

February 15, 2000

The Hon. Sin Chung Kai
Chairman
Bills Committee on Telecommunication (Amendment) Bill 1999
Legislative Council
Hong Kong SAR
Legislative Council Building
8 Jackson Road
Hong Kong

By Fax & By Post
(# 2121 0420)

Dear Mr. Sin,

RE: TELECOMMUNICATION (AMENDMENT) BILL 1999

At the last meeting of the Bills Committee on January 26, 2000, you said that as all the points raised by various interest groups had been discussed, and all the questions raised had been answered, the Committee should now proceed to examine the Bill clause by clause at its future meetings.

However, after studying all the documents produced by the Administration, including the opinion of Mr. Richard Fowler, Q. C., we BOT tunnel companies are of the opinion that our arguments have in fact not been answered. We are still of the view that:

1. this Bill infringes on all the Ordinances and Project Agreements governing our tunnels, and
2. it is unconstitutional as it is in contravention of Articles 105 and 160 of the Basic Law.

Our view is supported by Mr. Geoffrey Ma, Senior Counsel. A copy of his Opinion and summary prepared by LWD are enclosed for your reference.

In the circumstances, we request that the Committee examine the two specific points we mentioned above before looking at the Bill clause by clause.

We look forward to hearing from you.

Cont'd/...2

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

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

Alexander Chan
General Manager

George Lee
General Manager

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

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

Kenneth Pang
General Manager

Gary Luk
General Manager

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RE. TELECOMMUNICATION (AMENDMENT) BILL 1999

OPINION

1. I am asked to advise the New Hong Kong Tunnel Company Limited, Route 3 (CPS) Company Limited, Tate's Cairn Tunnel Company Limited and the Western Harbour Tunnel Company Limited ("**the tunnel companies**"), as to the constitutionality and legality of certain provisions of the Telecommunication (Amendment) Bill. This Bill contains significant amendments to the Telecommunication Ordinance, Chapter 106 ("**the Ordinance**").

The issues

2. The relevant provisions of the Bill are various amendments to section 14 and the new 36AA of the Ordinance. I set out some of the more important provisions:-

"14(1A) Notwithstanding any other law, but subject to subsection (1B) and (2), any licensee authorized by the Authority for any particular occasion may-

(a) place and maintain a radiocommunications installation in, over or upon any land for the purpose of providing a radiocommunications service to a public place;

(b) enter any such land for the purpose of-

(i) inspecting it; or

(ii) other activities which are for the purpose of or incidental to the maintenance and placement of the installation.

.....

(4) The Authority, or a licensee authorized by the Authority under subsection (1) or (1A), as the case may be, may apply to a magistrate for an order that a person shall not prevent or obstruct the Authority or the licensee, as the case may be, from exercising the powers conferred by that subsection.

(5) Where subsection (1A) is applicable-

(a) the licensee and the person having a lawful interest in the land concerned shall endeavour to come to an agreement as to the fee to be paid under that subsection by the licensee to that person;

(b) in the absence of any such agreement within a reasonable time-

(i) the Authority shall determine the fee; and

(ii) the fee so determined shall be -

(A) fair and reasonable in all the circumstances of the case; and

(B) payable in accordance with the terms and conditions specified by the Authority in the determination.

.....

36AA. Sharing of use of facilities

(1) The Authority may direct a licensee or a person to coordinate and cooperate with another licensee or another person specified by the Authority in the public interest to share the use of any facility owned or used by it.

.....

(4) Where another licensee, or another person authorized by the Authority, reasonably requests to share a facility, the licensee or person shall endeavour to come to an agreement with the requesting party on the conditions, including but not limited to providing for fair compensation to the licensee or person for the provision, use or sharing of the facility.

- (5) *A shared facility may include a building, place or premises that is exclusively occupied and operated by one of the parties to the sharing agreement.*
- (6) *If the parties do not reach an agreement within a reasonable time, and the Authority requires shared use of the facility, the Authority may determine the terms and conditions for the shared use of the facility.*
- (7) *For the purposes of this section “facility” includes-*
 - (a) *atunnel...”*

3. These amendments have the following effect on the tunnel companies:-

- (a) Any licensee under the Telecommunication Ordinance (including duly licensed mobile telephone operators) will be able to apply for authorization from the Telecommunications Authority to enter into any land for the purpose of placing and maintaining a radiocommunications installation: **section 14(1A)**. This includes the tunnels operated by the above tunnel companies.
- (b) Such authorization can be given without the consent of the tunnel companies and the Telecommunications Authority; the relevant licensee may even apply to a magistrate for an order: **see section 14(4)**. In other words, the tunnel companies can be compelled to allow access.
- (c) Where such authorization is given and access allowed, the licensee and the tunnel company shall endeavour to come to an agreement as to the fee to be paid by the licensee, failing which the Telecommunications Authority is

empowered to determine a fee which is “fair and reasonable in all the circumstances of the case”: **section 14(5)**. No further criteria are set out in the Bill as to how the fees is to be determined.

