CB(1)190/99-00

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Letterhead of CABLE & WIRELESS HKT

By Fax 2121 0420 and Mail

Your Reference:

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Clerk to Bills Committee
Bills Committee on Telecommunication (Amendment) Bill 1999
Legislative Council
Legislative Council Building
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Hong Kong

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Date: 20 October 1999

Dear Miss Yeung,

Telecommunications (Amendment) Bill 1999

Further to our submissions made to the Bills Committee on 25 August 1999 in relation to the Telecommunications (Amendment) Bill 1999 ("Telecom Bill") and to the "Administration's response to the views submitted by the deputations" ("Response") (Bills Committee document reference CB(1)1960/98-99), we would like to continue exchanging our views on the Telecom Bill with the Bills Committee and the Administration.

Although the Administration has tabled its aforementioned Response at the 28 September and 6 October 1999 Bills Committee meetings, we are concerned that the points raised in our submissions have not been adequately addressed by the Administration. To reinforce the legal and constitutional issues previously raised to the Bills Committee by Cable & Wireless HKT, we would like to forward the attached independent legal opinions to the Bills Committee members & the Administration for their review. We respectfully request that the Administration respond to all the legal concerns identified in the three legal opinions enclosed herewith in the Bills Committee meeting(s) prior to the Bill proceeding to its third reading.

The independent legal opinions on the Telecom Bill enclosed herewith are as follows:

1) Joint Advice by Michael Thomas Q.C.S.C. of the Hong Kong and English Bars, Johannes Chan of the Hong Kong Bar and Tim Eicke of the English Bar, dated 13 July 1999 - Appendix A;

2) Legal Opinion by Allen & Overy, Solicitors, dated 3 September 1999 - Appendix B; and

3) Short Advice by Johannes Chan of the Hong Kong Bar, dated 5 October 1999 - Appendix C.

We would appreciate your understanding that we have not translated the above documents into Chinese as we seriously do not want to alter or lose or dilute any point of argument raised in the legal opinions which may be an inadvertent result of the translation process.

We would be pleased to clarify any points raised in the enclosed documents if required.

Yours sincerely,

EVA CHAN

Manager, Regulatory Affairs

Appendix A

Legal Opinion from Michael Thomas

IN THE MATTER OF HONG KONG TELECOMMUNICATIONS LIMITED

AND

THE TELECOMMUNICATIONS (AMENDMENT) BILL 1999, CURRENTLY BEFORE

THE LEGISLATIVE COUNCIL

JOINT ADVICE

Introduction

1. We are asked to advise Hong Kong Telecommunications Limited ("HKT") in relation to the constitutional (and human rights) implications of the amendments to the Telecommunication Ordinance ("the Ordinance") currently before the Legislative Council in form of the Telecommunications (Amendment) Bill 1999 ("the Bill"). We are asked in particular to advise on the relationship between the Bill and the Basic Law and the Bill of Rights Ordinance, taking into account the jurisprudence not only of the Hong Kong courts but also of the Human Rights Committee (under the International Covenant on Civil and Political Rights ("ICCPR")) and the European Commission and Court of Human Rights.

2. The particular areas of concern we are asked to address are:

   a. The extension of the Telecommunications Authority's ("TA") power to impose financial penalties, in particular in connection with new sections 7K to 7N (Clause 22 in conjunction with Clause 4); and

b. The TA's new powers to obtain and disclose information as well as to enter and inspect premises (Clauses 4 and 18); and

c. The TA's power to order sharing of facilities and /or interconnection without specifying the basis upon which the licensee is to be compensated for the interference with its property rights. (Clauses 19 and 20)

We will deal with these in turn below, but it may be convenient to summarise at the outset our conclusions.

Summary

3. For the reasons set out below in more detail, the Bill, as currently drafted, raises some serious concerns about its constitutionality *per se* and the lack of guidance to the TA about the limits of its power (as required by the Basic Law, the Bill of Rights and the ICCPR). We have come to the conclusion that:

a. the provisions conferring wide ranging powers on the TA, on the basis of an "opinion", to impose financial penalties on a licensee for breach of sections 7K to 7N of the Ordinance aand to give third parties a right of action against the licensee are clearly 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);

b. the powers given to the TA to inspect documents and accounts under 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). There is, therefore, a strong argument that these provisions are *per se* unconstitutional. At the very least, the powers given to the TA purport to be much more far reaching than the Basic Law would allow;

it is, therefore, important that the limits of this power be spelt out in the Ordinance;

c. there is a strong argument, that the powers conferred by sections 36A and 36AA, to order interconnection and/or the sharing of facilities, falls within the protection of Article 105 of the Basic Law. This would require that there be compensation for the inherent deprivation of property, calculated on a fair and adequate basis, i.e. on the basis of the real value of the property concerned. As a result, we see the absence of any guidance to the TA (and any person affected) as to how to calculate the compensation due as a potential deficiency in constitutional legislation.

The one major concern, however, that runs through most if not all the issues identified below is the complete lack of involvement of the courts or independent scrutiny, be it in the context of issuing warrants for inspection and search, or by way of an appeal on questions of law and fact arising in the context of the "opinions" reached by the TA under sections 7K to 7N and/or the imposition of financial penalties and/or the determination of adequate compensation in the context of an order for interconnection or the sharing of facilities.

Legislative constraints

4. It may be useful to draw attention to the constitutional constraints upon the power of the Hong Kong Special Administrative Region to enact laws.

a. Article 11 of the Basic Law of the Hong Kong Special Administrative Region of the Peoples Republic of China ("Basic Law") provides that "No law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene

this Law".

b. Article 73(1) of the Basic Law empowers the Legislative Council only "to enact, amend or repeal laws **in accordance with this Law** and legal procedures" (emphasis added).

c. Article 39 the Basic Law enshrines the rights protected by the ICCPR 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."

5. Furthermore, the ICCPR has been incorporated into Hong Kong law through the Hong Kong Bill of Rights Ordinance ("Bill of Rights"). As the Court of Final Appeal made clear in its judgment in Ng Ka Ling v Director of Immigration[1]:

> "...the courts should give a generous interpretation to the provisions in Ch III that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed".

The court further stated that, in interpreting the provisions in Ch. III, the court should consider the language in the light of any ascertainable purpose and the context:

> "The context would include other provisions of the Basic Law. Of particular relevance would be the provisions of the International Covenant on Civil and Political Rights (the ICCPR) as applied to Hong Kong which remain in force by virtue of art 39 and any relevant principles which can be distilled from the

[1] [1999] 1 HKC 291 at 326

ICCPR."[2]

(A) The TA's power to impose financial penalties

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

7. Under the present regime, section 36C provides the TA with the power to impose a financial penalty on a licensee, where that licensee has failed to comply with a direction under section 36B(1). Its power to issue directions under the existing section 36B, however, is subject to important safeguards against the abuse of power, such as

   a. the requirement to afford the licensee "reasonable opportunity to make representations"[3];

   b. the increasingly recognised public law duty to give reasons for administrative decisions which have a serious affect on a person[4]; and

   c. the supervision by the courts both in relation to the legality of a decision and, to a limited extent, a review of the merits.

