

**Bills Committee on
Telecommunication (Amendment) Bill 1999
A Summary of the Administration's Response to Queries Raised by the
Legal Service Division on the
Telecommunication (Amendment) Bill 1999**

Issues	Queries	Administration's Response
<p>Nature of "notice in the Gazette" under proposed sections 7(3)(a), 7B(3)(a), 7C(1) and (4) <i>(Marked-up copy: p. 11 - 14)</i></p>	<p>Whether "notices in the Gazette" in the proposed sections are subsidiary legislation.</p>	<p>Notices in the proposed sections are not subsidiary legislation. To avoid any confusion on the nature of the notices, the Administration will propose a CSA to provide expressly that the relevant notices are not subsidiary legislation.</p>
<p>Publication in the Gazette the form of licence and licence conditions - proposed section 7(8) and 7B(6) <i>(Marked-up copy: p. 11 - 12)</i></p>	<p>Will the form of licence and licence conditions be published as subsidiary legislation as in the present legislation?</p>	<p>No. The present licensing framework whereby TA must incorporate the general conditions specified by the Telecommunication Regulations in issuing licences has been found to be inflexible and insufficient to cope with the rapid developments of the telecommunications industry. The new licensing regime proposed in the Bill will give TA the power to determine the form, validity period, conditions and fees of telecommunications licences other than exclusive licences and carrier licences.</p>

Issues	Queries	Administration's Response
<p>Disclosure of information by TA - proposed section 7I (<i>Marked-up copy : p. 16</i>)</p>	<p>(a) Will the person who is required to provide information be given the protection that he may not be compelled to produce any documents which he could not have been compelled to produce in civil proceedings before the court? Similar safeguards are provided in the Personal Data (Privacy) Ordinance (Cap. 486).</p> <p>(b) If the information requested by TA is the subject of a confidentiality agreement, can other parties to the agreement, other than the person required to supply the information under subsection (1), make representations to TA before TA makes a final decision to disclose the information?</p>	<p>(a) It is not intended that the licensee is required to produce privileged documents. The proposed section 7I is modelled on an existing licence condition.</p> <p>(b) It is an existing practice of TA to invite the person providing the information to make representation regarding disclosure. Proposed section 7I(4) requires TA to consider such a representation before deciding whether the information should be disclosed. When confidential agreements are involved, the licensee who provides the information has the liability to consult the parties to the agreements and take into account the interests of these parties in their representations.</p>

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	<p>(c) Factors to be considered by TA in considering whether the disclosure is in the public interest.</p> <p>(d) Will the Administration consider imposing restrictions on disclosure of information in line with section 101 of the UK Telecommunications Act 1984? (Copy of the section at Annex A)</p>	<p>(c) In determining whether the disclosure of information is in the public interest, TA will take into the following factors:</p> <ul style="list-style-type: none">(i) Government's policy objectives on telecommunications industry, i.e. availability of the widest range of quality telecommunications services to the community at reasonable cost; provision of telecommunications services in the most economically efficient manner possible; Hong Kong serving as the preeminent communications hub for the region now and into the next century;(ii) protection of consumer interest;(iii) encouraging the efficient investment in telecommunications infrastructure; and(iv) such other matters as TA reasonably believes to be relevant to the public interest. <p>(d) The Administration does not consider it necessary to make express provision modelled on section 101 of the UK Act. In its view, section 101 deals with protection of personal data which is already safeguarded by Cap. 486.</p>

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	<p>(e) If information supplied by a licensee consists of personal data collected by the licensee as defined in the Personal Data (Privacy) Ordinance, do the provisions of Cap. 486 and the data protection principles apply to such data?</p>	<p>(e) Cap. 486 is applicable to personal data collected by licensee.</p>
<p>Access to buildings and land - proposed section 14 (Marked-up copy : p. 26-29)</p>	<p>(a) Criteria for determining "public interest" in proposed section 14(1B).</p> <p>(b) Scope of "person having a lawful interest in the land".</p>	<p>(a) In determining whether the authorization is in the public interest, TA will take into consideration the factors which he will consider in deciding whether information should be disclosed, including the interest of tunnel users and the investment incentive in HK's infrastructure.</p> <p>(b) "Person having a lawful interest in the land" would cover legal and equitable owners, tenants, licensees, occupiers, etc. Persons having a lawful interest in the neighbouring land would not be entitled to compensation. They, however, may be able to claim compensation or sue for damages under common law or other applicable legislation. In any case, the Administration does not envisage that the exercise of powers under section 14 is likely to cause damage to neighbouring land.</p>

