22. Against this background, I consider each of sections 73A(5) and 73A(6).

iii. *Section 73A(5)*

23. The evidence which section 73A(5) of the Bill would permit to be used against an accused person charged under section 73A would consist either of an acknowledgment by a firm in a consent order or a finding by the Competition Tribunal or Competition Appeal Court that the firm had engaged in a prohibited practice. The firm could make such an acknowledgement without any reference to the individual criminally charged in terms of section 73A and without any ability on the part of that individual to influence whether such an acknowledgment is made or not. Similarly, any finding by the Competition Tribunal or the Competition Appeal Court, in proceedings before it where the standard of proof is that of a balance of probabilities, could be made without any participation in those proceedings by the individual criminally charged under section 73A.

24. Yet, section 73A would permit the State to use either the acknowledgment or the Competition Tribunal's/Competition Appeal Court's finding against the individual so criminally charged, and the Court would be required to accept such evidence as *prima facie* proof that the firm had engaged in the prohibited practice. In this regard, it is important to note that whether or not the firm had engaged in the prohibited practice is an essential element or the criminal offence sought to be created by section 73A.

25. The practical effect of a provision which permits for the acknowledgment or the finding to be so used (namely as *prima facie* evidence against the accused) is that:

25.1 the Court will have to accept, *prima facie*, that the firm did

engage in a prohibited practice, and the Court will have to do so on the basis of the acknowledgment by the firm in a consent order or the finding by the Competition Tribunal or the Competition Appeal Court;

25.2 if no evidence is led by the accused or if the accused is unable to rebut the *prima facie* evidence, on a balance of probabilities, that the firm did not engage in a prohibited practice, then the evidence, at the end of the case, will stand and the State will be taken to have discharged its onus in respect of that element of the crime (namely that the firm had engaged in a prohibited practice).

26. This clearly would have the effect of lessening the onus on the State to prove every element of the crime beyond a reasonable doubt. Whilst there are circumstances in which such reverse onus provisions can operate, it must be reasonable and desireble.

27. In the present case, I am of the view that the reverse onus which would be created by the proposed section 73A(5) would infringe upon the constitutional right contained in section 35 of the Constitution which guarantees the accused a right to a fair trial, including the right to be presumed innocent. My principle concern is that the accused would be confronted with evidence which can be taken as *prima facie* proof of an essential element of the offence (namely that the firm had engaged in a prohibited practice) in circumstances where the accused may not have had the opportunity to have challenged that evidence in the first instance. Thus:

27.1 if the firm makes an acknowledgment in a consent order that it engaged in a prohibited practice, it could have done so without any reference to the accused and the accused will not have had the opportunity to test the acknowledgment.

27.2 similarly, where there is such a finding by the Competition Tribunal or the Competition Appeal Court, this would not only be on the strength of a lesser onus (i.e. balance of probabilities) but could also be a finding in proceedings in which the accused does not participate at all.

28. There appears to me to be no justification to excuse the State from proving an essential element of the offence, namely that the firm had participated in a prohibited practice, and to do so beyond reasonable doubt. This would then enable the accused to challenge the evidence in the criminal proceedings brought against him or her rather than to be confronted with *prima facie* proof of that element which he or she would have to rebut.

29. For these reasons, I am of the view that section 73A(5), in its present form, would violate the fundamental constitutional right enshrined in section 35(3)(h) of the Constitution.

iv. <u>*Section 73A(6)(b)*</u>

30. A person will be charged under section 73A(1) on the basis that he/she is either a director of the firm or is engaged or purported to be engaged by the firm in a position having management authority. Either way, the person is acting for and on behalf of the firm.

31. However, that person could if his/her conduct falls within the ambit of section 73A(1), be convicted in his/her personal capacity. That principle is not the subject matter of this memorandum.

32. What is an issue though is that section 73A(6) prohibits the firm, in such an instance, from either directly or indirectly indemnifying, reimbursing, compensating or otherwise defraying the expenses of

the accused person "*incurred in defending against a prosecution*", unless the prosecution is abandoned or the person is acquitted.

33. In other words, it is only at the stage where either the prosecution has been abandoned or the accused has been acquitted (which will happen at the conclusion of the trial), that the firm may either indemnify, reimburse, compensate or otherwise defray the expenses of the accused incurred in defending himself/herself against the prosecution. But any indemnification, reimbursement, compensation or defreying of expenses by the firm on behalf of the person who was accused, at that stage, may well be scant consolation to the person who was so accused and in fact may (and in many instances probably will) be of little or no use to the accused in relation to defending the prosecution itself. It will merely have the effect of allowing the firm to compensate the accused for his out of pocket legal and other expenses incurred in defending himself/herself, but only after the battle has been waged.

