The Administration's response to issues raised at the meeting of the LegCo Subcommittee on regulation relating to Occupational Safety and Health on 30 October 1998

1. Information on provisions in overseas legislation regarding workers' right to refuse work on ground of hazard to their safety and health, including the backgrounds and enforcement practices of the legislation

The Administration has researched into the legislation of neighbouring countries and the UK, Canada and Australia. We found that none of our neighbouring countries, viz. Japan, Singapore, Malaysia, South Korea has legislation providing for a worker's right to refuse work on ground of hazard to personal safety or health. The occupational safety and health laws in the UK do not have provisions on the right of employees to refuse dangerous work. However, under section 100 of its Employment Rights Act 1996, an employee who is dismissed for leaving or refusing to return to his place of work which he reasonably believes poses a serious and imminent danger will be regarded as having been unfairly dismissed.

We found that legisiation in Ontario, Canada and Western Australia and Southern Australia has provisions governing situations wherein workers may refuse to work on ground of hazards to their health or safety. The following paragraphs give a summary of the legislative provisions.

CANADA

Legislation in different provinces of Canada is very similar and, for illustration, we shall refer to the Occupational Health and Safety Act, 1990 of Ontario.

The Ontario Act sets out quite detailed procedures to be followed when a worker refuses to work. Essentially, there are two stages. When a worker refuses to work, an internal investigation must be carried out in the workplace. The worker has a right to have a worker representative present during the investigation. If the employer corrects the problem or satisfies the worker that the work is safe, then that is the end of the

matter. The worker returns to work and the Ministry of Labour (MOL) is not notified.

If after the investigation the employer is satisfied that the work is safe, but the worker does not agree, the worker may continue to refuse, but there are two other scenarios. First, the employer may ask another worker to do the work, provided that the replacement worker has been advised of the refusal by the first worker, but he may not coerce the replacement worker. The second scenario is that the MOL is notified and an inspector visits the workplace as soon as possible, usually on the same day. The inspector investigates the matter and makes a decision. If the inspector decides that the work is safe, then the refusing worker must return to work or face disciplinary action by the employer. If the inspector decides that the work is unsafe or that the law is not being complied with, then an order will be issued to the employer to correct the hazardous situation.

We understand that these procedures are designed to ensure that the worker's concern is investigated promptly and properly, and at the same time, to ensure that production is not interrupted for more time than is necessary. It is not intended to be the common method of dealing with hazards in the workplace since there are many other mechanisms which could address hazardous situations in a workplace. For example, workers are required to report hazards to a supervisor, the joint health and safety committee members[1] conduct monthly inspections of the workplace and so on. A work refusal is intended to deal with situations where a significant hazard is suddenly recognized, or where a worker feels that the employer has not taken a legitimate concern seriously.

AUSTRALIA

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[1] A joint health and safety committee is required at a workplace at which twenty or more workers are regularly employed. Where such committee is not required but the number of workers regularly exceeds five, at least one health and safety representative should be selected from among the workers who do not exercise managerial functions. The functions of a health and safety committee include:

(a) identifying situations that may be a source of danger to hazard to workers;

(b) making recommendations to employer and the workers for the improvement of the health and safcty of workers;

(c) recommending to employers and the workers the establishment, maintenance and monitoring of programs, measures and procedures respecting the health and safety of workers; and

(d) obtaining information from the employer respecting the identification of hazards of materials, etc.

In Western Australia, the relevant legislation is the Occupational Safety and Health Act. Under this piece of legislation, an employee who refuses to work because he believes that to continue to work would expose him or any other person to a risk of imminent and serious injury or imminent and serious harm to his health shall notify his employer forthwith, and the safety and health representative[2] for the workplace concerned if there is one, and they shall attempt to resolve the problem. Should this fail, the safety and health representative shall refer the problem to the safety and health committee of the workplace concerned (if there is one) for it to attempt to resolve the matter.

Where all attempts to resolve the problem in-house are unsuccessful, the employer, the safety and health representative or, if there is no safety and health representative, the employee concerned may notify an inspector. The inspector shall attend forthwith at the workplace to investigate and take whatever action deemed appropriate, e.g. issue of an improvement notice or a prohibition notice.

In Southern Australia, the Occupational Health, Safety and Welfare Act 1986 confers on the health and safety representative of a workplace the power to direct that work shall cease until adequate measures are taken to protect the health and safety of an employee if he is of the opinion that there is an imminent threat to the health and safety of the employee to an extent that work should cease immediately.

