

立法會
Legislative Council

LC Paper No. CB(1)1234/04-05

Ref: CB1/SS/4/04

Background Brief

**Subcommittee to Study the Eastern Harbour Crossing Ordinance
(Amendment of Schedule) Notice 2005**

This paper sets out the background to the toll increase of the Eastern Harbour Crossing (EHC).

Eastern Harbour Crossing

2. On 7 April 1986, New Hong Kong Tunnel Company Limited (NHKTC) was granted a 30-year franchise to build and operate the EHC. The EHC was opened to traffic on 21 September 1989.

Eastern Harbour Crossing Ordinance

3. Section 55(3)(a) of the EHC Ordinance (Cap. 215) provides that the tolls specified in the Schedule to the EHC Ordinance may be varied by agreement between the Chief Executive-in-Council and the tunnel company. If an agreement cannot be reached, either side may resort to arbitration under the Arbitration Ordinance (Cap. 341). While the EHC Ordinance does not set out the criteria for determining toll adjustments, it stipulates that if the matter is submitted for arbitration, the Arbitrator shall be guided by the need to ensure that the company is reasonably but not excessively remunerated for its obligations under the EHC Ordinance. A copy of section 55 of the EHC Ordinance is in **Annex A**.

The Last Arbitration in 1997

4. In May 1995, NHKTC submitted for the first time an application for a \$10 or 100% toll increase for private cars and similar percentage increases for other types of vehicles. The then Governor-in-Council rejected the application in

October 1995. NHKTC formally notified the Government in January 1996 that it would resort to arbitration and both sides agreed on an Arbitrator in the same month.

5. A Final Interim Award was made by the Arbitrator in April 1997 which specified that the toll for private cars and taxis should be increased by \$5 (from \$10 to \$15) with corresponding increases for other types of vehicles with effect from 1 January 1998. The Arbitrator also ruled that a reasonable but not excessive remuneration to NHKTC fell within a range of 15% to 17% Internal Rate of Return (IRR).

The Present Arbitration

6. NHKTC submitted on 27 September 2002 an application for a \$5 or 33.3% toll increase for private cars with proportionate increases for other categories of vehicles to take effect from 1 January 2003.

7. In July 2003, the Chief Executive in Council rejected NHKTC's application because the proposed toll increase could not be justified on either traffic management or financial grounds.

8. In August 2003, NHKTC commenced arbitration against the Government's decision. NHKTC sought an increase from \$15 to \$25 in tolls for private cars and taxis, with corresponding increases for other types of vehicles, on 1 January 2005, in order to ensure that its remuneration would be within the 15-17% band of reasonable remuneration fixed in the last arbitration in 1997.

9. The Administration maintained the view that there was no justification for a toll increase.

The Arbitrators' Award

10. The arbitration hearing was conducted from 20 to 24 September 2004. The Administration received the arbitrators' Award and Reasons for Award on 26 January 2005.

11. The arbitrators' conclusion is that the level of reasonable but not excessive remuneration for the NHKTC is an IRR on equity after tax of between 15% and 17% over the life of the franchise. Having examined the various toll increase options, the arbitrators have determined that the tolls for private cars and taxis be increased by \$10 from \$15 to \$25 with corresponding increases for other vehicles

with effect from 1 May 2005¹. For details of the arbitrators' Award and "Reasons for Award", please refer to the LegCo Brief issued by the Administration vide ETWB(T)CR 1/3/4651/92.

Notice to Amend the Toll Schedule

12. Pursuant to section 55(6) of the EHC Ordinance, the Commissioner for Transport shall, by notice in the Gazette, as soon as practicable amend the toll Schedule in accordance with the Award. The Notice was gazetted on 18 March 2005 and would come into operation on 1 May 2005. The deadline for amending the Notice is 4 May 2005, or 25 May 2005 if extended by resolution.

Consultation with the Panel on Transport

13. The Panel was briefed on the outcome of the arbitration on the toll increase of the EHC at its meeting on 18 March 2005. At the meeting, members called upon NHKTC to defer the toll increase, and the Administration to withhold gazetting the Notice to amend the Schedule to the EHC Ordinance to vary the EHC Road Tunnel tolls, pending the outcome of further consideration by NHKTC on EHC toll increase as requested by members.

14. The Panel also passed a motion, expressing astonishment and strong dissatisfaction over the toll increase and asking the Government to

- (a) expeditiously review the toll levels of the three cross-harbour tunnels; and
- (b) come up within one month with proposals aimed at addressing the uneven distribution of traffic among the cross-harbour tunnels.

The draft minutes of meetings are in **Annex B**.

15. The Panel will revisit the related issues at its forthcoming meeting to be held on 22 April 2005.

Consultation with the House Committee

¹ NHKTC has subsequently agreed that the toll increase for empty taxis and light buses be deferred to 1 July 2005 and 1 October 2005 respectively.

16. At the House Committee meeting on 1 April 2005, the House Committee raised concern about LegCo's power to amend the Notice. The Legal Adviser had pointed out that:

- (a) according to section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), LegCo's amending power of subsidiary legislation had to be consistent with the power to make such subsidiary legislation. As the power of the Commissioner for Transport to make the Notice was restricted by section 55(5) and (6) of the EHC Ordinance, the power of Members to amend this Notice was similarly restricted. There was little room for Members to amend the Notice, except for minor technical amendments; and
- (b) under Article 73(6) of the Basic Law, LegCo could debate any issue concerning public interests. However, a motion seek to reduce the toll increase would only be an expression of views and would not have any binding effect.

17. The minutes of the House Committee are in **Annex C**.

Council Business Division 1
Legislative Council Secretariat
11 April 2005

55. 道路公司就行車隧道的使用而收取經批准的隧道費

- (1) 在符合本條例的規定下，道路公司可就汽車通過行車隧道而索取及收取隧道費。
- (2) 根據第(1)款可收取的隧道費，須為附表所指明者。
- (3) 附表所指明的隧道費——
- (a) 可由總督會同行政局與道路公司協定而予以更改；或
- (b) 在並無協定時，由總督會同行政局或道路公司根據《仲裁條例》(第 341 章) 將更改隧道費的問題提交仲裁。
- (4) 對於根據第(3)款提交的仲裁，仲裁人須以有需要確保道路公司在根據本條例履行其義務或行使其權利時，獲得合理但非過多的報酬為準則，並顧及以下各點——
- (a) 自本條例制定或自上一次根據本條例定隧道費(視屬何情況而定)以來，香港經濟情況的任何重要變動；
- (b) 道路公司根據第 75 條所作出的任何上訴遭駁回；
- (c) 任何影響道路公司行使其根據第 4(1)條獲批授的專營權權利的其他情況，有任何重要變動；
- (d) 引進或更改就使用行車隧道而徵收的任何稅項或徵費的效果；
- (e) 隧道費或收取隧道費的未來權利不得用作建造鐵路工程的融資的原則，亦不得用以直接或間接解除本條例所施加於鐵路公司的任何義務的原則；及
- (f) 任何其他有關事宜。
- (5) 凡根據第(3)款——
- (a) 總督會同行政局及道路公司協定更改隧道費；或
- (b) 依據提交仲裁的仲裁裁決，決定應更改隧道費，
- 則附表所指明的隧道費須遵從該協定或仲裁裁決(視屬何情況而定)作出更改。
- (6) 運輸署署長須在第(5)款所提述的協定或仲裁裁決作出後，在切實可行範圍內盡快藉憲報公告修訂附表。

