Bills Committee on the Telecommunications (Amendment) Bill 1999

Access Right of Mobile Network Operators into Shielded Areas - Response to the Lovell White Durrant on the Policy Considerations, Legal and Constitutional Issues

Purpose

At the Bills Committee meeting held on 10 December 1999, the Lovell White Durrant ("Lovell") (the legal adviser of the BOT tunnel operators) made presentations on the legal and constitutional issues arising from our proposed section 14 in respect of the right of access of mobile network operators to shielded areas. It also expressed its views that these proposed sections may be in contravention of the Basic Law. We firmly disagree with such views. This paper sets out the Administration's detailed response to Lovell.

Basic Law Implications

2. There is no question that the Bill will compromise the stipulations in the Basic Law and we are fully committed to abide by them. We had made response to similar views put forward by the BOT tunnels at their submissions to the Bills committee dated 22 September 1999. A detailed response on the Basic Law issues raised by Lovell is set out in the attached paper. We also note that the legal opinion put forward by the Legal Adviser of the LegCo Secretariat lends support to our view regarding the legality of the proposed section 14. As set out in the attached paper and pointed out by the LegCo Legal Adviser, reasonableness and proportionality are the two major considerations as to whether our proposed sections would be consistent with the Basic Law. We would like to assure Members below that these two tests are met having regard to our policy considerations.

Reasonableness

3. A major relevant consideration on the test of reasonableness is whether there are legitimate societal and community interests in the provision of ubiquitous coverage for mobile telecommunications services. We would like to point out that notwithstanding the importance of mobile telecommunications in Hong Kong (3.64 million subscribers; and 53% penetration), coverage of our mobile networks is not yet ubiquitous. There are still many "blind spots" in urban and business areas. This is not in the interest of the consumers and businesses. The problem will intensify with the advent of the third generation mobile phone services, especially for potential

new entrants.

4. To ensure that Hong Kong can take full advantage of the broad range of innovative service to be brought about by the new generation of mobile servcies, we must resolve the access problems operators may face in the roll-out of their new networks. It is widely accepted that the third generation mobile phone will drastically change the landscape of our telecommunications and IT sectors. It is crucial in providing a suitable operating environment to attract investment and promote application, which will in turn strengthen our position as a telecommunications and Internet hub in the region. The new section 14 aims to provide a proper mechanism to address access problems when commercial negotiations fail between mobile operators and facilities owners of shielded areas e.g. BOT tunnels.

5. The proposed section 14 also has a pro-competition element. As the Consumer Council puts aptly and fairly in its letter to the Bills Committee on 2 October 1999, "(t)he need to ensure that economic welfare is not compromised by the ability of one party to assert leverage, that emanates from a lack of substitutes available to the other party, would demand that the arbitration power is vested in the hands of an authority that has the statutory capacity to neutralise that leverage, and safeguard the interests of the businesses and consumers who use the telecommunications services." The situation described is an imperfect market in the first place. The new section 14 does not extend the right of access automatically to any buildings, land or shielded areas. The vast majority of facilities owners will not be affected when there are alternative areas for the radiocommunications installation to provide service coverage in certain locations/areas. Indeed, under such circumstances, if the two parties fail to agree commercially, the mobile network operator can always choose alternative locations/areas. Their failure to agree will not put public interest at stake. When alternative locations are available, the market should be left to work on its own. The new section 14 therefore sets the necessary checks and balances to strictly prescribe the checks and balances before granting an authorisation. The new section 14(1A)(a) requires that the installation is for the purpose of providing a radiocommunications service to a public place; the new section 14(1B)(a) requires that the authorisation must be in public interest; the new section 14(1B)(b) sets out that the factors to be taken into account before granting authorisation, including the availability of alternative location to place equipment and the availability of technical alternative

6. Owners of shielded areas, which are also public areas, where is no alternative location for radiocommunications installation, are in an exclusive position to negotiate with the mobile operators who want to extend its mobile service to those particular shielded areas. Consumers at such public places cannot enjoy quality mobile network services if the parties concerned cannot

reach a commercial agreement on access arrangements. This is not in the public interest. A very well-balanced framework is put forward in the new section 14 to achieve our policy of ubiquitous mobile service coverage under such circumstances. Apart from the checks and balances as set out in paragraph 5 above, we will ensure primacy of commercial negotiations (see section 14(5)(a)), and intervene only upon market failure. Moreover, mobile operators will be required to pay access fees, which must be fair and reasonable in all circumstances of the case as required under section 14 (5)(b).