(d) The Telecommunications Authority is also able to direct a tunnel operator to share the use of its facility: **section 36AA(1)**. Tunnels are expressly included in the definition of “facility” used in that section: **see section 36(7)(a)**. Where a facility is to be shared, the licensee and the tunnel operator shall endeavour to come to an agreement as to the terms of the sharing and this would include the provision of fair compensation for the use or sharing of the facility; **section 36AA(4)**. If there is no agreement, again the Telecommunications Authority may determine the terms and conditions: **section 36AA(6)**. It is not clear whether it is intended that these “facility sharing” provisions of section 36AA are intended to cover the road tunnels operated by the tunnel companies or even how section 36AA is to be read consistently with the amendments to section 14, but I have assumed that this new section will affect to the tunnel companies.

4. The above mentioned amendments will, in short, result in a situation whereby the tunnel companies can be compelled to allow access to telecommunications licensees in return for a fee which is ultimately fixed not by commercial negotiation but by the Telecommunications Authority, which is to apply a vague notion of reasonableness.

5. Before analysing the constitutional and legal issues which arise, it is first important to set out the existing rights enjoyed by the tunnel companies (here I take as an example the Western Harbour Crossing - the other tunnel companies are in the same position):-
- (a) In return for the substantial investments made by the tunnel companies, they are entitled to operate tunnels with a view to profit. As will be seen, this entitlement or right is expressly given both by contract and by Ordinance.
 - (b) The profits from the operation of tunnels derive not just from the collection of tolls from vehicles but also from fees obtained from other users of the tunnels.
 - (c) The tunnel companies have at present the right to allow or refuse access to tunnels by utility operators: **see for example section 19(1)(b) of the Western Harbour Crossing Ordinance, Chapter 436.** Utilities include any telecommunications apparatus: **see definition of “utility” in section 2 of the Western Harbour Crossing Ordinance.** This right exists “Notwithstanding any thing to the contrary in any other Ordinance”; **section 19(1).**
 - (d) In practical terms, this right means that if permission is granted by the tunnel companies to a telecommunications operator to install its telecommunications equipment in tunnels, a commercial fee is payable. If no fee is agreed, the tunnel companies would be perfectly within its rights to refuse consent.

- (e) No power exists in the existing legislation on anyone (and certainly not the Government) to compel the tunnel companies to give consent. The only power allowed by statute is to withhold approval of the installation of any utility within the tunnels: **section 19(1)(a) of the Western Harbour Crossing Ordinance**. Even then, the approval can be withheld by the Commissioner of Transport by taking into account only safety factors: **section 19(3) of the Western Harbour Crossing Ordinance**.
- (f) This right of the tunnel companies to withhold consent and, where consent is given, to negotiate and obtain a commercial fee, is a right not only recognised by statute (see: **section 19(1)(b) of the Western Harbour Crossing Ordinance**), but perhaps more important, is also a right, alongside other rights given by ordinance, expressly given to the tunnel companies by contract in their relevant franchise Agreements with the Government: **see for example clauses 2(B) & (F) of the Project Agreement for the Western Harbour Crossing**. These contractual rights are expressly reinforced and protected by Ordinance: **section 4 of the Western Harbour Crossing Ordinance**.
- (g) There are other rights along similar lines, for example, the right of the tunnel companies to charge commercial fees for advertising in tunnels: **section 29 of the Western Harbour Crossing Ordinance**. Again, although the approval of the Commissioner for Transport is required, he is to consider only safety aspects: **section 29(3)**.

6. It can thus be readily appreciated that the rights of the tunnel operators are twofold: first, the right to be in control of and enjoy without interference the tunnels which they operate; secondly, the right to charge a commercial fee for the use of the tunnels or any part thereof. At no stage can they be compelled by anyone to allow access to their tunnels or to be disabled from negotiating and obtaining a commercial fee in return for such access.

