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By Fax (2877 5029) and by Post

9 September 2013

Mr Kelvin Ka-yun LEE
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central
Hong Kong

Dear Mr Lee,

Solicitors (General) Costs (Amendment) Rules 2013
(L.N. 110 of 2013)

I refer to Mr Jimmy Ma's letter of 9 July 2013 to the Secretary for Justice and to my interim reply of 18 July 2013. I also refer to Ms Mary So's letter to the Secretary for Justice dated 22 July 2013.

The background

2. The Solicitors (General) Costs (Amendment) Rules 2013 ("the Rules") were published in the Gazette on 21 June 2013 as L.N. 110 of 2013 and were tabled at the Legislative Council ("LegCo") on 26 June 2013.

3. At the meeting of the House Committee held on 5 July 2013, Members of the Committee noted that the Rules had not been made by the right party, namely that they had apparently been made by the Council of the Law Society of Hong Kong rather than by the Costs Committee as provided under section 74 of the Legal Practitioners Ordinance ("LPO") (Cap.159).[1] It is further noted that the Law Society had agreed to liaise with the Costs Committee to arrange for the Rules to be published in the Gazette again.[2]

4. A subcommittee ("Subcommittee") has been formed under the House Committee to consider how the Rules should be dealt with as they have been published in the Gazette and tabled at the LegCo. The Administration is invited to give its views on any legal and related issues.[3]

The proper authority for making the Rules

5. Under section 74(1) of the LPO, the Costs Committee consists of the following persons-

"(a) a judge of the Court of First Instance appointed by the Chief Justice as Chairman;

(b) the Registrar of the High Court or a senior deputy registrar or deputy registrar of the High Court;

(c) for the purposes of the Solicitors (General) Costs Rules (Cap 159 sub. leg. G), the Director of Lands, or his representative approved by the Chief Justice;

(ca) for the purposes of the Solicitors (Trade Marks and Patents) Costs Rules (Cap 159 sub. leg. I), the Director of Intellectual Property, or his representative approved by the Chief Justice;

(d) the President and one of the Vice-Presidents of the [Law] Society and 2 members of the [Law] Society nominated by the [Law] Society and

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1 See *Paper for the House Committee Meeting on 5 July 2013 – Further Report by Legal Service Division on Solicitors (General) Costs (Amendment) Rules 2013* (L.N. 110) gazetted on 21 June 2013 (LC paper No. LS69/12-13).

2 See the letter dated 28 June 2013 from the Law Society to the Assistant Legal Adviser of the Legal Service Division of the LegCo Secretariat, at para 4.

3 See the letter dated 9 July 2013 from the Legal Adviser of the Legal Service Division of the LegCo Secretariat to the Secretary for Justice.

approved by the Chief Justice;

(c) 3 persons appointed by the Chief Executive who, in the opinion of the Chief Executive, can represent the interests of consumers of legal services."

6. The Costs Committee is empowered to make rules on matters specified in section 74(3) of the LPO including provisions under the Solicitors (General) Costs Rules (Cap 159G).[4] Under section 74(4) of the LPO, the prior approval of the Chief Justice is required for the rules made by the Costs Committee.

7. In the present case, the enacting formula as appeared in the Rules states that the Rules are"[m]ade by the Costs Committee of The Law Society of Hong Kong under section 74 of the Legal Practitioners Ordinance (Cap. 159) subject to the prior approval of the Chief Justice".

8. It is noted that the names of the 20 persons which appear at the end of the Rules are in fact the names of the 20 members of the Council of the Law Society, and apparently with the exception of four, they are not members of the Costs Committee established under section 74(1) of the LPO.[5]

9. The Law Society also admits that the Costs Committee is not a committee of the Law Society.[6]

10. The Administration takes the same view as the Subcommittee that the proper authority for making the Rules is the Costs Committee established under section 74(1) of the LPO.

Whether the Rules have been validly made

11. The general principle is that legislative power should be exercised

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4 See section 74(1)(c) of the LPO referred to in para 5 above.

5 See the letter dated 28 June 2013 from the Law Society to the Assistant Legal Adviser of the Legal Service Division of the LegCo Secretariat.

6 Ibid, para 2.

by those in whom it is vested or on whom it is conferred.[7]

12. The validity of a piece of subsidiary legislation may be challenged on the ground that the power under which the subsidiary legislation purports to have been made was not available to the particular person by whom the subsidiary legislation was made.[8]

13. In the present case, the proper authority for making the Rules is the Costs Committee established under section 74(1) of the LPO. No legislative power has ever been conferred, either expressly or by necessary implication, on the Law Society, or its Council, to do so.[9]

14. As the Rules have not been made by the correct authority, the Administration takes the view that the Rules have not been validly made.[10]

<u>Presumption of lawful exercise of power</u>

15. Section 38 of the Interpretation and General Clauses Ordinance (Cap 1) ("IGCO") provides for the presumption of lawful exercise of power:

> "Where any Ordinance confers power upon any person to-
>
> (a) make any subsidiary legislation;
>
> ...
>
> and the Ordinance conferring the power prescribes conditions, subject to the observance, performance or existence of which any such power may be exercised, such conditions shall be presumed to have been duly fulfilled if in

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[7] See Paul Craig, *Administrative Law* (7th edition) (Sweet & Maxwell 2012), pages 460-461, at para 15-026.

