

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Telecommunications (Amendment) Bill 2010

Paper No: 256/10

Date: 21 October 2010

Report of: Attorney General

1.0 Purpose

To seek the agreement of Executive Council to the introduction of this Bill into the Legislative Assembly at its November 2010 meeting.

2.0 Recommendation

That the Bill be agreed for publication in the Gazette and for presentation at that meeting of the Assembly.

3.0 Summary of Financial Implications

None directly from this paper, but costs will arise in future if a decision is taken to remunerate members of the Telecommunications Appeals Panel. That will be a matter for future decision by Executive Council.

4.0 Background

4.1 Paper 221/10 was considered by Executive Council at its meeting on 16 September 2010, and explained how the proposed interim Telecommunications legislation was being taken forward.

4.2 This Bill is concerned with the provision of information to Falkland Islands Government (FIG), and with Cable & Wireless' (C&W) complaints handling and dispute resolution procedures.

4.3 The Bill has been the subject of detailed consultation with C&W, and whilst FIG has not agreed to all the changes to the Bill that they proposed, the substance of the Bill is largely agreed by C&W.

4.4 The need for this Bill arises from:-

- (a) the current provision under the Telecommunications Ordinance relating to the provision of information to FIG being wholly inadequate;
- (b) widespread dissatisfaction from customers of C&W about the approach of C&W to complaint handling and dispute resolution.

4.5 The Bill (which may be subject to minor formatting and drafting changes prior to publication in the Gazette) has the following key elements:-

- (a) a new Part of the Telecommunications Ordinance which permits Executive Council to appoint a Regulator to carry out specified functions of the Governor or Government under the Ordinance. This will enable the Director of Regulation to carry out day to day regulation of C&W whilst reserving key functions (such as the revocation of licences) to Executive Council. The precise details of what is to be delegated will be the subject of a further Executive Council Paper in due course.
- (b) the establishment of a Telecommunications Appeals Panel (TAP) to exercise certain appeals functions under the Ordinance. These will be limited initially to appeals against penalties imposed for failures to supply information (see below), but it is envisaged that further appeals functions might be added at a later date by order – such as appeals in relation to satellite telecommunications services under the second Telecommunications Bill referred to in Paper 221/10. The TAP is considered to be preferable to making the Supreme Court the appeal mechanism – using the Supreme Court would be expensive, time consuming, and would inevitably have less expertise than it is hoped the TAP will develop. The TAP will be appointed by the Governor in Executive Council, and will have three members – a person appointed after consultations with C&W (or all telecommunications utilities if others are appointed at a future date), a person appointed after consulting users, and an independent chairperson.

The Bill allows Executive Council to make arrangements in relation to the TAP, which include remunerating members of the Panel (but does not require this to be done).

- (c) new provisions relating to the provision of information to FIG. This gives FIG a much more extensive power to require information from C&W, but protects C&W's position by enabling them to argue that the burden of providing specified information to FIG would be disproportionate to the benefits to FIG in receiving it.

The new provisions enable FIG to impose a financial penalty on C&W for a failure to provide information to FIG, which C&W may appeal to TAP.

- (d) new provisions requiring C&W to establish and maintain a Code of Practice relating to complaint handling and dispute resolution, which has to be approved by FIG.

This requires the Code to include details of how complaints will be handled, disputes resolved, and how the Code is to be brought to the attention of customers. The dispute resolution procedures must be administered by a person who is independent, must be easy to use, transparent and effective, and be free to customers to use. Awards of compensation must be possible under the Code (limited to direct losses) and there must be procedures to enable such awards to be enforced against C&W.

Where a Code has been approved, a customer must use those procedures before bringing legal proceedings against C&W.

5.0 Financial Implications

As set out in 3.0 above.

6.0 Legal Implications

None

7.0 Human Resources Implications

None

DRAFT: 13.10.2010 (RMB)

Telecommunications (Amendment) Bill 2010

(No: of 2010)

ARRANGEMENT OF PROVISIONS

Clause

1. Title
2. Commencement
3. Amendment of Telecommunications Ordinance
4. Section 2 amended – Interpretation
5. New Parts 1A and 1B
6. Section 11 substituted
7. New sections 11A to 11I

TELECOMMUNICATIONS (AMENDMENT) BILL 2010

(No: of 2010)

(assented to: 2010)
(commencement: on publication)
(published: 2010)

A BILL

for

AN ORDINANCE

To amend the Telecommunications Ordinance (Title 70.1) in relation to: the appointment of a Regulator; the provision of information by telecommunications utilities; and the establishment by telecommunications utilities of procedures for the handling of complaints and resolution of disputes; and for connected purposes.

