an in-house lawyer is engaged in procurement of labour insurance and compensation of staff involved in the management of a property (a category (6)² service) or is rendering legal advice on building management related contracts (a category³ (7) service). Another example: a solicitor-mediator (a category (7)³ service) who helps to convene owners' committee meetings (a category(1)⁴ service) for the purpose of his mediation would come under the regime and be required to apply for a licence. Even if only one category of service is provided, the lawyer will inadvertently fall within the requirements of the PMSO.
19. There is similarly no definition for other categories of property management services in Schedule 1 of PMSO. The PMSA only gives illustrations in the Consultation Paper, including:

Category (5)⁵ – "... Examples include but are not limited to management of club house, [and] it includes application for relevant licences [*Law Society comment– this falls squarely within the work of corporate lawyers who assist in the application of the club house licence*]..."
20. The PMSA proposes to include all categories of the services set out in Schedule 1 of the PMSO as property management services for the purposes of section 3(1) of the PMSO. In addition, section 3(2) of the PMSO empowers the PMSA to prescribe more than one type of service under a category. The effect of prescribing all the categories of services set out in Schedule 1 as property management services without limitation or exception, together with the powers given by section 3(2), will make the regulatory regime under PMSO excessively broad and bring lawyers and other professionals who provide services to PMCs and PMPs under the licensing control of PMSA.
21. The above is particularly troubling when

² The Consultation explains what the PMSA envisages to be covered in this category, see p.11

³ See page 12 for the scope

⁴ See page 10 for the scope

⁵ *Ibid*

- (a) the Consultation Paper merely provides “*examples*” of what are proposed to be covered. These “*examples*” are not statutory provisions;
- (b) the language used in the examples is imprecise and confusing. By way of example, under Category 2, the Consultation Paper provides that “[Category (2)] is on the repair, replacement, maintenance and large-scale maintenance [*Law Society query – how is the first “maintenance” in this phrase different from “large scale maintenance” referred to in the explanation notes for the same category of services?*], continuous improvement [*Law Society query – how “continuous”?*] of the functions of a property [*Law Society query – what are meant by the “functions of a property”?*].
22. Put simply, the legal profession would now be subject to the regulation, control and disciplinary proceedings of the PMSO under a confusing regime. This is wrong as a matter of principle when, *fundamentally*, there is **no** policy justification for the proposed control. The legal professionals are already subject to a well-established system of statutory and regulatory control and discipline operated and monitored by the Law Society. The Law Society also has specific CPD requirements which its members have to comply with annually before they are entitled to practicing certificates.
23. In fact, there are already ordinances and rules in Hong Kong which rightly recognize the adequacy of the existing regulatory framework for solicitors and which exempt the legal profession from the respective regulatory regimes. For example, section 2(2)(b) of the Estate Agents Ordinance (Cap 511)⁶, section 7(5A) of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap. 615)⁷ and the professional exemptions provided by the Securities and Futures Commission⁸. In the circumstances, the same exemption should be provided for the legal profession in the proposed licensing regime.
24. For record, the Law Society has not in any previous consultations or discussions with the Policy Bureau been advised of any policy intent of regulating the legal profession. There was also no indication of the above in the Legislative Council when the related Property Management Services Bill was scrutinized. On the other hand, in the course of review of the Bill, we have raised our concerns on the meaning of “legal service” in our submission of 6 August 2014 on this matter⁹. We have not received any

⁶ https://www.elegislation.gov.hk/hk/cap511?INDEX_CS=N

⁷ https://www.elegislation.gov.hk/hk/cap615?INDEX_CS=N

⁸ <https://www.sfc.hk/web/EN/regulatory-functions/intermediaries/licensing/do-you-need-a-licence-or-registration.html#3>

⁹ See para 2.3 in the submission: http://www.hklawsoc.org.hk/pub_e/news/submissions/20140806a.pdf

replies or invitation to dialogues. The confusing and unnecessarily wide licensing *regime as proposed is not acceptable to the legal profession. We hereby make it clear that unless our concerns are addressed and appropriate amendments are made to the PMSO, we object to the Proposal for Licensing Legal Services.*

Effect on Pro Bono Services

25. There are penalties under the licensing regime. For example, for offences relating to applications for licences, an offender on conviction on indictment under section 14 is liable to a fine of \$200,000 and to imprisonment for 1 year; or on summary conviction to a fine at level 6 and to imprisonment for 6 months.
26. The PMSA may issue and/or gazette a code of conduct for the licensees under the regime (see section 4). Breaches of the code attract disciplinary offences (section 3).
27. The licensing regime coupled with pecuniary and custodial punishments are demoralizing and would have deterrent effects upon those pro bono legal services now offered to owners' corporations and the general public on property management. The exception under section 7(4) of the PMSO apparently does not help as the above pro bono services do involve a reimbursement (of travelling expenses) which could arguably be a "consideration".
28. The requirement to have a license from PMSA for pro bono solicitors significantly deviates from the current practice. Currently, to protect the interests of the public, pro bono solicitors are required to hold a Practising Certificate issued by the Law Society of Hong Kong and hence are subject to the same CPD and indemnity requirements as solicitors serving their clients.
29. Under the licensing regime, it will not be difficult to foresee that members of the Law Society would be discouraged to take part in the offer of pro bono advice on building management, such include (i) the scheme on "Free Legal Advice Service on Building Management" run by the Home Affairs Department ("HAD") since about 2015¹⁰; and (ii) the "Three-year Pilot Free Outreach Legal Advice Services to Owners' Corporations", also proposed by HAD. This "Legal Advice Services" is a "semi" pro-bono service at a consideration / fee to be agreed between HAD and the Law Society. The proposed scheme aims to, among other things, assist the

¹⁰https://www.buildingmgmt.gov.hk/en/whats_new/t_2_13.htm. The scheme had been run by the Housing Society before, and it was transferred back to Home Affairs Department in 2015.

