

## HONG KONG ENVIRONMENTAL LAW ASSOCIATION COMMENTS

### **Directors Liability for Noise Offences The Noise Control (Amendment) Bill 2001**

#### **Introduction**

1. The Association recognises that noise is an increasing problem in Hong Kong and generally advocates a comprehensive policy and legal framework for improving the environment, including noise quality.
2. Public opinion is broadly divided regarding the usefulness and deterrent effect of further sanctions. As regards construction your attention is drawn to the findings contained in the **Report of Construction Industry Review Committee "Contract for Excellence", January 2001 ("The Tang Committee") (extract attached)**. This supports the adoption of a more integrated approach to construction, and recommends that the Environment and Food Bureau and the Environmental Protection Department should, **as a matter of priority**, conduct a regulatory impact assessment on the cumulative impact of environmental legislation on the construction industry vis-à-vis the community (**see paragraph 8.41(c) at page 146**).

#### **The Bill**

3. The Noise Control (Amendment) Bill 2001 introduces personal liability for directors and officers of companies found liable for offences committed under the Noise Control Ordinance (Cap 400). It brings with it a new procedure for prosecuting individuals. The Bill significantly increases the environmental risk associated with directorships and senior management for noise related offences.

4. We have two main concerns, which are primarily legal:-

- (1) Under the proposed procedure a notice may be served on the "specified person" **whether or not** the company is convicted of that offence (**s.28B(1)(a) and (b)**).

This means that a director may subsequently commit an offence, even though the company was acquitted on the first occasion. This seems wrong in principle.

- (2) Under the proposed procedure, **any** person who is a director at the time of the offence is guilty of an offence provided he or she has been served with a notice (**s.28A(1) and (2)**).

No evidence of a "guilty mind" or culpability is required. These powers are excessive and potentially oppressive in our view.

### **Defence**

5. A director is guilty unless he can bring himself within one of the statutory defences. The only defence expressly provided is that the director took reasonable precautions and exercised due diligence to prevent the commission of the offence (**s.28B(3)**). He may do so by showing that he has established a proper system to prevent the commission of such offences and ensuring the operation of the system (**s.28B(4)**).

6. This defence would be open to judicial interpretation. However there is at least a presumption that every director should be responsible for environmental management at every site. Many would feel that this is unrealistic. At a corporate level, a director's ability to take precautions will depend upon whether this is within his/her area of control. For example, another officer of the company may have responsibility for the site concerned (**s.28B(1)(c)(i)**) or bear particular responsibility for environmental matters generally within the company.

7. Also a director's ability to take action will depend upon whether there has been adequate time in which to do so. Under **s.28B(1)(c)(ii)**, the offence can occur at **any** time after the date on which the notice is served.
8. It is proposed that the Authority may issue codes of practice containing such practical guidance as it thinks fit for the purpose of providing industries with good management practice in respect of the defence provided under s.28a(3) (**s.28C(1)**). The content of these codes of practice is entirely within the discretion of the Authority. These codes of practice therefore prescribe the standards by which every director shall be judged when deciding whether he has taken reasonable precautions and exercised due diligence. However, there are no limits on the standards that can be set by the Authority in the codes of practice.

### **Construction Companies**

9. There is no defence at all for directors of construction companies to certain offences under Sections s.6(1)(a), 6(2)(a) or 6(3)(a) namely various offences in relation to noise from construction sites where there is no constitution noise permit in force. These offences are typically often committed by sub-contractors acting on site without permission. A director of a contractor company will be guilty of an offence purely by virtue of his office as a director. We see this as a draconian provision which is likely to leave the industry with an acute feeling of injustice.

### **Guilty Mind**

10. Under the proposed regime the prosecution would no longer need to show the "consent, connivance, negligence or omission" of a director as they do with air and water offences. The Bill seeks to replace this normal requirement for a criminal offence, by merely fixing a director with notice of previous complaint. There does not even need to be a previous conviction as explained above.

## **Human Right Implications**

11. These provisions are therefore wrong in principle in our submission and could potentially have human rights implications.