[8] See *Halsbury's Laws of Hong Kong* [Volume 45] (July 2012, 2nd edition), at para [365.119]. As stated in that paragraph: "There are several grounds on which the validity of subsidiary legislation may be challenged. In the first place, it may be alleged that the power under which the legislation purports to have been made...was not available to the particular person by whom the legislation was made."

[9] In *Hawkes's Bay Raw Milk Producers Co-operative Co. Ltd. v New Zealand Milk Board* [1961] N.Z.L.R. 218, it was held by the New Zealand Court of Appeal that in making regulations under statutory authority the Governor–General is exercising a delegated power of legislation. Such a delegated authority must be exercised strictly in accordance with the powers creating it, and in the absence of express power or by necessary implication to do so the authority cannot be delegated to any other person or body.

[10] The Subcommittee is also of the view that the Rules are "void ab initio because they were not made by the Costs Committee as provided for under section 74 of the Legal Practitioners Ordinance (Cap. 159)": see the letter dated 22 July 2013 from the Clerk to Subcommittee to the Secretary for Justice.

> the subsidiary legislation ...there is a statement that the subsidiary legislation...is made,...in exercise of, or in pursuance of, the power conferred by such Ordinance, or a statement to the like effect."

16. There is also a presumption of correctness under common law which requires it to be assumed, in the absence of evidence to the contrary, that subsidiary legislation is correctly made.[11]

17. This presumption is not expressed to be conclusive, and may thus be rebutted. It is, having regard to the facts set out in paragraphs 5 to 10 above, rebutted in the present case.

The proposed solutions

Option 1 – Publication of a new set of rules to be made by the Costs Committee with a corrigendum in the Gazette to explain the background

18. The proposed course of action under this option is for a new set of rules to be made by the Costs Committee with the publication of a Corrigendum in the Gazette to explain the error.

19. There are two alternative arguments in support of this option.

The void ab initio argument

20. The first one is that because the body of persons which purported to have made the Rules was not the Costs Committee, the Rules have not been validly made. It may be argued that the Rules are therefore void *ab initio*, and as such, there is nothing validly made under the law to be repealed.

21. The above approach may find support in a previous matter handled by the LegCo Subcommittee in its scrutiny of Commencement Notices relating to the *Ozone Layer Protection (Controlled Refrigerants) Regulation* ("the Ozone Regulation").

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[11] See Halsbury's Laws of England (Volume 96 (2012) 5th edition), para 1142.

Ozone Layer Protection (Controlled Refrigerants) Regulation Commencement Notice (L.N. 391 of 1998)

22. In that case, a Government Notice (G.N. 4794) was published in the Gazette on 23 December 1993 to appoint 1 January 1994 as the commencement date of the Ozone Regulation. However, the Government Notice was not laid on the table of the Legislative Council as is required under section 34(1) of the IGCO.

23. The Administration held the view that the first Commencement Notice was ineffective as the requirement of tabling of subsidiary legislation before LegCo is mandatory. On 15 December 1998, the Administration published another Commencement Notice (L.N. 391 of 1998), which appointed 1 January 1999 as the day on which the Ozone Regulation was to come into operation.

24. The Subcommittee for the Ozone Regulation ("Ozone Regulation Subcommittee") took the view that as the first Commencement Notice in respect of the Ozone Regulation had been validly made, it was both unnecessary and *ultra vires* on the part of the Administration to publish the second Commencement Notice to appoint a fresh commencement date in respect of the Ozone Regulation.

25. In the absence of a proper authority to publish the second Commencement Notice, the Ozone Regulation Subcommittee took the view that the legal effect of that piece of subsidiary legislation was in doubt as being *ultra vires* and that the LegCo could not rely on section 34 of the IGCO to amend or repeal it. A summary of the facts and the detailed explanation given by the Ozone Regulation Subcommittee are at **Annex A**.

26. As the existence of two commencement dates in the Gazette for the same Ozone Regulation would cause confusion, the Ozone Regulation Subcommittee suggested that one of the ways to tackle the issue was to publish a corrigendum notice.

27. For the reasons as set out in **Annex A** (which have not cast any doubt on the original proposition by the Ozone Regulation Subcommittee referred to in paragraphs 24 to 26 above), the two pieces of Commencement Notices concerned were subsequently dealt with by the Administration in the Statute Law (Miscellaneous Provisions) Ordinance (Ordinance No. 32 of 2000).[12]

28. If the reasoning of the Ozone Regulation Subcommittee in the case of the Ozone Regulation is to be followed in the present case,[13] the Rules, being a piece of subsidiary legislation that has not been validly made for a lack of proper authority, would be deemed to have no legal effect and there is no substance to be repealed. The essence of this reasoning is that if the LegCo could not rely on section 34 of the IGCO to amend or repeal a piece of subsidiary legislation the legal effect of which was in doubt as being *ultra vires*, it would not be appropriate to rely on section 34 of the IGCO to repeal the Rules in the present case.

