

立法會
Legislative Council

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(These minutes have been seen by
the Administration and cleared
with the Chairman)

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Bills Committee on Broadcasting Bill

Minutes of Meeting
held on Saturday, 6 May 2000 at 9 am
in Conference Room A of the Legislative Council Building

Members Present : Hon Mrs Selina CHOW LIANG Shuk-ye, JP (Chairman)
Hon Cyd HO Sau-lan
Hon MA Fung-kwok
Hon SIN Chung-kai
Hon Emily LAU Wai-hing, JP
Hon Andrew CHENG Kar-foo

Members Absent : Hon David CHU Yu-lin
Hon Ronald ARCULLI, JP
Hon YEUNG Yiu-chung
Hon CHOY So-yuk
Hon FUNG Chi-kin

Public Officers Attending : Mr Eddy CHAN
Acting Deputy Secretary for Information Technology
and Broadcasting (1)

Mr Eddie MAK
Principal Assistant Secretary for Information Technology
and Broadcasting (A)

Ms Ava CHIU
Assistant Commissioner for Television and Entertainment
Licensing (Broadcasting)

Mr Geoffrey A FOX
Senior Assistant Law Draftsman, Department of Justice

Clerk in Attendance : Mrs Constance LI
Chief Assistant Secretary (2) 2

Staff in Attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Miss Betty MA
Senior Assistant Secretary (2) 1

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I. Clause-by-clause examination

In view of the tight legislative timetable for the scrutiny of the Bill, the Chairman suggested and members agreed to concentrate on the clause-by-clause examination of the Bill at the meetings on 6 and 9 May 2000, while outstanding policy issues would be dealt with at subsequent meetings of the Bills Committee.

2. The Bills Committee then continued clause-by-clause examination of the Bill from clause 10(6) onwards.

Clause 10 - Grant of licence

3. Mr Andrew CHENG noted from clause 10(6) that in the case of a licence granted by the Chief Executive in Council (CE in C), the Broadcasting Authority (BA) would "fairly reflect the representations on behalf of a licensee" to CE in C, in relation to any proposed variation of licence conditions. He was concerned that the arrangement would give rise to a conflicting role of BA. He therefore asked whether the licensee would be allowed to make representations to CE in C before a decision was taken on any proposed variation of licence conditions.

4. Acting Deputy Secretary for Information Technology and Broadcasting (DS(ITB)(Ag)) responded that BA was required by legislation to reflect fairly the representations to CE in C. The arrangement had been in operation for a long time and no problems had been encountered so far. He added that experience showed that BA would normally reach agreement with the licensees on the proposed variation of licence conditions beforehand. The provision in clause

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10(6) was only to provide an opportunity for the licensee to make representations to further safeguard his interests.

5. Senior Assistant Laws Draftsman (SALD) added that a licensee could also submit representations directly to CE in C. The provision only required BA to fairly reflect to CE in C any representations received, especially if technical input was required for the analysis or the case. Moreover, a licensee aggrieved by a decision of CE in C could apply for judicial review of the decision. Assistant Legal Adviser 3 (ALA3) agreed with SALD's interpretation of clause 10(6).

6. Mr Andrew CHENG maintained the view that the Administration should consider providing an independent appeal mechanism for licensees on the proposed variation of licence conditions. To enhance the transparency of the appeal process, he asked whether public hearings would be held in the consideration of representations. Ms Cyd HO expressed similar concerns.

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7. To address members' concerns, the Chairman requested the Administration to provide a response to the suggestion of an independent appeal mechanism.

8. On the prohibition of transfer of licence in clause 10(8), DS(ITB)(Ag) said that although the licences could not be transferred, the voting shares of the companies holding the licences were transferable subject to other statutory or regulatory requirements.

Clause 11 - Extension or renewal of licence

9. The Chairman noted that the Hong Kong Journalist Association had suggested in its submission [Paper No. CB(2)1572/99-00(01)] that public hearings should be held for the grant, extension and renewal of licences.

10. DS(ITB)(Ag) said that under existing practice, public hearings were conducted for extension and renewal of licences. However, with a liberalised market, there would be an increase in the number of television programme service licences of varying durations. For example, Non-Domestic and Other Licensable service licences would have a relatively shorter duration. It might not be practicable to introduce mandatory public hearings for the extension and renewal of licences of these categories.

11. The Chairman suggested that consideration should be given to holding public hearings for the extension and renewal of Domestic Free and Domestic Pay television programme services so that the public could have a chance to comment on the performance of the licensees. DS(ITB)(Ag) agreed to consider the suggestion.

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12. Ms Cyd HO opined that public hearings should also be held for the extension or renewal of Other Licensable service licences. She was concerned that the licensee might not be given sufficient notice in relation to the extension and renewal of licence.

