

立法會
Legislative Council

LC Paper No. CB(4)713/14-15

Ref : CB4/SS/7/14

Paper for the House Committee meeting on 10 April 2015

**Report of the Subcommittee on Proposed Resolution Relating to the
Establishment of the Innovation and Technology Bureau**

Purpose

This paper reports on the deliberations of the Subcommittee on Proposed Resolution Relating to the Establishment of the Innovation and Technology Bureau ("the Subcommittee").

Background

2. In preparation for the establishment of the Innovation and Technology Bureau ("ITB"), the Legislative Council ("LegCo") made and passed a resolution under section 54A of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO") to effect the transfer of statutory functions under the Electronic Transactions Ordinance (Cap. 553) from the Secretary for Commerce and Economic Development ("SCED") and Permanent Secretary for Commerce and Economic Development (Communications and Technology) to the Secretary for Innovation and Technology and Permanent Secretary for Innovation and Technology on 29 October 2014 ("the original Resolution"). The original Resolution was published in the Gazette as Legal Notice No. 132 of 2014 on 31 October 2014.

3. The original Resolution commences on the 14th day after the day on which the Finance Committee ("FC") approves, under section 8 of the Public Finance Ordinance (Cap. 2) ("PFO"), the proposal to make changes to the Estimates of Expenditure 2014-2015 to provide for specified matters arising from the establishment of ITB ("the 2014-2015 funding proposal"); or the 14th day after the day on which the original Resolution is made and passed by LegCo under section 54A of IGCO, whichever is the later.

4. Since the 2014-2015 funding proposal could not be approved by FC in time for the relevant changes to be included into the Draft Estimates of Expenditure for 2015-2016 which was introduced into LegCo on 25 February 2015, the 2014-2015 funding proposal has been temporarily withdrawn. As such, another proposal to make changes to the Estimates of Expenditure for 2015-2016 to provide for matters arising from the establishment of ITB will need to be submitted later. Accordingly, the Administration takes the view that the original Resolution could not commence and considers it necessary to introduce amendments to the original Resolution to provide for new commencement arrangements for the proposed establishment of ITB.

The proposed resolution

5. On 24 February 2015, SCED gave notice to move a motion ("the proposed Resolution") under section 54A of IGCO at the Council meeting of 18 March 2015 to amend the original Resolution.

6. The proposed Resolution revises the definition of "commencement date" in, and adds a new definition of "amending Resolution" to, the original Resolution to provide that the original Resolution will commence on the 14th day after the day on which FC approves, under section 8 of PFO, the proposal to make changes to the Estimates of Expenditure 2015-2016 to provide for the specified matters arising from the establishment of ITB; or the 14th day after the day on which the proposed Resolution is made and passed by LegCo under section 54A of IGCO, whichever is the later.

The Subcommittee

7. At the House Committee meeting on 27 February 2015, Members agreed to form a Subcommittee to study the proposed Resolution. At the request of the House Committee, SCED has withdrawn his notice for moving the proposed Resolution at the Council meeting of 18 March 2015, pending the deliberation of the Subcommittee.

8. Under the chairmanship of Ir Dr Hon LO Wai-kwok, the Subcommittee held a meeting with the Administration on 24 March 2015. The membership list of the Subcommittee is in **Appendix I**.

Deliberations of the Subcommittee

9. Members note that according to the Legal Adviser to the Subcommittee ("the Legal Adviser"), paragraph 10.2.3 of *Craies on Legislation*, Sweet & Maxwell (10th edition, 2012) ("*Craies*") states that while an Act of Parliament does not lapse for mere disuse, it is possible for the effect of an Act to lapse because it depends for its continuing effect on a state of affairs that has permanently ceased to exist. As reflected by the structure and drafting of the original Resolution where a definition is provided for the expression "commencement date" in paragraph (1) thereof, there is an argument that the only substantive provision in the original Resolution is paragraph (2) which effects the transfer of statutory functions. Paragraph (2) has since lapsed because the state of affairs contemplated as condition for its commencement (namely, the approval by FC of the 2014-2015 funding proposal) will not happen as a matter of fact. If such argument stands, the proposed amendment to the so-called "commencement provision" may not have legal effect as the original Resolution which is sought to be amended has lapsed.

10. Members also note that in the opinion of the Administration, under the presumption of permanence, paragraph 10.2.2 of *Craies* states that unless the legislature expressly repeals or revokes legislation, or in some other way makes express arrangements for it to cease to have effect, it will continue in force indefinitely. The original Resolution was made and passed by LegCo but has not yet come into operation. There is no fixed term nor sunset clause which provides that the original Resolution is to operate until a particular date or the occurrence of a future event. The original Resolution should therefore be presumed to be valid and subsisting. The case of the Agricultural Research Act 1956 as referred to in the statement in paragraph 10.2.3 of *Craies* is not pertinent to the present case of the original Resolution. The subject matter of the Act, i.e. the Agricultural Research Council, had vanished after the commencement of the Act, while the subject matter of the original Resolution, i.e. the transfer of statutory functions, has not yet come into operation. Since the original Resolution has yet to commence, there is not yet any "continuing effect" and thus no issue of lapse.

