

**立法會**  
**Legislative Council**

LC Paper No. CB(1)903/99-00  
(These minutes have been seen  
by the Administration and  
Cable & Wireless HKT  
Limited)

Ref : CB1/BC/18/98/2

**Legislative Council**  
**Bills Committee on Telecommunication (Amendment) Bill 1999**

**Minutes of meeting**  
**held on Wednesday, 1 December 1999, at 10:45 am**  
**in the Chamber of the Legislative Council Building**

- Members present** : Hon SIN Chung-kai (Chairman)  
Hon David CHU Yu-lin  
Hon HO Sai-chu, SBS, JP  
Hon Eric LI Ka-cheung, JP  
Hon MA Fung-kwok  
Dr Hon Philip WONG Yu-hong  
Hon Howard YOUNG, JP  
Hon YEUNG Yiu-chung  
Hon Mrs Miriam LAU Kin-ye, JP  
Hon CHOY So-yuk
- Members attending** : Hon Margaret NG  
Hon Ronald ARCULLI, JP  
Hon Emily LAU Wai-hing, JP
- Member absent** : Hon Fred LI Wah-ming, JP
- Public officers attending** : Ms Eva CHENG  
Deputy Secretary for Information Technology and  
Broadcasting
- Mr M H AU  
Senior Assistant Director (Regulatory),

Ms Gracie FOO  
Principal Assistant Secretary for Information  
Technology and Broadcasting

Miss Priscilla TO  
Assistant Secretary for Information Technology  
and Broadcasting

Mr Peter H H WONG  
Senior Assistant Solicitor General/Basic Law

Mr Paul TSANG  
Government Counsel/Basic Law

**Attendance by  
Invitation** : Cable & Wireless HKT Limited

Mr Norman YUEN  
Deputy Chief Executive

Mr Donald HESS  
Director of Legal Affairs & Company Secretary

**Clerk in attendance** : Miss Polly YEUNG  
Chief Assistant Secretary (1)3

**Staff in attendance** : Miss Connie FUNG  
Assistant Legal Adviser 3

Ms Anita SIT  
Senior Assistant Secretary (1)8

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## **I Confirmation of minutes and matters arising**

The minutes of the meeting on 6 October 1999 were confirmed subject to an amendment to paragraph 18 proposed by Mr Eric LI. Members have been notified of the amendment vide LC Paper No.CB(1)547/99-00 dated 7 November 1999.

2. As an introductory remark, The Chairman reported that the Bills Committee had met deputations in early September 1999 to hear their views on the Telecommunication (Amendment) Bill 1999. In response to the request of Cable & Wireless HKT Limited (CWHKT), the Bills Committee had agreed at

the last meeting that CWHKT, and indeed other deputations, should be given another opportunity to present views, if any, on major constitutional and legal issues which the deputations considered critical in the scrutiny of the Bill. Hence, CWHKT was invited to attend this meeting. He also informed members that the operators of the four "build-operate-transfer" (BOT) tunnels had also indicated their intention to present views on constitutional and legal issues, but as the responsible person was out of town, arrangement would be made for them to make their presentation at the next meeting of the Bills Committee.

3. The Chairman then referred to a commentary by Professor Johannes CHAN published in the Hong Kong Economic Journal on 26 November 1999 and circulated to members vide LC Paper No. CB(1)484/99-00. In view of Professor CHAN's comments on the scrutiny of the Bill, the Chairman stated the following points -

- (a) The Bills Committee had the duty to examine the legal, constitutional, policy and technical aspects of the Bill and for this purpose, had invited views and met with deputations earlier on;
- (b) in the course of deliberating on proposed amendments in the Bill, the Bills Committee had noted that there were divergent views over some controversial issues; and
- (c) the Bills Committee was prepared to take up issues that justified further examination and would require further clarification from the Administration where necessary.

## **II Meeting with Cable & Wireless HKT Limited**

4. The Chairman welcomed the representatives from CWHKT. He remarked that the presentation by CWHKT and the ensuing discussion should focus on constitutional and legal issues. While two representatives from the Department of Justice were present to observe the meeting, it had been agreed at the last meeting that the Administration would not be required to provide its immediate response at this meeting, but would provide a detailed response in writing to CWHKT's views and concerns/questions raised by members for consideration at a future meeting. Mr Ronald ACCULLI categorically requested that the Administration should provide a written response to CWHKT's views.

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5. The Chairman also requested the legal adviser to the Bills Committee to provide her advice with respect to the views of CWHKT and the response of the Administration in due course.

