

LETTERHEAD OF Legislative Council Secretariat Legal Service Division

來函檔號 Your Ref:
本函檔號 Our Ref: LS/M/7/98-99
電 話 Tel: 2869 9216
圖文傳真 Fax: 2877 5029

By Fax No.2537 2102

12 October 1998

Hon Lau Chin-shek, JP
Room 327 Central Government Offices
West Wing
Central
Hong Kong

Dear Mr. Lau,

**Legal Procedure for Adjustment in
Fares of Licensed Ferry Services**

I am asked by Mr. Jimmy MA, Legal Adviser, to respond to your letter dated 26 September 1998 relating to the above matter.

Under section 28(1) of the Ferry Services Ordinance (Cap. 104) (“the Ordinance”), the Commissioner for Transport (“the Commissioner”) may if he thinks fit grant to any person a licence to operate a ferry service between such points as may be specified in the licence. Section 33(1) of the Ordinance provides that the Commissioner may by notice in the Gazette determine the maximum fares that may be charged for the carriage of passengers, baggage, goods and vehicles on any licensed service.

I am asked to advise whether such notice in the Gazette made by the Commissioner under section 33(1) of the Ordinance is subsidiary legislation.

Section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) defines “subsidiary legislation” as “... any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect”. To determine whether a notice in the Gazette made by the Commissioner under section 33(1) of the Ordinance is subsidiary legislation, it is necessary to decide whether such notice has “legislative effect”.

There is no direct authority on the precise meaning of “having legislative effect”. However, there are cases in the Commonwealth jurisdictions in which judges have expressed opinions on the meaning of those words. According to these opinions, it would appear that an instrument having legislative effect is one made under or by virtue of an Ordinance that:

...../P.2

- (a) has the effect of determining the content of the law, rather than applying the law in a particular case; and
- (b) has the direct or indirect effect of affecting a privilege or interest, or imposing an obligation, creating a right, or varying or removing an obligation or right of persons generally or of persons of a specified class.

On the basis that courts in Hong Kong will accept the above opinions and apply them to the present case, it is clear that any notice made by the Commissioner determining the maximum fares chargeable on a licensed ferry service is made under an Ordinance, namely, the Ferry Services Ordinance (Cap. 104). Moreover, such notice which determines the content of section 33(1) of the Ordinance has the effect of imposing an obligation on ferry service licensees not to charge a fare exceeding the maximum fares as determined by the Commissioner. On the other hand, such notice also imposes an obligation on members of the public using the licensed services to pay a fare not exceeding those maximum fares.

Following from the above analysis, notice made by the Commissioner under section 33(1) of Cap. 104 should be subsidiary legislation within the meaning of section 3 of Cap. 1 and should therefore be subject to the scrutiny by the Legislative Council.

It should also be noted that an order made by the Chief Executive in Council under section 19(1) of the Ordinance determining the maximum fares chargeable on a franchised service is subsidiary legislation. Given the similarity in the effect of such order and a notice made under section 33(1) of the same Ordinance, there appears no logical reason why the latter should not be subsidiary legislation. If the legislature had intended to exclude such notice from the scrutiny by the Legislative Council, there should have been express provisions to that effect.

I hope the above clarifies the matter. Please do not hesitate to contact me should you wish to discuss further.

Yours sincerely,

(Connie Fung)
Assistant Legal Adviser

cc. Mr. TSOI Yiu-cheong,
P.A. to Hon. Lau Chin-shek, JP (Fax No.2537 2102)
Mr. Jimmy MA, LA