8. The amendments proposed in this Bill will effectively remove the majority of these important safeguards:

   a. Clause 22 removes the requirement for a sections 36B(1) direction before a financial penalty for failure to comply with "any licence condition" or "any

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2 ibid, per Li CJ

3 section 36B(2)

4 See *inter alia* Oriental Daily Publisher Ltd v Commissioner for TELA [1997] 3 HKC 93 and [1998] 4 HKC 505 (Court of Final Appeal)

provision of this Ordinance" may be imposed. This, in turn, removes the requirement for the licensee to be given "reasonable opportunity to make representations".

b. Clause 4, for the first time, makes particular forms of conduct by a licensee, thought objectionable by the TA, subject to its power to impose financial penalties. These include new sections 7K to 7N, which raise complex judgmental issues, where proof of a breach depends solely upon the "opinion of the Authority". This, in turn, poses two problems:

   i. the new section 6A (introduced by clause 3 of the Bill) expressly exempts "opinions" from the duty to give reasons so the licensee may never know what facts were before the TA or why the TA thought its conduct was objectionable; and

   ii. in order to activate the power of the TA to impose a financial penalty the TA would merely have to prove its own "opinion": the burden of proof is therefore squarely on the licensee faced with such a financial penalty to establish his "innocence" by disproving the "opinion", in ignorance of the factual or judgmental basis of the TA's opinion.

c. Furthermore, clause 22 increases by ten-fold the amount of financial penalty that may be imposed by the TA without reference to a court of law or any provision for an appeal to an independently constituted tribunal.

9. The abolition of these important safeguards, however, is not only of significance in the context of the imposition of financial penalties by the TA. Clause 25, for the first time, introduces a cause of action for damages, an 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".

a. The absence of a duty on the TA to give reasons for its "opinion", will fundamentally undermine the "equality of arms" between the parties to any such action, which is an essential requirement of the right to a fair hearing "in the determination ... of his rights and obligations in a suit at law", protected by Article 10 of the Bill of Rights (implementing Article 14(1) ICCPR)[5]. A plaintiff will merely have to prove the existence. of the TA's opinion, leaving the defendant licensee to disprove an opinion, the basis of which is not disclosed.

b. This deficiency is further aggravated by the fact that, under the proposed amendments introduced by the Bill, no provision is made enabling the licensee 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 the licensee's conduct, before any civil litigation is instituted by an "aggrieved person".

c. New section 39A does not provide any definition of the term "aggrieved", which by itself is so broad that it will expose any licensee to excessive (legal) uncertainty in its day-to-day running. By comparison, the United Kingdom's 1984 Telecommunication Act provides for a right of action to "any person who may be affected" by a breach of a final or provisional order made by the Director General of Telecommunications[6], but then defines this category as:

"... any breach of the duty which causes that person to sustain loss or damage ...

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[5] See *inter alia* Ma Wan Farming Ltd v Chief Executive in Council [1998] 2 HKC 190

[6] Similar to section 36B directions under the Telecommunications Ordinance

shall be actionable at the suit or instance of that person."[7]

In order to avoid such unnecessary uncertainty, it is essential that a definition of the term "aggrieved" is inserted into the Bill, preferably along the lines of the definition in the UK's 1984 Act, i.e. by requiring proof of loss or damage for there to be a right of action.

(I) A criminal charge

10. Articles 10 and 11 of the Bill of Rights (implementing Articles 14(1) and 14(2) to (7) ICCPR respectively) provide *inter alia* that:

"... 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 11(1))

"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 own choosing.

(C) to be tried without undue delay ..." (Article 11(2))

This wording is virtually identical to that of Articles 6(1), (2) and (3)(a) and (b) of the European Convention of Human Rights ("ECHR").

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[7] Section 18(6)(a)

11. It is trite law the Bill of Rights shall be construed generously and purposively.[8] In this regard the court has, following the jurisprudence of the European Court of Human Rights, adopted a generous interpretation of the meaning of "criminal charge". In R v Chan Suen Hay[9], the District Court held that a disqualification order under section 168E of the Companies Ordinance constituted a criminal penalty within the meaning of Article 12 of the Bill of Rights.

12. According to long established jurisprudence of the European Court of Human Rights the concept of "criminal charge" under the ECHR is to be given an autonomous Convention meaning, independent of its classification under national law[10]. The justification for this was that:

> "If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a mixed' offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinate to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention."[11]

13. The same reasoning applies to the interpretation of Article 14(2) of the ICCPR[12].

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[8] Attorney General v Lee Kwong Kut (1993) 3 HKPLR 72 at 90.

[9] (1995) 5 HKPLR 345 at 353-354

[10] see e.g. Engel v Netherlands (No 1) 1 EHRR 647 and Neumeister v Austria (No 1) 1 EHRR 91

[11] Engel, para. 81

[12] see: Manfred Nowak, *UNO-Pakt uber bugerliche und politische Rechte und Fakultativprotokoll - CCPR-Kommentar*, N.P. Engel Verlag, Strasbourg, 1989 Commentary on Article 14, para. 13

14. The fact that section 36C is not part of Part V ("Offences and Penalties") of the Act but rather in Part VI ("Supplementary and Miscellaneous") is therefore of no relevance to the assessment of its compliance with Articles 10 and 11 of the Bill of Rights.

15. In the case of Societe Stenuit v France[13], the European Commission of Human Rights was faced with the question of whether a fine of FF50,000 for anti-competitive behaviour imposed by the Minister on the applicant company amounted to a "criminal charge". The Commission Concluded:

> "... the Minister's decision to impose a fine constituted, for the purposes of the Convention, determination of a criminal charge, and the fine had all the aspects of a criminal penalty."[14]

This approach was confirmed by the European Court of Human Rights in its judgment in Bendenoun v France[15].

(II) The presumption of innocence

16. The European Commission of Human Rights has characterised the presumption of innocence thus:

> "Article 6(2) of the Convention, laying down the principle of presumption of innocence, is certainly first of all a procedural guarantee applying to any kind of criminal procedure. ... However, the Commission is of the opinion that its application is wider than this. **It is a fundamental principle embodied in this Article which protects everybody against being treated by public officials as being guilty of an offence before this is established by a competent court.** Article 6(2), therefore, may be violated by public officials if they declare that

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13 (1992) 14 EHRR 509

14 *Ibid.* Para. 65

15 (1994) 18 EHRR 54

somebody is responsible for criminal acts without a court having found so."[16]

17. This approach is also reflected in application of the ICCPR by the UN Human Rights Committee. In its General Comment 13/21 the Human Rights Committee stated:

> "The Committee ... has even observed that the presumption of innocence, which is fundamental to the protection of human rights, is expressed in very ambiguous terms or entails conditions which render it ineffective. By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. **No guilt can be presumed until the charge has been proved beyond reasonable doubt.** Further, the presumption of innocence implies a right to be treated in accordance with this principle. **It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial."**[17]

This is also the approach adopted by the Hong Kong courts: Attorney General v Lee Kwong Kut[18]. In that case, the Privy Council held that shifting the burden to the defendant upon the mere proof of reasonable suspicion of an offence constituted a violation of the right to be presumed innocent.

