

立法會
Legislative Council

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Legislative Council
Panel on Transport

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

**Minutes of meeting on
Monday, 22 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 CHAN Kwok-keung
Hon LAU Kong-wah
Hon Abraham SHEK Lai-him, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon Albert CHAN Wai-yip
Hon WONG Sing-chi
Hon LAU Ping-cheung
- Members absent** : Hon LAU Chin-shek, JP
Hon Andrew CHENG Kar-foo
Hon TAM Yiu-chung, GBS, JP
Hon LEUNG Fu-wah, MH, JP
- Non-Subcommittee Members attending** : Dr Hon David CHU Yu-lin, JP
Hon Cyd HO Sau-lan
Hon Martin LEE Chu-ming, SC, JP
Hon Margaret NG
Hon Emily LAU Wai-hung, JP
Hon Howard YOUNG, JP
Dr Hon TANG Siu-tong, JP
Hon Audrey EU Yuet-mee, SC, JP

- Public officers attending** : 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/New Territories West
- Highways Department
- Mr Matthew HO
Acting Government Engineer/Railway Development
- Department of Justice
- Mr Benedict LAI
Deputy Law Officer (Civil Law)
- 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;
- 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;
- 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; and
- LC Paper No. CB(1)2322/01-02(01) - Information paper provided by the Administration)

The Chairman invited members to note that as requested by the Subcommittee at its last meeting held on 16 July 2002, the Administration had provided a written response to the analysis prepared by the Legal Service Division (LC Paper No. LS133/01-02 refers) vide LC Paper No. CB(1)2322/01-02(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 as stated at the last meeting, the Government's legal advice was that the dividend waiver option proposed by the Government to provide funding support for the Penny's Bay Rail Link (PBRL) Project was entirely lawful. Nevertheless, arising from the concerns expressed by members, the Administration had further consulted the Department of Justice (D of J) and sought the views of an outside Senior Counsel (SC), Mr Daniel FUNG. Their view was that there was sound legal basis for the option. In this connection, a supplementary note entitled "Extract from SC Opinion" was tabled at the meeting.

(Post-meeting note: The supplementary note was subsequently issued to members vide LC Paper No. CB(1)2334/01-02(01).)

Legal basis of dividend waiver

3. The Deputy Law Officer (Civil Law) (DLO(CL)) took members through the explanation set out at Annex A to the Administration's paper and highlighted the following points for members' consideration:

- (a) It was expressly provided in section 38(1)(a) of the Public Finance Ordinance (Cap. 2) (PFO) that the Financial Secretary (FS) or any public officers delegated by him had the power to waive any claims by or on

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behalf of the Government.

- (b) Under PFO, the concept of "claim" was a broad one. It had, for example been defined as "embracing every species of legal demand" in a Canadian case. There was no doubt that the word "claims" in section 38(1)(a) of PFO covered the right of the Financial Secretary Incorporated (FSI) to dividends as shareholder of the MTR Corporation Limited (MTRCL). They arose, at the latest, when dividends were being declared by the Corporation. At such time, FS might direct that such right to dividends be waived. There was, however, nothing to prevent FS from indicating, in any agreement to be reached with the Corporation, that he would exercise such power at the relevant time, provided such agreement was in no way inconsistent with his duties and functions as FS and such exercise of the power was in the public interest.
- (c) Under section 3(1) of PFO, moneys raised or received for the purposes of the Government shall form part of the general revenue. Likewise, section 58(1) of the Mass Transit Railway Ordinance (Cap. 556) (MTRO) provided that "monies received by the Financial Secretary Incorporated ... form part of the general revenue." The words "monies received" in these provisions meant precisely what they said, namely, monies actually received by the Government and not monies to which it was entitled but which it had not received. Hence, they did not cover dividends declared by the Corporation but waived by the Government. 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.
- (d) Given that the "claims" waived under section 38 of PFO would not form part of the general revenue and hence, would not be subject to the jurisdiction of the Finance Committee (FC), an exercise of FS's power or discretion under section 38(1)(a) of PFO could in no way be properly characterized as an act bypassing the control, or checks and balances, put in place by PFO in regulating the expenditure out of the general revenue.
- (e) The conclusion was that an exercise of FS's power or discretion under section 38(1)(a) of PFO would neither infringe the letter and spirit of any provisions in PFO, nor contravene the relevant provisions in MTRO.

