CB(1)402/99-00

By Hand and Fax 2121 0420

Miss Polly Yeung Clerk to Bills Committee Bills Committee on Telecommunication (Amendment) Bill 1999 Legislative Council Legislative Council Building 8 Jackson Road Central	Our Ref: Telephone: Fax: Date:	RALC-698/99 2883 3869 2962 5894 15 November 1999

Dear Miss Yeung,

We refer to the ITBB's response to the comments submitted by the industry [Bills Committee reference CB(1)1860/98-99(01)], CWHKT regrets to find that the crux of many legal & constitutional issues raised in the CWHKT submissions have not been adequately and objectively addressed by the Administration. CWHKT has prepared the enclosed "Reply to the Administration's Response to the Views submitted by the Deputations" and respectfully requests that the Administration provide a thorough and direct response to our paper. As the Bills Committee meeting plans to proceed to the clause-by-clause review stage shortly, we would appreciate it if CWHKT could be given an opportunity to make a presentation to the Administration and Bills Committee on the legal issues of the Bill at a time convenient to the committee.

We take this opportunity for presentation seriously, as it will, we hope, provide a direct discussion forum for the Administration, Bills Committee members and CWHKT to exchange views constructively and effectively.

Thank you.

Yours sincerely,

EVA CHAN
Manager, Regulatory Affairs

Encl.

Bills Committee of the Legislative Council
Telecommunication (Amendment) Bill 1999

Reply of Cable & Wireless HKT Limited to
"The Administration's response to the views submitted by the deputations"
Paper No. CB(1)1960/98-99

Introduction

The Administration describes the Telecommunication (Amendment) Bill 1999 ("the Bill") as an important and technical Bill and notes that the Bill aims to amend the Telecommunication Ordinance (Cap 106) ("the Ordinance") in order, *inter alia*, to enhance competition safeguards, improve interconnection and access arrangements for telecommunications services, and provide the Telecommunications Authority ("TA") with the necessary powers in certain technical areas such as radio spectrum management and setting technical standards. The Administration states that a "majority of the provisions proposed are existing licence conditions" which are included in the Bill to provide an "even more certain operating environment for telecommunications operators." It is also noted by the Administration that the Bill has reflected views collected in several rounds of public consultation.

In the view of Cable & Wireless HKT Limited ("CWHKT"), the Bill if enacted as presently drafted, will:

- radically alter competition regulation of telecommunications which will stifle future development,

- confer on the TA vastly increased powers, ranging far wider than "certain technical areas", without any checks and balances, and

- be a major departure from sound legislative practice due to violations of the Hong Kong Bill of Rights Ordinance (Cap 383) and the Basic Law.

It is acknowledged by the Administration that it is understandable that CWHKT "would have substantial concern over the provisions on competition safeguards." This implies, incorrectly, that CWHKT fears competition safeguards. On the contrary, CWHKT supports proper competition safeguards - provided they are applied fairly to **all** persons who may behave anti-competitively; and that there are adequate checks and balances against improper application of the competition safeguards.

The Bill proposes to confer powers on the TA that are purely discretionary and vastly increased in both scope and scale. The Bill will create a private right of action, potentially leading to "nuisance" lawsuits, that can be grounded solely on the "opinion" of the TA. There is no statutory requirement for the TA to hear representations from an affected party before forming the "opinion" which could result in the party being subjected to lawsuits for damages. Effectively, the Bill deprives the affected party of its **fundamental constitutional right to a fair hearing**. Further, the TA's "opinion" is not subject to any right of appeal on the merits, nor even any obligation to provide written reasons for that opinion. There are absolutely no safeguards in this Bill against arbitrary or capricious decisions by the TA. This is **without precedent** in any international telecommunications market.

While some of the provisions of the Bill are loosely based on existing licence conditions in the FTNS licence, it is misleading to suggest that the Bill merely incorporates existing licence conditions. In fact the Bill proposes to establish a parallel regime of statutory regulation on top of the existing licence regulation. Sweeping provisions in relation to competition and price regulation (similar to, but not the same as, the existing FTNS licence conditions) are extended to all sectors of the telecommunications industry including the mobile and internet sectors (which have not previously been subject to such regulation under the applicable licences). Contrary to the claims of the Administration, a parallel regime of regulation will greatly increase **uncertainty** in the operating environment for telecommunications operators.

Further, the fact that certain of the provisions proposed in the Bill, such as those relating to competition issues, the TA's proposed powers of entry, search and seizure, and the power to compel production of documents, resemble provisions in the existing FTNS licence completely misses the point. Licences and statutes are subject to entirely different constitutional considerations. The legislature has a clear duty to ensure that no law it enacts will contravene the Basic Law (see paragraph 3 of the Short Advice of Professor Johannes Chan, Annex C of CWHKT's Letter to the Bills Committee dated 20 October 1999 ("Short Advice")).

