

立法會
Legislative Council

LC Paper No. CB(1)300/02-03
(These minutes have been seen
by the Administration)

Ref: CB1/PS/2/00/1

Panel on Transport

**Subcommittee on matters relating to the
implementation of railway development projects**

**Minutes of meeting on
Tuesday, 16 July 2002, at 8:30 am
in the Chamber of the Legislative Council Building**

- Members present** : Hon Miriam LAU Kin-yee, JP (Chairman)
Ir Dr Hon Raymond HO Chung-tai, JP
Hon LAU Kong-wah
Hon Andrew CHENG Kar-foo
Hon Abraham SHEK Lai-him, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon Albert CHAN Wai-yip
- Members absent** : Hon CHAN Kwok-keung
Hon LAU Chin-shek, JP
Hon TAM Yiu-chung, GBS, JP
Hon LEUNG Fu-wah, MH, JP
Hon WONG Sing-chi
Hon LAU Ping-cheung
- Non-Subcommittee members attending** : Hon Cyd HO Sau-lan
Hon Audrey EU Yuet-mee, SC, JP

**Public officers
attending**

: Agenda item I

Environment, Transport and Works Bureau

Mr Stephen LAM

Acting Secretary for the Environment, Transport and Works

Mr Paul TANG

Deputy Secretary for the Environment, Transport and
Works (Transport and Works)

Financial Services and the Treasury Bureau

Mr Martin GLASS

Deputy Secretary for Financial Services and the Treasury
(Treasury)

Transport Department

Mr Y M LEE

Chief Engineer/NTW

Highways Department

Mr Matthew HO

Acting Government Engineer/Railway Development

Department of Justice

Mr M Y CHEUNG

Senior Government Counsel

Clerk in attendance :

Mr Andy LAU

Chief Assistant Secretary (1)2

**Legal Adviser
in attendance**

: Mr Jimmy MA

Legal Adviser

Staff in attendance :

Miss Connie FUNG

Assistant Legal Adviser 3

Ms Alice AU

Senior Assistant Secretary (1)5

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I MTR Penny's Bay Rail Link Project Agreement

- (Ref: TBCR 3/5/511/98 - Legislative Council Brief on the MTR Penny's Bay Rail Link Project Agreement provided by the Administration;
- LC Paper No. CB(1)2279/01-02(01) - Information paper provided by the Administration;
- LC Paper No. CB(1)2297/01-02(01) - Letter dated 13 July 2002 from Legal Adviser to the Administration;
- LC Paper No. CB(1)2297/01-02(02) - Reply dated 15 July 2002 from the Administration; and
- LC Paper No. LS133/01-02 - Paper prepared by the Legal Service Division on Proposed Government's agreement to waive claims for dividends for the Mass Transit Railway Penny's Bay Rail Link Project)

In response to members' request at the last meeting held on 9 July 2002, the Administration had provided supplementary information in relation to the Penny's Bay Rail Link (PBRL) Project Agreement (the Project Agreement) and the funding arrangement of the PBRL Project vide LC Paper No. CB(1) 2279/01-02(01).

2. At the invitation of the Chairman, the Acting Secretary for the Environment, Transport and Works (SETW (Ag)) briefed members on the salient points of the paper. He said that the \$798 million financial support to be provided to MTR Corporation Limited (MTRCL) in the form of waived dividends had been estimated based on a thorough check on MTRCL's assumptions. As regards capital cost, the Government had through several rounds of negotiations with MTRCL successfully agreed to a reduction from the initial estimate of \$2.6 billion to \$2.0 billion. The project internal rate of return (PIRR) at 11.25% was pitched in the range between 1% and 3% above the cost of capital. This was estimated based on the weighted average of MTRCL's cost of debt and cost of equity, and was comparable with the PIRRs of other infrastructure projects.

3. Regarding the sustainability assessment of the project, SETW(Ag) advised that PBRL would have slight positive impact on most indicators. MTRCL would comply with all the conditions in the relevant environmental permits for the construction and operation of the PBRL. The PBRL was also an essential element of the associated infrastructure in support of the Hong Kong Disneyland (HKD) development which would provide an efficient and environmentally-friendly means of transportation to and from HKD.

