CB(1) 866/98-99(02)

Letterhead of DEPARTMENT OF JUSTICE CIVIL DIVISION

本司檔號 Our Ref: ADV 504/00/1C III Urgent by hand
來函檔號 Your Ref: LS/M/7/98-99
電話號碼 Tel. No.: 2867 2098

5 February 1999

Ms Connie Fung
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat

Dear Ms Fung,

LegCo Panel on Transport
Mechanism for Fare Adjustment of Licensed Ferry Services

Thank you for your letters of 21 January 1999 and 22 January 1999 respectively together with a copy of the paper (LC Paper No. LS 101/98-99) on the subject for the LegCo Panel on Transport. The Administration has considered the paper and I have been instructed to make a reply on behalf of the Administration in response to the said paper.

In the first place, the Administration would maintain its views as have been duly conveyed to you vide my previous letters dated 14 December 1998 (copy at Annex I) and 29 December 1998 (copy at Annex II) respectively.

It remains the view of the Administration that on the basis of the case law one of the criteria for determining whether an instrument has "legislative effect" and is therefore subsidiary legislation is whether the instrument applies to the public or a sector of the public as opposed to individuals. Applying that criterion to the two notices issued by the Commissioner for Transport under section 33(1) of the Ferry Services Ordinance (Cap 104), the Administration has further taken the view that on the basis of the provision in section 33(1) and the contents of the two notices, they only apply to the particular ferry licensees. The notices clearly do not apply to the public or a sector of the public; they do not extend to or bind on them either.

While the Administration is pleased that you have now accepted the above criterion as suggested by the Administration, we are most disappointed that you have refuted the logical conclusion of the Administration that the two notices in question only apply to the particular licensees. In your analysis you have apparently equated the "application" of the notices to the "effects" the notices may possibly give rise to. In the former, the two notices in question can only lawfully apply to or have legally binding effect on the particular licensees, and not the public or a sector of the public, whereas in the latter it is possible that the notices may give rise to "effects" of varying types and degrees, direct or indirect and intended or unintended. In effect, you have re-asserted your former relaxed approach based on any direct or indirect effects of the instrument on rights or interests of the public or a sector of the public. If your proposed test were correct, in practical terms all instruments would have to be necessarily treated as being subsidiary legislation, which cannot be the intention of the legislature in the context of the definition of "subsidiary legislation" under section 3 of the Interpretation and General Clauses Ordinance (Cap 1) which clearly suggests that there can be instruments of administrative or non-legislative character.

The Administration considers that your argument that the public may complain to the authorities for overcharging and urge the authorities to take enforcement action against the licensee is totally irrelevant to the question of whether the two notices are subsidiary legislation, as the public may legitimately do the same whether the notices are subsidiary legislation or otherwise. Nor are the entirely out-of-context remarks of the court in the Australian decision in Queensland Medical Laboratory and others v. Blewett and others (1988) 84 ALR 615 of any assistance, as the Administration has more fully explained to you in the previous letters at Annex I (paragraphs 7-9).

The statutory definition of "subsidiary legislation" includes notices. It appears to be common ground that nomenclature is of no importance under the definition. What matters are whether:-

(a) the authority to make the instrument is derived from an Ordinance; and

(b) the instrument has "legislative effect".

On the above basis it seems clear that "a notice in the Gazette" which is subsidiary legislation in one situation may not be subsidiary legislation in another context, depending on whether such notice has "legislative effect". The fact that some Gazette notices have been treated as being subsidiary legislation in some Ordinances does not necessarily mean that such notices must be similarly treated elsewhere; it depends on the "legislative effect" of the instrument. This explains why some of the Gazette notices such as those you have mentioned in paragraph 5 of your Paper have been published as subsidiary legislation. Should there be any genuine doubt about an instrument not having been properly treated, the

Administration may cause a review to be made of that instrument and take corrective action. You will also agree that while a "for the avoidance of doubt" provision may remove any doubt, the clause is not absolutely necessary if the nature of an instrument is already clear.

Finally, whether the instrument issued under section 33(1) of Cap 104 is subsidiary legislation is a legal question, not a matter of policy.