It is true to say that the Bill has been through several rounds of public consultation. The Bill has been subject to public consultation since December 1996, and consultations were opened with respect to the Bill in 1997, and again in 1998 as part of the Administration's 1998 Fixed Review of Telecommunications. However, despite several three rounds of public consultation, none of CWHKT's views in relation to the Bill have been incorporated into its drafting. Despite previous submissions from CWHKT concerning the Bill's legality, the Bill is presented to the Legislative Council still containing provisions which, in CWHKT's submission and in the opinion of Michael Thomas Q.C. S.C., Tim Eicke, and Professor Johannes Chan, whose Joint Advice has been provided to the Bills Committee (CWHKT's Letter to the Bills Committee dated 20 October 1999, Annex A ("Joint Advice")), are contrary to the Basic Law and the Hong Kong Bill of Rights Ordinance.

In addition, CWHKT has pointed out areas of the Bill where the drafting is ambiguous, which will lead to uncertainty as to the operation of several significant provisions. For example, proposed section 36C(3B) is unclear as to whether the Court may revisit the TA's determination of a breach of the Ordinance leading to a financial penalty, and it is also unclear whether the TA may seek further financial penalties on a licensee from the Court additional to the TA imposing financial penalties himself (see the advice of the firm of solicitors Allen & Overy, Annex C of CWHKT's Letter to the Bills Committee dated 20 October 1999 ("Allen & Overy Advice"). Despite submissions on these points, even when the Administration implicitly acknowledges that the alternative meaning to the one intended is arguable, the Administration persistently refuses to address the drafting ambiguities in the legislation.

CWHKT's detailed comments by way of response to the Administration's paper CB(1)1960/98-99 follow below.

Powers of the TA

It is stated by the Administration that "it has been a well established practice of the TA to consult the industry or the public ... and to give reasonable opportunities for affected parties to make representations before he comes to a conclusion on significant issues, including directions and determinations". Further it is observed that the TA is subject to the rules of natural justice, and to

the duty to take into account all relevant considerations and make known to the public the reasons for decisions. **The TA's past practice is no substitute for statutory obligations compelling the TA to observe the processes of natural justice.** Under the Bill, the TA will be required to give reasons in writing in regard to certain decisions, and is obliged to make decisions on reasonable grounds having regard to relevant considerations. This merely codifies the TA's common law obligations to observe natural justice. Significantly, the Administration has omitted the TA's "opinion" from the requirement to give reasons in writing. As the TA's opinion is fundamental to the provisions relating to competition, and is the basis both for significant financial penalties and private rights of action against licensees, it is vital that an affected party be entitled to know the reasoning of the TA in forming an opinion: see paragraph 8a of the Joint Advice. The Administration notes that the TA's current practice is to include written reasons for his opinion in relation to licence issues. Past administrative practice is no substitute for a statutory requirement for the TA to follow the law.

While the Administration has stated that it proposes to codify the TA's common law requirement to give reasons for decisions, to take into account relevant considerations, and to act reasonably, the Administration has not included in the Bill a general legal requirement on the TA to consult for every major decision. The obligation to consult is provided for in specific instances only. These include, as noted by the Administration, new sections 7I(4) (disclosure of information), 36A(5C) (publication of interconnection agreements) and 36AA(2) (facilities sharing). Sections 36A(4) and 36(B)(2) of the existing Ordinance provide for the TA's obligation to hear representations from affected parties in relation to interconnection, and the TA's power to issue a direction in relation to interconnection, respectively. Neither the Bill nor the Ordinance would oblige the TA generally to consult with affected parties in relation to a decision, opinion, direction or determination, nor specifically with respect to any of the competition provisions (ss. 7K-7N) nor the penal provisions (s 36C). Contrary to the Administration's statement, there is no statutory obligation on the TA to consult before imposing a penalty (or making public disclosure or requiring corrective advertising) under section 36C.

In CWHKT's submission the TA should be statutorily compelled to consult in the exercise of every major decision, especially his decisions in relation to competition issues, as the TA's decisions may lead to an affected party being subject to an application by the TA to the Court for additional financial penalties, or against a third party for damages. Such a trial may be unconstitutional because the defendant would be deprived of the right to a fair trial since the issue of liability would have been determined by the TA in advance, without the affected party even being given an opportunity to make representations: see the Joint Advice paragraphs 19-22.

However, an obligation to consult is not a substitute for an adequate right of appeal against decisions of the TA which will serve as a check and balance on the exercise of the TA's power. The Administration has stated that the existing system whereby appeals against the TA's decisions are by means of judicial review "has worked well and has the general support of the industry".

As was noted in the Bills Committee meeting of 6 October 1999, judicial review is **not the same as appeal on the merits** because:

(i) judicial review is not a **right**: a party seeking review of an administrative decision must seek the leave of the Court to even begin the case seeking review;

(ii) judicial review focuses on the **process** of the decision, not on the **merits**: the Court will not quash a decision unless the process of reaching the decision was unlawful, or unless the decision itself is so unreasonable as to become unlawful - for example, if alternative factual conclusions are available, the Court will not supplant the TA's conclusions with the Court's preferred conclusions unless the TA's conclusions are so unreasonable as to be unlawful;

(iii) the Court in giving judgment in a judicial review application will not supplant the original decision with the decision of the Court, but may quash the decision and direct that the decision be made again - so long as the correct process is followed the decision may in fact be exactly the same despite the review - so in fact judicial review is **not an appeal** at all.

