

**立法會**  
***Legislative Council***

LC Paper No. LS57/14-15

**Paper for the House Committee Meeting  
on 10 April 2015**

**Legal Service Division Report on  
Proposed Resolutions under section 54A  
of the Interpretation and General Clauses Ordinance (Cap. 1)**

The Secretary for Commerce and Economic Development (the Secretary) has given notices to move two motions respectively under section 54A of the Interpretation and General Clauses Ordinance (Cap. 1) at the Legislative Council (LegCo) meeting of 29 April 2015 to -

- (a) repeal (the Repeal Resolution) the resolution made and passed by LegCo under the same section on 29 October 2014 and published in the Gazette as Legal Notice No. 132 of 2014 (the Original Resolution); and
- (b) effect the transfer of statutory functions under the Electronic Transactions Ordinance (Cap. 553) (the Relevant Statutory Functions) pursuant to the proposed establishment of the Innovation and Technology Bureau (ITB) (the New Resolution).

2. The Original Resolution was made to effect the transfer of the Relevant Statutory Functions pursuant to the proposed establishment of ITB. The term "commencement date" is defined under paragraph (1) of the Original Resolution to mean that the Original Resolution commences on the 14th day after the day on which the Finance Committee of LegCo (FC) approves, under section 8 of the Public Finance Ordinance (Cap. 2), the proposal to make changes to the Estimates of Expenditure 2014-15 to provide for the specified matters arising from the establishment of ITB (the 2014-15 Funding Proposal); or the 14th day after the day on which the Original Resolution is made and passed by LegCo under section 54A of Cap. 1, whichever is the later.

3. According to the Administration, the 2014-15 Funding Proposal could not be approved by FC in time for the relevant changes to be included into the Draft Estimates of Expenditure for 2015-16 which was introduced into LegCo on 25 February 2015. Accordingly, the Administration considers that

the Original Resolution could not commence without first making new commencement arrangements for the proposed establishment of ITB.

4. For that purpose, the Secretary gave notice on 24 February 2015 to move a motion under section 54A of Cap. 1 at the LegCo meeting of 18 March 2015 to amend the Original Resolution (the Amending Resolution) by repealing the definition of "commencement date" under paragraph (1) of, and substituting a new definition of "commencement date" in, the Original Resolution. The Amending Resolution also adds a new definition of "amending Resolution" to the Original Resolution. The intended legal effect is that the Original Resolution will commence on the 14th day after the day on which FC approves, under section 8 of Cap. 2, the proposal to make changes to the Estimates of Expenditure 2015-16 to provide for the specified matters arising from the establishment of ITB; or the 14th day after the day on which the Amending Resolution is made and passed by LegCo under section 54A of Cap. 1, whichever is the later.

5. Upon scrutiny of the legal and drafting aspects of the Amending Resolution, we have raised our concern with the Administration that the Original Resolution may not be valid and subsist. We are of the view that, 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 has since lapsed because the state of affairs contemplated as condition for its commencement will not happen as a matter of fact. If such argument stands, the proposed amendment to the so-called "commencement clause"<sup>1</sup> may not have legal effect as the Original Resolution which is sought to be amended has lapsed<sup>2</sup>.

6. The Administration does not agree to our view and considers that the Original Resolution, similar to an un-commenced Ordinance, is valid and subsisting except that it has yet to come into operation, and thus is capable of being amended by the Amending Resolution. Since the Original Resolution

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<sup>1</sup> See paragraph 4 of the LegCo Brief on the Amending Resolution (File Ref: CTB/B480-20-6-6/3/C) issued by the Commerce and Economic Development Bureau (CEDB) on 24 February 2015.

<sup>2</sup> We have referred to paragraph 10.2.3 of *Craies on Legislation*, Sweet & Maxwell (10th edition, 2012) (Craies). The author says 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 (the Principle). The author then quotes, as an example, the lapse of the Agricultural Research Act 1956 (the 1956 Act) before its formal repeal by the Statute Law (Repeals) Act 1998 because that Act concerned a Council established under a Charter which subsequently surrendered its Charter. Paragraph 10.2.1 of Craies further says that many of the principles discussed are equally relevant to subordinate legislation. The commencement clause of the Original Resolution is tied in with an event that could not happen anymore, namely, the approval by FC of the 2014-15 Funding Proposal. In our view, it appears that it is not a matter as to whether the Original Resolution is not commenced but it is rather that the Original Resolution is unable to be commenced because the approval by FC of the 2014-15 Funding Proposal could not happen.

has not yet come into operation, there is not yet any continuing effect and thus no issue of lapse<sup>3</sup>. Members may view copies of the correspondence between the Administration and us at the LegCo's website<sup>4</sup>.

