

Panel on Administration of Justice and Legal Services

Information paper for meeting on 24 January 2005

Subsidiary legislation

Introduction

This paper informs the Panel on Administration of Justice and Legal Services of the factors relevant to determining whether or not an instrument is subsidiary legislation.

Background

2. This issue was referred to the Panel by the Bills Committee on the Boilers and Pressure Vessels (Amendment) Bill 2001 as a result of the Committee's deliberations on the proposed section 6(8) of the Bill. That section specifies that the rules to be made by the Boilers and Pressure Vessels Authority under powers conferred on it by the primary legislation, in relation to examinations conducted for the issue or endorsement of certificates of competency, are not subsidiary legislation.

3. At a meeting held on 3 November 2004, the Chairman of the Panel requested the Department of Justice to prepare a paper setting out the criteria or factors which are relevant to considering and determining whether or not an instrument is subsidiary legislation.

Subsidiary legislation

4. "Subsidiary legislation" is a convenient general description for a legislative instrument made by an authority to whom the power to legislate has been delegated by the Legislative Council through primary legislation.

5. “Subsidiary legislation” is defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) 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”. “Subsidiary legislation” is also known as subordinate legislation (section 3) or delegated legislation.

Administrative instruments

6. Not all instruments made under statutory powers are necessarily legislative in character. The Donoughmore Committee on Ministers’ Powers (1932 Cmnd 4060)¹ distinguished legislative and administrative or executive authority on the basis, in summary, that legislative activity involves the process of formulating general rules of conduct without reference to particular cases, while executive action involves the process of performing particular acts, issuing particular orders or making decisions that apply general rules to particular cases.

7. Though administrative instruments are not subject to the control of the Legislative Council, they are subject to judicial control. The courts may declare that a particular administrative instrument is outside the ambit of the relevant enabling legislation and hence unlawful.

Instruments having “legislative effect”

8. Under the definition of subsidiary legislation in Cap.1, in order to qualify as subsidiary legislation, an instrument must have “legislative effect”. There is no statutory definition of the phrase “legislative effect”.

¹ As cited in Pearce Delegated Legislation in Australia 2nd Ed., p.1.

9. Although in many cases it is obvious whether an instrument is legislative or administrative in character, in some the distinction is not easy to draw. This difficulty has been widely acknowledged. For example, the Donoughmore Committee noted –

“It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative on the one hand and the purely administrative on the other; administrative action so often partakes of both legislative and administrative characteristics.”²

10. The need to focus on individual instruments was emphasised by Scott L J in *Blackpool Corporation v Locker*, 368 –

“As the Donoughmore Committee itself [chaired by Scott L J] pointed out, it is the substance and not the form, or the name, that matters. In delegated legislation, law-making is the essential feature, and law-making (except in the case of mere codification) means altering the existing law – whether written or unwritten – and, therefore, means interfering with existing rights vested in persons affected.”

The current practice in “doubtful cases”

11. In view of this difficulty, since October 1999, in cases where a doubt may arise as to whether or not an instrument is subsidiary legislation, the Administration has adopted the approach of including in the legislation an

² (1932 Cmnd 4060), p.19.

express provision declaring or clarifying the character of the instrument³. Naturally, when such a provision is proposed, during the legislative process, it comes under the scrutiny of the Legislative Council and is subject to amendment and debate by the Council. Once enacted, the provision can be regarded as expressing the legislative intent as to the nature of the instrument.

Criteria for determining whether an instrument is subsidiary legislation

12. In ascertaining the criteria for determining whether an instrument has “legislative effect”, and is therefore subsidiary legislation, reliance is placed on factors that have been considered in judicial decisions to be relevant. The following factors have been considered by the courts to be relevant in determining whether an instrument has legislative effect –

- (a) Whether the instrument extends or amends existing legislation⁴ (or alters the common law – see paragraph 10 above).
- (b) Whether the instrument has general application to the public or a class as opposed to individuals. Though not conclusive, if the

³ For example, an order made under s.11(1), a notice made under s.11(2) of the Electronic Transactions Ordinance (Cap. 553), bylaw made under s.33(2) of the Hong Kong Science and Technology Parks Corporation Ordinance (Cap. 565).