The Administration in its response to the Bills Committee at the meeting of 6 October 1999 noted that judicial review has worked well as a right of appeal which is why the Administration has chosen to incorporate this appeal right into the Bill. This is misleading: as stated above, judicial review is not a right of appeal, and no such right has been incorporated into the Bill, which is completely silent on the issue of appeals. Consequently, judicial review becomes the only avenue of redress available. Professor Johannes Chan notes in his Short Advice "administrative efficacy is of course not a justification for denying the constitutional right to a fair hearing" (paragraph 7).

It is also fallacious to say that judicial review has the general support of the industry: in fact, operators which own and operate three of the five major wireline networks in Hong Kong, namely Cable & Wireless HKT Limited, New T&T Hong Kong Limited, and Hong Kong Cable Television Limited, have submitted that an appeals procedure is necessary to protect against arbitrary or unlawful decisions of the TA. The Consumer Council also actively supports the establishment of an appeals procedure in relation to decisions of the TA. The availability of appeals against decisions of regulatory bodies responsible for telecommunications is usual in other liberalised markets, as demonstrated by the TA's own research presented to the Legislative Council, and is usual in other regulated industries in Hong Kong, such as the financial industry. The lack of an appeals procedure in relation to such wide-ranging powers of the TA is in breach of the Hong Kong Bill of Rights: see the Joint Advice paragraphs 23-27.

Competition Safeguards

The Administration asserts that the competition provisions (proposed sections 7K - 7N) are "largely modelled on the existing conditions in the FTNS licence". In fact, the Bill will significantly expand the scope of the existing conditions in the FTNS licence to all sectors of the telecommunications industry, including internet and mobile, rather than just to local fixed networks. The Bill will create considerable uncertainty due to the differences between the licence conditions of mobile and internet operators and the provisions of the Bill. We would note that the TA will have the power to issue directions, impose penalties and the like for breaches of either the licences or the Ordinance; consequently the TA will be able to pick and choose which regulation (licensing or statutory) he believes would serve his purposes.

The Bill also significantly extends the scale of the existing conditions in the FTNS licence as the competition provisions proposed in the Bill will enable the TA, in his sole discretion, to impose vastly increased fines and to seek a penalty from the Courts of up to 10% of the licensee's turnover in a particular market. The competition provisions create a private right of action for third parties potentially creating an opportunity for "nuisance" lawsuits and liabilities amounting

to damages claims in the tens or hundreds of millions of dollars. Both penalties and damages claims proceed on the basis of the "TA's opinion". The TA in forming his opinion is not subject to appeal nor even to any legal obligation to hear representations from affected parties or to set out the reasons for the opinion in writing.

It is not correct to suggest, as the Administration does, that the proposed competition safeguards in the Bill merely codify existing regulatory measures found in the FTNS licence and put beyond doubt the TA's powers to enforce these measures. The proposed competition safeguards establish an **entirely new** regulatory regime and give the TA considerable powers which are in their nature police powers. These powers are not subject to any checks and balances. Such a competition framework in telecommunications exists in **no other advanced telecommunications market in the world**.

The Administration has mischaracterised CWHKT's position in relation to competition issues and penalties. CWHKT does not disagree with the need for increased penalties for anti-competitive action, nor does CWHKT disagree with private rights of action. In fact CWHKT would support the availability of increased penalties and private rights of action in relation to all anti-competitive conduct in telecommunications markets, including for the anti-competitive conduct of affiliated property companies outside the ambit of the Telecommunication Ordinance, and for the anti-competitive conduct resulting from unlicensed operators operating illegally in Hong Kong. Such conduct is not presently addressed by the provisions of the Bill for penalties or for private rights of action.

Interconnection

The Administration states that it is proposed in the Bill "to clarify the powers of the TA on interconnection". In fact the Bill goes much further than clarification: entirely new powers are proposed to be granted to the TA in relation to interconnection. CWHKT has expressed concern over the proposed interconnection provisions because the Administration has chosen to grant the TA a discretionary power over interconnection which is not subject to adequate statutory guidelines, either as to the type of interconnection subject to the provisions, or as to the compensation payable to the interconnection access provider.

At the minimum, the interconnection provisions should require that **fair compensation must be payable** to an access provider providing interconnection for the costs of that interconnection. As presently drafted, the TA is granted the discretion as to whether or not **any** compensation is payable for interconnection.