4. At the invitation of the Chairman, Legal Adviser (LA) commented that the Administration's paper had provided another perspective for members to consider the legal issues arising out of the proposed dividend waiver. However, he expressed the view that the Administration's approach in interpreting section 38(1)(a) of PFO was an example of "pushing the envelope", i.e. stretching statutory interpretation to its very limits.

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5. Ir Dr Raymond HO opined that as the dividends would be received more or less automatically by the Government upon declaration by the Corporation and there was no need for the Government to take any action to make a demand, they should be rightly regarded as "receivables" and not "claims" as suggested by the Administration. As such, the dividends declared by MTRCL should form part of the general revenue and come under the scrutiny of FC. Ir Dr HO considered that if such a broad definition was given to the word "claims", the power of the Legislative Council (LegCo) in monitoring public expenditure would be seriously undermined. As the MTRCL shares were held by FSI in trust, any waiver of dividends in respect of such shares should require LegCo/FC's approval.

6. Pointing out that the words used in the Chinese text of section 58(1) of MTRO were "而獲得" which were broader in meaning than "已獲得", Mr LAU Kong-wah was not convinced by the Administration's explanation that only monies actually received by the Government should form part of the general revenue. Furthermore, he said that if the Administration's argument was followed, there was in fact nothing to waive because no monies had been received by the Government, i.e. there was no triggering point for FS to exercise his power of waiver under section 38(1)(a) of PFO.

7. Ms Audrey EU maintained that the application of law must be reasonable and she was utterly not convinced that there was a sound legal basis for the proposed dividend waiver and nobody would accept that the Government's interpretation of the relevant provisions was reasonable. Legally speaking, she said that as a trustee, FSI would be under a duty to take all reasonable and proper measures to obtain possession of the trust property if it was outstanding. Also, given that the dividends would be readily received by the Government upon declaration by the Corporation, she seriously doubted whether the proposed dividend waiver would come under the contemplation of section 38(1)(a) of PFO. She also queried whether FS could exercise his discretion under section 38(1)(a) of PFO to enter into an agreement with the Corporation to waive claims of dividends that had yet to be accrued.

8. Ms EU further said that a very bad precedent had been set as the Administration had resorted to an unreasonable legal means to bypass the scrutiny of LegCo/FC. Notwithstanding the elaborate arguments put forward by the Administration, she said that the matter was indeed very simple. FSI, as the holder of the MTR shares in trust on behalf of the Government, had an obligation to receive the dividends and pay the dividends into general revenue, and any expenditure from the general revenue required the approval of LegCo/FC. Given the large sum of public monies involved, Ms EU opined that if the Government was convinced that funding support for the Project was in the public interest, the proper way was to present a funding request together with all justifications to FC for approval. In this connection, she queried why the Administration had not done so when there was still time.

9. Concurring with Ms Audrey EU's query about the legality of the proposed dividend waiver, Miss Margaret NG pointed out that another equally important issue was involved. She said that under the Basic Law, one of the powers and functions of

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the legislature was to approve public expenditure. It was also clearly stipulated in section 3(1) of PFO that "any moneys raised or received for the purposes of the Government shall form part of the general revenue". It did not only cover "monies received". If FS could, by an exercise of his discretion under section 38(1)(a) of PFO, tick out any monies that were due to the Government, the whole purpose of the legislative framework provided by PFO for the control and management of public finance of Hong Kong would be defeated. More importantly, it would go against the constitutional rule laid down by the Basic Law. The scope of LegCo's scrutiny of Government expenditure would be effectively limited by FS's discretion under section 38(1)(a) of PFO. Given such serious implications, Miss NG said that the Secretary for Justice (SJ), as the principal legal adviser to the Government, would have the duty to ensure that the Government's actions were legally and constitutionally in order, proper under the circumstances and in line with public interest. In this connection, she asked whether the advice of SJ had been sought on the matter and whether the proposed dividend waiver was also supported by her. If that was the case, Miss NG enquired about the accountability of SJ as a principal official if there was any problem with the legality and constitutionality of the Administration's proposed course of action.

10. Mr Martin LEE was also of the view that FSI, as a trustee, had the responsibility not only to receive the dividends declared by MTRCL, but also to take necessary actions to obtain the dividends if outstanding. The Administration's argument that monies not yet received could be waived by FS was flimsy and would clearly not stand in trust law because the general principle was that "equity treats as done that which ought to be done". The Administration's argument could easily lead to abuse as monies which ought to form part of the general revenue would go unaccounted for. Highlighting the importance of maintaining the checks and balances between LegCo and the Government in respect of public expenditure and the Government's duty to be answerable to LegCo and the public, Mr LEE considered that the proposed dividend waiver was obviously neither a proper nor desirable course of action to take.

