

**Bills Committee of the Legislative Council
Telecommunication (Amendment) Bill 1999**

**Further Representations of Cable & Wireless HKT Limited
Legal and Constitutional Issues arising under the Telecommunication
(Amendment) Bill 1999**

Chairman and Members of the Committee.

In presenting our concerns on the legal and constitutional issues which arise under the Bill, I feel I can do no better than refer to the joint advice of leading counsel, Mr. Michael Thomas Q.C. S.C., Mr. Timothy Eicke and Professor Johannes Chan, which has been tabled before this Committee (“Joint Advice”). I regret that these leading counsel could not be here today to present these views themselves, but unfortunately their schedules did not permit this. I have, however, taken the liberty of providing additional copies of the Joint Advice to which members may wish to refer as I present our submission.

SUMMARY

Our concerns with the legal and constitutional issues under this Bill fall into three broad categories:

1. Those provisions in the Bill which confer broad powers on the TA to impose financial penalties on a licensee (but not others) for “breaches” of proposed sections 7K to 7N of the Ordinance and to give third parties a private right of action against the licensee based on such “breaches”, all of which are based *solely* on the “*opinion*” of the TA. In the view of leading counsel, these provisions are 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). *Members may wish to refer to paragraph 3, sub-paragraph a. of the Joint Advice.*
2. The powers given to the TA to inspect documents and accounts under proposed 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). In the opinion of counsel, there is a strong argument that these provisions are *per se* unconstitutional or, at the very least, more far reaching than the Basic Law would allow. *Paragraph 3, sub-paragraph b. of the Joint Advice.*

3. There is a strong argument that the powers conferred on the TA by proposed sections 36A and 36AA to order interconnection and/or the sharing of facilities fall within the protection of Article 105 of the Basic Law, which requires that there be fair and adequate compensation for the inherent deprivation of property. The absence of any statutory guidance to the TA as to how to calculate the compensation due to the person affected is a potential deficiency in constitutional legislation. **Paragraph 3, sub-paragraph c. of the Joint Advice.**

As noted by counsel in the Joint Advice, the one major concern that runs through most, if not all, the issues identified above is the complete lack of involvement of the courts or any independent tribunal:

- in *issuing warrants* for inspection and search;
- by way of *appeal* on questions of law and fact arising in the context of the “opinions” reached by the TA under proposed sections 7K to 7N;
- in the *imposition of financial penalties*; and
- in the determination of *fair and adequate compensation* in the context of an order for interconnection and/or the sharing of facilities.

I would note at this point that, notwithstanding the Government’s assertions that the current system “has the general support of the industry”, a right of appeal against decisions of the TA is supported by the submissions of New T&T Hong Kong Limited, Hong Kong Cable Television Limited and the Consumer Council.

The Government also asserts that these provisions in the Bill do no more than replicate existing licence conditions. In our view, that misses the point entirely. First, inclusion of these kinds of provisions in a legislative enactment is a very different matter to including them in licence conditions, especially having regard to the legislative constraints and constitutional issues discussed below. Second, the fact that these conditions have been forced on licensees in the past does not make them constitutionally valid within legislation. And third, these provisions are currently included only in the FTNS licence, which covers local and international facilities and services, both of which are essential public services in which Cable & Wireless HKT used to enjoy a monopoly franchise. It is open to doubt whether such provisions are appropriate for the mobile and internet sectors, which are intensely competitive already, for which there is no historical legacy of any operator’s dominance and, in the case of the internet sector, where there are virtually no barriers to entry.

LEGISLATIVE CONSTRAINTS: CAN LEGCO PASS THIS BILL?

I should like to draw the attention of members to the constitutional constraints upon the power of the Hong Kong Special Administrative Region to enact laws:

- Article 11 of the Basic Law of the Hong Kong Special Administrative Region provides that:

“No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this Law” (i.e. the Basic Law).

- Article 73(1) of the Basic Law empowers the Legislative Council only:

*“to enact, amend or repeal laws **in accordance with this Law**” (i.e. the Basic Law) (emphasis added).*

- Article 39 of the Basic Law enshrines the rights protected by the International Covenant on Civil and Political Rights (“ICCPR”) and other international conventions in the following terms:

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.”

- The ICCPR has also been incorporated into Hong Kong law through the Bill of Rights Ordinance. See *Ng Ka Ling v Director of Immigration*, cited in paragraph 5 of the Joint Advice.

It is the view of leading counsel, as set out in the Joint Advice, that several provisions of the Bill are in breach of the Basic Law and the Bill of Rights. If this view is correct, then it is beyond the power of the Legislative Council to pass this Bill in its current form.

I will now elaborate on those provisions of the Bill which, in our submission and in the opinion of counsel, are in breach of the Basic Law and/or the Bill of Rights.