Yours sincerely,

(Benedict Lai)
Deputy Law Officer (Civil Law)
(Advisory)

c.c. The Hon Mrs Miriam Lau, JP, Chairman, LegCo Panel on Transport

Secretary for Transport
(Attn:Mr Brian Lo)

Commissioner for Transport
(Attn:Dr Dorothy Chan)

Annex I

Letterhead of DEPARTMENT OF JUSTICE CIVIL DIVISION

本司檔號 Our Ref: L/M to ADV 504/00/1C II
來函檔號 Your Ref: LS/M/7/98-99
電話號碼 Tel. No.: 28672098

14 December 1998

Ms Connie Fung
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat

Dear Ms Fung,

LegCo Panel on Transport
Mechanism for Fare Adjustment of
Licensed Ferry Services

Thank you for your letter of 8 December 1998 together with the list of authorities and the summaries of the two Australian decisions referred to therein. We have considered the same and I have been instructed by the Administration to make a reply to you.

The criteria

2. Before stating our views on the authorities you have cited, it would be helpful to recapitulate the stance of the Administration on the matter. As the Administration has made clear both in the paper dated 23 November 1998 submitted to the Legislative Council Panel on Transport and verbally at the meeting of the said Panel on 27 November 1998, the Administration will consider, on the basis of the case law and by reference to the authoritative texts the list of which has already been supplied to you, the following factors in determining whether a statutory instrument has legislative effect and is therefore subsidiary legislation within the meaning of s.3 of the Interpretation and General Clauses Ordinance (Cap. 1):-

(a) whether there is an express statutory provision in identifying the instrument as being subsidiary legislation;

(b) whether the instrument extends or amends existing legislation (Williams v. Government of Island of St. Lucia [1970] AC 935 at 937; Qieenslamd Medical Laboratory v. Blewett (1988) 84 ALR 615 at 635; The Commonwealth & Others v. Grunseit (1943) 67 CLR 58 at 83);

(c) whether the instrument has general application to the public or a class as opposed to individuals; (Fowler v. AG [1987] 2 NZLR 56 at 74; Jackson Standsfield & Sons v. Butterworth [1948] 2 All ER 558 at 564);

(d) whether the instrument formulates a general rule of conduct without reference to particular cases (de Smith & Others, "Judicial Review of Administrative Action, 5th edition, para A0-11; The Commonwealth v. Grunseit (1943) 67 CLR 58 at 83);

(e) the legislative intent.

Application of the Criteria

3. Applying the above tests to the present case the Administration has concluded that the Commissioner for Transport has acted entirely properly in treating the two Gazette notices (GN 4547 and GN 5086) as executive notices rather than subsidiary legislation. The two notices were issued under s. 33(1) of the Ferry Services Ordinance Cap. 104 which provides that the "Commissioner may by notice in the Gazette determine the maximum fare that may be charged for the carriage of passengers, baggage, goods and vehicles on any licensed service".

4. In reaching the above conclusion the Administration has considered that:-

(a) there is no express provision in the Ordinance concerned identifying the two said notices embodying the Commissioner's determinations as being subsidiary legislation;

(b) the two notices do not extend or amend existing legislation;

(c) the two notices apply to individuals; i.e. the ferry licensees, and do not have general application to the public or a sector of the public or a class;

(d) the two notices do not formulate a general rule of conduct as they apply only to the particular licensees;

(e) the legislative intent is clear - the Ordinance empowers the Commissioner to determine in an executive manner the maximum fares that the licensees may charge.

5. Apart from the above the Administration has also studied the legislative background of the Ferry Services Ordinance (Cap. 104) and noted that the Administration has, both before and after the enactment of the said Ordinance, consistently treated such notices as executive notices.

Your views

6. The Administration has had the benefit of a copy of the paper for the House Committee Meeting of the Legislative Council on 30 October 1998 (LC Paper No. LS 54/98-99) in which you have stated your opinions on the issue. The Administration has noted that the criteria you have adopted in determining whether a statutory instrument is subsidiary legislation are broadly similar to ours except in one aspect. While the Administration accepts that one criterion for determining subsidiary legislation is whether the statutory instrument applies to the public or a class as opposed to individuals, we cannot accept your contention that the criterion should be whether it has "the direct or indirect effect of affecting a privilege or interest.....of persons generally or of persons of a specified class" (my emphasis). Your proposition is too wide covering practically all statutory instruments and, with due respect, not supported by the authorities you have cited. I shall deal with this aspect further in the following paragraphs.