55. Road Company to charge approved tolls for use of road tunnel

- (1) Subject to this Ordinance, the Road Company may demand and collect tolls in respect of the passage of motor vehicles through the road tunnel.
- (2) The tolls that may be collected under subsection (1) shall be those specified in the Schedule.
- (3) The tolls specified in the Schedule may be varied—
- (a) by agreement between the Governor in Council and the Road Company; or
- (b) in default of agreement by submission of the question of the variation of tolls to arbitration under the Arbitration Ordinance (Cap. 341) by either the Governor in Council or the Road Company.
- (4) On a submission to arbitration under subsection (3), the arbitrators shall be guided by the need to ensure that the carrying out by the Road Company of its obligations, or the exercise of its rights, under this Ordinance is reasonably but not excessively remunerative to the Road Company, having regard to—
- (a) any material change in the economic conditions of Hong Kong since the enactment of this Ordinance or, as the case may be, since tolls were last determined under this section;
- (b) the dismissal of any appeal by the Road Company made under section 75;
- (c) any material change in any other circumstances affecting the exercise by the Road Company of its rights under the franchise granted by section 4(1);
- (d) the effect of the introduction of, or alteration in, any tax or levy imposed on the use of the road tunnel;
- (e) the principle that tolls or future rights to tolls should not be used to finance the construction of the railway works or to discharge directly or indirectly any obligation imposed on the Rail Company by this Ordinance; and
- (f) any other relevant matter.
- (5) Where under subsection (3)—
- (a) the Governor in Council and the Road Company agree to a variation of the tolls; or
- (b) in an award pursuant to submission to arbitration it is determined that the tolls should be varied,
- the tolls specified in the Schedule shall be varied in compliance with such agreement or award, as the case may be.
- (6) The Commissioner shall, by notice in the Gazette, as soon as is practicable after such agreement or award as is referred to in subsection (5) amend the Schedule.

立法會

Legislative Council

LC Paper No. CB(1) /04-05

(These minutes have been seen
by the Administration)

Ref : CB1/PL/TP/1

Panel on Transport

**Minutes of meeting held on
Friday, 18 March 2005, at 10:00 am
in the Chamber of the Legislative Council Building**

Members present : Hon LAU Kong-wah, JP (Chairman)
Hon Albert CHAN Wai-yip (Deputy Chairman)
Ir Dr Hon Raymond HO Chung-tai, S.B.St.J., JP
Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Hon LAU Chin-shek, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Andrew CHENG Kar-foo
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon LI Fung-ying, BBS, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon WONG Kwok-hing, MH
Hon LEE Wing-tat
Hon Jeffrey LAM Kin-fung, SBS, JP
Hon LEUNG Kwok-hung
Hon CHEUNG Hok-ming, SBS, JP
Hon Patrick LAU Sau-shing, SBS, JP

Member attending : Hon Albert HO Chun-yan

Public Officers attending : Agenda item IV

Mr Joshua LAW
Permanent Secretary for the Environment, Transport and Works

Ms Annie CHOI
Deputy Secretary for the Environment, Transport and Works
(Transport)³

Mr Clement LAU
Acting Principal Assistant Secretary for the Environment,
Transport and Works (Transport)²

Miss LUI Ying
Acting Assistant Commissioner for Transport/
Management and Paratransit

Miss Joyce CHAN
Senior Government Counsel
Department of Justice

Agenda item V

Dr Sarah LIAO
Secretary for the Environment, Transport and Works

Mr Joshua LAW
Permanent Secretary for the Environment, Transport and Works

Ms Annie CHOI
Deputy Secretary for the Environment, Transport and Works
(Transport)³

Mr Michael NG
Acting Principal Assistant Secretary for the Environment,
Transport and Works

Mr Blake HANCOCK
Chief Superintendent (Traffic Headquarters)
Hong Kong Police Force

Mr Simon IP
Chief Inspector (Traffic Headquarters)
Hong Kong Police Force

Mr K K LAU
Deputy Commissioner for Transport/
Planning and Technical Services

Mr J P CHEUNG
Principal Transport Officer/Urban
Transport Department

Agenda item VI

Mr Thomas CHOW
Deputy Secretary for the Environment, Transport and Works
(Transport)1

Ms Ernestina WONG
Principal Assistant Secretary for the Environment, Transport and
Works (Transport)5

Mr MAK Chai-kwong
Director of Highways

Mr Adrian NG
Project Manager/Major Works
Highways Department

Mr K B TO
Chief Engineer/Transport Planning
Transport Department

**Attendance by
invitation**

: **Agenda item IV**

New Hong Kong Tunnel Company Limited

Mr Simon CHENG
Operations Manager

Ms Becky FUNG
Project Manager

Ms Elaine CHEN
Legal Advisor

Ms Kathy CHAN
Consultant

Agenda item V

The Kowloon Taxi Owners Association Ltd.

Mr YUM Tai-ping
Chairman

新界的士司機權益大聯盟

梁于榮先生
理事

全港職業司機反對衝燈加重扣分大聯盟

梁靜珊女士
秘書

Hong Kong, Kowloon and N.T. Public & Maxicab Light Bus
Merchants' United Association

Mr LEUNG Hung
Chairman

Right Hand Drive Motors Association (HK) Ltd.

Mr Paul LAW Siu-hung
Founder Chairman

Institute of Advanced Motorists Hong Kong

Dr MONG Hoi-keung
Vice-Chairman

Mixer Truck Drivers Association

Mr CHAN Sam-choi
Secretary

Association of N.T. Radio Taxicabs Ltd.

Mr LAM Kwai-keung
Chairman

United Friendship Taxi Owners & Drivers Association Ltd.

Mr AU-YEUNG Kan
Chairman

中重型貨車關注組

Mr LAI Kim-tak
Chairman

的士權益協會有限公司

Mr WONG Tao
Representative

四海的士車主司機聯會有限公司

Mr LAU Kim-wan
Representative

Hong Kong Taxi Association

Mr LAI Hoi-ping
Chairman

Container Truck Drivers' Union

Mr YU Kwok-on
Chairman

Hong Kong Container Tractor Owner Association Limited

Mr CHAN Fu-chuen
Director

Rambo Taxi Owners' Association Ltd.

Mr LEE Chi-leung
Chairman

Lok Ma Chau China-Hong Kong Freight Association

Mr Stanley CHAING
Chairman

Hong Kong Automobile Association

Mr Wesley WAN
Vice-president

HK Public-Light Bus Owner & Driver Association

黎銘洪先生
秘書長

The Hong Kong Taxi & Public Light Bus Association Limited

Mr TRAN Chau
Chairman

Hong Kong Driving Instruction Club

Mr Albert LAI
Vice-Chairman

Kowloon Truck Merchants Association Ltd.