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	<p>(c) Scope of "physical damage".</p> <p>(d) Why is damage restricted to physical damage? In other Ordinances , e.g. Electricity Networks (Statutory Easements) Ordinance (Cap. 357) and Sewage Tunnels (Statutory Easements) Ordinance (Cap. 438) where statutory easements and other rights over land are created in favour of another person, compensation is payable to persons who have suffered loss or damage to land and things on land, including any diminution in the value of the land.</p>	<p>(c) "Physical damage" includes physical damage to fixtures and chattels found on land. The Administration will move a CSA to cover chattels found on land. Persons suffering physical damage are entitled to "full compensation", i.e. compensation for the entirety of the damage and not any proportion thereof.</p> <p>(d) The Administration's policy is that all consumers in Hong Kong should have unimpeded access to the full range of public telecommunications services of their choice and clear stipulation of payment of full compensation for physical damage only would help meet this policy intent. The authorization under section 14(1) and (1A) is intended to grant the "utility" status to network operators to operate FTNS and subscription television services and to mobile telecommunications operators to place and maintain radiocommunications installation. These are essential utilities which should be provided to the general public; compensation for depreciation in the value of any interest in the land is not applicable. However, the mobile operators will be subject to payment of a reasonable access fee to persons having a lawful interest in the land.</p>

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	<p>(e) How is the authorization of access to buildings and land consistent with Article 105 of the Basic Law which provides that the HKSAR shall in accordance with law, protect the rights of individuals and legal persons to the use of property?</p> <p>(f) Can a person having a lawful interest in the land concerned make representations to TA before TA exercises the powers under subsections (1) or (1A)?</p>	<p>(e) The proposed amendments to section 14 of the Telecommunication Ordinance are consistent with Article 105 of the Basic Law. Any effect that the proposed amendments may bring about regarding the right/interest of individuals and legal persons to use their property is sufficiently counter-balanced by public interest considerations.</p> <p>(f) Under subsection (2), the TA or the licensee is required to give reasonable written notice to landowners concerned of the intention to enter the land. In case the affected landowners lodge complaints with TA, TA would consider their representations in accordance with natural justice and the procedure prescribed under section 6A(3). TA will allow reasonable opportunity for the persons affected to make representations before granting authorization under section 14(1A).</p>

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<p>Right of access to public telecommunications services - Proposed section 19B <i>(Marked-up copy : p.31)</i></p>	<p>Reason for applying subsection (1) to existing agreements, deeds of mutual covenants or commercial contracts</p>	<ul style="list-style-type: none">● The policy objective of the proposed section is to ensure that the public would have access to the public telecommunications service of their own choice so that the benefits of competition can reach all sectors of the community. Existing agreements, deeds of mutual covenants or commercial contracts may have terms that restrict the rights of residents or occupiers to have such access.● This is not a retrospective provision as the restrictive terms will be void only from the commencement of the provision● It is not intended that parties to the agreements, deeds or contracts should be entitled to recover any loss or damage from the Government.

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<p>Orders made under proposed sections 32I(1), 32J(4) and 32K(6) and clause 27(11) <i>(Marked-up copy : p. 42-44, Blue Bill : p.C2119 for clause 27(11))</i></p>	<p>Whether orders made under those provisions are subsidiary legislation</p>	<p>Orders made under proposed section 32J(4) are not intended to be subsidiary legislation while orders made under proposed sections 32I(1), 32K(6) and clause 27(11) are subsidiary legislation. To avoid any confusion over the nature of the orders, the Administration will move a CSA to provide expressly which order is subsidiary legislation.</p>
<p>Interference - proposed section 32J(7) <i>(Marked-up copy : p. 43)</i></p>	<p>(a) What are the grounds for requesting access to premises, vessel, aircraft or vehicle and requesting permission to examine or test an apparatus?</p> <p>(b) Reason for providing for the power to confiscate apparatus found in the premises, vehicle, aircraft or vessel as there is already a general power of forfeiture under section 36 of the Telecommunication Ordinance</p>	<p>(a) It is an implied obligation that the request for access and permission envisaged in subsection (7)(a) and (b) is for the purpose of carrying out the object of section 32J. The Administration believes that the phrase "unreasonably refused" used in the proviso to subsection (7) would require the magistrate to consider and be satisfied that TA's request made under subsection (7)(a) or (b) was reasonable.</p> <p>(b) Proposed section 32J is intended to grant a power to confiscate for the purpose of stopping any unlawful interference detected from the inspection immediately. The general power of forfeiture under section 36 would necessitate another application to court for a forfeiture order that may delay any prompt action, as may be required in special circumstances.</p>