34. The area of competition law is complex, and the issues which could arise in a criminal trial, including whether there has been a contravention of section 4(1)(b) could, and in all likelihood would, be factually complex and also requiring of expert evidence. The costs which would be incurred in defending one-self against a prosecution based on section 73A(1) are likely to be substantive and if an accused person is unable to afford such costs, this could severely affect his/her ability to properly and fairly defend himself/herself.

35. It will not be of any assistance to the accused to be told that he/she will be in a position to recover expenses from the firm after the event. This could be like offering oxygen to a dead person when an earlier offer of oxygen may have saved the life.

36. In my view, a statutory provision which prevents a firm from offering financial assistance to a person criminally charged in terms of

section 73A(1) would have the effect of infringing the constitutional right granted to an accused to have adequate facilities to prepare for his/her defence.

37. In addition, section 73A(6)(b) in a sense works against the presumption of innocence. This is because it almost punitively places the accused on his/her own in a manner which seems to suggest that he/she has done something wrong merely because he/she has been charged under section 73A(1). The punishment for having being so charged is to prohibit the firm on whose behalf the accused acted from financially assisting the accused in defending himself/herself against the prosecution. This could well have the result of preventing the accused from properly preparing for the trial and from employing the witnesses who could be required for him/her to meet the State's case. Consequently, section 73A(6)(b) also violates the constitutional protection given to an accused in terms of section 35(3)(h) of the Constitution.

## THE LACK OF AN EXEMPTION PROVISION FOR COMPLEX MONOPOLY CONDUCT

38. The complex monopoly provisions which the Bill seeks to introduce into the Act are dealt with in section 4 of the Bill which seeks to introduce a new chapter 2A into the Competition Act.

39. Complex monopoly conduct will subsist within the market for any particular goods or services if –

39.1 at least 75% of the goods or services in that market are supplied to, or by, five or fewer firms;

39.2 any two or more of the firms contemplated above conduct their respective business affairs in a conscious parallel

manner or co-ordinated manner, without agreement between them or among themselves; and

39.3 the conduct contemplated above has the effect of substantially preventing or lessening competition in that market,

unless a firm engaging in the conduct can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.

40. The phrase "*conscious parallel conduct*" is said to occur when two or more firms in a concentrated market, being aware of each other's actions, conduct their business affairs in a co-operative manner without discussion or agreement.

41. The complex monopoly provisions are directed towards preventing conduct which has the effect of substantially preventing or lessening competition in a particular market unless it can be proved that there are technological, efficiency or other pro-competitive gains resulting from such conduct which outweighs the effect of substantially preventing or lessening competition. In this sense, it is directed at preventing the same end result which the provisions of section 4(1)(a) and section 5(1) of the Competition Act which deal with restrictive horizontal and restrictive vertical practices are directed towards.

42. The Competition Act makes provision for an exemption from the application of the chapter in which the provisions relating to restrictive horizontal practices and restrictive vertical practices reside. Chapter 2 deals with these restrictive practices and the exemption provisions contained in section 10 of the Competition Act allows a firm to apply to the Competition Commission for exemption, but only from the application of chapter 2.

43. But, if chapter 2A, dealing with complex monopoly conduct, is directed towards preventing the same end result, it is difficult to understand why there is no similar exemption provision relating to the complex monopoly conduct as there is in respect of restrictive horizontal and restrictive vertical practices. Thus, if two firms, through an agreement between them, engage in either a restrictive horizontal or restrictive vertical practice or seek to do so, they could apply for the exemption in terms of section 10. However, if their conduct does not fall within either of these restrictive practices but nonetheless constitutes complex monopoly conduct as contemplated by section 10A(1) then they would not be able to seek a similar exemption. The unfavourable treatment of complex monopoly conduct in relation to restrictive vertical and restrictive horizontal practices does not appear to be justified.

44. Not only is this inconsistency difficult to understand, but it also would place parties in a position in which they could be treated unequally in circumstances in which such unequal treatment is not justified. Thus, even though the restrictive vertical and horizontal provisions contained in chapter 2 of the Competition Act are directed towards preventing the same end result that the complex monopoly conduct provisions would be directed at, the former would have the benefit of a potential exemption in terms of section 10 of the Competition Act whilst the latter would not. But there is nothing in the nature of the conduct identified in the complex monopoly provisions which suggests that there should be such a differential treatment or that a lesser benefit should be afforded to parties engaged in complex monopoly conduct compared to parties who are engaged in restrictive horizontal or vertical practices. For this reason, I am of the view that such differentiation would offend against the right to equal protection and benefit of the law enshrined in section 9(1) of the Constitution and that the differentiation would

not be justifiable in terms of the limitation of rights provision contained in section 36(1) of the Constitution.