Analysis prepared by the Legal Adviser

4. In response to members' request, the Legal Adviser (LA) had prepared an

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analysis on the legal issues relating to the proposed waiver of dividends. The paper was circulated to members vide LC Paper No. LS 133/01-02. The related correspondences between LA and Financial Services and the Treasury Bureau (The Treasury Branch) were circulated to members vide LC Paper No. CB(1) 2297/01-02 (01) and (02).

5. At the invitation of the Chairman, LA briefed members on the legal basis for the proposed waiver agreement. He said that the provision the Administration relied on was section 38(1)(a) of the Public Finance Ordinance (Cap. 2) (PFO). To determine whether there was a legal basis for the proposed waiver agreement, it would be necessary to study the relevant provisions of the Mass Transit Railway Ordinance (Cap. 556) (MTRO) and PFO as well.

Mass Transit Railway Ordinance

6. Section 42(1) of MTRO provided that "The Corporation shall, on the appointed day, issue shares to the Financial Secretary Incorporated which shall be held by the Financial Secretary Incorporated in trust on behalf of the Government". LA advised that the question for consideration was whether section 42 of MTRO, as drafted, created a trust with the Financial Secretary Incorporated (FSI) holding the MTRCL shares in the capacity of a trustee. If FSI was a trustee, he would be under a duty to take all reasonable and proper measures to obtain possession of the trust property if it was outstanding, and to get in all debts and funds due to the trust estate, and to preserve it and secure it from loss or risk of loss. A trustee was also under a duty to distribute income and capital to the right beneficiaries without demand.

7. LA said that having regard to the opinions given by the courts in a number of cases, it could be argued that since FS, being a public officer, would effectively be performing the duties of FSI, it was likely for the courts to hold that no trust arose under section 42 of MTRO.

8. LA however advised that if it was accepted that section 42 of MTRO was to express an obligation of FSI in respect of the MTRCL shares, the question to consider was the nature and scope of this obligation under MTRO. Section 42 of MTRO was silent on this. Section 58(1) of MTRO provided that "monies received by the Financial Secretary Incorporated as the person holding shares in the Corporation, or from the sale of or other dealing in shares in the Corporation which are held by the Financial Secretary Incorporated, form part of the general revenue". It was not clear from section 58(1) of MTRO whether an obligation was created for FSI to receive the dividends from MTRCL.

9. To ascertain whether an obligation was intended to be created for FSI to receive the dividends under MTRO, LA said that it might be useful to look at the legislative history of the provisions concerning dividends. With reference to the Explanatory Memorandum to the Mass Transit Railway Bill, the deliberations of the Bills Committee formed to examine the Bill and the Hansard of the relevant Council

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meeting, LA was of the view that section 58 of MTRO was not intended to introduce changes to the manner in which dividends were handled. This would mean that the intention of the provision was that all dividends declared by MTRCL should be paid and form part of the general revenue and that it had not been intended that section 38(1)(a) of PFO would be applicable. If this legislative intention was accepted, it would appear that FSI would have an obligation under MTRO to receive the dividends and pay the dividends into the general revenue. Failure to pay the dividends into the general revenue without justification in law might render FSI liable to judicial review.

Public Finance Ordinance

10. LA said that the Administration purported to rely on section 38(1)(a) of PFO as the legal basis for the proposed waiver of dividends. The effect of section 38 of PFO was that FS had a discretion to waive any claims by or on behalf of the Government and it was for him to determine in the first instance the meaning and scope of the provision. The question that arose was whether FS had power under section 38 of PFO to waive the Government's claim for dividends payable by MTRCL. First of all, the powers referred to in section 38 of PFO were exercisable by FS or public officers delegated by him. LA was of the view that there might be doubt as to whether the powers under section 38 of PFO could be exercised by FSI, being a corporation sole established under the Financial Secretary Incorporation Ordinance (Cap. 1015). Moreover, FSI, like any other entity in law, was subject to law. In relation to monies received, FSI would have to act in accordance with section 58(1) of MTRO. If he was required to act in accordance with section 58 of MTRO, it was doubtful if FS could invoke section 38 of PFO to waive the dividends payable by MTRCL.

11. LA further advised that in any case, there was doubt as to whether the "waiver" was within the contemplation of section 38 of PFO at all in the light of section 58 of MTRO. It would appear that if it was intended that the Government should have the power to waive the dividends and as a result the dividends needed not go into the general revenue, this should have been expressly provided in MTRO. The lack of an express empowering provision in MTRO would suggest that the dividends declared by MTRCL should be paid into the general revenue following the general requirement provided by section 3 of PFO.