Another precedent

29. In connection with the above, we have found another precedent case, namely, the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997) under which a new Commencement Notice (which is also a piece of subsidiary legislation) has to be issued in relation to certain legislation to be followed by the publication of a Corrigendum in the Gazette to provide explanation for so doing.[14] A detailed summary of the case is at **Annex B**.

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[12] The first Commencement Notice was eventually deemed to have been duly laid on the table of the LegCo and the second Commencement Notice was "declared to be and always to have been of no force or effect" in the Statute Law (Miscellaneous Provisions) Ordinance (Ordinance No. 32 of 2000) introduced by the Administration: see sections 43 and 45 and item 1 of Schedule 1 of the Ordinance. It should be noted that the second Commencement Notice was not formally repealed; it was only "declared" to have been of no force or effect from the outset.

[13] See paras 4-6 of **Annex A**.

[14] It is to be noted that the Legal Service Division of the LegCo Secretariat has been involved in the handling of all the above precedents including raising queries on the validity of the various commencement notices involved in those cases.

Implied repeal by the publication of a new set of subsidiary legislation made by the Costs Committee

30. Alternatively, on the assumption that although the Rules have not been validly made, it remains legally effective as a piece of subsidiary legislation unless and until it is declared invalid by the court, another possible way of dealing with the Rules is by means of implied repeal by another piece of subsidiary legislation made by the Costs Committee under section 74 of the LPO – even though the amendments set out in the unrepealed Rules will not become operative in the absence of an appointment of commencement date.

31. In this regard, section 87 of *Bennion on Statutory Interpretation* sets out the principle on "implied repeal" of legislation:

> "Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim *leges porsteriores priores contrarias abrogant* (later law abrogate earlier contrary laws)."[15]

32. In the "Comment on Code S 87"[16], there is further exposition on the above principle:

> "If a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed. …
>
> > 'The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier act that the two cannot stand together?'
>
> This principle is a logical necessity, since two inconsistent laws cannot both be valid without contravening the principle of contradiction. …."

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[15] See F R A Bennion, *Bennion on Statutory Interpretation - A Code* (5th edition), at page 304.

[16] Ibid.

33. The making and gazetting of a new piece of subsidiary legislation by the Costs Committee with a different enacting formula would have the effect of repealing the Rules by implication.

34. A precedent case for the above argument can be found in the Dangerous Drugs (Amendment) (No.2) Ordinance 1994 (63 of 1994) (Commencement) Notice 1998 (L.N. 280 of 1998). A detailed summary of the case is at **Annex C**).

35. It is to be noted that the actual procedures to be undertaken behind the two propositions are the same except for the difference in the legal reasoning.

36. In the circumstances, if option 1 is adopted, it would not be necessary for the Rules to undergo any express repeal by the LegCo under section 34(2) of the IGCO. It would however be advisable for a Corrigendum to be made to explain the reason for the making and gazetting of the new rules.

Option 2 – Repeal under section 34 of the Interpretation and General Clauses Ordinance (Cap. 1)

37. Another possible solution to resolve the matter is for the Rules to be expressly repealed by the Legislative Council under section 34(2) of the IGCO.[17]

38. This approach is apparently based on the reasoning that although the Rules have not been validly made, they have been published in the Gazette and would have legal effect as a piece of subsidiary legislation.[18]

[17] Section 34(2) of Cap.1 provides: "Where subsidiary legislation has been laid on the table of the Legislative Council under subsection (1), the Legislative Council may, by resolution passed at a sitting of the Legislative Council held not later than 28 days after the sitting at which it was so laid, provide that such subsidiary legislation shall be amended in any manner whatsoever consistent with the power to make such subsidiary legislation, and if such resolution is so passed the subsidiary legislation shall, without prejudice to anything done thereunder, be deemed to be amended as from the date of publication in the Gazette of such resolution."

[18] Section 58(1) of *Bennion on Statutory Interpretation - A Code* (5th edition 2008), at page 254 provides: "Any provision of an instrument constituting delegated legislation is ineffective if the provision goes

39. Indeed, this is the approach proposed to be adopted by the Subcommittee in the present case:

> "As the Solicitors (General) Costs (Amendment) Rules 2013 are void ab initio because they were not made by the Costs Committee as provided for under section 74 of the Legal Practitioners Ordinance (Cap. 159), **members of the Subcommittee are of the view that the only proper way to deal with the matter is for you to move a motion to repeal the Rules.**"[19] (Emphasis added.)

40. The approach of an express repeal was adopted in the case of the Banking (Specification of Public Sector Entities in Hong Kong) (Amendment) Notice 2004 (L.N. 119 of 2004) ("the First Notice") as referred to in **Annex D**, albeit the repeal was effected by a piece of subsidiary legislation made by the authorized delegate rather than by a resolution of the LegCo made under section 34(2) of the IGCO.

41. In that case, the Monetary Authority published the First Notice in the Gazette on 18 June 2004 to specify a company as a public sector entity in Hong Kong under the Banking Ordinance (Cap. 155). Clarification was sought by the LegCo Assistant Legal Adviser as to why the Notice was signed by the then Deputy Chief Executive instead of the then Chief Executive of the Monetary Authority. Without accepting that the First Notice was invalidly made, the Monetary Authority published in the Gazette a Repeal Notice (L.N. 148 of 2004) on 24 September 2004. A new Notice (L.N. 149 of 2004) made by the then Chief Executive of the Monetary Authority was gazetted on the same date to set out the same specification as contained in the First Notice.

