

LEGISLATIVE COUNCIL BRIEF

Eastern Harbour Crossing Ordinance
(Chapter 215)

ARBITRATION ON THE TOLL INCREASE OF THE EASTERN HARBOUR CROSSING

INTRODUCTION

At the meeting of the Executive Council on 22 February 2005, the Council took note of the outcome of the arbitration on the toll increase of the Eastern Harbour Crossing (EHC)¹. 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.

BACKGROUND

The Eastern Harbour Crossing Ordinance

2. Section 55(3)(a) of the Eastern Harbour Crossing Ordinance (the Ordinance) provides that the tolls specified in the Schedule to the Ordinance may be varied by agreement between the Chief Executive in Council and the tunnel company. If an agreement cannot be reached, either party may submit the question of the variation of tolls to arbitration (section 55(3)(b) of the Ordinance). The Ordinance has not set out the criteria for determining toll adjustments. It only stipulates that if the matter is submitted for arbitration, the arbitrators shall be guided by the need to ensure that the carrying out by the tunnel company of its obligations, or the exercise of its rights, under the Ordinance is reasonably but not excessively remunerative to the tunnel company, having regard to, *inter alia*, any material change in the economic conditions of Hong Kong since the enactment of the Ordinance or, as the case may be, since tolls were last determined.

The Present Arbitration

¹ EHC consists of the road crossing and the rail crossing. The present arbitration concerns only the toll increase for the road crossing.

3. In September 2002, the New Hong Kong Tunnel Company Limited (NHKTC), franchisee of the Eastern Harbour Crossing, submitted an application for a \$5 increase in tolls (from \$15 to \$20) for private cars, and corresponding increases for other vehicles. The toll increases were proposed to take effect on 1 January 2003.

4. 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. In August 2003, NHKTC commenced arbitration against the Government's decision.

The Last Arbitration in 1997

5. The present case is not the first toll increase arbitration between the Government and NHKTC. When the Government rejected NHKTC's first toll increase application in 1995, NHKTC also submitted their case to arbitration.

6. In the 1997 Arbitration, it was common ground between the parties that an appropriate yardstick for measuring the reasonableness of the remuneration to a company engaged in a Build-Operate-Transfer project was its internal rate of return (IRR) on equity after tax over the life of the franchise. The arbitrator ruled that the band of reasonable remuneration for NHKTC was an IRR between 15% and 17% over the life of the franchise. The arbitrator also concluded that to maintain a remuneration which is reasonable but not excessive, it would be necessary to prevent NHKTC's remuneration falling below an IRR on equity of about 15%. To achieve this, a \$5 increase for private cars and taxis, and corresponding increases for other vehicles, were to take effect on 1 January 1998. The arbitrator also anticipated that further increases of a like amount at approximately 5-yearly intervals thereafter would be necessary to keep NHKTC's remuneration within the band of reasonable but not excessive remuneration. Nevertheless, the arbitrator also admitted that it would not be appropriate for him to award further increases at that stage, as he did not have the jurisdiction to make such further awards.

THE PRESENT ARBITRATION

NHKTC's Argument

7. In the present arbitration, 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. It was projected that the said toll increase, followed by a further toll increase of \$10 for private cars and taxis (with proportionate increases for other types of vehicles) with effect from 1 January 2010, would give NHKTC an IRR on equity after tax of 15.03% over the life of the franchise.

The Administration's Argument

8. The Government argued that there was no justification for a toll increase because -

- (a) the band of reasonable but not excessive remuneration determined in the last arbitration was neither fixed nor immutable;
- (b) in determining the question of the variation of tolls, the arbitrators were required by section 55(4)(a) of the Ordinance to have regard to the material changes in the economic conditions of Hong Kong since tolls were last determined in 1997; and
- (c) the band of reasonable but not excessive remuneration should be adjusted downward to 12-14%, having regard to the adverse changes in the economic conditions of Hong Kong since tolls were last determined in 1997. The financial experts of the Government and NHKTC agreed that the IRR for a "no toll increase" scenario (based on the traffic projection of EHC made by the parties' respective traffic experts) would be 13.64%, which fell within the range of an IRR on equity after tax of between 12% and 14% and hence would be a reasonable remuneration for NHKTC.

9. The arbitration hearing was conducted from 20 to 24 September 2004.

The Arbitrators' Award

10. We received the arbitrators' Award and Reasons for Award on 26 January 2005.

11. The arbitrators consider that the changes in the economic conditions of Hong Kong since the tolls were last determined in the 1997 Arbitration are not "material". These change, when set against the known changes which have occurred since the project began, are not sufficient to affect the overall level of reasonable but not excessive remuneration determined over the life of the franchise (commencing on 7 August 1986). They also consider that while some drastic and prolonged change in economic circumstances during the lifetime of the project would require a review, it is neither in the interests of the parties nor the public if tolls are continually reviewed and adjusted during less than material fluctuations in the economy over the 30 year franchise.

12. The arbitrators' conclusion is, therefore, 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.

13. Having examined the various toll increase options, the arbitrators consider it appropriate and necessary to award a \$10 increase for private cars and taxis with corresponding increases for other vehicles. In making the Award, the arbitrators also anticipate that it may be necessary for a further similar increase in about 5 years. A copy of the arbitrators' Award and Reasons for Award is at **Annex A**².

14. The following table sets out EHC's existing and new tolls, as determined by the arbitrators –

² This is a version amended by arbitrators on 28 February 2005 with some clerical errors corrected and minor changes agreed by parties incorporated. In the original uncorrected version received on 26 January 2005, the arbitrators determined that new tolls should take effect from 1 April 2005 or alternatively as soon thereafter as the increases can be properly implemented. Nevertheless, after our discussion with NHKTC, it has agreed that the effective date would be deferred to 1 May 2005.

	Existing Tolls (\$)	New Tolls (\$)
Motorcycles	8	13
Private cars, electrically powered passenger vehicles and taxis	15	25
Public and private light buses	23	38
Light goods vehicles	23	38
Medium goods vehicles	30	50
Heavy goods vehicles	45	75
Public and private single-decker buses	30	50
Public and private double-decker buses	45	75
Each additional axle in excess of two	15	25

IMPLEMENTATION

Implementation of the New Tolls

15. Subsequent to the first receipt of the Award in late January, we have expressed to NHKTC our grave concern over the impact of the magnitude of the toll increase determined by the arbitrators, and have requested NHKTC to reduce the actual level of increase, postpone the effective date of the increase, or implement the new tolls by stages. After some discussions, NHKTC has agreed to the following -

- (a) toll increases for all vehicles (except light buses and empty taxis) to be deferred to 1 May 2005;
- (b) toll increase for empty taxis to be deferred to 1 July 2005; and
- (c) toll increase for light buses to be deferred to 1 October 2005.