12. In the light of the above analysis, LA advised that there might be doubt as to whether section 38(1)(a) of PFO could be relied upon as the legal basis for the proposed waiver of dividends for the PBRL Project. In relation to the issue concerning the payment of dividends by the Kowloon-Canton Railway Corporation (KCRC) raised by members at the last meeting, LA advised that in accordance with section 14 of the Kowloon-Canton Railway Corporation Ordinance (Cap. 372) (KCRCO), any dividends declared by KCRC should be paid into the general revenue. LA suggested that members seek explanation on whether waiving dividends from KCRC in the past was in line with section 14 of the KCRCO and whether the present dividend waiver for PBRL would be a departure from what had been stated in the letter issued by the then Secretary for the Treasury on 16 May 2002 (Annex E to LC

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Paper No. LS133/01-02). LA was of the view that any dividends declared and payable by MTRCL and KCRC should be dealt with in the manner specified in the relevant specific provisions in KCRCO and MTRO and should accordingly be managed in accordance with the relevant provisions concerning general revenue under PFO.

13. Members thanked LA for preparing a detailed legal analysis.

Government's response to the analysis prepared by LA

14. SETW(Ag) said that the Government's legal advice was that the dividend waiver option was entirely lawful and that there was sound legal basis for the option. He provided the following information:

- (a) The FS and FSI had their respective functions and powers under different ordinances.
- (b) Section 38 of PFO conferred a general power to FS and such power should not be bound by MTRO. Once FS had exercised his power to waive the dividend claims, such dividend would not be received by FSI.

15. The Senior Government Counsel (SGC) added that:

- (a) Once FS had waived a claim under section 38(1)(a) of PFO, no money in that respect could be received by the Government and section 58(1) of MTRO would therefore not be applicable.
- (b) Section 38(1A) of the PFO provided that in cases involving "fraud or negligence", FS needed to comply with conditions specified by the Finance Committee (FC) in waiving any claims. This implied that in cases not involving fraud or negligence, the FS would not need to approach the FC to set any condition before exercising his power to waive any claim.
- (c) Section 58 of MTRO was enacted after section 38 of PFO. There was no express provision in MTRO to the effect that section 38 would not be applicable in the case of financing of MTRCL.
- (d) Since FS did not exercise his power to direct KCRC to declare dividends, no dividend was declared by KCRC and therefore the question of whether dividends declared by KCRC should be paid into general revenue did not arise.

16. The Chairman enquired whether small investors would be affected by the proposed dividend waiver. SETW(Ag) replied that the waived dividend of \$798 million only covered the part of the Government as a shareholder of MTRCL.

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Whether FS had power to waive claims to dividends

17. Mr LAU Kong-wah referred members to the legal analysis prepared by LA and pointed out that section 38(1)(a) of PFO should be construed in the context of the checks and balances put in place by PFO in regulating the expenditure from the general revenue and the handling of revenue. The dividend waiver option might be characterized as an act, bypassing the control, or checks and balances exercised by FC in accordance with PFO in regulating expenditure out of the general revenue.

18. SETW(Ag) replied that FS had the power to waive the dividend claims under section 38(1)(a) of PFO and such exercise of the power was in the public interest. Regarding the entire checks and balances mechanism, it had indeed been the established practice for the Administration to appear before the Council to answer members' questions. Even though FC's power did not extend to monies which might be so claimed by the Government but which had been waived by FS under section 38(1)(a) of PFO, the Administration had arranged to brief the Subcommittee on such exercise of the power.

19. LA advised that the effect of section 38(1)(a) of PFO was that FS had a discretion to waive any claims by or on behalf of the Government. Since the term "claims" was not defined in the legislation, it was for FS to determine in the first instance the meaning and scope of the provision. However, in his view, section 38 of PFO should be construed in the context of the checks and balances put in place by PFO in regulating the expenditure from the general revenue and the handling of revenue. The general framework under PFO was that any expenditure from the general revenue required the approval of the Legislative Council (LegCo) or FC. On the other hand, income received for the purposes of the Government had to be paid into the general revenue under section 3 of PFO. Whilst Government might have a point to say that section 38(1)(a) did empower FS to waive any claims by or on behalf of the Government and that there was also no express provision in the legislation to require FS to seek FC's approval whenever FS exercised his power under section 38(1)(a), LA was of the view that section 38(1)(a) might not be applicable in the circumstances as an exercise of the FS's power under section 38(1)(a) might affect the effective implementation of section 58(1) of MTRO. In other words, should FS exercise his power to waive the dividend claims, it would effectively prevent the payment of declared dividends into the general revenue in accordance with section 58(1) of MTRO. He also said that a literal interpretation of section 38(1)(a) of PFO would mean that LegCo's power in monitoring public expenditure would be undermined. In line with the principles of administrative law, an exercise of FS's power or discretion under section 38 of PFO should be reasonable and in line with its legislative intents.