13. DS(ITB)(Ag) responded that the licensee would be given sufficient notice on the extension or renewal of licence. Under the existing practice, BA would submit recommendations to CE in C not later than 12 months before the expiry of a licence.

14. Ms Cyd HO expressed concern that as the notice period was not specified in law, BA might take an unduly long period to prepare its recommendations to CE in C, leaving little time for the licensee to respond to the decision. DS(ITB)(Ag) responded that as the licence periods for the Non-Domestic and Other Licensable service categories would vary, it would be difficult to specify the notice period for each case in the legislation.

15. To address Ms HO's concern, the Chairman suggested that the clause could specify that the licensee would be given "reasonable notice" in relation to the extension and renewal of licence, while the guidelines could give the notice periods for different categories of licences. DS(ITB)(Ag) agreed to consider the suggestion.

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Clause 12 - Determination of whether television programme service primarily targets Hong Kong

16. The Chairman enquired about the basis for making a determination of whether a television programme service primarily targeted Hong Kong. DS(ITB)(Ag) responded that BA would take into account factors such as the source of advertising revenue, language of broadcasting, footprint of the satellite and sources of subscription. He said that there were well established criteria for making such determination. SALD added that BA could also issue guidelines in this respect. The Chairman was of the view that to provide legal backing for BA's decision, the Administration should consider specifying in clause 12 the criteria or basis for making a determination.

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17. Referring to ALA3's comment that clause 12(4) had not provided for the licensee to make representations where a new determination was made by BA, SALD agreed to consider making appropriate amendments to clause 12(4).

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Clause 13 - Prohibition on anti-competitive conduct

18. Mr Andrew CHENG enquired about the "prescribed grounds" for granting exemption to the competition provisions. DS(ITB)(Ag) said that the grounds would be prescribed by regulation made by CE in C under clause 41.

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Such regulation was subsidiary legislation and would be subject to the negative vetting procedure of the Legislative Council (LegCo). While there was no such regulation at the moment, the prescribed grounds would normally be related to the promotion of technical progress of the television broadcasting industry or the setting of technical standards for the industry.

19. Mr MA Fung-kwok expressed concern that unreasonable conditions might be included in the exclusive contracts between broadcasters and artistes. He asked whether BA would issue specific guidelines in this respect.

20. DS(ITB)(Ag) responded that BA would issue guidelines on anti-competitive conduct as soon as possible. However, it would be difficult for BA to issue specific guidelines for all scenarios as the contract terms might vary in individual cases. As competition legislation was new in Hong Kong, BA would have to make reference to the enforcement experience in other jurisdictions in drawing up the guidelines on anti-competitive conduct.

21. Mr MA Fung-kwok said that the industry was very concerned about the draft guidelines and urged for early publication of the guidelines. Mr SIN Chung-kai considered that the Administration should consult the industry before promulgating the guidelines. Ms Cyd HO said that the draft guidelines should also be made available for the scrutiny of the Bills Committee before concluding the deliberations of the Bill.

22. In view of members' concern, the Chairman advised the Administration to set a timeframe for the preparation of the guidelines which should be made available for consultation with LegCo and the public. In response, DS(ITB)(Ag) agreed to provide a paper on the scope of the draft guidelines as soon as practicable.

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23. The Chairman reminded the meeting that the Cable & Wireless HKT Limited and Cable & Wireless HKT VOD Limited had suggested in its submission [Paper No. CB(2)2094/99-00(04)] that clause 13(6) should be deleted. She explained that the effect of the proposal would mean that amendments to the list of exemptions would only be effected by way of an amendment bill. The Chairman said that she personally did not agree that the list of exemptions in clause 13(5) should be expanded as this would undermine the effectiveness of the competition provisions.

24. Mr Andrew CHENG suggested that amendments to the exemption list should be subject to the positive vetting procedure of LegCo. To facilitate members' consideration of the matter, he requested the Administration to provide information on overseas experience. DS(ITB)(Ag) responded that the competition provisions in the Bill were modelled on the European Union legislation. He explained that the negative vetting procedure would provide

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more flexibility for amendments to be made in response to technological changes.

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25. Mr SIN Chung-kai did not support amending the list of exemption by the negative vetting procedures of LegCo. He also had doubts on the need for clause 13(6). The Administration agreed to consider members' views on clause 13(6).