After the health and safety representative chooses to exercise this power, he shall consult with the employer over the matter concerned as soon as practicable and, if necessary or appropriate, with the health and safety committee (if any). The employer or the health and safety representative may also request an inspector to attend at the workplace for adjudication. The inspector shall attempt to resolve the matter and

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[2] In Western Australia, an employee who works at a workplace irrespective of employment size may give notice to the employer requiring the election of a safety and health representative for the workplace. In Southern Australia, a group of employees may elect a health and safety representative to represent a work group, the constitution of which will be determined by agreement between the employer and the interested employees. The functions of the representative in both provinces include, among other things,

(a) to inspect the whole or any part of the workplace at such times as are agreed with the employer or at any time after giving reasonable notice to the employer;

(b) to investigate immediately in the event of an accident, dangerous occurrence or imminent and serious risk to the safety and health of any person;

(c) to consult and co-operate with the employer on all matters relating to the safety or bealth of persons in the workplace; and

(d) Liaise with the employees regarding matters concerning the safety or health of persons in the workplace.

shall take appropriate actions under the Act including the issue of an improvement notice or a prohibition notice.

ADMINISTRATION'S OBSERVATION

Provisions for a worker's right to refuse work on grounds of hazard to his safety or health is not found in our neighbouring countries. In the UK, there is no procedure for dealing with a worker's refusal to work on grounds of hazard to his health or safety. However, there are such provisions in some provinces in Canada and Australia.

It is observed that in countries where the right to refuse work is provided in laws, there is always a mechanism for resolution of the issue by a third party on the site, e.g. a health and safety committee in the case of Ontario, a safety and health representative in Australia. Such provisions will allow prompt actions to be taken to remove any imminent danger to allow the work to go on. Before we consider any provisions on the right to refuse to work on similar grounds, a similar setup has to be in place or established. The Safety Management Regulation which the Administration proposes to make in early 1999 will provide for a safety committee and a legal framework for other elements of a safety management system. This is the first step towards setting up the necessary structure to resolve issues relating to work hazards. We consider it more appropriate to put in place and develop this structure and system in the local context in the first place.

2. Whether the Administration has consulted The Hong Kong Construction Association Ltd. (HKCA) about the proposed Factories and Industrial Undertakings (Confined Spaces) Regulation (the new regulation) and the Construction Sites (Safety) (Amendment) Regulation 1998 (CSSR); if so, how the consultation was done and what was the result of the consultation.

The HKCA was consulted on the amendments to both regulations on the basis of a paper put to the then Committee on Industrial Safety and Health (CISH) of the Labour Advisory Board on 28.11.95. Representatives of the HKCA and the Labour Department met on 15.12.95. On the new Regulation, HKCA suggested that, instead of requiring competent supervisors to supervise operations in confined spaces, the regulation should require all workers entering or working in confined spaces to be trained and certified. The Labour Department

accepted this proposal and incorporated it into the paper for consultation with LAB. The proposals were endorsed by LAB on 29.1.96.

On the CSSR, HKCA suggested that if it was not practicable to provide proper working platforms, the use of either safety nets or safety belts/ harness should be allowed. This was contrary to the advice of CISH which advised that both safety nets and safety belts/harness should be used where it was impracticable to provide working platforms. HKCA's suggestion was brought to the attention of LAB when it was consulted on the issue on 29.1.96. However, LAB endorsed the views of CISH.

3. To review the drafting of the definition of "confined space" in clause 2 of the new Regulation with a view to -

(i) making it clear how the definition can apply to the circumstances mentioned in Para. (a) as there is no reference to size or specifications;

(ii) qualifying the term "risk" in para. b(ii) as there is no reference to danger, risk of life or health to workers;

(iii) adding "temperature" as a parameter for cold storage.

Regarding sub-items (i) and (ii), the Administration's intention is to provide all the technical details in an approved Code of Practice. We, however, understand the concern of the Subcommittee for a more precise description of the term "confined space". We have looked into the definitions as provided in some other jurisdictions and would like to propose a revised definition as well as other modifications where appropriate after obtaining Members' view on the remaining parts of the new Regulation.

Regarding sub-item (iii) on the issue of "temperature" in a cold storage area, we wish to point out that a cold storage when functioning as such is not a place where workers will stay and work on a prolonged period of time. The main danger of working in such place is the danger of a worker being locked in. Such hazard is dealt with by the Occupational Safety and Health Regulation where section 3(1) requires that the person responsible for the workplace must ensure that the plant in a workplace is safe and without risk to the safety and health of persons who use the plant. A relatively low temperature maintained in a cold storage is an artificial environment created for a purpose and is not a symptom of

malfunction or danger. It is not appropriate to control the "temperature" aspect of a cold storage for purposes of the safety and health of a worker working therein. Besides, a cold storage, depending on its construction, may not necessarily be a confined space.

