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Paper for the House Committee meeting on 3 October 2003

**Report of the Subcommittee on
proposed resolution under section 7 of
the Factories and Industrial Undertakings Ordinance**

Purpose

This paper reports on the deliberations of the Subcommittee on proposed resolution under section 7 of the Factories and Industrial Undertakings Ordinance.

Background

2. The Secretary for Economic Development and Labour (SEDL) gave notice to move a motion at the Legislative Council meeting on 18 June 2003 to seek the Council's approval for the following four sets of Amendment Regulations made by the Commissioner for Labour under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59) (FIUO) on 28 May 2003 -

- (a) Construction Sites (Safety) (Amendment) Regulation 2003;
- (b) Factories and Industrial Undertakings (Lifting Appliances and Lifting Gear) (Amendment) Regulation 2003;
- (c) Factories and Industrial Undertakings (Suspended Working Platforms) (Amendment) Regulation 2003; and
- (d) Factories and Industrial Undertakings (Loadshifting Machinery) (Amendment) Regulation 2003.

The Amendment Regulations

3. The Amendment Regulations seek to improve the overall safety performance on construction sites, and to remove the ambiguity of two provisions of the Construction Sites (Safety) Regulations (CSSR).

The Subcommittee

4. At the House Committee meeting on 6 June 2003, Members agreed that a subcommittee be formed to study the proposed resolution under section 7 of the FIUO. At the request of the House Committee, SEDL withdrew the notice for moving the motion at the Council meeting on 18 June 2003 to allow time for the Subcommittee to study the proposed resolution.

5. The membership list of the Subcommittee is in **Appendix I**. Under the chairmanship of Hon Cyd HO Sau-lan, the Subcommittee has held three meetings, including two with the Administration.

Deliberations of the Subcommittee

Responsibilities of principal contractors and subcontractors

6. At present, under the CSSR, only the principal contractor of a construction site is held liable for offences committed on the site, even though the relevant contravening acts are committed by other contractors on the site. According to the Administration, in recent years, more and more developers and authorised persons have directly appointed specialist contractors, in parallel to principal contractors, to undertake specialised work on construction sites. The principal constructor has little control over these specialist contractors not appointed by him and may have difficulty in monitoring their safety performance on the construction site. They, as well as all sub-contractors, are not held liable for safety offences under the CSSR.

7. To improve construction site safety and health, the Administration proposes to amend the CSSR to hold the specialist contractors and sub-contractors who have direct control over any construction work responsible for the various statutory duties in addition to the principal contractor. The Administration also proposes to amend the Factories and Industrial Undertakings (Lifting Appliances and Lifting Gear) Regulations, the Factories and Industrial Undertakings (Suspended Working Platforms) Regulation and the Factories and Industrial Undertakings (Loadshifting Machinery) Regulation to extend the duties imposed on the principal contractor under these Regulations to the specialist contractors and sub-contractors who have direct control over any construction work which involves the use of the machinery or equipment on the construction site.

8. In view of the multi-layer subcontracting system in the construction industry, members have enquired how the proposed amendments, if implemented, would impact on the responsibility of the principal contractors in terms of site safety.

9. The Administration has explained that while the principal contractor should bear the primary responsibility for the co-ordination of all concerned contractors' activities and all safety matters on site, other contractors and sub-contractors should also have obligation over safety. Those contractors who have control over the way construction work is carried out should also be held liable for safety offences committed. In this way, all contractors and sub-contractors will be more alert to the need to comply with safety legislation, and this will help improve the overall safety performance at construction sites.

10. The Administration has assured members that the proposed amendments will not reduce the existing responsibility of the principal contractor under these four Regulations for the overall safety and health on a construction site. In meting out sanction when an offence is discovered, the Administration will identify the responsibility of the parties concerned by analysing their respective roles and involvement, and the parties that are responsible for the offence will be prosecuted.

11. As the proposed amendments will hold contractors who have direct control over relevant construction work, be they specialist contractors or sub-contractors, responsible for the various statutory duties in addition to the principal contractors, members have asked whether there would be any insurance implications on the relevant industries consequent to the amendments. Members have also sought clarification on the responsibility of other contractors or sub-contractors in taking out employees' compensation insurance.