16. The Department of Justice (DoJ) have sought advice from the two Leading Counsel (one overseas and one local) who represented the Government in the present arbitration on whether there is ground for appeal and the merits of an appeal against the Award. The two Leading Counsel have jointly advised that there is no reasonable prospect of a successful appeal. DoJ agree with their views.

17. Pursuant to section 55(6) of the Ordinance, the Commissioner for Transport shall, by notice in the Gazette, as soon as practicable amend the toll Schedule in accordance with the Award.

Fiscal and Traffic Management Measures

18. We anticipate that the roads leading to the Cross-Harbour Tunnel (CHT) will become more congested after the new tolls have taken effect. Therefore, in addition to the publicity arrangements as set out in paragraph 22 below, we will also make announcements before 1 May to encourage the public to use public transport and to avoid using CHT during peak hours as far as possible. We will also continue to explore longer term measures to alleviate the problem of uneven distribution of traffic at the three road harbour crossings.

IMPLICATIONS

19. The arbitrators' Award has no environmental, sustainability, productivity or civil service implications. The financial, economic and traffic implications of the Award are set out at **Annex B**.

20. In view of the arbitrators' Award, it would be necessary to review the additional fare for taxi passengers using the road harbour crossings. At present, a taxi passenger using the CHT, Western Harbour Crossing (WHC) or EHC is required to pay an additional fare comprising -

- (a) the tunnel toll which reimburses the taxi driver for the toll charge paid by him during the hiring (\$10, \$15 and \$35 for CHT, EHC and WHC respectively); and
- (b) a return toll of \$10 for crossing the harbour via CHT or \$15 via EHC/WHC, on a journey which does not begin from a cross-harbour taxi stand.

21. As the arbitrators' Award will have an impact on the toll for taxis, some members of the taxi trade would expect that the return toll for crossing the harbour via EHC/WHC should also be increased to \$25, so that a taxi driver who fails to obtain a hire on his return journey will not need to pay the additional \$10 out of pocket for crossing the harbour via the EHC/WHC, or suffer congestion and longer queuing time at the CHT. We

will consult the taxi trade, the Transport Advisory Committee and the Legislative Council Panel on Transport as to whether the return tunnel toll surcharge needs to be revised. Any increase in additional fare for taxi passengers using the road harbour crossings requires amendments to the Road Traffic (Public Service Vehicles) Regulation, Cap. 374D, by the Chief Executive in Council.

PUBLICITY

22. A press release will be issued on 11 March 2005. A spokesman will be made available to handle media enquiries. NHKTC will also issue a separate press release on the same day.

ENQUIRIES

23. Any enquiries concerning this brief can be directed to Mr Clement Lau, Principal Assistant Secretary for the Environment, Transport and Works (Acting), at 2189 2102.

Environment, Transport and Works Bureau
11 March 2005

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ANNEXES

- Annex A - The Arbitrators' Award and Reasons for Award
- Annex B - Implications of Arbitrators' Award on EHC Toll Increase

IN THE MATTER OF SECTION 55 OF THE EASTERN HARBOUR CROSSING
ORDINANCE, CAP. 215

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

THE NEW HONG KONG TUNNEL COMPANY LIMITED

Claimant

And

THE SECRETARY FOR JUSTICE
ON BEHALF OF THE GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION

Respondent

FINAL INTERIM AWARD

WHEREAS:

1. By Section 4 of the Eastern Harbour Crossing Ordinance ("the Ordinance") dated 1 August 1986, the New Hong Kong Tunnel Company Limited ("the Company") was granted the franchise:
 - (a) to construct an immersed tube crossing Victoria Harbour, Hong Kong, from Cha Kwo Ling to Quarry Bay containing 2 road traffic conduits, 2 railway line conduits and 1 conduit for services and utilities;
 - (b) to construct all other works comprised in the project other than the railway works;
 - (c) to keep in place the works described in (a) and (b) above; and to operate the road tunnel area (being the delineated area containing the road traffic conduits) for the benefit of the public upon payment to the Company of

the tolls specified in Part IX and the Schedule to the Ordinance for the period commencing on the start of construction and ending on the 30th anniversary thereof;

2. Section 55(3) of the Ordinance (as amended) provides that the tolls specified in the Schedule may be varied:
 - (a) by agreement between the Chief Executive in Council and the Company
or
 - (b) in default of agreement by submission of the question of variation of tolls to arbitration under the Arbitration Ordinance (Cap. 341) by either the Chief Executive in Council or the Company;

AND WHEREAS:

3. Following an Arbitration before Kenneth Rokison QC under the said Section 55(3) of the Ordinance on 4 March 1997 (amended by agreement on 10 April 1997) he awarded and determined:
 - (a) that the tolls specified in the Schedule to the Ordinance should be varied;
 - (b) that the toll for "Private cars, electrically powered passenger vehicles and taxis" should be increased by the sum of HK\$5 to a new toll of HK\$15, with corresponding increases in respect of other vehicles as specified in an Annex to the award;
 - (c) that the said increases and resulting new tolls as set out in the Annex should come into effect on 1 January 1998.
4. By letter dated 27 September 2002, the Company applied to the Secretary for the Environment, Transport and Works for a further tolls increase on the grounds set out in the letter.
5. On 15 July 2003 the Chief Executive in Council rejected the Company's application and there was a "default of agreement" within Section 55(3)(b) of the Ordinance.
6. By notice dated 20 August 2003, Messrs Johnson Stokes and Master, solicitors for the Company, gave notice that pursuant to section 55(3)(b) of the Ordinance that it submitted its application for a toll increase to arbitration, appointing Kenneth Rokison QC of 20 Essex Street, London WC2R 3AL as arbitrator.

