



**Report on the Bundling of
Telecommunications Service Charges with
Building Management Fees**

「電訊服務費用
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Consumer Council

Executive Summary

Report on the Bundling of Telecommunications Service Charges with Building Management Fees

1. Background

1.1. The Consumer Council received complaints in relation to four property development projects regarding management companies bundling telecommunications service charges with building management fees in the relevant residential estates.

1.2. On 11 August 2004, the Telecommunications Authority (TA) published its investigation report on complaints concerning the provision of telecommunications services at Banyan Garden. The report touches on issues some of which fall outside the TA's jurisdiction. The issues have raised a number of important consumer protection concerns involving the telecommunications market and the property sector, which the Council is obligated to address.

1.3. Initial enquiry revealed that the bundled services form part of the technological features of the relevant properties and were promoted as upmarket features. By bundling telecommunications service charges with the management fees, the developers could have the intention of offering an efficient service but the arrangement inadvertently has become an issue of consumer concern.

1.4. . This report studied: how consumers of telecommunications services are being affected by the bundling arrangements, and what improvements are necessary to address the problems surfaced. Of relevance to the property sector are the issue of consumer choice, and a concern over a wider application of bundling arrangements and action to exclude essential facilities from the definition of common facilities thus depriving residents of enjoyment of such facilities, and this would have detrimental effect on consumers.

2. Consumer Concerns

2.1. Consumer concerns arising from bundling of telecommunications service charges with management fees include:

- (a) predetermined choice rather than allow individual selection based on personal service requirements;
- (b) both users and non-users have to pay for the service; and
- (c) consumers with existing fixed term service contracts either pay more for duplicate service or bear penalty cost to opt out of them.

2.2. In addition, an innovative case (carve out case) to exclude the communications network area from the estate common areas causes concern with costs involved for unit owners to access the network and use alternative communications providers. By means of a lease of the communications network area, the developer assigned to its associated company a right to install and operate the communications networks in the estate for a period of 47 years at the nominal

rent of \$1 per year. There was in fact express disclosure of the lease in the relevant sales brochure, but the legal implications of the lease were apparently not understood by the purchasers. Complaint arose as it was found that the broadband Internet service charges and the public antenna maintenance charge had been bundled with the management fees for the estate. Upon the opposition by the owners committee of the charging scheme, the associated company subsequently agreed to levy the broadband Internet service charges only on users of its service, but did not agree on unbundling of the public antenna maintenance charge.

3. Consumer Awareness of the Bundling Arrangement

3.1. The Council has conducted a survey of 64 property sales brochures made available to it between January 2002 and August 2004 to obtain a general picture of representations on provision of telecommunications services in the relevant property developments.

3.2. 27 out of the 64 brochures contain references to telecommunications services, or similar terms in the information on services and facilities (see [1]-[3] in Appendix 1). Notably,

- 3 out of the 27 (see [4]) sales brochures clearly state under the section on property management that the management fee will be inclusive of the Internet service charges.
- In one of these 3, it is stated that residents are able to enjoy 24-hour broadband Internet service without any additional payment (see [5]). But in a later part of the sales brochure, there is the description that the management fee includes Broadband Internet charges (see [6]).

The Council found on enquiry with property sales agents and management companies that:

- 8 more developments out of the 27 in fact have bundling management in place, but do not disclose the arrangement in their sales brochures. The inconsistency is highly misleading but can easily escape attention from unwary purchasers;
- In the sales brochure of 1 out of these 8, it is even stated that there will be 24-hour free broadband Internet services (see [7]) when residents will in fact be paying for the services as part of the management fee. However, prospective purchasers will not be aware of this fact because of the non-disclosure in the sales brochure.

3.3. On the engagement of pre-determined telecommunications providers:

- 19 out of the 27 sales brochures contain references that telecommunications networks in the developments are to be installed and/or operated by particular service providers (see [8]);
- the references in some contain discrepancies between the Chinese and English versions (see [9]). Readers of the English version may get the impression that only the installation (but not operation) of the infrastructure and equipment has been arranged;

- only 4 of them go further to say that the broadband Internet services are to be provided by particular service providers (see [10] and [11]); and
- 9 other developments in fact have selected particular providers to provide the Internet services but do not provide any information on it in the sales brochures.

3.4. The survey therefore revealed substantial number of cases of non disclosure, partial disclosure and inconsistent and ambiguous representations regarding a) the bundling of Internet service charges with management fees and b) the engagement of selected telecommunications providers, and whether infrastructure supply and/or service provision was concerned. It is doubtful whether, from reading the sales brochures, purchasers will have sufficient knowledge, information or alertness of the implications of the availability to them of the pre-determined services and facilities in terms of costs and choice.

4. Implications of bundling on consumer welfare

4.1. A bundling arrangement may assume little prominence at the particular point of a prospective purchaser making a buying decision on property, but it is in fact a long-term commitment with significant implications, especially to purchasers who are not aware of it. They are:

- cost implications to consumers
Bulk purchase may have cost savings in theory, but residents should pay attention to the contract sum and the terms to see whether unilateral increase in charges would be allowed during the contract period. This would assist residents' assessment of whether the financial benefit to be gained from the bundled agreement would compensate the loss of consumer choices.
- fairness to all
The Real Estate Developers Association (REDA) representatives indicated that the telecommunications charges bundled with management fee are not higher than the market rate. However, other patrons of the particular telecommunications service provider may raise a question of cross-subsidization due to absence of transparency of cost information and lack of association/affiliation with the same developer which would enable them to bargain for the same lower rates.
- quality of service
A service contract having been arranged by a third party may not reflect the diverse needs of individual residents. Moreover, other issues related to quality of service, such as the speed and network security problems may arise if the selected broadband services are in the nature of a shared service.
- service contracts bind property owners
 - Lengthy service contract (3 years plus option to renew by the telecommunications provider for 2 years in one case) signed by the management company/developer on behalf of residents will bind individual residents regardless of whether the service is satisfactory.
 - Provisions in the DMC and the Building Management Ordinance will bind unit owners and subsequent buyers to payment of management fee (bundled with telecommunications service charge); there is no opting out.