7. The new framework is consistent with Administration's well-established policy of free trade and free economic principles. It is also in line with our practice to provide an economic and legal environment conducive to investments.

Proportionality

8. We would like to stress that the effect of our proposal on any facility owner is proportionate to the policy objectives sought to be achieved. As we have explained at previous Bills Committee meetings, there are sufficient statutory checks and balances in the proposed section 14 to ensure that it will not give unfettered rights to the mobile network operators in gaining access to shielded areas for radiocommunications installations Nor is the TA given powers wider than what public interest warrants in granting access right. The policy objective to achieve ubiquitous mobile service coverage in Hong Kong, with reference to societal and community interest considerations, has been set out in paragraph 3 and 4 above. The checks and balances before an empowerment to authorise access have been set out in paragraph 5 above. Apart from meeting such requirement, the two parties shall endeavour to come to a commercial agreement first. Only when this too fails, will a determination on access fees be made. The access fee to be determined must also be fair and reasonable in all circumstances of the case. All these have been explained in paragraph 6.

9. Suitable safeguards are provided for so that the TA and the licensee must exercise the power on right of access conferred by section 14(1A) reasonablely. As stipulated in section 14(2), the mobile network operators should give reasonable notice, do as little damage as possible and pay full compensation to the landowners who suffer physical damage.

10. Our proposed section 14 is strongly supported by the Telecommunications Users' Groups and the Consumer Council. The Consumer Council supports that this is a case for intervention having

regard to the "overarching concern" on "economic welfare". It sees "the necessity of interpolating a Government appointed arbitrator in the process of negotiations between two parties where the wider communities' concerns need to be safeguarded".

11. Finally, Lovell claims that the Government would be in breach of contract upon the implementation of the proposed section 14. Under the existing framework, the tunnel Ordinances provide that the BOT tunnel operators are authorised to determine the charges payable by the mobile network operators, subject to the consent of the Commissioner for Transport (C for T) to the radiocommunications installation. We should note that such authorisation appears not to be absolute as the installation itself has to be subject to the consent of the C for T. We should also note that the tunnel Ordinances are founded on the principle of *a reasonable, but not excessive* return on investment (whether by reference to the general principle or by a specific toll increase mechanism) and do not conflict in principle with our proposal, whereby the access fees the TA will determine under section 14 must be *fair and reasonable* in all circumstances of the case. Our view is that the project agreements do not confer the franchisees an extra right to determine access applications of utility operators in addition to that which has been already conferred to the franchisees by virtue of the relevant tunnel ordinances.

12. As we have explained above, the Bill serves to establish a fall-back mechanism for ensuring ubiquitous network coverage in shielded areas including tunnels, if commercial agreement cannot be reached under the existing framework. When we prepared the proposed section 14(1A), we were aware of the relevant provisions in the tunnel legislation. The section, as presently drafted, has already taken into account the concerned provisions in the tunnel legislation. We do not agree that the current mechanism is adequate and sufficient to meet our policy objective and the needs of the community in telecommunications. We believe that there is sufficient public interest to set up a fall-back mechanism. We argue very firmly and strongly against any implication that the Administration has infringed the Basic Law with the proposed amendments to the Telecommunication Ordinance.

<u>Information Technology and Broadcasting Bureau</u>
18 January 200

Response to Lovell White Durrant's Submission dated 10 December 1999 on the Legal and Constitutional Issues

Purpose

This paper is the response of the Administration to the submission made by Lovell White Durrant on behalf of New Hong Kong Tunnel Company Limited, Tate's Cairn Tunnel Company Limited, Western Harbour Tunnel Company Limited and Route 3 (CPS) Company Limited (collectively "the Tunnel Companies" and individually "Tunnel Company") on the legal and constitutional issues arising out of clause 7 of the Telecommunication (Amendment) Bill 1999 ("the Bill') and dated 10 December 1999 ("the Submission").