7. These existing rights of the tunnel operators will be taken away by the proposed legislation as far as licensees under the Ordinance are concerned. This represents a significant class of persons and their impact cannot therefore be downplayed. These licensees may for the first time be permitted to obtain access to tunnels without the consent of the tunnel operators. In addition, the fee payable by such licensees will be determined not through commercial negotiation but ultimately by the Telecommunications Authority applying not so much (and certainly not exclusively) commercial criteria, but principles of what is “fair and reasonable in all the circumstances of the case”. Furthermore, if the provisions of section 36AA are applicable, the criteria are even more obscure.

8. Are these changes sought to be introduced by the Bill constitutional or legal? These are the issues I am asked to address.

Constitutionality and legality

9. In my view, the provisions of the Bill identified above are at serious risk of being held unconstitutional under the Basic Law and moreover, if pushed through, will also constitute breaches of contract on the part of Government. Any law which is contrary to the Basic Law is invalid: BL 11.

10. The reasons for these conclusions can be summarised as follows:-
 - (a) Article 105 of the Basic Law protects (and requires the Government to protect) the right of persons to acquire and use property and the right to compensation for the lawful deprivation of property. Such compensation “shall” correspond to the real value of the property concerned and shall be paid without due delay.

 - (b) The rights of the tunnel companies to control and enjoy without interference the tunnels which they operate and to charge a commercial fee for the use of the tunnels or any part thereof (rights that are given and recognised by contract and statute) are rights within the definition of “property” in BL 105.

 - (c) These rights are expropriated or taken away by the proposed amendments contained in the Bill in circumstances where:-

- (i) no or no adequate compensation is provided for; and
 - (ii) it is questionable whether it is necessary in the public interest anyway for such expropriation of property to take place and, assuming there to be such necessity, whether the provisions of the Bill are proportionate in achieving this public interest.
- (d) Regarding compensation, it appears to be accepted on Government's part that there are no provisions for compensation for the loss of the tunnel companies' rights. Indeed there are none. If it is sought, however, to argue that the provisions in the Bill regarding fees are somehow to be equated with compensation, this is plainly not so. Quite apart from the fact that this represents no compensation for the loss of the right to refuse consent, the criteria for the determination of fees is NOT on any sort of commercial basis, but relies instead on vague and undefined notions of reasonableness. In other words, the "real value" of the right which is sought to be taken away (here the right to obtain a commercial fee) is simply not reflected in any provision in the Bill.
- (e) As regards the necessity in the public interest to deprive the tunnel companies of their said rights, this is an important first step in the inquiry in establishing, for the purposes of BL 105, whether the Bill succeeds in using "lawful" means in depriving the tunnel companies of such rights. The next step, assuming there to be a public interest, is to see whether the provisions of the Bill uses proportionate means to achieve this public interest. Both these facets have to

be satisfied. In this regard, given that the present position is that there is ubiquitous telecommunications coverage as far as the tunnels operated by the tunnel companies are concerned, it is difficult to see the justification for extending the “compulsory” nature of the proposed provisions to tunnels. This is all the more so when the present position is one in which the rights of the tunnel companies are guaranteed by contract and statute. One would have thought that the need to respect contractual and statutory rights (on the basis of which the tunnel companies committed themselves to the substantial investments made in relation to the tunnels) would be a more important public interest than the taking away of such rights.

- (f) The provisions of BL 160 are also relevant. That Article of the Basic Law requires the Government to recognise and protect all contracts, rights and obligations which were valid under the laws in force prior to the resumption of exercise of sovereignty on 1.7.97. There is little doubt that the rights I have set out above fall within this rubric.
- (g) Finally, it should not be forgotten that the provisions of the Bill under present discussion, if passed, will cause Government to be in breach of their franchise agreements with the tunnel companies.