The scope of the proposed interconnection provisions is too broad. The current wording of the Bill proposes **no limit** on what the TA could conceivably require CWHKT to make available to its competitors, **possibly below cost**, including even hardware and software used by CWHKT for value-added services and other non-essential facilities, which are crucial service differentiators among competing operators. Internationally, interconnection is only mandated for interconnection between networks to allow for ubiquitous communications ("any-to-any" connectivity), or for interconnection to essential facilities (the facilities for which it may not be practically or economically feasible to duplicate). Network features and enhancements not necessary for interconnection should not be potentially subject to determination of mandatory interconnection.

The Administration has mischaracterised CWHKT's position with respect to bottleneck facilities. CWHKT believes that interconnection should be mandated only if the facility to which a competitor seeks interconnection is necessary for the competitor to be able to operate its business as a telecommunications operator, and if interconnection is mandated, fair compensation should be payable. CWHKT should not be required to subsidise its competitors' businesses below cost. It should be noted that CWHKT already provides interconnection to its competitors, including to CWHKT's local loops, at commercial rates agreed between them. The type of interconnection referred to in the Administration's Response - the interconnection of networks so that customers of one network can communicate with customers of the other networks - has been in operation for several years and CWHKT has no issue with interconnection of that nature.

CWHKT notes, in regard to the Administration's statement that the "concept of 'bottleneck' facility is not relevant in the consideration of interconnection in general", that the TA has several times in public statements discussed the concepts of interconnection and bottleneck facilities.[1] The TA has stated that for many buildings there are bottlenecks in access rendering it difficult for the new entrant networks to install a second local loop. The TA has called the local access links ("LALs"), which are local loops provided on a commercial basis by CWHKT to the new entrant fixed operators to obviate the requirement they would otherwise face to install alternative local loops, "bottleneck facilities". Clearly the concept of "bottleneck facilities" is relevant to the interconnection power the Administration proposes to grant to the TA. CWHKT maintains the position that adequate and clear statutory guidelines should be set out in the Bill in relation to interconnection of this kind, which should only be mandated if alternative network facilities cannot be duplicated reasonably economically or efficiently, and then only if adequate compensation is payable to the network access provider.

The requirement for fair compensation must be provided for in the Bill, otherwise the Bill is at risk of being in breach of the Basic Law. Mandatory interconnection to the local loops is a deprivation of property without due compensation within the meaning of Article 105 of the Basic Law if inadequate compensation for the provision of the loops is payable to CWHKT: see Joint Advice paragraphs 49-57; Short Advice, paragraph 5.

Access Right of Mobile Network Operators

Cable & Wireless HKT CSL Limited has previously made submissions on the access rights of mobile network operators which are incorporated by reference in this Reply.

CWHKT has set out detailed replies in **Annex A** of this Reply to the Administration's detailed responses to the views submitted by the deputations as set out in Annex C to the Administration's Paper No. CB(1)1960/98-99.

Cable & Wireless HKT
November 1999

[1] "Type II Interconnection between New World Telephone and Hong Kong Telephone", Statement of the TA, 19 April 1999, para 6(b); "Regulation of Broadband Network Services", Statement of the TA, 16 July 1997, para 6(2)(b); and "Interconnection Configurations and Basic Underlying Principles: Interconnection and Related Competition Issues", Statement of the TA, 3 June 1995, para 8.

Annex A

Issue & Relevant Provision(s)	Summary of Cable & Wireless HKT's Submissions	Summary of Administration's Response	Cable & Wireless HKT's Reply
Powers of TA (s. 6A)	The statutory functions of the TA should be set out in the Ordinance.	The TA's functions are set out in Schedule 1 of the Legislative Council Resolution on the establishment of the OFTATF under the Trading Funds Ordinance.	CWHKT sees no reason why the TA should be exempt from the usual practice in Hong Kong of setting out a statutory body's functions in that body's enabling legislation. For example, the functions of each of the Securities and Futures Commission, Insurance Authority, Gas Authority, Public Service Commission, Hospital Authority, Town Planning Board, Monetary Authority, Consumer Council and the Broadcasting Authority are set out in their respective enabling Ordinances. Schedule 1 to the OFTATF may be changed by the administrative action of the Government. Given the broad powers of the TA and the power to impose substantial penalties, we believe that any change to the functions and powers of the TA should be passed by proper legislative process and amendment.
	The TA should be required by statute to act reasonably, consult, take into account only relevant considerations, and give written reasons for forming an opinion, making a decision, issuing a direction, and making a determination.	The Administration states that the omission of the word "opinion" in section 6A(3)(b) is not a deliberate act of releasing the TA from giving reasons for forming an opinion. The TA has an established practice of consulting the relevant parties before he makes any decisions of significance.	The Administration has given no sound reason for omitting the word "opinion" from proposed section 6A(3)(b). CWHKT believes that the TA could issue reasons for reaching a decision without adequately stating the reasoning behind the underlying opinion forming the basis of the decision. Further, the TA's opinion is central to the competition provisions of proposed sections 7K - 7N, which in turn may lead to liability for financial penalties and private rights of action for damages by third parties. In each of these instances it is vital that the TA is required by statute to give detailed reasons in writing for forming any opinion: see the Joint Advice, paragraph 22. The TA's obligation to consult affected parties is confined to certain provisions only, such as releasing confidential information, and the interconnection and facilities sharing provisions. Importantly, the TA is not statutorily obliged to consult affected parties before forming opinions or making decisions with respect to the competition provisions (sections 7K-7N). Affected parties will be deprived of the right to a fair hearing in contravention of the Basic Law: see the Joint Advice paragraph 22. In CWHKT's view the TA's past practice is no substitute for a statutory