18. *A fortiori*, the Bill's emphasis on the TA's "opinion" 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 to this requirement:
    a. the amendments will lead to the TA, a public authority and, if the matter is brought before the Court of First Instance under new section 36C(3B), the

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[16] Application No 7986/77 Petra Krause v Switzerland 13 D & R 73 at 75-76, emphasis added; see also the judgment of the European Court of Human Rights in Allenet de Ribemont v France (1995) 20 EHRR 557

[17] At paragraph 7, emphasis added

[18] [1993] AC 951, (1993) 3 HKPLR 72 at 92.

"prosecution", "prejudging" the licensee's guilt and treating the licensee as guilty before such guilt has been established, beyond reasonable doubt, by the competent court. This is further reinforced by the language used in new section 36C(3B) which refers to "commission of the breach", very much the language generally applied to those who have been found guilty of an offence or breach;

b. the result of this is that the burden of (dis-)proving the guilt (or innocence) will be placed squarely on the shoulders of the licensee; any such burden to be discharged not in a criminal court with full jurisdiction of fact and law but on judicial review or in the Court of First Instance under section 36C(3B).

(III) The right to a fair hearing

19. The requirements of Article 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". Amongst the fundamental requirements of a "fair hearing" are:

a. 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)[19]; and

b. the licensee must be given access to all the material evidence in the hands of the TA, whether it is in favour of or against the licensee[20]. In its Opinion in Jespers

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[19] See *inter alia* the European Court of Human Rights in Kamasinski v. Austria (1991) 13 EHRR 36 at para. 80 and Pelissier and Sassi v France (judgment of 25 March 1999), where the Court reiterated that the information provided in the indictment needs to be detailed

[20] See *inter alia* the European Court of Human Rights in Edwards v. United Kingdom (1993) 15 EHRR 417

v. Belgium[21] the European Commission of Human Rights described the requirement thus:

> "the 'facilities' which everyone charged with a criminal offence should enjoy include the opportunity of acquainting himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings. Furthermore, the Commission has always recognised that although a right of access to the prosecution file is not expressly guaranteed by the Convention, such a right can be inferred from Article 6(3)(b) ... it is clear that the facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence ..... . In short, Article 6(3)(b) recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or obtaining a reduction in his sentence, **all relevant elements that have been or could be collected by the competent authorities**"[22]

This *dictum* of the European Commission of Human Rights was expressly followed in R v Chan Chak-fan[23]

20. 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, in particular where the decision at issue has serious adverse effect on a person. As Chan CJHC said in Oriental Daily Publisher Ltd v Commissioner for TELA:

> "Where in appropriate cases, it is considered desirable or even necessary to know the reasons for a decision, the courts have readily implied a duty in the administrative tribunal or the lower court to give reasons for its decisions. The nature and circumstances of the adjudication may indicate a necessity for giving reasons: See *R v Civil Service Appeal Board, ex parte Cunningham, R v City of London Corporation, ex parte Matson and R v Secretary of State for the Home Department, ex parte Doody*, above.
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> There is also a growing tendency to make express provisions in legislation

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21 27 D & R 61

22 *Ibid.* At paras 56-58

23 (1993) 3 HKPLR 456 at 479-480.

creating administrative tribunals requiring the relevant tribunal to give reasons for its decisions. In the absence of an express provision, it is a matter of construction of the relevant statute to see whether such a duty can be implied. But the courts are more ready nowadays to imply that such a duty exists."[24]

21. This passage was affirmed on appeal by the Court of Final Appeal:

> "It is possible that the duty may be put on a wider ground than implication as a matter of statutory construction. It may be said to arise under the common law in the following way. Considering the character of the Tribunal, the kind of decision it has to make and the statutory framework in which it operates, the requirements of fairness demand that the Tribunal should give reasons; there being no contrary intention in the statute.
> ...
> In *Doody*, Lord Mustill stated (at 564E) that the law does not at present recognise a general duty to give reasons. He found in the recent cases on judicial review a perceptible trend to wards an insistence on greater openness of decision making and spoke of a continuing momentum (at 561E, 566C). See also *Higher Funding Council* at 259A. That this trend exists cannot be doubted. The courts have increasingly found a duty to give reasons in various contexts. See also the essay by Sir Patrick Neill QC in *The Golden Metwand and the Crooked Cord: Essays in honour of Sir William Wade QC* [1998] at 161 and the article by P.P. Craig: The Common Law, Reasons and Administrative Justice [1994] *Cambridge Law Journal* 282 at 301. As the Chief Judge rightly pointed out (at 102F), the decisions in the courts in Hong Kong are consistent with and are part of this trend. It is an open question as to how the law should now properly develop in this area. But the common law is likely to apply its characteristic pragmatism and robustness."[25]

22. However, the new section 6A(3)(b) of the Ordinance, as introduced by clause 3 of the Bill, in particular in its inter-action with new sections 7K to 7N and the power to impose financial penalties, on its face seeks to derogate from this essential safeguard for the right to a fair hearing imposed by the Bill of Rights. Considering the potentially serious consequences arising for a licensee out of the TA having formed an "opinion" and the relevant case-law, it seems to us wrong to exempt the TA from the duty to give reasons

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[24] [1997] 3 HKC 93 at 102

[25] [1998] 4 HKC 505 at 513-515

in relation to such "opinions"; we would expect the Court to uphold a challenge to the TA's imposition of financial penalties on that ground alone.

(IV) Access to a court of full jurisdiction

23. Though the European Court and Commission of Human Rights have accepted that, in the interests of flexibility and efficiency, the initial stages of proceedings, which involve the determination of (civil rights and obligations or) criminal charges, may be conducted before bodies which do not comply in full with the Article 6(1) requirements, they have stressed the need for there to be an appeal against their findings to a judicial body that has full jurisdiction and does provide a "fair ... hearing ... by an independent and impartial tribunal..." under Article 6(1)[26]. In its judgment in Le Compte, Van Leuven and De Meyer v. Belgium, the European Court of Human Rights gave the following definition:

> "... Article 6(1) draws no distinction between questions of fact and questions of law. Both categories of question are equally crucial for the outcome of proceedings relating to 'civil rights and obligations'. Hence, the 'right to a court' and the right to a judicial determination of the dispute cover questions of fact just as much as questions of law."[27].

The approach set out *inter alia* in the judgment in Le Compte, Van Leuven and De Meyer v. Belgium was expressly followed by the Hong Kong Court of Appeal in Ma Wan Farming Ltd v Chief Executive in Council[28].

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[26] Le Compte, Van Leuven and De Meyer v. Belgium (1983) 4 EHRR 1, para. 51, Albert and Le Compte v. Belgium, (1983) 5 EHRR 533, para. 29, British American Tobacco Company Ltd v Netherlands (1996) 21 EHRR 409, para. 78; Ortenberg v Austria (1995) 19 EHRR 524, para. 31 and Fischer v Austria (1995) 20 EHRR 349, para. 28.