### Presentation by CWHKT

6. Mr Norman YUEN stated the main concern of CWHKT that the Bill should provide a legal framework compatible with the development of the telecommunications sector. The exercise of powers by the regulatory authority should be subject to proper checks and balances which should be enshrined in the legislation. CWHKT found that the Bill in its present form had serious flaws in certain constitutional and legal aspects and thus required vigorous scrutiny by the Bills Committee.

7. Mr Donald HESS briefed members on the major legal and constitutional issues with which CWHKT was concerned as per the presentation notes provided by the company before the meeting (CB(1)461/99-00). The salient points of his presentation were as follows-

- (a) Clauses 22 and 25 of the Bill conferred broad powers on the Telecommunications Authority (TA) to impose financial penalties on licensees (but not others) for "breaches" of proposed sections 7K to 7N and to give third parties a private right of action against the licensee for such "breaches". The proposed provisions were based solely on the opinion of TA. According to the Joint Advice of the leading counsel, Mr Michael Thomas Q.C. S.C., Mr Timothy Eicke and Professor Johannes CHAN, these provisions were unconstitutional and in violation of the right to a fair hearing and the presumption of innocence.
- (b) The powers conferred on TA to inspect and disclose documents and accounts of licensees under proposed sections 7I and 35A fell short of the requirements of Article 14 of the Bill of Rights and Article 29 of the Basic Law on right to privacy. In the opinion of the aforesaid leading counsel, there was a strong argument that these proposed provisions were per se unconstitutional or, at the very least, more far reaching than the Basic Law would allow.
- (c) There was also a strong argument that the powers conferred on TA by proposed sections 36A and 36AA to order interconnection and/or the sharing of facilities fell within the protection of Article 105 of the Basic Law, which required that there should be fair and adequate compensation for deprivation of property. The absence of any statutory guidance to TA as to how to calculate the compensation due to the person affected was a potential deficiency in constitutional legislation.
- (d) One major concern that ran through the issues identified in (a) to (c) above was the complete lack of involvement of the courts or

any independent tribunal:

- (i) in issuing warrants for inspection and search;
  - (ii) for appeal on questions of law and fact arising in the context of the "opinions" reached by TA under proposed sections 7K to 7N;
  - (iii) in the imposition of financial penalties; and
  - (iv) in the determination of fair and adequate compensation in the context of an order for interconnection and/or the sharing of facilities.
- (e) Of even greater concern was that as certain provisions of the Bill were in breach of the Basic Law and the Bill of Rights, it was important for these constitutional and legal issues to be addressed in the legislative process rather than leaving them to ex post facto challenge in court.
- (f) Given the constitutional constraints stipulated under Articles 11, 39 and 73(1) of the Basic Law on the power of the legislature of the Hong Kong Special Administrative Region to enact laws, if the view that several provisions of the Bill were in breach of the Basic Law and the Bill of Rights was proved correct, it would be beyond the power of the Legislative Council to pass the Bill in its present form.

#### Discussion with CWHKT

8. Miss Margaret NG expressed serious concern that the constitutional and legal issues raised by CWHKT, if justified, would have important implications on the consideration of the Bill by the Legislative Council. She enquired about the legislative timetable for the Bill and whether the issues raised by CWHKT had been discussed at previous meetings of the Bills Committee and during the Administration's earlier consultation with the relevant Panel.

9. In reply, the Chairman said that the Administration had not proposed a specific timetable for the Bill, but it was expected that the legislative process should be completed before the end of the current term of the Legislative Council on 30 June 2000. He also confirmed that the Bills Committee had taken note of the legal and constitutional issues raised in CWHKT's submissions but had not yet had the opportunity to examine them in detail until this meeting. He nevertheless reiterated that the Bills Committee would examine these issues seriously before recommending the resumption of the second reading of the Bill. As regards discussion at the Panel, the Chairman reported that the Panel on Information Technology and Broadcasting had been briefed on the legislative proposals in early 1999 and Panel members were

generally in support of the policy objectives of the proposals. However, at the time of the Panel meeting, the text of the Bill was not yet available.

10. In reply to Miss Margaret NG's enquiry about public consultation on the Bill, the Deputy Secretary for Information, Technology and Broadcasting (DS/ITB) confirmed that the Administration had undertaken several rounds of consultation on the major legislative proposals in the Bill, including those related to interconnection, sharing of network facilities, strengthening of competitive safeguards and regulation of licensees in a dominant position. The telecommunications sector had also been consulted on the proposal to codify existing licence conditions into statutory provisions. She also referred members to the report "The 1998 Review of Fixed Telecommunications - A Considered View" published by the Information Technology and Broadcasting Bureau in September 1998 which contained the major proposals in the Bill.

