

URBAN PLANNING AND  
**ENVIRONMENTAL**  
**LAW REPORT**

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Our feature in this issue looks at how an environmental consultant can help your business and how to choose one. Although originally written for a Canadian audience by our Associates *Smith, Lyons, Torrance, Stevenson & Mayer* it has been adapted for Hong Kong readers with the assistance of environmental consultants *CES Asia Ltd.* and we are grateful to them.

March saw the foundation of the Hong Kong Environmental Association, its inaugural general meeting and the election of the executive committee, a list of which appears on page 4. Its constitution provides for the promotion for the benefit of the public generally the enhancement and conservation of the environment in Hong Kong which is to be done primarily through collaboration, education and consultation. This is laudable but to achieve its objectives the Association will first have to establish greater and closer ties with the Chinese community in Hong Kong.

In this issue we also bring you a full report and commentary on *Chan Chi-Kuen v. R.* based on the unreported judgment of Keith, J.

The Editors

**The Environmental Consultant**

In our increasingly "environment-minded" society, there is a growing need for qualified and competent professionals to assist companies in complying with the vast array of environmental laws and regulations. Unfortunately, there are many consulting firms which claim to be environmental specialists regardless of their past experience. It is very important that companies in need of an environmental consultant refrain from being "green-washed" and retain a consultant with extensive knowledge of and experience with environmental issues.

*What Consultants Can Do*

Experienced consultants can assist companies with a wide range of activities involved in

maintaining a proactive environmental management system as well as the reactive tasks that could occur as a result of a known or suspected pollution problem.

Consultants can perform various types of property audits or assessments. There is at present no statutory guidelines for land contamination assessment in Hong Kong. International guidelines are often considered and adopted. However, they may not be completely suitable for the specific environmental concerns of Hong Kong. Therefore, professional judgment of the consultant in interpreting the contamination guidelines and his local experience in conducting such projects in close liaison with the regulatory agency are of primary importance.

International site contamination assessments usually include

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preliminary or Phase I site assessments (non-intrusive evaluations) and Phase II subsurface investigations (involving sampling and analysis) and remediation activities. Even though this is not the norm in Hong Kong, there is an increasing trend to adopt such phase-wise assessment to minimise any excessive cost exposure of the property owners.

This will also allow competent consultants to come up with a competitive and realistic price quotation, as it is often the case that the client who goes for the lowest fixed-fee bid will soon find that the bidder cannot deal with the scope of work quoted and the low-quality results thus produced mean either unjust excessive remediation costs or government's refusal to endorse the report. Increasingly, clients are developing environmental management systems, and there are consultants who conduct reviews of client systems and operations.

Consultants are most helpful when conducting technical tasks such as audits, testing for contamination or planning remediation. They can assist in identifying the nature and source of contamination and in recommending alternatives for remediation. Consultants can provide cost estimates for further investigations and remediation which can assist in quantifying potential liability. Although consultants should be familiar with regulatory requirements, they are not expected to provide legal opinions respecting compliance with specific laws and regulations.

From a legal perspective, an environmental assessment or audit carried out by a qualified

consultant can assist in establishing that a company is acting with due diligence. Pre-acquisition audits are becoming popular as companies face the prospect of inheriting historical environmental problems.

#### *Selecting a Consultant*

Before selecting an environmental consultant, management should ask some general background questions such as the following:

- What are the company's specific needs? *eg.* conducting an environmental assessment or audit, testing for contamination, determining appropriate remediation options or response to claims made by a third party.

**It is often the case that the client who goes for the lowest fixed-fee bid will soon find that the bidder cannot deal with the scope of work quoted**

- Is there a specific area of concern which has been identified? For example, there are specialized consultants who deal with asbestos removal, hydrocarbons and heavy metals, *etc.*
- Considering the industry and any identified area of concern, what type of technical background should the consultant have (such as chemical engineering, marine biology knowledge of wetlands issues)?
- What will the consultant be expected to accomplish?
- What would be an appropriate

time frame and cost allowance for the work?

- Are there any tasks that are expected to be performed in-house?
- Are there any deadlines required to be met?