4. To explain the legislative intent of clause 3(b) of the new Regulation and to review its drafting in particular the underlined words in the phrases "within the immediate vicinity of, and is associated with work occurring within, a confined space" so as to ensure enforcement of the new Regulation.

The intention of clause 3(b) is to extend the ambit of the new Regulation to cover work beyond the confined space. This is necessary because much precautionary measures to ensure the safety of working inside a confined space has to be performed outside the confined space. However, this sub-section also limits the application of the new Regulation to certain work only. These limitations are:

(a) the work must be required by the new Regulation;

(b) it must be in the immediate vicinity of the confined space and;

(c) it must be associated with the work occurring within the confined space.

Therefore, most of the work outside the confined space should not be affected because they will be excluded by the above limitations.

The words "in the immediate vicinity of" are frequently used and can be found in such other regulations as section 2 of CSSR and section 3 of the FIU (Lifting Appliances and Lifting Gear) Regulations (see Annex 1 for extracts on these sections). Other examples can be found in the FIU (Safety Officers and Safety Supervisors) Regulations, the FIU (Suspended Working Platforms) Regulation and the FIU (Cartridge-operated Fixing Tools) Regulations. An interpretation of these words can also be found in the case of R v Tsui Wai Ping [1993] 2 HKC 675 (see commentary at Annex II). The words "associated with work" also appear in the FIU (Work in Compressed Air) Regulation and whether the work outside a confined space is associated with the work therein should be determined on the facts of each case. We do not envisage any difficulty in enforcement by using these words in the new Regulation.

5. To review the drafting of clause 4(2) of the new Regulation with a view to specifying clearly who should be the persons to whom certificates are issued.

The person referred to in clause 4(2) should be a person who has completed a course preparing a person to make a risk assessment and complete a risk assessment report. Subject to the advice of the Law Draftsman, we propose to amend the reference to "competent person" in this sub-clause to "a person who is the subject of a certificate under (b)(ii) in the definition of a 'competent person' under section 2 of this Regulation".

Annex I

Chapter:59I

Title:

CONSTRUCTION SITES (SAFETY) REGULATIONS

Gazette Number:
Regulation:2
Heading: Interpretation

Version Date:30/06/1997

“construction site” (建築地盤) means a place where construction work is undertaken and also any area in the immediate vicinity of any such place which is used for the storage of materials or plant used or intended to be used for the purpose of the construction work;

Chapter:59I

Title:

FACTORIES AND INDUSTRIAL UNDERTAKINGS (LIFTING APPLIANCES AND LIFTING GEAR) REGULATIONS

Gazette Number:
Regulation:3
Heading: Interpretation

Version Date:30/06/1997

“construction site: (建築地盤) means a place where construction work is undertaken and includes any area in the immediate vicinity which is used for the storage of materials or plant used or intended to be used for the purpose of the construction work;

Annex II

R v Tsui Wai Ping

In R v Tsui Wai Ping [1993] 2 HKC 675 the appellant was employed to carry out decoration work, including dismantling two metal structures at the external wall on the tenth floor of the premises. The dismantling work required the erection of a bamboo scaffolding outside the metal structures. The appellant sub-contracted the scaffolding to T. There was a metal structure on the ground floor of the premises and another one on the ground floor of the adjoining building. The roof of the metal structure of the premises and that at the adjoining building overlapped with each other. T climbed up to the roof of the metal structure at the premises with the intention of transporting some bamboo posts from the roof by means of ropes to the tenth floor of the premises. T in fact managed to carry some of the bamboo posts onto the roofs. T walked along the roof of the metal structure at the adjoining building in order to find the best location to pull up the bamboo posts. But in the course of doing so, T fell off from the roof and died. The appellant was charged with failing to comply with regs 38A(b) and 38P(I) of the Construction Sites (Safety) Regulations, convicted and fined. He appealed. The issues in this appeal included whether the roofs in question could be regarded as part of the construction site within the meaning of regs 38A(b) and 38P(I) of the Construction Sites (Safety) Regulations in light of reg 2(I) of the same.

In allowing the appeal, Patrick Chan J Held, inter alia that in order to give some meaning to the word 'immediate' in reg 2(I), an area in the immediate vicinity of site must be more than close to or near the site. Further, in order for the contractor or principal contractor to discharge the obligation of making and keeping the place of work on the site safe under reg 38A(b), the perimeter of his construction site should only be the place where he can reasonably foresee to be the place where the construction works are to be undertaken and where his materials would be stored. The roofs were not construction sites within the meaning of regs 38A(b) and 38P(I). *Taylor V Coalite Oils & Chemicals* [1967] *3 KIR 315 and Morrow v Enterprise Sheet Metal Works (Aberdeen)* [1986] *SLT 697* applied.