Constitutional Issues Raised in the Submission

2. In the Submission (paras 4-5), it is argued that the proposed right of access and fee determination provisions of the Bill as set out in clause 7 ("the Proposed Provisions") would breach one or more of the following provisions of the Basic Law:

(a) the preservation of Hong Kong's previous capitalist system (Article 5 of the Basic Law);

(b) the protection of property (Articles 6 and 105 of the Basic Law);

(c) the pursuit of the policy of free trade (Article 115 of the Basic Law);

(d) the provision of an economic and legal environment for encouraging investments (Article 118 of the Basic Law); and

(e) the continuing validity and recognition of contractual rights and obligations under the laws previously in Hong Kong provided that they do not contravene the Basic Law (Article 160 of the Basic Law).

3. It is the Administration's view that the above argument in the Submission is not tenable.

Article 5 of the Basic Law– Preservation of Previous Capitalist System

4. Article 5 of the Basic Law provides:

> "The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

5. In the opinion of the Administration, the Proposed Provisions are consistent with Article 5 of the Basic Law. The "previous capitalist system" in Hong Kong was not a system where the Government did not interfere with the right of individuals to carry on business and negotiate contracts as alleged in the Submission (para 14). Section 36A of the Telecommunication Ordinance (Cap 106) ("the Ordinance") provides a good example. Under that section which has been in force prior to reunification, the Telecommunications Authority ("TA") enjoys the power to determine the terms and conditions of any agreement of interconnection, including charges payable from one operator to another for interconnection services.[1] Hence, it is inaccurate to state that the Proposed Provisions depart from the pre-reunification capitalist system in Hong Kong.

Articles 6 and 105 of the Basic Law – Protection of Property Rights

6. Article 6 of the Basic Law provides:

> "The Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law."

7. Article 105 of the Basic Law provides:

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[1]That the terms and conditions of any interconnection agreement determined by the TA under section 36A of the Ordinance would include charges payable from one operator to another for interconnection services, please refer to, for example, the *TA's Interconnection and Related Competition Statement Issues, Statement No 1* dated 28 March 1995.

> "The Hong Kong Special Administrative Region 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.
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> 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. …"

8. For the purpose of this response, the Administration would assume but without admitting that the rights of the Tunnel Companies under the Eastern Harbour Crossing Ordinance (Cap 215), the Tate's Cairn Tunnel Ordinance (Cap 393), the Western Harbour Crossing Ordinance (Cap 436) and the Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap 474) (collectively "the Tunnel Ordinances") and their project agreements with the Hong Kong Special Administrative Region Government to permit access to their tunnels and to determine the relevant fees (referred to in para 17 of the Submission) are property rights within the scope of Articles 6 and 105 of the Basic Law.

9. A distinction may be drawn between a "deprivation" of property on the one hand and a "control" or "regulation" of property (as regards use, disposal, etc) on the other. Article 105(2) of the Basic Law expressly provides that the former case requires compensation corresponding to the real value of the property to be paid.[2]

10. The term "in accordance with law" in Articles 6 and 105 of the Basic Law indicates that the property rights protected thereunder are subject to restrictions that are provided by law and are compatible with the Basic Law as well as the international covenants as applied to the HKSAR by virtue of Article 39 of the Basic Law.

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[2] The text of the Basic Law does not number the sub-paragraphs of each Article. However, as a common practice (endorsed by the Court of Final Appeal in *Ng Ka Ling & Others v Director of Immigration* [1999] 1 HKLRD 315), it is convenient to refer to the sub-paragraphs by numbering them. This paper will follow this common practice. "Article 105(2)" thus, for example, refers to the second sub-paragraph of Article 105 of the Basic Law.