Issues	Queries	Administration's Response
<p>Inspection of records, documents and accounts - proposed section 35A (Marked-up copy : p. 46)</p>	<p>(a) Purposes for which copies and extracts of documents taken from the licensee's premises will be used.</p> <p>(b) Can TA disclose records, documents and accounts obtained?</p> <p>(c) Are privileged documents required to be produced?</p>	<p>(a) The copies and extracts of documents will be for TA to consider whether the licensee has been operating in compliance with the Telecommunication Ordinance and licence conditions. They will also be used as evidence of contravention in case TA needs to take any further action against the licensee.</p> <p>(b) It is not intended that TA will disclose records, etc. obtained under this section.</p> <p>(c) TA does not intend to compel the licensee to produce any documents which he could not have been compelled to produce in civil proceedings before the court.</p>
<p>Interconnection - proposed section 36A (Marked-up copy : p. 47)</p>	<p>(a) Criteria for determining "public interest" in subsection (2).</p>	<p>(a) The "public interest" test for interconnection has been explained in the Guidelines to Assist the Interpretation and Application of the Interconnection Provisions of the Telecommunication Ordinance and the FTNS Licence issued under section 36A(8) of the Ordinance. An extract from the Guidelines with regard to the public interest is at Annex B. The "public interest" test is only applicable where TA decides to initiate the determination in the absence of a request.</p>

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	<p>(b) In taking the initiative to make determination for interconnection in the absence of a request, does TA have to be "satisfied" that it is in the interest of the public to do so?</p>	<p>(b) "To be satisfied that it is in the public interest" requires a higher standard that "to consider that it is in the public interest". Under proposed section 14(1B), TA should be satisfied that the authorization of access is in the public interest before he can grant the authorization. As regards proposed section 36A(2), given that interconnection is an internationally recognized means to achieve a competitive environment for the telecommunications industry, the Administration proposes a lower standard, i.e. interconnection may be determined if he considers that it is in the public interest to do so.</p>
<p>Clause 27(11) of the Bill <i>(Blue Bill - p.C2119)</i></p>	<p>Scope of the amendment and how it is effected.</p>	<p>The amendment to "telecommunication" or "radiocommunication" is restricted to amending those terms to "telecommunications" and "radiocommunications". As the amendments in question are editorial in nature and would not in any way affect the operation of the Ordinances to be amended, the Administration proposes to make the amendments by way of subsidiary legislation, i.e. by order rather than a bill.</p>

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<p>Consequential amendments - Schedule 1 to the Bill (<i>Blue Bill - p. C2121</i>)</p>	<p>(a) Given that proposed sections 32J and 32K will replace certain provisions in the Telecommunication Regulations (Cap. 106 sub. leg.) and in the light of the proposed repeal of section 37(1)(h) and (i) of the Telecommunication Ordinance, should consequential amendments be made to repeal the overlapping provisions in the Regulations? Will the forms of licences currently set out in Schedule 3 to the Regulations remain after proposed sections 7, 7A and 7B have come into operation?</p> <p>(b) Reason for repealing the Charges for Radiotelegrams Order, Telecommunication (Closed Circuit Television Systems) Regulations and Telecommunication (Cable and Wireless (Hong Kong) Limited) (Exemption from Licensing) Order.</p>	<p>(a) The overlapping provisions in the Telecommunication Regulations and the forms of licences in Schedule 3 to the Regulations will be repealed. The existing Regulations are being reviewed and the necessary consequential amendments will be proposed by way of Amendment Regulation. This exercise will be synchronized with the commencement of the Bill.</p> <p>(b) The subject matter of the Charges for Radiotelegrams Order is governed by conditions of the FTNS Licence held by Hong Kong Telephone Company Limited, Hong Kong Telecom International Limited and Hong Kong Telecom CAS Limited. This Order is therefore obsolete.</p> <ul style="list-style-type: none"> ● The Telecommunication (Closed Circuit Television Systems) Regulations are obsolete and have not been enforced for many years. ● The subject matter of the Telecommunication (Cable & Wireless (Hong Kong) Limited) (Exemption from Licensing) Order is now covered by the Telecommunication (Fixed Telecommunication Network Services) (Exemption from Licensing) Order.

Issues	Queries	Administration's Response
Appeal mechanism	Is judicial review an appropriate and adequate appeal mechanism given that it is concerned with reviewing, not the merits of the decision in respect of which application for judicial review is made, but the decision-making process itself?	The existing system whereby appeals against TA's decisions are by means of judicial review has worked well and has general support in the telecommunications industry. The Administration does not propose any change to the present arrangements. In fact, there are requirements in the Bill for TA to consult and issue guidelines on the exercise of his power and to give reasons in writing for his decision. This ensures that TA's powers are subject to sufficient public scrutiny.

Encl.

Prepared by

Legal Service Division
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TELECOMMUNICATIONS ACT 1984 s 101

101 General restrictions on disclosure of information

(1) Subject to the following provisions of this section, no information with respect to any particular business which—

- (a) has been obtained under or by virtue of the provisions of this Act; and
- (b) relates to the private affairs of any individual or to any particular business,

shall during the lifetime of that individual or so long as that business continues to be carried on, be disclosed without the consent of that individual or the person for the time being carrying on that business.