11. In response, SETW(Ag) stressed that both the executive authorities and the legislature must act in accordance with the Basic Law and the laws of Hong Kong. In the present case, all the legal issues arising out of the proposed dividend waiver had been carefully considered by the Administration including D of J. The conclusion was that there was sound legal basis for the proposed waiver and that the proposed waiver was entirely lawful. In order to allay members' concerns, the Administration had also set out its justifications clearly for members' consideration. He reiterated that the dividend waiver option was proposed because it was considered the most appropriate means to provide the funding support required for the Project. There was no intention to bypass LegCo/FC's scrutiny.

12. SETW(Ag) added that SJ, as a member of the Executive Council, was involved in the decision to approve the execution of the draft Project Agreement. As a principal official, SJ would be accountable for the policies within her purview. Miss

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Margaret NG was dissatisfied with the Administration's reply and suggested that the Subcommittee should seek clarification directly from SJ.

13. On the length of time taken to reach an agreement with the Corporation, the Deputy Secretary for the Environment, Transport and Works (Transport and Works) (DS/ETW(T&W)) advised that PBRL was the first railway development project to be undertaken by MTRCL after its privatization. After several rounds of lengthy negotiations, both sides managed to reach an agreement on the draft Project Agreement, including the financing arrangements for bridging the funding gap identified in connection with the Project. Once a decision was made by the Executive Council, the Administration had immediately made arrangements to brief members about the matter.

Interpretation of "claims" and "monies received"

14. Responding to members' query about the legal basis of the proposed dividend waiver option, DLO(CL) reiterated that the concept of "claim" was indeed a broad one. Citing a Canadian case, he said that the word had been defined as "... embracing every species of legal demand". Hence, there was no doubt that "claims" in section 38(1)(a) of PFO covered the right of FSI to dividends as shareholder of the Corporation. In this connection, he emphasized that while the shares in the Corporation were held by FSI, the power to waive claims was vested in FS under section 38(1)(a) of PFO and it had nothing to do with section 58(1) of MTRO. Under the proposed dividend waiver option, an agreement would be reached by FS and the Corporation. FS would then be contractually bound to exercise his power under section 38(1)(a) of PFO from time to time as and when dividends were declared by the Corporation to waive any claim for such dividends. 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.

15. LA pointed out that as the word "claims" was not defined in PFO, the word should be given its ordinary and natural meaning in the context of the relevant provisions. Citing *Haydon v Lo & Lo*, LA advised that the Privy Council, in construing the word "claim" in an insurance policy, held that the primary meaning of the word "claim" was such as to attach it to the object that was claimed and a claim was not the same thing as the cause of action by which a claim might be supported. Given the possible broad meaning of the word "claim" a court might give to it in a given context, it would be difficult for LA to advise categorically that the interpretation put by the Administration would not be able to withstand challenge in law.

16. On the meaning of "而獲得" in section 58(1) of MTRO, LA advised that these words should be read in context, i.e. "將...股份出售或作其他方式交易而獲得的款項", denoting monies that came about as a result of certain actions. The use of these words in the provision was unrelated to the concept of "monies receivable". In this respect, LA agreed with the Administration's analysis that the legal meaning of

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"monies received" in section 58(1) of MTRO was different from monies receivable.

17. DLO(CL) said that the purpose of section 58 of MTRO should not be confused with section 14A of the repealed Mass Transit Railway Corporation Ordinance (Cap. 270) which provided that a "dividend declared" by the Corporation should be paid into the general revenue. He stressed that there was no doctrine of automatic succession or migration of legislative intent. The words "monies received" in section 58(1) of MTRO meant precisely what they said, namely, monies actually received by the Government and not monies to which it was entitled but which it had not received. They did not therefore cover dividends declared by the Corporation but waived by the Government as there would not be "monies received" within the meaning of section 58(1) of MTRO.

18. Mr Albert CHAN however considered that if the Mass Transit Railway Bill did intend to introduce any changes to the manner in which dividends paid by MTRCL was handled, the Administration should have the duty to ensure that LegCo Members were fully informed of such change. Otherwise, it would seem that the Administration might have deliberately misled members on this matter.