42. The above approach rests on the premises as set out in paragraph 38 above, namely that the subsidiary legislation has already had legal effect.

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beyond the totality of the legislative power which (expressly or by implication) is conferred on the delegate by the enabling Act or Acts. The provision is then said to be ultra vires (beyond the powers). This applies even where the instrument has been sanctioned by a confirming authority. However the instrument is not to be treated as ineffective in any respect on the ground of ultra vires unless and until declared to be so by a court of competent jurisdiction."

[19] See the letter dated 22 July 2013 from the Clerk to Subcommittee to the Secretary for Justice.

However, such an approach may not be applicable in the present case because of its unique feature, namely that the Rules have not come into operation.

43. Section 28(3) of IGCO provides as follows:

> "Subsidiary legislation comes into operation-
>
> (a) at the beginning of the day on which it is published; or
> (b) if provision is made for it to commence on another day, at the beginning of that other day."

44. Section 1 of the Rules provides that the Rules "come into operation on a day to be appointed by the President of The Law Society of Hong Kong by notice published in the Gazette". No commencement notice has ever been issued in the present case.

45. In this regard, subsidiary legislation which has been passed and which has not yet come into operation, as a matter of law, does not have the full effect of statute. As stated in *Craies on Legislation – A Practitioners' Guide to the Nature, Process, Effect and Interpretation of Legislation*:

> "A frequently asked question is "what status in law does legislation have between the moment when it is enacted or made and the moment when it comes into force?"
>
> The simple answer is that prospective legislation is merely an announcement by the legislator that the law will change at some point in the future and that until that point arises the law is unaffected by the announcement.
>
> In particular, it is not open to the courts to act as if a prospective change in the law were already effected. ..."[20]

46. On the basis of the above legal principle, it is doubtful whether it is necessary to have an express repeal of the Rules in the present case.

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20 10th edition (London, Sweet & Maxwell 2012), at para 10.1.2.

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Option 3 – Validation of the Rules by legislation

47. The last option is to introduce a scheme of validation under a principal Ordinance to deem the Rules which have been made by the Law Society to have effect as if made by the Costs Committee established under section 74(1) of the LPO.

48. In this regard, a scheme of validation has been introduced by the Administration under the Statute Law (Miscellaneous Provisions) Ordinance (No. 32 of 2000) ("the SLMP Ordinance") to deem certain items of subsidiary legislation which had been gazetted but which had not been laid before the LegCo to have been duly laid on the table of the LegCo in accordance with the requirements of section 34(1) of the IGCO.[21]

49. In the UK, the National Insurance Regulations (Validation) Act 1972 was passed to validate national insurance regulations which had not been made by the correct authority.[22]

50. However, it should be noted that both the subsidiary legislation referred to above in the UK and in the SLMP Ordinance referred to in paragraph 48 above had already been in operation for several years before the defect was discovered. In the present case, the Rules have not yet come into operation. No commencement notice has ever been issued. The Administration takes the view that it is not appropriate to validate the Rules which have been erroneously made by the wrong party and which are not yet in force.

The view of the Administration

51. The Administration has presented the three options to the Subcommittee for its consideration. We note that it is ultimately a matter

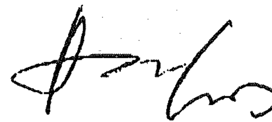
[21] See Annex A, at paras 7 to 11.

[22] It was stated in section 1 of the National Insurance Regulations (Validation) Act 1972 that: "The provision purporting to have been made in the National Insurance (Earnings-related Benefit) Regulations 1966 under section 114(5) of the National Insurance Act 1965 by the Minister of Pensions and National Insurance shall have, and be deemed to have had, effect as if made by the National Insurance Joint Authority."

for the Subcommittee to decide how the Rules should be dealt with.

52. Having considered the arguments that we have set out for the three options above, the Administration is more inclined towards option 1 in the context of the present case. Assuming that the Subcommittee would agree to the adoption of option 1, it would seem that the better course of action would be for the Costs Committee to make a new set of Rules together with the publication of a Corrigendum in the Gazette to clarify the matter.

Yours sincerely,



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Annex A

The scrutiny by the LegCo Subcommittee on the two Commencement Notices in respect of the Ozone Layer Protection (Controlled Refrigerants) Regulation

A Government Notice (G.N. 4794) was published in the Gazette on 23 December 1993 to appoint 1 January 1994 as the commencement date of the Ozone Layer Protection (Controlled Refrigerants) Regulation ("the Ozone Regulation"). However, the Government Notice was not laid on the table of the Legislative Council as is required under section 34(1) of the Interpretation and General Clauses Ordinance (Cap 1).

2. The Administration held the view that G.N. 4794 was ineffective as the requirement of tabling of subsidiary legislation before LegCo is mandatory. On 15 December 1998, the Administration published another Commencement Notice (L.N. 391 of 1998), which appointed 1 January 1999 as the day on which the Regulation was to come into operation.