1. THE TA'S POWER TO IMPOSE FINANCIAL PENALTIES

Clause 22 of the Bill provides far reaching amendments to the powers of the TA under section 36C of the Telecommunication Ordinance.

Under the present regime, the power of the TA to impose financial penalties under section 36C is subject to a requirement that the licensee must have failed to comply with a direction under section 36B(1). In other words, the imposition of financial penalties requires two steps:

- the issuing of a direction under Section 36B(1); and
- the licensee's failure to comply with that direction.

The TA's power to issue directions under section 36B is subject to a number of safeguards against the abuse of power:

- the requirement to afford the licensee "reasonable opportunity to make representations";
- the public law duty to give reasons for administrative decisions which have a serious effect on a person; and
- ultimately, supervision by the courts.

The amendments proposed in clause 22 will effectively remove these safeguards:

- there is no requirement for the TA to issue a direction before imposing financial penalties;
- this, in turn, removes the requirement that a licensee be given "reasonable opportunity to make representations";
- in addition, clause 4 makes particular forms of conduct, including "breaches" of sections 7K to 7N, subject to the TA's power to impose financial penalties based *solely* upon "the opinion of the Authority". This, in turn, poses two problems:
 - new section 6A expressly exempts "opinions" from the duty to give reasons, so that the licensee may never know what facts were before the TA or why the TA thought the licensee's conduct was objectionable; and
 - in order to activate its power to impose a financial penalty, the TA need only prove his "opinion": the burden of proof falls squarely on the licensee to establish its "innocence"

(or disprove its “guilt”), without knowing the factual or judgmental basis for the TA’s “opinion”.

The abolition of these important safeguards becomes even more significant in light of new clause 25 which creates, for the first time, a private right of action for damages, injunction or other “appropriate remedy, order or relief” in relation to a “breach” of new sections 7K to 7N. Such an action may be brought by any “person who is aggrieved”. This provision poses a number of problems:

- the absence of a duty on the TA to give reasons for his “opinion” will fundamentally undermine the “equality of arms”, which is an essential requirement of the right to a fair hearing protected by Article 10 of the Bill of Rights (implementing Article 14(1) ICCPR). A plaintiff will need only to prove the existence of the TA’s opinion in order to succeed;
- this deficiency is further aggravated by the lack of any right to challenge an “opinion” in a court of law for mistake, for errors of fact or law, or for taking a wrong view on the merits of a licensee’s conduct; and
- new section 39A does not provide any definition of the term “aggrieved”. Licensees could therefore be exposed to excessive litigation and legal uncertainty. Cable & Wireless HKT has suggested that a clearer definition of “aggrieved”, such as that provided in the UK’s 1984 Telecommunication Act, be included in the Bill.

In the view of leading counsel, the power given to the TA to impose financial penalties under section 22 is in breach of the Basic Law and Bill of Rights, for the following reasons:

(A) *Criminal charge*

Articles 10 and 11 of the Bill of Rights (implementing Articles 14(1) and 14(2) to (7) ICCPR, respectively), provide as follows:

“...In the determination of any criminal charge against him ... everyone shall be entitled to a fair ... hearing by a competent, independent and impartial tribunal.” (Article 10)

“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.” (Article 10)

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;*
- (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing;*
- (c) to be tried without undue delay ...” (Article 11(2))*

It is well established that the concept of “criminal charge” should be broadly defined, and clearly includes the power to impose financial penalties. *See paragraphs 10 to 15 of the Joint Advice.*

(B) *The presumption of innocence*

As noted by counsel in the Joint Advice (paragraphs 16 and 17), both the European Commission of Human Rights and the UN Human Rights Committee have stated that it is a fundamental principle embodied in the ICCPR that no person should be treated by a public official as being guilty of an offence before this is established by a competent court. No guilt can be presumed until the charge has been proved beyond reasonable doubt. It is a duty for all public authorities to refrain from pre-judging the outcome of a trial.

This is also the approach adopted by the Hong Kong courts: Attorney General v. Lee Kwong Kut (*see paragraphs 16 and 17 of the Joint Advice*).

It therefore follows that the Bill’s emphasis on the “opinion” of the TA in new sections 7K to 7N, a “breach” of which may lead to the imposition of very substantial fines (or parasitic civil litigation), is in clear contradiction of this requirement:

- if a matter is brought before the Court of First Instance under new section 36C(3B) the TA will be the “prosecution”; he will have “pre-judged” the licensee’s guilt; and he will, in effect, be treating the licensee as guilty before such guilt has been established, beyond reasonable doubt, by the competent court;
- the result of this is that the burden will be placed squarely on the licensee to disprove its guilt (or prove its innocence), rather than on the prosecutor having to prove the

licensee's guilt; and this burden will not be discharged in a criminal court with full jurisdiction of fact and law, but only on judicial review (an extremely limited remedy) or in the Court of First Instance under section 36C(3B).