20. LA pointed out that as MTRO was enacted after PFO, a general legal principle was that if there was inconsistency between two pieces of legislation, the one enacted later in time should prevail over the one enacted earlier.

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21. LA advised that to facilitate members' understanding of the legal basis of dividend waiver, it might be helpful to examine the concept of "claim" under section 38(1)(a) of PFO and whether dividend was a kind of claim for the purpose of the section.

22. SETW(Ag) clarified that the intention of citing the enactment dates of the two legislation was not related to the legal principle of *Lex Posterior Derogat Priori*. Section 58 of MTRO did not contain an express provision to restrict the application of section 38(1)(a) of PFO to the financing arrangement for railways projects undertaken by MTRCL. Once FS had waived a claim under section 38(1)(a) of PFO, no money in that respect could be received by FSI and section 58(1) of MTRO would therefore not be applicable.

23. Mr Andrew CHENG shared the view of LA and queried the legal basis of the dividend waiver option. He cast doubt on whether the word "claims" in section 38(1)(a) of PFO covered the right of FSI to dividends as shareholder of the Corporation. Even if it covered, it was doubtful whether FS had the power to waive the dividend claims, having regard to the legislative intent of MTRO and the specific provision in section 58(1) of MTRO. He also referred to the then Secretary for the Treasury's letter dated 16 May 2002 that dividends from certain organizations including KCRC and MTRCL were credited into the General Revenue Account in accordance with KCRCO and MTRO which provided that dividends paid to the Government should become part of the general revenue. Separately, he was also concerned about the Government's act to bypass the control, or checks and balances, put in place by PFO in regulating the expenditure out of the general revenue. Given that the Government was facing a budget deficit, it was not appropriate for Government to waive its claims for dividend at the expense of taxpayers, bearing in mind MTRCL was making a profit of more than \$4 billion in 2001. Mr Albert CHAN also opined that under the circumstances, if Government could still rely on section 38(1)(a) of PFO to waive any claims by or on behalf of the Government, Government would be free to do anything on its own will.

24. SETW(Ag) replied that the Administration would give a written response to the legal analysis prepared by LA. Regarding whether the present dividend waiver for PBRL was a departure from what had been stated in the letter issued by the then Secretary for the Treasury on 16 May 2002, he clarified that only dividends actually paid to the Government would become part of the general revenue. By exercising the power of dividend waiver, the Government would not receive any dividend from MTRCL. Likewise, since FS did not exercise his power to direct KCRC to declare dividends, no dividend was declared by KCRC and therefore the question of whether dividends declared by KCRC should be paid into general revenue did not arise. In case FS had not waived its claim under section 38(1)(a) of PFO, the Administration would take necessary actions to recover the outstanding claims including monies receivable.

(Post-meeting note: The Administration's response was circulated to members

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vide LC Paper No. CB(1)2322/01-02(01) for the Subcommittee meeting held on 22 July 2002.)

25. Mr Andrew CHENG remarked that as the proposed dividend waiver option might be subject to legal challenge, it might affect the Administration's credibility in the end. Further, the proposal was made at the expense of taxpayers' interest with a view to enabling MTRCL to obtain a PIRR of 11.25%. To avoid dispute and possible legal challenge, the Administration should submit an equity proposal to FC for approval instead.

26. SETW(Ag) replied that the PBRL Project was an essential element of the associated infrastructure in support of the HKD development. It was also well received by the general public. On the other hand, as MTRCL was a commercially-run corporation, a reasonable rate of return should be attainable by the Corporation. Government, being the majority shareholder of the Corporation, supported the PBRL, which was also in line with public interest.