BE IT ENACTED by the Legislature of the Falkland Islands —

1. Title

This Ordinance is the Telecommunications (Amendment) Ordinance.

2. Commencement

This Ordinance comes into force on publication in the *Gazette*.

3. Amendment of Telecommunications Ordinance

This Ordinance amends the Telecommunications Ordinance.

4. Section 2 amended – Interpretation

(1) This section amends section 2.

(2) The following definition is inserted after the definition of “Crown” —

““customer” includes a potential customer;”.

(3) The following definition is inserted after the definition of “mobile station” —

““Panel” means the Telecommunications Appeals Panel established by Part 1B;”.

5. New Parts 1A and 1B

The following Parts are inserted after Part 1 —

“PART 1A REGULATOR

2A. Regulator

(1) The Governor may, in writing, appoint a person as the Regulator for the purposes of this Ordinance.

(2) The Governor may, in writing, appoint one or more persons to act on behalf of the Regulator.

(3) A person appointed as the Regulator or to act on the Regulator’s behalf may exercise functions vested by or under this Ordinance in the Government or the Governor.

(4) Subsection (3) only allows a person to exercise functions on behalf of the Government or the Governor to the extent that person’s appointment allows.

(5) Subsection (3) does not allow a person to exercise —

(a) a function of the Government under section 13; or

(b) a function of the Governor under a provision in —

(i) Part 1B;

(ii) Part 7;

(iii) Part 8; or

(iv) Part 9.

PART 1B
TELECOMMUNICATIONS APPEALS PANEL

2B. Telecommunications Appeals Panel

- (1) This Part establishes a Telecommunications Appeals Panel.
- (2) The Panel will have 3 members to be appointed by the Governor in accordance with sections 2C and 2D.
- (3) The Panel's role is to deal with appeals under section 11D.
- (4) The Governor may by order amend subsection (3) to extend the role of the Panel.
- (5) Before making an order under subsection (4), the Governor must —
 - (a) consult each telecommunications utility; and
 - (b) consult users of telecommunications services in the Falkland Islands in whatever way the Governor thinks appropriate.

2C: Appointment of Chairperson

- (1) The Governor must appoint a person to be the Chairperson of the Panel.
- (2) That person —
 - (a) must, in the Governor's opinion, have appropriate knowledge and experience;
 - (b) must not be an employee of or a contractor for either —
 - (i) the Government; or
 - (ii) a telecommunications utility; and
 - (c) must not have another conflict of interest which could reasonably be expected to stop that person from being appointed to be the Chairperson.
- (3) A person is not stopped from acting as Chairperson only by being a customer (whether in the Falkland Islands or elsewhere) of either —
 - (a) a telecommunications utility; or
 - (b) a competitor of a telecommunications utility.

2D. Appointment of other members

- (1) The Governor must appoint two other persons to be the members of the Panel.

(2) The Governor must consult each telecommunications utility before making one of the appointments under subsection (1).

(3) The Governor must consult users of telecommunications services in the Falkland Islands before making the other appointment under subsection (1).

(4) When consulting under subsection (3), the Governor must —

- (i) consult the Falkland Islands Chamber of Commerce; and
- (ii) carry out other consultation, as the Governor thinks appropriate.

2E. Arrangements

(1) The Governor may make arrangements about the following matters —

- (a) paying members of the Panel (and different arrangements may be made for the Chairperson and for the other members);
- (b) other terms and conditions of appointment for the members of the Panel (including the period a member will serve);
- (c) removing a member of the Panel for good cause before the expiry of the period that member was to serve;
- (d) specific conflict of interests that arise in particular cases to be dealt with by the Panel;
- (e) filling vacancies on the Panel (including temporary vacancies that arise for specific cases); and
- (f) the Panel's proceedings.

(2) Before making arrangements under subsection (1), the Governor must consult —

- (a) the Panel,
- (b) each telecommunications utility;
- (c) the Falkland Islands Chamber of Commerce, and
- (d) other persons the Governor thinks are likely to be interested.

