

立法會 *Legislative Council*

LC Paper No. LS57/10-11

Information Note for the Bills Committee on Communications Authority Bill

Purpose

At the meeting of the Bills Committee on Communications Authority Bill held on 12 April 2011, a member proposed that the Bill be amended as follows:

- (a) the long title should refer to "an independent Communications Authority" (CA); and
- (b) Clause 4 should provide that CA is to "carry out its functions under this Ordinance without interference from the Government¹".

2. The Administration has explained that the proposed amendments are unnecessary because CA's independent status is already enshrined in clause 3(3) which provides that CA is not a servant or an agent of the Government nor does it enjoy any status, immunity or privilege of the Government. The Administration has further expressed concerns that the proposed amendments may affect the courts' assessment of the independence of statutory bodies or corporations established under existing Ordinances which do not contain similar provisions. This paper provides the Legal Service Division's views on the concerns raised by the Administration.

General principles of statutory interpretation

3. As the issue raised by the Administration relates to statutory interpretation, it may be useful to look at those general principles of statutory

¹ "Government" is not defined in the Bill but section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) defines "Government" as "the Government of the Hong Kong Special Administrative Region".

interpretation which are relevant to ascertaining the legislature's intent as to the status of a statutory body. These principles are set out as follows:

- (a) In the absence of ambiguity, extraneous materials (e.g. Hansard or another statute) are not admissible for the interpretation of statutes. However, where any doubt or difficulty arises on the true sense and meaning of the words, or their application to the circumstances, extraneous materials may be used to ascertain their meaning².
- (b) Under section 19 of the Interpretation and General Clauses Ordinance (Cap. 1), an Ordinance must be deemed to be remedial and receive such fair, large and liberal construction and interpretation as will best ensure the attainment of its object according to its true intent, meaning and spirit.
- (c) The informed interpretation rule³ requires an enactment to be construed in its "context" which includes "its preamble, the existing state of the law, other statutes *in pari materia* (i.e. other statutes dealing with comparable matters⁴), and the mischief... the statute was intended to remedy"⁵.
- (d) As a general rule, occurrences after an Ordinance is passed cannot affect the actual legislative intention at the time it was enacted, and a later statute may only be resorted to for the interpretation of an earlier one if both statutes are on the same subject matter⁶.
- (e) Comparison between statutes not *in pari materia* (i.e. those passed with different motives in pursuance of different lines of thought) affords no reliable guide to their construction. The same words used in different statutes may have different meanings in each statute, according to the intentions of the statutes and the mischiefs they are designed to prevent⁷.

² *Bennion on Statutory Interpretation*, Fifth Edition (2008 Butterworths LexisNexis), p.647.

³ *Ibid*, pp.585-589. Also *Commissioner of Inland Revenue v Sawhney* [2006] 3 HKLRD 21 at 26.

⁴ *Medical Council of Hong Kong v Chow Siu Shek David* [2000] 2 HKC 428 at 440G, Bokhary PJ.

⁵ *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461, Viscount Simonds.

⁶ *Halsbury's Laws of Hong Kong*, Volume 23, 2008 Reissue, 365.061.

⁷ *Halsbury's Laws of Hong Kong*, Volume 23, 2008 Reissue, 365.069.

Approach adopted by the courts in determining whether a body is independent from the Government

4. According to our research, we are not aware of any Hong Kong case in which the court had to determine whether a statutory body or corporation was independent from the Government. However, the question of whether a statutory body is part of the Crown or independent from the Government has been considered by the High Court of Australia in *Superannuation Fund Investment Trust v Commissioner of Stamps*⁸. In that case, it was held that the question is one of statutory interpretation to ascertain the legislature's intent as evinced by the enabling legislation under which the body is established and this exercise involves the consideration of a number of factors⁹ including:

- (a) the scope and nature of the functions and powers of the body, and whether it is permitted or required to exercise independent and professional judgment;
- (b) the composition of the body;
- (c) who has the power to appoint members of the body;
- (d) whether members, once appointed, have security of tenure;
- (e) in what circumstances they may be removed by the Government;
- (f) whether the body is required to be self-sufficient in meeting the costs of and incidental to the performance of its functions;
- (g) to what extent it must report its activities to the Government;
- (h) the extent to which the body is affected or influenced by the Government in performing its functions; and
- (i) the degree of Government control or direction to which the body is subject: whether it is "the passive instrument" of the Government, or "essentially autonomous, its acts being... truly its own"¹⁰.

⁸ (1979) 145 CLR 330

⁹ *Ibid.*, per Stephen and Mason JJ.

¹⁰ *Ibid.*, per Stephen J.

