

**The definition of ‘State’ for the purposes
of section 66 of Cap.1**

Section 66(1) of the Interpretation and General Clauses Ordinance (‘Cap.1’) provides that -

“No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is therein expressly provided or unless it appears by necessary implication that the State is bound thereby.”

2. The definition of ‘State’ that applies to section 66 of Cap.1 is at **Annex 1**. It
----- comprises only the following.

The President of the PRC

3. The Office of President of the PRC is dealt with in Articles 79 to 84 of the
----- Constitution of the PRC (copy at **Annex 2**).

The Central People’s Government

4. The Central People’s Government, also known as the State Council, is dealt
----- with in Articles 85 to 92 of the Constitution (copy at **Annex 3**).

Central Authorities exercising functions of CPG under the BL

5. It is possible that, under the Chinese Constitution, a Central Authority other than the Central People’s Government may exercise functions that, under the Basic Law, are the responsibility of the Central People’s Government. In such a situation, the relevant Central Authority would fall within the definition of ‘State’.

Government of the Hong Kong SAR

6. The HKSARG is within the definition of 'State', in the same way as the former Hong Kong Government was part of the 'Crown'. All government policy bureaux and departments are therefore covered. Whether they would engage in commercial activities such as the letting out of government owned premises or sale of confiscated commodities is immaterial. The term 'HKSARG', however, does not normally include bodies corporate such as the two municipal councils or the Equal Opportunities Commission in respect of which the relevant legislation normally provides that they are not to be regarded as servants or agents of the Government or the State or as enjoying any status, immunity or privileges of the Government or the State.

Certain subordinate organs

7. A subordinate organ of the Central People's Government or of relevant Central Authorities is only within the definition if it satisfies three tests -

- it carries out executive functions of the CPG, or functions for which the CPG has responsibility under the Basic Law
- it does not exercise commercial functions
- it is acting within the scope of the authority and functions delegated to it by the Central People's Government or the relevant Central Authority.

8. Mainland bodies that have commercial functions, or that are not subordinate organs of the CPG or the relevant Central Authorities, will not be within the definition of 'State'. State corporations, provincial authorities, autonomous regions and municipalities are therefore outside the definition.

9. The fact that the Basic Law provides that the Central Government is responsible for the defence and foreign affairs of Hong Kong does not mean that relevant subordinate organs may not lawfully

carry out other executive functions in Hong Kong, provided they are consistent with Hong Kong's high degree of autonomy and are carried out in accordance with the Basic Law.

Clarity of definition

10. Given that the definition of 'State' was designed to correspond to the 'Crown' before Reunification, it is considered that the definition is both appropriate and tolerably clear.

11. It is true that a definition of 'State' that listed relevant subordinate organs by name would be simpler to apply. However, this would not accurately reflect the previous meaning of the 'Crown'. There was no fixed list of authorities within the 'Crown'. A functional test was used to decide which particular authorities were, from time to time, within the 'Crown'. The definition of 'State' incorporates a similar test in respect of subordinate organs of the 'State'. It must not be forgotten that the nature, name and functions of authorities can change from time to time. Only a functional test can cater for this.

The definition of ‘State’ in Cap. 1

“‘State’ includes only -

- (a) the President of the People’s Republic of China;
- (b) the Central People’s Government;
- (c) the Government of the Hong Kong Special Administrative Region;
- (d) the Central Authorities of the People’s Republic of China that exercise functions for which the Central People’s Government has responsibility under the Basic Law;
- (e) subordinate organs of the Central People’s Government that -
 - (i) on its behalf, exercise executive functions of the Central People’s Government or functions for which the Central People’s Government has responsibility under the Basic Law; and
 - (ii) do not exercise commercial functions,when acting within the scope of the delegated authority and the delegated functions of the subordinate organ concerned; and
- (f) subordinate organs of the Central Authorities of the People’s Republic of China referred to in paragraph (d), that -
 - (i) on behalf of those Central Authorities, exercise executive functions of the Central People’s Government or functions for which the Central People’s Government has responsibility under the Basic Law; and
 - (ii) do not exercise commercial functions,when acting within the scope of the delegated authority and the delegated functions of the subordinate organ concerned;”

Extract from the Constitution of the PRC

SECTION II

**The President of the People's
Republic of China**

ARTICLE 79

The President and Vice-President of the People's Republic of China are elected by the National People's Congress.

Citizens of the People's Republic of China who have the right to vote and to stand for election and who have reached the age of 45 are eligible for election as President or Vice-President of the People's Republic of China.

The term of office of the President and Vice-President of the People's Republic of China is the same as that of the National People's Congress, and they shall serve no more than two consecutive terms.

ARTICLE 80

The President of the People's Republic of China, in pursuance of decisions of the National People's Congress and its Standing Committee, promulgates statutes; appoints and removes the Premier, Vice-Premiers, State Councillors, Ministers in charge of ministries or commissions, and the Auditor-General and the Secretary-General of the State Council; confers state medals and titles of honour; issues orders of special pardons; proclaims martial law; proclaims a state of war; and issues mobilization orders.