Issue & Relevant Provision(s)	Summary of Cable & Wireless HKT's Submissions	Summary of Administration's Response	Cable & Wireless HKT's Reply
			requirement compelling the TA to observe the processes of natural justice and to follow the law.
Tariffs and Price Control (ss. 7F & 7G)	CWHKT believes the price control regulations reflect an outdated regulatory regime inconsistent with the current competitive environment.	Proposed section 7F is an existing licence condition in the FTNS licence for the protection of consumers' interests.	In a liberalised and competitive telecommunications market there is no need for price controls to be imposed on private telecommunications operators be the Government. As the last remaining milestone before full contestability in all telecommunications markets in Hong Kong is to fall on 1 January 2000 (almost certainly before the Bill will come into force) price control is simply obsolete and unnecessary. The Administration has previously stated that the reasons for price control regulation have diminished with liberalisation as increasingly competition acts to discipline CWHKT's tariffs. In the Administration's Statement "Liberalisation of Hong Kong's External Telecommunications - *A Policy Statement*", 20 January 1998, the Administration stated that "the Government intends to withdraw the price control arrangements by seeking to repeal the relevant Regulation." By this Bill the Administration is contradicting that statement by seeking to *re-regulate* for price control. Accordingly, CWHKT believes that the Policy Statement should be followed and section 7G should be deleted. CWHKT has also submitted that the proposed section 7F be deleted because tariffing regulation does not serve the purpose for which the Administration intends it; namely, to protect consumers' interests. Tariffing regulation as it is currently being administered by the TA merely serves to distort market pricing with the result that consumers are being harmed by paying higher prices. The Administration has cited the UK, the US and Australia as examples of overseas jurisdictions which have experience of price regulation of the dominant operator. In each of these jurisdictions price regulation is being liberalised as it is recognised that economic regulation of this type creates market distortions which ultimately cause consumers to suffer through paying higher prices.

Issue & Relevant Provision(s)	Summary of Cable & Wireless HKT's Submissions	Summary of Administration's Response	Cable & Wireless HKT's Reply
Request for, and Disclosure of, Information (s. 7I)	CWHKT believes that the proposed power to disclose information to third parties under proposed section 7I(3) is unnecessary and arbitrary within the meaning of the Basic Law and the Bill of Rights Ordinance. Proposed section 7I(3) should be deleted.	Disclosure of confidential or commercially sensitive information may be required in the public interest. The Basic Law and the Bill of Rights Ordinance will not be contravened as the exercise of the power is necessary, in the public interest and by no means arbitrary.	The Administration has not stated any reasons as to how or why disclosure of commercially sensitive or confidential information could be in the public interest. The Administration claims that disclosure would not be arbitrary because proposed section 7I(4) would require the TA to consult a person before disclosing information. In fact, proposed section 7I(4) provides no real safeguard against arbitrary disclosure by the TA because the TA has absolute discretion as to whether or not to consult the person whose information is to be disclosed before disclosing it. The Administration states that this power is a restrictive one necessary for the TA to exercise his functions (which are not set out in the Bill). However, section 7I does not set out any criteria for determining when disclosure is necessary but rather provides a blanket power of disclosure. 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: see the Joint Advice, paragraphs 42-48. The Administration notes that similar powers are given to telecommunications regulators in other jurisdictions, such as Canada and the UK. However, other regulators in other jurisdictions are subject to much wider constitutional safeguards, such as the Canadian Charter of Rights and Freedoms, which are vigilantly maintained by the Courts: see the Short Advice, paragraph 4.
Competition Safeguards (ss. 7K - 7N)	CWHKT has suggested that a general competition law should be introduced in Hong Kong. Given that such an introduction is outside the scope of this Bill, CWHKT believes that the competition provisions of the Bill should be subject to objective assessment by the Courts, rather than subjective assessment by the TA, and that	The Administration states that the competition provisions (sections 7K - 7N) merely reflect existing FTNS licence conditions. The Administration states that the special characteristics of the telecommunications markets justifies the sector-specific approach proposed in the Bill.	Cable & Wireless HKT supports the adoption of general standards of competition law to be objectively assessed before the Courts. Even if the creation of a general competition law is not possible within the context of the Bill, CWHKT sees no reason why the principles that should underpin a general competition law cannot be established in the Bill with respect to the telecommunications sector before being expanded to cover other market and industry sectors through other legislation. First, any breach of the competition provisions should be objectively assessed by the Courts, particularly as the Courts may be called upon to assess the appropriate penalty to be paid to the Government or the