Mr LEUNG Kun-kuen
Chairman

Taxi Dealers & Owners Association Limited

Mr NG Kwan-sing
President

Public Light Bus General Association

萬振輝先生
副主席

Urban Taxi Drivers Association Joint Committee Co. Ltd.

Mr KWOK Chi-piu
Chairman

Motor Transport Workers General Union

Mr LI Wing-sang
Chairman

Motor Transport Workers General Union
(Public Light Bus Branch)

Mr AU-YEUNG Ming
Director

Hong Kong Kowloon Taxi & Lorry Owners' Association
Limited

Mr TSE Ming-chu
Representative

Hong Kong Logistics Association

Mr Stephen CHENG
Executive Vice President

Federation of Hong Kong Transport Worker Organizations

譚偉濤先生
代表

Ms HUI Wai-mui

Clerk in attendance : Mr Andy LAU
Chief Council Secretary (1)2

Staff in attendance : Ms Connie FUNG
Assistant Legal Advisor 3

Ms Anita SIT
Senior Council Secretary (1)9

Miss Winnie CHENG
Legislative Assistant (1)5

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- I Confirmation of minutes and matters arising**
(LC Paper No. CB(1)1082/04-05 - Minutes of the meeting held on
2 February 2005)

The minutes of the meeting held on 2 February 2005 were confirmed.

II Information papers issued since last meeting

2. No information paper had been issued since last meeting.

III Items for discussion at the next meeting scheduled for 22 April 2005

- (LC Paper No. CB(1)1096/04-05(01) - List of outstanding items for
discussion
LC Paper No. CB(1)1096/04-05(02) - List of follow-up actions
LC Paper No. CB(1)1047/04-05(01) - A letter from Hon WONG
Kwok-hing requesting the Panel to

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follow up the employment arrangements for franchise bus drivers)

3. Members noted that the Administration had proposed the following items for discussion at the next meeting scheduled for 22 April 2005:

- (a) Return toll charge for taxi passengers using Harbour Crossings;
- (b) Miscellaneous amendments to subsidiary legislation under the Road Traffic Ordinance;
- (c) Progress update on the Intelligent Transport System;
- (d) 94TB-Sha Tin New Town, Stage 2 – Pedestrian and Cycle Subways at Lion Bridge;
- (e) 705TH – Sha Tin New Town, Stage 2 – Trunk Road T4; and
- (f) Area Traffic Control and Closed Circuit Television Systems for Tuen Mun and Yuen Long Districts.

4. Members agreed that items (b) and (c) be tentatively scheduled for discussion on 22 April 2005. As regards items (a) which involved a legislative proposal and items (d), (e) and (f) which involved funding proposals, members agreed that the Administration should first submit information papers on these four items to the Panel for consideration by circulation. Should it be considered necessary by members upon perusal of the information papers, arrangements would be made for the Panel to discuss the item(s) at a future meeting.

(Post-meeting note: During the discussion under agenda item IV, members agreed that the Panel should further discuss the toll increase of the Eastern Harbour Crossing and related issues at the meeting on 22 April 2005. Also, due to insufficient time, item VI on “Northwest New Territories Traffic and Infrastructure Review 2004/Reconstruction and improvement of Tuen Mun Road” was not discussed and was thus deferred to the meeting on 22 April 2005. In view of the heavy agenda for the meeting on 22 April 2005, the Panel Chairman subsequently advised that an information paper on item (c) above should be provided by the Administration for the Panel’s consideration by circulation. The notice of the meeting on 22 April 2005 was issued vide LC Paper No. 1153/04-05 dated 23 March 2005.)

Employment arrangements for franchise bus drivers and safety of bus operation

5. Members noted the letter from Mr WONG Kwok-hing dated 2 March 2005 requesting the Panel to follow up on the employment arrangements for franchise bus drivers. In response to the Chairman’s question on whether the issue involved

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transport policies and hence fell within the purview of the Panel, Mr WONG Kwok-hing explained that in recent years, with the Kowloon Motor Bus Company (1933) Limited taking the lead, some franchised bus operators had changed the employment terms for their bus drivers to contract terms and in some cases, the contract period only lasted for one year. Further employment of bus drivers upon expiry of their employment contracts was subject to review, resulting in a lack of job security for bus drivers. He stressed that the new employment arrangements posed immense psychological pressure on bus drivers, which in turn would directly affect the safety of franchised bus operation. He therefore suggested that the Transport Panel should follow up the issue.

6. Members agreed that the issue should be placed on the Panel's list of outstanding items for discussion. Ms Miriam LAU opined that the Panel should discuss the issue with the Administration from the angle of ensuring the safety of franchised bus operation.

IV Toll increase of the Eastern Harbour Crossing

- (File Ref.: ETWB(T)CR1/3/4651/92 - Legislative Council Brief on Arbitration on the toll increase of the Eastern Harbour Crossing
LC Paper No. CB(1)1127/04-05(01) - A letter from New Hong Kong Tunnel Company Limited
LC Paper No. CB(1)1127/04-05(02) - Extracts of the relevant statutory provisions)

7. The Chairman said that the Board Chairman of New Hong Kong Tunnel Company Limited (NHKTC), who was currently out of town, had requested that the Panel's discussion of this item be deferred by one week so that he could personally attend the meeting. However, in order to enable the Panel to discuss the matter at the earliest opportunity and follow up on the related issues, he had decided that the meeting should be held as scheduled. If considered necessary, the Panel might arrange another meeting with the Board Chairman of the Company.

8. The Permanent Secretary for the Environment, Transport and Works (PS/ETW) said that the Administration was very disappointed at the outcome of the arbitration on the toll increase of the Eastern Harbour Crossing (EHC) and was extremely concerned about the toll increase. However, the Administration had to respect the law and the result of the arbitration. After the arbitrators' Award was received in late January 2005, the Administration had had some discussions with NHKTC and had requested the company to reduce the level of increase, postpone the effective date of the increase, or implement the new tolls by stages, taking into account the public acceptability and affordability of the magnitude of the toll increase. To the Administration's disappointment, NHKTC only agreed to slightly defer the implementation of the toll increase.

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9. PS/ETW further said that the Transport Department (TD) would closely monitor the traffic condition at Cross-Harbour Tunnel (CHT) after the new tolls had taken effect. TD would disseminate information to motorists and make announcements to encourage the public to use public transport and to avoid using CHT during peak hours as far as possible. The Administration had been exploring various possible fiscal and traffic management measures that would help better distribute the cross harbour traffic, and had been listening to views of the community. However, at this point in time, the Administration was far from reaching any decision on any of the measures under study, including the reported option of buying out the franchises of both EHC and Western Harbour Crossing (WHC). In considering the viability of these measures, the Administration would certainly taken into account the likely financial implications and the need to preserve the value of public assets. The Administration would maintain an open mind and continue to listen to views from the community and maintain a dialogue with the tunnel franchisees.