ARTICLE 81

The President of the People's Republic of China receives foreign diplomatic representatives on behalf of the People's Republic of China and, in pursuance of decisions of the Standing Committee of the National People's Congress, appoints and re-calls plenipotentiary representatives abroad, and ratifies and abrogates treaties and important agreements concluded with foreign states.

ARTICLE 82

The Vice-President of the People's Republic of China assists in the work of the President.

The Vice-President of the People's Republic of China may exercise such parts of the functions and powers of the President as may be deputed by the President.

ARTICLE 83

The President and Vice-President of the People's Republic of China exercise their functions and powers until the new President and Vice-President elected by the succeeding National People's Congress assume office.

ARTICLE 84

In case the office of the President of the People's Republic of China falls vacant, the Vice-President succeeds to the office of President.

In case the office of the Vice-President of the People's Republic of China falls vacant, the National People's Congress shall elect a new Vice-President to fill the vacancy.

In the event that the offices of both the President and the Vice-President of the People's Republic of China fall vacant, the National People's Congress shall elect a new President and a new Vice-President. Prior to such election, the Chairman of the Standing Committee of the National People's Congress shall temporarily act as the President of the People's Republic of China.

Extract from the Constitution of the PRC

SECTION III

The State Council

ARTICLE 85

The State Council, that is, the Central People's Government, of the People's Republic of China is the executive body of the highest organ of state power; it is the highest organ of state administration.

ARTICLE 86

The State Council is composed of the following:

the Premier;

the Vice-Premiers;

the State Councillors;

the Ministers in charge of ministries;

the Ministers in charge of commissions;

the Auditor-General; and

the Secretary-General.

The Premier has overall responsibility for the State Council. The ministers have overall responsibility for the ministries or commissions under their charge.

The organization of the State Council is prescribed by law.

ARTICLE 87

The term of office of the State Council is the same as that of the National People's Congress.

The Premier, Vice-Premiers and State Councillors shall serve no more than two consecutive terms.

ARTICLE 88

The Premier directs the work of the State Council. The Vice-Premiers and State Councillors assist in the work of the Premier.

Executive meetings of the State Council are composed of the Premier, the Vice-Premiers, the State Councillors and the Secretary-General of the State Council.

The Premier convenes and presides over the executive meetings and plenary meetings of the State Council.

ARTICLE 89

The State Council exercises the following functions and powers:

(1) to adopt administrative measures, enact administrative rules and regulations and issue decisions and orders in accordance with the Constitution and the statutes;

(2) to submit proposals to the National People's Congress or its Standing Committee;

(3) to lay down the tasks and responsibilities of the ministries and commissions of the State Council, to exercise unified leadership over the work of the ministries and commissions and to direct all other administrative work of a national character that does not fall within the jurisdiction of the ministries and commissions;

(4) to exercise unified leadership over the work of local organs of state administration at different levels throughout the country, and to lay down the detailed division of functions and powers between the Central Government and the organs of state administration of provinces, autonomous regions and municipalities directly under the Central Government;

(5) to draw up and implement the plan for national economic and social development and the state budget;

(6) to direct and administer economic affairs and urban and rural development;

(7) to direct and administer affairs of education, science, culture, public health, physical culture and family planning;

(8) to direct and administer civil affairs, public security, judicial administration, supervision and other related matters;

(9) to conduct foreign affairs and conclude treaties and agreements with foreign states;

(10) to direct and administer the building of national defence;

(11) to direct and administer affairs concerning the nationalities, and to safeguard the equal rights of minority nationalities and the right of autonomy of the national autonomous areas;

(12) to protect the legitimate rights and interests of Chinese nationals residing abroad and protect the lawful rights and interests of returned overseas Chinese and of the family members of Chinese nationals residing abroad;

(13) to alter or annul inappropriate orders, directives and regulations issued by the ministries or commissions;

(14) to alter or annul inappropriate decisions and orders issued by local organs of state administration at different levels;

(15) to approve the geographic division of provinces, autonomous regions and municipalities directly under the Central Government, and to approve the establishment and geographic division of autonomous prefectures, counties, autonomous counties and cities;

(16) to decide on the enforcement of martial law in parts of provinces, autonomous regions and municipalities directly under the Central Government;

(17) to examine and decide on the size of administrative organs and, in accordance with the law, to appoint, remove and train administrative officers, appraise their work and reward or punish them; and

(18) to exercise such other functions and powers as the National People's Congress or its Standing Committee may assign it.

ARTICLE 90

The Ministers in charge of ministries or commissions of the State Council are responsible for the work of their respective departments and convene and preside over ministerial meetings or commission meetings that discuss and decide on major issues in the work of their respective departments.

The ministries and commissions issue orders, directives and regulations within the jurisdiction of their respective departments and in accordance with the statutes and the administrative rules and regulations, decisions and orders issued by the State Council.

ARTICLE 91

The State Council establishes an auditing body to supervise through auditing the revenue and expenditure of all departments under the State Council and of the local governments at different levels, and those of the state financial and monetary organizations and of enterprises and undertakings.

Under the direction of the Premier of the State Council, the auditing body independently exercises its power to supervise through auditing in accordance with the law, subject to no interference by any other administrative organ or any public organization or individual.

ARTICLE 92

The State Council is responsible, and reports on its work, to the National People's Congress or, when the National People's Congress is not in session, to its Standing Committee.