(C) *The right to a fair hearing*

Articles 10 and 11(2) of the Bill of Rights essentially deal with the requirements of a fair hearing in the context of a "criminal charge". Among the fundamental requirements of a "fair hearing" are:

- the licensee must be informed, in detail, of the acts with which he is charged and of their legal classification i.e. a duty to state "reason" for instigating the criminal charge; and
- the licensee must be given access to all the material evidence in the hands of the TA, whether it is in favour of against the licensee. *See paragraph 19 of the Joint Advice.*

The Hong Kong courts are increasingly accepting the need to imply a duty to give reasons as a fundamental part of the requirement for a fair hearing, particularly where the decision at issue has serious adverse effect on a person. *See Oriental Daily Publisher Ltd. v. Commissioner for TELA, referred to at paragraphs 20 and 21 of the Joint Advice.*

Proposed new section 6A(3)(b) of the Ordinance, as introduced by clause 3 of the Bill, and particularly its interaction with proposed new sections 7K to 7N and the power to impose financial penalties, on its face seems to derogate from this essential safeguard for the right to a fair hearing imposed by the Bill of Rights.

(D) *Access to a court of full jurisdiction*

As presently drafted, the Bill does not appear to make any provision for access to a court in relation to an "opinion" of the TA or, even more importantly, a decision of the TA to impose a financial penalty under section 36C. According to the Joint Advice (paragraph 25), it is extremely doubtful whether, at least in the context of the imposition of financial penalties, access to judicial review is sufficient to satisfy this requirement.

Cable & Wireless HKT has submitted that the best way to address the concerns arising under Articles 10 and 11 of the Bill of Rights is to provide for a right of review to the Court of First Instance or to an independent tribunal such as the Administrative Appeals

Board, which review should be by way of re-hearing with the Court (or Administrative Appeals Board) being empowered to confirm, reverse or vary any decision of the TA under sections 7L to 7N and 36C. As noted above, this view is supported by the submissions of other interested parties.

(E) *Undue delay*

Proposed new section 36C(3B) provides the TA with the power to apply to the Court of First Instance for the imposition of a financial penalty beyond that which the TA himself can impose. Although we support the need for recourse to the Court, we are concerned that sub-section 3B(a) provides for a limitation period of three years.

In light of the criminal nature of the financial penalties imposed, there would be a very strong argument that a violation of Article 11(2)(c) of the Bill of Rights would occur if the TA waits for as long as the permitted three years instead of bringing the matter to the Court of First Instance as soon as possible.

(F) *Discrimination*

There is also a strong argument that new section 7K, which only penalises the “*licensee*” for anti-competitive conduct “*which ... has the purpose or effect of preventing or substantially restricting competition in a telecommunications market*”, is discriminatory. In the absence of a general competition law, which would cover others whose conduct also has the purpose or effect of restricting competition in a telecommunications market, it is arguably discriminatory to single out **licensees** for punishment. This arguably constitutes a violation of the right to “equality before and equal protection of the law” protected by Article 22 of the Bill of Rights.

In our submission, the power of the TA to impose substantial financial penalties amounts to a criminal charge, which necessarily requires the right to a fair hearing and the presumption of innocence. As the amendments proposed by clause 22 of the Bill will effectively deprive a licensee of these rights, this provision is in breach of Articles 10 and 11 of the Bill of Rights. If this view is correct, then the Legislative Council does not have the constitutional power to pass the Bill in this form.

We believe these constitutional defects can be overcome by:

- (i) deleting the phrase “in the opinion of the Authority” from clauses 7K to 7N so that liability for any breach of those provisions is determined by the court; and
- (ii) providing for a right of appeal on the merits against any decision of the TA by any party affected by the decision. That right of appeal should be available to an independently constituted tribunal such as a court of law, or it could be made to some other appellate body, such as a specialist appellate body established under the auspices of the Telecommunication Ordinance, or a general appellate body such as the Administrative Appeals Board.

2. INFORMATION, INSPECTION AND DISCLOSURE OF DOCUMENTS: SECTIONS 35A AND 7I

Under proposed section 35A, the TA is empowered to enter the premises of a licensee and inspect and make copies of any document or account. A person who, without reasonable excuse, refuses to give access to the document or account, commits an offence and is liable on conviction to imprisonment for up to six months.

The power of entry, search and seizure under proposed section 35A is an obvious interference with privacy. Under Article 14 of the Bill of Rights and Article 29 of the Basic Law, such interference must not be arbitrary or unlawful. There is no provision in the Bill for objective verification of the reasonableness of the TA’s requirement for search or seizure, nor any way in which the licensee can scrutinise the TA’s decision to exercise the power. *Please refer to paragraphs 30-37 of the Joint Advice.*

Article 14 of the Bill of Rights and Article 29 of the Basic Law will be satisfied if the exercise of a power in breach of the right of privacy is subject to three conditions:

1. a requirement that a search warrant or other authorisation to be obtained in advance of the search;
2. a requirement that the warrant be issued by a person who must be capable of acting judicially, that is, a person who is not involved in the investigation; and
3. a requirement that the warrant be issued only after it has been established upon oath that reasonable and probable grounds exist to believe that an offence has been committed.