The case law

7. In the Australian case of Queensland Medical Laboratory v. Blewett (1988) 84 ALR 615 which you have cited, the applicants applied for judicial review of a determination made by the Minister for Community Services and Health under the Health Insurance Act 1973 that the Pathology Services Table in Schedule 1A of the 1973 Act which sets out the fees for pathology services be substituted by a new Table. The new Table reduced the fee levels to reflect more closely the current costs. At the material time, medicare benefits in Australia were payable by the Health Insurance Commission and calculated by reference to the fees for medical services set out in the General Medical Services Table and the Pathology Services Table of the 1973 Act. The applicants who were members of the Australian Association of Pathology Services were not happy about the revised fees and applied to the court for judicial review. The Respondents challenged that the proceedings commenced under the Administrative Decisions (Judicial Review) Act 1977 were not competent as the

determination was of an essentially legislative character falling outside the scope of the 1977 Act. In this context Court examined the distinction between legislative and administrative acts.

8. In so doing the Court (Gummow J) cited the dicta of Latham CJ in an earlier Australian decision in the Commonwealth v. Grunseit (1943) 67 CLR 58 at 82 (I note that the case also appears on your list of authorities):

> "The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular case".

The Court did not consider that the above distinction is the sole criterion for differentiating a legislative act from an administrative act. The Court, however, pointed out that for the purposes of that review what was of central importance was the proposition that "to take the step which has the immediate effect of changing the content of a law as a rule of conduct or declaration of power, right or duty, is to act legislatively" (at p. 635). On the basis of this proposition the Court noted that the Schedules to the Act (in which the Pathology Services Table was set out) were clearly parts of the statute and as a result of the determination made by the Minister the existing law was changed as the old Table in Schedule 1A was replaced by the new Table. The Court remarked that "the result is the same as if the Schedule had been changed by an amending statute" (at p. 635). It was on this basis that the Court decided that the determination was of a legislative rather than an administrative character.

9. We cannot agree more with the decision of the court. Indeed, one (but not the sole) of the criteria adopted by the Administration is whether the statutory instrument extends or amends existing legislation (see paragraph 2(b) above). With due respect, the Court did not decide on the basis that "a statutory power of a strictly legislative nature was one which affected the interests of all members of the public" as you have suggested in your summary. However, in a different context, (i.e. in considering the contention of the applicants that there was a lack of procedural fairness or a denial of natural justice in the process of making the determination by the Minister) the Court did remark that the making of the determination affected the interests of the Australian public at large and certain classes or groups of the public, though the Court also pointed out that "the rules of natural justice may not be applicable to the exercise of a delegated legislative power" (at p. 637). In the end the Court ruled in favour of the applicants essentially because the advisory committee failed to observe the procedural requirements laid down in the statute in making the recommendation to the Minister. The determination made by the Minister was therefore not valid.

10. In relation to the proposition made by the court in the Commonwealth v. Grunseit, supra, to which you have also cited, we have no further comments apart from the remarks in paragraph 8 above.

11. We note that you have also relied on the decisions in Jackson, Stansfield & Sons v. Butterworth [1948] 2 All ER 558 and Fowler v. Roderique Ltd v. AG [1987] 2 NZLR 56 both of which appear on the list of authorities (together with brief notes thereon) which we have provided you with. In the former case, the Gazette notice declaring a certain fishery to be a controlled fishery was ruled subsidiary legislation as it "extends to all who propose to dredge for oysters in the area" (at p. 74). In the latter case, the licensing instructions in the circulars and notes issued by the Minister of Works were subsidiary legislation because they "bind the public" (at p. 564). You will note that one of the criteria adopted by the Administration is whether a statutory instrument has general application to the public or a class of the public as opposed to individuals. There is, however, a clear distinction between whether an instrument applies to (or extends or binds) the general public and whether it affects, directly or indirectly, the privileges or interests of the general public irrespective of whether the instrument has any binding effect on them. The former proposition is supported by the case law. The latter proposition allows a scope which is far too wide to catch practically all statutory instruments, which cannot be the intention of the legislature in the context of the definition of "subsidiary legislation" under s. 3 of the Interpretation and General Clauses Ordinance (Cap. 1).