[27] *Ibid.* para. 51

[28] [1998] 2 HKC 190

24. Any court seized of the alleged breach in issue should therefore have full jurisdiction both in relation to questions of fact as well as law[29]. This requirement is also reflected by the use of the description "competent ... tribunal" used in Article 10 of the Bill of Rights. This principle, set out above in the context of "civil rights and obligations", applies *a fortiori* in the context of "the determination of a criminal charge" against a licensee.

25. The Bill, in its present form, does not appear to make any provision for access to 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. 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[30]. Though the European Court of Human Rights has found judicial review to be sufficient for the purposes of Article 6(1) in the context of the "determination of ... civil rights and obligations" in Brvan v United Kingdom[31], it is important to note that this finding was made on the basis that:
    a. the dispute (which concerned a planning decision) was "civil" in nature and did not concern the determination of a criminal charge;
    b. the subject matter at issue was highly technical; and
    c. the decision maker (the planning inspector) was subject to significant procedural

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[29] See *inter alia* the Court of Appeal in Ma Wan Farming Ltd v Chief Executive in Council [1998] 2 HKC 190

[30] See, for example, Commissioner of Inland Revenue v Lee Lai Ping (1993) 3 HKPLR 141 where Cheung DJ (as he then was) held that judicial review was not a sufficient remedy in the context of restricting the freedom of movement of a person

[31] (1996) 21 EHRR 342

safeguards:

> "The quasi-judicial character of the decision-making process; the duty incumbent upon each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality."[32]

26. Under the regime to be established by the Bill, none of these safeguards is available. The adoption by the TA of an opinion cannot be described as "quasi-judicial", especially where it is neither subject to a right to make representations prior to the adoption of the opinion, nor to a duty to give reasons, which would enable an effective challenge to be mounted. In Bryan, the inspector was wholly separate from the decision maker and provided, for all intents and purposes, an independent review of the decision; the only reason why the inspector himself was not an "independent and impartial tribunal" under Article 6 was because there existed, in theory, a power in the executive to revoke his jurisdiction: there was, therefore, not the "requisite **appearance** of independence"[33]. This is very different from the position of the TA under the Ordinance (as amended by this Bill), where the TA itself is the decision maker, therefore combining the functions of prosecutor, judge and jury in one entity.

27. In this regard, the best way to address the concerns arising under Articles 10 and 11 of the Bill of Rights, in order to bring this Bill into conformity with the constitutional criteria we have reviewed, is to provide for a right of review to the Court of First Instance, which review shall be by way of re-hearing and the Court is empowered to

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[32] *Ibid.* Para. 46

[33] *Ibid.* Para. 38, emphasis added

confirm, reverse or vary any decision of the TA under sections 7L to 7N and 36C.[34]

(V) Undue delay

28. 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 can impose without recourse to the courts. Though, subject to the reservations expressed above, any reference of such imposition to a court must be welcome, we are concerned that subsection 3B(a) provides for a limitation period of some 3 years, "where the Authority considers that a financial penalty under subsection (3) is not adequate ...". 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 has occurred, where the TA, having realised its own powers are not adequate, fails to bring this matter to the Court of First Instance as soon as possible thereafter but waits as long as the permitted three years.

(VI) Discrimination

29. In addition to the above, we are somewhat concerned by the fact that new section 7K only penalises the "licensee" for anti-competitive conduct "which ... has the purpose or effect of preventing or substantially restricting competition in a telecommunications market". In the absence of a general Competition Ordinance, which would cover others whose conduct had the purpose or effect of restricting competition in a telecommunications market, to single out the licensee alone constitutes a violation of the right to "equality

[34] Another alternative would be a review by the Administrative Appeals Board set up under the Administrative Appeals Board Ordinance. The Board is chaired by a judge of the Court of First Instance and comprises two lay members to be chosen from a panel.

before and equal protection of the law" protected by Article 22 of the Bill of Rights (implementing Article 26 ICCPR). Article 22 requires the legislator not to discriminate against a person on any ground unless there are reasonable and objective criteria for the distinction that is applied. While it is clear that there are such reasonable and objective criteria in the context of sections 7L to 7N, none can be identified in the context of section 7K. On the contrary, a very strong case could be made out in support of the proposition that section 7K should embrace everybody whose conduct is aimed at or has the effect of restricting competition in the telecommunications market.

(B) Clauses 4 (new sections 7I and J) and 18 - Information, Inspection and Disclosure

30. New section 35A provides that the TA or any person authorized by him may at all reasonable times enter the premises of a licensee and inspect and make copies of, or make or take an abstract of or extract from, a document or an account relating to a telecommunications network system, installation or services conducted by the licensee. The document or account must be reasonably required. A person who, without reasonable excuse, refuses to give access to the document or account, shall commit an offence and is liable on conviction to imprisonment for 6 months: s 35A(6).

31. Though it may be implied into this that the documents or accounts must be "required" for the TA's performance of its functions under the Ordinance, we are concerned that there is no provision for objective verification of the reasonableness of the TA's requirement, nor any way in which the licensee can, itself, scrutinise the decision to exercise the

power. The fact that this power is armed with criminal sanctions for non-compliance raises particularly serious concerns.

32. Article 14 of the Bill of Rights (implementing Article 17 ICCPR) provides that:

> "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

33. In R v Securities and Futures Commission. ex parte Lee Kwok-hung[35], Litton JA (as he then was) held that no distinction should be drawn between personal and business affairs in the context of the protection against unlawful interference with one's privacy under Article 14. This is also the approach taken by the European Court of Human Rights in its jurisprudence under Article 8 ECHR: Niemitz v Germany[36].

34. Accordingly, a broad construction should be adopted and the term "privacy" in Article 14, even though it is followed by the words "family, home", is not confined to personal affairs but is wide enough to cover business affairs. The emphasis of Article 14 is whether the interference constitutes "arbitrary or unlawful interference."

35. The same can be said about the Basic Law. Article 29 of the Basic Law provides that:

> "the homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other

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[35] (1993) 3 HKPLR 39 at 50

[36] (1993) 16 EHRR 97

premises shall be prohibited."

36. There is no reference to "privacy". Instead, it refers to intrusion into one's premises, and again the emphasis is that the search or intrusion must not be "arbitrary or unlawful".

37. The power of entry, search and seizure under new section 35A is an obvious intereference with one's privacy, and under Article 14 of the Bill of Rights or Article 29 of the Basic Law, such interference must not be arbitrary or unlawful. According to the jurisprudence of the Hong Kong courts, the concept of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability: Fok Lai Ying v Governor in Council[37]. The concept of "arbitrariness" involves a balancing exercise, and any interference with privacy has to be justified by its necessities in a democratic society. Lord Cooke said:

> "While art 14 of the Bill of Rights is expressed in more positive terms than art 8 of the European Convention and does not contain the express limitations found in cl (2) of the latter, it is directed against arbitrary or unlawful interference and in determining whether an interference is to be so characterised it may be appropriate to consider, among other matters, democratic necessities such as are listed in art 8(2) of the European Convention. Both articles therefore may require a form of balancing exercise and the verbal differences should not be heavily stressed."

