

立法會
Legislative Council

LC Paper No. LS68/10-11

Paper for the Subcommittee on Matters Relating to Railways

**Comments on the Effect of a Recent Court of First Instance's Decision
on the Scrutiny of a Funding Application for
Shatin and Central Link by the Administration**

At the meeting of the Subcommittee on Matters relating to Railways on 6 May 2011, the Administration informed Members about a proposed funding application in relation to some of the works of the Shatin to Central Link (SCL). Members requested advice on whether a recent decision of the Court of First Instance (CFI) on the legality of the environmental impact assessment reports (EIAR) for the Hong Kong-Zhuhai-Macau bridge (the Project) may affect the scrutiny of the funding application.

The proposed funding application

2. The details of the proposed funding application are set out in a paper of the Transport and Housing Bureau issued in May 2011 with a draft paper to be submitted to the Public Works Subcommittee (PWSC) of Finance Committee at the annex (LC Paper No. CB(1)2069/10-11(01)) (the Paper). According to the Paper, as parts of SCL overlap with other large-scale infrastructure projects, the Administration needs to implement under these projects some protection works or advance works of the SCL to match the timetables of these large-scale projects, reduce the extent of works site and impact to the traffic, lower the construction costs and shorten the construction duration, and minimise the nuisance to the public during construction.¹ The scope of the proposed works for which the Administration intends to seek funding approval² (the Proposed Works) from the Finance Committee comprises –

- (a) construction of a concrete tunnel box of about 160 metres long to enable construction of required tunnel works in future;

¹ Paragraph 4 of the Paper.

² Paragraph 5 of the Paper.

- (b) construction of a temporary seawall of about 270 metres long and temporary reclamation of about 0.4 hectare, and their subsequent removal;
- (c) dredging in an area of about 1 hectare at the southeast corner of the Causeway Bay Typhoon Shelter; and
- (d) removal of the jetty of the Royal Hong Kong Yacht Club, construction of a temporary jetty and the subsequent reinstatement of the jetty after completion of the proposed works.

The CFI decision

3. The CFI decision concerned is *CHU Yee Wah v Director of Environmental Protection*, which was handed down on 18 April 2011.³ The applicant in that case sought to review the decisions of the Director of Environmental Protection (the Director) to approve the EIARs for the Project and to grant environmental permits to construct and operate the Project.⁴ The applicant argued that the air quality conditions without the Project in place (also known as the baseline conditions) were not presented in the EIARs. The absence of such analysis meant that it was not possible to ascertain the environmental footprint of the projects and the residual impacts of the projects to the environment.⁵ CFI has ruled in favour of the applicant and concluded that the Director has no power to approve the EIARs nor has the power to grant the relevant environmental permits. CFI quashed the decisions of the Director.

4. In arriving at the decision, CFI noted that the purpose of the Environmental Impact Assessment Ordinance (Cap. 499) (EIAO) aims to protect the environment by assessing the extent to which a project will have an environmental impact. The adverse impact is the change in the environment from the position that would prevail if the project were not implemented.⁶ If environmental protection is to be meaningful, EIAO must aim to minimise the environmental impact of any project and, in the case of air quality, by minimising the amount of pollutants released into the atmosphere.⁷ Reading the provisions of TM and in the light of the purpose of EIAO, the court concluded that the provisions of TM do require

³ HCAL9/2010, per Hon Mr Justice Fok.

⁴ *Ibid*, paragraphs 3 and 4.

⁵ *Ibid*, paragraphs 53 and 56.

⁶ *Ibid*, paragraph 70.

⁷ *Ibid*, paragraph 75.

a person proposing a designated project to set out a prediction of the environmental conditions that would be expected in the absence of the proposed project.⁸

Environmental Impact Assessment Report

5. Under section 9(1) of the EIAO, a person shall not construct or operate a designated project⁹ (which includes the construction of railway and its stations) without an environmental permit. EIAR is the prerequisite of the granting of an environmental permit. A person who contravenes the requirements of section 9(1) commits an offence and is liable on a first conviction on indictment to a fine of \$2 million and to imprisonment for 6 months and to a fine \$100,000 of and to imprisonment for 6 months on a first summary conviction.

6. Section 5 of EIAO provides that before the planning of a designated project, a person shall apply to the Director for an environmental study brief (SB) to proceed with an environmental impact assessment study for the project. The person then needs to prepare an EIAR in accordance with the SB and a technical memorandum (TM).