12. The Administration has explained that the FIUO and its subsidiary legislation are primarily concerned with the protection of the safety and health of employees at work on an industrial undertaking, including a construction site. Public safety is hence outside the purview of the FIUO, and the proposed amendments would not have any insurance implications in this area. As regards employees' compensation insurance, under the Employees' Compensation Ordinance (Cap. 282) (ECO), employers are required to take out an insurance policy to cover their liabilities under the Ordinance and common law in relation to work-related injuries to their employees. Other contractors and sub-contractors may also be required to take out insurance cover for their own workers. The operation of these compulsory provisions under the ECO will not be affected by the proposed amendments.

Proposed amendments to the Construction Sites (Safety) Regulations

Rationale for the amendments to regulations 38A and 44

13. Regulation 44(1) of the CSSR requires, among other things, a contractor responsible for a machine to securely fence its dangerous parts to the satisfaction of the Commissioner for Labour (Commissioner). In an appeal case, *HKSAR v Lam Geotechnics Limited*, the Court of First Instance held that the regulation was *ultra vires* and fell outside the enabling powers conferred on the Commissioner by section 7 of the FIUO. In its ruling, the Court points out that -

- (a) the elements of the offence purportedly set out in the regulation are incompletely defined because of the uncertainty in 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.

14. In the light of the Court ruling, the Administration proposes to amend regulation 44(1) to prescribe the specific measures required to effectively guard a prime mover, transmission machinery and other machinery.

15. Existing regulation 38A(1) imposes a general duty on the contractor responsible for a construction site to ensure every place of work on the site, so far as is reasonably practicable, made and kept safe for any person working there. The Administration has identified the same problem in the regulation as it does not indicate what measures ought to be taken to achieve the goal of ensuring the safety of workers. The Administration therefore proposes to amend the regulation to prescribe the specific measures required to ensure the safety of places of work.

Regulations 38A(3) and 38A(4)

16. Members have pointed out that while regulation 38A(1) is proposed to be amended by introducing the term "hazardous conditions", the terms "safe" and "unsafe" are still used in regulations 38A(3) and 38A(4). Members have queried whether there has been any difficulties in enforcing these two regulations. They have suggested that a consistent drafting approach should be adopted.

17. The Administration has advised that it has not considered amending regulations 38A(3) and 38A(4) because the duties imposed by the regulations are independent of and separate from the requirements of regulation 38A(1), and they do not need to be read in conjunction with each other. Although difficulties have not been encountered in enforcing the two regulations, having considered members' view, the Administration will revise these two regulations by making reference to the term "hazardous

conditions". The Administration will also make similar amendments to the proposed new regulations 38AA(4) and 38AA(5).

Regulation 38AA(4)

18. Under the proposed new regulation 38AA(4), any contractor who has direct control over any construction work should ensure that, so far as is reasonably practicable, no person gains access to any unsafe place which is within the place of work where the construction work is being carried out. Members are concerned that contractors may have difficulties in complying with the requirements of the proposed regulation, as they may not be able to prevent workers of other contractors, who are not under their control, from gaining access to an unsafe place.

19. According to the Administration, its policy intent is that the contractor would have discharged his duties under the proposed regulation if he has taken every reasonably practicable step to prevent access of persons to the unsafe place. It would be the duties of other responsible contractors if the contractor has taken the steps but failed to prevent workers of other contractors from gaining access to the unsafe place. To reflect its policy intent, the Administration will revise the regulation to clarify that the contractor needs only to take suitable and adequate steps to ensure that, so far as is reasonably practicable, no person gains access to any unsafe place.

Regulations 38F and 39

20. Under the proposed new arrangements in regulation 38F(3), a scaffold inspection report shall be made and delivered forthwith by the competent person who prepares the report to the contractors concerned. Under regulation 38F(4), the contractors to whom a report is delivered shall at all times keep the report or a copy thereof on the construction site on which the scaffold to which the report relates is located and shall at all reasonable times make that report or copy available for inspection.