10. Ms Becky FUNG, Project Manager of NHKTC said that the Board Chairman of NHKTC would very much wish to attend this meeting but could not do so due to the need to attend a conference in Europe. She conveyed the apology of the Board Chairman to Members. Ms FUNG then highlighted the following points –

- (a) This was the second toll increase of EHC since the franchise was granted to NHKTC 19 years ago. Whilst the Company had the responsibility to serve the public, it also had the responsibility to safeguard shareholders' interest by providing shareholders with reasonable but not excessive remuneration as stipulated in the Eastern Harbour Crossing Ordinance (EHCO) (Cap. 215).
- (b) It was common ground between the Government and NHKTC that an appropriate yardstick for measuring the reasonableness of the remuneration to a company engaged in a Build-Operate-Transfer (BOT) project was its internal rate of return (IRR) on equity after tax over the life of the franchise. In both the arbitrations in 1997 and the present one, the arbitrators determined that the band of reasonable remuneration for NHKTC was an IRR between 15% and 17% over the life of the franchise. The two arbitrators in the present arbitration also determined that to achieve the reasonable remuneration, it was necessary and appropriate to increase the tolls for private cars and taxis by \$10 from \$15 to \$25 with corresponding increases for other vehicles.
- (c) The arbitration hearings were held in September 2004 following the Government's rejection in July 2003 of NHKTC's application in September 2002 for a HK\$5 toll increase for private cars (and proportionate increases in other vehicle categories) to take effect from 1 January 2003. Having considered all relevant factors and taking into account the elapse of time, the arbitrators awarded a higher toll increase of HK\$10 than NHKTC's application in 2002 so that the Company could

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restore and maintain a reasonable level of remuneration before the expiry of the franchise in 2016.

- (d) In 1986, NHKTC invested over \$2.2 billion in building the tunnel. For the first nine years of operation, shareholders were not provided any return on their investment. It was only from the tenth year onwards that the company was in a position to distribute dividends to its shareholders.
- (e) Hong Kong upheld the rule of law, which was one of the pillars and core value contributing to Hong Kong's success. The arbitration result should be respected. Under the BOT mode of partnership, the Government had promised that NHKTC was entitled to reasonable but not excessive return on its investment. If the company was disallowed to pursue this objective, Hong Kong's business environment would be seriously undermined and private enterprises would become hesitant to undertake similar infrastructure projects in future, thereby jeopardizing Hong Kong's long term development.
- (f) EHC had provided the people of Hong Kong a safe, reliable and efficient service for crossing the harbour since its opening in September 1989. The entire EHC team looked forward to continuing to do so in the coming years.

11. Mr Jeffrey LAM said that Hong Kong had been under an economic downturn for most of the period since the last toll increase of EHC in 1998 and the economy only started to recover this year. In recent years, there had been strong views in the community that travelling expenses were high, constituting a significant portion of the daily expenses of Hong Kong people. The Liberal Party reckoned that NHKTC was entitled under the law to submit the question of the variation of tolls to arbitration when no agreement could be reached with the Government and the Liberal Party respected the result of the arbitration. Since the arbitration result was released, there had been very strong feedback from the community on the magnitude of the toll increase. He earnestly requested the Administration and NHKTC to explore feasible measures to alleviate the impact of the toll increase on the public.

12. Mr Simon CHENG, Operations Manager of NHKTC, said that the company appreciated the response of the public to the toll increase. He stressed that the company was entitled to a reasonable but not excessive remuneration for its investment in the tunnel as provided for under the EHCO. In order to achieve this level of return, it was necessary for the tunnel tolls for private cars and taxis to be increased by \$10 with corresponding increases for other vehicles. The extent of increase would even be greater if implementation of the toll increase was further deferred. The arbitrators and NHKTC were of the same view that it would be in the interest of the public to increase tunnel toll in a progressive manner. The rule of law and the spirit of contract were pillars for Hong Kong's continued success. These principles should not be compromised for short term benefits, lest Hong Kong's long term development would be jeopardized and the business environment undermined.

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As regards the offering of concessions, he remarked that if such concessions resulted in reduction of the company's revenue, a greater extent of toll increase in future would be necessary in order to achieve the company's entitled return as determined in the arbitration.

13. Mr Jeffrey LAM said that recently, many public utility companies had tempered the extent of increase in tariffs or fares having regard to the prevailing economic conditions and the community's sentiment. He urged the company to seriously consider reducing the extent of toll increase and/or provide toll concessions etc., which he considered would be conducive to achieving a harmonious social atmosphere.

14. Ms Becky FUNG undertook to convey Mr LAM's request to the Board of NHKTC for consideration but she could not give any decision at the meeting. She added that tunnel tolls together with vehicle licence fees and vehicle insurance premiums accounted for 1.5% of the Consumer Price Index.

15. Given that Ms FUNG agreed to relay the concerns of the community to the Company's Board for further consideration, the Chairman enquired whether the Administration would defer the gazettal of the revised toll schedule. PS/ETW said that the Government's position was that there was no justification for a toll increase. The Administration considered that the current level of IRR of 13.64% was already a reasonable but not excessive remuneration to NHKTC. Whilst the Government had rejected the toll increase application from NHKTC at the outset, it had to respect the outcome of the arbitration on the toll increase of EHC. Subsequent to the receipt of the Award, the Administration had requested NHKTC to reduce the actual level of increases, postpone the effective date of the increase or implement the new tolls by stages. After some discussions, NHKTC agreed to defer the toll increases for all vehicles from 3 April 2005 to 1 May 2005 and some other increases for empty taxis and light buses to 1 July 2005 and 1 October 2005 respectively. He noted from the meeting that the Company was prepared to reconsider the issue. The Administration would continue to discuss with the company, hoping that there would be a more favourable outcome, and would consider the gazettal arrangements thereafter.

16. Mr WONG Kwok-hing expressed grave disappointment at NHKTC's decision to implement the toll increase in accordance with the arbitrators' Award. He said that the toll increase would have the chain effect of inducing price increases in other sectors especially the public transport sector, hence adding to the financial burden of the public. He criticized the Administration for not having performed its role with due diligence on this matter, and opined that the Administration should come up with feasible measures to counter the toll increase of EHC. He asked when the Administration would put up concrete proposals for the Panel's consideration. He also questioned why the Administration only released information on the arbitrators' Award after the expiry of the appeal period. He considered this arrangement disrespectful to the Legislative Council.

17. Mr WONG Kwok-hing further said that he had met with the Deputy Secretary for the Environment, Transport and Works (Transport)³ on 17 March 2005, and was

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informed by her that the Administration was studying the option of buying out the franchises of both EHC and WHC and expected to come up with a proposal in a few months. However, in the afternoon of the same day, the Secretary for the Environment, Transport and Works (SETW) and the Secretary for Financial Services and the Treasury both spoke openly that the Administration was far from reaching any decision on any of the measures under study and there was no concrete plan yet. He thus sought clarification on the matter.

18. Mr WONG Kwok-hing also suggested that as CITIC Pacific Ltd. was the major shareholder of NHKTC, the Panel should invite the Chairman of CITIC Pacific Ltd. to the next meeting to further discuss the matter.

