

政府總部的信頭  
**Letterhead of GOVERNMENT SECRETARIAT**  
香港下亞厘華道  
LOWER ALBERT ROAD HONG KONG

OUR REF.: SBCR 4/2091/95 (98)

YOUR REF.: PC/c:118:98:IA2b

Tel No.: 2810 2506

Fax No. : 2868 1552

30 December 1998

Mr Jimmy Tse,  
President,  
Hong Kong Construction Association Ltd,  
3/F, 180 - 182, Hennessy Road,  
Wanchai,  
Hong Kong.

Dear Mr Tse,

**Immigration (Amendment) (No. 2) Bill 1998**  
**Illegal workers on construction sites**

I refer to your letter of 9 December 1998 to the Secretary for Security seeking clarification on Government's policy on prosecuting construction site controllers. You have also written to the Bills Committee expressing the opinion that the prosecution should be required to prove the employment status of the illegal worker arrested on a construction site before it could secure a conviction of the site controller.

It is always the Government's policy that where there is sufficient evidence, we will prosecute the employer of illegal workers. Under section 17I of the Immigration Ordinance, any person who employs an employee who is not lawfully employable commits an offence. However, prosecution of employers in the construction industry under this section has been difficult

because of the subcontracting system prevalent in the industry. Due to the difficulty in identifying the employer of an illegal worker on a construction site for prosecution under section 17I, section 38A was introduced in 1990 to tackle the specific problem of employment of illegal immigrants on construction sites. The construction site controller will be liable if an illegal immigrant is present on his site. Section 38A may be used if an offence under section 17I cannot be proved. It would be a defence in court proceedings for the construction site controller to prove that he had taken all practicable steps to prevent illegal immigrants from being on the construction site.

The Immigration (Amendment)(No. 2) Bill 1998 seeks to include other types of illegal workers such as Two-way Permit holders, under section 38A. There is, however, one major point worth noting. As the Secretary for Security explained during her meeting with you and your colleagues from the Hong Kong Construction Association, the construction site controller will not be liable simply because a Two-way Permit holder is found on his site. The site controller will be liable only if the Two-way Permit holder takes up employment on his site.

As a matter of policy and in practice, we will prosecute the illegal worker and secure a conviction under section 41 (i.e. by proving beyond reasonable doubt that the illegal worker has breached a condition of stay by taking up employment on the construction site) before we proceed to prosecute the construction site controller. There is however no need to prove that an employer-employee relationship existed between the site controller and the illegal worker. Nor is it necessary to actually identify who the particular employer was. The court may draw the irresistible inference from circumstantial evidence that the illegal worker did take up employment on the construction site without pinpointing who the employer was.

I wish to emphasize again that the primary targets of enforcement remain the employers of illegal workers. If there is sufficient evidence to prosecute the employer under section 17I, section 38A will not be used against the construction site controllers, unless, of course, there is ample evidence to prove that the controllers either condone, encourage or involve in the employment of illegal workers.

I hope the above clarifies the position.

Yours sincerely,

K S SO  
for Secretary for Security

c.c. The Hon James To  
The Hon Ronald Arculli  
Clerk to Bills Committee