“Deprivation”

11. In the jurisprudence developed by the European Court of Human Rights (“ECHR”) under Article 1 of the First Protocol to the European Convention on Human Rights (“the European Convention”),[3] “deprivation” has been held to include cases where all legal rights of the owner are extinguished by operation of law or by the exercise of a legal power to the same effect. On the basis that ownership is seen as a bundle of rights, the fact that an owner has been deprived of one right will not usually be sufficient to say that he has been deprived of ownership: rather it is a control of use of property under the ECHR’s jurisprudence. [4] Thus in *Baner v Sweden*, 60 DR 128 (1989), the European Commission of Human Rights held (at p 140) that the Swedish legislation which gave the public a right to fish with hand-held tackle in private waters did not have the effect of depriving the applicant’s property. He still retained title to it. The applicant had not been deprived of his right to fish, including the right to fish with hand-held tackle. What he had lost was his right to exclude others from fishing with hand-held tackle. The Commission further observed:

> “Legislation of a general character affecting and re-defining the rights of property owners cannot normally be assimilated to expropriation even if some aspect of the property right is thereby interfered with or even taken away … [G]eneral rules regulating the use of property are not to be considered as expropriation. The Commission finds support for this view in national laws of many countries which make clear a distinction between, on the one hand, general legislation redefining the content of the property right and expropriation, on the other.
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> The Commission has for the same reasons in cases concerning rent regulations, which have seriously affected the right to property, nevertheless held that such regulations fall to be considered under the ‘control of use’ rule…”

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[3] Article 1 of the First Protocol of the European Convention protects property rights.

[4] Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights* (Butterworths, 1995), pp 528-9.

12. The Proposed Provisions obviously fall short of extinguishing all the legal rights of the Tunnel Companies in respect of permitting access to their tunnels and determining the relevant fee. To begin with, the Tunnel Companies' existing right to permit access to their tunnels is subject to restriction.[5] Under each of the Tunnel Ordinances, no person other than the relevant Tunnel Company may install any utility within the tunnel without the consent of the Tunnel Company concerned. The relevant Tunnel Company shall not give such consent unless the Commissioner for Transport has previously approved the giving of consent and the terms and conditions (other than a term or condition relating to charges), if any, subject to which consent is to be given.

13. Hence, the Tunnel Companies' existing right to approve installation of utilities within their tunnels is very much a qualified right: it is subject to the Commissioner for Transport's approval. If the Proposed Provisions are enacted, such right will be further qualified, but not extinguished, by the TA's power to authorize a licensee to place and maintain a radiocommunications installation in their tunnels (see the proposed section 14(1A)). There is no extinction of such right because the TA's power will leave intact the Tunnel Companies' right to approve installation of utilities within their tunnels where:

(a) the relevant installation is not a "radiocommunications installation" which the TA is empowered under the Proposed Provisions to authorize a licensee to place and maintain in the tunnels. "Utility" in the Tunnel Ordinances means "any electric power cable, telephone cable or other cable used in communication, any telecommunications apparatus, and any pipe used in the supply of water, gas, or oil, or for drainage or sewage, together with any duct for such cable or pipe and any apparatus or works ancillary to such cable, apparatus, pipe or duct".[6] It

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[5] The expression "tunnel" or "tunnels" used in this paper is a shorthand reference to any or (as the case may be) all of the "tunnel area" referred to in section 19(1)(b) of Cap 436 and section 21(1) of Cap 393, the "toll area" referred to in section 16(1)(a) of Cap 474, and the "conduits of the immersed tube containing the railway lines" in clause 40(1)(a) of Cap 215.

[6] This definition of "utility" exists in each of the Tunnel Ordinances other than Cap 215. In Cap 215, the definition of "utility" is identical to the above quoted wording, save that the words "any apparatus or works ancillary to such cable, apparatus, pipe or duct" appearing at the end of the latter are replaced by the words "any ancillary apparatus or works".

has a broader scope than "radiocommunications installation" which under clause 2 of the Bill means "a radio transmitter, receiver, aerial, support structure, ancillary equipment or apparatus used or intended for use in connection with radiocommunications";[7]

(b) the party installing the utilities is not a "licensee", ie "the holder of a licence under [the] Ordinance".[8] Under the amended section 14 of the Ordinance, the TA may only authorize a licensee (and not other persons) to place and maintain a radiocommunications installation in the tunnels of the Tunnel Companies; or