(3) When making arrangements in relation to filling vacancies, the Governor must follow sections 2C and 2D.

(4) Decisions of the Panel are to be taken by majority vote and arrangements made by the Governor in relation to the Panel's proceedings must reflect that.

2F. Annual report

(1) The Panel must prepare a written report as soon as reasonably practicable after the end of each calendar year.

(2) The written report prepared under subsection (1) must contain details of the Panel's activities (including the number of appeals) in the previous year.

(3) The Panel must send its reports to the Governor and the Legislative Assembly.

(4) The Governor must publish the reports.

6. Section 11 substituted

Section 11 is repealed and the following section substituted —

“11. Telecommunications utility to provide Government with information

(1) This section applies if the Government considers that it is necessary to require a telecommunications utility to provide it with information or documents for the purpose of the Government carrying out its functions in relation to telecommunications.

(2) If this section applies, the Government may send a notice to the utility requiring it to provide the information or documents specified in the notice.

(3) The notice to the utility must be accompanied by an explanation why the Government considers the information or documents specified in the notice are necessary for the purpose.

(4) The information or documents must be provided to the Government —

(a) before the end of such reasonable period as may be specified in the notice; and

(b) in such form as the Government may reasonably require.”

7. New sections 11A to 11I

The following sections are inserted after section 11 —

“11A. Representations from utility as to provision of information

(1) Paragraph (2) applies if a telecommunications utility to which a notice is sent under section 11(2) considers that the burden of providing some or all of the information or one or more of the documents specified in the notice would be disproportionate to the benefits to the Government in receiving it.

(2) The utility may send written representations to the Government in which it —

- (a) specifies the information or documents in relation to which it considers that the burden to it would be disproportionate to the benefit to the Government; and
 - (b) sets out in full the reasons why it takes that view.
- (3) A written response under subsection (2) must be sent within 20 business days of the utility receiving the notice from the Government.
- (4) If the Government receives written representations under subsection (2) —
- (a) the Government must —
 - (i) consider whether or not it would be disproportionate for the utility to provide the information or documents specified in the representations; and
 - (ii) respond to the utility within 20 business days of receiving the representations, indicating its decision in relation to the information or documents; and
 - (b) the utility need not provide the information or documents while the Government is considering its response to the utility's representations.
- (5) If information or documents specified in the notice sent under section 11(2) is not specified in the utility's representations under subsection (2), the utility must provide that information to the Government within the period originally specified in the notice.
- (6) If the Government determines that it would be disproportionate for the utility to have to provide some or all of the information or one or more of the documents specified in the notice sent under section 11(2), the Government —
- (a) must withdraw the notice; and
 - (b) may send a revised notice to the utility.
- (7) If the Government determines that it would not be disproportionate to have to provide some or all of the information or documents specified in the notice sent under section 11(2), it may notify the utility of a new reasonable period before the end of which the utility must provide that information to the Government.

11B. Failure to provide information

- (1) If the Government considers that there are grounds for believing that a telecommunications utility is in breach of one or more requirements under sections 11 and 11A, it may give a notice in writing to the utility —
- (a) setting out the requirement and the alleged breach;
 - (b) giving the utility a reasonable period to do either or both of the following things —

- (i) comply with the requirement; and
 - (ii) make representations about the allegation to the Government.
- (2) The Government must consider any representations made under subsection (1)(b)(ii).
- (3) If a utility is or has been in serious or repeated breach of requirements imposed under sections 11 and 11A, the utility's licence may be revoked under Part 7.

11C. Failure to provide information: penalties

(1) Subsection (2) applies if the Government —

- (a) has given a notice to a utility under section 11B(1);
 - (b) has considered any representations made under section 11B(1)(b)(ii); and
 - (c) is satisfied that the utility is in breach of one or more requirements imposed under section 11.
- (2) If this subsection applies, the Government may impose a penalty on the utility that it determines to be both —
 - (a) appropriate; and
 - (b) proportionate to the breach.
- (3) A penalty imposed under subsection (2) may not exceed £20,000.
- (4) If the Government imposes a penalty on a utility under subsection (2), it must notify the utility within 10 business days of —
 - (a) the decision that has been made;
 - (b) the reasons for it; and
 - (c) the period for payment.
- (5) A penalty imposed under subsection (2) will not be included as a cost of the telecommunications utility under section 46(3).