Whether "monies received" under section 58 of MTRO covered "monies receivable"

27. Mr Albert CHAN expressed grave concern about whether the present course of action to waive the dividend claims on behalf of the Government was in contravention of section 58 of MTRO which provided that monies received by FSI as the person holding shares in the Corporation formed part of the general revenue. He pointed out that as the dividends would be received by Government upon declaration by MTRCL, an exercise of FS's power to waive the dividend claims would be in contravention of section 58 of MTRO and was also not in public interest. He cautioned that this would have serious implications on the rule of law. The Chairman remarked that the crux of the issue was whether "monies received" under section 58 of MTRO covered "monies receivable" as well.

28. LA advised that it was not clear from section 58(1) of MTRO whether an obligation was created for FSI to receive the dividends from MTRCL. To ascertain whether an obligation was intended to be created for FSI to receive the dividends under MTRO, it might be useful to look at the legislative history of the provision concerning dividends and the general framework of public finance management. Given that MTRO was a piece of specific legislation for providing a legislative framework for MTRCL to operate as a listed company, MTRO should prevail over legislation of a general nature if there were inconsistencies between them.

29. LA also said that legally speaking, monies receivable were different from monies received. In the former case, a beneficial owner had a right to claim for his own entitlement through legal proceedings. Whilst an express provision was not provided for in MTRO, it would appear that FSI would have an obligation under the Ordinance to receive the dividends and pay the dividends into general revenue.

30. SGC said that section 58 of MTRO was silent on money receivable by FSI.

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Indeed, once FS had waived a claim under section 38(1)(a) of PFO, no money in that respect could be received by the Government and section 58(1) of MTRO would therefore not be applicable.

31. Although, according to the Administration, waiving dividends from KCRC had been done in the past, Mr Albert CHAN remarked that the present case was rather different. First, MTRC was no longer a Government wholly-owned company. Second, with the dividend already declared by MTRCL, it should be regarded as part of the general revenue. Hence, the proposed waiver was tantamount to a withdrawal of money from the general revenue which should be subject to the approval of FC.

Dividend Waiver as Funding Support: Principles

32. Referring to paragraph 10 of the Administration's paper, Mr LAU Kong-wah said that an exercise of the FS's power or discretion under section 38 of PFO should be justified with reasonable grounds. He did not agree that equity was a cost to the Government on which the Administration might never see a return. He therefore cast doubt on the Administration's argument that funding support through a dividend waiver was more appropriate as it should be treated as retention and enhancement in value of the Government's investment.

33. SETW(Ag) replied that FS would only exercise his power in accordance with laws and on reasonable grounds. Before arriving at the decision to support the PBRL through waiving Government's claim to MTRCL dividends, the Administration had examined whether it could fill the funding gap by granting property development rights to MTRCL. It concluded that the option was not possible. The Administration was satisfied that there were compelling reasons for adopting the present course of action. It would enable MTRCL to deliver a cost-effective, efficient and environmentally-friendly mode of transport in time for the opening of HKD so as to achieve the full economic benefits for Hong Kong.

34. Ir Dr Raymond HO opined that in view of the healthy financial performance of MTRCL, a dividend from MTRCL was forthcoming. As such, he was not convinced of the Administration's reply that the dividend would not form part of the general revenue. He also found it difficult to accept the Administration's view that a dividend waiver was not a cost to the Government but should be treated as retention and enhancement in value of the Government's investment. In his opinion, a dividend waiver would never see a return, not to mention the fact that the funding gap of \$798 million was only worked out from a subjective assessment of the MTRCL's assumptions which contained inherent uncertainties. On the other hand, an equity injection would ensure a certain degree of return on investment in future. He also remarked that the proposed dividend waiver option was to the disadvantage of Government as other small investors would not be required to bear the costs of the funding support.

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35. SETW(Ag) said that the PBRL was essential to the opening of the HKD, which, in turn, would bring substantial economic benefits to Hong Kong. The proposed dividend waiver option would bridge the funding gap identified in connection with the PBRL Project.