11. I now analyze these reasons in greater detail.

The rights of the tunnel companies as “property” under BL 105 and their “deprivation”

12. There is no definition of the word “property” in BL 105.
13. In context, it is clearly intended to have a wide meaning. It cannot of course just mean real property; there is no cause to restrict the meaning in this way and besides, Articles 120 to 123 of the Basic law use the word “land” in dealing with real property.
14. Of perhaps more assistance is the definition of the word “property” in section 3 of the Interpretation and General Clauses Ordinance, Chapter 1:-

“‘property’ includes-

- (a) money, goods, choses in action and land; and*
- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in paragraph (a) of this definition.”*

15. The word is apt to cover property both tangible and intangible: see **Belfast Corporation v O.D. Cars Limited** [1960] AC 490, at 517.
16. There is no doubt that the Courts will give a wide and purposive meaning to BL 105 and avoid “a literal, technical, narrow or rigid approach” in interpretation: see **Ng Ka**

Ling v Director of Immigration (1999) 2 HKCFAR 4, at 28-29. This is entirely consistent with the way that property rights have been treated in other common law jurisdictions: **see for example the position in Australia as shown in landmark cases like Minister of State for the Army v Dalziel (1944) 68 CLR 261 and Bank of New South Wales v The Commonwealth (1948) 76 CLR 1.** This is all part of the Courts' approach in adopting a generous and purposive approach to the construction of fundamental rights and freedoms: **see AG of The Gambia v Momodou Jobe [1984] AC 689, at 700; AG of Hong Kong v Lee Kwong Kut [1993] AC 951, at 966; Ming Pao Newspapers Limited v AG of Hong Kong [1996] AC 907, at 917.**

17. One would have thought it reasonably clear that the purpose of BL 105 was to protect economic rights of legal persons in Hong Kong and the continued existence of the free market economy and economic (and fiscal) policies of Hong Kong. This is clear from the very context in which BL 105 is situated: **see BL 105-119 contained in section 1 of Chapter V of the Basic Law (headed "ECONOMY").**

18. The rights with which we are here concerned, are economic rights which the Basic Law preserves. They are rights which were in existence prior to 1.7.97 and which continue to exist today. The right to freely negotiate (and obtain) a commercial fee for allowing access to the tunnels to utility operators is merely an example of an economic right which is common in the free market and capitalist system expressly preserved by the Basic Law.

19. In my view, these rights constitute property:-

- (a) Contractual rights are choses in action, a well established form of personal property: see **Halsbury's Laws of England Vol.6 at paragraphs 4-8**. This has been held to be so in the High Court of Australia in dealing with their equivalent of the constitutional property clause (section 51(xxxi) of the Commonwealth Constitution 1900): see **Mutual Pools & Staff Pty Limited v The Commonwealth of Australia (1994) 179 CLR 155; Georgiadis v Australian and Overseas Telecommunications Corporation (1994) 179 CLR 297**.
- (b) These rights also fall within the definition of “property” in the Interpretation and General Clauses Ordinance (even on the assumption that this definition is sufficiently wide for the purposes of BL 105).
- (c) The right to exclude others from using property in a certain way may itself constitute property, particularly when such right is founded on contract or statute: see for example **The Commonwealth of Australia v The State of Tasmania (1983) 158 CLR 1, at 281-292**. The right to exclude certainly appears to be regarded as a property right in the USA: see **Kaiser Aetna v United States (1979) 444 US 164; Loretto v Teleprompter Manhattan CATV Corporation (1982) 458 US 419; Nollan v California Coastal Commission (1987) 483 US 825**.
20. There appears to be a suggestion by Government that in the present instance there is no deprivation of property but rather a “control” or “regulation” of property: see

paragraph 9 of the Response to Lovell White Durrant’s Submission dated 10 December 1999 on the Legal and Constitutional Issues. It is in my view unrealistic to restrict the application of BL 105 in this way. Quite clearly these provisions are not a means of control or regulation: they actually extinguish those rights of the tunnel owners identified above. To argue that the provisions merely control or regulate the way in which the tunnels are used (as in the case of public health or building legislation), is to understate their effect and wholly ignores the important element of these rights being actually or ancillary to contractual rights (which are embodied by statute). It is in any event only a matter of degree and semantics as to whether the measures contained in the Bill can be said to be “regulatory” or “confiscatory”; it is the substance that matters: **see Belfast Corporation v O.D. Cars Limited at 520.**

Compensation under BL 105

21. The Bill contains no provisions for compensation. As much is accepted by the Government: **see paragraph 29 of the Response to Lovell White Durrant’s Submission dated 10 December 1999 on the Legal and Constitutional Issues.**

22. Even if it is accepted that there is a lawful deprivation of the tunnel companies’ property (which is not free from doubt - see below) for the purposes of BL 105, proper compensation must be paid to the tunnel companies. The Bill fails to deal with this aspect and on this point alone, renders it extremely vulnerable to criticisms that it is unconstitutional.