It is possible that different views on the question may legitimately be formed on a particular set of facts, as is shown by the equal division of the High Court of Australia in *Superannuation Fund Investment Trust v Commissioner of Stamps* where one view principally relied on the nature of the functions of the trust in managing superannuation funds for government employees and the other on the large measure of independence enjoyed by the trust in managing those funds¹¹.

Whether the proposed amendments to the Bill would affect the courts' assessment of the independence of statutory bodies or corporations established under existing Ordinances

5. Except in the Independent Commission Against Corruption Ordinance (Cap. 204) and the Independent Police Complaints Council Ordinance (Cap. 604) where the names of the statutory bodies concerned include the word "Independent", it is noted that in existing Ordinances under which various statutory bodies or corporations are established, no reference is made to "independent" in the long title to describe the status of the statutory body or corporation concerned, nor is there a provision to the effect that the relevant body or corporation is to carry out its functions under the Ordinance without interference from the Government. Instead, these Ordinances all contain a provision that the relevant body or corporation is not a servant or agent of the Government and does not enjoy any status, immunity or privilege of the Government¹². Examples of such bodies or corporations are the Hospital Authority established under Cap. 113, the Consumer Council under Cap. 216, The Ombudsman under Cap. 397, the Equal Opportunities Commission under Cap. 480, the Privacy Commissioner for Personal Data under Cap. 486, the Urban Renewal Authority under Cap. 563, the West Kowloon Cultural District Authority under Cap. 601, the Independent Police Complaints Council under Cap. 604 and the Minimum Wage Commission under Cap. 608.

¹¹ *Holflex Pty Ltd v Paradox Pty Ltd* (unreported) 1724 of 1989 (NSW), Waddell CJ at pp.17-18.

¹² Some of these Ordinances (e.g. Cap. 113, Cap. 216, Cap. 563 and Cap. 601) empower the Chief Executive (CE) to give directions to the statutory bodies or corporations concerned with respect to the performance of their functions. According to the Administration, CE's power to give directions would not undermine the independence of the statutory bodies or corporations concerned, and would only be exercised where there is a clearly justified need and when it is in the public interest to do so: see the Administration's Reply to a Question (LCQ9) by Hon Emily LAU at the Legislative Council meeting of 18 October 2006.

6. Based on the statutory interpretation principles and the courts' approach set out in paragraphs 3 and 4 above, to determine whether a statutory body or corporation is independent, it appears that the following considerations would be relevant:

- (a) The courts would examine the relevant enabling Ordinance including its long title in its proper context (which includes the factual circumstances surrounding the establishment and operation of the statutory body or corporation) in order to give it a construction that will ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit. In making its decision, the court may have regard to the various factors referred to in paragraph 4 above.
- (b) Indeed, in respect of some (if not all) of the bodies or corporations referred to in paragraph 5 above, the legislative scheme or object would be frustrated (contrary to the requirements of section 19 of Cap. 1) if they are construed as not being independent from the Government. For example, the Personal Data (Privacy) Ordinance (Cap. 486) is expressed to be binding on the Government (section 3(1)). It is hard to envisage how the Privacy Commissioner for Personal Data could effectively discharge his functions under Cap. 486 vis-à-vis government departments if he were not functionally independent from the Government. The same applies to the Equal Opportunities Commission which administers anti-discrimination legislation that binds the Government (e.g. section 3 of Cap. 480).
- (c) Since individual statutory bodies or corporations established under their respective Ordinances have different functions and powers, it is unlikely that those Ordinances would be construed as dealing with matters which are comparable to those in the Bill. As such, the reference to "independent" and "without interference from the Government" in the Bill (which is a later statute when enacted) should not affect the courts' assessment of the independence of statutory bodies or corporations established under earlier statutes.

7. It should also be pointed out that while the long titles of Cap. 204 and Cap. 604 refer respectively to the establishment of an Independent Commission Against Corruption and the incorporation of the existing Independent Police Complaints Council, there is no suggestion that the use of the word "independent" in those two Ordinances would affect the courts' assessment of the independence of other bodies or corporations which are not so described in the long title of their respective Ordinances.

Conclusion

8. In the light of the above analysis, it appears that the independence of individual statutory bodies or corporations is to be ascertained in the context of the respective statutes having regard to factors such as the scope and nature of their functions and powers, the extent to which they are influenced by the Government in performing their functions, and the degree of Government control or direction to which they are subject. Accordingly, it is unlikely that the proposed amendments to the Bill, if enacted, would affect the courts' assessment of the independence of other statutory bodies or corporations established under existing Ordinances.

Prepared by

LOO Chi-pong, Bonny
Assistant Legal Adviser
Legislative Council Secretariat
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