36. The Deputy Secretary for Financial Services and the Treasury (Treasury) (DS/FS&T(T)) advised that being a commercial entity, MTRCL would not undertake any railway development project unless it could achieve a commercial return. Before arriving at the decision to support the PBRL through waiving Government's claim to MTRCL dividends, the Administration had carefully evaluated various options. Subsidy was considered not acceptable for commercial operation. For equity investment, the general expectation was to achieve a return. However, as equity would increase the cost of capital which, in turn, would enlarge the funding gap, it was considered not practicable. The granting of property development rights to MTRCL was also considered not feasible in the present case. The remaining option was to allow the corporation to retain that part of the dividend which would otherwise come to Government as a shareholder. In so doing, a dividend waiver should be treated as retention and enhancement in value of the Government's investment as a PIRR of 11.25% could be maintained.

The Project Agreement and Construction Programme

37. In response to Mr Tommy CHEUNG and the Chairman, SETW(Ag) said that the construction programme was very tight. MTRCL had already identified contractors for some of the contracts which were on a critical path. The award of the contracts had already been deferred due to the deferral of execution of the Project Agreement. Further, as the PBRL was an integral part of the overall HKD development, there were a lot of interface issues between the PBRL works and the works now being carried out by Government for the HKD development.

38. Mr Tommy CHEUNG remarked that as an undertaking was not given to The Walt Disney Company on the timing of the development of PBRL and taking into account Government's downside risk in case of construction delays, there was no urgency to press ahead for the delivery of PBRL. SETW(Ag) replied that Government had already considered the downside risk of the project. The present arrangement was considered appropriate.

39. Mr Tommy CHEUNG enquired about the future arrangements for dealing with MTRCL dividends in excess of the claimed amount of \$798 million. SETW(Ag) replied that the arrangements would be covered in the Project Agreement. DS/FS&T(T) added that over the next few years, the Administration would gradually waive the amount of dividend on a cumulative basis until it reached \$798 million. Thereafter, Government would receive the dividends in the normal manner.

40. Ms Audrey EU cast serious doubt on the legal basis for the proposed waiver agreement. She queried whether Government could waive "claims" to dividends

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which had yet to be declared by the Corporation. In light of members' reservation over the legal basis for the proposed waiver agreement, she enquired whether the Administration was prepared to execute the Project Agreement irrespective of members' views on the matter.

41. SETW(Ag) replied that as the Administration only received the legal analysis prepared by LA last night, it would carefully examine the legal points and provided a written response. The Administration would ensure that its acts would comply with the law. Given the tight construction programme for PBRL, the Project Agreement would need to be executed within one or two days. The Deputy Secretary for the Environment, Transport and Works (Transport and Works) (DS/ETW(T&W)) added that if MTRCL contracts were delayed, there might be timing implications on the opening date of the HKD.

42. Members enquired about the possible course of action in case a consensus view could not be reached between members and the Administration over the legal basis for the proposed waiver agreement. LA advised that in accordance with the Basic Law, the Government must abide by the law and be accountable to LegCo. To answer members' questions at meetings of LegCo could be seen as a sign of accountability. However, LegCo had no power to issue any restraint order to prohibit the carrying out of a Government's act which Government considered appropriate.

43. Whilst supporting the implementation of PBRL, Mr Abraham SHEK cast doubt on the need for the Administration to execute the Project Agreement within one or two days. As the HKD project was planned for years, there was no reason for the Administration to put up a case for members' consideration at the last minute, not to mention the fact that the legality of the proposed act had yet to be established. Given that the proposal would involve public monies, LegCo had a duty to scrutinize the proposed expenditure in detail. The Administration should therefore put up sufficient grounds to justify their own proposal.

44. DS/ETW(T&W) replied that the need and timing for PBRL was beyond doubt. The crux of the issue was on the financing arrangement for the project. The Administration had examined various options and considered that the proposed dividend waiver option was the most appropriate one. Over the past few months, the Administration had conducted several rounds of negotiation with MTRCL over the financing arrangements for PBRL. Once a decision was made by the Executive Council, a briefing was immediately arranged by the Administration. SETW(Ag) added that the Administration would carefully examine views put forward by members and that Government must abide by the law.

45. Ms Cyd HO remarked that the present financing arrangement was rather "creative". If capital raising was considered necessary, it should cover all shareholders of the Corporation. The present arrangement was made at the expense of taxpayers' interests.

