

立法會
Legislative Council

LC Paper No. LS122/02-03

**Paper for the House Committee Meeting
on 6 June 2003**

**Legal Service Division Report on
Proposed Resolution under Section 7 of the
Factories and Industrial Undertakings Ordinance (Cap. 59)**

The Secretary for Economic Development and Labour has given notice to move a motion under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59) ("FIUO") at the Legislative Council meeting on 18 June 2003. The proposed resolution seeks to amend the following 4 sets of subsidiary legislation, namely,

- (a) the Construction Sites (Safety) Regulations (Cap. 59 sub. leg. I) ("CSSR");
- (b) the Factories and Industrial Undertakings (Lifting Appliances and Lifting Gear) Regulations (Cap. 59 sub. leg. J);
- (c) the Factories and Industrial Undertakings (Suspended Working Platforms) Regulation (Cap. 59 sub. leg. AC); and
- (d) the Factories and Industrial Undertakings (Loadshifting Machinery) Regulation (Cap. 59 sub. leg. AG).

Proposed Amendments

2. The objects of the proposed amendments are twofold - to improve the overall safety performance on construction sites and to remove the technical difficulty of certain provisions of CSSR.

3. Under Regulation 2(2)(a) of CSSR, for the purposes of CSSR, a contractor is responsible for a construction site if he is undertaking construction work there or, where there is more than one contractor undertaking construction work at the site, if he is the principal contractor undertaking work there. The principal contractor of a construction site is therefore liable for various statutory offences committed on the construction site, even though the relevant acts or omission are committed by other sub-contractors on the construction site. The intention of the existing

provisions is to require the principal contractor to assume overall responsibility for safety and health at work in the whole construction site.

4. In recent years, more and more developers directly appoint specialist contractors in parallel to principal contractors to undertake specialised work on construction sites. The principal contractors have little control over these specialist contractors who are not accountable to them and have difficulty in monitoring their safety and health performance on the construction sites. There are also situations where no principal contractor is appointed to assume overall responsibility for a construction project, particularly in renovation works where it is common for owners of sites or premises to appoint different specialist contractors to undertake different types of work.

5. The proposed resolution seeks to amend the above 4 subsidiary legislation to hold contractors who have direct control over relevant construction work, be they principal contractors, sub-contractors or specialist contractors, responsible for the various statutory duties.

6. The second aspect of the proposed resolution deals with the *vires* of Regulation 44(1) of CSSR. In *HKSAR v. Lam Geotechnics Limited* ([2000] 4 HKC 367), the Court of the First Instance ("CFI") held that the Regulation was *ultra vires* and fell outside the enabling powers of section 7 of FIUO. Under section 7(1)(o) of FIUO, the Commissioner for Labour ("Commissioner") may in respect of industrial undertakings by regulations impose duties on proprietors, contractors and persons employed. The CFI's ruling points out that -

- (a) the elements of the offence with respect to fencing purportedly set out in Regulation 44 of CSSR are incompletely defined because of the words "to the satisfaction of the Commissioner", and
- (b) those who are required to regulate their conduct according to the Regulation cannot ascertain, before a prosecution is brought, what fencing measure will satisfy the Commissioner.

7. The Administration has identified the same problem in Regulation 38A of CSSR and now seeks to amend both Regulations 44 and 38A of CSSR to overcome the technical difficulty. Regulation 44 is proposed to be amended to prescribe the specific measures required to effectively guard a prime mover, transmission machinery and other machinery. Regulation 38A is proposed to be amended to prescribe the specific measures required to ensure the safety of places of work.

Consultation

8. In the LegCo Brief (ref: LD HQ/711/36/2) issued by the Economic Development and Labour Bureau on 28 May 2003, the Administration has advised that it was the recommendation of the Construction Industry Review Committee that CSSR should be amended to enable prosecution to be brought against sub-contractors for non-compliance with safety requirements in operations under their direct control. The Labour Advisory Board ("LAB") was consulted and has endorsed the proposed amendments.

9. The proposed amendments were discussed at the meeting of the LegCo Panel on Manpower on 18 December 2002. A member enquired whether the Administration had considered the feasibility of amending section 7 of FIUO for the purpose of conferring greater powers on the Commissioner, instead of amending regulations 38A and 44 as proposed. Another member said that she was in support of the direction of the proposed amendments but considered that a subcommittee should be formed to study the proposed amendments.

Conclusion

10. The Legal Service Division has written to the Administration to seek further information on the proposed amendments (Appendix).

11. In the light of the concerns raised by some of the members present at the meeting of the Manpower Panel and the significant policy change in the duties and liabilities of respective contractors, we recommend that a sub-committee be formed to scrutinise the proposed amendments in detail.

Encl

Prepared by

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3 June 2003

Dear Mr Tso,

Proposed Resolution under Section 7 of Cap. 59

I refer to the proposed amendments under the above resolution which is to be moved by the Secretary for Economic Development and Labour on 18 June 2003. I wonder if the Administration could provide further information on the following questions:-

- (a) The proposed amendments will hold contractors who have direct control over relevant construction work, be they principal contractors, sub-contractors or specialist contractors, responsible for the various statutory duties. Would there be any insurance implications on the relevant industry(ies) in consequence to the proposed amendments?
- (b) Apart from consulting the Labour Advisory Board, has the Administration consulted the relevant industry(ies) with regard to the proposed amendments?

I would be most grateful if you could let me have a reply in bilingual form on or before 9 June 2003.

Yours sincerely,

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c.c. Legal Adviser