Other Observations

12. The Administration has the following further observations in respect of your various queries:-

(a) The two notices do not extend or amend the existing provision. S. 33(1) of the Ferry Services Ordinance (Cap. 104) already provides that the Commissioner may determine the maximum fares that may be charged on any licensed service. What the Commissioner did in relation to the two Gazette notices is the exercise of her administrative discretion pursuant to s. 33(1) to determine the maximum fares.

(b) The two Gazette notices do not bind on, apply or extend to people other than the licensees concerned.

(c) The fact that there is a separate, express provision (i.e. s. 33(1)) empowering the Commissioner to determine the maximum fares that may be charged does not necessarily reflect the legislative intent that the Gazette notice issued by the Commissioner has legislative effect.

Their very existence may dispel any doubt and avoid any argument over whether the Commissioner has the power to determine, by way of a licensing condition or otherwise, the maximum fares that may be charged. You have rightly pointed out that s. 29(1) of the Road Traffic Ordinance (Cap. 374) expressly provides that the licensing conditions may include a condition on the fares to be charged. However, you will also appreciate that in the case of the Ferry Services Ordinance (Cap. 104), s. 28(2) which deals with licensing conditions does not have a similar provision. Whether the Ferry Services Ordinance (Cap. 104) should have been drafted in a similar way with the Road Traffic Ordinance (Cap. 374) depends on a number of factors including the preference of the individual draftsman but clearly it is a separate matter.

(d) The Administration is aware that the orders made by the former Governor in Council under s. 19(1)(a) in respect of the maximum fares that a franchisee might charge had been consistently treated and published as subsidiary legislation. You will appreciate that the Ordinance provides different mechanisms for determining maximum fares for franchised and licensed ferry services, such differences including different decision makers (the Chief Executive in Council and the Commissioner for Transport respectively) and different modes of determination (by "Order" and by "notice" respectively). Coupled with the differences between the franchised and the licensed services, such differences may suggest different legislative intent. The Administration admits that it is not always easy to draw a distinction between instruments of a legislative character and instruments of an executive character (see The Commonwealth v. Grunseit, supra, at 82). However, as the Administration has pointed it out before, the different treatment in respect of franchised services does not affect the character of the notice issued by the Commissioner under a different provision.

Conclusion

13. The Administration has carefully considered the issue together with your arguments and the authorities cited but cannot accept the proposition that the two Gazettee notices issued by the Commissioner for Transport under s. 33(1) of the Ferry Services Ordinance (Cap. 104) should have been treated and published as subsidiary legislation.

14. The Administration has arranged for the translation of this letter into Chinese and will let you have a copy of the same as soon as it is available.

15. I shall be happy to meet you and further discuss the matter, if necessary.

Yours sincerely,

(Benedict Lai)
Deputy Law Officer (Civil Law)
(Advisory)

c.c. Secretary for Transport
(Attn.:Mr Brian Lo)

Commissioner for Transport
(Attn.:Dr. Dorothy Chan)

Annex II

Letterhead of DEPARTMENT OF JUSTICE CIVIL DIVISION

本司檔號 Our Ref: ADV 504/00/1C III By hand
來函檔號 Your Ref: LS/M/7/98-99
電話號碼 Tel. No.: 28672200

29 December 1998

Ms Connie Fung
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat

Dear Ms Fung,

LegCo Panel on Transport
Mechanism for Fare Adjustment of Licensed Ferry Services

Thank you for your letter of 19 December 1998. The Administration has considered the points you have raised therein and I have been instructed to make a reply to you.