3. A Subcommittee was set up under the House Committee to study the issue in respect of the validity of a piece of subsidiary legislation, namely G.N. 4794, which has been published in the Gazette but not tabled in the LegCo in accordance with section 34 of Cap 1.[1]

4. The Subcommittee came to the view that the legislative process is considered completed upon the publication of the subsidiary legislation. As the Commencement Notice 1993 has been published in the Gazette, it was validly made. The Subcommittee considered it both unnecessary and *ultra vires* on the part of the Administration to publish the second Commencement Notice.

[1] The Subcommittee on the Ozone Regulation was chaired by the then Hon Ronald ACRULLI, JP.

5. The above view of the Subcommittee has been recorded in the *Paper for House Committee meeting on 5 February 1999 – Report of the Subcommittee on Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1998* (LC Paper No. CB(1) 857/98-99) as follows:

> "As the legislative process is considered completed upon the publication of the subsidiary legislation in the Gazette and there is no specific requirement on whether this should be in the form of a Government Notice or Legal Notice, the Subcommittee concludes that the Government Notice No. 4794 in 1993 was validly made. **This being the case, the Subcommittee considers it both unnecessary and lacking in legal authority on the part of the Administration to publish the second Commencement Notice** to appoint a fresh commencement date of the Ozone Layer Protection (Controlled Refrigerants) Regulation. **In the absence of a proper authority to publish the second Commencement Notice, the legal effect of this piece of subsidiary legislation is in doubt. The Legislative Council therefore cannot rely on section 34 to amend or repeal it.**"[2] (Emphasis added.)

6. The Subcommittee reiterated the above views in its report to the LegCo at the Council meeting on 10 February 1999:

> "As the legislative process is considered completed upon the publication of the subsidiary legislation in the Gazette and the Commencement Notice 1993 was published in the Gazette, the Subcommittee came to the view that the Government Notice to appoint 1 January 1994 as the commencement date of the Ozone Layer Protection (Controlled Refrigerants) Regulation was validly made. This being the case, the Subcommittee considers it both unnecessary and *ultra vires* on the part of the Administration to publish the second Commencement Notice to appoint a fresh commencement date in respect of the Regulation. Although the Administration has advised the Subcommittee that the trade has complied with the provisions of the Regulation since 1 January 1994 and that no prosecution action has been taken, **the Subcommittee is of the view that the existence of two commencement dates in the Gazette for**

[2] LC Paper No. CB(1) 857/98-99, at para 8.

the same regulation would cause confusion and has requested the Administration to find the best way to tackle the issue. **One of the ways suggested by the Subcommittee is to issue a corrigendum notice.**

Madam President, I would like to stress that we consider the Government Notice made in 1993 valid. There is no need to publish the 1998 Commencement Notice; and **since the 1998 Notice is *ultra vires*, there is no way we can repeal it.** I, therefore put on record the views of the Subcommittee to put beyond doubt that we regard the Ozone Layer Protection (Controlled Refrigerants) Regulation had taken effect on 1 January 1994."[3] (Emphasis added.)

7. The Administration subsequently introduced a scheme of validation under the Statute Law (Miscellaneous Provisions) Ordinance (Ordinance No. 32 of 2000) ("the SLMP Ordinance") to deem certain items of subsidiary legislation which had been gazetted but which had not been laid before the LegCo to have been duly laid on the table of the LegCo in accordance with the requirements of section 34(1) of the Interpretation and General Clauses Ordinance (Cap 1). The first Commencement Notice (G.N. 4794) of the Ozone Regulation was included in this scheme of validation together with 19 other items of subsidiary legislation.[4]

8. Section 45 of the SLMP Ordinance also contains a declaration to the effect that the second Commencement Notice (L.N. 391 of 1998) "is declared to be and always to have been of no force or effect".[5] It should be noted that the second Commencement Notice was not expressly repealed by the SLMP Ordinance.

9. The rationale for the introduction of the above scheme of validation has been considered by another Subcommittee set up to study issues relating to the tabling of subsidiary legislation in LegCo:

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[3] See *Report of the Subcommittee on Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1998*, Official Record of Proceedings of the Legislative Council dated 10 February 1999, at page 21.

[4] See section 43 and item 1 of Schedule 1 of the SLMP Ordinance.

[5] See section 45 of the SLMP Ordinance.

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"2. At the meeting of the Subcommittee on Ozone Layer Protection (Controlled Refrigerants) Regulation (Commencement) Notice 1998 on 21 January 1999, members noted that a total of 19 items of subsidiary legislation gazetted on 27 June 1997 (L.N.s 359 to 376 of 1997) and 30 June 1997 (L.N.s 377 and 378 of 1997) had not been tabled in Council. ...

3. The Subcommittee reported the problem to the House Committee on 22 January 1999. The House Committee decided to set up another Subcommittee to study the legal and procedural issues relating to the tabling of subsidiary legislation in LegCo. ...

....

9. Although the Subcommittee forms the view that the non-tabling of the 19 items of subsidiary legislation gazetted on 27 June 1997 and 30 June 1997 does not render them ineffective, the fact remains that these items of subsidiary legislation have not been tabled. Members note and the Administration confirms that section 34(1) of Cap. 1 does not provide a way of resolving the issue of non-tabling. The statutory timeframe for the tabling of the subsidiary legislation has long passed and LegCo can no longer scrutinize the subsidiary legislation under section 34(2) of Cap. 1 now. To remove any doubt on the validity of the subsidiary legislation not tabled in LegCo, the Administration is considering the desirability of enacting validation legislation. ...