38. Article 14 of the Bill of Rights, and *a fortiori* Article 29 of the Basic Law, will be satisfied if the exercise of the power is subject to three conditions:
    a. a requirement of a search warrant or other authorization, to be obtained in advance of the search;
    b. a requirement that the warrant be issued by a person who must be capable of

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[37] (1997) 7 HKPLR 327 at 340

acting judicially, that is, who must not be involved in the investigation; and

c. 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[38].

39. In R v Yu Yem-kin[39], the late Jerome Chan J held that the power of warrantless search and seizure in section 52(1)(e) of the Dangerous Drugs Ordinance (Cap 134) can only be justified if it satisfies the test of reasonable necessity and minimum intrusion, that is, its unreasonably wide ambit must be appropriately trimmed down to within limits of necessity and reason.

40. New section 35A falls well short of these requirements. The TA is not required to apply for a warrant from an independent supervisory body before it can enter and conduct search of the premises of a licensee. The decision to enter, search and seize document search of the premises of a licensee. The decision to enter, search and seize document or account is to be made by the very same body which is to carry out these powers. Failure to comply with the request of the TA is a criminal offence. There is no reason to believe that the requirement of applying for a warrant from a body capable of acting judiciously will unduly hamper the intended search and seizure.

41. The powers granted to the TA by these amendments therefore amounts to a clear departure from the requirements of Article 14 of the Bill of Rights or Article 29 of the

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[38] See: Hunter v Southam Inc (1984) 11 DLR (4th) 641, followed in Re Hong Kong and Shanghai Banking Corporation Ltd (1991) 1 HKPLR 59 at 67

[39] (1994) 4 HKPLR 75 at 97-98

Basic Law and are therefore, arguably, unconstitutional.

Disclosure

42. New section 7I further provides that the TA may, as reasonably necessary to perform his function, require any person who provides or offers a public telecommunications service to supply him with information relating to his business. The fact that the information is the subject of a confidentiality agreement is not an excuse not to supply the information: section 7I(2). The TA, after affording the person concerned a reasonable opportunity to make representation, may disclose information supplied to him if he considers that disclosure of the same is in the public interest: section 7I(3) & (4).

43. Article 14(2) of 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). As the UN Human Rights Committee expressed it in its General Comment 16/32[40]:

> "Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and **is never used for purposes incompatible with the Covenant**."[41]

44. This principle was applied by the English Court of Appeal in Marcel v Commissioner of Police, where Sir Christopher Slade, delivering the judgment of the Court of Appeal,

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[40] Adopted on 8 April 1988

[41] *Ibid*. Paragraph 10, emphasis added

stated:[42]

> "Documents seized by a public authority from a private citizen in exercise of a statutory power can properly be used only for those purposes for which the relevant legislation contemplated that they might be used. The user for any other purpose of documents seized in exercise of a draconian power of this nature, without the consent of the person from whom they were seized, would be an improper exercise of the power. Any such person would be entitled to expect that the authority would treat the documents and their contents as confidential, save to the extent that it might use them for purposes contemplated by the relevant legislation."[43]

45. A similar principle was adopted by the High Court of Australia in Johns v Australian Securities Commission[44], which held that a statute conferring power to obtain information by compulsion limits, expressly or impliedly, the purposes to which that information may be used or disclosed.

46. This common law principle is further buttressed by the Personal Data (Privacy) Ordinance (Cap 486): see section 4 and Schedule 1: Principle 3 of the Data Protection Principles.

47. The stated purpose of supplying information to the TA is to enable it to perform its functions: section 7I(1). It is difficult to see how a general power of disclosure will assist in the discharge of its functions. Disclosure may be necessary in exceptional circumstances, but section 7I does not set out any criteria for determining when disclosure is necessary. Instead, it provides a blanket power of disclosure. A licensee is

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[42] See also Morris v Director of Serious Fraud Office [1993] 3 WLR 1.

[43] [1992] 1 All ER 72 at 86

[44] (1993) 78 CLR 408

compelled to supply the information even if the information is the subject of a confidential agreement. There is no restriction on the disclosure of such confidential information. The provision is silent as to whom can the TA disclose the confidential information. Presumably it can choose to disclose the information privately to a law enforcement agency, or to make public disclosure and hence destroy any confidentiality in the information concerned. There is no restriction on disclosure of information concerning a third party. Nor is there any provision for a third party who may be adversely affected by the disclosure to make representation to the TA.

48. On balance, it appears that the absolute and unfettered nature of the power of disclosure is neither necessary nor proportionate, and is therefore "arbitrary" within the meaning of Article 14 of the Bill of Rights or Article 30 of the Basic Law and therefore unlawful.

(C) Clauses 19 and 20: Interconnection and Sharing of Facilities

49. Sections 36A and 36AA, as amended and/or inserted by the Bill, empower the TA to mandate the interconnection and sharing of facilities of HKT, upon terms and conditions determined by the TA, if it considers it is in the public interest to do so. Shared facilities may include a building, place or premises that is exclusively occupied and operated by one of the parties to the sharing agreement. Such power to mandate interconnection and sharing of facilities between licensees will inevitably encroach on the property right of one of the licensees and thereby constitutes a deprivation of private property. The exercise of this power will, however, have to comply with the requirements of Articles

6 and 105 of the Basic Law[45].

50. Article 6 of the Basic Law provides that the Hong Kong Special Administrative Region shall "protect the right of private ownership of property in accordance with law." Article 105 further elaborates this right to property:

> "The HKSAR shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.
>
> Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay."

51. There is, currently, no case law on the interpretation of Article 105. However, the protection offered by Article 105 is set out in terms very different to those used by the ECHR. While Article 1 of the First Protocol to the ECHR expressly protects the "right of a State to enforce such laws as it deems necessary to control the use of property ...", Article 105 does not contain this express exclusion. It may therefore be more appropriate to look to the United States for guidance as to how the right to property and/or compensation for deprivation of property under Article 105 should be interpreted. The Fifth Amendment of the US Constitution provides:

> "...No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation."

52. Though the right to property is not absolute, any deprivation of such property must be "in accordance with law". This does not, however, mean that private property can therefore

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[45] for the common law presumption against the taking of property without compensation see: Belfast Corporation v O D Cars Ltd [1960] AC 490 at 517-518.

be taken away by legislation without any limitations. In a different context, the Court of Appeal held that the phrase "according to law" does not refer to any domestic law, for otherwise the protection in the Bill of Rights would become illusory and could be easily abrogated by statutes, but that it refers to a "universal concept of justice".[46] Embodied in this notion of universal concept of justice is the principle that any restriction on fundamental rights and freedoms must:

a. pursue a legitimate purpose; and
b. be a necessary and proportionate means to achieve that objective.

In principle, this implied balancing process applies *mutatis mutandis* to Articles 6 and 105 of the Basic Law.

53. Art 105 refers to deprivation of property. "Deprivation" could take different forms. In Societe United Docks v Government of Mauritius[47], Lord Templeman held that "loss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition." In Societe United Docks v Government of Mauritius and Marine Workers Union v Mauritius Marine Authority[48], the Privy Council held that driving somebody out of his existing business by creating a state monopoly is a deprivation or acquisition of property. In Manitoba Fisheries Ltd v The Queen[49], the appellant was compelled to cease its business when the legislation granted a monopoly

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[46] *R v Sin Yau Ming* (1991) 1 HKPLR 88 at 130, per Kempster JA; *R v Securities of Futures Commission, ex parte Lee Kwok-hung* (1993) 3 HKPLR 39 at 50, per Litton VP.