- Owners' committee (OC) will be able to represent views of residents but will still be bound by length of the service contract. Formation of OC takes time and developer has strong influence through large management shares in hand for staged developments. Moreover, in new developments, the management company will usually also be an associated company of the developer.

For existing tenement buildings (versus new developments), OC or Incorporated Owners may make decision on bulk purchase through a transparent and fair bidding process. It is for wider discussion for the consumers at large whether broadband services should be regarded as an essential service appropriate for bulk purchase.

5. Impact of bundling telecommunications service charges with management fees on the market, and its effect on consumer welfare and choice

5.1. TA's investigation report concluded that competitors of the bundled service providers have been rendered unable to compete on a level playing field in providing services to the Banyan Garden residents.

5.2. The Council considers that use of the network carve-out but charges-bundled arrangement mentioned in paragraph 2.2 above may enable the service providers to bypass the various safeguards that the *Telecommunications Ordinance* has in place to ensure that all licensed carriers have equal access to consumers, in particular, provision that govern Class Licenses for In-building Telecommunications Systems under section 7B(2) of the Ordinance. This is because even if competitors have access to the building infrastructure, building unit owners are highly unlikely to subscribe to "duplicate" services or make alternate arrangements which would entail substantial connection and leasing charges in order to take advantage of any offer of service from another competitor.

5.3. Yet it was the management company or property developer that has made the arrangements in question and the TA has no jurisdiction under the Telecommunications Ordinance over the conduct of non-telecommunications licensees.

5.4. The bundling of telecommunications service charges with building management fees will represent a drastic change of emphasis in the market. Telecommunications service providers will not be competing with each other to attract individual consumers to take up their telecommunications services through cheaper prices, higher quality services, and more choices that are directed at individual consumer needs. Instead, they will be competing with each other to attract management companies and property developers to select them as the 'pre-arranged service provider' to provide a standardized set of service that could meet the requirements of the management companies and or property developers concerned. Whilst marketing of essential services and facilities such as lifts and air-conditioners in such a mode is widely accepted, it is subject to debate whether telecommunications services should be treated likewise. This is because the purchaser needs only to pay for lift maintenance and air-conditioners charges in one development, whilst with bundled telecommunications service paid through management fees, the purchaser with a pre-existing contract with another service supplier will have to pay more for duplicate service.

5.5. Moreover, the limitation in the TA's jurisdiction and the inadequacy of the sector specific approach are also highlighted in the complaint against the carve out case. The current regulatory regime does not provide for the assessment of potential competition issues that arise from the arrangements discussed in this report, as borne out by TA's report:

"The TA has no jurisdiction under the Ordinance over the conduct of non-telecommunications licensees, even though the conduct may prejudice competition in a telecommunications market. There is no general competition law in Hong Kong and conduct which could be unlawful if engaged in by a telecommunications licensee, would be perfectly legal for a non-licensee." (paragraph 86 of TA report)

"In the absence of a general competition law in Hong Kong, the application of sector specific telecommunications laws outside their designated area would be cause for concern. Accordingly, potential competition issues that may be identified outside the scope of present regulations may suggest that a broader regulatory framework would be beneficial to the economy." (paragraph 70)

6. Property concerns

6.1 Apart from the telecommunications issues highlighted, the Council is concerned with the possibility of a much wider application of developers reserving or carving out essential facilities which can effectively place such facilities and areas out of reach of property owners. If, in extreme cases, essential facilities such as lifts and security system could be confined within areas carved out of the common areas and made subject of a lease, individual unit owners could become captive customers liable to payment of a monthly access charge fixed entirely at the will of the lease holder. This calls into issue the necessity of putting measures in place to safeguard the rights of individual unit owners and the need to take steps to forestall innovations like the carve-out lease.

6.2 The Council has raised, for safeguarding building owners' rights in the selection of contractors to carry out work inside one's own unit, the important principle that building management should not arbitrarily limit unit owners' access to those contractors who can fulfill the required qualifications. The Council considers that the principle, and the protection of unit owners from inappropriate tendering conduct in regard to building maintenance work, should be equally applied in regard to unit owners' choice of service provisions in buildings.

7. Recommendations

Recommendation 1 – defining 'essential facilities and services' that should be provided by developers and paid for through management fees

The Council urges the government to take all necessary steps, such as through imposing conditions in the land lease and issuing guidelines on the definition of common facilities and services in DMCs, to ensure fundamental protection of the rights of individual owners to have access to the essential facilities and use of common areas.

The Council proposes the formation of a task force comprising the relevant government departments/bureaux, REDA, relevant professional bodies such as the Institute of Surveyors, the Law Society and Bar Association, and property management association etc. to discuss with a view to drawing up guidelines on what

should or could constitute essential facilities and services in a property development project and making them applicable to all purchasers of undivided shares of properties alike.

The definition of essential facilities should be reviewed periodically to ensure that it is in line with changing life-style and that the state of technological advances can be allowed for.

Recommendation 2. – ensuring consumer choice and fair access to telecommunications and other services

On telecommunications services, the Council recommends that:

- (a) DMCs should explicitly state whether telecommunications facilities form part of the common facilities. Whilst the developer or property manager may select the supplier of telecommunications facilities, whether the telecommunications service providers should be selected on behalf of the residents should depend on circumstances. It may be determined after considering factors such as the sophistication and up-market features of the property to be delivered to purchasers.
- (b) Any such contract entered into for provision of the relevant services should be limited to a minimum duration to enable residents to readily change to another operator if deemed necessary through the decision of the owners' committees.
- (c) There should be express and prominent reference of bundling arrangements in sales brochures for the information of prospective purchasers and details on costs are to be given.
- (d) Where building managers have arranged for bulk telecommunications service provision in existing buildings (as against uncompleted or newly completed buildings), individual unit owners should be allowed to exercise a right to opt out of the service.