## **Background**

12. Offences under the Ordinance carry with them fines of up to HK\$200,000 for repeat offenders. These levels have not been increased in recent years. It is unclear whether the Government have plans to increase the level of fines or even ultimately to introduce terms of imprisonment as with the Air and Water Ordinances.
13. The Water Pollution Control Ordinance (Cap 358) in 1990 and the Air Pollution Control Ordinance (Cap 311) in 1993 included sections which created personal liability offences for directors and managers of companies.
14. If personal liability under the NCO is to be brought into force, it should not be different in principle from the existing legislation in relation to air and water.
15. The drafting of the existing legislation under Section 10A of the Water Pollution Control Ordinance and Section 47A of the Air Pollution Control Ordinance requires that:
  - (a) there is conviction against the company for the breach.
  - (b) there is proof of consent, connivance, negligence or omission on the part of the director or manager in respect of the company's breach.
16. It is apparent that there are two main problems with this legislation. First, there is procedural uncertainty concerning whether the individual and the company should be prosecuted at the same time or consecutively. If the NCO is to be amended this should be clarified and provided for in the NCO Amendment Bill by an amendment requiring there to have been a previous conviction (not merely a charge).

17. The second difficulty is in identifying the appropriate person. This can be especially difficult in practice if a Defendant argues that he was not the person responsible. In our view, it is entirely appropriate (and an essential legal requirement) that the prosecution must still show that an individual is culpable ie by showing their consent, connivance, negligence, or omission. The problem could be addressed by a notice requiring the director or other officer upon whom it is served to notify the Authority of the name of the person responsible for the site. This should be required within a given period eg 14 days, failing which the person served could be deemed to be the appropriate person.
18. Service of such a counter-notice identifying the appropriate person would obviate the need to draw the legislation so widely and ensure that, if need be, proceedings may be brought against the correct individual. This person may be shown to have consented, connived, neglected or omitted to take action if he or she ignores the notice which is served after an earlier conviction.

### **Summary**

- A regulatory impact assessment should be conducted as a matter of priority to assess the cumulative impact of the environmental legislation.
- The powers contained in the NCO Amendment Bill are excessive and potentially oppressive. They also give unlimited discretion to the Authority.
- Such amendment would create a legal precedent for Hong Kong.
- The NCO Amendment Bill could have human rights implications.
- If director's liability is to be introduced for noise offences, a notice should only be served after the company has been convicted of an offence.

- a counter-notice procedure could be considered whereby the company could identify the appropriate person.
- The offence must still require consent, connivance, negligence or omission on the part of the individual.
- The basic principles in respect of noise offences should be consistent with air and water legislation.

**Extract of Report of Construction Industry Review  
Committee “Contract for Excellence” January 2001**

its subsidiary legislation state that where more than one contractor operate on the site, the principal contractor is held liable for offences committed on that site. We observe that in practice, this may, in some circumstances, absolve the offending subcontractors from their responsibilities. To establish clear accountability and to mete out sanction where it is due, we recommend that the relevant provisions should be amended to enable prosecution action to be brought against subcontractors for non-compliance with safety requirements in operations under their direct control.

8.23 We also observe that the regulatory authority currently encounters much difficulty in prosecuting workers who do not comply with statutory site safety requirements because employers are unwilling to confirm the concerned workers’ identities and their employment status. To encourage construction workers to take responsibility for their personal safety, we urge contractors and subcontractors to co-operate with the Labour Department in taking enforcement action against non-compliant workers.

8.24 As a further step to ensure that project management is fully committed to site safety, we recommend that the Buildings Department should consider initiating disciplinary action against Registered General Building Contractors and Registered Specialist Contractors for blatant negligence leading to serious site accidents or for poor site safety performance below a certain benchmark. We also recommend that the Buildings Department and the Labour Department should co-ordinate the requirements for the Site Supervision Plan System mandated under the Buildings Ordinance and the Safety Management System under the Factories and Industrial Undertakings (Safety Management) Regulation to facilitate compliance efforts.

## **II. An Environmentally Responsible Industry**

8.25 The construction industry has a major impact on our environment. Construction activities are the source of many environmental problems such as noise, air and water pollution, solid waste and land contamination. Moreover,

Built structures consume a lot of energy and natural resources both during their construction and subsequent occupation. To improve the environmental performance of the construction industry, we need to devote more effort to the proper management of various environmental issues arising from the design, construction and operation phases. The objective is to achieve a healthier living environment and better quality of life for the community at large through a more sustainable approach to construction.