7. In view of our concern, the Administration has decided not to proceed with the Amending Resolution further and will introduce the Repeal Resolution to repeal the Original Resolution and the New Resolution for the transfer of the Relevant Statutory Functions pursuant to the proposed establishment of ITB.

8. The Repeal Resolution repeals the Original Resolution. The New Resolution is the same as the Original Resolution, except that the commencement date is determined by making references to the 14th day after the day on which FC approves, under section 8 of Cap. 2, the proposal to make changes to the Estimates of Expenditure 2015-16 to provide for the specified matters arising from the establishment of ITB and the 14th day after the day on which the New Resolution is made and passed by LegCo under section 54A of Cap. 1, whichever is the later.

9. Members may refer to the LegCo Brief on the Repeal Resolution and New Resolution (File Ref: CTB/B480-20-6-6/3/C) issued by CEDB on 31 March 2015 for further information.

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<sup>3</sup> See paragraph 4 of the LegCo Brief on the Repeal Resolution and New Resolution (File Ref: CTB/B480-20-6-6/3/C) issued by CEDB on 31 March 2015, and the Administration's letters of 26 February, 27 February, 23 March and 1 April of 2015. The Administration has said in its letters of 27 February and 23 March 2015 that the 1956 Act referred to in Craies is not pertinent to the present case in that the subject matter of the 1956 Act has vanished after the commencement of the 1956 Act, while the subject matter of the Original Resolution that effects the transfer of statutory functions to the proposed Secretary for Innovation and Technology and proposed Permanent Secretary for Innovation and Technology has not yet come into operation. The Administration is also of the view that because of the presumption of permanence as explained in paragraph 10.2.2 of Craies, the Original Resolution should be presumed to be valid and subsisting as 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 Administration further considers that the Principle is not conclusive authority for saying that the Original Resolution has lapsed, nor does it lay down a legal principle that is applicable to the present case. In the Administration's opinion, the presumption of permanence is more legally relevant to the present situation. The Administration has quoted the commencement provision of the Air Pollution Control (Amendment) Ordinance 1993 (the 1993 Amendment Ordinance) to support its 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. To that end, we have responded by stating 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. In our view, it appears that the presumption of permanence and the Principle are not mutually exclusive. As regards the 1993 Amendment Ordinance, we note that the commencement mechanism of the Original Resolution is provided in the definition provision of the Original Resolution and is an integral part of the Original Resolution as a whole. Therefore, the 1993 Amendment Ordinance would only be useful if the Original Resolution contains a free-standing commencement provision.

<sup>4</sup> [http://www.legco.gov.hk/yr14-15/english/hc/sub\\_leg/sc107/papers/sc107\\_ppr.htm](http://www.legco.gov.hk/yr14-15/english/hc/sub_leg/sc107/papers/sc107_ppr.htm).

10. At the House Committee meeting on 27 February 2015, members agreed to form a subcommittee to study the Amending Resolution (the Subcommittee). As advised by the Clerk to the Subcommittee, the Subcommittee held a meeting with the Administration on 24 March 2015. Members noted the concern raised by the legal adviser to the Subcommittee and the Administration's point of view about the legal validity of the Original Resolution. Members also noted that the Administration had decided not to proceed further with the Amending Resolution. The Administration advised that to avoid time being unnecessarily spent on an argument over a technical legal issue, and hence to expedite legislative process, it would introduce another resolution to repeal the Original Resolution as well as a fresh resolution for the transfer of the Relevant Statutory Functions pursuant to the proposed establishment of ITB. Some members opined 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 considered 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 Amending Resolution. These members also considered that the proper arrangement was to form a new subcommittee under the House Committee to study the relevant subsidiary legislation upon their introduction into LegCo.

11. No difficulties relating to the legal and drafting aspects of the Repeal Resolution and the New Resolution have been identified.

Prepared by

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