See paragraph 38 of the Joint Advice.

Proposed section 35A falls well short of these requirements. The TA is not required to apply for a warrant from a court or any other independent body before it can enter and conduct a search of the premises of a licensee. The decision to enter, search and seize documents or accounts is made by the TA alone, and a licensee's failure to comply with the TA's request is a criminal offence.

Disclosure

Proposed section 7I also requires a person who supplies a public telecommunications service to supply the TA with such information relating to its business as the TA may reasonably require to perform his functions. The TA, after hearing representations from the person who supplied the information, may disclose the information supplied to him to any party, including the public, if he thinks it is in the public interest to do so.

The Bill of Rights implicitly requires that there be protection in law against use and disclosure of information obtained that would be incompatible with the rights guaranteed under the Bill of Rights and the Basic Law. Proposed section 7I provides a blanket power of disclosure. It may be that there are exceptional circumstances when a power of disclosure would be in the public interest, but there are no statutory guidelines in the Bill as to when such disclosure might be appropriate. There is no restriction on the disclosure of information, nor are there any statutory criteria as to whom the TA may disclose information, nor is there any restriction on disclosure of information concerning a third party. On balance, the absolute, unfettered nature of the power of disclosure is neither necessary nor proportionate and is therefore "arbitrary" within the meaning of the Bill of Rights and the Basic Law and is therefore unlawful. *See paragraph 48 of the Joint Advice.*

We have already supplied to the members of this Committee a marked up copy of the Bill incorporating changes to proposed sections 35A and 7I that, we believe, will bring the Bill into conformity with the Basic Law and the Bill of Rights.

3. INTERCONNECTION AND FACILITIES SHARING - SECTION 36A AND PROPOSED SECTION 36AA

Section 36A, as amended by the Bill, and proposed section 36AA, as inserted by the Bill, empower the TA to mandate the interconnection and sharing of facilities of Cable & Wireless HKT, upon the terms and conditions determined by the TA, if he considers it in the public interest to do so.

We want to make it clear that we have no objection to mandatory interconnection of networks. We already interconnect with the networks of all other operators in Hong Kong on a voluntary basis on commercial terms.

Our concern is with the mandatory unbundling of network elements without a requirement for payment of fair compensation. We already offer unbundled local loops to our competitors on commercial terms. However, it should be noted that the power to mandate unbundling of network elements and the sharing of facilities will inevitably encroach on the property rights of the licensee compelled to grant access to its network for interconnection or its facilities for sharing. Article 6 of the Basic Law provides that the Hong Kong SAR shall “protect the right of private ownership of property in accordance with law.” This right is further elaborated in Article 105 of the Basic Law, which directs the Hong Kong SAR to protect the right of individuals and legal persons to the use of property and their right to compensation for lawful deprivation of property. Although the right to property is not absolute, any deprivation of such property must be “in accordance with law”.

If a licensee is to be deprived of the exclusive use of its private property through mandatory unbundling of network elements in accordance with section 36A, or compelled to share the use of its property in accordance with proposed section 36AA, then fair compensation must be paid to the licensee who loses the rights to enjoy the unfettered use of its own property. Neither section 36A as amended nor proposed section 36AA will compel the TA to determine that fair compensation must be payable to the operator offering or being required to grant access to its network elements or facilities sharing. The TA is given an absolute discretion as to whether any compensation is payable at all.

Article 105 of the Basic Law requires that any provision granting the Government the power to deprive any person of the exclusive use of its property should also provide with sufficient legal certainty the methodology to be used by the Government for calculating the value of the compensation to be paid to that person for the deprivation. This Bill, in vesting absolute discretion in the TA to calculate the value of any compensation to be paid, or even whether any compensation is payable at all, falls well short of the requirements of Article 105 of the Basic Law.

The Government argues that mandatory unbundling of the local loop does not constitute a deprivation of property because Cable & Wireless HKT would retain ownership of the local loop. As noted by Professor Chan in his Short Advice dated 5 October 1999, that is like saying

that, if a property owner is required to lease his flat to someone else, he has not been deprived of the use of his property. We do not accept the Government's position on this issue.

We have already supplied to the members of this Committee a marked up copy of the Bill incorporating changes to proposed sections 36A and 36AA that, we believe, will bring the Bill into conformity with the Basic Law.

I thank the Committee for giving us this opportunity to present our views, and I would be happy to answer any questions the Committee may have.

Cable & Wireless HKT

1 December 1999