19. Speaking from his personal recollection, the Deputy Secretary for Financial Services and the Treasury (Treasury) (DS/FS&T(T)) advised members on the legislative intent of section 58 of MTRO. He said that in the course of scrutiny of the Bill, it was clear to members of the Bills Committee that the primary intention of section 58 of MTRO was to allow the Government to defray expenses in connection with the sale of MTRCL shares by setting these off from the money received from the share offering. He believed that members were also clear that the question of whether the Government could require a privatized corporation with shareholding in the private sector to declare a dividend was not a tenable option. It was thus accepted that the scope should be broadened from dividends declared to monies received and certainly there was no question at any discussion that monies receivable in concept should be covered by that provision.

FSI's obligation under MTRO

20. As far as section 58 of MTRO was concerned, LA advised that this provision should be considered in conjunction with section 42 of MTRO. In this connection, he reminded members that the doubts raised by the Legal Service Division in its paper (LC Paper No. LS133/01-02) were based on the analysis that a court might be prepared to find that the expression "held by the Financial Secretary Incorporated in trust on behalf of the Government" in section 42 of MTRO reflected the legislature's intention to impose a governmental obligation on FSI. And, although section 58 of MTRO only referred to "monies received", FSI might have an obligation to receive any dividends declared by MTRCL.

21. DLO(CL) responded that the question of whether a true trust (as opposed to a mere governmental obligation) had been created with FSI acting as the trustee of the

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MTRCL shares under MTRO was of little relevance. Even if there were to be a true trust, it would not prevent FS or Government as a beneficiary of the shares from exercising his statutory power to waive claims of dividends otherwise payable by the Corporation. This would not be inconsistent with the role of FSI under MTRO.

22. Mr Albert CHAN remained unconvinced by the Administration's explanation. Referring to paragraph 8 of LC Paper No. LS133/01-02, he reiterated that for all practical purposes, the dividends from MTRCL should not be regarded as "claims" as suggested by the Administration. Instead, the dividends were monies receivable which FSI was obliged to receive and pay into general revenue under section 58 of MTRO. Highlighting FSI's statutory obligation under MTRO, he agreed with LA's view that section 38(1)(a) of PFO was not intended to be applicable. An exercise of FS's discretion under section 38 of PFO to waive the dividend claims would be in contravention of section 58 of MTRO and was also not in public interest.

23. In reply, DLO(CL) explained that FSI was established by the Financial Secretary Incorporation Ordinance (Cap. 1015) which was intended to provide for "perpetual succession" and the "capacity" to acquire and hold properties of all kinds. It was a "corporation sole" with a separate legal identity from FS to enable him to discharge his duties as FS in the most expedient fashion (i.e. where perpetual succession and ability to bind successors to the office were required). FS and FSI had their respective functions and powers. The power to waive claims under section 38(1)(a) was vested in FS, and not FSI. Once FS had exercised his power of waiver, he could then implement such decision in his other capacity as FSI in entering into such formal arrangements as might be necessary regarding the shares held in the name of FSI. There was no conflict of roles as between FS and FSI so far as the powers and functions under the provisions in PFO and MTRO were concerned.

24. Referring to the Legal Service Division's view that "[f]ailure to pay the dividends into general revenue without justification in law may render FSI liable to judicial review", Ms Emily LAU sought LA's view as to whether there were grounds for LegCo to apply for judicial review of the Government's decision in the present case. Mr Albert CHAN also asked whether LegCo could apply for a judicial declaration on the legality of the Administration's proposed course of action for providing funding support to the Project. Mr LAU Kong-wah however expressed reservation on Mr CHAN's suggestion.

25. In response, LA said that having considered the Administration's views, he believed that there were no firm legal grounds to advise categorically that the conclusions reached by the Administration would not be able to stand up to challenge in law. As set out in the Legal Service Division's analysis, a number of presumptions had to be established before one could go down the road of judicial review. The Legal Service Division's view was that the courts might hold that a governmental obligation was imposed on FSI to receive the dividends declared by the Corporation in respect of the shares held and to pay those dividends into general revenue. However, he said that in some cases, the court might find such governmental obligation non-

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justiciable. On Mr Albert CHAN's query, LA said that the legal issues involved were very complex, one of which was whether LegCo had the capacity to make an application in court. There was no binding judicial authority which was directly on the point. He would provide written views to elaborate on this point further.

(Post-meeting note: The paper prepared by LA was circulated to members vide LC Paper No. LS137/01-02.)

Waiver of claims yet to be accrued

26. As regards the question on whether FS could enter into an agreement in respect of his future exercise of discretion under section 38(1)(a) of PFO, DLO(CL) cited *Birkdale District Electric Supply Company v Corporation of Southport* [1926] AC 355 and advised that an authority vested with statutory powers and duties might enter into an agreement, a commercial agreement in particular, restricting its future exercise of discretion provided that there was no incompatibility with its statutory powers or duties.