Once management has decided what it wishes to accomplish, the following steps should be taken to select an appropriate consultant:

- Get recommendations from other companies with similar operations or from a solicitor about consultants that have provided efficient service in the past. Retain a consultant suited to the task at hand; don't rely on one consulting firm just because your company has used them before.
- Many consulting firms provide brochures and will supply references as to work performed for other clients. This information can be useful in ensuring that the consultant has the appropriate combination of skills and experience to perform the required work.
- Consider soliciting proposals from a short list of consultants who specialize in the area of your needs. Proposals should include a workplan or "terms of reference", a cost estimate and a time frame for completing the work. There can be large discrepancies in costs from one consultant to the next.
- Determine whether the firm is locally based. Many consultancies, some are even quite reputable internationally, set up an office in Hong Kong with only a few technical staff and secretaries but

most of the work is done outside of Hong Kong. This leads to the impossibility of the key project staff attending local meetings and it takes considerably more time and money for frequent communications.

- Ascertain to what extent any of the work will be subcontracted and whether the consultant has technical or laboratory facilities on site. This can serve to contain costs and to decrease the amount of time required to complete the work.
- Determine whether the consultants are well connected with government agencies most involved with your business. Sometimes government officials are more co-operative with consultants than with managers in private industry.
- Find out the size of the consultant firm and whether the firm is internationally connected. A larger firm with international network and resources means that more areas of expertise can be efficiently drawn from if such needs suddenly arise. In addition, it is more flexible for the firm to allocate staff to continuously manage the project, for instance during the vacation of project team members.
- Determine which consultant is best qualified and with whom you feel most comfortable. His future performance in the project may sometimes be reflected by their enthusiasm in the proposal stage.
- Canvass with the consultant any potential for conflict of interest.

- Require confirmation of insurance coverages carried by the consultant and ensure that they are adequate.

- Inquire on the consultant's quality assurance policy. The company should have implemented or on the path of implementing quality systems compliant with the ISO 9001 standard. Many times low data quality control results in wrong interpretation and recommendations by the consultant.

It is important to choose an environmental consultant who specializes in the appropriate area. There are presently various systems for the certification of environmental consultants, even though they are yet to be standardised.

### **It is important to choose an environmental consultant who specializes in the appropriate area.**

Examples are Registered Environmental Assessor under the Institute of Environmental Assessment (IEA) and Registered Environmental Auditor under the Environmental Auditors Registration Association Scheme (EARA). Individuals and firms offering environmental services range from chartered engineers and PhDs in biology, chemistry *etc.* to persons who may have no scientific expertise, such as real estate appraisers. It is therefore important to ensure that the consultant selected has the appropriate qualifications for the job and has the relevant experience. The difficulty is that frequently a company will not know what work has to be undertaken and will reply on the consultant to determine the

appropriate scope of the investigation and its content.

#### *The Retainer Agreement*

It is important to document the agreement with the consultant in an engagement letter or contract. Frequently consultants will offer standard form letter agreements which tend to be weighted in favour of the consultant.

The retainer letter should be a comprehensive document which sets out everything that is expected of the consultant in a clear and concise manner. The retainer agreement should include at least a detailed work description, the consultant's fee and manner of payment and a time limited for completing the work and submitting a report. In addition, a confidentiality clause and representations respecting the consultant's insurance coverage for public and professional liability are advisable.

If a company requires legal advice with respect to compliance of its property and/or operations with environmental laws and regulations, a consultant may be retained through a solicitor. Many clients assume that consultants' reports and the raw data compiled in the course of an investigation are confidential and need not be produced in the course of prosecution or civil action. This is not necessarily the case. While most professional consultants would consider their relationship with the client to require confidentiality, their work product may be compellable evidence at the suit of the government or in subsequent proceedings. Provided that a consultant's work is performed to assist counsel in providing legal advice, the report and information col-

lected may be protected by solicitor-client privilege. Privilege will attach and confidentiality will be protected only where the work was undertaken for the principal purpose of assisting in the provision of legal advice.

### *Conclusion*

Companies increasingly need the expert assistance that only a qualified environmental consultant can provide. An assessment prepared by a reliable consultant can be an important component of a corporate due diligence strategy. The level of reassurance to be obtained from an environmental evaluation depends on the expertise of the consultant who performs the work and the thoroughness of the investigations undertaken. It is therefore critical to retain the right consultant for the job, one with the necessary experience and training to provide a reliable assessment.