Issue & Relevant Provision(s)	Summary of Cable & Wireless HKT's Submissions	Summary of Administration's Response	Cable & Wireless HKT's Reply
	the provisions should apply to all persons who act anti-competitively with respect to a telecommunications market in Hong Kong.		appropriate damages to be paid to a private third party for a breach of these provisions. Accordingly, the phrase "in the opinion of the Authority" should be deleted from the provisions where it appears. Second, there is no valid reason why the competition provisions should be applicable to licensees only. CWHKT does not disagree with the Administration that the telecommunications market should be subject to competition law, but we do disagree with the apparent conclusion of the TA that licensees are the only participants in the telecommunications market who can act anti-competitively. CWHKT has previously raised to the TA the anti-competitive behaviour of companies (particularly property developers) which are affiliated with licensees to be told that these companies are outside the TA's powers. It would seem that this Bill provides ample opportunity for the Administration to legislate for competition provisions applicable to all participants in the telecommunications market, simply by replacing the word "licensee" with the word "person" where it appears in the competition provisions. Failing to provide for a level playing field in the regulation of competition in the telecommunications market would be a breach of Article 22 of the Basic Law: see the Joint Advice, paragraph 29.
Inspection of Records, Documents and Accounts (s. 35A)	CWHKT considers that the proposed section 35A gives the TA unlimited power to compel production of information from a licensee; accordingly the provision should be amended to require the TA to exercise search, seizure and document compulsion powers under warrant only.	Proposed section 35A is modelled on an existing licence condition and grants the TA the power to inspect records, documents, and accounts of the licensee to enable the TA to perform his statutory functions, which power has to be exercised "from time to time on a routine basis". It is noted that the TA is bound by administrative law duties to act lawfully and that similar powers are given to overseas regulators.	Powers of search, seizure and the compulsion of production of documents are police powers. Accordingly such powers should only be granted, and exercised, in accordance with due process of law. Such powers are not routine, and should not be exercised "from time to time" without adequate judicial oversight. Proposed section 35A falls well short of the requirements of the Bill of Rights and the Basic Law as interpreted by the Courts: see Joint Advice, paragraphs 37-41. The fact that the powers conferred by section 35A are also included in the FTNS licence completely misses the point; the constitutional context of legislation compared to licence conditions is entirely different: see Short Advice, paragraph 3.

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Interconnection and Sharing of Facilities (ss. 36A & 36AA)	CWHKT considers that the proposed amendments to sections 36A and 36AA will significantly expand the powers of the TA to mandate the terms and conditions of interconnection, and will extend his powers to include mandatory unbundling of the local loop. This would confer on the TA an unlimited power to require a licensee to provide its competitors with the core elements of its business, and, if the TA so determines, below cost. Interconnection should be between networks, not between elements of networks. Deprivation of property without fair compensation raises serious constitutional issues under the Bill of Rights and the Basic Law. Proposed section 36AA, which would not require the payment of fair compensation for sharing of facilities raises serious constitutional issues under the Bill of Rights and the Basic Law.	The Administration states that the property rights in facilities including the local loops subject to interconnection (including Type II interconnection) and sharing requirements remain to be vested in the licensee who owns them. The TA's powers are not in their nature a deprivation of property within the meaning of Article 105 of the Basic Law. Under proposed section 36A(3B) the TA would select costing methods which are fair and reasonable. The TA has issued guidelines. According to the guidelines, the TA will not determine terms which are below cost. CWHKT's suggestion that interconnection should only be mandated if there is a bottleneck facility is not acceptable. Interconnection is essential for customers of one network to be able to communicate with customers of another network.	CWHKT agrees that the statutory guidelines set out in proposed section 36AA provide some safeguards in relation to the exercise of the TA's power to require the sharing of facilities. CWHKT believes that proposed section 36AA(6) should be amended to include a requirement that the terms and conditions determined by the TA for the sharing of facilities must include fair compensation to the facilities provider for the investment in those facilities. There appears to CWHKT to be no reason why similar statutory guidelines for the exercise of the TA's powers with respect to interconnection should not be added to section 36A. CWHKT agrees with the Administration that the interconnection of networks to allow customers of one network to communicate with customers of any other network ("any-to-any" connectivity) is important. CWHKT notes that the power to mandate such interconnection is already conferred on the TA by the existing section 36A, and that every network in Hong Kong is already interconnected directly or indirectly to CWHKT's networks. CWHKT does not agree with the Administration that the concept of bottleneck facilities is irrelevant to interconnection. In fact the TA has several times in public statements discussed the concepts of interconnection and bottleneck facilities together.[1] Interconnection should only be mandated to provide for ubiquitous connectivity, and to provide for ubiquitous coverage if there are bottleneck or essential facilities which are physically or economically impossible to duplicate. CWHKT notes that it has had agreements with other network operators for Type II interconnection since May 1996 - one of the first operators in the world to offer interconnection services of this type. Mandated interconnection of any scope wider than this creates a disincentive to invest in any network facilities by any licensee for such investment will be at risk of appropriation by the TA on behalf of competitors, at or below cost.