(c) the TA is prohibited from exercising its power of authorization by the proposed section 14(1B). The latter stipulates that the TA shall not grant an authorization unless he is satisfied that the authorization is in the public interest, and except after taking into account a number of specified matters, including, for example, whether an alternative location can be reasonably utilized for placing the radiocommunications installation to which the authorization, if granted, will relate.[9]

14. Nor will the Proposed Provisions extinguish the Tunnel Companies' right to determine fees or charges for the installation of utilities within their tunnels. It is because the Proposed Provisions will not affect such right of the Tunnel Companies in cases referred to in para 13(a)-(c) above. Moreover,

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[7] Under clause 2 of the Bill, "radiocommunications" means "telecommunications by means of radio waves"; and "telecommunications" means "any transmission, emission or reception of communication by means of guided or unguided electromagnetic energy or both, other than any transmission or emission intended to be received or perceived directly by the human eye".

[8] Clause 2 of the Bill.

[9] The other specified matters which the TA has to take into account include (a) whether or not there are technical alternatives to the installation, (b) whether or not the utilization of the public place to which the authorization, if granted, will relate is critical for the supply of the service of the licensee seeking the authorization, (c) whether or not that public place has available capacity to be so utilized having regard to the current and reasonable future needs of the occupants of that public place, and (d) the costs, time, penalties and inconvenience to the licensee and the public of the alternatives, if any, referred to in (a) above. See the proposed section 14(1B)(b)(ii)-(v) under clause 7 of the Bill.

where the TA does exercise his authorization power under the Proposed Provisions, the authorized licensee and the relevant Tunnel Company shall endeavour to agree to the fee to the paid for the installation. It is only where such agreement is wanting within a reasonable time that the TA shall determine the fee (see the proposed section 14(5)(a) and (b)).

15. In the jurisprudence developed by the ECHR, "deprivation" has been held to include also cases where there is a *de facto* deprivation in that the authorities interfere substantially with the enjoyment of possessions without formally divesting the owner of his title.[10]

16. It should be noted that real instances of *de facto* deprivation are very rare.[11] As commented by one commentator, "[g]enerally, where ownership of property remains or some form of expropriation, by way of sale or receipt of rents for example, the measure will not be regarded as a *de facto* expropriation or deprivation of property…but an interference with peaceful enjoyment of possessions".[12] The substantial degree of interference with possessions required for a *de facto* deprivation may be illustrated by *Papamichalopoulos and others v Greece* (1993) 16 EHRR 440. In that case, the Greek navy constructed a naval base and officers' resort on the applicants' land, the ECHR found that although there had been no formal expropriation, their land was occupied, and being unable to sell, mortgage or even gain entry, they had lost all ability to dispose or make use of it. This, combined with the failure of attempts to remedy the situation, entailed sufficiently serious consequences to disclose a *de facto* expropriation incompatible with their right to the peaceful enjoyment of their possessions.[13]

17. In the light of the discussion in para 16 above, the Administration takes the view that the TA's power under the Proposed Provisions, if exercised, will not amount to a *de facto* deprivation. Any Tunnel Company subject to the said TA's power will not lose all its right to permit access to its tunnel or determine the relevant fee (see paras 13 and 14 above). Further, the licensee

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[10] Harris, O'Boyle and Warbrick, op cit, p 528.
[11] Ibid.
[12] Karen Reid, *A Practitioner's Guide to the European Convention of Human Rights* (Sweet & Maxwell, 1998), at p 215.
[13] Ibid, pp 215-6.

authorized to place and maintain a radiocommunications installation in its tunnel is expected to pay fee for the installation, and such fee to be determined, shall be "fair and reasonable in all the circumstances of the case" (see the proposed section 14(5)(b)(ii)(A)). Even if such fee may not be as much as the amount that the relevant Tunnel Company may have agreed with the licensee without the enactment of the Proposed Provisions, this in itself does not amount to a *de facto* deprivation under the test established by the ECHR.[14]

18. In paras 23-4 of the Submission, it is argued that the Proposed Provisions amount to "deprivation" of property for the purposes of Article 105 in the light of the doctrine of inverse condemnation developed by the United States courts on the basis of the property rights protected under the United States Constitution.[15] It is, however, dubious whether the doctrine of inverse condemnation has application to the protection of property rights under the Basic Law. As stated in the *Report of the Special Committee on Compensation and Betterment* (March 1992) (at para 1.18):