10. As regards the confusion caused by the publication of two Commencement Notices in respect of the Ozone Layer Protection (Controlled Refrigerants) Regulation (General Notice No. 4794 of 1993 and Legal Notice No. 391 of 1998), the Subcommittee notes that the Administration is considerting the need to validate the former Notice and repeal the latter Notice by legislative means."[6]

10. The reasons as to why the Administration has decided to introduce the scheme of validation under the SLMP Ordinance had been explained at the passage of the Statute Law (Miscellaneous Provisions) Bill 1999 ("SLMP Bill") through the LegCo as follows:

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[6] See Paper for House Committee meeting on 7 May 1999 – Report of Subcommittee to study issues relating to the tabling of subsidiary legislation in Legislative Council (L.C. Paper No. CB(1) 1267/98-99).

"Clauses 44 to 47 remove any doubt about the validity of 20 pieces of subsidiary legislation, that were inadvertently not laid before the Legislative Council. Fifteen of these are commencement notices appointing dates for the coming into operation of Ordinances, there are orders making minor amendments to legislation, and two pertain to changes in title of government offices and officers."[7]

11. A further explanation for the scheme of validation was made upon the resumption of debate on Second Reading of the SLMP Bill:

"Some items of subsidiary legislation gazetted in 1997 were not laid before this Council, thus contravening section 34 of the Interpretation and General Clauses Ordinance. A Subcommittee was formed on 22 Janaury 1999 under the House Committee to study issues relating to the tabling of subsidiary legislation in this Council. Although the Subcommittee took the view that the tabling requirement should not affect the effect of subsidiary legislation, it raised no objection to the Administration's proposal to clarify the matter for there were at the same time conflicting but equally respectable views. The Administration's current proposal was to enact provisions to deem those items of subsidiary legislation as having been duly laid.

The Bills Committee was of the view that although Members of this Council and the Administration had taken different views on the legal effect of the subsidiary legislation which were not laid before this Council, it acknowledged that it was a matter of legal technicality and the Administration's proposal sought to settle any doubt on the legal effect of the subsidiary legislation. The Bills Committee therefore held no objection to the Administration's proposal."[8]

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7 See Record of Proceedings of Legislative Council on Second Reading of the Statute Law (Miscellaneous Provisions) Bill 1999 on 23 June 1999, at page 8985.

8 See Record of Proceedings of Legislative Council on 31 May 2000 on Resumption of debate on Second Reading of the Statute Law (Miscellaneous Provisions) Bill 1999 which was moved on 23 June 1999, at pages 6904-5.

Annex B

Commencement Notices relating to the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997)

The Legal Services Legislation (Miscellaneous Amendment) Ordinance 1997 ("the Ordinance") was passed by the Legislative Council on 28 June 1997. The then Governor assented to it on 29 June 1997. The Ordinance was published on 30 June 1997.

2. Under section 1(2) of the Ordinance, certain sections of the Ordinance were to come into operation on a day to be appointed by the then Attorney General by notice in the Gazette. The rest of the Ordinance (including section 1(2)) came into operation on the day on which the Ordinance was published in the Gazette.

3. The first Commencement Notice was published in the Gazette on 30 June 1997 as L.N. 378 of 1997. The then Attorney General, under section 1(2) of the Ordinance, appointed 30 June 1997 as the day upon which certain sections of the Ordinance were to come into operation. The first Commencement Notice and the Ordinance were both published on the same day.

4. However, although the first Commencement Notice was published on 30 June 1997, it was dated 29 June 1997.

5. The Administration took the view that the first Commencement Notice might not be valid because on the date of the purported appointment of the commencement date, the Ordinance had not yet come into operation as the Ordinance had not been published in the Gazette on 29 June 1997.

6. On 8 August 1997, the second Commencement Notice dated 6 August 1997 was published in the Gazette together with the Corrigendum (L.N. 413 of 1997).

7. The explanation provided in the Corrigendum is as follows:

> "The Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997) Commencement Notice 1997 published in this Gazette on 30 June 1997 as Legal Notice No. 378 of 1997 was signed by the Attorney General before the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997) was published in the Gazette. Accordingly a fresh Commencement Notice has now been signed by the Secretary for Justice and it is published as Legal Notice No. 413 of 1997."

8. In the *Paper for the House Committee Meeting of Provisional Legislative Council on 22 August 1997 - Legal Service Division Further Report on Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997 (94 of 1997)(Commencement) Notice 1997 (L.N. 413 of 1997)*, the Assistant Legal Adviser of the LegCo Legal Service Division has asked the Administration to comment on "whether the commencement notice issued by the former Attorney General is still valid".[1]

9. The reply of the Administration has been summarised as follows:

> "a. Doubts have been cast on the validity of the first Commencement Notice;
> b. The Secretary for Justice has considered that the most appropriate action has been taken; ...".[2]

[1] See para 2a of the PLC Paper No. LS 18.
[2] Ibid, para 3a and b.