⁴ For example, order made under s.72 of the Quarantine and Prevention of Spread of Infectious Disease Ordinance (Cap.141), regulation made under s.52(1)(e) of Firearms and Ammunition Ordinance (Cap.238).

In *Queensland Medical Laboratory v Blewett* (1988) 84 ALR, it was held that the making of a new pathology services table which was set out in Sch.1A of the Health Insurance Act 1973 is a decision of a legislative rather than an administrative character. The Court held that while it might be true to say that the Minister’s consideration of whether or not to exercise his power to substitute the new pathology Schedule was of an administrative character in that it was executing or maintaining a law of the Commonwealth, the making of the determination changed the content of the law with the same result as if the Schedule had been changed by an amending statute.

instrument has general application to the public or to a class, the instrument is more likely to be held to be subsidiary legislation⁵.

- (c) Whether the instrument formulates a general rule of conduct without reference to particular cases. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases⁶.

13. When a court determines the question whether an instrument has “legislative effect”, the legislative intent is also relevant. An express provision declaring or clarifying the status of the instrument would be a clear indicator of the legislative intent as to the nature of the instrument. Sometimes, the legislative intent may be ascertained from provisions other than a provision expressly stating the nature of the instrument⁷.

⁵ For example, order made under s.21 of the Road Traffic Ordinance (Cap.374), s.13 of the Community Service Ordinance (Cap.378), s.360 of the Companies Ordinance (Cap.32), s.50 of the Electronic Transactions Ordinance (Cap.553).

In the New Zealand case of *Fowler & Roderique Ltd v the Attorney General* [1987] 2 NZLR 56, one of the issues was the status of a notice published in the New Zealand Government Gazette declaring a fishery to be a controlled fishery and limiting the number of boat fishing licences for the fishery to the number existing at the time of the notice. The Court of Appeal held that the notice was a general piece of delegated legislation as it had effect against the whole world notwithstanding that it significantly protected the 23 boats previously fishing. In short, the notice was a general piece of delegated legislation.

⁶ For example, notice made under s. 17C of the Wild Animals Protection Ordinance (Cap. 170) (Wild Animals Protection (Approval of Hunting Appliances) Notice (Cap. 170A)), notice made under s.7 of Cap. 170 (Prohibition of Feeding of Wild Animals Notice 1999 Cap. 170B). In *Commonwealth v Grunseit* (1943)67 CLR58 at 83, Chief Justice Latham of the High Court of Australia stated that: the general distinction between legislation and the execution of legislation is that legislation determines the content of the law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases.

⁷ In *Pokfulam Development Co. Ltd. v Incorporated Owners of Scenic Villas* LDBM No. 70 of 2000; [2001] HKEC 541, the judge held that the 1993, 1997 and 2000 Codes of Practice (“the Codes”) issued by the Secretary for Home Affairs (“the Secretary”) under s. 44(1) of the Building Management Ordinance (Cap. 344) (“BMO”) and published in the Gazette by general notice were only directory in nature and not subsidiary legislation as the aim of the Codes, as clearly indicated in s.20A(1) and (3) of the BMO, was to specify standards and guidelines in relation to the procurement of supplies, goods or services required by a corporation, and the procurement by invitation to tender of any supplies, goods or services under s.20A(2) and the tender procedures in

14. To conclude, as has been observed in LC Paper No. CB(2) 15/99-00, in case of a dispute as to the whether an instrument is subsidiary legislation, it would be a matter for the court to adjudicate, as in *English Schools Foundation v Bird* [1997] 3 HKC 434⁸.

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respect thereof. Thus the Codes, providing standards and guidelines for the above purposes, could not be rules of law, unless they were clearly enacted as such. The Codes could not therefore be mandatory in nature and could not be subsidiary legislation.

⁸ In this case, the court held that regulations made under section 10 of the English Schools Foundation Ordinance (Cap. 1117) were subsidiary legislation despite a provision to the effect that it was not necessary to publish them or lay them on the table of the Legislative Council.