*A list of Environmental Consultancies can be found in the Industry Department Study, Support to Industry on Environmental Matters pp. V.3-V.7.*

### **Hong Kong Environmental Law Association** Executive Committee

#### Office bearers:

Rona Westgate - Chairperson  
Peter Hills - Vice-Chairperson  
Martin David - Secretary  
Alan Wisdich - Treasurer

#### Others:

Bryan Bachner  
Ian Dubin  
Fred Kan  
Terri Mottershead

## **Digest of LEGISLATION**

(This digests Legal Supplements to the GAZETTE No.5 of 4th February 1994 to No.15 of 15th April 1994).

### *AIR*

**Air Pollution Control (Amendment) Ordinance 1994** (Ordinance No.19 of 1994 to Gazette No.13 dated 31st March 1994 p A269). This Ordinance amended the Air Pollution Control Ordinance (Cap.311), especially by repealing ss. 26B to 26F of the Ordinance which dealt with the supply and dispensing of unleaded petrol; exempting certain premises from giving the notices required under s. 19 of the Ordinance; and consequential amendments to the Dutiable Commodities Ordinance (Cap.109) in respect of the definitions of 'leaded petrol' and 'unleaded petrol' as well as the definition of 'unleaded petrol' in the Air Pollution (Vehicle Design Standards) (Emission) Regulations.

**Air Pollution Control (Motor Vehicle Fuel) Regulation** (L.S. No.2 to GAZETTE No.13/1994/31st March 1994/L.N. 196 of 1994 p.B643) This Regulation provides, under Part II, for the offence of refusing to supply unleaded petrol to any person and the supply of leaded petrol (which is not unleaded petrol) as unleaded petrol; to prescribe the size of petrol pump of a petrol retailer and the dispensing of petrol into the fuel tank of any motor vehicle. Part III of the Regulation provides for the offence of knowingly sells or offers for sale of any substance (which is not motor vehicle diesel) as motor vehicle diesel.

### *NOISE*

**Civil Aviation (Aircraft**

**Noise) (Amendment) Bill 1994** (L. S. No.3 to GAZETTE No.15 dated 15th April 1994 p. C421) To provide for amendment of the Civil Aviation (Aircraft Noise) Ordinance by adding, inter alia, standards of noise to be complied with by aircraft and consequential amendments on the Civil Aviation (Aircraft Noise) (Certification) Regulations, Civil Aviation (Aircraft Noise) (Aircraft Classes) Notice and Civil Aviation (Aircraft Noise) (Limitation on Landing or Taking Off of Aircraft) Notice.

### *PUBLIC HEALTH*

**Pesticides (Amendment) Regulation 1994** (L. S. No.2 to GAZETTE No.5/1994/4th February 1994/L.N.92 of 1994 p.B247) This Regulation increases all of the fees provided for in the Schedule to the Pesticides Ordinance (Cap. 133 sub. leg) payable for the application, issue, renewal or extension of licences or permits in respect of pesticides and in relation to the application for registration of a pesticide pursuant to the Pesticides Ordinance. The Regulation is effective from 10 March 1994.

### *LAND USE PLANNING*

**Land Drainage Ordinance** (Ordinance No.20 of 1994 to GAZETTE No.13 dated 31st March 1994 p. A282) An Ordinance to make provision for the constitution of Drainage Authority Areas and the carrying out of drainage works within such areas and for connected matters including preparation of draft plans and their publication, amendment and objection; to provide for the powers of the Drainage Authority; to provide for appeals of the decision of the Drainage Authority.

### SHIPPING AND PORT CONTROL

**Merchant Shipping (Prevention of Oil Pollution) Regulations (Exemption) Notice 1994** (L.S. No. 2 to GAZETTE No.5/1994/4th February 1994/ L.N. 91 of 1994 p.B245). This Notice exempts from certain requirements of the Merchant Shipping (Prevention of Oil Pollution) Regulations various types of vessels stated in Schedule 1 of the Notice which are licensed under Part IV of the Shipping and Port Control Ordinance (Cap.313) except those listed in Schedule 2 of the Notice. The Notice shall be effective on 16 February 1994.

