

Extract of summary from the joint legal advice by Michael Thomas Q.C.S.C., Johannes Chan of the Hong Kong Bar and Tim Eicke of the English Bar on the Telecommunications (Amendment) Bill 1999

Summary

For the reasons set out in the joint advice, the Bill, as currently drafted, raises some serious concerns about its constitutionality *per se* and the lack of guidance to the TA about the limits of its power (as required by the Basic Law, the Bill of Rights and the International Convention on Civil and Political Rights [ICCPR]). We have come to the conclusion that:

- a. the provisions conferring wide ranging powers on the TA, on the basis of an "opinion", to impose financial penalties on a licensee for breach of sections 7K to 7N of the Ordinance and to give third parties a right of action against the licensee are clearly unconstitutional and in violation of the right to a fair hearing and the presumption of innocence (and therefore outside the legislative competence of the Legislative Council);
- b. the powers given to the TA to inspect documents and accounts under section 35A fall well short of the requirements of Article 14 of the Bill of Rights and Article 29 of the Basic Law (right to privacy). There is, therefore, a strong argument that these provisions are *per se* unconstitutional. At the very least, the powers given to the TA purport to be much more far reaching than the Basic Law would allow; it is, therefore, important that the limits of this power be spelt out in the Ordinance;
- c. there is a strong argument, that the powers conferred by sections 36A and 36AA, to order interconnection and/or the sharing of facilities, falls within the protection of Article 105 of the Basic Law. This would require that there be compensation for the inherent deprivation of property, calculated on a fair and adequate basis, i.e. on the basis of the real value of the property concerned. As a result, we see the absence of any guidance to the TA (and any person affected) as to how to calculate the compensation due as a potential deficiency in constitutional legislation.

The one major concern, however, that runs through most if not all the issues identified in the joint advice is the complete lack of involvement of the courts or independent scrutiny, be it in the context of issuing warrants for inspection and search, or by way of an appeal on questions of law and fact arising in the context of the "opinions" reached by the TA under sections 7K to 7N and/or the imposition of financial penalties and/or the determination of adequate compensation in the context of an order for interconnection or the sharing of facilities.