



HONG KONG RETAIL MANAGEMENT ASSOCIATION

Preliminary Response on Raising Penalties of Occupational Safety & Health Legislation

- Legislative Council Brief (LC Paper No. CB(2)492/20-21(06)¹

6 January 2021

Background

1. Hong Kong Retail Management Association (HKRMA) received a letter from the Hon. Mr. Shiu Ka-fai dated 28 December 2020 regarding the captioned matter and that the Legco Manpower Panel will discuss about the proposed amendments to the Occupational Safety & Health Legislation (“OSH Legislation”) on 7 January 2021. Mr. Shiu invites HKRMA to express our view on the potential impact arising from the proposed legislative changes to our sector and members.
2. The 1st public consultation regarding the proposed amendments on the OSH Legislation took place in around April 2019, and relevant stakeholders in the business sectors submitted various responses to the Labour Department. According to the Legislative Council Brief (“Legco Brief”), it appears that the Government did revise some of the proposed amendments pursuant to comments received in the 1st Consultation, and it has just started on a “targeted consultation” (“2nd Consultation”) on the revised proposed amendments with selected stakeholders (such as construction industry representatives) which will end on 31 January 2021. It seems that the retail sector has not been approached by the Labour Department for the 2nd Consultation.
3. In view of the short lead time, HKRMA takes this opportunity to express our preliminary response to the revised proposed amendments to the OSH Legislation. We are in the course of preparing a more detailed submission which we will submit directly prior to the end of the 2nd Consultation.

HKRMA’s preliminary response

Raising the amount of the fines for breaching OSH Legislation

4. The Government intends to modify the behaviour of local businesses to focus on complying with the OSH Legislation by proposing to increase the amount of fines under the OSH Legislation and the length of jail sentences (for more serious breaches of the OSH Legislation) for non-compliance in order to strengthen the deterrent effect
5. We respectfully disagree that the maximum penalty for the indictable offences for corporates should be tied to the company’s turnover. The linking of company’s turnover with non-compliance of any legislation is rare and primarily used for (i) data protection, and (ii) competition law compliance. In each case, non-compliant practices directly result in an economic benefit to the company (e.g. bid rigging can lead to higher prices and higher profits). It is arguable that non-compliance with OSH

¹ Available at: www.legco.gov.hk/yr20-21/english/panels/mp/papers/mpcb2-492-6-e.pdf



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Legislation would be directly attributable to a company's turnover or economic benefit. We submit that the existing level of fines is a sufficient deterrence to local businesses to ensure compliance with the OSH Legislation. The falling rates of OSH Legislation non-compliance in recent years is further proof of the sufficient deterrence at current levels.

6. Those companies breaching the OSH Legislation, particularly the repeated offenders, could be smaller businesses with smaller turnovers which spend less effort in embedding work procedures to ensure compliance with the requirements under the OSH Legislation. As such, tying the fines to turnover will have little deterrent effect.
7. Larger size companies can use their resources to provide more detailed work procedures complying with the requirements under the OSH Legislation and regularly review and improve them to further reduce the likelihood of incurrance of accidents that could lead to severe injuries or deaths. It is disproportionate for companies which spend precious resources in compliance with the OSH Legislation to be exposed to such a high level of fines for occasional and unintentional technical breach.
8. We consider the fines to be determined by the court must be proportionate to the severity and culpability of the offence, such as the extent of recklessness / gross negligence of the employer.
9. In addition, the revised cap of HK\$50M appears to be excessive. The maximum fines in the jurisdictions which were benchmarked (Annex 1 of the Legco Brief) is HK\$22M (Australia). The cap for Singapore, a similar city to Hong Kong with about half the population size, the cap is HK\$3M. As such, if a cap is to be set for the fines of very serious offences, we consider the cap should be set at the range of HK\$6M to HK\$10M, which would provide a meaning sum of financial penalty with a deterrent effect.

Introducing a general defence in maintaining adequate measures to comply with the OSH Legislation

10. For certain more serious breaches of the OSH Legislation which could result in imprisonment, a mental element could be required to establish for such an offence against an individual (e.g. intentionally, knowingly or recklessly committing an offence). Whilst the current OSH Legislation imposes potential personal criminal liability (and prison time) on directors and key management of non-compliant company, these risks increase significantly as the proposed maximum sentences are increased to 3 years.
11. Due to such increased risks, we consider it is appropriate to introduce a general defence for potential corporate liability and personal liability for the directors and senior managers against liability for all the offences under the OSH Legislation provided that the employer has put adequate measures in place established under a compliance program² to comply with the relevant requirements under the OSH Legislation (which includes regular training on raising the awareness on OSH measures).

² For example, the Safety Management System required to be maintained for certain industries under Factories and Industrial Undertakings (Safety Management) Regulation (Cap. 59AF).



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12. This is a common defence for corporate liability (extending to the company and its directors and key management) in other common law jurisdictions, such as Bribery Act 2010 of the United Kingdoms and the Malaysian Anti-Corruption Commission (Amendment) Act of Malaysia⁴.
13. As such, there will be a strong incentive for businesses to devote resources to maintain such compliance programs with an objective to protect the company and its directors and key management, which ultimately would achieve the goal of the public policy to further reduce accidents leading to severe injuries and/or deaths arising from lack of OSH compliance measures.
14. The proposed general defence should be applicable to both the company and individuals – for corporate liability this should at least serve as a mitigating factor in reducing the fines and to protect the directors and key management who have devoted efforts in good faith to avoid contravening the offences under the OSH Legislation from personal criminal liabilities.

Conclusion

15. We consider the current level of fines under the OSH Legislation offers adequate deterrence, and that tying the level of fines to the non-compliant employer's turnover appears to be disproportionate.
16. We suggest to introduce a general defence of adopting adequate procedures by an employer for potential liabilities against the employer and its directors and key management.

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³ Please refer to the Bribery Act 2010 Quick Start Guide for further information:

<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-quick-start-guide.pdf>

⁴ Please refer to the Guidelines on Adequate Procedures pursuant to Sub-Section (5) of Section 17A under the Malaysian Anti-corruption Commission Act:

https://f.datasvr.com/fr1/119/75252/Prime_Ministers_Department_-_Guidelines_on_Adequate_Procedures.pdf