11. In this connection, Mr Donald HESS said that CWHKT had been urging for the constitutional and legal issues to be addressed over the past three years, but the Administration had not taken heed of CWHKT's request.

12. Mr Ronald ACCULLI sought CWHKT's views on how the proposed provisions on interconnection and sharing of facilities could be rectified/improved, as CWHKT apparently did not object in principle to the objectives of the legislative proposals, but objected to the deprivation of property without fair and adequate compensation. He also asked whether the problem with these provisions could have been avoided if the terms of the licence issued to the licensee had given TA the power to mandate interconnection at a price to be determined by TA.

13. Mr Donald HESS confirmed that CWHKT accepted the policy objectives of the proposed legislative amendments in principle. However, CWHKT was concerned about administrative fairness and the lack of checks and balances on TA's powers in the Bill. As regards possible amendments to the Bill to address the company's concerns, he requested members to refer to the CWHKT's marked-up version of the Bill containing its proposed amendments which had been delivered to members of the Bills Committee directly by CWHKT earlier on. On the issue of deprivation of private property arising from proposed sections 36A and 36AA, Mr HESS said that in CWHKT's view, the proposed provisions conferring powers on TA to mandate interconnection and facility sharing without requiring TA to ensure that fair and adequate compensation was paid was potentially unconstitutional. CWHKT therefore proposed that the Bill should contain a requirement that fair and adequate compensation should be paid to the affected licensee for mandatory unbundling of network elements and sharing of facilities.

14. As regards the current licence provisions dealing with interconnection and facility sharing, Mr Donald HESS informed members that under the

existing licence conditions, TA was required to satisfy a number of procedural steps in mandating the sharing of facilities and there was a requirement that fair compensation be paid to the affected licensee. He nevertheless stressed that a licence was only a private contract between the Government and the licensee, whereas the enactment of legislation would impose a higher burden on the Government to ensure constitutionality of the provisions to be enacted. Mr Norman YUEN also reinforced the point that the relevant Bill/Ordinance must be concordant with the Basic Law and the Bill of Rights in the first place as it provided the legal basis for licences issued under the relevant Ordinance.

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15. Mr Ronald ACCULLI requested sight of the existing licence conditions relating to interconnection and facility sharing. The Administration agreed to provide the information for members' reference.

16. Mrs Miriam LAU sought CWHKT's view on the proposed amendments to section 14, which she considered had problems similar to those of proposed sections 36A and 36AA, in that TA had unfettered powers to determine the fees for access to land and buildings under section 14 and to determine the terms of interconnection and facility sharing under proposed sections 36A and 36AA.

17. In response, Mr Norman YUEN said that CWHKT did not object to providing interconnection when the facility concerned was a bottleneck and there was no alternative for interconnection. CWHKT considered that fair compensation for interconnection and facility sharing should be calculated on the basis of a reasonable return on investment. He considered that the same principle might apply to the determination of access fees under proposed section 14. He further elaborated that a reasonable return was a clearly defined concept under common law. It should include a return on capital investment plus a risk premium. He further confirmed his view that access fees under section 14 as well as any compensation under sections 36A and 36AA should not be determined by a Government agency such as TA, as this arrangement was susceptible to arbitrary determination. In reply to Dr Philip WONG, Mr Norman YUEN said that a risk premium referred to a return on the risk entailed in an investment and there were numerous precedent cases in commercial litigation that could be referred to for determining a reasonable risk premium.

18. With regard to proposed section 35A on inspection of records, documents and accounts, Miss Emily LAU considered that the proposed provisions conferred extensive powers on TA and enquired about the present arrangement and practice with regard to the exercise of such powers by TA. Referred to the paper - "The Administration's response to the Cable and Wireless HKT's submission dated 20 October 1999 to the Bills Committee on Telecommunication (Amendment) Bill 1999" (CB(1)358/99-00), Miss LAU also sought CWHKT's comment on the Administration's claim that "the power under proposed section 35A had to be exercised from time to time on a routine

basis as part of the operational functions of the TA to monitor compliance of licence conditions by the licensees".