[1] "Type II Interconnection between New World Telephone and Hong Kong Telephone", Statement of the TA, 19 April 1999, para 6(b); "Regulation of Broadband Network Services", Statement of the TA, 16 July 1997, para 6(2)(b); and "Interconnection Configurations and Basic Underlying Principles: Interconnection and Related Competition Issues", Statement of the TA, 3 June 1995, para 8.

Issue & Relevant Provision(s)	Summary of Cable & Wireless HKT's Submissions	Summary of Administration's Response	Cable & Wireless HKT's Reply
		The concept of bottleneck facility is not relevant in the consideration of interconnection in general. On the sharing of facilities under section 36AA, there are adequate safeguards to ensure that the exercise of powers by the TA is reasonable and fair.	The fact that the TA has already established guidelines for interconnection which include that interconnection will be based on a reasonable estimate of cost is no substitute for adequate statutory guidelines. The proposed section 36A goes much further than the required scope: the section would empower the TA to mandate interconnection to any element of a licensee's network, which may include value-added services, and the section does not require the TA to determine that fair compensation is payable. It is this element of proposed section 36A that is in breach of Article 105 of the Basic Law: see Joint Advice, paragraphs 56 and 57. CWHKT disagrees with the Administration's narrow view of property rights. The mandatory vesting of the use of the local loops to another operator by the TA is equivalent to conversion of CWHKT's property rights of use in those loops, notwithstanding that CWHKT still owns them. In fact, CWHKT will be subject to obligations to maintain the local loops even when they are in use by a competitor.
Increased Penalties (s. 36C)	(a) CWHKT considers that the proposal to impose fines by the TA is, in effect, a "quasi-criminal" process. (b) The drafting of section 36C leaves open the possibility that the TA could impose a penalty and then seek the imposition of an additional penalty, by the Courts. It is also unclear from the drafting what role the Courts would have, if any, in determining liability for a breach of the competition provisions in an application by the TA for the imposition of additional	(a) Increased penalties are considered reasonable and not excessive by the Administration. (b) There will not be any double penalty first by the TA under the proposed section 36C(3) and by the Court under section 36C(3B)(b) on the same breach. (c) There is always an obligation on the TA to act promptly without undue delay. The TA's exercise of powers are under sufficient public scrutiny. Three years is an appropriate period for an application to the Courts	(a) The power of the TA to impose financial penalties of such magnitude in effect amounts to a power to determine a "criminal charge". Accordingly, rights to a fair hearing by a competent, independent and impartial tribunal, the right to be presumed innocent, and the right to be tried without undue delay are required by the Bill of Rights: see the Joint Advice, paragraphs 10-28. (b) The "double jeopardy" ambiguity needs to be clarified by expressly stating in the provision that the imposition of a penalty by the TA and an application by the TA to the Courts for the imposition of an additional penalty are mutually exclusive: see Allen & Overy Advice, paragraph 8.2. The extent to which the Court determines the issue of liability for a breach of the competition provisions of the Bill needs to be clarified: see Allen & Overy Advice, paragraph 8.1. (c) The Administration itself states on page 24 of Annex C of the Administration's Response that "issues of the telecommunications industry ... require timely action in response to rapid changes brought by technological

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	penalties. (c) The TA can wait for up to three years before making an application to Court for greater penalties. This is an unreasonable delay within the meaning of the Bill of Rights.	for the imposition of additional penalties. The time limit for the purpose of the Bill of Rights begins from when the person is "charged".	advancements". In that context, it is entirely unreasonable that a licensee should have to wait for three years before the licensee would know whether or not it would face an action against the TA for additional penalties. In the light of the "quasi-criminal" nature of these penalties there is a strong argument that a failure to bring an action for additional penalties expeditiously is a violation of Article 11 of the Bill of Rights: see the Joint Advice, paragraph 28. In the event that the TA seeks the imposition of additional penalties by the Courts up to three years from, say, a direction issued by the TA, then the "liability" for the penalty would have been determined already in the direction - this direction is equivalent to a prosecutorial charge. Delay of up to three years from that point is undue within the meaning of the Bill of Rights.
Power to Compel Public Disclosure of Information by Licensees	CWHKT has suggested the deletion of proposed section 36C(3A)(a) which would empower the TA to require a licensee which has breached a provision of the Ordinance or its license to disclose information to the public. Given that breaches of the Ordinance or a licence can give rise to massive penalties, and may form the basis for private law suits against the licensee under proposed section 39A, such disclosure may deprive the licensee of the protections of due process of law.	The proposed section 36C(3A) is modelled on section 80A of the Australian Trade Practices Act 1974. The TA would take into account matters in relation to any disclosure of information under section 6(3). The statutory right of consultation and the rules of natural justice will provide safeguards.	A crucial difference between section 80A of the Australian Trade Practices Act and the proposed section 36C(3A) is that the power of requiring corrective advertising in Australia is vested in the Court, on the application of the Minister or the Australian Competition and Consumer Commission ("ACCC"), if the Court is satisfied that a breach of one of the competition provisions of the Act has occurred. Unlike Australia, the Bill proposes to vest in the TA the power to investigate breaches of the Ordinance (armed with police powers), the power to determine whether or not a breach of the competition provisions has occurred, and then the power to require the licensee to make public disclosure or require corrective advertising. The TA becomes prosecutor, judge and executioner, without any checks or balances on the exercise of these powers. The Administration states that the statutory right of representation provides a safeguard. If should be pointed out that there is no statutory right of representation in this context: section 36C(4) does not give a licensee an opportunity to make representations as claimed by the Administration. Statutory guidelines should be set out to guide the TA's decision on whether to release information or require corrective advertising. The common law obligation to observe natural justice is not a sufficient check and balance to the blanket powers granted to the TA and it is not sufficient to meet the legal