On other services, the Council recommends that building managers should give unit owners the right of choice in regard to contractors of maintenance and repair work.

Recommendation 3 – ensuring transparent and responsible practice of property developers and property managers

- (a) In light of unequal bargaining powers between developers and small purchasers, the Council has approached REDA and urged it to manifest self-regulatory function by developing a code of best practice, which should cover accuracy of representations in sales brochures, transparent and fair practices in administering tenders for facilities, and in all matters concerning uncompleted residential properties which will have implications for small purchasers.

The Council requests that the relevant government bureau should facilitate REDA's initiatives in this respect and to monitor progress.

- (b) The Council considers that property manager acting on behalf of building owners should likewise observe good practice in administering tenders.

Recommendation 4 - maximising consumer protection by ensuring fair competition could take place in residential buildings

- (a) The Council supports strengthening the enforcement of 'level playing field' principles in the Telecommunications Ordinance to require all licensees to deal with associated companies in an arms length manner and to ensure a fair and transparent procedure in administering tender bids.

- (b) The Council also invites the government to consider whether to expand the scope of section 19B of the Telecommunications Ordinance to enable challenge of schemes of arrangements that serve to restrict access to telecommunications infrastructure. Also consideration can be given to prohibiting, by conditions of a land lease, developers from granting lease(s) of portion(s) of the land that may have the effect of denying individual building owners control over essential facilities constructed on the land.

Recommendation 5 – addressing consumer concerns in the broader economy

The Council requests COMPAG to consider whether the sector specific approach to competition is most appropriate in dealing with consumer concerns that may arise across different sectors as services become increasingly converged.

Consumer Council

Report on the Bundling of Telecommunications Service Charges with Building Management Fees

1. Introduction

1.1. Complaints in relation to four property development projects have been received by the Consumer Council from consumers regarding management companies bundling telecommunications service charges with building management fees in residential estates.

1.2. On 11 August 2004, the Telecommunications Authority (TA) published its investigation report on complaints concerning the provision of telecommunications services at Banyan Garden. The report touches on issues some of which fall outside the TA's jurisdiction. The issues have raised a number of important consumer protection concerns involving the telecommunications market and the property sector, which the Council is obligated to address.

1.3. Concerning the telecommunications market, the issues are

- how consumers are being affected by the bundling arrangements; and
- what improvements are necessary to address the problems surfaced.

1.4. Of relevance to the property sector are:

- the issue of consumer choice; and
- a concern over a wider application of bundling arrangements and action to exclude essential facilities from the definition of common facilities thus depriving residents of enjoyment of such facilities, and this would have detrimental effect on consumers .

1.5. This report examines the above issues and makes recommendations for improvement for consideration and further exploration by the government and the relevant organizations. References are made to the TA's investigation report on 11 August 2004 as appropriate.

2. Consumer Concerns

2.1. Consumer complaints have come to the Council against the charging of telecommunications services as part and parcel of the building management fees. Initial enquiry revealed that the bundled services form part of the technological features of the relevant properties and were promoted as upmarket features. Apparently the bundling arrangements, which could have been brought on by an intention to offer an efficient service and therefore intended by the developers as value-adding and attractive to some, unwittingly came to be dissented by others as pre-empting the choice of individual owners and therefore in discord with consumer interest.

2.2. Because of difference in the personal circumstances of individual unit owners, the consumer concerns involved vary, including

- predetermined choice, depriving individuals of the right to obtain services of their own selection instead of allowing selection based on price, quality of service, and access speed required
- both users and non-users have to pay for the service (unlike lift and fire services installation and other common services and facilities, there is no reason why telecommunications services cannot be provided separately to accommodate individual consumer requirements)
- consumers pay more either when they continue using their existing contracted services or when they choose to use another supplier's service other than the bundled arrangement
- for consumers opting out of their existing fixed term service contracts in order to avoid additional payment, there may be penalty cost in addition to the inconvenience of changing e-mail address etc.

2.3. In a more extreme complaint case (the carve out case), the owners' committee of the relevant residential estate found that the developer had, prior to beginning construction work on the estate, granted a lease of the communications network area to an associated company with right for it to install and operate the communications networks in the estate for a period of 47 years at the nominal rent of \$1 per year. There was in fact express disclosure of the lease in the relevant sales

brochure, but the legal implications of the lease were apparently not understood by all the purchasers. This arrangement effectively means that the estate communications area and infrastructure will be excluded from forming part of the estate common areas and facilities but will remain the exclusive province of the associated company. As a result, the unit owners, not being co-owners of the communications network area, cannot use the same as of right; and will be subject to a general condition, amongst other things, not to do or suffer to be done anything which contravenes the rights of the associated company as lessee of the communications network area. Yet the broadband Internet service charges and the public antenna maintenance charge were found to have been bundled with the management fees for the estate. Problems arose with regard to costs that were levied by the lessee for unit owners to access the network and use alternative communications providers. Upon the opposition of the owners' committee, the associated company subsequently agreed to levy the broadband Internet service charges only on users of its service, but did not agree on unbundling of the public antenna maintenance charge.

2.4. Other issues of concern identified by the Council in the course of studying the complaints are related to the quality of services, such as the speed and network security problems, which may arise if the selected broadband service is in the nature of a shared service.

2.5. The Council also sees a potential risk of developers extending bundling arrangements and choosing providers to cover what may be regarded as non-essential services, for example, paid television services in addition to a pre-determined broadband service. The developers could very well have regarded this as offering an efficient service, but in doing so have inadvertently pre-empted free choice of purchasers.

3. Consumer Awareness of the Bundling Arrangement

3.1. The Council has conducted a survey of 64 sales brochures sent to it between January 2002 and August 2004 by developers of private residential developments, pursuant to arrangement for sale of uncompleted buildings under the Consent Scheme. The purpose of the survey was to get a general picture of representations on provision of telecommunications services made available to prospective purchasers of the relevant property developments.

