

**LegCo Panel on Administration of Justice and Legal Services
for meeting on 23 October 2006**

**Review of legislative provisions containing the phrase
“to the satisfaction of” an enforcement agency**

The problem

In *HKSAR v Lam Geotechnics Limited* HCMA No. 379 of 2000, 20 November 2000, the Court of First Instance held that regulation 44(1)(c) of the Construction Sites (Safety) Regulations (Cap. 59I) was *ultra vires* section 7(1)(h) of the Factories and Industrial Undertakings Ordinance (Cap. 59) (which enables regulations prescribing or providing for “means of ensuring the safety of persons in industrial undertakings”) on the ground that the phrase “to the satisfaction of” the Commissioner for Labour did not prescribe with sufficient particularity the elements of a criminal offence or the means of ensuring the safety of persons or securing the removal of any danger or defects.

Background

2. The legislative provisions listed in the Annex to the Administration’s paper submitted to the Panel for its meeting on 24 April 2006 (10 provisions in primary legislation and 86 provisions in subsidiary legislation) require amendment to provide certainty further to the ruling in *Lam Geotechnics*.

3. It is contrary to the interests of legal certainty and fairness for an offence to be committed where a person is unable to ascertain with an appropriate degree of certainty what conduct is prohibited. At the 24 April 2006 meeting of the Panel, the Administration proposed that where an offence provision requires action to be taken “to the satisfaction” of an official, this should be subject to a statutory requirement that no offence is committed unless –

- (1) the enforcement agency has specified to the person concerned the measures to be taken to the agency's "satisfaction"; or
- (2) the person concerned has commenced the regulated activity without approaching the enforcement agency to ascertain the measures to be taken to the agency's "satisfaction".

4. The Administration gave an example of the statutory requirement, using the former version of regulation 44(1)(c) of the Construction Sites (Safety) Regulations as a model, as set out below –

“44. Fencing of machinery

- (1) A contractor shall ensure that -

...

- (c) every dangerous part of other machinery (whether or not driven by mechanical power),

for which he is responsible is securely fenced to the satisfaction of the Commissioner [for Labour] unless it is in such a position or of such construction as to be as safe to every workman on the construction site as it would be if it were securely fenced.

- (2) ...

[Example of new statutory requirement]

- (3) No offence under para (1) is committed unless -

- (a) the Commissioner has specified to the contractor the measures to be taken to the Commissioner's satisfaction; or
- (b) the contractor has caused or permitted the machinery specified in para (1) to be in motion or use without approaching the Commissioner to ascertain the measures to be taken to the Commissioner's satisfaction.

- (4) Where a contractor is charged under para (1), the contractor shall not be convicted of the offence unless the prosecution proves that either para (3)(a) or (3)(b) has occurred. [**Modelled on section 306(3) of the Securities and Futures Ordinance (Cap. 571)**]

5. Paragraphs 78 to 81 of the minutes of the Panel meeting of 24 April 2006 related to this matter state –

“78. Mr Martin LEE ... was of the view that as a better alternative [to the Administration’s proposed amendments], the safety measures to be taken by the affected persons “to the satisfaction of” the enforcement agency should be clearly stipulated in the principal ordinance to avoid uncertainty which might result in prosecution of the affected persons.

79. DSG explained that the option suggested by Mr Martin LEE had been thoroughly considered by the Administration. However, it might not be possible to list out the safety measures exhaustively in the principal legislation in all circumstances.

80. Mr Martin LEE maintained the view that the Administration should

adopt the approach he suggested in amending the 96 provisions. The Administration undertook to consider Mr LEE's suggestion and revert to the Panel in due course.

81. The Chairman pointed out that a person might have already commenced a regulated activity without approaching the enforcement agency to ascertain the safety measures to be taken "to the satisfaction of" that agency. She expressed concern that such person would be subject to prosecution after the relevant provision was amended as proposed. She sought clarification whether the affected person should approach the relevant enforcement agency to ascertain the measures required after the provision concerned was amended. The Administration undertook to revert to the Panel on the issue."

6. The main reason for the retention of the "to the satisfaction of" formula is that, in most cases, it is impossible for an official to foresee the measures which a person should appropriately be required to take in advance of inspection and consideration of the actual circumstances of a given case. The present regulation 44 of the Construction Sites (Safety) Regulations (Cap. 59I), for example, specifies safety methods but does not (and cannot, because of the problem of foreseeability) designate which of those (or possibly other) safety methods should be implemented by a contractor in which way in the circumstances of an individual case in order to ensure that machinery is "effectively guarded". Further, the contractor may have an inadequate view of what constitutes "effective guarding", or may be tempted to cut corners on time or costs grounds, or may not have the necessary safety or other requisite expertise.

Consultation of policy bureaux

7. The 96 statutory provisions containing the drafting formula "to the

satisfaction of” are within the policy responsibility of eight bureaux. The Administration sought the views of these bureaux and their subject departments on the feasibility of the suggestion by the Hon Martin Lee.

8. The replies from the bureaux were all to the effect that there are practical limitations on the extent to which the measures can be stipulated in advance, and that the provisions proposed by the Administration would sufficiently strike an appropriate balance between the right of the affected persons to know what action they must take “to the satisfaction of” the enforcement agencies, and the need for the agencies to have flexibility in determining the measures that may be required.

9. As an illustrative example, the Secretary for Financial Services and the Treasury observed that the Dutiable Commodities Regulations listed in the Annex to the 24 April 2006 AJLS Panel paper regulate the maintenance, safety and security of premises used for the manufacturing and storage of dutiable goods. With constantly changing circumstances, and different characteristics among premises such as size, location and surrounding environment, it is considered necessary to retain the phrase “to the satisfaction of the Commissioner” of Customs and Excise so that his department can instruct the affected person to implement appropriate measures accordingly.

Paragraph 81 of the 24 April 2006 minutes

10. The Administration considers that, in the situation where a person may have commenced a regulated activity without approaching an enforcement agency before the relevant “to the satisfaction of” provision was amended, such person would not be liable to prosecution for a pre-amendment failure to approach the enforcement agency. The reason is that, as incorporated in Article 39 of the Basic Law (and in Article 12 of the Hong Kong Bill of Rights Ordinance (Cap. 383)), Article 15 of the International Covenant on Civil and Political Rights provides that no one shall be held

guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under Hong Kong or international law at the time when it was committed.

11. If the affected person wishes to continue to carry out the regulated activity after the relevant provision has been amended, it would be prudent for such person to approach the enforcement agency to ascertain the measures, if any, that the agency may require.

Legal Policy Division
Department of Justice
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