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Paper for the House Committee

**Report of the Subcommittee on Tate's Cairn Tunnel Ordinance
(Amendment of Schedule) Notice 2010**

Purpose

This paper reports on the deliberations of the Subcommittee on Tate's Cairn Tunnel Ordinance (Amendment of Schedule) Notice 2010.

Background

2. Tate's Cairn Tunnel Company Limited (TCTC) was granted a franchise under the Tate's Cairn Tunnel Ordinance (Cap. 393) (TCTO) to build and operate Tate's Cairn Tunnel (TCT) for 30 years starting from July 1988, inclusive of the construction period. The tunnel was opened to traffic in June 1991. The franchise granted to TCTC would expire in July 2018.

3. Section 36(3) of TCTO provides that the tolls specified in the Schedule to TCTO may be varied by agreement between the Chief Executive-in-Council (CE-in-Council) and TCTC. If an agreement cannot be reached, either party may resort to arbitration. TCTO has not set out the criteria for determining toll adjustments. It only stipulates that if the matter is submitted for arbitration, the arbitrator shall be guided by the need to ensure that TCTC is reasonably but not excessively remunerated for its obligations under TCTO. A copy of section 36 of TCTO is at **Appendix I**.

4. The Administration informed the Panel on Transport on 25 April 2008 that, in considering TCTC's Base Toll Proposal in 1988, the Administration had agreed to the initial tolls but had given no undertaking in respect of subsequent toll adjustments. Neither was there any agreement on a guaranteed rate of return. However, based on the Base Toll Proposal which accompanied TCTC's franchise bid, the Administration noted that TCTC expected to achieve an Internal Rate of

Return (IRR) of 13.02% over the 30-year franchise period. The Administration has also advised that TCTC's target IRR is the lowest among the four Build-Operate-Transfer (BOT) tunnels¹ in Hong Kong. Route 3 (Country Park Section) aims at a target IRR of 15.18%, while the targets for the Eastern Harbour Crossing and the Western Harbour Crossing are both 16.5%.

Legislative Council's power to amend the toll levels of Tate's Cairn Tunnel

5. Before seeking the approval of CE-in-Council for TCTC's applications for toll increases, the Administration would seek the views of the Panel on Transport and the Transport Advisory Committee (TAC). After an agreement on revision to toll levels is reached between CE-in-Council and TCTC, the Commissioner for Transport (C for T) shall amend the Schedule to TCTO by notice in the Gazette as soon as practicable. Such a notice is a piece of subsidiary legislation subject to the negative vetting procedure of the Legislative Council (LegCo). The power of C for T to make the notice does not cover the determination of toll levels and the timing for implementation of the new tolls. According to section 34(2) of the Interpretation and General Clauses Ordinance (Cap. 1), the power of LegCo to amend subsidiary legislation has to be consistent with the power to make such subsidiary legislation. In other words, there is little room for LegCo to amend such notices other than making minor technical amendments. Similarly, LegCo cannot repeal the notice as the exercise of such power is also inconsistent with the power of C for T to make such notice.

Toll increases for Tate's Cairn Tunnel

6. So far, TCT has had five toll increases that came into effect in May 1995, November 1996, January 2000, August 2005, and November 2008 respectively.

7. TCTC applied for its sixth toll increases in July 2009, proposing a \$1 toll increase for each vehicle category. The Panel on Transport was consulted on TCTC's application at its meeting on 15 December 2009. Having regard to the views expressed by the Panel and following further consultations with the Administration, TCTC submitted a revised application in January 2010. While maintaining its earlier proposal of a \$1 toll increase for most vehicle categories, TCTC proposes not to increase the toll for public light buses (and to provide \$1 promotional discount for empty taxis between midnight and 6 a.m). The revised toll increases range from 0% to 9% for different vehicle types. A comparison of the existing and new tolls is set out at **Appendix II**.

¹ BOT tunnels are owned and managed by franchisees over a franchise period, and their operations are governed by their respective legislation.