19. PS/ETW said that being an executive-led government, the decision as to whether an appeal should be lodged against the arbitrators' Award rested with the Administration. The Administration had performed its role on the matter with due diligence. Upon receipt of the Award, the Administration had actively considered whether the Government should lodge an appeal and meanwhile discussed with NHKTC to see whether and how the magnitude of the toll increase could be reduced. These courses of actions had taken some time. It was incumbent upon the Administration to report to the Legislative Council on the matter with comprehensive information on, inter alia, the courses of actions it had taken and its decision with regard to lodging an appeal against the Award or otherwise.

20. The Senior Government Counsel, Department of Justice said that arbitration was generally different from civil litigation. The Government, being a party to the arbitration, could only appeal on question of law arising out of the Award. If the arbitrators did not err on any point of law, there was no ground for appeal. In considering whether to appeal against the Award, the Administration had made an internal study and sought advice from the two Leading Counsel (one overseas and one local) who represented the Government in the present arbitration on whether there was ground for appeal and the merits of an appeal against the Award. The two Leading Counsel jointly advised that the arbitrators had not made any error on points of law. The Administration therefore decided not to appeal.

21. As regards future actions, PS/ETW said that the Administration was very concerned about the uneven distribution of traffic among the three road harbour crossings at present and the traffic implications of the toll increase of EHC. The Administration would study various measures including the option of buying out the franchises of both EHC and WHC, the sale of CHT and others. In the past, the Administration had had some discussions with tunnel companies on the matter and found that it was not easy to reconcile certain major issues such as projections on the future tunnel throughput, cash flows etc. He stressed that each measure/option involved a lot of issues which might require expert advice at different stages of the examination process. As regards the time frame for reaching agreements with tunnel companies, he said that the Administration's position in any possible negotiation with the tunnel companies would be prejudiced if it were to set a deadline on the matter. Besides, the Administration must exercise great care if such

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negotiation involved any sensitive information relating to listed companies. He assured members that the Administration would report to the Panel at an appropriate timing.

22. Mr LAU Chin-shek expressed strong objection to the toll increase of EHC. He commented that the arbitrators failed to give due consideration on the effect of the toll increase on people's livelihood and the overall local economy as well as EHC's function in traffic diversion. He also expressed disappointment at NHKTC's response so far and commented that NHKTC was focusing on short term benefits as it failed to duly consider the overall and long term social and economic impact of the toll increase. He urged that the Chairman of CITIC Pacific Ltd. to seriously reconsider the whole matter. Citing that many in the community had called on the Administration to consider buying out the franchises of the two private road harbour crossings as their usage was far from optimized, he asked what longer term measures the Administration had in mind to address the anticipated traffic problems arising from the substantial toll increase of EHC. He also asked whether there were any objective indicators based on which the Administration would decide the appropriate traffic management measures to address the aggravated traffic congestion at CHT after the toll increase of EHC had taken effect.

23. PS/ETW said that in examining any possible approach to achieving a more balanced traffic distribution among the three road harbour crossings, the Administration would take into account the following considerations –

- (a) it should bring about overall benefit to the public;
- (b) it should protect the General Revenue;
- (c) it should make commercial sense to the franchisee;
- (d) it should help achieve the traffic management objective, i.e. a more balanced traffic distribution among the tunnels;
- (e) there should be a fair valuation of the road harbour crossings, especially the CHT, as it was a valuable asset of the public;
- (f) it should be accompanied by a toll adjustment mechanism that is acceptable to the public, the Government and the tunnel operators; and
- (g) an institutional framework has to be worked out for the management of the three tunnels in a cost-effective and efficient manner.

The above considerations involved very complicated financial, administrative and legal issues and the Administration needed to examine in detail the merits and demerits of any possible option. PS/ETW further said that once the toll increase of EHC had taken effect, TD and the Police would closely monitor the traffic condition and TD would activate its Emergency Transport Coordination Centre. If necessary,

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special traffic control measures would be implemented. He took the opportunity to encourage the public to use public transport and avoid using CHT during peak hours as far as possible.

24. In response to Mr LAU Chin-shek's further question on the specific measures the Administration would take to address the aggravated traffic congestion at CHT after the toll increase of EHC had taken effect, PS/ETW said that apparently, given its toll level and geographical location, patronage of CHT would continue to be the highest. The Administration would examine various measures that might achieve more even traffic distribution among the three road harbour crossings. Whilst one possible measure was to raise the overall tolls of CHT as suggested by some in the community, the Administration's present position was that this measure would be considered only if other measures failed to achieve the traffic diversion objective. However, the Administration would be prepared to explore this option if Members and the public were of the view that it could be considered.

25. Mr LAU Chin-shek stated that he had not suggested raising the tolls of CHT.

26. Mr CHENG Kar-foo recalled that since the opening of WHC, Members had repeatedly urged the Administration to explore viable measures to achieve more balanced distribution of traffic among the road harbour crossings. The Administration's response so far gave him the impression that there had been no progress at all in this regard. He pointed out that the daily traffic throughput of the three harbour crossings was some 250 000 vehicles in total. According to some academics and economists, assuming that each vehicle paid \$20 each time using any of the tunnels, EHC and WHC could easily achieve an IRR of 10% to 12%. Given that CHT had an edge over EHC and WHC given its location, to achieve the objective of balancing the traffic distribution among the tunnels, it was necessary for the Administration to consider cross subsidy among the tunnels. Other major cities including Shanghai and New York were adopting this approach. The Administration should have initiated discussion with the tunnel companies on the matter at a much earlier time. Now that given the arbitration outcome, the Administration's negotiation power had much weakened.

27. Mr CHENG Kar-foo also criticized that the Administration indeed disappointed the public over the matter. The procrastination of the Administration had caused the public to have paid very high prices in terms of the time wasted in traffic congestion. Even the day before this meeting, the Administration was still telling the public that it was far from reaching any decision on any of the measures under study. He opined that the Administration must be decisive and come up with viable options for discussion by the community. Cautioning that the toll increase of the Tate's Cairn Tunnel would probably be put to arbitration and the Administration might face a similar arbitration outcome, Mr CHENG asked the Administration to give clear indication as to what measures or options it would pursue.

28. PS/ETW said that as revealed in an earlier paper provided to the Panel (LC Paper No. CB(1)1912/03-04(26)), the Administration had had discussions with the

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Western Harbour Tunnel Company Limited about possible approaches to achieving a more balanced traffic distribution among the three road harbour crossings since 2001. The principles he had cited earlier on were those the Administration all along followed in pursuing the matter. Whilst the Administration would like to see the discussion to come to fruition, it turned out that there were major differences in some of the fundamental parameters and assumptions held by the two sides, and it was not easy to reconcile the differences. Hence there had been limited progress on the matter. However, the Administration reckoned that the problem of uneven distribution of traffic among the road harbour crossings needed to be addressed. Buying back the ownership of WHC and EHC was one option. Other options included selling CHT to the major shareholder of EHC and WHC, extending the period of the BOT franchises of the two tunnels, and using the revenue of CHT to subsidize the users of the other two tunnels, etc. The Administration would actively examine the various options with an open mind.