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			requirements that Bills should conform with the Basic Law and the Bill of Rights. Deletion of the proposed section will ensure that the Bill conforms with the Basic Law and the Bill of Rights Ordinance.
Civil Remedy (s 39A)	CWHKT points out that section 39A does not specify what (if any) loss a person must have suffered in order to be "aggrieved", or what criteria must be satisfied before a person can bring an action.	It is the Administration's intention that the aggrieved person should be able to claim remedies for loss or damage as a result of anti-competitive practices and the Court will have due consideration as to whether the person may substantiate his or her claims.	Given that, as presently drafted, proposed sections 7K-7N will create a private right of action under proposed section 39A for a person "aggrieved" by a matter the subject of an opinion of the TA, CWHKT believes that proposed section 39A should provide greater clarity with respect to persons or classes of persons who have standing to take action. Otherwise, licensees may be subject to a great deal of litigation from those who may benefit from fying that licensee in resource-intensive law suits. The provision should codify the "aggrievement" by specifically referring to loss or damage suffered by the potential plaintiff, following the wording of the relevant provision in the UK Telecommunications Act 1984. The Administration has not addressed CWHKT's suggestion that the proposed section 39A should be amended to include that a right of action is available in relation to a breach of section 8 of the Ordinance (offering a means of telecommunication without a licence) so that operators can recover damages for losses suffered due to unlawful operators (who are unlicensed and therefore not subject to most of the provisions of the Ordinance) unlawfully taking business away from the licensed operators. CWHKT repeats its earlier suggestion that section 39A should be available against persons, other than licensees, who act anti-competitively with respect to a telecommunications market by amending the competition provisions by the substitution of "person" for "licensee".
Appeal Body (no provision in Bill)	CWHKT considers that the Bill should provide for means for appeals on the merits against decisions of the TA. We propose that the new section 6B	The exercise of powers of the TA under the Ordinance is subject to checks and balances and important safeguards provided for in the Bill against	Administrative efficacy is not a justification for denying a constitutional right to a fair hearing: see Short Advice, para 7. The mere fact that technical issues are at stake is no answer as it is always possible to establish a specialised tribunal for the purpose. We have suggested that if the Administrative Appeals Board were to be used as an appropriate appeal mechanism, it may

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	be amended to provide for an appeal right, either to the Courts, or to the Administrative Appeals Board. As a matter of law, judicial review is not a right, but a remedy that may only be sought with the leave of the Courts.	abuse of powers. The existing system where appeals against the TA's decisions are by means of judicial review has worked well and has the general support of the industry. It is important to ensure that the regulatory framework would enable the regulator to deal with issues effectively and expeditiously. There is a danger that a new appeal procedure may be exploited by a delinquent licensee to delay the implementation of a well justified determination of the TA.	be suitable to appoint lay members who are qualified in telecommunications, engineering, economics or some related discipline to sit with the Chairman of the Board (a Judge of the Court of First Instance). As discussed above it is not true that the TA will be subject to adequate checks and balances under the Ordinance as amended by the Bill. The TA is under no general duty to consult, and with respect to the competition provisions, which may lead to penalties and to trials for damages claimed by third parties, there are no specific obligations to consult at all. Similarly, the TA is under no obligation to give written reasons for forming an opinion, and, as currently drafted, the TA's opinion is central to competition litigation or to actions taken by the TA to seek penalties. At the very least, an appeal from opinions formed and decisions made by the TA in respect of a licensee's conduct under the competition provisions is vital to protect a licensee's constitutional rights to a fair hearing: see Joint Advice, paragraphs 23-27. It is not correct to state, as the Administration does, that judicial review is a right of appeal, nor does it have the general support of the industry, nor can it be said that judicial review has "worked well" with respect to decisions of the TA as there are no concluded cases which could serve as any precedent. CWHKT, New T & T, HKCTV and the Consumer Council have all advocated the establishment of an adequate appeals procedure, so it is difficult to see where the Administration finds the "general support of the industry". The perceived danger that a "delinquent licensee" may exploit an appeals procedure is no reason to deny licensees their fundamental constitutional rights to a fair hearing under the Basic Law and the Bill of Rights.