

立法會
Legislative Council

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(These minutes have been seen by
the Administration and BOT
tunnel companies)

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Legislative Council
Bills Committee on Telecommunication (Amendment) Bill 1999

Minutes of meeting
held on Wednesday, 15 December 1999, at 8:30 am
in the Chamber of the Legislative Council Building

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

: Operators of the four BOT tunnels

Western Harbour Tunnel Co Ltd

Mr Kenneth PANG
General Manager

Mr Patrick HO
Finance & Materials Manager

Ms Peggy LAU
Marketing Manager

New Hong Kong Tunnel Co Ltd

Mrs Susan LO
Human Resources & Administration Manager

Route 3 (CPS) Co Ltd

Mr Gary LUK
General Manager

Tate's Cairn Tunnel Co Ltd

Ms Josephine LAM
Corporate Affairs Manager

Lovell White Durrant

Mr Henry WHEARE
Mr Peter TSE

Cheung-Macpherson & Co Ltd

Ms Ophelia CHEUNG
Strategic Consultant to the four BOT tunnel
companies

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

The Chairman informed members that due to indisposition, the Deputy Secretary for Information Technology and Broadcasting could not attend this meeting.

I Meeting with "build-operate-transfer" tunnel companies

Presentation by BOT tunnel companies

2. The Chairman welcomed representatives of the four "build-operate-transfer" (BOT) tunnel companies. At the invitation of the Chairman, Mr Henry WHEARE of Lovell White Durrant, legal advisers to the BOT tunnel companies, presented the major constitutional and legal concerns of the tunnel companies arising from the Telecommunication (Amendment) Bill 1999 as set out in the paper - "Opinion by Lovell White Durrant on behalf of tunnel companies on legal and constitutional issues arising out of clauses 7 and 20 of the Telecommunication (Amendment) Bill 1999" (CB(1)599/99-00(02)). The salient points were as follows-

- (a) The main concerns of BOT tunnel companies were Clauses 7 and 20 of the Bill which sought to amend Section 14 of and add a new section 36AA to the Telecommunication Ordinance respectively. The BOT tunnel companies considered that these proposed provisions on right of access, fee determination and facility sharing would be in breach of one or more of the following provisions in the Basic Law -
 - i) preservation of Hong Kong's capitalist system (Article 5);

- ii) protection of property (Articles 6 and 105);
- iii) pursuit of free trade (Article 115);
- iv) provision of an economic and legal environment for encouraging investments (Article 118); and
- v) continuing validity and recognition of contractual rights and obligations valid under the laws previously in force in Hong Kong provided they did not contravene the Basic Law (Article 160).

The aforesaid proposed provisions of the Bill, if passed in their present form, might be subject to judicial review and/or cause the Government to be in breach of its relevant agreements with the tunnel companies.

- (b) The proposed amendments to section 14 to empower the Telecommunications Authority (TA) to authorize access by mobile phone operators (MPOs) to land (which included tunnels) and to determine access fees would deprive the right of tunnel companies to freely negotiate and enter into contracts without government interference. The freedom to contract without government interference should be respected and protected if Hong Kong was to continue to practise the capitalist system and the free trade policy which were required under Articles 5 and 115 of the Basic Law.
- (c) Tunnel companies had made substantial investments in building and operating their respective tunnels. The proposed provisions for access, fee determination and facility sharing would result in an economic and legal environment that would reduce profit and positively discourage private investment in infrastructure facilities and thus were contrary to the Government's obligation under Article 118 of the Basic Law.
- (d) The concept of "property rights" in the Basic Law covered the existing contractual and statutory rights of tunnel companies to permit access to their tunnels and to determine access fees on the existing basis as provided by the relevant project agreements with the Government and the relevant tunnel Ordinances. That being so, the proposed provisions on authorization of access to land and fee determination by TA constituted a derogation from "the right of private ownership of property" in contravention of Article 6 of the Basic Law.
- (e) Article 105 of the Basic Law required that any deprivation of property must be "lawful" and "in accordance with law". The phrase "according to law" did not refer to any domestic law, but a

"universal concept of justice", under which any restriction on fundamental rights and freedoms must -

- (i) pursue a legitimate purpose; and
- (ii) be a necessary and proportionate means to achieve that objective.

The proposed access and facility sharing provisions were neither a necessary nor proportionate means to achieve a wider coverage for public mobile telecommunication services and therefore were not in compliance with Article 105.