> "…We record that the United States Constitution protects private property rights in wider terms than the Basic Law. However, if the American cases on the effect of the regulation of property rights, from which has developed the doctrine of inverse condemnation, were followed, compensation might be payable in similar cases, under the Basic Law. On the other hand, in some common law countries, with written constitutions, the doctrine has not developed. For example, in the only case where the House of Lords has considered this question [ie *Belfast Corporation v O D Cars Ltd* [1960] AC 490], on an appeal over the Northern Ireland written constitution, it declined to hold that the regulatory planning restrictions in that case amounted to a taking. Indeed, it doubted whether, even an extreme case,

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[14] See also, for example, *Mellacher v Austria*, (1989) 12 EHRR 391, where the applicants were property owners who complained that the Austrian authorities had deprived them of a substantial proportion (up to 82.4% for some applicants) of their future income under existing tenancy agreements by operation of the 1981 Rent Act. The ECHR held that the measures taken did not amount to either to a formal or *de facto* expropriation but only a control of the use of property as there was no transfer of property or deprivation of the applicants' right to use, let or sell their properties (paras 43-4).

[15] According to Gordon N Cruden, the doctrine of inverse condemnation applies "where as a result of use, restriction, regulation or other legislation, the value of unresumed property has been destroyed or permanently diminished but the loss is not otherwise compensatable." See Gordon N Cruden, *Land Compensation and Valuation Law in Hong Kong* (Butterworths, 2nd edition, 1999), p 189.

> regulation could amount to taking. More recently [ie in *Pine Valley Development Ltd v Ireland* 'The Times' 11.12.91] the European Court of Human Rights came to a similar conclusion. It refused to accept that certain planning procedures in the Republic of Ireland amounted to a de facto deprivation of property rights, because the Court held that they fell short of a formal taking. In resolving conflicting public and private interests the European Community Courts invariably invoke the civil law principle of proportionality. …"

19. Even if the doctrine of inverse condemnation has application to the protection of property rights under the Basic Law, the Administration takes the view that the Proposed Provisions, if enacted, will not have the effect that the value of the property rights of the Tunnel Companies in permitting access to their tunnels and determining the relevant fee will be "destroyed or permanently diminished but the loss is not otherwise compensatable" for the purpose of the doctrine of inverse condemnation[16] (for the reasons highlighted in paras 13, 14 and 17 above).

Control/Regulation of Property

20. Whilst the enactment of the Proposed Provisions will not "deprive" the property rights of the Tunnel Companies in permitting access to their tunnels and determining the relevant fee, it will control or regulate these rights.

21. Since its decision in *Sporrong and Lonnroth v Sweden* [1982] EHRR 35, the ECHR has a tendency to apply a "fair balance" test when considering whether a case complies with any rule under Article 1 of the First Protocol to the European Convention.[17] That test requires the Court to determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. It entails that in respect of any control of property, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.[18] In other words, in the light of

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[16] Ibid.
[17] Harris, O'Boyle and Warbrick, op cit, at pp 521-2 and 534.
[18] *AGOSI v UK*, (1986) 9 EHRR 1, at para 52.

the public good underlying the control, the burden which falls on the individual is not excessive.[19]

22. Although Articles 6 and 105 of the Basic Law do not expressly provide for limitation of property rights, it is prudent to read into these constitutional provisions permissible restrictions which are proportionate to the general interest of the public. This interpretation is in line with the above jurisprudence developed by the ECHR as well as the approach of the Basic Law that rights are generally subject to reasonable limitations (see, for example, Article 39).

