

Bills Committee on Financial Reporting Council Bill

Extracts of the papers previously provided by the Administration on clause 14



Paper provided in October 2005

(Paragraphs 11 to 14 of LC Paper No. CB(1)166/05-06(02))

Directions of the CE

11. **Clause 14** of the Bill enables the CE to give the FRC a written direction with respect to the performance of any of the Council's functions. Some Members were of the view that this clause might undermine the independence of the FRC.

12. The Administration considers that, in order to have a better understanding of **clause 14**, it is important to examine the clause in the context of the checks and balances to ensure the accountability and governance of the operation of the FRC. It must first be highlighted that this power of giving directions can only be exercised by the CE subject to the following restrictions -

- (a) the direction must be in the public interest;
- (b) the CE must first consult the Chairman of the FRC; and
- (c) the directions must be with respect to the performance of the FRC's function as stipulated in **clause 9**.

These three restrictions have been included in the Bill in order to strike a reasonable balance between protecting the public interest and ensuring the FRC's independence in performing its day-to-day functions.

13. **Clause 14** is a tool of last resort for the Administration, through the CE, to implement necessary remedial measures in the most pressing and extreme circumstances. The CE will not give directions to the FRC unless it is necessary in the public interest and that in doing so he will have taken into account all circumstances prevailing at the time. These circumstances may include whether there is any major malfunction on the part of the FRC, whether the reputation of Hong Kong as an international financial centre is at stake, the urgency of remedial actions required of the FRC, and whether other checks and balances are performed effectively at the time, etc.

14. We consider **clause 14** necessary to enable the Administration to continue to account to the Legislative Council and the public for effective regulation of the accountancy profession. The reserve power for the Administration to take remedial and other necessary action is not unique to the FRC and is, in fact, fairly common in the case of comparable statutory bodies. Similar provisions providing for the CE's reserve power are found in, for example, sections 11 of the SFO and section 6E(3) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485). Indeed, no direction has ever been given by the CE in the past in accordance with the aforementioned Ordinances, as this reserve power is not intended to be used lightly.



Paper provided in November 2005

(Paragraphs 11 to 14 of LC Paper No. CB(1)286/05-06(02))

DIRECTIONS OF THE CHIEF EXECUTIVE

11. **Clause 14** of the Bill enables the CE to give the FRC a written direction with respect to the performance of any of the Council's functions. Having considered the Administration's intention as set out in paragraphs 11 to 14 of the Administration's paper entitled "(I) Appointment to; and (II) Checks and Balances on the Proposed Financial Reporting Council", a Member invited the Administration to consider the following matters -

- (a) To provide in **clause 14** that the FRC is required to comply with the CE's written directions only if the directions are not inconsistent with the FRC's functions, and to make reference to section 6E(3) of the Mandatory Provident Fund Schemes Ordinance (Cap. 485) in this regard;
- (b) To provide that the CE's written directions should be made public and specify the circumstances under which non-disclosure may be allowed; and
- (c) To clarify whether the CE's written directions are subject to judicial review.

12. Regarding paragraph 11(a) above, **clause 14(1)** has already provided that the power of giving directions can only be exercised by the CE subject to the following restrictions -

- (a) the direction must be in the public interest;

- (b) the CE must first consult the Chairman of the FRC; and
- (c) the directions must be with respect to the performance of the FRC's function as stipulated in clause 9.

In this light, we consider that the clause as it is drafted have already prescribed the necessary checks and balances on the CE's reserve power, which is not intended to be used lightly. Similar provisions are found in section 11 of the Securities and Futures Ordinance (SFO, Cap. 571) and section 10 of Clearing and Settlement Systems Ordinance (CSSO, Cap. 584). To avoid any inconsistency with **clause 14(3)**⁹, the Administration considers that the present drafting of **clause 14** is appropriate and does not require further amendment.

13. Regarding paragraph 11(b) above, there is no provision in the Bill prohibiting the disclosure of the written directions given by the CE to the FRC. The CE will decide whether to make public such written directions, and if so, in what manner, in light of actual circumstances. There are also no similar requirements in other Ordinances (for example, section 11 of the SFO and section 10 of CSSO) to mandate the CE to make such disclosure.

14. Regarding paragraph 11(c) above, the Department of Justice advises that the CE's power in question, being a statutory power, would be regarded by the Court as being of a public nature and amenable to judicial review.



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⁹ **Clause 14(3)** provides that if a direction is given by the CE under **clause 14(1)**, a requirement under an Ordinance that the FRC shall, for the purpose of performing any of the functions to which the direction relates –

- (a) form any opinion;
- (b) be satisfied as to any matter (including the existence of particular circumstances); or
- (c) consult any person, does not apply for any purpose connected with the performance of functions pursuant to, or consequent upon, the direction.

Clause 14(3) is modelled on section 11(3) of the SFO and section 10(3) of CSSO.