Annex C

Commencement Notices relating to the Dangerous Drugs (Amendment) (No. 2) Ordinance 1994 (63 of 1994)

The Dangerous Drugs (Amendment) (No. 2) Ordinance (Ordinance No. 63 of 1994) ("DDAO") was enacted in July 1994. Section 1(2) of the DDAO provides that the DDAO shall come into operation on a day to be appointed by the Governor by notice in the Gazette.

2. On 15 July 1997, the then Chief Executive appointed 28 July 1997 as the day on which the DDAO was to come into operation. The first Commencement Notice was published in the Gazette on 25 July 1997 as L.N. 405 of 1997.

3. On 2 July 1998, the then Chief Executive, after consultation with the Executive Council, appointed 14 August 1998 as the day on which the DDAO was to come into operation by the second Commencement Notice (L.N. 280 of 1998). On 10 July 1998, the second Commencement Notice and the Corrigendum (L.N. 295 of 1998) were published in the Gazette.

4. The Administration took the view that a commencement notice was subordinate legislation upon which, under Article 56 of the Basic Law, the Chief Executive must consult the Executive Council. As a result of the failure to consult the Executive Council, it was arguable whether the first Commencement Notice was valid or not. The second Commencement Notice was made to put the matter beyond doubt.

5. An explanation was provided in the Corrigendum for the publication of a fresh Commencement Notice:

> "The Dangerous Drugs (Amendment) (No.2) Ordinance 1994 (63 of 1994) (Commencement) Notice 1997 published in this Gazette on 25 July 1997 as

Legal Notice No. 405 of 1997 was not made after consultation with the Executive Council. Accordingly a fresh Commencement Notice has now been made and it is published as the Dangerous Drugs (Amendment) (No.2) Ordinance 1994 (63 of 1994) (Commencement) Notice 1998 (L.N. 280 of 1998)."

6. The justifications in the Legislative Council Brief issued by the Security Bureau on 8 July 1998 for the publication of the second Commencement Notice also stated as follows:

> "The Amendment Ordinance [Dangerous Drugs (Amendment) (No. 2) Ordinance 1994 (63 of 1994)] provides that the Chief Executive may appoint a day, by notice in the Gazette, for the coming into operation of the Amendment Ordinance. Shortly after reunification, a commencement notice in respect of the Amendment Ordinance was made by the Chief Executive *without* reference to the Executive Council, and was published in the Gazette on 25 July1997 as Legal Notice No. 405 of 1997. According to subsequent legal advice, the Executive Council should have been consulted on the making of such a notice by the Chief Executive after reunification. **The Department of Justice has advised that a commencement notice is subordinate legislation, and that the Chief Executive is required under Article 56 of the Basic Law to consult the Executive Council before making any subordinate legislation. It is therefore arguable whether the Legal Notice is valid or not. To put the matter beyond doubt, it is decided after consultation with the Executive Council that a fresh commencement notice be made and published in the Gazette."**[1] (Emphasis added.)

7. In the *Paper for the House Committee Meeting of the Legislative Council on 17 July 1998 - Legal Service Division Report on Subsidiary Legislation Gazetted on 10 July 1998*,[2] the background and reasons relating to the issue of the second Commencement Notice and the Corrigendum were summarised as follows:

> "This [L.N. 280] appoints 14 August 1998 as the day on which the amending Ordinance shall come into operation.
>
> A previous notice has been made and gazetted in July 1997 to appoint 28 July

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1 See para 5 of the Legislative Council Brief for the Dangerous Drugs (Amendment) (No. 2) Ordinance 1994 (63 of 1994) (Commencement) Notice 1998 (File Ref: NCR 2/1/8 XIV).

2 See LC Paper No. LS14/98-99.

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1997 as the commencement date of the amending ordinance. However, it is now acknowledged by the Administration in a Corrigendum (the previous item) that the previous notice was not made after consultation with the Executive Council.

In the LegCo Brief NCR 2/1/8 XIV issued by the Security Bureau on 8 July 1998, it is explained that the failure to consult the Executive Council beforehand as required under Article 56 of the Basic Law has thrown doubt on the validity of that notice. This new commencement notice is therefore made to put the matter beyond doubt.

A letter (copy attached) has been written to the Administration to seek clarification on whether any thing has been done in reliance on, and the effect of, the first notice. ...". (Emphasis added.)

8. In the letter dated 13 July 1998 from the Assistant Legal Adviser ("ALA") of the Legal Service Division of the LegCo Secretariat to the Secretary for Security ("S for S"), ALA sought clarification on certain matters relating to the legal effect of the respective Commencement Notices:

"a. Has anything been done under the amending ordinance since 28 July 1997 in reliance on the first commencement notice and if so, whether the legality of anything so done would now be called into question in view of the dubious validity of that commencement notice?

b. **If nothing has been done so far under the amending ordinance in reliance on the first commencement notice, is there any need that the notice given its dubious validity should remain unrepealed after the second commencement notice has been made?**

c. **Would the second commencement notice have the effect of repealing the first commencement notice by implication?**"[3] (Emphasis added.)

9. In the reply dated 20 July 1998 (at **Appendix**) to the ALA, the S for S made the following comments:

"(a) no prosecution has taken place under the Dangerous Drugs (Amendment) (No.2) Ordinance 1994 (the amending ordinance) since 28 July 1997. ...