21. Members have sought clarification on the duties of the contractors concerned for the preparation of inspection report and the keeping of a copy of the report on the construction site. Members have also sought clarification on the duties of respective contractors in the similar situation under regulation 39 where report on the safety of excavations and earthworking operations is required.

22. The Administration has explained that it is the duty of both the contractor responsible for the scaffold and the contractor who has direct control over any construction work involving the use of the scaffold to ensure that the scaffold is not used unless it has been inspected by a competent person at regular interval. The competent person will only need to deliver the report to the contractor responsible for the scaffold and the contractor who employs him to carry out the inspection work. The competent person will not be able to deliver the certificate to all contractors using the scaffold as he

may not have the knowledge of these contractors. The same applies to regulation 39. The Administration will amend regulations 38F and 39 to clearly reflect its policy intent.

Regulation 48(1A)(b)

23. Under the proposed new regulation 48(1A)(b), any contractor who has direct control over any construction work should take all reasonable steps to ensure that no workman remains on the site to carry out the construction work unless he is wearing a suitable safety helmet. Members are concerned that the regulation as presently drafted may create difficulty for a contractor to ensure workers of other contractors, who do not wear helmet, from remaining on the site.

24. As it is the intention that the contractor will only need to ensure that the workman employed to carry out the construction work, which he has direct control, does not remain on the site unless he is wearing a safety helmet, the Administration will amend the proposed regulation to reflect more clearly its policy intent.

Review of legislative provisions which contain the drafting formula "to the satisfaction of " an enforcement agency

25. The legal adviser to the Subcommittee has pointed out that the Court ruling referred to in paragraph 13(a) above would impact on other legislative provisions which contain the drafting formula "to the satisfaction" of an enforcement authority, and has asked whether the Administration would consider reviewing all legislative provisions drafted with such formula. The Administration has undertaken to bring the attention of the relevant enforcement agencies to the Court ruling.

26. As the issue raised by the legal adviser to the Subcommittee is outside the purview of the Subcommittee, members have suggested that the matter be referred to the Panel on Administration of Justice and Legal Services for follow-up.

Follow-up action by the Administration

27. As discussed in paragraph 25 above, the Administration has undertaken to bring to the attention of the relevant enforcement agencies to the Court ruling.

Recommendations

28. The Administration will incorporate the agreed amendments to the Construction Sites (Safety) (Amendment) Regulation 2003. A copy of the agreed amendments is in **Appendix II**.

29. The Subcommittee recommends that the review of legislative provisions which contain the drafting formula "to the satisfaction" of an enforcement agency be followed up by the Panel on Administration of Justice and Legal Services (paragraphs 25 and 26 above refer).

30. The Subcommittee also recommends that the Administration should give fresh notice for moving the motion on the four sets of Amendment Regulations after the Subcommittee has reported its deliberations to the House Committee.

Advice Sought

31. Members are invited to note the deliberations and the recommendations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
24 September 2003

**Subcommittee on proposed resolution under section 7 of
the Factories and Industrial Undertakings Ordinance**

Membership List

Chairman	Hon Cyd HO Sau-lan
Members	Hon LEE Cheuk-yan
	Hon CHAN Kwok-keung, JP
	Hon Andrew CHENG Kar-foo
	Hon Abraham SHEK Lai-him, JP
	Hon LI Fung-ying, JP
	Hon LEUNG Fu-wah, MH, JP
	(Total : 7 Members)
Clerk	Mrs Sharon TONG
Legal Adviser	Miss Kitty CHENG
Date	9 July 2003

Marie SIU/Construction sites/#81208v4.doc
1st draft : 22.7.2003
2nd draft : 24.7.2003

FACTORIES AND INDUSTRIAL UNDERTAKINGS ORDINANCE

AND

INTERPRETATION AND GENERAL CLAUSES ORDINANCE

RESOLUTION OF THE LEGISLATIVE COUNCIL

CONSTRUCTION SITES (SAFETY) (AMENDMENT) REGULATION 2003

Resolution made and passed by the Legislative Council under section 7 of the Factories and Industrial Undertakings Ordinance (Cap. 59) and section 35 of the Interpretation and General Clauses Ordinance (Cap. 1) on 2003.