27. Ms Audrey EU however did not consider the cited case relevant because it was not related to the power to waive claims that had yet to be accrued.

28. Mr LAU Ping-cheung remarked that some insurance policies might contain provisions in respect of waiver of future rights or interests.

Exercise of FS's discretion under section 38(1)(a) of PFO

29. 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. In law, a public body endowed with a statutory discretion might legitimately adopt general rules or principles of policy to guide itself as to the manner of exercising its own discretion in individual cases, provided that certain criteria were satisfied. The courts would look at whether such rules or principles were legally relevant to the exercise of the powers of the public body, consistent with the purpose of the enabling legislation and not arbitrary, capricious or unjust and would decide the issue based on the facts of individual cases. The question of whether FS's decision to exercise his power under section 38(1)(a) of PFO to waive the share dividends to be declared by MTRCL was appropriate would be a matter for the Administration to justify to the satisfaction of members and the public.

30. In this respect, DLO(CL) confirmed that all relevant factors in relation to FS's exercise of his power under section 38(1)(a) of PFO had been carefully considered by the Administration before the decision was made. In addition, the Administration had evaluated other options which might be used to provide funding support for the Project. The conclusion was that dividend waiver was the most appropriate option.

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After all, when exercising the discretion under section 38(1)(a), FS and any public officers delegated by him would have to be accountable for their action.

31. SETW(Ag) also assured members that when exercising any discretionary powers under the law, the public officer concerned must act within bounds and be subject to scrutiny by LegCo and the public. Most importantly, he would need to satisfy the public that the exercise of such power was reasonable and in line with public interest.

32. Regarding the checks and balances between the executive authorities and the legislature, SETW(Ag) said that the Administration would be answerable to LegCo on all matters requiring LegCo's approval. Even for matters which did not come under FC's scrutiny, the Administration would actively seek the opportunity to brief members in other forum such as LegCo Panels or subcommittees as it had done in the present case.

Checks and balances between LegCo and the Government

33. Mr Albert CHAN opined that the Administration's approach of "pushing the envelope" was dangerous and would have far-reaching consequences on the control and management of public finances in Hong Kong. He cautioned that if FS could continue to rely on section 38(1)(a) of PFO to waive any claims by or on behalf of the Government, the Government would be free to do anything on its own will. He was particularly worried that the Government would resort to the same means to waive other sums of monies due to the Government from other public organizations such as the Airport Authority and the Monetary Authority. Without any checks and balances by LegCo, the public would have no way to tell if any exercise of such power by FS was justified and whether public interest had been safeguarded.

34. Mr LAU Ping-cheung said that he would support the Project out of the consideration of public interest. However, the concerns raised by members about any future exercise of FS's discretion under section 38(1)(a) of PFO should be carefully examined in another context. If considered necessary, legislative amendments might be introduced to set out clearly the conditions on which FS could exercise his discretion under section 38(1)(a) of PFO.

35. LA was of the view that if the Administration's approach in interpreting section 38 of PFO was followed, monies which might otherwise form part of the general revenue would be foregone and hence, upsetting the reportage mechanism and the checks and balances put in place by PFO in regulating the expenditure from the general revenue and the handling of revenue. In a wider context, it might also prevent LegCo from exercising its constitutional function of approving public expenditure. He suggested that it might be opportune to consider whether the legislative framework provided by PFO for the control and management of public finance of Hong Kong met current needs of Hong Kong.

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36. The Chairman advised that it would be outside the purview of the Subcommittee to discuss matters which related to other public organizations. The important policy question raised by Mr Albert CHAN should more appropriately be taken up by the Financial Affairs Panel. Ms Emily LAU agreed that the matter should be referred to the Financial Affairs Panel for discussion.

37. At members' request, LA agreed to provide a paper setting out his comments on the Administration's paper.

(Post-meeting note: The paper prepared by LA was circulated to members vide LC Paper No. LS137/01-02.)

38. Referring to the Administration's assertion that the power to waive claims under section 38(1)(a) of PFO was vested in FS in his "natural or personal capacity" as a public officer, Ir Dr Raymond HO enquired about the degree of accountability to be held by FS for his decision in this matter under the accountability system for principal officials.

39. SETW(Ag) replied that FS, as other principal officials, would be answerable to LegCo and the public for the policies within his purview, including the decision to exercise his discretion under section 38(1)(a) of PFO. FS would need to ensure that the public was satisfied that an exercise of his power under section 38 of PFO was reasonable and in line with public interest.