3.2. 27 out of the 64 sales brochures studied contain references to telecommunications services or similar terms in the information on services and facilities (see [1]-[3] in Appendix 1). Findings on examination of the 27 sales brochures are summarized in the following:

(a) On whether Internet services charges will be included in management fees:

Table 1 : Bundling of telecommunications service charges with management fees

No of sales brochures	With bundling info found in sales brochures	Bundling found upon Council's inquiry
(a) 3	Yes	---
(b) 8	Nil	Yes
(c) 16	Nil	Nil

Note: --- not applicable.

- 3 sales brochures, shown in group (a), clearly stated that the management fee will be inclusive of the Internet service charges (see [4]).
- In 1 sales brochure under this group (a), it is stated (in page 33) that residents are able to enjoy 24-hour broadband Internet service without any additional payment (see [5]). But in a later part of the sales brochure under "property management" (in pages 54 and 56), there is the description that the management fee includes Broadband Internet charges (see [6]). The inconsistency can easily escape attention from unwary purchasers.

- The Council found on enquiry with property sales agents and management companies that 8 more developments, shown in group (b), in fact have bundling arrangements in place but do not disclose the arrangement in their sales brochures.
- In 1 sales brochure under this group (b), it is even stated that there will be 24-hour free broadband Internet services (see [7]) when residents will in fact be paying for the services as part of the management fee. However, prospective purchasers will not be aware of this fact because of the non-disclosure in the sales brochure. The Council considers the 8 non-disclosure highly unsatisfactory and the discrepancy in the particular case cited [7] misleading.

(b) On the engagement of pre-determined telecommunications providers:

Table 2: Telecommunication facilities and service providers pre-determined

No of Sales brochures	With service provider named in sales brochures	Engagement of provider found upon Council's inquiry
(a) Telecom network supplier		
19	Yes	---
8	Nil	---
(b) Internet service provider		
4	Yes	---
9	Nil	Yes
14	Nil	Nil

Note: --- not applicable.

- 19 out of the 27 sales brochures contained references that telecommunications networks in the developments were to be installed and/or operated by particular service providers (see [8]). However, the references in some contain discrepancies between the Chinese and English versions (see [9]). Readers of the English version may get the impression that only the installation (but not operation) of the infrastructure and equipment has been

arranged.

- Only 4 sales brochures stated that broadband Internet services were to be provided by named service providers (see [10]&[11]). However, 9 other developments in fact had selected particular providers to provide the Internet service but the sales brochure did not provide any information on it.

3.3. The survey therefore revealed substantial number of cases of non-disclosure, partial disclosure and inconsistent and ambiguous representations regarding (a) the bundling of Internet service charges with management fees and (b) the engagement of selected telecommunications providers, and whether infrastructure supply and/or service provision was concerned. Purchasers expecting provision of merely the telecommunications facilities or infrastructure portal to facilitate their own choice of service provider, but having to subscribe to the service of a pre-determined operator upon occupation of their flats will find a cause for complaint.

3.4. The issue here goes much deeper than lack of proper disclosure. Purchasers with grossly unequal bargaining power compared to developers are very much at the mercy of developers to provide property details at their discretion. Purchasers are making purchase decisions on the basis of vague or incomplete representations made by developers and yet have no easy redress for lack of proper information which developers are not obliged to provide. Purchasers tend to be attracted by the descriptions and sometimes puff regarding the services and facilities set out in the sales brochures. However, it is doubtful whether, from reading the sales brochures, they will have sufficient knowledge, information or alertness of the implications of the availability to them of the pre-determined services and facilities in terms of costs and choice.

4. Impact on consumer welfare – issues that arise in bundling

4.1. It is noted that by bundling telecommunications service charges with the management fees, the developers could have the intention of offering an efficient service, but the arrangement has inadvertently become an issue of consumer concern.

4.2. A bundling arrangement with regard to telecommunications services may assume little prominence at the particular point of a prospective purchaser making a

buying decision, but it is in fact a long-term commitment with significant implications which may do injustice in individual consumer cases, especially to purchasers who are not aware of it.

Cost implications to consumers

4.3. There are immediate and future cost implications to bundling telecommunications service charges with management fees as illustrated in 2.2 above, i.e. non-users have to pay and there is duplication of service etc.

4.4. One issue for consumers would be: what if any cost savings are being provided to consumers in bundled arrangements. There should be some cost savings in theory due to the implied economies of scale in providing bulk services to housing estates. Residents will have to seek information from management companies on the contract sums for the service (and in particular regard to the Banyan Garden case, the amount of funds that the management company has agreed to contribute into the Banyan Garden management fund on goodwill basis) for them to assess the economic benefit of the bundled arrangement, and to consider whether to accept the contribution or to seek other remedies.

4.5. One also needs to examine the terms of the service contract to see whether it allows unilateral increase in charges during the currency of the service contract and whether the bundled arrangement will allow less flexibility to change provider. Even if there are cost savings now, there is the further question of whether the financial benefit to be gained from the bundled arrangement could well compensate the loss of consumer choice. This will be discussed in paragraph 4.9 fourth bullet point below.

Fairness to all

4.6. The impact of bundling may stretch beyond residents directly subject to bundled arrangements. At a meeting with REDA representatives, the Council was given to understand that the telecommunications service charges under a bundled arrangement are not higher than the market rate and therefore some residents expressly welcome the bundled arrangement. However, the financial savings enjoyed by the residents may leave other telecommunications services users to wonder whether they are cross-subsidizing the residents because of the absence of transparency of cost information and lack of association/ affiliation with the

developers to enable them to bargain for the same lower rates. This begs the question of whether it is fair to have bundled arrangement in selected developments.