7. TM is the document issued by the Secretary for Environment under section 16 of EIAO. TM is not subsidiary legislation.¹⁰ However, it is subject to the negative vetting procedure of the Legislative Council.¹¹ TM is a document which applies generally to all designated projects whereas SB is project specific which sets out the particular requirements of the EIAR to be prepared.¹²

8. Upon submission of the EIAR, the Director shall decide whether the EIAR has met the requirements of the SB and TM. If the EIAR has met the requirements of the SB and TM, the EIAR must be made available for public inspection. The EIAR may also be submitted to the Advisory Council on the Environment for comments. At the expiry of the public inspection, the Director shall decide whether the EIAR should be approved, having taken into account the views expressed during the public inspection or by the Advisory Council, if any.

⁸ Ibid, at paragraph 78.

⁹ "Designated project" means a project listed in Schedules 2 or 3 to EIAO.

¹⁰ Section 16(12) EIAO.

¹¹ Section 16(5) to (10) EIAO.

¹² Paragraphs 45 and 46, note 3.

9. Under section 3 of EIAO, EIAO binds the Government but EIAO does not have effect to permit proceedings to be taken against the Government or a public officer in the service of the Government. However, if a public officer, in carrying out his duties in the service of the Government, has done or has omitted to do something in contravention of EIAO, the Director shall, if the act or omission is not immediately terminated to his satisfaction, report the matter to the Chief Secretary for Administration who shall ensure that the best practicable steps are taken to stop the contravention or avoid the recurrence and to remedy any environmental damage that may have occurred.

10. The Court of Final Appeal (CFA) has held that although SB and TM are not legislative instruments, they are expressed to impose duties and to prescribe procedures.¹³ To ascertain whether an EIAR meets the requirements of SB and TM, their provisions must be properly understood. The correct definition of what SB and TM require is a question of law for the court. The Ordinance's purpose of protecting the environment must inform the meaning attributed to SB and TM.

11. CFA has also held that if the EIAR in fact meet the requirements of SB and TM, the Director's decision to approve the report is valid. If the EIAR has not in fact meet those requirements, the Director has no power to approve the report. It is immaterial whether the Director thinks that the requirements have been met.¹⁴

Comments

12. Members may wish to note that according to the draft paper for PWSC annexed to the Paper, the Proposed Works are designated projects and an environmental permit is required for their construction. According to the Administration, the EIAR for the Proposed Works was approved by the Director on 25 February 2011. It is a conclusion of the EIAR that the environmental impacts of the Proposed Works could be controlled to within the criteria under EIAO.¹⁵

13. CFI in *CHU Yee Wah* considered the relevant principles of interpreting the provisions in TM, which applies to all designated projects. CFI held that an analysis in an EIAR on baseline conditions is required according to those principles. Unless and until *CHU Yee Wah* is overruled

¹³ *Shiu Wing Steel Limited v Director of Environmental Protection & another* (2006) 9 HKCFAR 478, at paragraphs 23-25 on pages 495 to 496.

¹⁴ *Ibid*, paragraph 29, on page 499.

¹⁵ Paragraph 20 of the draft PWSC paper.

by the appellate court, the CFI's decision may affect the EIAR for the Proposed Works.

14. The approval of the EIAR for the Proposed Works was given on 25 February 2011. The Paper was issued in May 2011, which is after the CFI's handing down of the decision in *CHU Yee Wah* on 18 April 2011. However, the Paper does not address whether the CFI's decision in *CHU Yee Wah* may affect the EIAR for the Proposed Works. In particular, there is no information in the Paper as to –

- (a) whether an analysis of the baseline conditions is required for the EIAR in the light of *CHU Yee Wah*. If such an analysis is not required, what is the justification for not requiring such an analysis;
- (b) if an analysis of the baseline conditions is required, whether the EIAR contains any such analysis; and
- (c) if the EIAR does not contain an analysis of the baseline conditions, whether this would affect the legality of the approval given by the Director.

15. As CFA has observed, if the EIAR for the Proposed Works does not meet the requirements of SB and TM, the Director has no power to approve the EIAR. This may affect the validity of the environmental permit for the Proposed Works, which is necessary for constructing or operating a designated project under EIAO. In scrutinising the proposed funding application, Members may wish to consider whether further information from the Administration is necessary.

16. Members are invited to note the above information.

Prepared by

Kelvin Ka-yun LEE
Assistant Legal Adviser
Legislative Council Secretariat
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