Tate's Cairn Tunnel Ordinance (Amendment of Schedule) Notice 2010

8. At the meeting of the Executive Council on 11 May 2010, the Council advised and CE ordered that TCTC's application for toll increases should be approved. Taking into account TAC's concerns about public sentiment on the proposed toll increases, it was also decided that the new tolls should take effect from 25 December 2010. The Tate's Cairn Tunnel Ordinance (Amendment of Schedule) Notice 2010 (L.N. 67) reflecting the increase of the tolls payable under TCTO was gazetted on 20 May 2010 and tabled in LegCo on 26 May 2010.

9. The scrutiny period of the Notice has been extended to 14 July 2010 by resolution of the Council on 23 June 2010.

The Subcommittee

10. At the meeting of the House Committee on 28 May 2010, Members decided to form a subcommittee to examine the Tate's Cairn Tunnel Ordinance (Amendment of Schedule) Notice 2010. The Subcommittee held two meetings on 8 and 15 June 2010 under the chairmanship of Hon Miriam LAU. The membership list of the Subcommittee is at **Appendix III**.

Deliberations of the Subcommittee

11. The Subcommittee notes that there is little room for LegCo to amend the Tate's Cairn Tunnel Ordinance (Amendment of Schedule) Notice 2010 other than making minor technical amendments, and that LegCo cannot repeal the Notice.

12. Subcommittee members have pointed out that TCTC's financial position is already gradually improving. As at the end of June 2008, TCTC has accumulated profit of \$103 million. Members have also expressed concern that the proposed toll increases may trigger a spate of fee increases by other public utilities. The Subcommittee considers that the Administration should request TCTC to offer additional promotional discounts in order to alleviate the impact arising from the proposed toll increases. In particular, the Subcommittee has requested TCTC not to increase tolls for public buses lest the toll increase may add to the pressure for bus fare increase and would thus impose a greater financial burden on the commuting public.

13. The Administration has pointed out that TCT's tolls take up less than 1% of the operational cost of franchised bus companies, and whether promotional discounts could be provided for public buses is a commercial decision of TCTC.

In response to the Subcommittee's request, TCTC has advised that, after consideration of its financial position, it would not be able to provide promotional discounts for public buses.

14. Some members maintain the view that public buses should be exempted from the proposed toll increases as the annual income thus foregone for TCTC is estimated to be only \$1.7 million, which would be insignificant to TCTC. However, the exemption would relieve the fare increase pressure for the franchised bus companies. TCTC has advised that it has carefully weighed TCTC's financial position against that of the bus companies in coming up with the present decision. TCTC has pointed out that regarding the proposed toll increases, while the average increase rate is 5.9%, the increase rates for double-decker and single-decker buses are only 3% and 4% respectively. TCTC has emphasized that the proposed toll increases have been minimized after taking public interest into due consideration.

15. Subcommittee members have also expressed concern about the traffic impact of the proposed toll increases on Lion Rock Tunnel (LRT) as the toll disparity between LRT and TCT would be widened as a result. The Administration has advised that TCTC's estimate is that, based on its revised proposed toll increases, about 500 vehicles would be diverted to LRT and only 100 vehicles would be diverted to each of Tai Po Road and Route 8 (between Cheung Sha Wan and Shatin) per day. Moreover, based on past experience, TCT's traffic flow would be reduced only in the first two months after tolls were increased, and its traffic flow would afterwards resume to the normal level. The Administration's assessment is that the traffic impact of the proposed toll increases on LRT would not be significant.

16. Some members have also expressed concern about the impact of the proposed toll increases on the toll rate of Route 8, as the latter is determined by taking into consideration various factors such as tolls of alternative routes (including TCT). The Administration has confirmed that at present it has no plan to adjust the toll rate of Route 8 or LRT.