Dividend waiver versus other funding support options

40. In reply to Mr Abraham SHEK, DS/FS&T(T) advised that before arriving at the decision to support the PBRL Project through waiving Government's claim to MTRCL dividends, the Administration had carefully evaluated various options. The granting of property development rights to MTRCL was considered not feasible in the present case due to physical constraints. 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. A capital grant by the Government would amount to a subsidy for commercial operation and it was also considered not acceptable. Hence, the Administration's conclusion was that the best option was to allow the Corporation to reinvest that part of its profits which would otherwise come to the Government in the new project in order to achieve the desired overall return.

41. Mr Abraham SHEK however remarked that instead of considering options for the Government to provide funding support, the Administration should go out to the market and see if the private sector could come up with a plan that might improve the project's financial viability. He was dissatisfied that the Administration was now seeking to justify its proposed dividend waiver option by an obscure legal means in order to bypass LegCo's scrutiny. In so doing, the Administration had violated the good spirit of checks and balances between the executive authorities and the

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legislature put in place by PFO. Under the circumstances, he did not consider it prudent for FS to exercise his power under section 38 of PFO.

42. Mr Albert CHAN was gravely dissatisfied that the proposed dividend waiver option was decided by the Administration without any prior consultation with LegCo or the public. He also asked whether further dividend waivers would be effected to make up for the shortfall if the project internal rate of return (PIRR) of 11.25% could not be achieved. In response, SETW(Ag) advised that under the draft Project Agreement, the amount of funding support provided by the Government was limited to \$798 million. Once the Project Agreement was executed, all commercial risks relating to the Project would be borne by the Corporation.

43. As the LegCo Member returned from the Tourism Functional Constituency, Mr Howard YOUNG expressed support for the provision of PBRL to serve Hong Kong Disneyland (HKD). He said that as passenger trips on PBRL were mostly one-way and highly concentrated during the morning and evening peak periods, the tourism industry had all along recognized that the Project itself would not be financially viable. However, citing the additional revenue to be generated by PBRL for the whole Mass Transit Railway (MTR) network and the present low interest rate environment, Mr YOUNG queried whether the PIRR of 11.25% might be on the high side. He considered that as a matter of policy, the Administration should examine whether dividend waiver was the most appropriate way for providing funding support for railway development projects which were not financially viable. In this connection, he enquired about previous arrangements adopted by the Government for the purpose, say for the East Rail spur line to the RaceCourse.

44. In response, SETW(Ag) said that the Government would consider each request for funding support on its own merits. When considering the present case, the Administration had made no reference to the construction of the RaceCourse station. He also emphasized that although the Government was the majority shareholder of the Corporation, it could not simply direct the Corporation to undertake any railway development project unless it could achieve a commercial return. MTRCL, as a commercially-run corporation, should be allowed to attain a reasonable rate of return on its investment. Otherwise, the Corporation's financial standing and prospects as well as the interest of small investors might be adversely affected.

45. DS/FS&T(T) supplemented that incremental ridership from both residents and non-residents and hence, revenue across the whole of the MTR network had been taken into account and credited to the benefit of the extension. If this had not been done, the funding gap would have been considerably larger.

46. Regarding the weighted average cost of capital (WACC) and its relationship with the PIRR, DS/FS&T(T) said that the PIRR was pitched at 11.25% and it was consistent with what had been undertaken in the Initial Public Offering Prospectus for MTR Shares, i.e. the Government would not require the company to undertake any project whose rate of return was in a range less than the WACC of the company plus

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1% to 3%. He pointed out that the cost of capital of a company comprised its cost of debt and cost of equity and was also affected by its capital structure. Notwithstanding the present low interest environment, one had to consider the long-term cost of debts because the Project would be financed and operated over a long period of time. In addition, one must also take into account the cost of equity which had reference to market expectations. While the cost of capital was a commercially sensitive information to a listed company and should not be divulged here, DS/FS&T(T) assured members that all relevant calculations and assumptions had been carefully checked by the Government's financial advisors and he could confirm that 11.25% was in the range of the Corporation's WACC plus a margin of 1% to 3%.

47. While expressing support for the development of PBRL by MTRCL, Ir Dr Raymond HO reiterated the view that the proposed dividend waiver option was to the disadvantage of the Government as other small investors would not be required to bear the costs of the funding support.