RESOLVED that the Construction Sites (Safety) (Amendment) Regulation 2003, made by the Commissioner for Labour on 28 May 2003, be approved, subject to the following amendments -

(a) in section 15 -

(i) in paragraph (a), by deleting the proposed regulation 38A(1A);

(ii) by adding -

"(aa) in paragraph (3), by repealing "unsafe place on the site" and

substituting "place on the site where any hazardous conditions are present";";

(iii) by deleting paragraph (b) and substituting -

"(b) in paragraph (4), by repealing "making any place safe if all" and substituting "rectifying any hazardous conditions if all reasonably";";

(iv) by adding -

"(ba) by adding -

"(4A) For the purpose of this regulation, "hazardous conditions" (危険状況) includes the following conditions that may give rise to a risk of persons falling from a height -

(a) unprotected edge or opening at a place of work;

(b) improper design and

construction of
a place of work;

(c) inadequate or
insecure
support or
anchoring of a
place of work;

(d) improper
maintenance of a
place of work;

(e) any working
platform (other
than a suspended
working
platform) that
fails to comply
with the
provisions of
the Third
Schedule
applicable to
it." ;";

(v) in paragraph (c), in the proposed
regulation 38A(5) -

(A) in paragraph (a) -

(I) by deleting "(1A)" and

substituting "(4A)";

(II) by deleting "paragraph (1)" and substituting "paragraphs (1), (3) and (4)";

(B) in paragraph (b), by deleting "(1A)" and substituting "(4A)";

(b) in section 16, in the proposed regulation 38AA -

(i) by deleting paragraph (2);

(ii) by renumbering paragraphs (3), (4) and (5) as paragraphs (2), (3) and (4) respectively;

(iii) by deleting paragraph (3) and substituting -

"(3) Subject to paragraph (4), any contractor who has direct control over any construction work shall take suitable and adequate steps to ensure that, so far as is reasonably practicable, no person gains access to any place which is within the place of work where the construction work is being carried out and where any hazardous conditions are present.";

(iv) in paragraph (4) -

- (A) by deleting "Paragraph (4)" and substituting "Paragraph (3)";
- (B) by deleting "making any place safe" and substituting "rectifying any hazardous conditions";
- (v) by adding -
 - "(5) For the purpose of this regulation, "hazardous conditions" (危險狀況) includes the following conditions that may give rise to a risk of persons falling from a height -
 - (a) unprotected edge or opening at a place of work;
 - (b) improper design and construction of a place of work;
 - (c) inadequate or insecure support or anchoring of a place of work;
 - (d) improper maintenance of a place of work;
 - (e) any working

platform (other than a suspended working platform) that fails to comply with the provisions of the Third Schedule applicable to it." ;

(vi) in paragraph (6) -

(A) in paragraph (a) -

(I) by deleting "(2)" and substituting "(5)";

(II) by deleting "paragraph (1)" and substituting "paragraphs (1), (3) and (4)";

(B) in paragraph (b), by deleting "(2)" and substituting "(5)";

(c) by deleting section 21(b) and substituting -

"(b) in paragraph (3), by adding "and the contractor who employs him to carry out the inspection" after "the scaffold";"

(d) by deleting section 24(c) and substituting -

"(c) in paragraph (3)(b), by repealing "concerned" and substituting "responsible for the construction site

concerned and the contractor who employs that person to carry out the examination".";

- (e) in section 34, in the proposed regulation 48(1A)(b), by deleting "remains on the site to carry out the construction work" and substituting "employed to carry out the construction work remains on the site";
- (f) in section 43 -
 - (i) in paragraph (a), by deleting "38AA(1), (3) or (4)" and substituting "38AA(1), (2) or (3)";
 - (ii) in paragraph (b)(v), by deleting "38AA(3) or (4)" and substituting "38AA(2) or (3)";
- (g) in section 44, by deleting "regs. 38A(1A), 38AA(2)" and substituting "regs. 38A(4A), 38AA(5)".

Clerk to the Legislative Council

July 2003