7. By notice dated 27 August 2003 the Department of Justice, solicitors for the Respondent, gave notice of the appointment of Barry Mortimer QC of 3/4 South Square, Gray's Inn London WC1R 5HP as arbitrator.
8. On 7 May 2004, with the consent of the parties, we, the arbitrators, invited Michael Thomas QC of Essex Court Chambers, Temple, London EC4Y to accept our nomination as Umpire and he accepted.
9. Formal pleadings were exchanged between the parties as follows:
 - a. Points of Claim dated 19 December 2003;
 - b. Points of Defence dated 16 April 2004;
 - c. Particulars of Points of Defence dated 7 May 2004; and
 - d. Points of Reply dated 13 July 2004.
10. An oral hearing took place at the Hong Kong International Arbitration Centre, 38th Floor, Two Exchange Square, Central, Hong Kong, on 20, 21, 22, 23 and 24 September 2004. The Claimant was represented by Mr Joseph Fok SC and the Respondent by Mr Stewart Boyd QC and Mr Anderson Chow SC. The proceedings were recorded and transcribed by Wordwave International Asia.
11. At the beginning of the hearing it was agreed that Michael Thomas should preside but would not in any way 'enter on the reference' absent a disagreement between the arbitrators. The arbitrators having agreed on this Final Interim Award 'he has not in any way 'entered on the reference'.
12. Before the hearing written 'skeleton' arguments were exchanged and submitted. Subsequently, each party put in further written submissions.
13. Before the hearing the evidence of the Traffic Experts (MVA Hong Kong Limited for the Claimant and Wilbur Smith Associates Limited for the Respondent) was agreed between the parties in writing on 17 September 2004. 'The Toll Revenue Agreement'.
14. On the basis of the Toll Revenue Agreement, Mr Morrison for the Claimant, Mr Macleod for the Respondent, and the parties, agreed for use in the arbitration the calculations set out in writing dated 18 September 2004.
15. Following service of their reports or statement the Claimant called the following Financial Experts and witnesses to give evidence:
 - a. Mr Meocre Li. (Witness statement dated 15 July 2004.)
 - b. Mr Kenneth Morrison. (Reports dated 19 December 2003 and 13 July 2004; and a Supplementary Statement dated 7 September 2004.)

16. The Claimant also put into evidence the statement of Mr Joseph Ferrigno dated 8 January 1997 made for the purposes of the 1997 arbitration: Mr Ferrigno did not give evidence in this arbitration.
17. Following service of their reports or statement the Respondent called the following Financial Experts and witnesses to give evidence:
 - a. Mr Iain Macleod. (Reports dated 16 April 2004, 20 August 2004 and 18 September 2004.)
 - b. Mr Roger Thomas Best. (Witness statement dated 31 July 2004.)
18. It was agreed at the hearing that in the event that we decide that there should be a variation of the tolls specified in the Schedule to the Ordinance as amended, we should state the amount of any increase and the new toll by reference to the toll for "Private cars, electrically powered passenger vehicles and taxis", the parties being able to agree the relevant corresponding tolls for other vehicles listed in the Schedule.
19. In the course of the hearing Counsel for the Claimant asked that we give reasons for our award.
20. It was agreed by the parties that we should make no order for costs at this stage but that we should make a Final Interim Award, leaving issues of costs for further submission and award, if not agreed.

NOW THEREFORE WE, Kenneth Rokison and Barry Mortimer, having fully considered the oral and written submissions together with the evidence adduced before us make this our FINAL INTERIM AWARD as follows:

For the reasons set out in the "Reasons for Award" and its Annex ("Annex B"), which are part of this Award and appended to it,

WE AWARD AND DETERMINE:

1. that the tolls specified in the Schedule to the Ordinance as amended be varied;
2. that the tolls for "Private cars, electrically powered passenger vehicles and taxis" be increased by a sum of HK\$10 to a new toll of HK\$25 with

corresponding increases in respect of other vehicles as specified in Annex A hereto;

3. that the said increases and the resulting new tolls as set out in Annex A hereto shall come into effect as from 1 May 2005.

Dated this 20th day of January 2005.

Amended by agreement between the parties on the 28th day of February 2005



.....
Kenneth Rokison QC



.....
Barry Mortimer QC

ANNEX A
ANNEX TO THE FINAL INTERIM AWARD

Vehicle Type	Toll (in HK\$)
Motorcycles, motor tricycles	13
Private cars, electronically powered passenger vehicles, taxis	25
Public and private light buses	38
Light goods vehicles and special purpose vehicles of a permitted gross vehicle weight not exceeding 5.5 tonnes	38
Medium goods vehicles and special purpose vehicles of a permitted gross vehicle weight of or exceeding 5.5 tonnes but not exceeding 24 tonnes	50
Heavy goods vehicles and special purpose vehicles of a permitted gross vehicle weight of or exceeding 24 tonnes but not exceeding 38 tonnes	75
Public and private single-decker buses	50
Public and Private double-decker buses	75
Each additional axle in excess of two	25

**IN THE MATTER OF SECTION 55 OF THE EASTERN HARBOUR CROSSING
ORDINANCE, CAP. 215**

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

THE NEW HONG KONG TUNNEL COMPANY LIMITED

Claimant

And

**THE SECRETARY FOR JUSTICE
ON BEHALF OF THE GOVERNMENT OF THE HONG KONG
SPECIAL ADMINISTRATIVE REGION**

Respondent

REASONS FOR AWARD

(forming part of our Final Interim Award dated 20 January 2005)

Introduction and Background

- 1.1 As set out in Paragraph 19 in the main body of our Award we were asked by Counsel for the Claimant to publish a Reasoned Award. We now do so. These reasons are an integral part of our Award dated 20 January 2005 in which we award and determine that the tolls specified in the Amended Schedule to the Ordinance should be varied as set out therein. The tolls specified in the Amended Schedule were those awarded by Mr Kenneth Rokison QC in his Reasoned Award of 4 March 1997 (the 1997 Award).
- 1.2 The Claimant, the New Hong Kong Tunnel Company Limited, is a consortium of substantial companies. The Respondent has a minority shareholding in the Claimant.

We shall refer to the Claimant as “the Company” and the Respondent as “the Government”.