4.7. If the bundled cost is higher than market rates, then obviously the residents have paid more. This raises concern with the business practice of property management companies appointed by the developers leveraging their "monopoly position" within the market boundary of the particular estates to procure telecommunications services at higher prices so as to limit market access. The Council recognises that in commercial dealings, some customers come out better than others, but considers that whatever bargain arrived at should be the conscious decision made by the ultimate user, or in accordance with the preference of the majority of users as appropriate.

Service Quality

4.8. A bundled arrangement also has non-price dimensions relating to choice and quality of services for individual consumers. Because the service contracts are arranged by a third party (the management company and management committee) they may not reflect the diverse needs of individual residents. The absence of privity of contract between service providers and ultimate users may affect the efficiency of customer service to be rendered. Moreover, speed and network security problems may arise if the selected broadband services are in the nature of a shared service.

Service contracts bind property owners

4.9. Purchasers who acquire properties bundled with telecommunications services charged to the management fees will have great hurdles to surmount if they find use of the services provided by the pre-determined operators unsatisfactory, for the reasons that

- the services are contracted for on a long-term basis (three years in the case of Banyan Garden with option for Hutchison Multimedia to renew for another two years) which is longer than current 'lock in' consumer contracts commonly in use which are of about 18 months duration. An unduly long contract will cast doubt on whether the commercial interests of the relevant service provider rather than consumer welfare will be

served in entering into the arrangement, since residents are bound by the length of the contract regardless of whether the service is satisfactory.

- if the bundled services are included in the definition of common services and in the Deed of Mutual Covenants (DMCs), the relevant costs charges and expenses for their management and maintenance will be included as part of the management expenses. Unit owners are obliged under the terms of the DMCs and the Building Management Ordinance to contribute towards the relevant costs in proportion to the management shares or undivided shares allocated to the units, and cannot opt out. Such a covenant to pay towards the bundled services will be annexed to the property and passed on to subsequent assignees and purchasers of the units concerned.
- what may be a 'trendy' arrangement at one point in time may subsequently prove a source of inflexibility. For instance, the arrangement of bundling security and surveillance into pre-determined telephone fixed lines in certain housing estates may have been made with convenience for residents in mind but may not be welcome when more and more residents come to use their mobile phones for contact 24 hours a day and find subscribing to a fixed line superfluous and the cost unwarranted.
- formation of owners' committee is required within nine months of the first assignment and the incorporated owners take even longer to form. Before that, individual unit owners will have little avenue to change the management decision to maintain the bundled services. An owners' committee which resolves to change service provider will still be bound by length of the existing service contract unless the current service provider agrees to an early termination. In the Banyan Garden case, the Council was informed that Hutchison Multimedia Services Limited and PowerCom Network Hong Kong Limited would be willing to cancel the internet access services agreement for the estate if the owners committee elects to do so after it is formed.

- under staged development of property projects, the developers will remain in control of the majority of management shares to allow them to make decisive votes, particularly at the initial stage of residents taking up possession. This casts doubt on the prospect of overturning an unwelcomed decision endorsed by the developer in the first place. Moreover, in new residential developments, the management company will usually also be an associated company of the developer (to ensure fulfilment of the developer's maintenance obligation) and so introducing change of the network provider who is yet another associated company would be practically very difficult.

4.10. During the course of study, the Council has come across cases where the incorporated owners and owners' committees, having consulted all residents through an open process, made a conscious decision to bulk purchase broadband services from a telecommunications operator. This arrangement is perfectly legitimate. However, in another property development which is over 10 years old and did not have any bundling arrangement in place at the time of first sale, the decision of the owners incorporation to bulk purchase telecommunications service met with complaint from the minority group although a proper tender was conducted in the process. Therefore, it is for wider discussion whether broadband services should be regarded as a service appropriate for bulk purchase to be contracted for on behalf of residents at large.

5. Impact of bundling telecommunications service charges with management fees on the market, and its effect on consumer welfare and choice

5.1. In its report on the Banyan Garden case the TA noted that competitors of the service providers who had service charges bundled into the management fees have been rendered unable to compete on a level playing field in providing services to the Banyan Garden residents because:

- (a) These competitors were deprived of the opportunity of competing to supply services to residents via a more open tender process; and
- (b) the bundling arrangements effectively raise the price of competitors' services vis-a-vis the prices being offered by the subject telecommunications service

providers and that residents are unlikely to subscribe to 'duplicate' services unless they have specific needs and are willing to pay above market prices to satisfy those needs (paragraph 4 of the report refers).

5.2. These points raise a number of issues with regard to whether the arrangements are compatible with the aspirations of having an economically efficient telecommunications sector.

Bundling bypasses existing access safeguards on level playing fields

5.3. With regard to existing government policy on maintaining level playing fields, it appears that the various safeguards that the *Telecommunications Ordinance* has in place to ensure that all licensed carriers have equal access to consumers may be bypassed in the network carve-out but charges-bundled complaint case above-mentioned in paragraph 2.3, in particular, the provision that governs Class Licenses for In-building Telecommunications Systems under section 7B(2) of the Ordinance.

5.4. Whilst the class licence provisions in the Ordinance require that building communications network infrastructure is to be maintained in such a way as to enable equal access for competing carriers to that network, competitors of the service providers whose products have been bundled and charged with management fees are at a disadvantage even with that equal access to infrastructure because their potential customers have already been connected and 'signed up' via the bundling arrangements.

5.5. In theory, as the TA has noted in its report, residents will be unlikely to want to pay for 'duplicate services in addition to those they already pay for in their management fees. Therefore, regardless of whether physical access is available for competitors of the bundled service, and that the building management is ready and willing to make provision for access to building infrastructure, a building unit owner is highly unlikely to take advantage of any offer of service from another competitor.

5.6. Further, representatives from major developers revealed that the bundled internet charges would normally be below market retail rate. Hence, they are of the view that residents will be happy with the arrangement (except for the non-users). However, the fact remains that this may constitute a barrier for other competitors to enter this particular market. Thus vertical relationship between the developer and its

telecommunications affiliated company(ies) warrants attention from the telecommunications regulator. This is elaborated in the ensuing paragraphs.