23. The fee provisions contained in sections 14(5) and 36AA(6) (if the latter is applicable in the first place) do not amount to proper compensation. Quite apart from the fact that these provisions do not in any event deal with the loss of the right to exclude but only at best with the fees, they are inadequate even in this latter regard. Compensation amounting to the “real” value of the property concerned must be paid under BL 105. The real value (which should I think be equated with the market value) is a commercial fee, not one that is “fair and reasonable in all the circumstances of the case”. In addition, as I have also said above, the position is even worse if section 36AA is applicable.
24. I would also add in this context that it must be wrong for the arbiter of the fee to be the Telecommunications Authority, rather than a more neutral body. The Telecommunications Authority must have as one of its objects the promotion of telecommunications (in whatever form) in Hong Kong. In almost every Ordinance that makes provision for compensation, the arbiter is not a Government department but the Courts. In the present instance, there is something inherently wrong in the arbiter of the compensation being the same body that makes the decision to authorise entry into the land in the first place.
25. Finally, it is to be noted that the concept of proper compensation for expropriation or deprivation of property is a well established concept. It exists in numerous Ordinances (see for example the Lands Resumption Ordinance, Chapter 124). At common law, the Courts have developed a rule in the construction of statutes that the legislature will not take away private property without proper compensation: **see**

Commissioner of Public Works (Cape Colony) v Logan [1903] AC 255, at 363;
Belfast Corporation v O.D. Cars Limited at 523.

Necessity and proportionality

26. Both these factors have to be satisfied before any deprivation of property is permitted under BL 105: see **HKSAR v Ng Kung Siu [1999] 3 HKLRD 907, at 925-926**. Only then will the deprivation be “lawful”. There is perhaps also a third requirement for legislation that seeks to cut down on rights: rationality. The deprivation must be rational: cf **R v Man Wai Keung (No.2) [1992] 2 HKCLR 207, at 217**; **Lee Miu Ling v AG [1996] 1 HKC 124, at 130**.

27. No convincing argument has been put forward by the Government to extend the application of the proposed new provisions to tunnels as opposed to other land. There is now ubiquitous coverage of mobile telephone network systems in [all BOT] tunnels. One fails in these circumstances to see the necessity or rationality of including tunnels in the proposed amendment, particularly when no or no proper compensation is payable. The greater public interest must surely be in abiding by the franchise agreements made between the Government and the tunnel companies. It is to be noted that it must have been on the basis of the rights that they would enjoy under these agreements that the tunnel companies made the substantial investments they did in the first place.

28. The burden is of course on the Government to demonstrate the necessity to restrict (or in this case deprive) pre-existing rights, rationality and also whether such restriction is proportionate to the aims sought to be achieved thereby: see HKSAR v Ng Kung Siu at 922.

BL 160

29. As HKSAR v Ma Wai Kwan David [1997] HKLRD 761 makes clear as regards BL 160, the theme is one of continuity. That Article, however, is not restricted to the laws that were in existence prior to the resumption of the exercise of sovereignty on 1.7.97. BL 160(1) applies also to “contracts....valid under the laws previously in force in Hong Kong”. The importance of this article to the present discussion is that it is declared in BL 160(2) that such contracts shall continue not only to be valid but are also to be “**recognised and protected**” by the Government. The rights, therefore, to which I have already alluded are contractual rights which the Government is obliged under BL 160 to recognise and protect, and certainly to honour. The Bill takes away these rights.

The contractual position

30. I mention this aspect only for the sake of completeness.

31. Given the rights which the tunnel companies enjoy under the terms of the existing franchise agreements with the Government, the passing of the Bill will inevitably result in the Government being in breach of contract.

.....

32. I see nothing further that I can usefully add. If there are any queries or if I can be of any further assistance, please do not hesitate to contact me.

Geoffrey Ma, S.C.

14th February, 2000

RE. TELECOMMUNICATION (AMENDMENT)

BILL 1999

OPINION

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REF. KAW/HJHW/M1100/00017

TUNNEL/OPINION

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Letterhead of Lovells

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Please telephone 852 2219 0888 if any pages are missing or illegible

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14 February 2000

Please see attached.