29. Mr CHENG Kar-foo said that the Democratic Party in 2001 had proposed to the Administration to establish a Tunnels and Bridges Authority. Now the Administration only stressed that there were great differences between the Administration and the tunnel operators on certain important assumptions. Given the high possibility that the tunnel operators would not accept Government's buy-back offers, the Administration should work out alternatives, such as building the fourth cross harbour tunnel or widening CHT etc., to address the congestion problem at CHT. He demanded that the Administration should put forward concrete proposals when the Panel further discussed the subject.

30. PS/ETW responded that buying back the ownership of EHC and WHC was one of the options. As he had already mentioned earlier on, there were other options that could be considered and were being actively considered by the Administration.

31. Mr TAM Yiu-chung said that NHKTC was not compelled to increase tolls to the same extent as determined in the arbitration. NHKTC's decision to raise tolls to such a large extent had already aroused strong resentment towards the company among the public. The company should take into account the effect on its image in this matter. The Administration had also exhibited a passive and evasive attitude. The substantial toll increase of EHC would likely lead to serious traffic congestion at CHT and fare increases of public transport services. There was a need for the Administration to prevent or alleviate the dire consequences. He referred to his letter to the Chairman notifying that he would move a motion under this agenda item. He read out the terms of the motion –

“本委員會對於東區海底隧道在完全漠視市民的負擔能力及意願下，瘋狂加價，表示震驚及強烈不滿。為此，本委員會促請政府審慎考慮市民大眾利益，盡快檢討三條過海隧道的收費，以改善三隧現時汽車分流失衡的情況。另外，本委員會要求政府在未來一年盡快積極研究有關收購東隧及西隧事宜的可行性，在此期間

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與隧道公司商討延遲東隧加價一年，並向立法會匯報有關研究結果。”

32. Mr TAM said that given the extensive and significant impact of the toll increase on the community, it was necessary for the Administration to prudently work out viable measures to address the problem. There was also a need to conduct a fundamental review of Government's policy on the provision and operation of tunnels, to which the present problems could be attributed. He appealed to members to support his motion.

33. Ms Miriam LAU said that the Panel had discussed the issue of evening out the traffic of the tunnels on several occasions in recent years. The Administration had all along procrastinated on the matter. It was incumbent upon the Administration to address the traffic problems now facing the community. With regard to the option of buying back the ownership of EHC and WHC, she was concerned that making such a move might set an undesirable precedent in that it might carry the implication that when the Government was not satisfied with the toll levels of an infrastructure facility operated under a BOT franchise, it would resort to acquiring control of the facility by buying out the ownership or other means. Moreover, the buying out option entailed huge financial implications on the public coffer. The Liberal Party therefore did not support this option. Hence, the Liberal Party would not support Mr TAM Yiu-chung's motion. She opined that the Administration should examine other viable measures together with the tunnel operators with the objective of evening out the traffic of the three road harbour crossings. Whatever the measure pursued, the rule of law and spirit of contract must be upheld and the Administration must not convey a wrong signal to the business community that it might or would back away from these principles.

34. Referring to the forecast of traffic diversion from EHC to CHT and WHT after the toll increase of EHC had taken effect as set out in Annex B of the Legislative Council Brief, Ms Miriam LAU expressed serious doubt about the reliability of the forecast. She anticipated that given the higher tolls of the other two harbour crossings, the transport trades would choose to use CHT as far as possible. Thus, she believed that the traffic throughput at CHT would increase by more than 3%. She asked what concrete measures the Administration had in mind to address the aggravated congestion problem at CHT after the toll increase of EHC.

35. PS/ETW said that the forecast of traffic throughput at the three harbour crossings was made by the Transport Department using relevant traffic modeling which took into account the toll elasticity of cross harbour traffic and other relevant factors. The Administration would closely monitor the actual traffic situation after the toll increase had taken effect.

36. Ms Miriam LAU stressed that the Administration should plan ahead to prepare for the highly probable acute traffic congestion at CHT. Highlighting that taxis and public light buses would not be able to transfer the toll increase in full to passengers,

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Ms LAU asked if NHKTC would consider reducing the toll increase for the transport trades having regard to their business circumstances.

37. Mr Simon CHENG agreed to convey Ms Miriam LAU's request for reducing the toll increase for those vehicles operated for business purposes to the Board of Directors of NHKTC for consideration. He however remarked that implementation of such a measure would have implications on the future toll adjustments. Mr CHENG further said that there was also a common understanding between the Government and the NHKTC that the tunnels tolls should be adjusted in a progressive manner and at appropriate intervals. As the construction of EHC required substantial capital investment, the Government had undertaken to provide reasonable but not excessive return for the operator for its investment and this undertaking was stipulated in the EHC. At the time of the investment was made, the interest rate was very high. The franchise period lasted for 30 years and in the first nine years, shareholders of NHKTC had received no dividend at all. According to the toll adjustment schedule of NHKTC, the tolls of EHC should have been increased to \$25 (for private cars and taxis) in 2003. In both the arbitrations in 1997 and the present one, the arbitrators determined that the level of reasonable but not excessive remuneration for the NHKTC was an IRR on equity after tax of between 15% and 17% over the life of the franchise. It was unfair for the Administration and Members to criticize the company that it was seeking to obtain excessive return when the company only implemented the toll adjustment according to the arbitrators' Award. He appealed to Members for understanding of the company's position.

38. Ms LI Fung-ying referred to the Administration's assessment on economic implications of the toll increase of EHC as set out in Annex B of the LegCo Brief in which it was stated that "Given that tolls for using the EHC constitute an insignificant proportion of average household spending, EHC's toll increase would have a minimal lifting effect on the Consumer Price Index.". She expressed reservation on the assessment. She shared some other members' concern that the toll increase would have the effect of inducing the price increases in other sectors affecting people's livelihood. She sought details on the basis of the Administration's assessment.

39. Ms LI Fung-ying also commented that whether the toll increase was justified would be fairly judged by the public. What was important was whether NHKTC had given due regard to its corporate social responsibility. The company was earning profits and would attain an IRR of 13.64% without toll increase over the franchise period. Such an IRR was relatively high among similar enterprises under prevailing economic conditions. She urged the company to seriously consider reducing the toll increase giving particular regard to the financial hardship faced by many local workers at present.

40. PS/ETW advised that the assessment on the economic implications of EHC's toll increase was made by the Government Economist. He agreed to provide the details of the assessment to members after the meeting. As regards members' concern that the toll increase would induce fare increases of public transport services, he said that this was also an important concern of the Administration. While no such

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application had been received at the moment, if any such application was received, the Administration would carefully consider the application according to the relevant prescribed mechanism, taking into account the justification for the proposed increase, the financial position and the service performance of the corporation concerned, changes in operating cost and public affordability etc.

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41. Ms LI Fung-ying requested the Administration to also provide an assessment on whether the toll increase would induce fare increases of public transport services and the overall impact on Hong Kong people's livelihood.