[47] [1995] LRC (Const) 800 at 841

[48] [1985] LRC (Const) 801

[49] [1979] 1 RCS 101

to a statutory corporation for the export of fish. The Supreme Court of Canada held that although the corporation had not taken or acquired the appellant's business, the legislation had deprived the appellant of its business, and for such deprivation the appellant was entitled to compensation at common law.

54. The converse must be equally true: legislation destroying the existing monopoly of a licensee and compelling the licensee to share his facilities with other competitors must constitute a form of deprivation of property, and such deprivation can only take place when there is a compelling state interest and with adequate compensation.

55. In the United States, the Fifth Amendment right against deprivation of property without compensation is subject to implied limitations. In considering whether the deprivation is constitutional, it is relevant to take into account the nature, character, and duration of the interference, the purpose of the interference, the adverse impact on the property owner, the degree of public benefit, and the impact on the community if the interference is not undertaken. The mere fact that the owner has been denied the ability to exploit a property interest that he previously had believed was available for developments, or that a more severe impact is made on some landowners than others, does not by itself constitute "taking" of property within the meaning of the Fifth Amendment.[50] The US Supreme Court in Penn Central Transportation Co v New York City[51] defined the term "taking" thus:

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[50] Penn Central Transportation Co v New York City, 438 US 104, 57 L Ed d. 631 at 652, 654.

[51] 438 US 104, 57 L Ed 2d 631 at 648 (1978)

> "What constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the 'Fifth Amendment's guarantee [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole', this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons..."

56. Once the deprivation is lawful, the issue is whether the legislative scheme provides any adequate compensation. Article 105 of the Basic Law further requires that any compensation shall "correspond to the real value of the property concerned at the time". The Bill does not set out any principle for assessing compensation insofar as shared facilities are concerned. Insofar as interconnection is concerned, the TA may select from among alternative costing methods which he considers to be a fair and reasonable costs method. We are not in a position to consider fully the implications of the various costing methods. However, whichever method is devised to compensate for the licensee's loss of property, it is difficult to see how a court would uphold such deprivation if the compensation did not correspond to the real value of the property concerned and hence did not provide a fair and adequate basis of compensation. Considering the highly technical nature of the issues involved and the requirements of legal certainty, it is important that the Bill should spell out the basis upon which compensation is to be fixed, rather than leaving such matters to the courts on a challenge of the constitutionality of these provisions or a decision made thereunder.

57. A further important aspect of this new "regime" is that the Bill provides no right of appeal against a determination by the TA of the compensation payable. In light of the fact that the dispute about the adequacy of compensation will involve consideration of

highly technical information, access to judicial review will not provide the access to a court of full jurisdiction required by *inter alia* Article 10 of the Bill of Rights. In order to fulfil these requirements, the Bill would need to make provision for a right of appeal to the civil courts or, preferably, a specialist tribunal or arbitration.

Conclusion

58. For the reasons set out, certain provisions of the Bill, in its present form, raise major concerns about its constitutionality and its compliance with the requirements of the Bill of Rights. At this stage, those instructing us may find it useful to provide a copy of this Joint Advice to the members of the Legislative Council in order to ensure that they are aware of these concerns, can raise them with the administration and can, as far as is possible, take them into account when considering this Bill.

59. It would, however, be remiss of us not to point out to those instructing us that, under current Hong Kong law, it is not necessary to wait for the passage of the Bill before it can be challenged in courts. In Rediffusion (Hong Kong) Ltd v Attorney General[52], the Hong Kong Government proposed to have a bill passed in the Legislative Council which would damage the plaintiff's business interests. The plaintiff sought a declaration that it would be unlawful for the Council to pass the proposed bill and an injunction to restrain presentation of the Bill to the Governor for his assent, on the ground, which was conceded by the Attorney General for the purposes of the action, that the bill if enacted would be repugnant to a UK Act of Parliament and an Order in Council made under it.

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52 [1970] AC 1136

The Privy Council held that first, unlike the UK Parliament, the colonial legislature in Hong Kong was subject to the scrutiny of the local courts, which had the jurisdiction to enquire into and determine the lawfulness of specific aspects of the legislative process, and secondly, the courts could protect the legislative process by way of a declaration or an injunction before a bill was presented for assent. While this case is concerned with the colonial legislature, the same principle applies with even greater cogency regarding the Legislative Council of the HKSAR, as Articles 11 and 17 of the Basic Law expressly enjoin the HKSAR Legislature from passing any law which is in contravention of the Basic Law.

60. We remain, of course, ready to assist those instructing us further, whichever course of action they should decide on, be it by providing further advice and assistance in relation to possible amendments to the Bill or by taking whatever steps necessary in order to bring an effective challenge against this Bill in the Hong Kong Courts.

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13 July 1999

IN THE MATTER OF HONG KONG TELECOMMUNCATIONS LIMITED AND THE TELECOMMUNICATIONS (AMENDMENT) BILL 1999, CURRENTLY BEFORE THE LEGISLATIVE COUNCIL

JOINT ADVICE

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Appendix B

Legal Opinion from Allen & Overy

THE TELECOMMUNICATION (AMENDMENT) BILL 1999

1. We have been asked to consider the Telecommunication (Amendment) Bill 1999 (the "Bill") with a view to identifying those provisions of the Bill which we regard as being unsatisfactory on the basis that they are either ambiguous or, if not ambiguous, give rise to some inconsistency. Where we have reached such a view, we have not attempted to redraft the relevant provision but rather have suggested in broad terms the way in which the ambiguity or inconsistency might be resolved. We have also confined our comments to those sections where the ambiguity or inconsistency is material rather than to minor drafting errors.

2. Sections 6A - Powers of the Authority

2.1 Section 6A(1) provides that:

"The Authority may do all things necessary to be done to perform his functions under the ordinance."

Nowhere in this section or elsewhere in the Bill or the Telecommunication Ordinance (the "Ordinance") are the functions of the Authority expressly identified. We consider it desirable for the functions of the Authority to be clearly set out for the following reasons:

2.1.1 The Authority is a statutory body performing an important role as the regulator in the telecommunications market whose decisions affect the rights and duties of others. Unless there are good reasons not to do so, the Authority's functions should therefore be clearly set out so as to provide for greater transparency and certainty. This is the approach favoured with regard to regulators such as the Broadcasting Authority (whose functions are set out in section 9 of the Broadcasting Authority Ordinance), the Insurance Authority (see section 4A of the Insurance Companies Ordinance), the Gas Authority (section 6 of the Gas Safety Ordinance), the Securities and Futures Commission (section 4 of the Securities and Futures Commission Ordinance), the Hong Kong Monetary Authority (section 7 of the Banking Ordinance) and the ICAC (sections 12 and 13 of the ICAC Ordinance).

