

NOTE FROM BOT TUNNEL COMPANIES TO BILLS COMMITTEE OF LEGCO
ON THEIR RESPONSE TO ISSUES RAISED AT THE COMMITTEE'S MEETING
ON 6 SEPTEMBER 99 AND ISSUES RELATING TO THE BASIC LAW

INTRODUCTION

1. Background

On 6 September 1999, New Hong Kong Tunnel Co. Ltd, Route 3 (CPS) Co. Ltd., Tate's Cairn Tunnel Co. Ltd. and Western Harbour Tunnel Co. Ltd. (the "BOT Tunnel Operators") met with the Bills Committee considering the Telecommunication (Amendment) Bill 1999. This note responds to some of the issues raised at the meeting and sets out our views on issues relating to the Basic Law.

ISSUES RAISED AT BILLS COMMITTEE MEETING ON 6 SEPTEMBER 1999

2. Mobile phone licence obligations

Our legal advisors, Lovell White Durrant, have written to the Bills Committee expressing their opinion on the extent of mobile operators' obligations under their licences to provide coverage in BOT tunnels. In general, we understand that mobile licensees are not legally obliged to cover Tai Lam Tunnel. In relation to the other three BOT tunnels, many of the mobile licensees are either not required or have no effective time limit within which to provide coverage to these tunnels. We would like to add that before mobile operators were granted licences, they were well aware of these obligations.

3. Tunnel companies rejected mobile operators' proposals for collective negotiation and facility sharing

There has been some success in collective negotiations between individual tunnel companies and mobile operators. For example, a group of three mobile operators negotiated collectively with a tunnel company and now these operators share common facilities in that tunnel. There has also been an example of unsuccessful negotiation between a tunnel company and a group of four mobile operators which formed a cartel and attempted to dictate terms for access to that tunnel.

4. Tunnel companies adopted discriminatory approach

There is no alliance of tunnel companies in dealing with mobile operators. Individual tunnel companies have their own sets of criteria in determining wayleave fees. Each tunnel company applies such criteria to all mobile operators without discrimination.

5. Level of fees and suggestions on charging

The suggestion that the level of fees is too high is very subjective. Our calculation shows that the cost to the consumer on the access to all four BOT tunnels is just over 5 cents a day.

The claim by the representative of New World Telephone that the monthly wayleave fee amounted to HK\$ 600,000 is incorrect and misleading. This amount is the wayleave and advertising fee for a quarter (3 months).

The suggestion by a mobile operator that the wayleave fee should be equal to the revenue generated from mobile telephonic usage in tunnels is not appropriate for a number of reasons. Mobile phone calls are frequently initiated or completed outside tunnels. IDD and other value-added mobile services are also provided in tunnels. The intangible benefits arising out of tunnel coverage and its importance to the overall integrity of a mobile network should also be recognised.

It was suggested that wayleave fees should be calculated on a cost basis or by reference to the space taken up by mobile operators in tunnels. This fails to recognise the substantial investment made by tunnel companies in the construction of tunnels. Wayleave fees are to recoup some of this cost. It is not a charge for space but for mobile services provided within tunnels.

Wayleave fees have up to the present been agreed on a mutually beneficial basis, through commercial negotiation between the tunnel companies and mobile operators. Such agreements demonstrate the efficient working of market forces in a free economy.

6. Cost saving from wayleave fees will benefit mobile phone consumers

If tunnel companies waive the wayleave fees and mobile operators actually pass these on to consumers (as to which they have no obligation since their profits are not subject to any control), the benefit to each consumer will be only about 5 cents a day. The benefit, if any, will therefore be minimal.

On the other hand, since all BOT tunnel companies operate under schemes of control, any reduction in wayleave fees could bring forward increases in tunnel tolls, thus affecting road users.

7. Current high wayleave fees undermine network coverage

This is simply not true. The current level of wayleave fees is not an obstacle to the provision of network coverage in BOT Tunnels. As an example, all mobile operators reached agreements with Route 3 (CPS) Co. Ltd. in a matter of months, although they are not obliged under their licences to provide service in that tunnel. In addition, mobile operators already provide services in all BOT tunnels after reaching agreements with tunnel companies through commercial negotiation.

8. Practice in other liberalised countries

We understand that in a number of countries liberalised in telecommunications, such as U.K. and Australia, there is neither a statutory right of access to privately operated tunnels by mobile operators nor any related compulsory fee determination by the government or the regulator.

Why therefore should Hong Kong, which has thrived on a free market economy, adopt a policy contrary to the best international practices?

9. Statutory access right provides mobile operators an “useful fall back position”

We fail to see why a “fall back position” is necessary. If mobile operators have a statutory right of access to tunnels, this will give them an advantage in their negotiations and upset the relative bargaining strength of the parties. On this basis, the proposed amendment is clearly unfair, bearing in mind the substantial investments made by tunnel companies.

Mobile operators already benefit from reduced licence fees and advances in technology, whilst the interests of BOT tunnel companies are ignored. In effect, the proposed amendment assists the mobile communication industry at the expense of the BOT tunnel industry.

10. Telecommunication Authority should determine the fee

This is not acceptable. The TA has no sufficient knowledge of the operation of BOT tunnels. He also has a conflict of interest which renders it impossible for him to be impartial.

BASIC LAW ISSUES

11. Article 5: "...the previous capitalist system and way of life shall remain unchanged for 50 years.": The proposed amendment strikes a blow at the free market system, which has always been a principle of Hong Kong's capitalist way of life. The proposed government intervention in the process of freely negotiating commercial contracts will be contrary to the system previously practised in Hong Kong and be in breach of Article 5 of the Basic Law.

Article 6: The right of tunnel companies with respect to the use of their tunnels, as provided by law, should be protected by the SAR Government. Its failure to do so under the proposed amendment would be contrary to Article 6 of the Basic Law.

Article 115: Hong Kong's free trade policy includes the right to carry on business and negotiate contracts without government interference. The proposal clearly infringes this policy.

Article 118: The Government also has an obligation under Article 118 of the Basic Law to provide an economic and legal environment for encouraging investments. The proposal to introduce compulsory determination of fees is in breach of this principle.

Article 160: The contractual rights of tunnel companies under their respective project agreements should be recognised and protected pursuant to Article 160 of the Basic Law

CONCLUSION

The proposed amendment to grant the right of access to mobile operators is unnecessary as there is in reality no access problem. It is contrary to both the letter and spirit of agreements between tunnel companies and the Government. It will also have very damaging repercussions. The apparent contravention of the Basic Law is clearly of considerable concern. The proposal will not help consumers; it will disrupt free market forces and tarnish the reputation of Hong Kong as an international hub for investment.

**New Hong Kong Tunnel Company Ltd.
Route 3 (CPS) Company Ltd.
Tate's Cairn Tunnel Company Limited
Western Harbour Tunnel Company Limited**

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