8.26 Sustainable construction is a global trend. In brief, sustainable construction refers to construction activities whose negative impacts are minimised and positive impacts maximised so as to achieve a balance in terms of environmental, economic and social performance. Examples of sustainable construction include –

- (a) refurbishment of existing buildings;
- (b) restoration of historical buildings;
- (c) use of non-depletable and recycled construction materials;
- (d) reduction of construction and demolition waste;
- (e) reduction of energy consumption in buildings; and
- (f) provision of healthy, safe and pleasant built facilities.

8.27 We note that the Government is taking active steps to tackle many environmental issues arising from construction. But on the whole, these efforts are rather fragmented and tend to be organised by reference to the established functional distribution of responsibilities among policy bureaux and departments without a central steer. For instance, the Environment and Food Bureau, assisted by the Civil Engineering Department and the Environmental Protection Department, focuses on minimising the environmental nuisances generated by

construction activities through statutory control over noise, air and water pollution and through reduction of construction and demolition material. The Planning and Lands Bureau and the Buildings Department have recently embarked on private buildings from the building design perspective. Energy efficiency of buildings and indoor air quality issues, on the other hand, are dealt with by the Environment and Food Bureau and the Electrical and Mechanical services Department. To achieve the objective of sustainable construction and to maximise the impact of the efforts made by individual bureaux and departments, better co-ordination among the regulators is called for.

8.28 Apart from the regulators, clients, designers, contractors, suppliers and occupiers will also need to act in concert and show firm commitment to achieving better environmental performance. Each of them has an important role to play in the delivery of sustainable construction as explained below –

- (a) Clients – They have a key role to play in promoting sustainable construction. For instance, they can decide whether a new building is required or whether refurbishment or extension of an existing building will be sufficient. Clients can also make a contribution by ensuring that sustainable construction methods and features, such as use of environmentally friendly materials and specification for low energy consumption, are included in the design at the outset;
- (b) Designers – Designers can help to ensure that environmental issues are considered throughout the design process, that sustainable materials and construction methods are chosen, and that high environmental standards pertain in the built facilities;
- (c) Contractors – Contractors can contribute towards sustainability by adopting environmentally friendly construction methods and by planning their work to efficiently eliminate waste to the maximum extent possible;

- (d) Suppliers – Suppliers can contribute by assuring their customers that the products they supply will have little or no impact on the environment over their whole life-cycle; and
- (e) Occupiers – Occupiers can make a contribution by ensuring that buildings are used efficiently and maintained properly.

8.29 Sustainable construction is an integral element of the broader subject of sustainable development. Efforts to promote sustainable construction in Hong Kong would stand a better chance of success if there was a general appreciation of the need for sustainable development and a firm commitment to this cause. We recommend that in order to improve the environmental performance of local construction, we should first and foremost develop a coherent policy framework that anchors the concept of sustainable construction firmly in the context of sustainable development. We should also seek to build up a broad base of public support by ensuring that the need for sustainability is more widely understood in the community.

8.30 In paragraphs 8.31 – 8.50 below, we shall address more specific environmental concerns pertaining to local construction under the following headings –

- (a) life-cycle costing;
- (b) greener and more energy efficient designs;
- (c) abatement of environmental nuisance during construction;
- (d) reduction and management of construction and demolition material; and
- (e) environmental assessment schemes and environmental management systems.

Hong Kong Energy Efficiency Registration Scheme for Buildings<sup>31</sup>, etc. We recommend that the Electrical and Mechanical Services Department should work closely with the Buildings Department in implementing the latter's recent initiatives on greener buildings so as to achieve better synergy in their parallel efforts. To encourage more energy efficient designs, we recommend that more efforts should be devoted to the development and dissemination of guidelines and design tools for analysing the energy consequences of design options, also with the involvement of the local research community. In addition, guidelines targeted at clients and occupiers should be developed to help them assess the life-cycle energy cost of construction and to carry out self-audits of energy consumption.