- (f) Article 105 further enshrined a legal right to compensation for lawful deprivation of property corresponding to the real value of the property at the time of such deprivation. This provision should be interpreted as providing for compensation over and above open market value based upon criteria including the existing contractual and statutory rights of the tunnel companies. The proposed basis of compensation in the Bill, namely that which "is, in the opinion of the Authority, fair and reasonable in all the circumstances of the case", fell far short of this criterion.
- (g) Article 160 of the Basic Law provided that contracts and rights and obligations valid under the laws previously in force (i.e. before 1 July 1997) in Hong Kong should continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region (HKSAR). The rights and obligations of tunnel companies regarding access by utilities and charges for such access were embodied in the relevant project agreements with the Government and the tunnel Ordinances, which were in force before 1 July 1997. The proposed provisions of the Bill on right of access, fee determination and facility sharing would in effect invalidate, or failed to recognize or protect these rights and obligations and therefore, if enacted, would be in breach of Article 160 of the Basic Law.
- (h) Any implementation of the proposed powers by TA under proposed sections 14 and 36AA would constitute a breach of contract by the HKSAR Government. Damages and compensation for such breach should be payable measured by reference to the existing expectancy of the tunnel operators.

Discussion with BOT tunnel companies and their legal advisers

3. Mr Ronald ARCULLI recapitulated the concerns raised by the tunnel companies that the right of private ownership of property and the validity of

laws and contracts in force before 1 July 1997 were protected under the Basic Law. On the issue of private property rights, any deprivation of such property must be justified by an overwhelming public interest, and such deprivation must be a necessary and proportionate means to attain the object pertinent to the public interest. If the deprivation of tunnel companies' property was proved to be lawful, the tunnel companies should still be entitled to fair compensation from the Government. He then sought Mr Henry WHEARE's view on the proposition that the difficulties with regard to private property rights could have been avoided had the Government included in the project agreements with BOT tunnel companies or in the tunnel legislation provisions which empowered the Government to intervene at a threshold lower than the public interest and without payment of compensation.

4. In response, Mr Henry WHEARE acknowledged that if such provisions already existed in the BOT project agreements or tunnel legislation, BOT tunnel companies would not be in a position to object to the proposed legislation on grounds of deprivation of their property. He however pointed out that such provisions would be contrary to the current system of capitalism and the free trade policy, which were given effect in the existing project agreements and tunnel legislation and which should be preserved as required under the Basic Law.

5. Regarding the importance of preserving the freedom to contract, Mrs Miriam LAU sought the tunnel companies' view on the Administration's claim that the proposed legislation would not deprive the tunnel companies the freedom to contract because they would remain free to negotiate with MPOs for the fees payable for installation of radiocommunications facilities and that TA would intervene only if the parties could not reach an agreement on the fees within a reasonable time. Mrs LAU also enquired whether there were indications that the prospect of passage of the Bill was already working to the detriment of BOT tunnel companies in their recent negotiations with MPOs on terms and conditions of access.

6. In reply, Mr Kenneth PANG of Western Harbour Tunnel Co. Ltd. confirmed that all along, the BOT tunnel companies and MPOs had been able to reach access agreements on a fair commercial basis. However, since the introduction of the Bill, some MPOs had already asked tunnel companies to reduce access fees. Some MPOs had proposed new rates as low as one-tenth of the current level. Some MPOs had even declined to commence negotiation for renewal of access agreements pending the passage of the Bill. He said that these incidents were indicative of the effect of the proposed legislation on the contractual relationship between BOT tunnel companies and MPOs. BOT tunnel companies therefore anticipated that the passage of the Bill would put them in an even more disadvantageous position.

7. Mrs Miriam LAU further sought BOT tunnel companies' view on the Administration's proposal for fee determination by TA based on published guidelines, and on the proposed provision that the fee should be "fair and reasonable in all circumstances of the case".

8. In reply, Mr Henry WHEARE pointed out that whether a fee was "fair and reasonable" was a matter of subjective judgement. The proposed provision entirely missed the point of contractual realities as contracts did not depend upon the subjective view of individuals, but upon the interplay of the bargaining powers of the parties to a contract. Hence, Mr WHEARE remarked that it was immaterial whether there would be published guidelines for determination of fees, as by empowering TA to determine fees, the proposed legislation would upset the existing level playing field, whereby tunnel companies and MPOs could, under ordinary market forces and rules of negotiation, agree on the access fees payable by MPOs.