42. Mr Albert CHAN said that NHKTC was in extremely good financial position. The IRR from 1986 to 2003 was 8.5% and in each year from 2001 to 2003, it earned a profit after tax over \$200 million. Under the prevailing economic conditions, the company had already been earning more than a reasonable return. Yet, the company still sought to implement substantial toll increases making use of the relevant provisions in the legislation to justify the toll increase. It was thus understandable that the public in general were highly discontented with such commercial behaviour. The LegCo Members who had supported the passage of the relevant legislation were somehow responsible for the dire consequence today. With regard to the buy-back option, he opined that the Administration could finance the buy back by issuing bonds instead of direct disbursement of public funds for the purpose. Given the very good business prospect of the road harbour crossings, such government bonds would be well received. He also suggested that as a counteracting measure against NHKTC's toll, the Administration might substantially reduce the CHT tolls during the non-peak hours to compete away some traffic from EHC.

43. On the buy back option, PS/ETW said that as reminded by some Members, the relevant operators had been granted a franchise according to law, and it would therefore require discussion between the Government and the franchisees to see if some reasonable conditions could be agreed upon. Besides, as the existing franchise already provided a toll adjustment mechanism for the franchisee, it would still require the cooperation of the franchisee to work out a new mechanism for toll adjustment which was acceptable to both parties. It could be envisaged that it would not be easy for both parties to come to agreement and the negotiation would be a very complicated process. On Mr Albert CHAN's suggestion of reducing CHT tolls during non-peak hours, he said that the Administration could consider the suggestion but remarked that as the present problem was traffic congestion at CHT during peak hours, the reduction of CHT tolls during non-peak hours might not be an effective measure for resolving the problem.

44. Mr Albert CHAN further asked whether the Administration could acquire the franchise of EHC on grounds of public interest. PS/ETW said that Hong Kong upheld the rule of law and the spirit of contract, which were very important for maintaining a good business environment. He could not see how the Administration could use any public interest reason to unilaterally acquire the operating right of a private company which had been given a franchise to operate a tunnel. He however

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appreciated members' intention of assisting the Administration to garner more chips for its negotiation with tunnel franchisees.

45. Mrs Selina CHOW said that the Legislative Council should look at the issue from a balanced perspective. Indeed when NHKTC invested \$2.2 billion in the EHC project, the interest rate was as high as 20%. The company originally only asked for a \$5 increase to take effect in 2003, but this was rejected by the Administration. At the then discussion of the Panel on the toll increase application, it was understandable that members in general did not support the application in view of the need to safeguard consumers' interest. It was also natural for the company to submit the toll increase application to arbitration as provided under the EHCO. Although the arbitrators' Award was not welcomed by consumers, it was an outcome of due process in full compliance with the law. She considered that the criticisms made by some members against the company were not fair to the company. She however hoped that the company could appreciate the concerns of members about the impact of the substantial toll increase on the general public and in particular the transport trades. The Liberal Party sincerely requested the company to give due consideration to the social and economic impacts of the toll increase and the community's sentiment, and hence consider giving concessions in respect of the toll increase. She appealed to all sides to adopt a more accommodating and collaborative attitude in settling the matter. She also urged the Administration to expeditiously identify workable measures to address the traffic problems.

46. Mr LEUNG Kwok-hung said that the level of a reasonable but not excessive remuneration was not defined in the legislation but was determined through arbitration. He commented that the company should not expect that there was a guaranteed return for its investment in the tunnel, as ultimately the investment was a commercial decision and all commercial decision entailed risks. He considered that the arbitrators' Award was not reasonable and unfair to the public. He in particular expressed disagreement with one of the conclusions for the 1997 Award that "it is necessary to adjust the tolls so as to ensure that the NHKTC's remuneration does not fall below the lower end of the band of reasonableness (15%). To be entitled to a toll increase, the NHKTC need not demonstrate that it has already fallen below the lower end of the band but rather that without a toll increase, it is inevitable that it will fall below this lower end over the franchise period.". He considered that before a reasonable distribution of traffic among the road harbour crossings was achieved, toll increase based on the said premise was not acceptable. He called on NHKTC not to implement the toll increase as it was unjustified.

47. Mr Abraham SHEK said that it was unfair to blame the Administration for the present situation or criticize the BOT arrangement based on present-day circumstances. It would be more meaningful for the concerned parties to collaborate and come up with measures or options which would achieve a win-win situation. He requested NHKTC to duly consider the impact of such a substantial toll increase on the local economy and the livelihood of the general public and not just focus on maximizing its return.

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48. Mr TAM Yiu-chung said that in response to the suggestion of some other Panel members, he agreed to revise the wording of his motion to read as follows-

“本委员会对于东区海底隧道在完全漠视市民的负担能力及意愿下，疯狂加价，表示震惊及强烈不满。为此，本委员会促请政府审慎考虑市民大众利益，尽快检讨三条过海隧道收费，以改善三隧现时汽车分流失衡的情况。另外，本委员会要求政府在未来一个月内提出解决过海隧道汽车流量不均的方案，并呼籲隧道公司延迟东隧加价。”

English translation

“That this Panel expresses astonishment and strong dissatisfaction over the crazy toll increase of the Eastern Harbour Crossing, which is in total disregard of the affordability and wishes of the general public. In this connection, this Panel urges the Government to expeditiously review the toll levels of the three cross-harbour tunnels taking prudent consideration of the interest of the general public with a view to improving the current uneven distribution of traffic among the three tunnels. In addition, this Panel requests the Government to come up within one month with proposals aimed at addressing the uneven distribution of traffic among the cross-harbour tunnels, and calls on the tunnel company to defer the toll increase of the Eastern Harbour Crossing.”

Mr TAM said that whilst he still considered it important for the Administration to actively study the buy back option, in order obtain the support of more members, he agreed to revise the motion to state that the Panel urged the Administration to put forward concrete proposals to address the current uneven distribution of traffic among the three road harbour crossings within one month. In response to the Chairman’s enquiry, he confirmed the understanding that in working out proposals to address the uneven distribution of traffic among the three road harbour crossings, the Administration should examine the various options/schemes that had been suggested by members at this meeting and in the past.

49. Mr CHENG Kar-foo said that members shared the common concern about the uneven traffic distribution issue and agreed that the Administration must come up with concrete measures without further delay. As the Liberal Party had reservation on the buy back option, he had suggested to Mr TAM to revise the motion to focus on the need to address the uneven traffic distribution issue.

50. Mr LAU Chin-shek cautioned the Administration not to think of raising the tolls of CHT as a means to solving the traffic congestion problem arising from the toll increases of EHC. He expressed support for Mr TAM’s revised motion, and stated that given that the company could obtain an IRR of 13.64% without toll increase, he objected to any toll increase.

51. Mr WONG Kwok-hing also expressed support for Mr TAM’s revised motion. He said that for the Panel’s next discussion on the matter, the Secretary for the

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Environment, Transport and Works and the Chairman of CITIC Pacific Ltd. should be invited to attend the discussion.

52. PS/ETW said that the Administration would continue to actively examine various possible options. However, he quoted the saying that “it takes two to tango” and pointed out that the cooperation of the tunnel franchisees was essential for certain options to be viable.

53. The Chairman put Mr TAM Yiu-chung’s motion to vote. As a majority of the members voting voted for the motion, the Chairman declared that the motion was passed by the Panel.