- 1.3 The history leading to the grant to the Company of a 30 year franchise to construct, finance and operate the Eastern Harbour road crossing and to finance and construct the rail crossing is well known to the parties and is set out in the 1997 Award.
- 1.4 The 30 year franchise was agreed to begin at the commencement of construction of the harbour crossing. This was on 7 August 1986. The franchise will therefore come to an end on 6 August 2016.
- 1.5 The franchise was regulated under the Eastern Harbour Crossing Ordinance Cap. 215 which was enacted with an effective date of 1 August 1986 (“the Ordinance”)

The Ordinance

- 2.1 The relevant terms of the Ordinance are set out in Annex B to these Reasons.
- 2.2 The Schedule to the Ordinance provided for the following initial tolls:-

<u>Category</u>	<u>Vehicle</u>	<u>Toll</u>
1.	Motorcycles, motor tricycles	\$5
2.	Private cars, electrically powered passenger vehicles, taxis	\$10
3.	Public and private light buses	\$15
4.	Light goods vehicles and special purpose vehicles of a permitted gross vehicle weight not exceeding 5.5 tonnes.	\$15
5.	Medium goods vehicles and special purpose vehicles of a permitted gross vehicle weight of or exceeding 5.5 tonnes but not exceeding 24 tonnes.	\$20
6.	Heavy goods vehicles and special purpose vehicles of a permitted gross vehicle weight of or exceeding 24 tonnes but not exceeding 38 tonnes.	\$30
7.	Public and private single-decker buses	\$20
8.	Public and private double-decker buses	\$30
9.	Each additional axle in excess of two	\$10

2.3 The variation of tolls specified in the Schedule is regulated by sections 55(3) and 55(4).

Section 55(3) provides:-

- (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.*

Section 55(4) provides:-

- (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.

The 1997 Award

3.1 Following a “default of agreement” between the same parties an Arbitration under section 55(4) led to the 1997 Award by which the tolls were varied with effect from 1 January 1998 to the following:-

<u>Category</u>	<u>Vehicle</u>	<u>Toll</u> \$
1.	Motorcycles, motor tricycles	8
2.	Private cars, electrically powered passenger vehicles, taxis	15
3.	Public and private light buses	23
4.	Light goods vehicles and special purpose vehicles of a permitted gross vehicle weight not exceeding 5.5 tonnes.	23
5.	Medium goods vehicles and special purpose vehicles of a permitted gross vehicle weight of or exceeding 5.5 tonnes but not exceeding 24 tonnes.	30
6.	Heavy goods vehicles and special purpose vehicles of a permitted gross vehicle weight of or exceeding 24 tonnes but not exceeding 38 tonnes.	45
7.	Public and private single-decker buses	30
8.	Public and private double-decker buses	45
9.	Each additional axle in excess of two	15

3.2 In the 1997 Arbitration it was common ground between the parties that the appropriate yardstick for measuring reasonable but not excessive remuneration under Section 55(4) was the Company’s internal rate of return (IRR) on equity after tax and also that the arbitrator should have regard to the Company’s cash flow and net cumulative profit after

tax compared with the projections of these figures at the time when the Company submitted its bid and/or the franchise was granted.

- 3.3 In the 1997 Award Mr Kenneth Rokison QC held that there was a band or range of remuneration which would be reasonably but not excessively remunerative to the Company within section 55(4). In this he agreed with Sir Michael Kerr's analysis in his award dated 12 November 1990 when considering the application for a toll increase by the franchisee of the Cross Harbour Tunnel.
- 3.4 Mr Kenneth Rokison QC further held in his 1997 Award that the "range" of reasonable remuneration was an IRR on equity after tax of between about 15% and 17% over the life of the franchise. Further, that a variation of tolls to seek to ensure that this did not fall below about 15% was appropriate.
- 3.5 On this basis a HK\$5 increase was awarded for private cars, electrically powered passenger vehicles and taxis with corresponding increases for other vehicles. Mr Kenneth Rokison QC anticipated in his reasons that further like increases would be necessary at approximately 5 year intervals.

The "Default of Agreement" under Section 55(3) in the present Arbitration

- 4.1 By letter dated 27 September 2002 the Company applied to the Secretary for the Environment, Transport and Works for a toll increase of HK\$5 for cars and taxis with proportionate increases for other vehicles. The Company relied on the Conclusions in the 1997 Award as set out in their letter and the view expressed by the arbitrator that he anticipated further similar increases would be necessary at approximately 5 year intervals. Further, that at the date of the letter (although many of the assumptions used in the 1997 Assessments had not turned out as projected) the likely IRR on equity after tax would not get close to the higher figure (17%) and "most cases" showed a return below the lower band of reasonable return (15%).
- 4.2 This application was refused by the Chief Executive in Council on 15 July 2003. The grounds for his refusal pleaded in the Points of Defence are in summary:-
 - (a) The Company was in a consistently good financial position. The bank loans were fully repaid in July 2001, the cumulative profits to the end of 2002 were

HK\$2,135 million. Further up to May 2003 the Company had paid out HK\$1,758.75 million in dividends.

- (b) The Company was performing extremely well financially compared with other tunnel operators.
- (c) The Transport Advisory Committee was of the view that the “reasonable return” set at a time when Hong Kong’s economy was thriving was not applicable having regard to the adverse changes in the economy since. That in these circumstances an IRR of 13.73% “appeared to be more than a ‘reasonable return’ under the current economic conditions”.
- (f) From 1993 to 1997 the Composite Consumer Price Index rose between 5.8% (1997) and 9.1% (1995) but inflation fell to 2.8% in 1998 and since 1999 Hong Kong had experienced deflation. (4.0% in 1999).
- (g) No undue congestion had been observed in the Eastern Harbour Tunnel approach roads.
- (h) For the above reasons there was no justification for an increase on either financial or traffic management grounds.

These reasons were not entirely consistent with the Government’s press release of 15 July 2003 but no point on this has been taken.

Common Ground

- 5.1 As in the 1997 Arbitration it is common ground between the parties that the appropriate IRR on equity after tax over the life of the franchise remains the appropriate measure from which to decide reasonable but not excessive remuneration.
- 5.2 It was also agreed that the objective of the arbitration should be to prevent such remuneration falling below the lower end of whatever band or range of IRR is found to be reasonable but not excessive so as to ensure that the Company receives that level of remuneration over the franchise period.
- 5.3 On 17 September 2004 the traffic experts for each party reached agreement upon the traffic forecasts based upon a series of different toll scenarios. On 18 September the

financial experts reached agreement upon the resulting IRR's on equity after tax relating to each. They also agreed forecasts of the Company's accumulated net profits and accumulated dividends as at the end of 2004 and as at the end of the franchise on the basis of scenario A only – that is no further increase in tolls.