26. The Chairman referred to the suggestion of the Consumer Council that "wholly" or "substantially" should be added to the definition of "produced" in clause 13(5) in order to differentiate such programmes from those programmes acquired by a licensee with only minimal alterations [Paper No. CB(2) 2094/99-00(04)]. She also noted that the Administration had yet to respond to the other concerns raised by the Cable & Wireless HKT Limited and Cable & Wireless HKT VOD Limited on clause 13(5) [Paper No. CB(2)1504/99-00(09)] and the International Federation of the Phonographic Industry (Hong Kong Group) Limited on clause 13(1).

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27. In response, DS(ITB)(Ag) undertook to provide a consolidated response to the concerns on the competition provisions.

Clause 14 - Prohibition on abuse of dominance

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28. Miss Emily LAU expressed concern about the enforcement of clause 14(3). She urged the Administration to provide the guidelines on the criteria for the test of dominance. DS(ITB)(Ag) undertook to provide an outline of the draft guidelines as soon as practicable.

29. Mr Andrew CHENG asked about the Administration's response to the concerns relating to "prohibition of cross ownership" raised by the Consumer Council in its second submission [Paper No. CB(2)1674/99-00(02)]. DS(ITB)(Ag) advised that the Administration's response was given in Paper No. CB(2)1774/99-00(01). He stressed that cross-media ownership was within the meaning of "disqualified persons" stipulated in Schedule 1 to the Bill, and exemptions could only be granted by CE in C after taking into account the public interest considerations.

30. On the determination of abuse of dominance under clause 14(5), Mr SIN Chung-kai asked whether an agreement for exclusive service between a dominant Domestic Free service licensee and a licensee in the other category would be a breach of clause 14. The Chairman remarked that such conduct might not be in breach of the provision unless it could be proved that there was a discrimination in the supply of services to other competitors. DS(ITB)(Ag) said that BA would need to consider each individual case in forming an opinion as to whether a dominant licensee had abused its position.

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31. Mr SIN Chung-kai then sought clarification on the interpretation of clause 14. DS(ITB)(Ag) responded that in determining whether a licensee had abused its dominant position, BA had to assess in detail whether the licensee was in a dominant position and whether he had engaged in conduct which had the purpose or effect of preventing or substantially restricting competition in a television programme service market, with regard to factors listed in clauses 14(3) and 14(5).

32. Miss Emily LAU considered that the criteria adopted by BA in the determination should be clearly spelt out in the guidelines. DS(ITB)(Ag) responded that the guidelines would cover the consideration factors in clauses 14(3)(a) - (d).

33. The Chairman said that as the test of dominance was a complicated issue, the draft guidelines should be made available as soon as practicable for early consultation with the industry and LegCo. The Administration noted the concerns of the Bills Committee.

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Clause 15 - Notice to licensee to cease certain conduct

34. In response to Miss Emily LAU, DS(ITB)(Ag) said that a licensee who did not cease certain conduct as directed by BA would be liable to pay financial penalty under clause 27.

35. Miss Emily LAU then asked whether there was any appeal channel for the licensee to raise objection. DS(ITB)(Ag) responded that the licensee could appeal to CE in C in accordance with clause 33 or seek judicial review.

Clause 16 - Separate accounting

36. Members did not raise any queries.

Clause 17 - Service provision requirements

37. In reply to the Chairman, DS(ITB)(Ag) explained that the purpose of the exemption in clause 17(2) was to provide BA with the discretion to waive the licensee from complying with certain requirements where necessary. He assured members that BA would exercise its discretion very reasonably.

38. The Chairman advised that the Consumer Council suggested in its submission [Paper No. CB(2)1504/99-00(04)] that there should be public consultation on any exemption proposed by BA in respect of a Domestic Free or Domestic Pay service licence.

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39. DS(ITB)(Ag) responded that it might not be appropriate to conduct public consultation on exemptions concerning the provision of such service in very remote areas due to technical constraints.

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40. Noting that the exemptions under clause 17(2) were largely related to technical constraints, the Chairman agreed that public consultation might not be appropriate for the purpose of this clause. However, the Administration should ensure that the relevant information would be readily accessible by the public. Miss Emily LAU agreed with the Chairman's suggestion.

41. To address the concern that clause 17(2) should not be used to delay the provision of service to viewers in Hong Kong as stipulated in the licence conditions, the Chairman suggested that the Administration should consider specifying the grounds for exemption under clause 17(2). DS(ITB)(Ag) noted the Chairman's suggestion. He said that BA had never invoked the power under clause 17(2) before. He advised that a licensee must comply with the licence conditions and delays or non-compliance could lead to forfeiture of the performance bond.

42. Responding to Mr Andrew CHENG, DS(ITB)(Ag) advised that the provision of cabling network for Domestic Pay television programme service was regulated under the Telecommunication Ordinance.