On the point you have raised in the second paragraph of your letter, while the Administration has noted that the orders made by the former Governor in Council under s 19(1)(a) of the Ferry Services Ordinance (Cap 104) had been consistently treated and published as subsidiary legislation, the Administration has not formed any definitive view on whether such treatment was proper or whether such orders should have been more appropriately treated as being executive in nature; it is a non issue for the present purposes. Nevertheless the Administration has noted that the Ordinance provides different mechanisms for determining maximum fares for franchised and licensed ferry services, which may suggest different legislative intents.

On your third paragraph, as you have noted in other contexts, it is trite law that if the language in a statute is plain and admits of but one meaning, the task of statutory interpretation can hardly be said to arise. If, as in the case of some Ordinances in our statute book, there is an express provision that a certain statutory instrument is or is to be regarded as subsidiary legislation, there is simply little or no room for statutory interpretation. While the absence of such a provision does not necessarily mean that the statutory instrument in question must not be subsidiary

legislation, the existence of such a provision is clearly relevant and indeed it should be conclusive in most cases. There should not be any dispute on this straightforward point and we are somewhat puzzled by your query.

On your fourth paragraph, on the assumption that you have now accepted the contention of the Administration that one criterion for determining subsidiary legislation is whether the statutory instrument in question applies to the public or a class as opposed to individuals, not, as it has been earlier suggested to the Administration, whether it has "the direct or indirect effect of affecting a privilege or interest" of the public or a class, which is a far broader test, both you and the Administration have now as a matter of fact adopted similar if not wholly identical criteria in determining whether an instrument is subsidiary legislation. The issue that remains is only one of application of the criteria to the present problem. In this connection, we disagree, on the basis of the provision in s 33(1) of the Ferry Services Ordinance (Cap 104) and the contents of the two notices issued by the Commissioner for Transport thereunder, that the two notices in question apply to, extend to or otherwise bind the public or a sector of the public or a class. By way of notice published in the Gazette, the Commissioner has determined under s 33(1) of the Ordinance "the maximum fares that may be charged for the carriage of passengers, baggage, goods and vehicles on any licensed service" by the licensee. S 33(2) of the Ordinance clearly provides that "a licensee shall not charge a fare exceeding the maximum fare" determined by the Commissioner. A licensee who has demanded a fare in excess of the fare so determined will contravene s 4 of the Ferry Service Regulations (Cap 104) and commit an offence under s 30 of the same Regulations. The two notices therefore apply to, extend to or otherwise bind the two respective licensees. They do not, and cannot be so construed as to, apply to, extend to or otherwise bind people other than the two licensees who have a statutory obligation to abide by the determination by the Commissioner. The rights and obligations of any person who uses the services provided by the licensee clearly depend on the terms and conditions of the contract between them. S 33(3) of the Ordinances expressly provides that nothing in s 33 "shall prevent a licensee from charging a fare lower than the maximum fare" determined by the Commissioner for Transport. The patron's rights and obligations under the contract have neither been extended nor reduced by the Ordinance. If the licensee demands a fare exceeding the maximum fare determined by the Commissioner, the licensee will have acted in contravention of the Regulations and is liable to be prosecuted. The patron, however, has no statutory rights or obligations arising from the Commissioner's determination under s 33(1) and will certainly not commit an offence under the Ordinance by paying to the licensee a fare in excess of the maximum fare determined by the Commissioner.

On your last point, although there is no express statutory provision in the Ferry Services Ordinance (Cap 104) identifying the notice issued by the Commissioner under s 33(1) as being subsidiary legislation or otherwise, the Administration has come to the considered view that the Commissioner for Transport

has acted entirely properly in not having treated the two notices issued thereunder as subsidiary legislation. Since you have expressed doubts on the Administration's interpretation, we have made reference to the legislative background of the Ordinance to ascertain its legislative intent and are firmly of the view that the Administration's conclusion is both correct and logical. The Administration therefore does not consider adding an express provision in the Ordinance to this effect necessary. If you still have doubts on the interpretation of such notice, we shall nevertheless be pleased to discuss any further views put forward by you or the Transport Panel.

The Chinese translation of this letter is enclosed.

Yours sincerely,

(Benedict Lai)
Law Officer (Civil Law) (Ag)

c.c. Secretary for Transport
(Attn:Mr Brian Lo)
Commissioner for Transport
(Attn:Dr Dorothy Chan)