2.1.2 A number of important provisions in the Bill, for example, the power of the Authority to request and disclose information under section 7I are predicated on the basis that,

in making the request, or authorising the disclosure, of information the Authority is acting reasonably in the performance of its functions. Greater certainty as to what those functions are will make it easier to assess whether the pre-condition for the exercise of the power has been met which will hopefully reduce the potential for disputes.

2.2 Although the Authority is obliged to act on reasonable grounds and to have regard to relevant considerations when forming an opinion or making a determination, direction or decision, (see section 6A(3)(a)), the Authority is only obliged to provide written reasons when *"making a determination, direction or decision"* (see section 6A(3)(b)). The Authority is, therefore, not obliged to state its reasons when, for example, forming the opinion that particular conduct is anti-competitive under section 7K(1) or that a licensee is in a dominant position under section 7L(2). There is no obvious reason why there should be a distinction between the Authority forming an opinion (in which case reasons are not required) and making a decision (in which case reasons are required). Given that significant penalties may be imposed on a licensee who, in the opinion of the Authority, is in breach of these and other sections, the licensee should know, in accordance with the principles of natural justice, the reasons why the Authority has formed the opinion that it has. In addition, such a requirement will help avoid the arbitrary distinction and possible confusion which will otherwise arise as to whether the Authority has formed an opinion or made a determination, direction or decision.

3. Section 7I - Information

3.1 Section 7I(1) entitles the Authority to request information *"relating to [the licensee's] business"*. Whilst the Authority must require the information reasonably in the performance of its functions, the type of information which the Authority may require is unclear and potentially extremely wide. In particular, it is unclear whether:

3.1.1 The Authority's power to request information extends to documents which, as a matter of law, are privileged from production; and

3.1.2 Whether relevant "information" for the purposes of this section includes information belonging to third parties, although in the possession of the licensee.

To avoid uncertainty wording should be included to make clear that the power to compel information only applies to information that belongs to the licensee and that a licensee is to

have the same privileges in respect of the disclosure of information as it would before a court. With regard to the latter point, it is common where an ordinance confers a power to require disclosure for there to be this express protection (see, for example, the ICAC Ordinance (section 18), the Securities (Insider Dealing) Ordinance (section 21) and the Prevention of Bribery Ordinance (section 15)).

3.2 Section 7I(2) provides that a person must still supply to the Authority the information requested notwithstanding that it is the subject of a confidentiality agreement. The section does not make it clear, however, that a person who, at the request of the Authority, discloses information in breach of a confidentiality undertaking, is not to be liable to any other person as a result of such a breach. Such exonerating language should be included to make the position clear.

3.3 The power of the Authority to disclose information under section 7I(3) (including information which is the subject of a confidentiality agreement) is on its face extremely wide and subject only to the vague concept of "public interest" and the ability of the licensee to make representations if the Authority considers that disclosure would (among other things) result in the release of information concerning the business, commercial or financial affairs of the person supplying the information. In view of the concerns which this very wide power of disclosure gives rise to under the Bill of Rights and the Basic Law, if it is to be retained, then the circumstances under which the Authority may exercise this power, and the persons to whom the information may be disclosed, should be clearly stated. Such circumstances should be limited to exceptional cases where it can be established that disclosure is necessary to enable the Authority to perform its functions, particularly where the Authority proposes to disclose information which is subject to a confidentiality undertaking. Greater certainty and transparency in this respect will also reduce the scope for argument as to whether the Authority has in fact acted in accordance with its powers under the section and accordingly limit the number of disputes which will otherwise inevitably arise. Given the draconian nature of the disclosure power, its exercise should also be subject to scrutiny by the courts by way of an appeal on the merits.

3.4 Section 7I(4) provides that, in certain circumstances, a person supplying information is entitled to make representations to the Authority. However, there is no provision for a third party who may be adversely affected by such a disclosure to make such representations and such a right should be expressly included.

4. Section 7L - Abuse of Position

Section 7L(1) states that:

"A licensee in a dominant position in a telecommunications market shall not abuse its position."

It might be argued that section 7L(1) establishes an objective test as to whether a licensee is in a dominant position which is at odds with the provision in sub-section (2) which provides that a licensee is in a dominant position when, in the opinion of the Authority, it is able to act without significant competitive restraint from its competitors. The wording in section 7L(2) follows closely GC16(1) of the FTNS licence which states that it is for the Authority to decide whether a licensee is in a dominant position. However, to avoid any argument sub-section (1) could be amended to make the position clearer.

5. Section 35A - Inspection of records, documents and accounts

Section 35A(1) gives the Authority power to enter the premises of a licensee and inspect and take copies of documents *"relating to a telecommunications network, system, installation or service conducted by the licensee"*. It is unclear from the wording of the section whether a licensee is entitled to decline to produce documents which, as a matter of law, are privileged from production, for example, those covered by solicitor/client privilege. For the reason mentioned in paragraph 3.1 above the section should make clear that a licensee's rights in this regard are not to be affected.

6. Section 36A - Authority may determine terms of Interconnection

Under section 36A of the Ordinance the Authority may determine the terms and conditions of interconnection between a telecommunications system or service. The proposed new section 36A(3B) states that:

"The charges in a determination may be based on the relevant reasonable costs attributable to interconnection and, in determining the level or method of calculation... the Authority may select from among alternative costing methods...".

The use of the word "may" means that the Authority is not obliged to calculate the charges on the basis outlined in section 36A(3B) but can use some other basis of calculation if it so wishes. Indeed, it is arguable that, where the Authority mandates interconnection, it is not obliged to provide in its determination that any charges be payable by one party to the other. This uncertainty is unsatisfactory bearing in mind that when determining the terms and conditions of an interconnection the Authority is interfering with the property rights of a licensee. Quite apart from the constitutional issues which the taking of property gives rise to, this uncertainty should be removed and the section should make absolutely clear that, where interconnection is mandated under section 36A, the terms will include the payment of compensation which is to be calculated on a fair and adequate basis such as to compensate the licensee for the real value of the property of which it is being deprived.

7. Section 36AA - Sharing of use of facilities

Section 36AA(6) provides that, in the event that the parties are unable to reach agreement with regard to the sharing of a facility, the Authority may determine the terms and conditions for the shared use of the facility. However, unlike section 36AA(4) which does suggest that the terms and conditions to be agreed by the parties are to provide for *"fair compensation to the licensee,"* 36AA(6) does not stipulate that the terms and conditions to be determined by the Authority shall include compensation. In theory, therefore, the Authority could mandate that a facility owned by one person be shared with another without the payment of compensation. If property rights are to be interfered with by the Authority, the basis on which it is entitled to do so should be clearly stated including an obligation to provide for compensation which is to be calculated on a fair and adequate basis.

8. Section 36C - Authority or court may impose financial penalties

8.1 It is proposed that section 36C be amended to allow the Authority to fine a licensee who fails to comply with (among other things) any licence condition or provision of the Ordinance. The fines which may be imposed by the Authority are also to be increased. Under section 36C(3B)(b) where the Authority considers its powers inadequate the court may, on the application of the Authority, impose upon a licensee a financial penalty of up to 10% of the turnover of the licensee in the relevant telecommunications market or $10,000,000 whichever is the higher. It is unclear from the wording in sub-section (3B)(b) whether the court is entitled to revisit the merits of the particular matter before imposing the fine or whether liability is in effect a closed issue, the Authority having taken the view that a breach has

occurred, with the court only being concerned as to the level of the fine. The extent to which the court can revisit the issue of liability therefore needs to be clarified. Given that substantial fines can be imposed by the court it is desirable that the court's powers under sub-section (3B) should expressly extend to examining the merits of the alleged breach relied on by the Authority.