(2) Subsection (1) above does not apply to any disclosure of information which is made—

- (a) for the purpose of facilitating the performance of any functions assigned or transferred to the Secretary of State, the Director or the Commission by or under this Act;
- (b) for the purpose of facilitating the performance of any functions of any Minister, any Northern Ireland department, the head of any such department, the Director General of Fair Trading or a local weights and measures authority in Great Britain under any of the enactments specified in subsection (3) below;
- (c) in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings;
- (d) for the purpose of any civil proceedings brought under or by virtue of this Act or any of the enactments specified in subsection (3) below; or
- (e) in pursuance of a Community obligation.

(3) The enactments referred to in subsection (2) above are—

- (a) the Trade Descriptions Act 1968;
- (b) the 1973 Act;
- (c) the Consumer Credit Act 1974;
- (d) the Restrictive Trade Practices Act 1976;
- (e) the Resale Prices Act 1976;
- (f) the Estate Agents Act 1979; . . .
- (g) the 1980 Act;
- [(h) the Consumer Protection Act 1987].

(4) Nothing in subsection (1) above shall be construed—

- (a) as limiting the matters which may be published under section 48 above or may be included in, or made public as part of, a report of the Director or of the Commission under this Act; or
- (b) as applying to any information which has been so published or has been made public as part of such a report.

(5) Any person who discloses any information in contravention of this section shall be guilty of an offence and liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

NOTES

Commencement. See the note to s 93 ante.

The word "and" at the end of sub-s (3)(f) was repealed by the Consumer Protection Act 1987, s 48(3), Sch 5, and sub-s (3)(h) was added by s 48(1) of, and Sch 4, para 9(2) to, that Act.

Sub-s (1): Business . . . carried on. See the note "Carrying on any business" to s 53 ante.

Sub-s (2): Secretary of State. See the note to s 1 ante.

Director General of Fair Trading. See the note to s 47 ante.

Local weights and measures authority; Great Britain. See the notes to s 30 ante.

Community obligation. For meaning, see the European Communities Act 1972, Sch 1, Pt II, Vol 17, European Communities, as applied by the Interpretation Act 1978, s 5, Sch 1, Vol 41, title Statutes.

Sub-s (5): Person. See the note to s 3 ante; and as to offences by bodies corporate, see also s 102 post.

Shall be . . . liable, etc; summary conviction; conviction on indictment; fine. See the notes to s 5 ante.

Definitions. For "the Commission", see s 106(1) post; for "the Director", see s 1(1) ante (and s 106(1) post); for "statutory maximum", see s 106(2) post.

Trade Descriptions Act 1968; Consumer Protection Act 1987. See Vol 39, title Sale of Goods and Consumer Protection.

1973 Act. I.e. the Fair Trading Act 1973, Vol 47, title Trade and Industry (Pt 1); see s 106(1) post.

Consumer Credit Act 1974. See Vol 11, title Consumer Credit.

Restrictive Trade Practices Act 1976; Resale Prices Act 1976. See Vol 47, title Trade and Industry (Pt 1).

Estate Agents Act 1979. See Vol 1, title Agency.

1980 Act. I.e. the Competition Act 1980, Vol 47, title Trade and Industry (Pt 1); see s 106(1) post.

Extract from

**GUIDELINES TO ASSIST THE
INTERPRETATION AND APPLICATION OF
THE INTERCONNECTION PROVISIONS
OF THE
TELECOMMUNICATION ORDINANCE (CAP. 106)
AND
THE FTNS LICENCE**

*Office of the Telecommunications Authority
Hong Kong
June 1995*

THE BASIS FOR TA DETERMINATIONS

6. Essentially, the TA will apply a public interest test in deciding whether or not he should intervene to make regulatory determinations on interconnection matters. "Interconnection" is defined as having the following components:

- the provision of physical facilities to enable two networks to communicate with each other and transfer communications across their boundaries; and/or
- the carriage of services for an interconnecting licensee within networks, and across network boundaries.

7. The public interest will be determined having regard to the following criteria and their application to the interconnection matters under consideration:

- Government policy objectives for the telecommunications industry namely -
 - that the widest range of quality telecommunications services should be available to the community at reasonable cost;
 - that telecommunications services should be provided in the most economically efficient manner possible; and
 - that Hong Kong should serve as the preeminent communications hub for the region now and into the next century;
- consumer interest;
- encouraging the efficient investment in telecommunications infrastructure;
- the nature and extent of competition among the parties to interconnection, and their ability to compete with each other fairly; and
- such other matters particular to the circumstances as the TA reasonably believes are relevant to the public interest.