

**The Administration's response to issues raised
at the meeting of the Subcommittee on the
Factories and Industrial Undertakings
(Loadshifting Machinery) Regulation on 21 December 1999**

- (a) the Administration to reconsider whether it is reasonable to impose strict liability on the "responsible person" by requiring him to "ensure" compliance with the provisions in the revised Regulations 3 and 4. Members are concerned that the responsible person can only take all practicable steps to comply with the requirements but cannot guarantee, for example, that the employee can pass the training test and obtain a certificate under the proposed Regulation 4(1)**

We have done some research into our work safety regulations and some overseas law and found that our proposed requirement for a responsible person "to ensure" that the machine operator should be at least 18 years old and holding a certificate to prove that he has completed a relevant training course is not particularly stringent. A list of legislation providing for a similar requirement of "shall ensure" and similar responsibilities relating to age and proof of competency of an operator is in Annex I. It is clear that our proposed requirements are not something new and the industry is operating within this framework without much difficulty. This is understandable because the process to verify whether the operator has attained the age of 18 and is holding a valid certificate, as required by section 3, involves only simple administrative steps. From our research, we found that a similar approach is also adopted in the law in the USA, Canada and Australia. Notwithstanding that these more developed countries would tend to legislate on more liberal terms, they too require certain strict but not absolute liabilities to be imposed on a responsible person. Therefore, to be consistent with other similar requirements in our legislation and in line with the practices adopted by some developed countries, we believe that the current wording in section 3 of the proposed regulation should be appropriate.

It would also be useful to draw the attention of the LegCo Subcommittee to the fact that even for strict liability offences under other ordinances, the Courts do not hold the view that these offences are as absolute as they appear, notwithstanding that such words as "knowingly", "without reasonable excuse" are absent from the relevant provisions of these

ordinances. In our proposed regulation, the defendant is afforded even reasonable defence because in sections 8(1) and 8(2), we have explicitly provided for a ‘reasonable excuse’ element in respect of the offences and penalties in sections 3 and 4. He would not commit an offence if he has done his part as a reasonable man to discharge his duties under the relevant sections. From our enforcement experience of similar legislation, it will be counter-productive to initiate legal action against a responsible person if he can produce sufficient evidence that he has exercised due diligence to comply with the relevant regulations regarding age and proof of competency of an operator. If we do so, not only that we will be challenged in Court, but we will ruin the partnership which we try hard now to cultivate with construction and building contractors in maintaining a safe working environment.

- (b) the Administration to clarify whether the commencement notice to be made by the Commissioner for Labour under the proposed Regulation (which is subject to the positive vetting procedures) must also subject to positive vetting of LegCo. As the Regulation will be implemented by phases, members would like to have the opportunity to comment on the commencement date for those machinery listed in (f) – (j) in Part II of the Schedule**

There is no rule stating that the commencement notice to be made by the Commissioner for Labour under the proposed Regulation (which is subject to the positive vetting procedures) must also subject to positive vetting of Legislative Council. The positive vetting requirements stipulated in section 7(3) of the principal Ordinance does not apply to commencement notice made under the proposed regulation. Section 7(3) stipulates that –

“All regulations made by the Commissioner shall be submitted to the Chief Executive, and shall be subject to the approval of the Legislative Council.”

“All regulations” refers to regulations made under section 7(1) and (2). However, the commencement notice which is to be made under section 1 of the proposed regulation is not the kind of regulation referred to in section 7(3). There is nothing prohibiting the notice to be made by negative vetting if the Legislative Council so wishes and approves. The commencement notice, being a subsidiary legislation, has to be laid on the table of the Legislative Council under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1). Members would have ample

opportunity to comment on the commencement date and may amend the notice by resolution within 28 days after the notice is laid. The period may further be extended for another 7 days. Given the simple nature of the subject matter of the commencement notice, negative vetting seems to be more appropriate.