### **Abatement of environmental nuisance during construction**

8.39 Construction sites are frequently criticised for causing nuisance to their neighbours. Environmental nuisances arising from construction activities include noise pollution, dust emission, contamination by wastewater and muddy runoffs, and improper disposal of chemical waste. Convictions for environmental offences in 1999 involving construction activities increased by about 40% over 1998 to 633 cases, with convictions on noise pollution topping the list (about 42%). In the same year, there were altogether 3 660 complaints against the construction industry of non-compliance with environmental protection requirements, representing an increase of 9% over 1998. Complaints against noise pollution accounted for about 65% of all complaints. The situation calls for urgent attention.

8.40 The construction industry must substantially improve its environmental performance. In seeking to achieve this objective, the industry needs to tackle a number of inherent constraints, including tight construction programmes, inadequate consideration of environmental issues at the design

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<sup>31</sup> The Hong Kong Energy Efficiency Registration Scheme for Buildings, launched in 1998, is a voluntary implementation of the Building Energy Codes and is open to application for all types of new and existing building. All building developers, architects, property management agencies and other parties involved in the building and construction industries are encouraged to participate in the scheme. A registration certificate will be issued to the successful participants who are allowed to use the Energy Efficient Building logo in documents related to the registered buildings for publicity.

stage, congested site conditions and insufficient knowledge of practical solutions to meet the statutory requirements, so as to improve compliance with the requirements of the existing environmental legislation.

8.41 We advocate elsewhere in the report the adoption of a more integrated approach to construction, more realistic project programming and thorough consideration of relevant factors during the design stage. These measures would all contribute towards minimising environmental nuisances which arise during the construction stage. We recommend the following additional specific measures to bring about better results –

- (a) Clients should give appropriate weight to the environmental performance of contractors in tender assessment and ongoing performance assessment. They should also consider allowing a separate account in construction contracts for measures taken to address pollution prevention and control during the construction stage, which will be withheld from payment in case of non-compliance with environmental requirements. We urge public sector clients to take a lead in adopting these measures;
- (b) Contractors should be encouraged to employ dedicated personnel on-site to assist line managers in managing the environmental aspects of construction activities, adopt environmental management systems described in paragraphs 8.49-8.50 below to systematically identify the environmental impacts arising from construction, and take appropriate steps to mitigate any adverse impact; and
- (c) The Environment and Food Bureau and the Environmental Protection Department should, as a matter of priority, conduct a regulatory impact assessment on the cumulative impact of the environmental legislation on the construction industry vis-à-vis the community. The Environmental Protection Department should develop a service culture and work in partnership with the

construction industry to improve the latter's environmental performance. In this connection, we urge the Environmental Protection Department to compile and disseminate information on good environmental practices and provide practical guidelines to assist contractors in complying with statutory requirements and in seeking better performance beyond the minimum requirements of the law.

### **Reduction and management of construction and demolition material**

8.42 Construction and demolition (C&D) material is a mixture of inert and organic materials arising from clearance, excavation, construction, refurbishment, renovation, demolition and road works. The inert C&D material can be reused in public filling areas and site formation works. The remaining materials are C&D waste, comprising plastic, bamboo and packaging materials. They are often mixed and contaminated, and are not suitable for reuse or recycling. Thus, they have to be disposed of at landfills. There has been a year-on-year increase in the amount of C&D material produced locally. In 1999, the construction industry produced 7.52 million cubic metres of C&D material. Of this, about 79% was reused in public filling areas and the remaining 21% (a mixture of public fill and C&D waste) was disposed of at landfills. This accounted for about 44% of the total solid waste disposed of at landfills.

8.43 A number of factors account for the current unsatisfactory state. They include : lack of public filling areas for disposal of inert C&D material due to public sentiments against reclamation projects, mismatch of supply and demand for public fill, inadequate provision of off-site facilities for sorting of C&D material before disposal, lack of suitable sites for setting up public fill barging points, insufficient reuse and recycling of C&D material, and inadequate efforts to tackle waste reduction at source.

8.44 To successfully tackle the problem, we must reduce the generation of waste at source. Our recommendations to encourage the wider adoption of a