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46. SETW(Ag) replied that the Administration had all along adopted a prudent approach in managing its own finance.
47. The Chairman remarked that it was highly undesirable for the Administration to execute the Project Agreement if the legal debate could not be put to a rest. In view of the divergent views between the legal adviser of the Council and the Government, she asked if the Administration was prepared to seek the views of an outside Senior Counsel on the issue.
48. SETW(Ag) took note of the Chairman's view.
49. Mr CHENG Kar-foo clarified that whilst queries had been raised over the legal basis of the dividend waiver option, he was in support of the PBRL. He also cast doubt on a PIRR of 11.25% which was considered not reasonable. He sought the Administration's undertaking to defer the execution of the Project Agreement, pending members' further deliberation on the related legal issues.
50. Mr Tommy CHEUNG indicated his support to the development of HKD. He also understood that a PIRR of 11.25% would enable the Administration to sell its shares at a better price in the end. He asked about the liability of Government in case an indemnity in relation to the opening date of HKD was required.
51. SETW(Ag) replied that in case HKD could not be opened beyond October 2006, the Administration would need to assess the claims put forward by MTRCL. At this stage, it was difficult to give an accurate assessment.
52. Mr Albert CHAN cast doubt on the relationship between FSI and FS. On one hand, an obligation was created for FSI to receive the dividends from MTRCL to safeguard public interest. On the other hand, FS could waive the claims for MTRCL dividends. In view of the circumstances, he considered that FS should be invited to the meeting to brief members on the related issues.
53. SETW(Ag) replied that he would relay members' concerns to FS.
54. After deliberation, members agreed to hold another meeting on 22 July 2002 at 8:30 am.

Motion

55. As to whether the Administration would defer executing the Project Agreement pending further deliberation by the Subcommittee, SETW(Ag) replied that the Administration would provide a written response before deciding on the date of execution.

(Post-meeting note: The Administration's response was circulated to members vide LC Paper No. CB(1)2322/01-02(01) for the Subcommittee meeting held

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on 22 July 2002.)

56. Noting the Administration's response and against the background that a consensus view between Government and the LegCo over the legal basis for the proposed dividend option could not be reached, Mr CHENG Kar-foo proposed the following motion urging the Administration to defer executing the Project Agreement with MTRCL in respect of PBRL:

“鑒於政府與立法會未能在政府豁免收取地鐵股息的問題上達成共識，本小組委員會要求政府押後與地鐵有限公司就竹篙灣鐵路線簽署任何協議。”

57. Members generally felt dissatisfied that the Administration did not give an undertaking to defer the execution of the Project Agreement. Mr Abraham SHEK said that whilst the Administration might have difficulties in entertaining the request put forward by members, he suggested that the Administration could revert to the Subcommittee before actual execution. Ir Dr Raymond HO also considered that as a meeting was already scheduled for 22 July 2002, it was unacceptable for the Administration to refuse deferring the execution of the Project Agreement pending further deliberation by the Subcommittee. Ms Cyd HO could not see the reason why members' request could not be acceded to. As Government was the majority shareholder of MTRCL, it should have no difficulty in meeting members' request. Mr Albert CHAN echoed the view of Ms HO and remarked that Government was a signed party of the Project Agreement. If Government had doubts on the legal basis of the dividend waiver option, it should withhold executing the Project Agreement. He cautioned that if Government's act was in contravention of the law, it would be subject to legal challenge.

58. SETW(Ag) replied that the Administration fully understood members' views and request. As MTRCL had already identified contractors for some contracts, the award of these contracts had been deferred due to the deferral of execution of the Project Agreement. Notwithstanding the above, he would discuss further with MTRCL.

59. Referring to the motion moved by Mr CHENG, the Chairman said that it would be difficult for members to support the motion as it would mean that members must have a consensus view on the dividend waiver option before the Project Agreement could be executed. She considered that the crux of the issue was more on the legal basis of the proposed dividend waiver option. She suggested that the wording of the motion be refined to the effect that Government should not execute any agreement relating to PBRL with MTRCL prior to the completion of the meeting to be held on 22 July 2002. After deliberation, Mr CHENG Kar-foo agreed to refine the wording of his motion to read as follows:

“本小組委員會要求政府當局不會在小組委員會下次訂於 2002 年 7 月 22 日舉行的會議結束前，與地鐵有限公

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司就地鐵竹篙灣鐵路線簽署任何協議。”

60. Members voted on the motion. The motion was passed by the Subcommittee.

II Any other business

61. There being no other business, the meeting ended at 10:30 am.

Legislative Council Secretariat

15 November 2002