

財經事務及庫務局
(庫務科)

香港下亞厘畢道
中區政府合署

FINANCIAL SERVICES AND THE
TREASURY BUREAU
(The Treasury Branch)

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15 July 2002

Mr Jimmy Ma
Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
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(Fax: 2868 2813)

Dear Mr Ma,

Penny's Bay Rail Link

Thank you for your letter of 13 July 2002 in which you asked me to clarify why the Administration considers that Section 38 of the Public Finance Ordinance (Cap. 2) (the PFO) is applicable to our agreement with the MTR Corporation Limited (MTRCL) to waive claim for sufficient dividends in order to bridge the funding gap identified in connection with the Penny's Bay Rail Link (PBRL) project.

The arrangement we have reached is for the Government to waive its claim for \$798 million (in present value) worth of dividends that it could otherwise expect to receive as a shareholder from MTRCL from time to time during the next few years. These waived dividends will support the financing, construction and operation of PBRL by MTRCL. Section 38(1)(a) of the PFO provides for the Financial Secretary to exercise his discretion to waive any claim by or on behalf of the

Government and we consider that it covers any contingent claims in respect of dividends payable by MTRCL

We have also considered whether such an approach is compatible with section 58 of the Mass Transit Railway Ordinance (Cap. 556), which provides inter alia that monies received by the Financial Secretary Incorporated as the person holding shares in the Corporation form part of the general revenue. We believe this to be the case for the following reasons.

First, there is a distinction between “money received” as covered in that provision and the present case. Dividend that does not arise and is not paid cannot be considered to be “money received”. (At most, it may be considered money receivable, although given that the MTRCL Board will be aware of the PBRL support arrangements when it decides to declare a dividend, even that may be in doubt.) Once the Financial Secretary has waived a claim under Section 38(1)(a) of Cap. 2, no money in that respect can be received by the Government and section 58(2) of Cap. 556 will therefore not be infringed.

Second, the primary intention of this provision is 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.

Before arriving at the decision to support the PBRL through waiving Government's claim to MTRCL dividends we have carefully evaluated all options at our disposal under existing railway development policies. We have decided against the grant of property development rights to MTRCL because of engineering, planning and land use restrictions above and in the vicinity of PBRL. We have also concluded that seeking an injection of equity from the Finance Committee would not assist in bridging the funding gap: rather this would exacerbate the problem and increase the MTRCL's cost of capital as such equity is not without its own cost, and the MTRCL has access to more cost-effective borrowing facilities in the capital market.

In conclusion, we are convinced that there are compelling reasons for adopting the present course of action. Our legal advisers have confirmed that this is legally in order. It is also in line with our existing practice and would enable MTRCL to deliver a cost-effective, efficient and environmentally-friendly mode of transport in time for the opening of Hong Kong Disneyland so as to achieve the full economic benefits for Hong Kong, estimated to be \$148 billion. This is clearly in the public interest.

I hope that by setting out the foregoing observations this will assist your

consideration of the issue.

Yours sincerely,

(Martin M Glass)
for Secretary for Financial Services
and the Treasury

c.c. SETW (Attn: Mr Paul TANG)
DoJ (Attn: Mr M. Y. CHEUNG)