Other concerns raised by members

48. Mr Abraham SHEK stated support for the timely provision of PBRL to serve the HKD, which was in line with public interest. He however expressed disappointment with the Administration's handling of the draft Project Agreement. Instead of delaying the matter to such a late stage and resorting to such a treacherous legal means, the Administration could have given an early explanation to members about its dividend waiver proposal and sought funding approval from LegCo accordingly. He also questioned the Administration's decision to award the development right for PBRL to MTRCL which was no longer a Government wholly-owned corporation. Bearing in mind the hefty sum of funding support required, it might be more appropriate to grant the development right of PBRL to the Kowloon-Canton Railway Corporation which was wholly-owned by the Government.

49. While noting Mr SHEK's views about the timing of consultation with members, SETW(Ag) reiterated that as PBRL was a natural extension of the Tung Chung Line, it would be more cost-effective and efficient for MTRCL to construct and operate this new line. The decision to grant the development right for PBRL to MTRCL was made back in 1999. DS/FS&T(T) supplemented that if the development right was granted to a new operator, the new operator would need to invest a considerable sum on infrastructure and also, to align its operation with the Tung Chung Line. The cost would in fact be far higher than having MTRCL to undertake the Project. DS/ETW(T&W) also advised that by granting the development right to MTRCL, the Administration had more confidence that the Project would be timely completed for HKD's opening.

50. In view of members' concerns about the proposed dividend waiver option, Ms Audrey EU enquired about the remedial actions to be taken by the Administration if the proposal was not supported by members.

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51. In response, SETW(Ag) said that the need and timing for PBRL was beyond doubt, and most members had expressed support for the construction of PBRL. Regarding the concerns raised by members about the exercise of FS's discretion under section 38(1)(a) of PFO, he would relay members' views to FS and other colleagues in the Government for consideration. As suggested by the Chairman, the matter could be further pursued in the Financial Affairs Panel. SETW(Ag) also highlighted that the construction programme of PBRL was very tight. MTRCL had already identified contractors for the tunnel and Yam O Station contracts which were on a critical path. The award of these two contracts had already been deferred due to the deferral of execution of the Project Agreement. If the Project Agreement was not signed very shortly, this might affect the estimated construction cost and more importantly, the completion date of the Project. However, the Administration would hold further discussions before deciding on the date of execution.

52. Mr Albert CHAN was dissatisfied with the presumptuous statement made by SETW(Ag) about members' support for the Project.

53. Ms Emily LAU also said that she did not support the construction of PBRL and she shared the query raised by Dr David CHU at a previous meeting about the cost-effectiveness of the rail link. Her concern was further aggravated by recent press reports about the opening of another Disneyland Theme Park in Shanghai, possibly by 2006. Under the circumstances, she asked whether the revenue assumptions quoted in paragraph 5 of the Administration's paper (LC Paper No. CB(1)2279/01-02(01)) were still valid. Faced with such direct competition, she queried whether the projected attendance of around 5.5 million visitors to HKD could be attained. If, in turn, PBRL failed to achieve the estimated PIRR of 11.25%, she asked whether further subsidies would be required from the Government.

54. SETW(Ag) replied that as understood by the Government, The Walt Disney Company (WD) had not ruled out any possibility of building another theme park in the Mainland in future. However, as far as the Government knew, no decision or agreement had been made by WD in this regard. When the agreement on the development of HKD was made, WD had undertaken that it would not open another theme park in the Mainland until HKD was up and running successfully.

55. SETW(Ag) further said that the Government was confident that the projected attendance of HKD could be achieved, having regard to the fact that other tourist attractions in Hong Kong, say the Ocean Park already attracted over 3 million visitors per year. In addition, there was a growing trend of tourists both from the Mainland and other countries visiting Hong Kong. However, he stressed that whether the PIRR could be achieved was a matter for the Corporation and not the Government.

56. Ms Emily LAU however considered that the timing when HKD was "up and running successfully" was difficult to assess objectively. In this respect, she asked whether WD's undertaking was a contractual obligation and whether the company would have to pay compensation if another Disneyland theme park was opened in the

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Mainland before HKD was "up and running successfully".

57. In response, SETW(Ag) stressed that the Government and WD were partners in the development of HKD. It was a common aspiration for HKD to achieve target opening and successful operation and hence, bring in economic benefits for the community. He assured members that the Government would undertake the HKD project in accordance with the agreement reached with WD.

58. Given the short distance of PBRL, Ms Emily LAU considered that a fare level of less than \$10 was too high. DS/ETW(T&W) responded that the exact fare would be determined by the Corporation before the commissioning of the rail. Given that the projected market share was about 40%, the Corporation would set its fares on PBRL taking into account all relevant factors, in particular market competition at the time of PBRL's opening.