11D. Failure to provide information: appeals against penalties

(1) A telecommunications utility may appeal to the Panel against —

- (a) the imposition of a penalty on it under section 11C(2);

(b) the amount of the penalty imposed; or

(c) both.

(2) Notice of an appeal under subsection (1) must be given within 60 business days of the date of the notice under section 11C(3).

(3) The notice of appeal must set out the full grounds of the appeal, including (in particular) whether it is contended that —

(a) the decision appealed against is —

(i) based on an error of fact;

(ii) wrong in law, or

(iii) both; or

(b) the penalty imposed is disproportionate.

(4) The Panel may —

(a) uphold both the imposition of a penalty on the utility and the amount of the penalty imposed;

(b) uphold the imposition of a penalty on the utility but substitute a lower penalty for the one imposed; or

(c) overturn the decision to impose a penalty on the utility.

(5) The decision of the Panel under subsection (4) is final (subject to the possibility of challenge by way of judicial review).

11E. Failure to provide information: payment of penalties

(1) A penalty imposed under section 11C(2) must be paid by the telecommunications utility within the period specified under 11C(4)(c).

(2) Subsection (1) does not apply if the utility appeals to the Panel under section 11D(1).

(3) If the Panel upholds the imposition of a penalty on the utility's appeal, the following become payable immediately —

(a) either —

(i) the penalty imposed under section 11C(2); or

- (ii) if the Panel substituted a lower penalty under section 11D(4)(b), that lower penalty; and
 - (b) interest on that amount from the day after the end of the period specified under section 11C(4)(c) until the day on which the Panel gives its decision.
- (4) If an amount due under either subsection (1) or subsection (3) (or part of it) remains unpaid —
- (a) it may be enforced as a statutory debt;
 - (b) interest (or further interest) must be added to the unpaid amount from the date by which it was to have been paid or the date on which it became payable until the date on which it is paid.
- (5) The rate of interest that applies for the purposes of this section is the statutory interest rate fixed under section 8 of the Interest on Debts Ordinance 2002 (No. 13 of 2002).

11F. Complaint handling and dispute resolution

A telecommunications utility is under a duty to establish and maintain a Code of Practice, relating to complaint handling and dispute resolution, which has been approved by the Government.

11G. Draft Code of Practice

- (1) A telecommunications utility must submit a draft Code to the Government for approval within —
- (a) 40 business days of this section coming into force, or
 - (b) if later, within 40 business days of its licence being granted.
- (2) The draft Code must set out how —
- (a) the utility proposes to handle complaints made to it by customers;
 - (b) disputes between the utility and customers are to be resolved; and
 - (c) the utility proposes to bring the existence of the Code to the attention of customers.
- (3) In relation to complaint handling, the draft Code must provide for complaints to be dealt with by the utility in a fair, effective and timely manner without the imposition of a fee or charge.
- (4) In relation to dispute resolution, the draft Code must provide for procedures which —

- (i) are administered by a person who is, for practical purposes, independent (so far as decisions in relation to disputes are concerned) of the utility;
 - (ii) are easy to use, transparent and effective;
 - (iii) give, to each of the utility's customers, a right to use the procedures free of charge;
 - (iv) enable any disputes which are found to be frivolous or vexatious to be rejected or brought to an early conclusion;
 - (v) ensure that all information necessary for giving effect to the procedures is provided;
 - (vi) ensure that disputes are effectively investigated;
 - (vii) confer power to make awards of appropriate compensation in respect of customers' direct losses; and
 - (viii) enable awards of compensation to be properly enforced.
- (5) A draft Code need not provide for compensation in respect of customers' indirect losses.

11H. Approval of Code of Practice

(1) The Government must approve a telecommunication utility's Code of Practice if it is satisfied that —

- (a) the draft Code meets the requirements of sections 11G(3) and (4); and
- (b) if approved, the Code will ensure an appropriate balance is maintained between —
 - (i) the legitimate commercial interests of the telecommunications utility; and
 - (ii) the protection of the interests of the customers of the utility.

(2) The Government may by notice in writing to a utility —

- (a) approve modifications that the utility has proposed to an approved Code;
- (b) withdraw approval of a Code; or
- (c) give notice that approval will be withdrawn from a Code from a date specified in the notice, unless modifications specified in the notice are made to the Code before that date.