23. It should be noted, however, that the above proportionality requirement does not have to meet a test of strict necessity. In *James v UK* (1986) 8 EHRR 123, the applicants argued that only if no other less drastic remedy for the perceived injustice that the extreme leasehold reform regulatory measure (which involved a compulsory transfer of property from one individual to another) could satisfy the requirements of Article 1. This argument was rejected by the ECHR which held (at para 51):

> "This [argument] amounts to reading a test of strict necessity into the Article, an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a 'fair balance'. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way." (emphasis added)

24. It should be noted that the underlined part of the above quoted paragraph was cited with approval by the Privy Council in *Ming Pao Newspapers Ltd v AG of Hong Kong* [1996] AC 907 at 919, where it dealt with the question of whether section 30(1) of the Prevention of Bribery Ordinance

[19] Harris, O'Boyle and Warbrick, op cit, pp 535-6.

(on disclosing details of investigation) was consistent with the protection of the right to freedom of expression protected under article 16(2) of the Hong Kong Bill of Rights Ordinance (Cap 383). In considering whether the second limb of the above section was necessary to preserve the integrity of investigation into corruption in Hong Kong or whether it was disproportionate to that aim, the Privy Council commented that the existence of an alternative means of achieving the legitimate aim did not render the relevant legislation unjustified, and then cited the underlined part of the above quoted paragraph in *James v UK*. Further, the Privy Council endorsed the Hong Kong courts' approach in attributing the word "necessary" its normal meaning.

25. In its recent decision *Hong Kong Special Administrative Region v Ng Kung Siu and Lee Kin Yun* (FACC No 4 of 1999), Li CJ, delivering the majority judgment of the Court of Final Appeal, also held (at p 30 of the judgment) that the word "necessary" in Article 16(2) of the Hong Kong Bill of Rights Ordinance should be given its ordinary meaning, citing, inter alia, the *Ming Pao Newspapers Ltd* case in support. In addition, he said (at pp 31-2):

> "In considering the question of necessity, the Court should give due weight to the view of the HKSAR's legislature that the enactment of the National Flag Ordinance in these terms…is appropriate for the discharge of the Region's obligation to apply the national law arising from its addition to Annex III [of the Basic Law] by the Standing Committee [of the National People's Congress]. Similarly, the Court should accord due weight to the view of the HKSAR's legislature that it is appropriate to enact the Regional Flag Ordinance.
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> In applying the test of necessity, the Court must consider whether the restriction on the guaranteed right to freedom of expression is proportionate to the aims sought to be achieved thereby. See *Ming Pao Newspapers Ltd v Attorney-General of Hong Kong* at 917D-E…"

26. In *Collins CoBuild English Language Dictionary*, "necessary" means, inter alia, "needed in order to obtain the result or effect you want".[20]

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[20] In *Handyside v The United Kingdom* (1976) 1 EHRR 737, the ECHR noted (at para 48) that "whilst

27. In para 20 of the Submission, reference is made to the approach of the Hong Kong Court of Appeal in construing the phrase "according to law" in the Hong Kong Bill of Rights Ordinance. Under that approach, "law" meant not the domestic law of Hong Kong but a "universal concept of justice". It is argued in the Submission that under such "universal concept of justice", any restriction on fundamental rights and freedoms must, inter alia, be a "necessary" means to achieve that objective. In this connection, regard should be had to (a) the approach of the Privy Council and the Court of Final Appeal in the *Ming Pao Newspapers Ltd* case and the *Ng Kung Siu* case respectively in interpreting the word "necessary", and (b) the ordinary meaning of "necessary" referred to in para 26 above.

28. In the present case, the Administration is of the view that the Proposed Provisions are likely to meet the above "fair balance" test or the proportionality requirement (which as discussed above does not preclude the existence of an alternative solution) in the light of the following:

(a) there is apparent public interest in procuring ubiquitous coverage of mobile telecommunication services;

(b) there is apparent public interest in making available to the public quality mobile telecommunications services at reasonable cost;

(c) the TA's power under the Proposed Provisions is subject to various restrictions (see para 13(c) above);

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the adjective 'necessary', within the meaning of Article 10(2) [of the European Convention on Human Rights, which Article protects freedom of expression], is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context. Consequently, Article 10(2) leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force." Although as noted by the Privy Council in the *Ming Pao Newspapers Ltd* case (at p 919G) that the courts in Hong Kong have not been assisted by substituting for "necessary" a phrase such as "pressing social need" which has commented itself to the ECHR, the above discussion of the meaning of "necessary" appears to be of relevance value in understanding the "ordinary meaning" of "necessary". The second sentence in the above cited part of ECHR's judgment in the *Handyside* case is in line with the approach of the Court of Final Appeal in the *Ng Kung Siu* case that "in considering the question of necessity, the Court should give due weight to the view of the HKSAR's legislature…" (cited in para 26 above).