Way forward

59. Mr LAU Kong-wah expressed support for the construction of PBRL. Highlighting his utmost concern about the legality of the Administration's proposal, Mr LAU said that he had carefully considered the views presented by LA and the Administration and there seemed to be no conclusive evidence showing that the proposed dividend waiver was indeed illegal. Under the circumstances, he would accept the proposed arrangements. However, he still had doubts as to whether dividend waiver was in fact the most appropriate means. In this respect, the principles governing any future exercise of FS's discretion under section 38(1)(a) of PFO, particularly for the purpose of providing funding support for other railway development projects that were financially not viable, merited further discussion. He also said that the Subcommittee had yet to discuss whether a funding support of \$798 million was appropriate for the PBRL Project. In this respect, the Administration would need to provide additional information on how this amount was arrived at, in particular the revenue assumptions of fare and estimated additional revenue induced by PBRL to the rest of the MTR network.

60. Mr Albert CHAN was strongly of the view that as members had yet to accept the legal basis for the proposed waiver agreement, the Government should not seek to execute the draft Project Agreement with MTRCL. Given that a hefty sum of public monies was involved, the matter should not be handled haphazardly.

61. Both Mr Albert CHAN and Ms Emily LAU considered that the Subcommittee should hold another meeting to continue discussion with the Administration. Mr CHAN said that FS should be invited to the meeting to brief members on the related issues. Mr Martin LEE remarked that FC might need to hold an urgent meeting to discuss the matter. Mr Tommy CHEUNG however said that the legal issues involved had been discussed in great detail by the Subcommittee in the last few meetings. As the issue relating to FS's discretion of waiver under section 38(1)(a) of PFO would be pursued in the Financial Affairs Panel, it might not help much even if further meetings

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were held by the Subcommittee. Mr LAU Kong-wah said that subject to the additional information to be provided by the Administration, the Subcommittee might need to hold another meeting to discuss whether the proposed amount of funding support was justified.

62. The Chairman advised that under its terms of reference, the Subcommittee could discuss all matters relating to the implementation of railway development projects including their financing arrangements. However, an important policy issue had been brought up in the present case, i.e. whether an exercise of FS's discretion under section 38(1)(a) of PFO was an act bypassing the checks and balances to be exercised by LegCo on government expenditure. This question should be pursued in the context of the Financial Affairs Panel. However, she shared Mr LAU Kong-wah's view that the Subcommittee would need to examine whether the proposed amount of funding support was appropriate.

63. In response, SETW(Ag) said that patronage and revenue of PBRL were commercially sensitive information to MTRCL and the Administration was unable to divulge more information without its consent. Reiterating the urgency of the Project, SETW(Ag) said that the Project Agreement would need to be executed within one or two days.

Motions

64. Noting the Administration's position, Mr Albert CHAN proposed the following motion calling on the Administration not to execute the Project Agreement, pending further deliberation by the Subcommittee on the proposed dividend waiver of \$798 million:

"本小組委員會要求政府當局不會在小組委員會就政府建議豁免收取地鐵有限公司 7.98 億元的股息一事再進行討論前，與地鐵有限公司就地鐵竹篙灣鐵路線簽署任何協議。"

65. Members agreed to proceed with the motion and voted on it. The motion was passed by the Subcommittee.

66. To facilitate members' consideration on the proposed sum of \$798 million as funding support, Mr LAU Kong-wah proposed the following motion calling on the Corporation to provide additional information on the fare level of PBRL and the estimated additional revenue induced by PBRL to the rest of the MTR network:

"本小組委員會要求地鐵有限公司向小組委員會就地鐵竹篙灣鐵路線的票價釐定及地鐵沿線的額外收益，進一步提供資料。"

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67. Members agreed to proceed with the motion and voted on it. The motion was passed by the Subcommittee.

68. Responding to the motions passed by the Subcommittee, SETW(Ag) said that he could not give any firm undertaking to members at this stage. However, he would liaise further with MTRCL to see if any additional information could be provided. In this respect, Mr LAU Ping-cheung suggested that information which was commercially sensitive could be circulated to members under restricted cover.

69. After deliberation, members agreed that another meeting would be scheduled once further information was provided by the Administration. The Clerk was requested to liaise with the Administration on this matter.

(Post-meeting note: The said meeting was scheduled to be held on Wednesday, 24 July 2002, at 5:00 pm.)

II Any other business

70. There being no other business, the meeting ended at 11:05 am.

Legislative Council Secretariat
19 December 2002