

**Bills Committee on Boilers and
Pressure Vessels (Amendment) Bill 2001**

**Criteria for determining whether
a statutory instrument is subsidiary legislation**

Purpose

This paper sets out the criteria for determining whether an instrument made under an Ordinance is subsidiary legislation for the purposes of section 34 of the Interpretation and General Clauses Ordinance (Cap. 1)¹.

Definition of "subsidiary legislation"

2. Section 3 of Cap. 1 defines "subsidiary legislation" as "... any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect".

3. To determine whether a rule or other instrument made under an Ordinance is subsidiary legislation, it is necessary to decide whether such rule or instrument has "legislative effect".

Definition of "legislative effect"

4. There is no direct legal authority on the precise meaning of "having legislative effect". However, there are cases in the Commonwealth jurisdiction in which judges have expressed opinions on the meaning of those words. These opinions are not binding on the courts in Hong Kong. Based on judicial opinions and views expressed by writers in some common law jurisdictions, the following factors or criteria are relevant in determining

¹ Under section 34 of Cap. 1, all subsidiary legislation shall be laid on the table of the Legislative Council at the next sitting after the publication in the Gazette of that subsidiary legislation and the subsidiary legislation so laid will be governed by the "negative vetting procedure" under section 34(1) and (2) of Cap. 1.

whether a statutory instrument has legislative effect and is therefore subsidiary legislation within the meaning of section 3 of Cap. 1:

- (a) whether there is an express provision identifying the instrument as being subsidiary legislation;
- (b) whether the instrument determines the content of a law as a rule of conduct or applies the law in a particular case²;
- (c) whether the instrument has general application to the public or a class as opposed to individuals³;
- (d) whether the instrument extends or amends existing legislation⁴;
- (e) the legislative intent that the instrument is subsidiary legislation.

Discussion of the issue by LegCo Panel(s)

5. Members may wish to note that the above criteria had been considered by the Panel on Transport in late 1998 and early 1999 when the Panel discussed whether a "notice in the Gazette" issued by the Commissioner for Transport to determine the maximum fares for licensed ferry services under section 33(1) of the Ferry Services Ordinance (Cap. 104) was subsidiary legislation. Legal advisers of the Administration and the Legislative Council Secretariat had different opinions on the nature of such notice. Applying the above criteria to the Gazette notices issued under section 33(1) of Cap. 104, the Legal Service Division was of the view that notices of this kind should have legislative effect and be published in the form of subsidiary legislation while the Administration came to a different conclusion. The Administration, nevertheless, acknowledged that it was not always easy to draw a distinction between instruments of a legislative character and instruments of an executive character.

² *Commonwealth v Grunseit* (1943) 67 CLR 58 at 83, per Latham C.J., High Court of Australia; de Smith & Others, *Judicial Review of Administrative Action*, 5th edition, para. A0-11.

³ *Fowler v AG* [1987] 2 NZLR 56 at 74, per Somers J, Court of Appeal, New Zealand; *Queensland Medical Laboratory & Others v Blewett & Others* (1988) 84 ALR 615, at 637, per Gummow J, Federal Court of Australia.

⁴ *Williams v Government of Island of St. Lucia* [1970] AC 935 at 937, Privy Council; *Queensland Medical Laboratory & Others v Blewett & Others* (1988) 84 ALR 615 at 635.

6. As the deliberations of Transport Panel on the nature of notices issued under section 33(1) of Cap. 104 raised a much broader and more fundamental issue as to whether the existing legislative mechanism for the Legislative Council to monitor the exercise of power to make subsidiary legislation should be examined, the House Committee decided on 30 April 1999 that this broader issue should be referred to the Panel on Constitutional Affairs for examination.

7. At the meeting of the Panel on Constitutional Affairs on 19 July 1999, members examined the existing mechanism for the Legislative Council to monitor the exercise of delegated authority for making subsidiary legislation. In the course of discussion, members noted that there was no direct legal authority on the precise meaning of "having legislative effect" and a number of criteria had been adopted by the Administration in determining whether an instrument had legislative effect⁵. To make a clear distinction between instruments of a legislative character and instruments of an executive character, the Administration proposed to include, wherever necessary, an express provision in new legislation to make it abundantly clear whether a statutory instrument was subsidiary legislation. Members of the Panel supported the proposal. The Panel made a report to the House Committee on its deliberations on 8 October 1999. At the House Committee meeting, Members accepted the Panel's support for the Administration proposal.

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3 May 2002

⁵ The criteria are those set out in paragraph 4 of this paper.