5.4 These scenarios were brought up to date at the time of the hearing and are as follows:-

Scenario	Toll increase(1)	Toll increase(2)	IRR
A	N/A	N/A	13.64%
B	\$5 (1.1.2005)	\$5 (1.1.2010)	14.50%
C	\$10 (1.1.2005)	N/A	14.74%
D	\$8 (1.1.2005)	\$8 (1.1.2010)	14.84%
E	\$10 (1.1.2005)	\$5 (1.1.2010)	14.91%
F	\$10 (1.1.2005)	\$10 (1.1.2010)	15.03%

5.5 The agreed reports show that, if there is no further increase of tolls, the Company's projected IRR on equity after tax over the life of the franchise will be 13.64%. On that basis, expressed in \$000 the Company's accumulated profits at the end of 2004 will be \$2,673,007 and at the end of the franchise period will be \$6,434,337. The accumulated dividends at the end of 2004 will be \$2,288,502 and at the end of the franchise period, \$6,434,337.

The Issues

6.1 The central issue for our decision is whether, guided by the need to ensure that carrying out of its obligations, or the exercise of its rights under the Ordinance, and having taken into account the "regards" in section 55(4) of the Ordinance the Company's remuneration has fallen below, or inevitably will fall below, that which is reasonable but not excessive. Inherent in this is a finding on what is reasonable but not excessive remuneration at the time of this hearing.

- 6.2 The second major issue is if the remuneration has fallen below this level, then by how much and with effect from when should the tolls be increased?
- 6.3 There are two subsidiary issues:-
- (a) whether, applying section 55(4)(a) of the Ordinance, the changes in the economic conditions of Hong Kong since the tolls were last determined are material to the issue of reasonable remuneration and if so, to what extent?
 - (b) whether the Government is estopped from alleging that at the time of the hearing the reasonable level of remuneration is less than an IRR of 15% having regard to the 1997 Award.

Estoppel: the Issue

- 7.1 It is appropriate to determine the estoppel issue before turning to the others.
- 7.2 Although estoppel was not pleaded by the Company, during the final submissions Mr Joseph Fok QC was encouraged by the tribunal to take the point. He did so and we have now received written submissions upon it from both the parties. We are grateful.
- 7.3 In summary, the Company relies upon the 1997 Award as determining between the parties the reasonable rate of remuneration.
- 7.4 As this is a statutory arbitration to which the Arbitration Ordinance CAP 341 applies (Section 2 AB) the Company accepts that there is a "public" element to this arbitration, nevertheless it submits that the Government is estopped from relying upon section 18 which deems that the arbitration agreement shall "contain a provision that the award to be made by the arbitrator... shall be final and binding upon the parties...".
- 7.5 Even if we accept the Company's submissions on estoppel, nevertheless it invites us to deal with the merits on the evidence.
- 7.6 The Government submits in brief that it is not estopped because in reaching the decision in this arbitration section 55 (4)(a) of the Ordinance requires the arbitrators to have regard to any material change in the economic circumstances of Hong Kong since the tolls were last determined in the 1997 Award. Further, there has been such a material change and therefore the band of reasonable remuneration is not either fixed or immutable.

- 7.7 Secondly, the Government contends that the public interest involved in this decision is such that it is inappropriate for the Government to be shut out from advancing its case even if it has reconsidered the grounds upon which the reasonable level of IRR is to be determined. It suggests that *res judicata* is not appropriate in public law matters because of the public interest involved and that this is such a case.

Estoppel: Conclusion

- 8.1 In usual circumstances the parties are estopped from reopening the same issues in subsequent proceedings when those issues have been finally determined between them in arbitration. This principle is reinforced if in a statutory arbitration there is a provision of finality as there is here.
- 8.2 However, there can be little doubt that the Government is not estopped in these proceedings from alleging a material change in the economic circumstances of Hong Kong, since the tolls were last determined. Section 55 (4)(a) of the Ordinance would otherwise be emasculated. Clearly, the Government may reopen the question of reasonable remuneration on this ground.
- 8.3 The question still arises whether the Government is estopped from reopening the matter generally.
- 8.4 Two considerations lead us to conclude that the Government is not estopped in these proceedings from advancing its case generally.
- 8.5 The first is the width of the regards in section 55 (4) of the Ordinance. In particular we have in mind section 55 (4)(f): "any other relevant matter".
- 8.6 Secondly there is a public element in these proceedings concerning the fixing of the level of tolls. R (Munjaz) v Mersey Care NHS Trust [2003] 3 WLR 1505 concerns judicial review but the public nature of those proceedings and this arbitration is similar. At page 1535 Hale LJ (as she then was) said

"But issue estoppel is a doctrine appropriate to proceedings in private law... in judicial review,... there is always a third party who is not present: the wider public or public interest. They should not be prejudiced by the failure of a public authority to place all the relevant material and arguments before the court on the

first occasion. Still less should they be prejudiced if the public authority does indeed reconsider in the light of the previous decision but arrives at conclusions which do not in every respect mirror the court's conclusion on the first occasion. We therefore share the doubts expressed by this court in R v Secretary of State for the Environment Ex p Hackney London Borough Council [1984] 1 WLR 592, as to whether the doctrine of issue estoppel is applicable at all in judicial review proceedings."

- 8.7 For the sake of completeness there remains the possibility in certain circumstances even in proceedings of a public nature that it may be an abuse of process for a public authority to reopen questions already decided but this is not relevant in this matter.

Our Task in this Arbitration

- 9.1 In turning to consider the issues it is useful to identify our task. In determining whether, and if so what variation in tolls is needed to ensure that the carrying out of the Company's obligations, or the exercise of its rights, the Company's remuneration is reasonable but not excessive, it is necessary:
- a) to determine what level of remuneration is reasonable and not excessive;
 - b) to decide whether such level has been, or is being, or will be achieved or maintained;
 - c) if not, to determine what variation in tolls is needed to ensure that it is.
- 9.2 In approaching this task in theory there are many ways in which the tribunal may assess the reasonableness of the company's remuneration. As was pointed out on page 24 of the 1997 Award the tribunal is given a wide discretion. With this we both agree.
- 9.3 As we have already pointed out in this arbitration as well as that in 1997, the parties have agreed that the appropriate yardstick for measuring the reasonable remuneration is the Company's IRR on equity after tax *over the life of the franchise*.
- 9.4 It is useful to note that the primary use of such an IRR is to predict the expected return at the beginning of a project before the necessary capital is committed. But this is not its

only value. It may also be used as the project progresses, or at the end of the project, to test the extent to which the projected IRR is being, or has been achieved or maintained.