19. In response, Mr Donald HESS said that General Condition (GC) 18 of the existing fixed telecommunication network services (FTNS) licence provided TA with broad powers to compel a licensee to provide information but not the power to publish information obtained from a licensee. He however pointed out that enshrining such an existing FNTS licence condition in the legislation did not necessarily render the proposed provisions on inspection and disclosure of documents constitutionally valid, having regard to the legal and constitutional considerations mentioned above. He stressed that the proposed legislation should be clearly and unequivocally in conformity with the Basic Law and the Hong Kong Bill of Rights Ordinance and that statutory powers conferred on any Government official to search premises, seize information and publish private documents must be clearly circumscribed in legislation and be subject to the independent scrutiny of the court or some other independent tribunals. He however pointed out that these checks and balances were not available in the Bill.

20. Mr Donald HESS confirmed that CWHKT had not raised objection to the said GC 18 in the past as it had observed that the use of such powers by TA had all along been relatively benign although there were signs that this was changing. He emphasized that the powers conferred on TA by the Bill (under proposed sections 7I, 35A and 36C) to compel disclosure of information and to require publication of potentially sensitive information and/or public corrective advertisements with details of a licensee's alleged anti-competitive behaviours, which CWHKT considered might amount to a form of public humiliation of the licensee concerned, went far beyond the existing licence conditions.

21. Miss Emily LAU sought elaboration from CWHKT regarding its observation about signs of change in TA's exercising of its powers. Mr Donald HESS stressed that CWHKT all along had a good working relationship with the Office of the Telecommunications Authority (OFTA). It had nevertheless noticed in the past few months that OFTA had carried out what CWHKT would consider as "fishing expeditions" without providing CWHKT with specific grounds for making the enquiries. Hence, CWHKT considered it necessary to provide in the legislation how such powers should be invoked and exercised so that the commercial interests of CWHKT and other licensees could be protected. CWHKT was thus gravely concerned about the proposed legislative amendments which might confer on TA unchecked powers to embark on fishing expeditions, i.e. to go and see if an offence could be found, and then invoke very strong enforcement powers which might lead to heavy financial penalties. Under the proposed provisions, licensees were deprived of the right to a fair hearing and the right of privacy. Taking note of CWHKT's concern, Miss Emily LAU requested the Administration to provide its comments on the concern about emerging



signs of "fishing expeditions" carried out by OFTA.

Admin

22. Miss Margaret NG pointed out that constitutional checks and balances and the protection of rights were of serious concern to her. She remarked that the issue of whether there was a trend of increasing unchecked administrative powers had been a major concern to the Panel on Administration of Justice and Legal Services. In relation to the powers of entry and seizure under proposed section 35A, she requested the Administration to provide information on comparable provisions in other ordinances for members' reference.

23. Mr Eric LI also expressed grave concern about the broad powers conferred on TA under proposed section 35A and opined that in order to accord licensees adequate legal protection, the following checks and balances should be prescribed in the legislation -

- (a) the relevant section(s) for the purposes of which invocation of the powers under section 35A could be allowed;
- (b) the powers under section 35A could only be exercised if the licensee concerned had turned down TA's request for information;
- (c) invocation of such powers should be authorized by a sufficiently senior officer in the department with formal authorization confirming the need to require disclosure of the information; and
- (d) an application should be made to the court for the necessary court order. On application, the enforcement agency should state the required documents and provide reasons for the search and seizure of the documents.

Admin

In this connection, Mr Eric LI sought CWHKT's suggestion on possible improvements to the drafting of proposed section 35A to provide adequate checks and balances. He also requested the Administration to provide a comparison between the proposed provisions in the Bill on the powers to obtain and disclose information and comparable provisions in the Inland Revenue Ordinance and the ordinances enforced by the Independent Commission Against Corruption.

24. Mr Norman YUEN expressed agreement with Mr Eric LI's view. Mr Donald HESS reiterated that in providing its service, CWHKT had been working constructively and positively with TA all along. However, there should be a clear distinction between routine administrative activities which were necessary and proper for TA to conduct and those activities involving the use of punitive powers. If TA was seeking information which might result in prosecution for breach of licence conditions or provisions in the Ordinance, particularly if the enquiry actions might lead to third party actions and private

lawsuits against a licensee, then TA should be required to state the charge of which the licensee was suspected before exercising the powers of search and seizure. TA should also satisfy the court that there was a prima facie case or reasonable cause to believe that an offence had been committed in order to obtain a search warrant. There should be protection for the information obtained by TA from the licensee, in particular where the information was related to third parties. As CWHKT had various commercial arrangements with other telecom operators in Hong Kong and overseas, it would be a cause of concern to them if TA could seize and make public the information relating to them.