A profound change to the marketing environment

5.7. From the complaints made by consumers, the results of the Council's survey on sales brochures, and confirmation by members of REDA , it has become apparent that there is growing incidence of bundling telecommunications service charges with building management fees. As such, the Council notes that there will be a profound change to the manner in which telecommunications services will be marketed in the future, impacting on consumer choice, at least in the following two ways:

- (a) The practice of bundling fees and other innovative arrangements as in the carve out case will to a large extent segment the overall Hong Kong telecommunications market into exclusive areas centred on housing estates that are for practical purposes only supplied by the one service provider.
- (b) The arrangements will represent a drastic change of emphasis in the market from that of:
 - telecommunications service providers competing with each other to attract individual consumers to take up their telecommunications services through cheaper prices, higher quality services, and more choices that are directed at individual consumer needs; to
 - telecommunications service providers competing with each other to attract management companies and property developers to select them as the 'pre- arranged service provider' on the basis of a somehow standardized set of service that primarily serves the requirements of the management companies and/or property developers concerned.

5.8. Whilst the same situation also applies to the suppliers to new property developments of fixtures and fittings, the Council considers that the provision of telecommunications services should be distinguished from one-off supplies like refrigerators, particularly since there is vast variation in telecommunications user preference and ancillary changes will be required as a consequence of change in service provider such as change of e-mail address.

5.9. In these circumstances, the impact that consumer choice can have on market efficiency will be diminished. Telecommunications service providers will no longer be competing for individual consumers on the basis of cheaper prices, higher quality and extensive range of choices. Instead, service providers will be devoting marketing efforts to responding to specific requests made by third parties such as property developers and building management companies, thereby subjugating the individual role of consumers.

Competitive tendering for the benefit of residents

5.10. At the core of the complaint made to the TA regarding the Banyan Garden case was an allegation that PowerCom, the equipment provider chosen by the Banyan Garden property manager Citybase (which was associated with PowerCom) had received an unfair advantage in the selection process. The TA has made it clear in its report that the selection process left something to be desired in terms of whether Citybase had acted in a sound commercial manner. For example, in commenting on the manner in which Citybase had sought persons to provide the subject services to residents through a 'survey questionnaire' as distinct from a request to tender for services, the TA noted (at paragraph 82 of the report) that

“... nothing in the actions of Citybase increased the competitive pressure on PowerCom as one would expect to have been the case had Citybase been seeking to secure the most competitive bid outcome it could. The fact that Citybase considered the lack of response from other operators to its letter to indicate their disinterest in entering into any commercial arrangements to supply their services to Citybase-managed estates defies commercial sense.”

5.11. While the evidence shown in the TA's final decision did not support the view that the whole purpose of the process was to provide an unfair advantage to Citybase's associated companies, the effect of the selection process was to deny the residents of Banyan Garden an equipment provider who was chosen on the basis of a rigorous competitive procedure. It should be noted that all the service providers who were ultimately included in the provision of communications services to the estate in fact were also found to be associated persons of Citybase. The Council believes this has flagged the need for guidelines on dealings between associated companies.

Difficulties with protecting consumer welfare under the sector specific approach of the Telecommunications Ordinance

5.12. The TA's report into the Banyan Garden case primarily addressed the question of whether the subject telecommunications providers had been in receipt of unfair advantage from an associated person (section 7K(3)(c) of the Ordinance). The TA noted in paragraph 6 of the report that it did not find any evidence that the licensees under examination had sought advantage or received advantage from associates in the knowledge that they were advantages.

5.13. In making this observation, the TA went on to state:

"Although the conferment of the advantages had arguably placed other operators at a significant disadvantage, any regulatory action in this particular case should, in the TA's opinion, be targeting the person conferring the advantages rather than the operators. However, the TA has no jurisdiction under the Ordinance over the conduct of non-telecommunications licensees."

5.14. Para 86 of the report states:

"The TA has no jurisdiction under the Ordinance over the conduct of non-telecommunications licensees, even though the conduct may prejudice competition in a telecommunications market. There is no general competition law in Hong Kong and conduct which could be unlawful if engaged in by a telecommunications licensee, would be perfectly legal for a non-licensee."

5.15. It is apparent therefore, that even if the TA did find evidence that the property manager Citybase had intentionally given the subject telecommunications service providers an unfair advantage, the TA would not be able to apply the safeguards against anti-competitive conduct found in section 7K(3)(c) to Citybase which is not a licensee under the Telecommunications Ordinance.

5.16. The TA also noted at paragraph 70 of its report that:

“In the absence of a general competition law in Hong Kong, the application of sector specific telecommunications laws outside their designated area would be cause for concern. Accordingly, potential competition issues that may be identified outside the scope of present regulations may suggest that a broader regulatory framework would be beneficial to the economy.”

5.17. Moreover, the limitation in the TA's jurisdiction and the inadequacy of the sector specific approach are also highlighted in the complaint case against the lease of the telecommunications network area referred to in paragraph 2.3 above. The current regime does not provide for the assessment of potential competition issues that arise from the arrangements discussed in this report.

5.18. The Council therefore requests the Government to examine how this inadequacy that has the potential of affecting consumer welfare can be addressed.

6. Property concerns

6.1. The carve out of the telecommunications network area mentioned in paragraph 2.3 above raises concern with a possibly much wider application of developers' right to reserve or carve out which will not fall within the jurisdiction of any legislation or scheme of control. If, in extreme cases, essential facilities such as lifts and security system could be confined within areas carved out of the common areas and made subject of a lease, individual unit owners could become captive customers liable to payment of a monthly access charge fixed entirely at the will of the lease holder. This calls into issue the necessity of putting measures in place to safeguard the rights of individual unit owners and the need to take steps to forestall innovations like the carve-out lease which can effectively place common facilities and areas out of reach of those owners.