Clause 18 - Television programmes for schools

43. Responding to the Miss Emily LAU, DS(ITB)(Ag) said that the television programmes for schools supplied by Government referred to the education television (ETV) programmes produced by RTHK. The drafting of clause 18 was modelled on the provision in the existing legislation.

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44. Miss Emily LAU pointed out the clause 18 appeared to cover a wider scope than ETV. She therefore suggested that the drafting should be improved to confine the scope of clause 18 to those educational programmes related to school subjects. SALD agreed.

Clause 19 - Television programme service locking device

45. Members noted that the industry generally supported the proposal.

Clause 20 - Restrictions on persons not regarded as fit and proper

46. Mr Andrew CHENG asked about the criteria for assessing whether a licensee remained a fit and proper person for the purpose of the Bill. DS(ITB)(Ag) responded that the criteria for the fit and proper test were laid down in clause 20(3). In making the assessment, BA would consider the

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applicant's previous records, especially those concerning trust and candour. SALD added that as the applicant would be a company, the consideration factors would be related to the company concerned. At the request of Miss Emily LAU, SALD agreed to provide more information to illustrate the fit and proper test.

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47. Mr Andrew CHENG sought clarification as to whether the licensee had the responsibility to inform BA about changes in the business records under clause 20(2). Miss Emily LAU also asked whether a notification mechanism would be put in place for the purpose.

48. DS(ITB)(Ag) said that the licensee should report to BA changes which might have implications on the "fit and proper" test. SALD added that BA could specify the frequency for a licensee to update its information in the specified form under clause 20(2). He said that clause 40 of the Bill empowered BA to specify forms for the purpose of the Bill. A licensee was required to make a statutory declaration on the information provided. Provision of false information would be a criminal offence.

49. At the suggestion of Mr Andrew CHENG, DS(ITB)(Ag) agreed to consider making it a statutory requirement under clause 20 for the licensees to report any changes in the business records.

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50. Miss Emily LAU asked about the arrangement if an existing licensee did not satisfy the fit and proper test proposed in the Bill. DS(ITB)(Ag) advised that under section 4(4) of Schedule 8 (Transitional and Savings Provisions), a person who was lawfully exercising control of a corporation holding a licence before enactment of the Bill could continue to exercise control of the corporation, subject to the restriction that he could not increase the interest he had in that corporation in his capacity.

Clause 21 - Limitations on agreements by licensee

51. Miss Emily LAU referred to the submission from the Turner International Asia Pacific Limited [Paper No. CB(2)1504/99-00(07)] which suggested that the Administration should incorporate the principles of the competition provisions under clause 21. Miss LAU asked about the Administration's response to the suggestion.

52. DS(ITB)(Ag) said that clause 21 was to prevent interference in the provision of services by licences and was not related to the competition provisions. SALD supplemented that clause 21 sought to ensure the editorial independence of a licensee.

53. The Chairman commented that the drafting of clause 21(1) was misleading and it gave the impression that the provision was related to anti-

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competition conduct. She considered that clause 21(1) was unnecessary if the intention was to uphold editorial independence. Miss Emily LAU agreed with the Chairman and suggested that the title of clause 21 should also be amended to reflect the intention of the clause. DS(ITB)(Ag) agreed to consider these suggestions.

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Clause 22 - General requirements as to television programme services

54. Members noted that the Administration agreed to consider the suggestions from the Consumer Council and other deputations on clause 22.

55. In response to Mr Andrew CHENG, DS(ITB)(Ag) said that BA would issue Codes of Practice modelling on the existing version. Generally speaking, the degree of regulation for the different categories of service licence would depend on the target audience and the degree of viewer control over the service received. In this connection, Domestic Free services would continue to be subject to more stringent control. A lesser degree of programme regulation would apply to Domestic Pay services which would be subject to the mandatory requirement of a parental locking system so that the subscriber would exercise control over the type of programmes to be viewed. In line with existing practice, minimal regulation would be imposed on Non-Domestic services and Other Licensable services.

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56. To facilitate members' further deliberations of the proposed regulatory requirements, the Chairman requested and DS(ITB)(Ag) agreed to provide a comparison on the existing and proposed Codes of Practice highlighting changes to be proposed.

Other concerns

57. Mr SIN Chung-kai asked about the regulation of radio broadcasting. DS(ITB)(Ag) said that sound broadcasting was not included in the Bill pending public consultation and formulation of policy on digital broadcasting. Where necessary, an amendment bill could be introduced to include sound broadcasting in the regulatory regime for broadcasting services.

Date of next meeting

58. The Bills Committee agreed to hold the next meeting on 9 May 2000 at 8:30 am.

59. There being no other business, the meeting ended at 12 noon.

Legislative Council Secretariat

5 October 2000