8.2 Section 36C leaves open the possibility that the Authority may impose a financial penalty under sub-section (3) and then apply to the court for the imposition of a higher financial penalty in the event that it considers the penalty levied under sub-section (3) inadequate. This potential for "double jeopardy" should be resolved by making it clear that the Authority will not have the power to levy a financial penalty in circumstances where it intends to apply to the court for the imposition of a higher penalty because it considers its powers in this regard inadequate.

9. Section 39A - Remedies

9.1 Section 39A(1) provides that:

"A person who is aggrieved by a breach of section 7K, 7L, 7M or 7N, or a breach of a licence condition, determination or direction relating to that section, may bring an action for damages, an injunction or other appropriate remedy, order or relief against the person who is in breach."

There is no definition in the section as to who qualifies as "a person who is aggrieved". As presently drafted, arguably any person who feels that he has a complaint as a result of the Authority forming the view that a licensee is in breach of the provisions relating to anti-competitive practices, can bring a claim whether or not he has suffered loss or damage. This is unsatisfactory and could lead to a multiplicity of unmeritorious suits. The section therefore needs to be amended to make clear exactly who is entitled to bring a claim, for example, by limiting this right to only those who have suffered loss and damage as a result of the breach.

9.2 Section 39A(1) is also unsatisfactory in that it is not clear whether a person bringing an action under sub-section (1) has to establish before a court whether the alleged breach has in fact occurred under section 7 or whether the fact that the Authority is of the opinion that a breach has occurred is sufficient. Suitable wording to clarify the position therefore needs to be introduced by making it clear, for example, that the person bringing the action must establish

to the satisfaction of the Court that a breach of the relevant section has in fact occurred. The opinion of the Authority that there has been a breach would not, of itself, be sufficient to establish liability.

Allen & Overy
3rd September, 1999

Appendix C

Short Advice from Johannes Chan

SHORT ADVICE
Re Telecommuntcations (Amendment) Bill 1999

1. I refer to our previous Joint Opinion by Michael Thomas SC, Tom Eicke and myself dated 13 July 1999 on this matter. In September 1999, the Administration has produced a response to the submissions of our client. I am asked to give, on an urgent basis, a broad overview of the Administration's response.

2. The Administration's response has failed to address our main concern, which is the complete lack of involvement of the courts or independent scrutiny in the exercise of draconian statutory powers. We do not oppose the substantial increase in power as such, but what we do oppose is an increase of such power without at the same time strengthening the system of safeguards against abuse of power, which may arise, not necessarily out of bad faith, but simply due to an over-paternalistic or unduly anxious approach. Thus, for example, we do not oppose a substantial increase in fines. However, we do object that a power to impose substantial fines be conferred on a civil servant without the involvement of a court or an independent tribunal. It may be noted in this respect that many criminal offences do not attract a penalty of up to $1,000,000, which is the maximum proposed penalty in the Bill.

3. The Administration keeps referring to the fact that some of the proposed draconian powers to compel production of information, and power of entry, search, and seizure under the proposed section 35A are nothing more than a reproduction of existing licence conditions. This has completely missed the point. The constitutional context is entirely different. A licence is a contract between two contracting parties. It is not subject to any constitutional constraint. Legislation, in contrast, is subject to the constraints of the Basic Law. The clear duty of the legislature is to ensure that no law it enacts will contravene the Basic Law, which includes the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong. Thus, the mere fact that these powers exist in the existing licence do not provide an answer to the constitutionality of such powers.

4. These powers are in the nature of police powers, and we have shown, with support of both local and overseas judicial decisions, that such powers should only be exercised by the courts or be subject to the scrutiny of the courts under a warrant system. The Administration has failed to address these concerns. Nor has it shown why it cannot go

to the court to apply for a warrant for the exercise of such powers, when other law enforcement agencies are subject, day in and day out, to such requirement for the exercise of similar powers. The Administration's reference to overseas examples lacks details. It is no answer merely to say that similar powers are granted to overseas regulators in Canada or Switzerland. The more important point is what safeguards exist in those jurisdictions. For example, the Canadian Charter on Fundamental Rights and Freedoms imposes stringent requirements on the exercise of any power of entry, search and seizure.

5. The Administration strongly objects that the power to compel interconnection and sharing of use of facilities do not constitute a deprivation of property rights because 'the property rights of the facilities, including the local loops, remain to be vested in the licensee as owner of the facilities/loops even with interconnection'. This is an extremely narrow view of property right. It is tantamount to saying that to compel a property owner to allow his flat to be used by other people is not a deprivation of property because the flat remains the property of the owner. Property right includes peaceful enjoyment of property without interference.

6. Again we are not saying that property right cannot be taken away. It can, but this must be subject to; (1) the existence of clear criteria for doing so; and (2) a right to fair and equitable compensation. The decision to compel sharing of facilities is to be made by a civil servant. The terms and conditions of the sharing are to be dictated by a civil servant. There is no right of appeal against such terms and conditions. Judicial review cannot provide a remedy in this respect as the court will be extremely reluctant to interfere with such matter on merits.

7. On a more general level, we have argued that the Bill should provide channel for appeal against decisions of the Telecommunication Authority on grounds of merit. The Administration says that this is unnecessary because it would not be administratively efficient. Administrative efficacy is of course not a justification for denying the constitutional right to fair hearing. The mere fact that these may involve technical matters is no answer. It is always possible to establish a specialised tribunal for this purpose. The Administration's argument that 'to have an appeal board under the legislature empowered to review and quash the independent regulator's decision is out of step with the structure of government and cannot be accepted as a matter of principle' is at best misleading. The Town Planning Appeal Board set up under section 17 of the Town Planning Ordinance is a specialised tribunal empowered by the legislature to review and quash certain decisions of the Town Planning Board. Administrative Appeals Board is another statutory body empowered to review and quash the decision of many

independent regulators, including the Privacy Commissioner.

8. Nor is there any statutory right to obtain fair and equitable compensation. The Administration says that it has already issued guidelines regarding the principles governing the criteria for the determination of compensation, which would not be below the reasonable relevant costs, including the cost of capital. Administrative guidelines are no substitute for legal provisions. Administrative guidelines are not binding, and can be easily changed without any independent scrutiny. If the Administration is prepared to issue such guidelines, there is no reason why such principles cannot be written into the legislation. If it wishes to retain flexibility, it all the more reinforces the impression that these guidelines do not confer any right to compensation.

9. The Telecommunication (Amendment) Bill is a complicated piece of legislation. However, technical complexity is not a reason to undermine the importance of constitutional requirements. At this stage, the constitutional concern that we have raised has not been adequately addressed, if at all.

Dated this the 5th of October, 1999

Johannes Chan
Counsel