TELECOMMUNICATION (AMENDMENT) BILL 1999 (THE “BILL”)

SUMMARY OF

SOME KEY ISSUES ARISING OUT OF THE OPINION BY GEOFFREY MA, S.C. ON 14/2/2000

1. THE ISSUES

The relevant provisions of the Bill are various amendments to section 14 and the new section 36AA of the Telecommunication Ordinance (the “Ordinance”).

The proposed amendments to section 14 provides a statutory right of access to BOT tunnels by mobile communication operators and empowers the Telecommunications Authority (the “TA”) to determine a fee for such access.

The proposed section 36AA empowers the TA to direct a person to coordinate and cooperate with another person to share the use of any facility (including tunnels) owned or used by it.

The amendments will result in a situation whereby the tunnel companies can be compelled to allow access to telecommunications licensees in return for a fee which is ultimately determined not by commercial negotiation but by the TA, who is to apply a vague notion of reasonableness.

The existing rights of tunnel companies are the right to be in control of and enjoy without interference the tunnels which they operate and the right to charge a commercial fee for the use of the tunnels. These rights[, relating to radiocommunication installation,] will be taken away by the proposed amendments as far as licensees under the Ordinance are concerned. The issue is whether such amendments sought to be introduced by the Bill are constitutional or legal.

2. CONSTITUTIONALITY AND LEGALITY

The proposed amendments are at serious risk of being held unconstitutional under the Basic Law on the following reasons. The amendments, if enacted, will also cause the Government to be in breach of its franchise agreements with the tunnel companies.

2.1 The Basic Law

Article 105 of the Basic Law protects (and requires the Government to protect) the rights of persons to acquire and use property and the right to compensation for lawful deprivation of property. Such compensstion shall correspond to the real value of the property concerned and shall be paid without undue delay.

2.2 Meaning of “property” and tunnel companies’ existing rights

The rights of the tunnel companies to control and enjoy without interference the tunnels which they operate and to charge a commercial fee for the use of the tunnels are given and recognised by contract (relating to their franchise agreement with the Government) and statute (relating to those of various tunnel Ordinances) (the “Existing Rights”). These are rights within the definition of “property” in BL 105.

2.3 Circumstances the Existing Rights are taken away

The Existing Rights are expropriated or taken away by the proposed amendments in circumstances where:-

- (i) no or no adequate compensation is provided for; and
- (ii) it is questionable whether:-
 - (a) it is necessary in the public interest for such expropriation of property to take place; and
 - (b) the proposed amendments are proportionate in achieving the public interest (assuming there is such necessity).

2.4 Compensation to tunnel companies

As set out in paragraph 2.5, it is not free from doubt that the deprivation of tunnel companies' property is lawful. Even if it is accepted that it is a lawful deprivation for the purposes of BL 105, proper compensation must be paid to the tunnel companies.

There are no provisions in the Bill for compensation for the loss of the Existing Rights. There is no compensation for the loss of the right of tunnel companies to refuse consent for the installation of a facility in tunnels.

The criteria for a determination of fees is not on a commercial basis, but relies on vague and undefined notions of reasonableness. Under BL 105, compensation corresponding to "real value" of the property concerned must be paid to the tunnel companies. The "real value" (which should be equated with the market value) is a commercial fee, not one that is "fair and reasonable in all the circumstances of the case".

2.5 Necessity and proportionality

For the purposes of BL 105, the following two matters must be satisfied in establishing that the Bill succeeds in using "lawful" means in depriving the tunnel companies the Existing Rights:-

- (a) it is necessary in the public interest to deprive the tunnel companies the Existing Rights; and
- (b) the Bill uses proportionate means to achieve the public interest (assuming there is such necessity).

Given that there is currently ubiquitous [mobile communications] coverage as far as tunnels operated by the tunnel companies are concerned, it is difficult to see the justification for extending the "compulsory" nature of the proposed amendments to these tunnels. This is all the more so when the present position is one in which the Existing Rights are guaranteed by contract and statute. The greater public interest must be in abiding by the franchise agreements made between the Government and the tunnel companies, which have made substantial investment in the first place.

3. ARBITER OF THE FEE

It must be wrong for the arbiter of the fee to be the TA, rather than a more neutral body. The TA must have as one of its objects the promotion of telecommunications in Hong Kong. In the present instance, there is something inherently wrong in the arbiter of the compensation being the same body that makes the decision to authorise entry into the land in the first place.