11. In the Legal Adviser's opinion, the legal effect of the original Resolution from the time when it is certain that the state of affairs contemplated as condition for its commencement is not going to occur could be subject to different views and arguments thereon. In order to obviate any arguments on the technical propriety of the proposed amendment to the so-called "commencement provision", it seems that the prudent approach to take in the present case would be for LegCo to make and pass a fresh

resolution under section 54A of IGCO for the transfer of the statutory functions in question, with or without a formal repeal of the original Resolution.

12. In view of the Legal Adviser's concern regarding the legal status of the original Resolution, the Administration has advised that it decided not to proceed further with the proposed Resolution to amend the original Resolution. The Administration would introduce another resolution to repeal the original Resolution as well as a fresh resolution for the transfer of the statutory functions in question in due course. This is solely to avoid time being unnecessarily spent on an argument over a technical legal issue, and hence to expedite legislative process. This does not prejudice the Administration's position that the original Resolution is valid and subsisting, and thus could be amended by the proposed Resolution, and should not be regarded as a precedent. The Administration will continue to adopt the same approach to amend commencement provisions in future similar cases such that the un-commenced legislation concerned could be brought into operation.

13. Some members opine that the Subcommittee should continue its scrutiny work and be tasked with examining the resolution to repeal the original Resolution and the fresh resolution to be introduced by the Administration. A majority of members consider that the Subcommittee should, before its dissolution, report its deliberations in writing to the House Committee given the Administration's decision not to proceed further with the proposed Resolution. These members also consider that the proper arrangement is to form a new subcommittee under the House Committee to study the relevant subsidiary legislation upon their introduction into LegCo. Members of the existing Subcommittee could join the new subcommittee if they so wish.

Follow-up actions taken

14. Following the Subcommittee meeting on 24 March 2015, the Legal Adviser has written to the Administration concerning the view on the legal effect of the original Resolution. The Legal Adviser's letter dated 30 March 2015 and the Administration's response dated 1 April 2015 are in **Appendices II and III**.

15. On 31 March 2015, SCED gave notice to move two motions in respect of the resolution to repeal the original Resolution and the resolution to effect the transfer of relevant statutory functions respectively at the Council meeting of 29 April 2015.

Advice sought

16. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 4
Legislative Council Secretariat
9 April 2015

**Subcommittee on Proposed Resolution Relating to the Establishment of
the Innovation and Technology Bureau**

Membership List

Chairman	Ir Dr Hon LO Wai-kwok, BBS, MH, JP
Members	Hon CHAN Kam-lam, SBS, JP
	Hon WONG Kwok-hing, BBS, MH
	Hon Andrew LEUNG Kwan-yuen, GBS, JP
	Hon WONG Ting-kwong, SBS, JP
	Hon Cyd HO Sau-lan, JP
	Hon Mrs Regina IP LAU Suk-ye, GBS, JP
	Hon Alan LEONG Kah-kit, SC
	Hon LEUNG Kwok-hung
	Hon Albert CHAN Wai-yip
	Hon Claudia MO
	Hon Frankie YICK Chi-ming
	Hon Charles Peter MOK, JP
	Hon CHAN Chi-chuen
	Dr Hon Kenneth CHAN Ka-lok
	Dr Hon KWOK Ka-ki
	Hon SIN Chung-kai, SBS, JP
	Dr Hon Elizabeth QUAT, JP
	Hon TANG Ka-piu, JP
	Dr Hon CHIANG Lai-wan, JP
	Hon CHUNG Kwok-pan
	Hon Christopher CHUNG Shu-kun, BBS, MH, JP
	Hon Tony TSE Wai-chuen, BBS
	(Total : 23 members)
Clerk	Ms YUE Tin-po
Legal Adviser	Ms Wendy KAN



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF : CTB/B480-20-6-6/3/C
本函檔號 OUR REF : LS/R/4/14-15
電話 TELEPHONE : 3919 3509

傳真 FAX : 2877 5029
電郵 E-MAIL : wkan@legco.gov.hk

By Fax (2511 1458)

30 March 2015

Mr LAM Shing-fung, Billy
AS for Commerce & Economic Development
(Communications & Technology)B1
Commerce and Economic Development Bureau
21/F, West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

Dear Mr LAM,

Re: Proposed resolution under section 54A of the Interpretation and General Clauses Ordinance (Cap. 1) (the Proposed Resolution)