9. On the issue of fair compensation, Mr Henry WHEARE said that the Bill sought to institute a mechanism to determine fair compensation payable by the MPOs. It however did not deal with the compensation that the tunnel operators should receive as a result of their contractual rights being deprived of. As a result of TA's determination, BOT tunnel companies would be deprived of their financial interests which they would otherwise get without the proposed legislation. Such contractual compensation should not be mixed up with compensation engineered by TA or any other body other than the contracting parties. Mr WHEARE further submitted there was no evidence that the policy objective of wider coverage for mobile telecommunication services was being upset or obstructed under the current regime of fee determination through free commercial negotiation.

10. Mr Howard YOUNG sought BOT tunnel companies' view on the suggestion of independent arbitration by an outside body or agent instead of by TA to resolve access disputes between tunnel companies and MPOs in the case of a failure to reach an agreement.

11. In response, Mr Henry WHEARE commented that the proposed establishment of any form of arbitration mechanism by third parties for fee determination would already breach the relevant Basic Law provisions, as mandatory fee determination, in whatever form, would upset the existing contractual positions of the parties who could otherwise freely negotiate and enter into contracts without any Government intervention at present. Mr WHEARE further pointed out that in case some form of fee determination was provided for in the legislation, BOT tunnels would concur with the Cable & Wireless HKT (CWHKT) that TA was not the appropriate body to determine the relevant fees. He elaborated that it was one of the tenets of natural justice that justice should be done and should be seen to be done. If the arbitration body had an interest directed towards one of the disputing parties, as in the case

of TA, the arbitration mechanism would contravene all known rules of natural justice. The other relevant issue was that even if determination was to be made by an independent body, the parties concerned should still have the right to appeal for the determination to be reconsidered in a court of law or in a certain tribunal set up for the purpose.

12. In this regard, the Chairman sought clarification on the implications of enacting general competition legislation on existing contracts in other jurisdictions and whether there were statutory compensation for the deprivation of contractual rights in these jurisdictions. In reply, Mr Henry WHEARE advised that as far as he knew, if certain contracts had resulted in a dominant position for a party/licensee and if that dominant position had been held improper or unlawful under newly enacted competition legislation, then these contracts might become unenforceable. He stressed that there was a distinction between entering into a contract and enforcing a contract. If one sought to enforce a contract in such a way as to offend the rules against dominance, then the competition legislation would prevail over the existing contracts. This however was not the case for the contractual position between BOT tunnel companies and MPOs. The proposed legislation would change the basis upon which contracts were negotiated and entered into, rather than striking down the existing contracts or contract provisions. He also recalled that the HKSAR Government had provided a handsome package of compensation to the then Hong Kong Telecom (now CWHKT) when the Government sought to end the contract with the company which gave the company a monopoly right in the provision of certain services.

13. Mr Henry WHEARE further submitted that BOT tunnel companies did not create their own position of dominance. Instead, they had been given certain rights by the Government under the relevant franchise agreements. As far as the proposed access provisions were concerned, two different industries were involved rather than one tunnel company being in a dominant position over the others.

14. Mr Ronald ARCULLI concurred that the issue of access in question involved two different industries and doubted whether the current regime whereby access agreements were negotiated without government intervention had given rise to any unfair competition. He gave an example that a situation of unfair competition would be created if a company, which owned all the tunnels and at the same time operated a telecommunications company, refused access by other telecommunications operators to its tunnels.

15. The Chairman said that as far as he knew, general competition legislation in other jurisdictions contained elaborate provisions and its scope was very wide as to cover cross-industry competition issues.

16. In response to the Chairman's enquiry on whether the current system in Hong Kong provided a mechanism for putting up a challenge on the constitutionality of enacted legislation, Mr Henry WHEARE said that the right of the courts to adjudicate on the constitutionality of legislation was already provided in the Basic Law. Unlike the situation in the United Kingdom where the concept of parliamentary sovereignty applied, the courts in Hong Kong had the power to examine the constitutionality of legislation passed by the legislature. This was confirmed in the case of *Rediffusion (Hong Kong) Ltd. v Attorney General* [1970]AC1136 and other precedents in Australia and Canada.