Admin

25. Miss Emily LAU sought CWHKT's view on the implication of proposed section 7I on personal data privacy. Mr Donald HESS said that CWHKT had always held that customer data must be protected as required under the Personal Data (Privacy) Ordinance (Cap. 486). However, section 7I as currently drafted could not afford such protection as there was no provision to allow licensees to resist TA's requirement to disclose information on grounds of protection of data privacy. Miss Emily LAU requested the Administration to provide its response to this area of concern, with an analysis of circumstances under which proposed sections 7I and 35A were to be invoked and exercised and how third party information (notably customer data) could be safeguarded in accordance with the Personal Data (Privacy) Ordinance. She opined that in principle, customer data involved personal data privacy and therefore should not normally be accessed to and disclosed by any Government agency. The powers to search, seize and disclose information should only be exercised when there were sufficient reasons to believe that a criminal offence had been committed. The procedure for the exercise of these enforcement powers should also be clearly prescribed in the legislation.

26. The Chairman thanked the representatives of CWHKT for the presentation and exchange of views with members.

### **III Meeting with the Administration**

27. As general remarks, DS/ITB affirmed that the Administration was fully aware of its duty to ensure conformity of its legislative proposals with the Basic Law and the Hong Kong Bill of Rights Ordinance. Under this premise, there was a need to build in adequate checks and balances in the proposed legislation and to strive for a balance among different interests. She assured members that in its detailed response to be provided to the Bills Committee, the Administration would explain the policy objectives underlying the legislative proposals contained in the Bill and how the proposed amendments as currently drafted could achieve the objectives. The Administration would also explain the balance between the need to confer adequate regulatory powers on TA and

the need to protect the legal privilege of licensees and non-licensees, including personal data privacy.

28. The Senior Assistant Solicitor General/Basic Law said that the Department of Justice would examine the issues raised at this meeting and provide its views. Nevertheless, on concerns about compatibility of certain provisions with the Basic Law and the Bill of Rights and whether TA would be vested with too broad and unchecked powers by the Bill, he pointed out that there were two different approaches in dealing with the issue. One approach was to incorporate in the legislation the requisite provisions in the Basic Law and the Hong Kong Bill of Rights Ordinance circumscribing the exercise of executive powers to comply with the requirements in the Basic Law and the Hong Kong Bill of Rights Ordinance. The other approach was to rely on the general constitutional and legislative framework whereby in exercising powers under a particular ordinance, the executive authority concerned must comply with relevant provisions in the Basic Law and the requirements laid down in human rights legislation including the Personal Data (Privacy) Ordinance. On the issue of private property rights, the Department of Justice considered that proposed section 36A and 36AA on TA's power to determine terms of interconnection and to direct the sharing of facilities were consistent with Articles 6 and 105 of the Basic Law which offered protection for private property rights.

Admin

29. Mr Eric LI recalled that at a recent meeting of the Panel on Economic Services, the Administration had claimed that it had no authority to order interconnection between the power networks of the CLP Power Hong Kong Limited and the Hong Kong Electric Company as such action would infringe upon private property rights. This claim appeared to be contradictory to the Administration's stance on interconnection between telecommunications networks as proposed in the Bill. He would appreciate it if the Administration could clarify the difference in this regard.

*(Post-meeting note: The Administration has made the view subsequent to the meeting that the issue of concern in paragraph 29 above falls outside the purview of the Bills Committee. The matter should be followed up, if necessary, by the Bureau/LegCo Panel overseeing the policy of power and electricity supply. The Information Technology and Broadcasting Bureau has accordingly informed the Economic Services Bureau of the concern in paragraph 29.)*

Admin

30. Miss Emily LAU and Miss Margaret NG expressed concern about the absence of statutory procedures/mechanism for appeals against the exercise of powers by TA under the Ordinance. They requested the Administration to critically re-examine whether judicial review was an adequate and effective appeal channel and whether an independent appeal mechanism should be provided for in the Bill.

31. The Chairman suggested that as the operators of the four "build-operate-transfer" (BOT) tunnels would also present views on constitutional and legal issues arising from the Bill at the next meeting, the Administration should be asked to provide its detailed written response after the meeting with BOT tunnel operators. Members agreed.

32. The next two meetings of the Bills Committee were scheduled for 15 December 1999 at 8:30 am and 6 January 2000 at 10:45 am.

33. The meeting ended at 12:15 pm.

Legislative Council Secretariat

1 February 2000