Owners' Corporations in the conduct of general meetings. It is expected to be launched in 2019.

30. The Law Society will have a re-think on taking part in any pro-bono service and/or semi pro-bono services if our members could be exposed to a confusing and unreasonable licensing regime in taking up "property management services" as defined under PMSO.

Other Problems with the Proposals

31. The combined effect of sections 7(5) and 7(8) of the PMSO is that *an owners' organization or owner(s) of a property containing less than 1,500 flats and managing the property without engaging any property management companies ("PMCs") or property management practitioners ("PMPs")* are not required to have a PMC licence or as the case may be a PMP (Tier 1) licence or PMP (Tier 2) licence.
32. In Hong Kong, it is not uncommon for an owners' organization or owner(s) of a property containing less than 1,500 flats to engage a PMC or PMP for the management services set out in Schedule 1 of the PMO. For instance, it could engage PMP/PMC for
 - general management (such as waste and refuse disposal, a Category(1) service) and
 - finance and asset management (preparing and auditing management accounts, a Category(5) service).

If a PMC license is exempted only when the property contains less than 1,500 flats and the property has not engaged any PMC or PMP, the exceptions to the prohibitions of unlicensed activities would be prohibitively narrow. That is not at all helpful to the general public and is not consistent with the policy intent of the Administration to improve property management.

33. In most cases, although owners' committee or owners' corporation has been formed to manage a property, the owners will also engage a PMC or PMP(s) to provide property management services in particular aspect(s) such as disposal of garbage and those mentioned in the above. Since the condition for exemption stipulated in Section 7(5) or 7(6)(a) of the PMSO will not be satisfied in such cases, the members of the owners' committee or management committee will have to apply for PMP licences. It is foreseeable that most if not all of the existing members of owners' committee or owners' corporation will resign from their appointment and the owners of the property are deterred from acting as members of the owners' committee or management committee. As a result, the formation

of owners' committee or owners' corporation of a property will be severely hindered by the narrow exceptions provided under Sections 7(5) and 7(6) of the PMSO.

34. Section 7(6)(b)(ii) of the PMSO is also peculiar for it prohibits a lawyer who happens to be an owner of the kind of property intended to benefit from the exception from licensing from providing property management services to the property of which he is an owner in his capacity as an owner, as long as he or his law firm provides legal services relating to property management (category (7) services) for profit. This would mean that all such lawyers who now serve on the owners' committee or the management committee of their building have to resign from their appointment when the licensing regime has become effective unless they have obtained licences from PMSA.
35. In our submission¹¹ of 6 August 2014 rendered on the matter, we raised the following

"3.3 It is the intention of the Administration to subject only those multi-storey buildings involving shared ownership of common parts and with Deed of Mutual Covenants ("DMC") in effect to the licensing regime. Hence the following situation should be excluded from the Bill¹²:

- (i) The sole owner of a part (e.g. commercial accommodation) in a development involving no shared ownership of common areas should be allowed to manage the commercial accommodation without being subject to the licensing regime.*
- (ii) Similarly, if the commercial accommodation is owned by two owners without strata-title, either or both of the owners should also be allowed to manage such commercial accommodation and not subject to the licensing regime.*

The Administration is invited to clarify the above scenario and include them as exceptions to Clause 6 of Part 2 of the Bill."

36. In a Legislative Council paper in October 2014 (LC Paper No. CB(2)22/14-15(04)), the Administration, among other things, replied in paragraph 3.3 of the paper that the Administration noted the Law Society's comments and will consider in consultation with the Department of Justice whether to include the suggested exceptions in clause 7(4) of the Bill. We have so far

¹¹http://www.hklawsoc.org.hk/pub_e/news/submissions/20140806a.pdf

¹²The Property Management Services Bill

received no response from the Administration on the above, but now note that (1) the exceptions have not been included in the PMSO, and (2) it is not mentioned in the Consultation Paper how the Administration is to address the above notwithstanding the above open promise. The situation is unsatisfactory. In our views *the above derails the policy intent to help the general public with property management.*

37. In relation to the PMC Register as a whole, apart from information on the number of household units for which a PMC is providing property management services, we are of the view that other information such as the addresses of the buildings managed by the PMC, the number of any office, commercial and industrial buildings managed by the PMC and the area of accommodation provided by the buildings, the locality of the residential and other types of buildings managed by the PMC, whether short term parking facilities for guests and visitors are involved, whether there is any recreational space for public use in the buildings managed by the PMC, should be included in the PMC Register, to make the Register useful to the public.
38. The above observations are not exhaustive.
39. We ask that the PMSO must be amended as soon as practicable.

Conclusion

40. We do not support the Proposal for Licensing Legal Services. The principle underlining the Proposal for Licensing Legal Services is fundamentally wrong. Some of the proposals in the Consultation Paper will also have the effect of being counter-productive to the improvement of property management in Hong Kong.
41. We take a strong view that the PMSO **MUST** be amended as soon as practicable to sufficiently and satisfactorily address the concerns we raise in relation to the Proposal for Licensing Legal Services in the above as well as in our submissions in 2014. Amendments are also required to correct other problematic parts of the proposals in the Consultation Paper. We would welcome the chance of further dialogue with the PMSA on the matter.

**The Law Society of Hong Kong
9 January 2019**