Safeguarding building owners' rights in selection of contractors

6.2. The Council has from time to time received complaints from occupiers regarding unreasonable restrictions exercised by building managers on occupiers'

choices as to the selection of contractors for the carrying out of certain works in buildings. The complaints have mainly concerned the practice of management companies controlling the appointment of contractors on building works, such as water, electricity, alarm systems and fire safety devices, by restricting occupants to the use of a certain contractor or a small number of contractors nominated by building managers from time to time. This has led to allegations that occupants have had to pay higher costs for the work than would otherwise be the case if they had free choice.

6.3. The Independent Commission Against Corruption (ICAC) has produced a guide for owners incorporations on tendering and accounting procedures in building management.

6.4. ICAC's *Corruption Prevention Guide on Building Management to Owners Incorporations* points to the need for open tendering and accounting procedures in building management, for example, by requiring that building management follow the *Building Management Ordinance* (Cap.344) in the procurement of any supplies, goods or services required by building management, which requires amongst other matters that the procurement of all supplies, goods or services within certain financial limits shall be procured by invitation to tender which complies with such standards and guidelines as may be specified in a Code of Practice relating to such procurement and tender procedures. All tender documents, copies of contracts, accounts and invoices and any other documents in the possession of a corporation and relating to the procurement of supplies, goods and services shall be kept by the corporation for such period, being not less than 6 years, as the corporation may determine.

6.5. In its letter to LACO in 2003, the Council has reiterated its recommendation that as a matter of good management practice, the DMC Guidelines should be specifically amended to require managers to allow tenants access to qualified contractors for carrying out works within a building. The Council accepts that in justifiable cases, some restrictions on the qualifications of contractors may be imposed such as requiring contractors to have familiarity with the particular systems in place, a satisfactory level of experience in working on the systems, and other attributes as to financial and security credentials. However, an important principle must be maintained, namely, that building management should not arbitrarily limit unit owners' access to those contractors who can fulfill the qualifications.

6.6. The Council considers that the principles noted above, to protect unit owners' rights of choice, and protection from inappropriate tendering conduct in regard to building maintenance work, should be equally applied in regard to unit owners' choice of service provisions in buildings.

7. Recommendations

7.1. Having studied the facts of the complaints received, conducted a survey on information disclosure in sales brochures as well as made reference to the TA's investigation report and relevant laws in Hong Kong, the Council puts forward the following recommendations which aim at:

- defining essential facilities and services;
- ensuring consumer choice and fair access to telecommunications and other services;
- ensuring transparent and responsible practice of property developers and managers;
- maximizing consumer protection by ensuring fair competition could take place in residential buildings;
- addressing consumer and competition concerns in the broader economy.

7.2. Such recommendations are made with a view to addressing the consumer concerns over:

- the bundling of telecommunications fees and charges with management fee, and the possible detriment it causes to consumer welfare;
- the rights of individual owners to have access to essential facilities and services; and
- limitations of the Telecommunications Ordinance over cross-sector anti-competitive conduct

7.3. The ensued recommendations are outlined for consideration by the relevant government bureaux and departments, as well as by property developers,

management companies, and last but not least, by residents and prospective purchasers of properties to address the consumer concerns.

Recommendation 1 – defining ‘essential facilities and services’ that should be provided by developers and paid for through management fees

- (a) The Council urges the government to take all necessary steps to ensure there will be fundamental protection of the rights of individual owners to have access to the essential facilities and use of common areas so that property developers cannot bypass any rules through ‘carving out’ such facilities and infrastructures and yet creating an incumbrance on the land to which unit owners will become bound. Such common facilities and services are essential for the peaceful and quiet enjoyment by unit owners of their properties.
- (b) The Council will discuss with the relevant government departments/bureaux, REDA, relevant professional bodies such as the Institute of Surveyors, the Law Society and Bar Association, and property management association etc. the feasibility of defining the scope of essential facilities and services in a property development project so that only those identified facilities and services can be covered and paid for through management fees, with no provision for opting out by residents. The Council believes that a task force comprising the parties above-mentioned could be formed to look into the matter and the Council would be prepared to give its input as well.

Once essential facilities and services are defined, application should be extended to all purchasers of undivided shares of properties alike. There should be no allowance for exemption or departure from the definition, even if sales brochures and all promotional materials explicitly provide otherwise. Home buyers have many factors to consider in making a purchase decision and they should be able to rely on assurance of enjoyment of essential facilities and services when presented with an array of novel arrangements which may not always serve their individual interest.

The definition of essential facilities should be reviewed periodically to ensure that it is in line with changing life-style and that the state of technological advances can be allowed for.

Recommendation 2. – ensuring consumer choice and fair access to telecommunications and other services

Telecommunications services

- (a) the Council considers that there should be clear distinction between the installation of telecommunications facilities (i.e. trunk lines) and the provision of telecommunications services (fixed line and Internet). The Council recommends that there should be clear provisions in DMCs concerning telecommunications facilities, whether they are so essential as to form part of the common facilities and to be maintained out of common fund.

Whilst the developer or property manager may select the supplier of telecommunications facilities, in the same way as lift suppliers are selected, it does not follow as a matter of course that the telecommunications service providers should be selected on behalf of the residents.

- (b) The Council considers that if there are good reasons to make telecommunications services immediately available upon the taking up of occupation of premises, such as where an intelligent building with sophisticated up-market features has been promoted, the contracts entered into for provision of the relevant services should be limited to a minimum duration to enable residents to be able to readily change to another operator if deemed necessary through the decision of the owners' committees.
- (c) The relevant sales brochures should contain express and prominent reference of such arrangements for the information of prospective purchasers and details on costs are to be given.
- (d) As far as existing buildings (as against newly completed buildings) are concerned, the Telecommunications Ordinance or the Property Management Ordinance should provide that where building managers or incorporated owners have arranged for bulk telecommunications

service provision in buildings, individual unit owners should be allowed to exercise a right to opt out of the service. This should not pose any problem if willing subscribers to the successful bidder or service provider are individually billed instead of the managers bundling the telecommunications charges into the management fee. To allow for opt-out will also avoid the controversy of whether bulk purchase of services as a result of a majority decision is fair where the essential nature of the relevant services is subject to dispute. This should perhaps be made part of the terms of reference of the joint task force proposed to be formed in the above.