A. E. Bham SC
Chambers, Sandton
28 November 2008

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| | 4(1)(d)<br><br>- The council will determine strategic policy regarding education – fundamentally the function of Higher Education<br><br>- Do not restrict to strategic policy of DPW – should include the broader needs of the economy | The Clause refers to educational requirements for purposes of registration and practicing in a BEP<br><br>Replace "national public works policy" with "government policy" |
| | 4(1)(e)<br>- Council will control and exercise authority in respect of all matters affecting education and training – unacceptable – is the responsibility of universities<br><br>- Composition of council – mainly of non professionals – threatening the existence of the profession | Universities will determine the educational programmes which they would like to offer. Council and the PB will determine which programmes offered by the universities are to be accredited for purposes of registration in a BEP.<br><br>Members on the SACBE are to ensure the interest of the BE as a whole and not specific individual professions. The interests of the specific individual professions will be protected by the respective PBs. |
| | 4(1)(m)<br>- Add "to gain <u>and maintain</u>" international recognition<br><br>- Section 4(1)m passing of this bill would | Agree<br><br>- How? Transitional arrangements provides for the SACBE to assume all liabilities and obligations of |

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| | ruin the current status of ECSA i.t.o. the Washington, Sydney and Dublin Accords. | the existing councils. This also holds true for the obligations in terms of all international agreements. In terms of the international agreements the signatories agree that the criteria, policies and procedures used by the signatories in accrediting engineering academic programs are comparable.<br>- There is no intention of lowering any standards.<br>- The SACBE will through the Engineering board continue to ensure that the same standards are maintained in education and training.<br>- |
| | 4(2)(b)<br>- Renumber 4(2)(b) to 4(1)(s) – councils responsibility to ensure financial sustenance of PBs | Agree |
| | 4(1)(n)(v)<br>- Does not understand why govt. would require such tariffs as its policy is to procure consultants on a competitive basis. This is anti-competitive and value for money cannot be interrogated at the procurement stage.<br>- The setting of fee tariffs is viewed by the international community as being anti-competitive. – check against competition commission. Alternatively, PBs should only be empowered to publish data associated with historic fees | These are recommended fees which professionals may charge. |
| | 4(1)(m)<br>- International recognition will be lost if peer evaluation is not maintained and if registrar is to decide on the registration of professionals | Peer review is to be done at PB level. Registrar is only to attend to the administrative aspects of registration. |
| | **4 (1)(f)** – Uniform guidelines throughout the Built Environment Professions is an extremely important requirement which will greatly serve the public in | The intention of this clause is to ensure that the norms and guidelines established by PB are applied consistently from in respect of all professionals within that profession. |

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| | its understanding of and interaction with the professions. Consideration should be taken of the different functions and methods of the different professions. This will be accommodated by the revised clause:<br><br>"ensure [the] **that** uniform [application of norms and guidelines set by] **principles are determined and practiced** by professional boards throughout built environment professions" | The clause does not intent for council to establish uniform norms and guideline for application by the various PBs. |
| | **4 (1)(j)** – Considering the broad impact of the Built Environment professions, co-operation should be facilitated on a very wide scale and at various levels, including directly with government departments, and at all levels of government. The clause could read:<br><br>"facilitate [inter-ministerial] co-operation concerning issues relating to the built environment **between all levels and spheres of government**" | Lydia |
| | **4 (1)(k) and 4 (1)(l)**– In the light of the democratic principles of freedom of speech and in encouragement of public participation, the council should not require the ministers' request to provide advice and comments, but should be able to provide such advice and comments whether it is desired or not. The following proposed clause reflects this:<br><br>"provide advice, if requested by the minister, **or at such other time as it may deem fit and necessary,** in respect of national policy that could impact on the built environment **in any way, including** built environment human resource development in relation to the built environment professions and to the recognition of new professions **within or affecting the built** | Agree |

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| | **environment."** | |
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| | **4 (1)(n)** – The following examples highlight particular aspects of the various professions that may require flexibility in policy:<br>• Point (i) – Education and training institutions may provide excellent training for one profession, while the training in another is poor – these should be separately evaluated. Some courses, such as engineering, is much less sensitive to large class sizes than is the case for the design professions – consistent standards should not include factors which is variable across the professions. Some courses can have evaluation performed exclusively through written test, others require projects and oral exams – allowance should be made for these differences.<br>• Point (ii) Not all the professions can implement the same number of categories of registration, or use the same means to differentiate between such categories. Various categories of registration has been identified for architects (and probably for engineers and landscape architects) - Architect, Senior Architectural Technologist, Architectural Technologist and Architectural Draughtsperson. These categories can be based on various aspects, ranging from scope of service through complexity of brief and program, to environmental factors that require greater or lesser skill and training (Similar principles are probably applied for the other professions that have identified | Yes. Cannot address in the Bill<br><br>Not to be dealt with in the Bill<br><br>Not to be dealt with in the Bill |