The Question of Principle

- 10.1 The question of principle which arises is whether the level of remuneration which is reasonable and not excessive should, once ascertained be maintained, subject to exceptional economic or other changes in Hong Kong, or whether it is open to change and reassessment from time to time having regard to prevailing circumstances.
- 10.2 It is obvious that from a purely practical standpoint, the maximum degree of certainty is desirable not only for the Company, but also for the Government and indeed the public. Even though when making its investment the company could not expect to be insulated against all future economic uncertainty to test the current rate and estimated rate of return against a moving target would introduce considerable uncertainty – a point to which we will return when considering the effect of section 55 (4)(a) of the Ordinance and what changes in economic circumstances are “material”.

The 1997 Arbitration in further detail

- 11.1 It is useful to return to the 1997 Arbitration for the reason that the Government’s case is not that Mr Kenneth Rokison QC’s approach as arbitrator was in any way flawed. The case is that the IRR held to be reasonable should be adjusted by reference to an up-to-date capital asset pricing model (CAPM) and a consideration of the intervening changes in economic circumstances. This contention that the IRR should be assessed or adjusted by reference to a CAPM calculation either at the time or in future was not contended for in 1997.
- 11.2 Although the parties could then have simply invited the arbitrator to look at the evidence of what was in the contemplation of the Company at the time when the decision was taken to embark upon the enterprise, in fact they agreed to take an average of the projected IRR for the Eastern Harbour Tunnel as contemplated by the parties and demonstrated by the Information Memorandum and the Descriptive Memorandum as well as the projected IRR for other comparable build, operate and transfer tunnel projects. Although a CAPM calculation was done for the Cross Harbour Tunnel (CHT) and

included in the average of comparables this was only because there was no evidence of any projected or contemplated IRR at the time of the original investment.

11.3 With this background in 1997 the arbitrator concluded (inter alia):

- a) that there was a range of reasonable remuneration;
- b) that an appropriate yardstick for measuring the reasonableness of the Company's remuneration was its IRR over the life of the franchise;
- c) that the only way in which it was possible to test the reasonableness of the Company's remuneration was by reference to some assumed pattern of remuneration which would arrive at the appropriate IRR at the end of the day; and that one should also have regard to the Company's cash flow and in particular its net cumulative profit after tax and compare these with those projected when the Company submitted its bid and/or the franchise was granted;
- d) that the adverse case figures in the Descriptive Memorandum and the Information Memorandum provided better guidance than the base rate figures as to the party's contemplation as to what should be the lower limit of the band of reasonableness (since the investors were apparently willing to risk their capital in the knowledge of the risk that their return would be no higher than the adverse case predictions);
- e) that if one considers what level of remuneration is reasonable, it is appropriate to look at all available evidence, including in particular levels of remuneration projected in respect of other comparable projects, even if these were developed and projections made after the date of the ordinance relating to this tunnel;
- f) finally that, on the basis of the figures presented by the experts and the parties, the level of reasonableness was such as to achieve over the life of the franchise an IRR of about 15% to 17%, and that it would be necessary to adjust the tolls so as to ensure that the Company's remuneration did not fall below about 15%.

An Alleged Mistake

- 12.1 The agreed figures used for the purposes of the 1997 arbitration are not generally disputed, but the Government contends that in respect of the CHT the CAPM figure of 16.92% (agreed between Mr Best for the Government and Mr Li for the Company) was wrong. It should be adjusted downwards to take into account Mr Best's opinion that, in order to arrive at the risk free interest rate, a deduction of about 3% from the best lending rate should be made. This caused him to propose a figure of 14.41% rather than the agreed figure of 16.92%. The effect would be to reduce the average for the purpose of fixing the lower level of the reasonable band of IRRs from 15% to about 14.5%.
- 12.2 We can only speculate as to why the parties agreed for the purposes of the 1997 arbitration that, despite Mr Best's unwillingness to agree Mr Li's figure, 16.92% should be fed into the average. Mr Li explained in his evidence how the figure of 16.92% was reached. For his part Mr Best was unable to recall how it came to be agreed and it may be that the parties simply agreed to accept Mr Li's opinion. However, since Mr Best's disagreement is expressly referred to in a note to the party's agreement for the 1997 arbitration, Mr Best's view must have been in the minds of both the parties and their lawyers when the agreement was reached. It is not therefore possible to conclude that this agreement was entered into by a mistake. In these circumstances we cannot regard the 1997 decision as in any way flawed on this ground.
- 12.3 In these circumstances we do not think it justified to reconsider the figures agreed for the purposes of the 1997 Arbitration in the absence of clear evidence. This would not only introduce uncertainty by moving the buoys marking the channel (see the analogy adopted by Mr Kenneth Rokison QC in the 1997 Award) but would also be unfair to the Company.
- 12.4 Further, the figure of 16.92% can be justified if, rather than carrying out a CAPM calculation as a "proxy" for the projected IRR one would take the actual IRR achieved in the Cross Harbour Tunnel project. At the time of the arbitration before Sir Michael Kerr in 1990 this was 18.4%. Ultimately according to Mr Morrison the IRR had risen to 18.9% in 1999.

Our Approach

- 13.1 As we have indicated we do not find that the 1997 Award gives rise to an estoppel. However, this does not mean that the ruling should now be set at naught. The decision was founded upon wide agreement between the parties not only upon traffic and financial matters but also upon the appropriate yard-stick upon which to assess reasonable remuneration. We have well in mind that these agreements were made for the purposes of the 1997 Arbitration only. But, the IRR was to be over the life of the project. It was, therefore, necessarily envisaged that there would be changes in the economic conditions of Hong Kong during this period.
- 13.2 It is both practical and fair to the parties and the public that the conclusions of the 1997 Arbitration should be given weight in the absence of persuasive evidence to the contrary.
- 13.3 Two other matters are worth noting. First, that as the IRR is over the life of the project the effect of the Government's argument would be to adjust the IRR downwards with retrospective effect back to the beginning of the project which would have the effect of negating the 1997 decision. Secondly, that whilst the parties recognised that the arbitrator had no jurisdiction to award anything beyond a single increase in tolls in the 1997 Award, both parties invited him to give guidance for the future as to further possible toll adjustments which would be appropriate if the then current traffic projections proved to be accurate. This approach is inconsistent with the suggestion now advanced by the Government that the appropriate IRR is capable of reassessment from time to time. Of course, if this is the effect of the evidence – so be it.