The negative vetting procedure had been adopted in the commencement notice of other regulation made under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59). For example, both Construction Sites (Safety) (Amendment) Regulation (L.N. 76 of 1999) and the Factories and Industrial Undertakings (Confined Spaces) Regulation (L.N. 18 of 1999) are made under section 7 of the principal Ordinance. Their commencement notices (L.N. 240 of 1999 and L.N. 271 of 1999) are made under section 1 of the respective regulations without the positive vetting of the Legislative Council.

- (c) **the Administration to improve the drafting of the revised Regulations 4 and 5 to clearly reflect the legislative intent. Members are also concerned that Regulation 5 may catch persons not intended to cover by the Regulation**

The Administration proposes to make the following amendments to clarify that section 5 only binds those mentioned in section 4(1) :

section 5 - delete “A person who is instructed to operate a loadshifting machine” and substitute “The second-mentioned person referred to in section 4(1)”

section 8(3) - delete “who is instructed to operate a loadshifting machine and”

Similar legislation under the Factories and Industrial Undertakings Ordinance with similar strict liability provisions

Regulations	Description
Factories and Industrial Undertakings (Lifting Appliances and Lifting Gear) Regulations —Regulation 15A	(1) The owner of a crane shall ensure that it is only operated by a person who- (a) has attained the age of 18 years; (b) holds a valid certificate issued by the Construction Industry Training Authority or by any other person specified by the Commissioner;
Factories and Industrial Undertakings (Suspended Working Platforms) Regulation —Section 17	(1) The owner of a suspended working platform shall ensure that every person working thereon shall- (a) be at least 18 years old; and (b) have undergone training that is either recognized by the Commissioner or provided by the manufacturer of the suspended working platform or its local agent, on- (i) general construction of the suspended working platform; and (ii) how to operate it safely, and have obtained a certificate in respect of such training from the person who provided the training.

Overseas legislation with similar strict liability provisions

Countries/Regulations	Description
<p>United States OSHA Regulations (Standards - 29 CFR) Powered industrial trucks —1910.178</p>	<p>(1)(1)(i) The employer shall ensure that each powered industrial truck operator is competent to operated a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this paragraph (1).</p> <p>(1)(1)(ii) Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this paragraph (1), except as permitted by paragraph (1)(5).</p> <p>.....</p> <p>(1)(6) <i>Certification.</i> The employer shall certify that each operator has been trained and evaluated as required by this paragraph (1). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.</p>
<p>Australia - New South Wales Part 2 - Unqualified Persons not to do certain kinds of work —Section 8(2)</p>	<p>(2) A person must not employ, direct or allow another person to do any kind of scheduled work unless the person doing the work holds a recongnised qualification in relation to work of that kind.</p>

Countries/Regulations	Description
<p>Australia - Queensland Workplace Health and Safety Act 1995 —Section 31(1)</p>	<p>A principal contractor has the following obligations for a construction workplace -</p> <ul style="list-style-type: none"> (a) to ensure the orderly conduct of all work at the construction workplace to the extent necessary - <ul style="list-style-type: none"> (i) to ensure workplace health and safety at the workplace; and (ii) to assist the discharge of workplace health and safety obligations of an employer or self-employed person; (b) to ensure that plant and substances at the workplace for which no other person is presently responsible are safe and without risk of disease or injury to persons at the workplace; (c) to ensure that workplace activities at the workplace are safe and without risk of disease or injury to members of the public at or near the workplace; (d) to provide safeguards and take safety measures prescribed under a compliance standard made for principal contractors.
<p>Canada Canada Occupational Safety and Health Regulations Part XIV Materials Handling —Section 14.23(1)</p>	<p>Subject to subsection (2), every employer shall ensure that every operator of motorized materials handling equipment has been instructed and trained in the procedures to be followed for</p> <ul style="list-style-type: none"> (a) its inspection; (b) its fuelling; and (c) its safe and proper use, in accordance with any instructions provided by the manufacturer and taking into account the conditions of the work place in which the operator will operate the materials handling equipment.