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Letterhead of CABLE & WIRELESS H K T

Submission of Comments on the Broadcasting Bill by CWHKT

A. Policy Aspects of the Broadcasting Bill

CWHKT embraces the Government's policy objectives of broadening programme choice, encouraging innovation and promoting Hong Kong as a regional broadcasting and communications hub. CWHKT welcomes and supports the Government's initiative, in drafting and proposing this Bill, to identify and address the implications of convergence for the regulatory regime for the communications industry. CWHKT considers that this Bill marks an important step in rationalising the current licensing structure by separating the regulation and licensing of transmission facilities from the regulation and licensing of programme service provision in order to foster a technology and transmission neutral regime.

In particular, CWHKT fully supports the following proposals in the Bill:

1. With the liberalization of the broadcasting industry, CWHKT supports the proposal in the Bill to remove royalty payments to enhance market competition.

2. The following changes would facilitate market liberalization and encourage competition to bring in more consumer benefits:

- The deletion of the dominant Fixed Telecommunications Network Service licensee as a disqualified person.

- he lifting of the restriction on voting control by non-residents for domestic pay television programme service licensees.

- The lifting of the restriction to allow subsidiary companies to become domestic pay television programme service licensees.

- With the introduction of the locking device, the relaxation of the programme and advertising standards in the codes of practice for television services other than the domestic free television services.

However, CWHKT would like to register the following policy concerns arising from the Bill:

1. It is noted that there is no mechanism for the approval of transfer of licences, and, in fact clause 10(8) of the Bill prohibits such a transfer. This marks a significant departure from many existing licences including the current programme service licence, satellite uplink and downlink licence and the subscription television broadcasting licence. There is no discussion in either the Explanatory Memorandum accompanying the Bill or the Brief to the Legislative Council on its introduction of any policy intention behind this restriction. CWHKT takes the view that given the dynamic commercial environment, the Bill should not categorically bar the transfer of licences but procedures including the requisite approval steps should be stipulated to cater for the requirements of commercial flexibility in the transfer of licences.

2. CWHKT notes that the policy intention behind the issuance of licences for "other licensable television programme services" is to cover small scale, niche or localized television programme services targeting specific viewer groups. While CWHKT recognizes the need for this type of licence for target markets like hotels or specific residential estates, it is CWHKT's view that the audience ceiling available to any one licensee by means of the accumulation of "other licensable television programme service" licences should not be increased by 40 times to up to 200,000 premises, as this represents a significant portion of the broadcasting market. It has been the experience in Hong Kong that some existing pay television service providers only reached a level of customer penetration of 200,000 a long time after the service launch. CWHKT holds the view that this increased audience maximum limit of 200,000 premises for the "other licensable television programme services" would provide a means for the licensee to circumvent the 4-tier regulatory system proposed by the Bill.

3. It is proposed in the Bill that television services receivable in Hong Kong but uplinked from places outside Hong Kong would continue to be exempted from the application of the Bill. With the advent of technology and the increasing commercial corporate mergers/alliances at both the regional and international level, it is anticipated that the competition battlefield would not be confined to the local territory but would extend to vigorous competition at the broadcasting and communications hub level. It is therefore CWHKT's view that the BA's decisions on whether those programmes are primarily targeting Hong Kong are important in protecting the interest of the broadcasting licensees who have made substantial investments in Hong Kong.

4. Currently there are television broadcasting licensees who uplink their services from Hong Kong for reception overseas. While these licensees would only be required to have their own broadcasting licences two years after the Broadcasting Ordinance has come into effect, CWHKT is of the view that the licence terms should not be too onerous to deter the existing or even potential broadcasters from hubbing or uplinking their programmes in Hong Kong.

B. Legal/Drafting Aspects of the Broadcasting Bill

1. Given the proposals to grant to the Telecommunications Authority (TA) concurrent powers under the Broadcasting Bill ("the Bill") and the Telecommunication Ordinance (*Cap. 106*), as it is proposed to be amended under the Telecommunication (Amendment) Bill 1999 ("Telecommunication Bill"), and given that both Bills are currently before Bills Committees of the Legislative Council, CWHKT takes the view that the Legislative Council should ensure that there are no substantial differences between the powers, duties and obligations of the TA under the two pieces of legislation.

2. Otherwise, great uncertainty will occur in the broadcasting and communications industry as to the jurisdictional issues, overlaps and conflicts that will inevitably arise. In this regard, CWHKT submits that the Bills Committee considering the Bill should take notice of the currently proposed Committee Stage Amendments of the Telecommunication Bill (CSAs). In particular, for example, clause 11 of the Bill should be aligned with the similar provisions in the CSAs to make it clear that the TA and the Broadcasting Authority have the duty to give reasons in writing in relation to forming an opinion as the opinion formed by either the TA or the BA is the foundation for the competition safeguards in the respective Bills.