17. Subcommittee members are of the view that as in the case of other BOT tunnels, given the existing franchise arrangement and toll adjustment mechanism for TCT, there is little the Administration or LegCo can do to prevent substantial or frequent toll increases in future. It is therefore imperative for the Administration to iron out effective measures such as extending TCTC's franchise or buying back TCT at a reasonable price. In this connection, members note that the Government has commissioned a consultancy study in November 2008 to identify possible measures to improve traffic distribution among the three road harbour crossings, two of which are operating under BOT franchises. The Administration has advised that the consultants are expected to submit their report around mid year. The Administration has undertaken to consult the Panel concerned on the relevant

recommendations.

18. The Administration and the Subcommittee will not move amendments to the Tate's Cairn Tunnel Ordinance (Amendment of Schedule) Notice 2010.

Advice sought

19. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 1
Legislative Council Secretariat
30 June 2010

Appendix I

Chapter: 393	Title: TATE'S CAIRN TUNNEL ORDINANCE	Gazette Number:
Section: 36	Heading: Company to charge approved tolls for use of tunnel	Version Date: 30/06/1997

PART VIII

COLLECTION OF TOLLS

- (1) Subject to this Ordinance, the Company may demand and collect tolls in respect of the passage of motor vehicles through the 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 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 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 Company of its obligations, or the exercise of its rights, under this Ordinance is reasonably but not excessively remunerative to the 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 Company made under section 53;
 - (c) any material change in any other circumstances affecting the exercise by the Company of its rights under the franchise;
 - (d) the effect of the introduction of, or alteration in, any tax or levy imposed on the use of the tunnel;
 - (e) the project agreement; and
 - (f) any other relevant matter.

(5) In determining for the purposes of subsection (4) whether the carrying out by the Company of its obligations, or the exercise of its rights has been reasonably but not excessively remunerative to the Company, the arbitrators shall, if there has been any failure by a guarantor under the further guarantee agreement to comply with the terms of that agreement, deem the Company to be in the financial position it would have been in had the further guarantee agreement been honoured, and subject to this subsection nothing in that subsection shall be deemed to render such failure a relevant matter which the arbitrators may take into consideration.

(6) Where under subsection (3)-

(a) the Governor in Council and the Company agree to a variation of the tolls; or

(b) in an award pursuant to a 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.

(7) The Commissioner shall, by notice in the Gazette, as soon as is practicable after such agreement or award as is referred to in subsection (6), amend the Schedule.

(Enacted 1988)

Tate's Cairn Tunnel Tolls

Category	Vehicle	Toll (\$) (as from 25 December 2010)	Existing Toll (\$)	Percentage Increase
1.	Motorcycles, motor tricycles	12	11	9%
2.	Private cars, electrically powered passenger vehicles, taxis	15	14	7%
3.	Public light buses	21	21	N/A
4.	Private light buses	22	21	5%
5.	Light goods vehicles and special purpose vehicles of a permitted gross vehicle weight not exceeding 5.5 tonnes	22	21	5%
6.	Medium goods vehicles and special purpose vehicles of a permitted gross vehicle weight of or exceeding 5.5 tonnes but not exceeding 24 tonnes	26	25	4%
7.	Heavy goods vehicles and special purpose vehicles of a permitted gross vehicle weight of or exceeding 24 tonnes but not exceeding 38 tonnes	26	25	4%
8.	Public and private single-decker buses	29	28	4%
9.	Public and private double-decker buses	32	31	3%
10.	Each additional axle in excess of 2	19	18	6%

**Subcommittee on Tate's Cairn Tunnel Ordinance
(Amendment of Schedule) Notice 2010**

Membership list

Chairman Hon Miriam LAU Kin-ye, GBS, JP

Members Hon Andrew CHENG Kar-foo
Hon WONG Kwok-hing, MH
Hon CHEUNG Hok-ming, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon IP Wai-ming, MH

(Total: 6 Members)

Clerk Ms Joanne MAK

Legal Adviser Mr Stephen LAM

Date 8 June 2010