The Evidence

- 14.1 The central pillar of the Government's case is the effect of the severe adverse changes in the economic conditions of Hong Kong since the tolls were determined by the 1997 arbitration. These it is said are such that 15% is no longer to be regarded as the bottom of the range of IRR's denoting reasonable remuneration. The evidence of changes is correctly summarised in the Government's Skeleton Argument as follows:

"... since tolls were last determined in March 1997, the economic conditions of Hong Kong have drastically deteriorated, due largely to the Asian financial crises starting in the second half of 1997 and the SARS outbreak in Hong Kong in 2003. The extent

and the period of the economic down turn, as clearly reflected by indicators such as GDP, CPI, Hang Seng Index, high employment rate, etc, are unprecedented ever since Government statistics on GDP growth and inflation were first kept in 1961.

Between 1986 (when the franchise was granted) and 1997 (when tolls were last determined), the annual GDP growth (year on year basis) was between 10.5% to 23%, except for 1995 when it grew by 6.5% only. However, over the six year period from 1998 to 2003, there was a GDP contraction in five years (ranging from 0.8% to 4.8%) with only 1 year of growth in 2000 (3.4%).

Between 1986 and 1997, annual inflation was between 3.8% and 11.6%. In 1998, inflation dropped to 2.8% and over the next 5 years from 1999 to 2003 there was a continuous deflation of between 1.6% and 4% per annum.”

- 14.2 To complete the picture there were over the same period two serious stock market crashes.
- 14.3 Each of the experts called before us has done impressive research into the history of this project and all the surrounding economic circumstances. Not least was Mr Macleod who was called by the Government. He had been assisted in his research by a team from Deutsche Bank. In particular it was his opinion that an IRR of 15% no longer represents the lower limit of the band of reasonable remuneration. He sought to demonstrate this by pointing out that the CAPM for this project would now be less than 15%. His evidence is that the reasonable return would now be expressed as an IRR of between 12% and 14% but calculates on current traffic projections that over the life of the 30 year franchise an IRR of 13.82% would be achieved assuming no change in the nominal tolls between 2003 and the end of the franchise.
- 14.4 A CAPM is usually a means of calculating the cost of capital. In other words it is a method used to determine what return an investor should look for before he invests in a specific project. A CAPM is a ‘snapshot’ of the cost of capital at the time of the calculation and only relates to the cost of capital at that time. It is not of any fixed duration. Neither does it factor in any future financial assumptions nor any projection of traffic levels.

- 14.5 Further, in cross examination Mr Macleod accepted that the cost of capital at any one time could vary irrespective of the range of IRRs. Indeed a CAPM assesses the price or value of the capital invested by reference not to the projected return from the investment in question, but by reference to the notional projected return for the same amount of capital invested in the stock market over time.
- 14.6 It is clear from the evidence that to compare a CAPM calculation with an IRR is not comparing like with like and this was also demonstrated in the evidence of Mr Best who was called on behalf of the Government.
- 14.7 In considering whether the economic down turn or changes since 1997 are "material" within the meaning of section 55(4)(a) of the Ordinance it is relevant to put these changes into the context of the life of the project. First, that there is a possibility (no more) that based on the Government's forecast the GDP for 2004 will be positive. Further, that in spite of the unprecedented down turn, the CPI for 2003 was still 28% higher when compared to that in 1992 and that the CPI for 2003 was almost exactly the same as that for 1995. Similarly, reference is made to the increase in the Hang Seng Index since the beginning of the project. In spite of crashes in August 1998 when it was 6,545 and in September 2001 when it was 8,894, in December 2003 the level had risen to 12,576. Further, at the end of 2003 the index stood at 12,240 whereas at the end of 1995 it was 10,073.
- 14.8 Even the GDP for 2003 was slightly higher than in 1996 and substantially higher than in 1995.
- 14.9 We note that the dramatic growth in the Hong Kong economy between the beginning of the project and the 1997 Arbitration was not the subject of submission by either party to increase the Company's remuneration through tolls to any greater extent than was necessary to maintain the projected IRR.

Conclusions

What is a reasonable level of remuneration?

- 15.1 In deciding on the evidence before us what level of remuneration is now reasonable but not excessive and whether such level has been, is being or will be achieved or maintained

the Ordinance requires that we have regard (inter alia) to material changes in the economic circumstances of Hong Kong since 1 January 1998.

- 15.2 The common ground between the parties that the appropriate bench mark for assessing the range of reasonable remuneration is an IRR on equity after tax over the life of the project makes it necessary for this Tribunal to weigh against the undoubted and serious changes in the economy since 1998 those changes which have taken place since the commencement of the project. It is in this context that we must judge the materiality of the changes since the 1997 Arbitration.
- 15.3 We have drawn this comparison in paragraphs 14.7 to 14.9 above. We could add to its weight by relying upon Government forecasts which now indicate a possibility that the severity of the down turn is abating. However, we prefer not to take account of this evidence at this stage.
- 15.4 After a careful consideration of all the evidence before us our conclusion is that the changes in the economic conditions of Hong Kong since the tolls were last determined are not "material". These changes when set against the known changes which have occurred since the project began are not sufficient to affect the overall level of reasonable but not excessive remuneration determined over the life of the franchise.
- 15.5 Further, considering the other "regards" in section 55(4) of the Ordinance there is no evidence before us which persuades us that the range of reasonable but not excessive remuneration expressed as an IRR on equity after tax over the life of the franchise is other than that decided in the 1997 Award.
- 15.6 Whereas we can imagine some drastic and prolonged change in economic circumstances during the lifetime of the project which would require a review it is neither in the interests of the parties nor the public if tolls are continually reviewed and adjusted during less than material fluctuations in the economy over the 30 year franchise. This we apprehend is the true effect of the Ordinance.
- 15.7 Our conclusion is, therefore, that the level of remuneration for the Company which is reasonable but not excessive is an IRR on equity after tax over the life of the franchise of between 15% and 17%. It remains therefore as was decided in the 1997 Award.