#### Corrigendum

The digest of the *Noise Pollution Control (Amendment) Ordinance* did not intend to suggest that there was any relaxation in control of powered mechanical equipment. The use of such equipment for works of a household nature by an owner, tenant or occupier will continue to be exempted from the night permit system. We are grateful to the EPD for bringing this to our attention. *Eds.*

### CASELAW Update

**Chan Chi-Kuen v. R.** (Supreme Court of Hong Kong, Appellate Jurisdiction, Keith J., Magistracy Criminal Appeal No. 915 of 1993, 28 January 1994) *Water Pollution Control Ordinance - sentencing - fine - imprisonment in default of payment - appeal against sentence - use of deterrent sentences - government's call for deterrent sentences - need for deterrent sentences solely for the courts to decide - deterrent sentence not usually applicable to first offence - fine must be within ability to pay - magistrate has no power to impose imprisonment in default of payment: R.*

*v. Tong Lai Ping applied.*

On 25 October 1993 at the Tuen Mun Magistracy, the Appellant pleaded guilty to an offence under s.9(1) of the Water Pollution Control Ordinance (Cap. 358), that is, discharging matter other than domestic sewage into a communal sewer for the carriage of foul water. He was fined \$10,000 pursuant to s.11 of the Ordinance and sentenced to 3 months' imprisonment in default of payment. He then appealed against his sentence. Keith, J. allowed the appeal and reduced the fine to \$5,000 and set aside the sentence of imprisonment in default of payment. The Appellant was the sole proprietor of a shop which served cooked food. He had since ceased business and at the time of the appeal worked as a relief worker and lived in a public housing unit. He had a clear record and in the Supreme Court it was accepted that the waste water would have been filtered before it was discharged into the sewer.

In determining the appropriate level of the fine, Keith J. found that the magistrate had taken four factors into account: (1) the Appellant's plea of guilty (2) his clear record (3) the magistrate's own knowledge of the importance of controlling water pollution gleaned from a talk to members of the judiciary by officers of the Environmental Protection Department (4) the need for deterrent sentences in water pollution control as stated by these EPD officers. Whilst the magistrate was entitled to take the first three factors into account in sentencing the Appellant, the need for deterrent sentences 'is a matter for the courts and for the courts alone' and the magistrate was therefore not entitled 'to

respond to what she was told by those officers about the need for deterrent sentences in this area'.

Keith, J. said that it is well established in Hong Kong that as a general rule a deterrent sentence should not be imposed on a first offender which may be departed from only in bad cases. A fine must also be within the Appellant's ability to pay. Bearing in mind the first three factors, the Appellant's limited means, which the magistrate failed to take into account, and that the maximum sentence was \$100,000 and a daily fine of \$5,000, the appropriate level of the fine should have been \$5,000.

As to the sentence of three months' imprisonment in default of payment, Keith, J. applied the reasoning of Mills-Owens J. in *R.v. Tong Lai Ping* [1961] HKLR 341 and held that nothing in the Magistrate's Ordinance gave the magistrate any power to impose imprisonment where, as in this case, the offence was punishable only by fine. Keith, J. therefore set aside the sentence of three months' imprisonment in default of payment.

#### Commentary

This is one of the rare cases where the Supreme Court considers the appropriate sentence for an environmental conviction. It should therefore be of interest to Hong Kong's environmental enforcement authorities and polluters alike. The case demonstrates two important things about sentencing of environmental offenders. First, environmental offenders are sentenced according to the same principles as apply to all criminal offenders, that is, sentencing is based on

individualised punishment and deterrence. Thus, Keith, J. found that the magistrate had failed to take into account the defendant's ability to pay a fine and had improperly imposed a specifically deterrent sentence on a first offender. Whilst sentences may be a general deterrent to anyone committing certain types of offences, specifically deterrent sentences, that is, punishment severe enough to discourage individuals from re-offending, are not, as a general rule, to be imposed on first offenders.

Secondly, sentencing is not a science. Keith, J. halved the fine imposed by the magistrate and said that was in his view the appropriate level. Such judicial assessments are subjective and it is hard to measure what is an 'appropriate level'. It may surprise Keith J. that, according to 1993 statistics, the average fine imposed on first offenders for water pollution convictions was \$12,077 (the average in the Tuen Muen magistracy was only slightly higher at \$12,368). Of course, the statistics do not tell the individual characteristics of the offence or the offender, such as the ability to pay. Even more surprising is that the average fine for repeat offenders in 1993 was only \$16,796 which seems low if specifically deterrent sentences are reserved for repeat offenders. There seems to be a case for putting these statistics to the court so that judges can make consistent decisions in the absence of sentencing guidelines.