3. Clause 9(e) of the Bill ought to be broadened to make it clear that no person could be compelled to disclose any information or document which must be disclosed or otherwise given to the BA or any other person pursuant to the Bill, if that person could not be compelled to disclose the information or document in civil proceedings before the Courts. Confining the protection against disclosure only to legal professional privilege does not offer sufficient safeguards.

4. In clause 3(8) of the Bill the BA has the duty to consult in relation to his power to approve a new or revised code of practice, but that consultation is limited to "such bodies representative of licensees". It is submitted that this provision will be difficult to administer in practice, and that the more practicable approach would be to require the BA to consult with the entire industry or industry sector concerned with the new or revised code of practice.

5. It is proposed in clause 6(4) (b) of the Bill to confer on the TA the power to enter and inspect any premises at which he believes that unauthorised decoders are being sold etc. As presently drafted, clause 6(5) of the Bill requires the TA to obtain a warrant, in accordance with the provisions of clause 6(6) before he can enter any domestic premises. However, CWHKT believes that the TA ought to be required to obtain a warrant issued by a magistrate before the TA can enter any premises, both domestic and commercial. CWHKT does not believe that there is any policy justification for relaxing the ordinary legal requirement that a government agency must obtain a warrant from the Courts before it can enter any premises simply because the premises in question are used for commercial purposes.

6. The general competition safeguards contained in clause 13 are expressed by sub-clause 13(5) not to operate to "prevent any restriction imposed on - (a) the inclusion in television programme service of a television programme produced by the licensee of the service; or (b) any person from using or exploiting his artistic talent or ability." It is submitted that neither of these exceptions should be included in the Bill as there is no reason why in either case any particular conduct should not be subject to analysis of whether it has any purpose or effect of substantially restricting competition. There is a breadth of international precedent on the application of this competition test, while the meaning of the proposed exception will be subject to a great deal of uncertainty. In the case of sub-paragraph 13(5)(b) it is difficult to see how the use or exploitation of one person's "artistic talent or ability" could have any purpose or effect of substantially restricting competition in a television programme service market.

7. If it is the Administration's intention to protect the intellectual property rights of content providers and artistic talent, it would be more effective and in line with international best practice to include a general exception in the Bill for intellectual property. An exception to the operation of the competition provisions of the Bill should be drafted to make it clear that the protection or enforcement of any rights under the intellectual property legislation such as the Copyright and Trade Marks Ordinances would not, in and of itself, give rise to a claim of abuse of dominance or anti-competitive conduct for the purpose of substantially restricting competition in a television programme services market.

8. CWHKT believes that sub-clause 13(6) ought to be deleted. If it is the Administration's intention to cater for future flexibility in the kinds of conduct for which the BA may take the view that no competition problem exists, the BA could achieve this flexibility through guidelines. It is submitted that it is not sound legislative practice to allow the BA, or any part of the Administration, to amend by notice in the Gazette any provisions of empowering legislation such as sub-clause 13(6) of this Bill.

9. By virtue of one of the Transitional Provisions of the Bill, in sub-paragraph 4(2) of Schedule 8, it is intended that proposed section 13 of the Bill (the primary provision for the safeguarding of competition) will not apply to any existing contracts for a period of two years from 28th January 2000 so long as the contracts otherwise continue to be lawful and are not amended by the parties during that period. There is no such transitional provision proposed in the Telecommunication Bill which would apply to agreements, for example, for the transmission of television programme services that would have an anti-competitive effect on a telecommunication market.

10. CWHKT can see no rationale for protecting agreements under the Broadcasting Bill that would otherwise have an anti-competitive effect on a television programme services market, when agreements relating to transmission (which could even be the same agreement) could be found to be anti-competitive under the Telecommunication Bill. For this reason CWHKT believes that the relaxation of the application of the competition safeguards contained within proposed section 13 should be removed.

11. It is submitted that the amendment to Schedule 3 entitled "Services not to be regarded as television programme services" should not be subject to Chief Executive in Council's approval, but that the standard legislative process should be applied to any changes to the Schedule.

12. In the past year, Hong Kong has seen rapid development in the area of the provision of electronic transactional services, which the Government has recognised in passing the Electronic Transactions Ordinance. In CWHKT's view, only the transmission of these services ought to be regulated under the Telecommunication Ordinance, and the content of any 'transactional services' should not be regulated under the Broadcasting Bill as this is not a television or broadcasting type of service. CWHKT notes that these services, together with any services provided by means of the Internet, are currently excluded from the ambit of the Broadcasting Bill by means of their inclusion in Schedule 3 to the Bill. CWHKT believes that these services should permanently be excluded from the ambit of the Broadcasting Bill as stringent legislation or regulation would only stifle the growth of the industry.

13. In summary, CWHKT is strongly of the view that the provisions of the Telecommunication Bill and the Broadcasting Bill should present a consistent policy platform for the regulation of transmission and provision of television programme service content. Any degree of misalignment between the two Bills as discussed above will undermine the cohesion of that platform.

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