Is this level of remuneration being maintained?

- 16.1 The agreement between the financial experts shows that in the absence of a toll increase the level of remuneration will fall below the range of 15%. As can be seen from scenario A the forecast is that at the end of the franchise an IRR of only 13.64% will be achieved.
- 16.2 Further, this agreement demonstrates that the forecast accumulated net profits and forecast accumulated dividends at the end of the franchise period in the absence of a toll increase will both fall well below the adverse case projections in the information memorandum. The estimated accumulated profits and dividends at the end of the franchise period are each HK\$6,434,337,000 whereas the above Adverse Projections were each HK\$ 8,111,901,000.
- 16.3 If a reasonable but not excessive level of remuneration is to be maintained a toll increase is necessary.

What toll increase is necessary?

- 17.1 In assessing what increase in tolls are necessary we adopt as correct the approach adopted in the 1997 Arbitration. We therefore seek to award such increase as will restore and maintain the Company's remuneration to the IRR which is at the lower level of the band or range of reasonableness (about 15%).
- 17.2 Mr Boyd for the Government suggested in argument that it was unfair to users of the tunnel to have to pay increased tolls at a time of unprecedented deflation. Whereas we seek to award only such increase as is necessary, it is pertinent to point out that the Ordinance looks to the reasonableness of the remuneration of the Company which made the investment rather than the reasonableness of tolls in the general sense. Also, that the EHT tolls bear favourable comparison with those of the other harbour tunnels.
- 17.3 Having considered the various options put before us we conclude it appropriate and necessary to award a HK\$10 increase for private cars, electrically powered passenger vehicles and taxis with corresponding increases in respect of other vehicles as agreed by the parties and embodied in Annex A to the Final Interim Award – these increases to take

effect on 1 May 2005^o. In making this Award we anticipate that it may be necessary for a further similar increase in about 5 years.

Costs

18.1 As invited by the parties at the end of the hearing we reserve the question of costs. Failing possible agreement upon the costs between the parties in the light of this Award further submissions may be made.



Kenneth Rokison QC



Barry Mortimer QC

ANNEX B

ANNEX TO THE REASONS FOR AWARD

RELEVANT PROVISIONS OF
THE EASTERN HARBOUR CROSSING ORDINANCE
(CHAPTER 215)

...

4. The road franchise

- (1) Subject to this Ordinance, the Road Company shall have the franchise to –
 - (a) construct the immersed tube;
 - (b) construct all other works comprised in the project, other than the railway works;
 - (c) keep in place the works referred to in paragraphs (a) and (b), (other than works which are, under the project agreement, to be handed over to the Government) for the purpose specified in paragraph (d) and for the period specified in subsection (2); and
 - (d) operate the road tunnel area for the public, upon payment to the Road Company of the tolls specified in Part IX and the Schedule, for the period specified in subsection (2).
- (2) The period referred to in subsection (1) is the period that commences at the start of construction and ends on the thirtieth anniversary of the start of construction.

...13. The Government's equity in the Road Company

- (1) The Government shall be entitled –

(b) upon the opening for use by the public of a trunk road connexion from the vicinity of Shatin passing through a tunnel under or in the vicinity of Tate's Cairn to East Kowloon, to hold an additional 2.5 per cent of the shares.

(2) Within 14 days after the occurrence of a relevant event the Road Company shall procure the transfer of shares to the Government of sufficient shares to ensure that, upon such transfer, the government holds the shares which, immediately after that event, it is by subsection (1) entitled to hold ...

...15. Construction works to be carried out at the expense of the Road Company

(1) The Road Company shall, at its own expense, carry out the construction works in accordance with the project agreement and this Ordinance and within the period specified in section 17
.....

...17. Period within which works must be completed

(1) Subject to this section, the Road Company shall complete the construction works within 42 months from the start of construction or within such extended period as may be approved by the Governor in Council ...

...37. Repair of immersed tube and road works

(1) The Road Company shall keep in a state of repair until the expiration or revocation of the franchise granted by section 4(1) and to the satisfaction of the Director –

(a) the fabric of the immersed tube including all sealing elements and the common wall separating the road conduits from the railway conduits and the rock armouring; and

- (b) all works, whether within or outside the immersed tube, which it has the right to keep in place under section 4(1)(c)

...44. **Road operating date**

- (1) The road tunnel and its approach roads shall be opened to the use of the public on a date determined by the Commissioner and notified by him in the Gazette ...

...45. **Road Company to provide tunnel facilities**

Subject to this Ordinance, on and after the road operating date and, throughout the continuance under section 4(2) of the franchise granted by that section, the Road Company shall provide and operate, to the satisfaction of the Commissioner, adequate, efficient and safe facilities for the passage of motor vehicles through the road tunnel.

46. **Right to use of tunnel facilities**

Subject to this Ordinance -

- (a) the road tunnel shall be used for the passage of motor vehicles upon payment of the tolls specified in the Schedule; and
- (b) the Road Company shall not without reasonable grounds prevent or refuse the use of the road tunnel for such purpose.

47. **Control and safety of tunnel traffic**

- (1) The Road Company shall, to the satisfaction of the Commissioner, provide personnel and facilities for the control and safety of motor vehicles and persons in the road tunnel area.

- (2) The provision of such personnel and facilities shall be at the expense of the Road Company.

...51. **Advertising in road tunnel area**

- (1) The Road Company may, with the prior approval of the Commissioner in writing, use, or permit the use of any part of the road tunnel area for advertising purposes on such conditions as to charges and otherwise as may be determined by the Company

...

PART IX

COLLECTION OF TOLLS

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 rolls or future right 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.

Implications of Arbitrators' Award on EHC Toll Increase

Financial Implications

Holding a 7.5% stake in NHKTC, the Government will receive an additional dividend of about \$10 million in 2005/06 as a result of the toll increase.

Economic Implications

2. 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.

Traffic Implications

3. According to Transport Department's forecast, the relevant toll increase will lead to a reduction of traffic throughput at EHC by about 17% (a drop of 12,500 vehicles per day from the current throughput of 73,500). Traffic throughput at WHC will increase by 21% (an increase of 8,400 vehicles per day from the current throughput of 39,200), and the throughput at CHT will increase by about 3% (an increase of 3,800 vehicles per day from the current throughput of 121,700).