11I. Use of procedures

While a telecommunication utility's Code of Practice is approved by the Government, a customer of the utility must exhaust the procedures set out in the Code in relation to a complaint or dispute before bringing proceedings against the utility in relation to that complaint or dispute."

OBJECTS AND REASONS

This Bill would amend the Telecommunications Ordinance (Title 70.1).

It has four main aims:

- (a) to provide for the appointment of a Regulator to carry out some of the functions under the Telecommunications Ordinance that belong to the Government and the Governor;
- (b) to establish a Telecommunications Appeals Panel, which would initially deal with appeals against penalties imposed on telecommunications utilities under the new information provisions;
- (c) to replace the existing provisions relating to the provision of information to the Government by telecommunications utilities with a new regime;
- (d) to provide for the establishment by telecommunications utilities of procedures for the handling of complaints and the resolution of disputes.

Clause 4 would amend the interpretation provisions in *section 2* of the Telecommunications Ordinance to include two new definitions. One of these would mean that references to customers also cover potential customers.

Clause 5 would insert two new Parts: new Part 1A would deal with the Regulator and new Part 1B would deal with the Telecommunications Appeals Panel.

New *section 2A* would provide for the appointment of a Regulator to exercise some (but not all) of the functions of the Government and the Governor under the Telecommunications Ordinance. It would also provide for the appointment of one or more other persons to act on behalf of the Regulator.

New *section 2B* would establish a Telecommunications Appeals Panel, which would consist of 3 members. Its initial role would be to deal with appeals under new *section 11D* (which deals with appeals against the penalties that could be imposed on telecommunications utilities for breaches of the new information regime) but there would be power for the Governor to extend that role, following consultation with telecommunications utilities and the users of telecommunications services.

New *sections 2C and 2D* deal with the appointment of the three Panel members: an independent Chairperson and two other members (one to be appointed following consultation with telecommunications utilities and the other following consultation with users of telecommunications services).

New *section 2E* would give the Governor power to make detailed arrangements for the operation of the Panel. It provides for consultation before arrangements are made.

Under new *section 2F*, the Panel would have to prepare an annual report on its activities for publication.

Clauses 6 and 7 would replace section 11 with an amended section 11 and new sections 11A to 11E, dealing with the provision of information by telecommunications utilities. Clause 7 would also insert new sections 11F to 11I to deal with the complaints handling and dispute resolution. The Government's functions under these provisions could be exercised by the Regulator or someone appointed to act on behalf of the Regulator.

Under the amended *section 11*, the Government would be able to serve notices on telecommunications utilities requiring the provision of information and/or documents.

New *section 11A* would allow a telecommunications utility to make representations about the proportionality of providing the required material, balancing the burden on the utility against the benefit to the Government. If the utility does this, it need not provide the material covered by the representations while the Government considers them. However, it must provide the rest of the material in the original notice. The possible outcomes of the representation process are that a new notice could be served or a new date for compliance set.

New *section 11B* deals with failures to comply with the amended *section 11* and new *section 11A*. The Government would be able to serve a notice setting out the alleged breach and requiring a telecommunications utility comply and/or to make representations (which the Government would have to consider). Serious or repeated breach could result in the revocation of a utility's licence.

Under new *section 11C*, if the Government remained satisfied (after considering any representations made) that a telecommunications utility was still in breach of its requirements to provide information and/or documents, it would be able to impose a penalty of up to £20,000 on the utility and such a penalty could not be counted as a cost for price regulation purposes.

New *section 11D* would allow a telecommunications utility to appeal to the Telecommunications Appeals Panel against a penalty imposed under new *section 11C*. The Panel would be able to overturn the penalty, uphold the penalty but reduce its amount or confirm the original penalty. There would be no further appeal against the Panel's decision but it would still be possible to seek judicial review.

New *section 11E* deals with the payment of penalties and the interest on unpaid penalties.

New *section 11F* would make it a duty for a telecommunications utility to have an approved Code of Practice dealing with complaint handling and dispute resolution.

Under new *section 11G*, a telecommunications utility would have 40 business days to submit a draft Code of Practice. New *section 11G* also sets out what a Code of Practice must contain and new *section 11H* deals with the approval process.

New *section 11I* would require customers to make use of an approved Code of Practice (if one is in place) before bringing proceedings against a telecommunications utility.