17. In response to the Chairman's request for clarification on the interpretation of Article 160 of the Basic Law, Mr WHEARE explained his view that firstly, existing legislation could be amended by new legislation as long as the new legislation in question was in compliance with the Basic Law. Secondly, contracts could be invalidated if they became unlawful under the new legislation. This situation was however different from the present case where the proposed legislation would not render existing contracts unlawful, but would invalidate contractual rights which had been recognized and protected under the existing legal framework.

18. Miss Emily LAU referred to the paper - "Summary of deputations' views and relevant comments on major clauses of the Telecommunication (Amendment) Bill 1999" in which the legal adviser to the Bills Committee advised that the proposed amendments to section 14 appeared to contradict the relevant provision in the tunnel legislation. Miss LAU sought further comments of the legal adviser on whether the proposed legislation was unconstitutional or otherwise.

19. In reply, the Assistant Legal Adviser 3 (ALA3) advised that the existing tunnel legislation contained a provision which provided that notwithstanding anything to the contrary in any other Ordinance, no person other than the relevant tunnel company might install any utility within the tunnel area without the consent of the company concerned. The provisions on right of access in the Bill sought to prevail over this provision in the tunnel legislation. From a legal point of view, enacting new legislation to prevail over existing legislation was in order. However, it would be up to members to decide in a particular case whether such action was justified as a matter of policy. She added that the right of access provisions in the Bill might also affect the franchise agreements between the Government and the tunnel companies as the agreements might likely contain a provision similar to the aforesaid provision in the tunnel legislation.

20. On the constitutionality or otherwise of the right of access provisions in the Bill, ALA3 advised that in most jurisdictions where there were constitutional rights and human rights legislation, the rights conferred by

constitution and human rights legislation were by no means absolute but could also be subject to such reasonable limits prescribed by statutes. In any case, any legal restriction on such rights was subject to the tests of reasonableness and proportionality. There were precedents where legal restrictions on certain constitutional rights had been ruled constitutional as they could satisfy the aforesaid tests. She further advised that in considering whether the proposed legislation was reasonable and proportionate, members would need to consider whether the proposed legislation had gone beyond the policy objective(s) it sought to achieve and whether there were alternative means apart from the proposed legislation to achieve such objective(s). She also pointed out that the ultimate authority to decide on the constitutionality or otherwise of the proposed provisions, after enactment, would rest with the court.

21. Taking note of ALA3's advice, Mr Henry WHEARE said that he doubted whether reasonableness should be the test for constitutionality of legislation. He considered that the proper tests should be whether the legislation was necessary and proportionate to meet the intended objectives.

22. Pointing out that the legal issues involved were complicated and to facilitate members' consideration, Miss Emily LAU suggested that ALA3 should provide her detailed advice in writing on the constitutionality and other legal concerns of the proposed provisions. Mr Ronald ARCULLI said that having regard to the complexity of the issues involved, it might not be fair to ask the legal adviser to the Bills Committee to give a definite comment on whether certain provisions in the Bill were constitutional or otherwise. Noting members' concerns, the Chairman requested the legal adviser to consider whether or not to provide written advice as requested by some members.

(Post-meeting note : ALA3 has prepared a paper - "Legal analysis on proposed right of access, fee determination and facility sharing provisions of the Telecommunication (Amendment) Bill 1999" which has been circulated to members vide LC Paper No. CB(1)761/99-00 dated 12 January 2000.)

III Meeting with the Administration

23. The Principal Assistant Secretary for Information Technology and Broadcasting confirmed that, as agreed at a previous meeting, the Administration would provide a detailed written response to the concerns and issues raised by the BOT tunnel companies.

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24. As the constitutional and legal issues raised at the last and this meetings required further examination, the Chairman suggested that the Bills Committee would not proceed with the clause-by-clause examination of the Bill until these

issues had been adequately addressed. Members agreed.

IV Any Other Business

25. Members noted that the next meeting of the Bills Committee had been scheduled for 6 January 2000 at 10:45 am. Members agreed that following the meeting on 6 January 2000, the Bills Committee would meet on 19 January and 17 February 2000, both at 8:30 am.

(Post-meeting note : At the request of the Administration and with the concurrence of the Chairman, the meeting scheduled for 6 January 2000 has been cancelled but an additional meeting has been arranged to be held on 26 January 2000 at 8:30 am. Members were notified of the new meeting schedule vide LC Paper No. CB(1)688/99-00 dated 29 December 1999.)

26. The meeting ended at 9:35 am.

Legislative Council Secretariat
22 February 2000