54. The Chairman requested the representatives of NHKTC to relate members’ views and the motion passed to the company’s management. He said that as suggested by members, the Panel would further discuss the matter at the next meeting on 22 April 2005 and would invite representatives from ETWB, Financial Services and the Treasury Bureau and CITIC Pacific Ltd. to attend the meeting.

立法會
Legislative Council

LC Paper No. CB(2) 1200/04-05

Ref : CB2/H/5/04

House Committee of the Legislative Council

**Minutes of the 21st meeting
held in the Legislative Council Chamber
at 2:30 pm on Friday, 1 April 2005**

Members present :

Hon Miriam LAU Kin-ye, GBS, JP (Chairman)
Hon Fred LI Wah-ming, JP (Deputy Chairman)
Hon James TIEN Pei-chun, GBS, JP
Hon Albert HO Chun-yan
Ir Dr Hon Raymond HO Chung-tai, S.B.St.J., JP
Hon LEE Cheuk-yan
Hon Martin LEE Chu-ming, SC, JP
Dr Hon David LI Kwok-po, GBS, JP
Dr Hon LUI Ming-wah, JP
Hon Margaret NG
Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP
Hon James TO Kun-sun
Hon CHEUNG Man-kwong
Hon CHAN Yuen-han, JP
Hon CHAN Kam-lam, JP
Hon LEUNG Yiu-chung
Hon SIN Chung-kai, JP
Hon Jasper TSANG Yok-sing, GBS, JP
Dr Hon YEUNG Sum
Hon LAU Kong-wah, JP
Hon LAU Wong-fat, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon CHOY So-yuk
Hon Timothy FOK Tsun-ting, GBS, JP
Hon TAM Yiu-chung, GBS, JP
Hon Abraham SHEK Lai-him, JP
Hon LI Fung-ying, BBS, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon Albert CHAN Wai-yip
Hon Frederick FUNG Kin-kee, JP

Mr Ray CHAN	Assistant Secretary General 3
Mr Arthur CHEUNG	Senior Assistant Legal Adviser 2
Miss Kathleen LAU	Chief Public Information Officer
Mrs Constance LI	Chief Council Secretary (2)5
Mrs Betty LEUNG	Chief Council Secretary (3)1
Miss Anita HO	Assistant Legal Adviser 2
Miss Lolita SHEK	Senior Council Secretary (2)7

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II. Legal Service Division report on subsidiary legislation gazetted on 18 March 2005

(LC Paper No. LS 42/04-05)

2. The Legal Adviser said that two items of subsidiary legislation were gazetted on 18 March 2005 and would be tabled in the Legislative Council (LegCo) on 6 April 2005.

3. Regarding the Eastern Harbour Crossing Ordinance (Amendment of Schedule) Notice 2005, the Legal Adviser explained that the Notice amended the Schedule to the Eastern Harbour Crossing Ordinance (Cap. 215) to increase the Eastern Harbour Crossing Road Tunnel tolls pursuant to an arbitration award. The Notice would come into operation on 1 May 2005.

4. The Legal Adviser further explained that by virtue of section 55(5) and (6) of the Ordinance, where in an award pursuant to submission to arbitration it was determined that the tolls should be varied, the tolls should be varied in compliance with such award. The Commissioner for Transport should, as soon as was practicable after such award, amend the Schedule by notice in the Gazette.

5. The Legal Adviser added that the Panel on Transport was briefed by the Administration and the New Hong Kong Tunnel Company Limited (the Company) on the toll increase at its meeting on 18 March 2005. The Panel would revisit the matter at its next meeting on 22 April 2005.

6. Mr LAU Kong-wah sought clarification on LegCo's power to amend the Notice.

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7. The Legal Adviser said that according to section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), LegCo's amending power of subsidiary legislation had to be consistent with the power to make such subsidiary legislation. As the power of the Commissioner for Transport to make the Notice was restricted by section 55(5) and (6) of Cap. 215, the power of Members to amend this Notice was similarly restricted. There was little room for Members to amend the Notice, except for minor technical amendments.
8. Mr LAU Kong-wah said that a subcommittee should be formed to scrutinise the Notice.
9. In response to Ms Emily LAU's enquiry, the Legal Adviser explained that the Notice was subject to the negative vetting procedure. The Notice would come into operation on 1 May 2005, and it was not necessary for a motion on the Notice to be moved in Council to seek LegCo's approval, unless amendments were proposed before expiry of the scrutiny period. However, as he had explained earlier, there was little room for LegCo to amend the content of the Notice. The Chairman added that LegCo could not repeal the Notice.
10. Mr LEE Cheuk-yan supported that a subcommittee be formed to study the Notice. Mr LEE expressed concern that while the scrutiny period could be extended to 25 May 2005 by resolution, the Notice would come into operation on 1 May 2005. He said that the Administration should request the Company to defer implementation of the new tolls until LegCo had completed scrutiny of the Notice. Ms Emily LAU concurred with Mr LEE.
11. The Chairman said that the date of 1 May 2005 for the toll increase to come into effect was made in the arbitration award.
12. The Legal Adviser said that Cap. 215 provided for the procedures to vary the tolls, and that implementation of the new tolls by the Company was outside the ambit of the Ordinance.
13. Mr Martin LEE asked whether LegCo could seek to reduce the toll increase by resolution of the Council.
14. The Legal Adviser said that under Article 73(6) of the Basic Law, LegCo could debate any issue concerning public interests. However, such a motion would only be an expression of views and would not have any binding effect.
15. Ms Emily LAU said that the subcommittee, if formed, should listen to the views of the public, in addition to holding discussion with the Administration and the Company.

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16. Mr WONG Kwok-hing said that at the meeting of the Panel on Transport on 18 March 2005, the representative of the Environment, Transport and Works Bureau (ETWB) had promised that the toll increase would not be gazetted, pending further discussion with the Company on the matter. However, the Notice was gazetted on the same day of the meeting. Mr WONG considered that the Administration had not honoured its promise which was disrespectful to the Panel, and that LegCo should follow up the matter.

17. Mr LAU Kong-wah, Chairman of the Panel on Transport, confirmed that the representative of ETWB had made such a promise at the Panel meeting on 18 March 2005.

18. The Chairman said that it would be more appropriate for the Panel on Transport to follow up the matter with ETWB.

19. Mr SIN Chung-kai and Mr WONG Kwok-hing suggested that the Chairman should raise the matter with CS at their next meeting. The Chairman agreed. Mr Fred LI said that the LegCo Secretariat should check the audio record of the meeting to ascertain what exactly the representative of ETWB had promised.

20. The Chairman proposed that a subcommittee be formed. Members agreed. The following Members agreed to join: Mr LEE Cheuk-yan, Mr Fred LI, Mr LAU Kong-wah, Ms Miriam LAU, Ms Emily LAU, Mr Andrew CHENG (as advised by Mr SIN Chung-kai), Mr WONG Kwok-hing and Mr Jeffrey LAM.

21. The Chairman reminded Members that the deadline for amending these two items of subsidiary legislation was 4 May 2005, or 25 May 2005 if extended by resolution.

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