[3] Ibid.

(b) & (c) **the first commencement notice will have been impliedly repealed by the second commencement notice on 14 August 1998.** Taking into account it is arguable whether the first commencement notice is valid or not, the Administration considers it necessary to put this matter beyond doubt and hence the need to make the second commencement notice." (Emphasis added.)

Appendix to Annex C

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NARCOTICS DIVISION
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來函檔號 Your Ref.: LS/S/3/98-99
圖文傳真 Fax: (852)-2810 1790/2521 7761
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BY FAX (2877 5029)

(2 pages)

20 July 1998

Mr Arthur Cheung
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Mr Cheung,

Commencement of the
Dangerous Drugs (Amendment) (No. 2) Ordinance 1994

Thank you for your letter of 13 July on the above subject.

On the issues raised in your letter, you may wish to know the following -

(a) no prosecution has taken place under the Dangerous Drugs (Amendment) (No. 2) Ordinance 1994 (the amending ordinance) since 28 July 1997. Proceedings for offences committed under the amending ordinance will only be taken in respect of acts performed after the date appointed by the second commencement notice; and

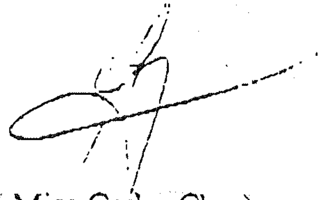
(b)&(c) the first commencement notice will have been impliedly repealed by the second commencement notice on 14 August 1998. Taking into account it is arguable whether the first commencement notice is valid or not, the Administration considers it necessary to put this

20/7 6:20 p.m.

matter beyond doubt and hence the need to make the second commencement notice.

In case you have further queries about the second commencement notice, please do not hesitate to contact me.

Yours sincerely,



(Miss Cathy Chu)
for Secretary for Security

Annex D

Banking (Specification of Public Sector Entities in Hong Kong) (Amendment) Notice 2004 (L.N. 119 of 2004)

On 16 June 2004, the Banking (Specification of Public Sector Entities in Hong Kong) (Amendment) Notice 2004 (L.N. 119 of 2004) was made by Mr. William A. Ryback as the Monetary Authority to specify the newly established 香港五隧一橋有限公司 Hong Kong Link 2004 Limited as a public sector entity in Hong Kong under the then Third Schedule to the Banking Ordinance (Cap. 155).

2. The Notice was published in the Gazette on 18 June 2004 and took effect on 11 November 2004.

3. The Legislative Council Assistant Legal Adviser raised a query as to why the Notice was signed by the then Deputy Chief Executive instead of the then Chief Executive of the Monetary Authority Mr. Joseph C.K. Yam:

> "2. "Public sector entity in Hong Kong" is defined in the Ordinance to mean some specified corporations and any body specified by the MA in a notice in the Gazette. On our scrutiny of that Notice, we noted that the Notice was not made by the MA himself. We have sought clarification with the Secretary for Financial Services and the Treasury on the legal basis for making the Notice by a person other than the MA himself as specified in the Ordinance. In response, the MA agreed that it would be preferable for the Notice to be signed by him personally and would make the necessary amendments."[1]

4. The Notice was subsequently repealed by the Banking (Specification of Public Sector Entities in Hong Kong) (Amendment) Notice 2004 (Repeal) Notice (L.N. 148 of 2004) made by Mr Joseph C. K. YAM as the Monetary Authority. The Repeal Notice was published in the Gazette on 24 September 2004.

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[1] See para 2 of the *Legal Service Division Report on Subsidiary Legislation Gazetted on 24 September 2004* dated 4 October 2004.

5. A new Notice, the Banking (Specification of Public Sector Entities in Hong Kong) (Amendment) (No. 2) Notice 2004 (L.N. 149 of 2004) was made by Mr Joseph C.K. YAM as the Monetary Authority to set out the same specification as contained in the first Notice. The second Notice was published in the Gazette on 24 September 2004 and took effect on 25 November 2004.[2]

6. An explanation has been given in the Legislative Council Brief issued by the Financial Services and the Treasury Bureau for the publication of the Repeal Notice and the new Notice:

> "The MA [Monetary Authority] published in the Gazette on 24 September 2004 the Banking (Specification of Public Sector Entities in Hong Kong) (Amendment) Notice 2004 (Repeal) Notice to repeal a similar notice (L.N.119 of 2004) published in the Gazette on 18 June 2004 which served to specify the Hong Kong Link as a public sector entity in Hong Kong. The notice (which has not yet come into effect) was repealed for technical reasons."[3] (Emphasis added.)

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[2] As stated in para 3 of the *Legal Service Division Report on Subsidiary Legislation Gazetted on 24 September 2004* dated 4 October 2004: "L.N. 148 now repeals L.N. 119. L.N. 149 of 2004 which specifies 香港五隧一橋有限公司 Hong Kong Link 2004 Limited as "a public sector entity in Hong Kong" is now made by MA himself. It will come into operation on 25 November 2004."

[3] See para 6 of the Legislative Council Brief (G4/16/34C(2004)) dated 2 October 2004.

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