

25 October 1999

Bills Committee on Telecommunication (Amendment) Bill 1999
Legislative Council
Hong Kong SAR
Legislative Council Building
8 Jackson Road
Hong Kong

Attention: Hon. Sin Chung Kai

Dear Sir

**Telecommunication (Amendment) Bill 1999 -
International best practices on statutory right of access to private tunnels by mobile
communication operators and related compulsory fee determination (“International
Practices”)**

Further to our previous letters, we attach a note to further describe the International Practices.

Countries considered

We believe that the practices in countries liberalised in telecommunications should be considered. These countries include US, Australia and UK, which are among the first countries in the world to open up their telecommunications markets. Hong Kong has also been influenced by practices in these countries. For example, the proposed anti-competitive misleading or deceptive conduct provisions in the Telecommunication (Amendment) Bill 1999, is similar to those of section 52 (also for misleading or deceptive conduct) of the Trade Practices Act 1974, Australia.

Scandinavian countries have about 60% of mobile communication subscriber penetration of population, which is among the highest in the world. We have therefore also included Finland in our survey. We have also considered some countries of the major economies such as Germany and Japan.

We believe that the Hong Kong should consider practices in these countries, rather than some other countries (for example, Portugal, which is referred to by the Government).

Summary

U.S., Australia, Finland and Germany do not have statutory right of access to private tunnels by mobile communication operators. In Japan, there is a strong argument that the land access provision does not apply to access to private tunnels by mobile operators.

In U.K., a land access is subject to a fee determination by either the court or a land tribunal (rather than the regulator). In Australia, decisions of the regulator, Australian Communications Authority, can be subject to reviews by the Administrative Appeals Tribunal. In Finland, the Telecommunications Market Act has been amended, effective from 1 January 2000, to remove any compulsory fee determination.

We shall be pleased to respond to any questions or comments.

Yours faithfully

For and on behalf of
NEW HONG KONG TUNNEL CO. LTD.

For and on behalf of
ROUTE 3 (CPS) CO. LTD.

For and on behalf of
TATE'S CAIRN TUNNEL CO. LTD.

For and on behalf of
WESTERN HARBOUR TUNNEL CO.
LTD.

NOTE ON INTERNATIONAL PRACTICES ON STATUTORY RIGHT OF ACCESS TO PRIVATE TUNNELS BY MOBILE COMMUNICATION OPERATORS AND RELATED COMPULSORY FEE DETERMINATION

1. United States

Telecommunications activities are primarily regulated by the Communications Act 1934, as amended by the Telecommunications Act 1996. Access to land by telecommunications operators is provided under section 224 (Regulation of pole attachments) of the Communications Act. Under that section, the telecommunication regulator, Federal Communications Commission, is empowered to regulate the rates, terms and conditions for pole attachments. However, this regulation only applies where a public utility (including telecommunications operator) owns or controls the relevant pole, duct or conduit. There is therefore no statutory right of access to private tunnels by mobile operators.

2. Australia

The installation and maintenance of a telecommunication facility in or over land is provided under the Telecommunications Act 1997. The primary provisions for a carrier to carry out the installation of a telecommunication facility are whether the carrier is authorised to do so by a facility installation permit, or whether the facility is a low-impact facility (clause 6 of Schedule 3).

Under clause 27 of Schedule 3 of the Act, a facility installation permit must not be granted unless all criteria listed in that clause are satisfied. The criteria include the telecommunications network to which the facility relates is of national significance and that the facility is an important part of the telecommunications network to which the facility relates.

It is clear that access to some private tunnels by mobile operators does not satisfy the criteria of “national significance” and the facility being important part of the mobile networks. In addition, under clause 26 of the Act no facility installation permit may be issued unless a public inquiry in relation to that permit is conducted. Further, there is a strong argument that radiocommunication equipment and related facility in a private tunnel is not a low-impact facility. Australia does not therefore have statutory right of access to private tunnels by mobile operators.

Part 29 of the Telecommunications Act provides for a review by the Administrative Appeals Tribunal on the decisions of the regulator, Australian Communications Authority.

3. Finland

Section 28 of the Telecommunications Market Act 1997 contains provisions relating to the access to land by telecommunications operators. However, the right is limited to the installation of a telecommunications cable rather than radiocommunication equipment (section 28).

Under section 33 of the Act, if no agreement is reached regarding the compensation for the installation of a telecommunications cable, it shall be decided in accordance with the Redemption of Real Property and Special Rights Act 1977 (“Redemption Act”). However, this section has been amended, effective on 1 January 2000, to remove any compensation determination power under the Redemption Act and presumably the compensation is determined commercially from that date.

4. Germany

Section 57 of the Telecommunications Act provides for the access to land “for the setting-up, operation and renewal of telecommunications lines” under certain conditions. Under section 3, telecommunications lines means “underground or overhead telecommunication cable systems, including the associated switching and distribution equipment, poles and supports, cable chambers and cable duct conduits.” This right of access to land is therefore limited to telecommunications lines and does not extend to radiocommunication equipment. Accordingly, access to private tunnels by mobile operators for the installation of radiocommunication facility is determined commercially between the tunnel companies and mobile operators.

5. United Kingdom

Provisions relating to access to land by telecommunication operators are contained in Schedule 2 (Telecommunications Code) and section 34 of the Telecommunications Act 1984.

Under paragraph 5 of the Telecommunications Code, if a land owner and a telecommunications operator do not agree the terms for an access, the operator may apply to the County Court (rather than the telecommunication regulator or the government) for an order which will confer upon the operator the right of access and the court may determine the fee of such access.

Under section 34 of the Telecommunications Act, the Secretary of State may authorise a public telecommunications operator to purchase compulsorily any land in England and Wales which is required by the operator for, or in connection with, the establishment or running of the operator’s system and the Acquisition of Land Act 1981 shall apply to such purchase. Under section 4 of the Acquisition of Land Act, the Land Compensation Act 1961 shall have effect subject to the provision in that section. Under section 1 of the Land Compensation Act, the Land Tribunal (rather than the telecommunications regulator) is empowered to determine any question of disputed compensation. Under section 5 of that Act, the rules for assessing compensation includes a reference to open market price. Section 23 of the Acquisition of Land Act provides for the grounds for application to the High Court for adjudication relating to a compulsory purchase order.

6. Japan

Under article 73 of the Telecommunication Business Law, a Type I telecommunications carrier (including a mobile operator) may, “when it is necessary and reasonable to use other person’s land ... for establishment of wire and cables, antennas ... for the use of its Type I telecommunications business ...”, negotiate with the land owner for such use of land. By the nature of radiocommunication, it is not necessary or reasonable to provide radiocommunication coverage of the whole territories of Japan. There is therefore a strong argument that the use of a private tunnel is not either necessary or reasonable for the use of a mobile communication business. Further, the use of land is subject to the authorisation of the relevant prefectural governor, who also determines, in the absence of agreement, the terms of the use (articles 74 to 77).