Other services

- (e) The Council recommends that building managers should give unit owners the right of choice in regard to contractors of building works and that it will be sufficient to require engagement of qualified persons to undertake the necessary works. This is against the background of the requirement by some property managers that certain works such as electrical wiring or plumbing be undertaken only by nominated contractors or those on an “authorised list” which led to allegations that occupants had to pay higher costs for the work and posed a source of dispute in the past.

Recommendation 3 – ensuring transparent and responsible practice of property developers and property managers

- (a) In light of unequal bargaining powers between developers and small purchasers, the Council has approached REDA and urged it to manifest self-regulatory function by developing a code of best practice, which should cover accuracy of representations in sales brochures, transparent and fair practices in administering tenders for facilities, and in all matters concerning uncompleted residential properties which will have implications for small purchasers. Despite the Guidelines issued by REDA in June 2001 regarding the preparation of sales brochures for the public sale of uncompleted residential properties, the transparency and accuracy of information provided by developers in the sales brochures leaves much to be desired, as seen from the

Council's survey. The Council therefore urges that considerations should be given to instituting a scheme that would carry a deterrent effect, including sanction and consumer redress.

The Council requests that the relevant government bureau should facilitate REDA's initiatives in this respect and to monitor progress.

- (b) The Council considers that property manager acting on behalf of building owners should likewise observe good practice in administering tenders.

Recommendation 4 – maximizing consumer protection by ensuring fair competition could take place in residential buildings

- (a) In paragraph 95 of its report, TA stated that telecommunications licensees should support their associates in adopting open and competitive selection procedures. The Council supports strengthening the enforcement of 'level playing field' principles in the Telecommunications Ordinance to require all licensees to deal with associated companies in an arms length manner and to ensure a fair and transparent procedure in administering tender bids.
- (b) The Council also invites the government to consider:
 - expanding the scope of section 19B of the Telecommunications Ordinance to enable challenges of schemes of arrangements that serve to restrict access to telecommunications infrastructure; and
 - making it a condition of land lease that property developers are prohibited from granting lease(s) of portion(s) of the land that may have the effect of denying individual building owners control over facilities necessary for the functioning of the property development to be constructed on the land.

Recommendation 5 – addressing consumer concerns in the broader economy

The TA's report noted that it was unable to examine the competition issues that arise from the subject bundling arrangements because of its limited jurisdictional powers, and it indicated that 'potential competition issues that may be identified outside the scope of present regulations may suggest that a broader regulatory framework would be beneficial to the economy.'

The Council requests COMPAG to consider whether the sector specific approach to competition is law most appropriate in dealing with consumer concerns that may arise across different sectors as services become increasingly converged.

Consumer Council Survey
Sales Brochures between January 2002 and August 2004

Appendix 1: Illustrative examples of representations made in sampled sales brochures on telecommunications services

- [1] "Home Automation System: The leading edge of home automation technology coupled with the broadband network, setting a new standard in tomorrow's living."

"智能家居系統: 先進智能家居科技及寬頻網絡, 開拓新一代優越生活!"

- [2] "To keep you in touch with the world at large, each unit has built-in broadband access, through which you can even book clubhouse facilities and request professional household services,"

"住客可透過完善的寬頻網絡, 與外界時刻溝通連繫、預訂會所設施與專業家居服務。"

- [3] "Homes equipped with broadband network for easy connection. ... Residents can book clubhouse facilities and receive management notices via the internet."

"特設寬頻網絡, 配合每個單位內的 Cat.5 線路, 讓住客以高速上網。...網上 24 小時預訂會所設施及接收管理處通告。"

- [4] "The management fee of residential unit includes the monthly service charges for 24-hour unlimited broadband internet communication service."

"所有住宅單位之管理費用已包括使用安裝於住宅單位內之二十四小時寬頻上網通訊服務之費用。"

- [5] "住戶毋須額外付款, 即可享受 24 小時寬頻上網服務"*

- [6] "The management fee of residential units includes the monthly service charges for 24-hour unlimited Broadband Internet and communication services"

"所有住宅單位之管理費用已包括使用安裝於住宅單位內之二十四小時寬頻上網及通訊服務之費用"

- [7] "... 除 24 小時免費寬頻上網服務外，另設 6 星級專家居服務..."**

- [8] "... a Lease made between the Developer and X Limited in respect of certain conduits, pipes and areas in the Development for the installation and operation of common aerial broadcast distribution network and telecommunication network in the Development."

"發展商已與 X Limited 訂立一份租約，將物業內有關管道、導管及範圍租予 X Limited 作安裝及操作公共天線網絡及通訊網絡用途。"

- [9] "Transmission and distribution telecommunication equipment will be installed by X Limited and Y Limited in the Development for strengthening the use and enjoyment of the residents."

"X 有限公司及 Y 有限公司在物業範圍內設有電訊傳輸及分配網絡設備提供服務予住客。"

- [10] "Residents can access the world of information and entertainment programmes through X broadband services including M plus the Y TV services, offering numerous new and exclusive channels in Hong Kong and Asia."

"住戶可選用 X 寬頻服務接收來自世界各地的各類型娛樂及資訊，觀賞 M 節目及使用其 Y TV 服務，收看多個在香港甚至亞洲首播的節目頻道。"

- [11] "屋苑內並已預設寬頻固網光纖，讓每戶可享用集團提供之寬頻服務。"**

(* there is no corresponding English version in the sales brochures)