Finally, the EPD must now realise how fine the line really is between 'informing' Hong Kong's judiciary about the effects of pollution and 'influencing' their sentencing discretion. It is implicit in his

judgment that Keith, J. believed the magistrate was wrong to be influenced by the EPD's felt need for heavier penalties on environmental offenders. If 'educating' the judiciary by informal means is an inroad into judicial independence perhaps the EPD should press the prosecution to take action by more formal means. A procedure exists for the Attorney General to ask the Court of Appeal to review sentences which he considers are 'manifestly inadequate' (Cap. 221 s.81A). Although this procedure is usually confined to cases where he considers a custodial sentence should have been imposed, there seems no reason in principle why it could not be used to review low fines imposed on offenders whose conduct is at great cost to the environmental and society at large.

## HONG KONG Briefing

### ENVIRONMENT AND PUBLIC HEALTH

**MORE** stringent pollution standards are proposed for vehicles registered in Hong Kong after April. The amendment will require vehicles to use better quality fuel. Moreover more vehicles will be examined for possible breaches of pollution laws and the Government would consider what might be done to halt the problem of pollution caused by the illegal use of sub-standard diesel by container lorries. According to study by Hong Kong University, the biggest polluters on the road were trucks. (SCMP 24/2/94)

**AIR** blowing from East Asia is about 10 times dirtier than that

over the Pacific Ocean and poses a long-term threat in terms of climate change, a NASA mission has found. The pollutants interfere with the atmosphere's ability to rid itself of greenhouse gases, which can lead to global warming. It is believed that the region's phenomenal economic and population growth rates were a problem in this respect. (SCMP 25/2/94)

**AIR** pollution levels dipped in February mainly due to the Lunar New Year break and heavy rainfall, the EPD reported. The drop was particularly noticeable in industrial areas where most factories were shut down during the mid-month holiday. Heavy rains around February 16 further helped to wash pollutants from the air and maintain acceptable readings at the three monitoring stations reported on by the department. (SCMP 15/3/94)

**ENERGY** code will be proposed to legislators in May in a first attempt to make buildings more environmentally friendly. The new code will set standards for the external walls and roofs of new buildings so that they did not let in too much heat. Developers will have to tell the Buildings Department the size of the windows, the materials used and other information. The Advisory Council on the Environment urged the Government to apply codes to the inside of buildings, such as the cooperation of air-conditioners and lifts which consume large amount of energy. Legislation on surcharge and on sewage charges in general will go to legislators in April. (SCMP 22/3/94 and 9/4/94)

**BUDGET** spending on environmental problems has increased for 48 per cent in

comparison with last year's budget. However, it only constitutes about 3% of the total budget. Most of the money is headed to cover capital works projects that were commissioned some time ago and are due to be started in the coming financial year. About \$1.52 billion will cover recurring expenses such as staff for anti-pollution enforcement. But most of money will go to the EPD. Such proportion of spending is however criticized by legislators as too low when compared with other big cities. (SCMP 26/2/94)

**NOISE CONTROL** measures were announced by the Urban Council after residents complained about the noise and the traffic caused by concerts at the Hong Kong Stadium, which opened on 11th March 1994, leading to the EPD serving a noise abatement notice. Measures included tilting the sound speakers at least 20 degrees towards the crowd, moving the stage towards the centre of the stadium and adding a 4.5 metre sound barrier on the hospital side of the stadium. The Urban Council ruled that noise levels in the centre of the stadium should be kept below 90 decibels - which is a reduction of about 30 per cent from perceived noise levels at concerts held in early March, which reached about 96 decibels. (SCMP 31/3/1994)

**CONSTRUCTION WASTE** has reached crisis point, according to the EPD, which is gearing up for a crackdown. About 11,500 tonnes of construction waste are sent each day to landfills. The penalty for illegally dumping waste will soar, from being a littering offence with a maximum fine of \$10,000 and six months in jail, to a pollution offence with

a maximum \$200,000 fine and six months' jail or \$500,000 and six months for subsequent offences. (SCMP 7/3/1994)