(d) the Tunnel Companies under the Proposed Provisions are given the opportunity to agree with the interested licensees as to the fee for the proposed radiocommunications installation before the TA shall determine such fee; and

(e) any fee to be determined by the TA under the Proposed Provisions shall be "fair and reasonable in all the circumstances of the case".

Compensation

29. Since the Proposed Provisions, if enacted, will not have the effect of "depriving" the property rights of the Tunnel Companies for the purposes of Article 105 of the Basic Law, no question of mandatory compensation arises. Such being the case, there is obviously no need to spell out in the Bill the basis of compensation under that Article as suggested in para 39 of the Submission. Even if the Proposed Provisions did raise compensation issue under Article 105 of the Basic Law, the Bill would not be defective for not detailing the basis on which compensation under that Article shall be calculated. This is because Article 105(2) of the Basic Law already provides for the measure of compensation for lawful deprivation of property and the manner and time of its payment: that "it shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay". Any further details of the above constitutional compensation provision may be worked out by local courts.

30. As the Proposed Provisions do not require any mandatory compensation, it is not necessary for the Administration to comment on the arguments in the Submission on the measure of compensation under Article 105(2) of the Basic Law (at paras 24 and 25 above).

Article 115 of the Basic Law– Free Trade Policy

31. Article 115 of the Basic Law provides:

> "The Hong Kong Special Administrative Region shall pursue the policy of free trade…".

32. The Administration does not agree that the policy of free trade protected under Article 115 strictly prohibits government intervention in conduct of business or negotiation of contracts. There was no such strict prohibition under the free trade policy before reunification (refer to, for instance, the Misrepresentation Ordinance (Cap 284)), and in view of the theme of continuity in the Basic Law as identified by the Court of Appeal in *HKSAR v Ma Wai Kwan, David & Others* [1997] HKLRD 761, it is unlikely that it is imposed under Article 115.

Article 118 of the Basic Law – Encouraging Investments

33. Article 118 of the Basic Law provides:

> "The Government of the Hong Kong Special Administrative Region shall provide an economic and legal environment for encouraging investments, technological progress and the development of new industries."

34. It is doubted whether the enactment of the Proposed Provisions (particularly in view of the considerations referred to in para 28 above) is inconsistent with the HKSARG's obligation to provide an economic and legal environment for encouraging investments under Article 118. The Proposed Provisions, if put into force, may or may not affect the BOT tunnel industry in a material manner. However, it would probably encourage investments in the telecommunication industry.

Article 160 of the Basic Law – Continuity

35. Article 160 (2) of the Basic Law provides:

> "Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be

valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law."

36. In the *David Ma* case, Chan CJHC held that the theme of Article 160 is continuity (at p 774J). Article 160(2) serves to put it beyond doubt that the laws previously in force in Hong Kong are effective on 1 July 1997 (other than those which the Standing Committee of the National People's Congress declares to be in contravention of the Basic Law) without any act of adoption (at p 775A). Hence, in the view of the Administration, Article 160(2), being a supplementary provision, is to protect against transition. It is not intended, on its own, to have the effect of rendering any breach of a pre-reunification "contract, right and obligation" (like the breach of contract as alleged in para 38 of the Submission) a breach of that Article. Hence, the question of whether any breach of "contract, right and obligation" is unconstitutional will have to be determined by reference to the other provisions of the Basic Law. The above discussion has shown that none of Articles 5, 6, 105, 115 ,118 and 160 of the Basic Law would be breached by the enactment of the Proposed Provisions. In the opinion of the Administration, no other provisions of the Basic Law would be breached by the same enactment.

Conclusion

37. To conclude, the Administration is of the view that contrary to the arguments in the Submission, the enactment of the Proposed Provisions is consistent with Articles 5, 6, 105, 115, 118 and 160 of the Basic Law.

18 January 2000