We refer to your letter of 23 March 2015. It is noted that you have reiterated in your letter that the resolution made and passed by the Legislative Council on 29 October 2014 and published in the Gazette as Legal Notice No. 132 of 2014 (the Resolution) is valid and subsisting, and thus is capable of being amended by the Proposed Resolution. It is also noted that you will be proposing a resolution under section 54A of Cap. 1 to repeal the Resolution and to effect afresh the transfer of statutory functions for the establishment of the Innovation and Technology Bureau. In light of the approach to be adopted in that proposal, the legal validity of the Resolution should not be in issue. Nonetheless, we would like to put on record that we maintain our view that as a matter of principle the Resolution has lapsed because it depends for its continuing effect on a state of affairs that has permanently ceased to exist (the Principle).

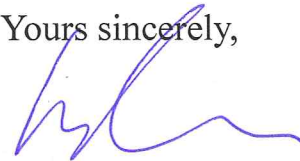
In addition, we would like to set out briefly our views on your references to the presumption of permanence and the Air Pollution Control (Amendment) Ordinance 1993 (the 1993 Amendment Ordinance) in your letter as follows.

It is noted that the Administration is of the view that because of the presumption of permanence, the Resolution should be presumed to be valid and subsisting as there is no fixed term nor sunset clause which provides that the Resolution is to operate until a particular date or the occurrence of a future event. However, our view is that whilst a legislative instrument may lapse due to maturity of a sunset clause or expiry of a fixed term as provided, the Principle should apply where the state of affairs that the legal instrument depends for its continuing effect has permanently ceased to exist. It appears that the presumption of permanence and the Principle are not mutually exclusive.

As regards the 1993 Amendment Ordinance, the Administration is of the further view that even though a piece of legislation cannot commence because an event provided under the commencement provision can no longer happen, the commencement provision can still be amended such that the legislation could be brought into operation. It is noted that the commencement mechanism of the Resolution is provided in the definition provision of the Resolution and is, in our view as previously explained, an integral part of the Resolution as a whole. Therefore, the 1993 Amendment Ordinance would only be useful if the Resolution contains a free-standing commencement provision.

We would like to take this opportunity to express our appreciation of your sharing with us your views on the matter, and we hope our respective views will be useful for future references.

Yours sincerely,



(Wendy KAN)
Assistant Legal Adviser

cc. DoJ (Attn: Ms Angie LI, SGC (By Fax: 2869 1302))

LA

SALA2

Clerk to Subcommittee

商務及經濟發展局
通訊及科技科

香港添馬添美道二號
政府總部西翼二十一樓



COMMUNICATIONS
AND TECHNOLOGY BRANCH
COMMERCE AND ECONOMIC
DEVELOPMENT BUREAU

21/F, West Wing
Central Government Offices
2 Tim Mei Avenue
Tamar, Hong Kong

本局檔號 OUR REF :

來函檔號 YOUR REF :

電話 TEL. NO. : 2810 2713

傳真 FAXLINE : 2511 1458

電子郵件 E-mail Address:

By Fax (2877 5029)

1 April 2015

Miss Wendy Kan
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road, Central
Hong Kong

Dear Miss Kan,

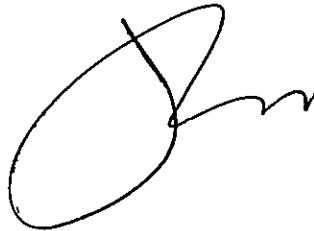
**Proposed resolution under section 54A of
the Interpretation and General Clauses Ordinance (Cap. 1)**

Thank you for your letter of 30 March 2015.

In our previous correspondence, we have already shared our views on the issues mentioned in the first, second and third paragraphs of your letter of 30 March 2015. For record, we would like to set out our views to address the points that you made in the fourth paragraph of that letter.

As expressed at the meeting of the Subcommittee on Proposed Resolution Relating to the Establishment of the Innovation and Technology Bureau on 24 March 2015, we consider that paragraph (1) of the Original Resolution is merely a commencement provision. It is a technical provision that does not go to the substance of the Original Resolution, i.e. the transfer of relevant statutory functions. The drafting of paragraph (1) and the location of it in the Original Resolution, similar to those of the commencement provision of other legislation, also clearly indicate that paragraph (1) is a commencement provision. Therefore, paragraph (1) of the Original Resolution is capable of being amended by the Amending Resolution, similar to the case of the 1993 Amendment Ordinance.

For future references, we would like to make clear that we maintain our position.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a few horizontal strokes.

(Ivanhoe Chang)

for Secretary for Commerce and Economic Development

c.c. DoJ (Attn: Ms Angie Li, SGC (By Fax: 2869 1302))
Clerk to Subcommittee (Attn: Ms Yue Tin-po (By Fax: 2840 0269))