### **PLANNING AND LAND USE**

**SHEK O QUARRY** will be turned into a flower-covered park in ten years. Pioneer Group, which has quarried there for 20 years, will fund the rehabilitation in exchange for rights to quarry nine hectares of land on a hillside behind the existing quarry. Ten million cubic metres of material on the country park hillside removed to soften the steeply terraced slopes. The quarry basin will be deepened and flooded to form a marine cove connected to Tai Tam Bay. (SCMP 30/3/1994)

**\$78.6 MILLION** project will be launched to convert the Sai Wan Ho pier into a police building for the replacement of the 110-year-old Marine Police headquarters site at Tsim Sha Tsui. The new headquarters project, which is expected to be completed by late 1996, will involve building on extra floor on top of the existing west pier wing where the Harbour Division is located. And the present headquarters had been earmarked for commercial, cultural and recreational development. (SCMP, 13/4/1994)

### **PADS UPDATE**

**ANGRY** builders are set to continue their boycott of further airport construction work despite the latest attempt by the Provisional Airport Authority ("PAA") to settle its contract conditions row with the Hong Kong Construction Association ("HKCA"). Contractors believe the PAA's concessions are significant but still do not resolve deep concerns that

firms face unacceptable and costly risks on key contract clauses. If the boycott holds and no tenders are lodged the PAA will come under tremendous pressure from Government and legislators to make a deal with the HKCA, politicians believe. However, following a take between the builders and the PAA on 16th April 1994, the builders could settle their airport contract conditions row with the PAA. (SCMP 14/4/94 and 18/4/94)

**THE Government** has thought of asking the Legislative Council for all of the \$3.87 billion needed to build government facilities at the new airport and now wants only \$1.45 million for what it will justify as "urgent projects". Under the new strategy, the Government will seek funds for construction of buildings such as an air traffic control complex and towers and for buying equipment such as surface movement radar, control tower simulator, instrument landing systems as well as meteorological requirements. Officials maintained that it was urgent to design the sophisticated systems and facilities and put them out to tender and construct them, as the lead time was at least two to three years. (SCMP 13/4/94)

**CHINA** is to press Britain to say exactly how much debt incurred by Hong Kong's new airport will be left after 1997. The demand for clarification of the borrowing of the Mass Transit Railway Corporations ("MTRC") and the PAA was made when experts from the Joint Liaison Group ("JLG") Airport Committee meet to discuss the fourth financial package on the airport proposed by the Government in February. Chinese officials urged Britain to increase the

**Comparative Table of Environmental Convictions:  
January and February 1994**

	Number	First Offence	Second Offence	Third+ Offence	Highest Fine
Air	15	10	1	4	\$13,000
	13	12	1	-	\$10,000
Noise	9	7	2	-	\$25,000
	11	11	-	-	\$15,000
Waste	1	1	-	-	\$ 1,000
	-	-	-	-	-
Water	15	9	4	2	\$50,000
	15	9	3	3	\$50,000
Total	40	27	7	6	
	39	32	4	3	

*January figures appear on the first line and February figures on the second line of each item.*

Source: EPD, Anti-Pollution Prosecution Figures (22 February & 15 March 1994).

injection to the project and its associated rail link to cut the

financial burden on the future SAR. (SCMP 2/3/94)

**ABBREVIATIONS**

AFD	Agriculture & Fisheries Department
APCO	Air Pollution Control Ordinance
CFCs	Chlorofluorocarbons
EC	European Community
EPCOM	Environmental Pollution Advisory Committee
EPD	Environmental Protection Department
EXCO	Executive Council
FEER	Far Eastern Economic Review
HKU	University of Hong Kong
JLG	Joint Liaison Group
LDC	Land Development Corporation
LEGCO	Legislative Council
LS	Legal Supplement
NCO	Noise Control Ordinance
NT	New Territories
PAA	Provisional Airport Authority
PADS	Port and Airport Development Strategy
SCMP	South China Morning Post
SMP	Sunday Morning Post
WDO	Waste Disposal Ordinance
WPCO	Water Pollution Control Ordinance

This report does not constitute advice of a legal nature. Whilst all effort has been made to ensure completeness and accuracy at the time of publication, no responsibility is accepted for errors or omissions. Further information, inquiries and advice in respect of this report should be directed to:

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