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LC Paper No. PWSC33/14-15(01)

18 November 2014

Members of the Public Works Subcommittee

Dear colleagues,

**My intended ruling on Hon SIN Chung-kai's proposal
for rearranging the sequence of items on the agenda
of a meeting of the Public Works Subcommittee
per his letter of 21 October 2014**

At the meeting of the Public Works Subcommittee ("PWSC") on 29 October 2014, I informed members that, subject to the views of the Legal Adviser, the Administration and PWSC members on whether I should depart from the established practice of PWSC to exercise my power to rearrange the order of the items on the agenda of a PWSC meeting, I intended to make a ruling on the above proposal of Hon SIN Chung-kai.

After the meeting, I received responses and advice from the aforementioned parties. The advice of the Legal Adviser and the response from the Administration were circulated to colleagues on 3 and 5 November respectively. I thank colleagues for responding to two questionnaires that I directed the Clerk to issue on the subject. 40 and 43 members of PWSC responded to the First Questionnaire and the Second Questionnaire respectively. Having studied the views collected, I came up with a draft ruling (**enclosed**) on Hon SIN Chung-kai's proposal. In gist, I concluded that I shall accede to the request of Mr SIN to rearrange the sequence of items on the PWSC agenda per his letter of 21 October 2014.

When I was finalizing the draft ruling at around 1:15 pm on 11 November, the Clerk to PWSC forwarded to me a draft agenda from the Administration for the meeting on 19 November for my approval. The draft agenda was sent to the Clerk 20 minutes before. On the draft agenda, there were only 7 items, all from the 20 items on the agenda of the previous meeting. The other 13 items originally on the agenda were no longer there. Of the 12 items set out in Hon SIN Chung-kai's letter, only one was among the 7 items. The item was "PWSC(2014-15)32 - 756CL - Ma On Shan development - roads, drainage and sewerage works at Whitehead and Lok Wo Sha, phase 2" ("the item on the Ma On Shan project"), which was placed second on the Administration's draft agenda.

Since only one of the 12 items proposed by Hon SIN Chung-kai to precede the item "PWSC(2014-15)11 - 768CL- Strategic studies for artificial islands in the central waters" ("the item on artificial islands") for the consideration of PWSC was on the draft agenda, my draft ruling was rendered irrelevant.

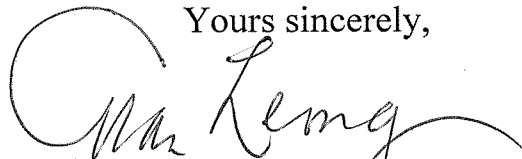
I asked the Administration on the same day whether it had withdrawn the other 13 items. The Administration provided a written reply, circulated to colleagues on 12 November, in which it explained that the arrangement to propose only 7 items on the agenda was made having regard to the progress of examination of the items by PWSC in the recent months. The Administration considered it unlikely that PWSC could examine 20 works items at the two-hour session on 19 November. In my view, the act of the Administration to take out the 13 livelihood-related items from the agenda was downright "executive dictatorship" and the purpose could only be to sabotage the ruling which I was about to hand down and not otherwise.

I did consider whether I should place the item on the Ma On Shan project before the item on artificial islands on the agenda. The Legal Adviser reminded me of paragraph 11 of the PWSC Procedure, which sets out that - "Any items on the agenda scheduled for discussion but not dealt with at the meeting will be carried over to the next meeting or, if the Chairman decides, to a special meeting." He advised that since the Subcommittee's deliberation on the item on

artificial islands had already started at a previous meeting, members expected the deliberation to continue at the next meeting. And, I, as the Chairman, had the responsibility to carry forward unfinished business to the next meeting. He opined that I should pay heed to paragraph 11 and let the item on artificial islands be discussed prior to other items at the next meeting. I took his advice, for which I am grateful. The agenda approved by me was circulated to colleagues on 12 November.

If the Administration had not taken out the 13 items from the agenda for the meeting to be held on 19 November, I would have issued the "draft" ruling and the same would have been implemented, subject only to the Legal Adviser's advice recited in the paragraph above. Though the draft ruling has now become inapplicable, I consider it useful to share it with you all to make clear my stance on the subject matter. Your feedback on this matter is always welcome.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Alan Leong', with a large, stylized initial 'A'.

(Alan LEONG)

Chairman, Public Works Subcommittee

Encl.

c.c. Members of the Finance Committee

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CHAIRMAN'S RULING ON HON. SIN CHUNG-KAI'S PROPOSAL FOR REARRANGING THE SEQUENCE OF ITEMS ON PWSC AGENDA PER HIS LETTER OF 21 OCTOBER 2014

Facts and Background

1. By his letter dated 21 October 2014, Hon Sin Chung Kai wanted me, as Chairman, to consider rearranging the sequence of the 20 outstanding items now pending consideration by the Public Works Subcommittee ("PWSC"), so that PWSC would consider and make recommendations to the Finance Committee on 12 of such items in the order he had proposed before returning to deliberate on the remainder.
2. By a further letter dated 31 October 2014, Hon Sin Chung Kai further elaborated on his reasons for asking me to make the rearrangement as he had requested.
3. I shall summarize below the reasons relied on by Hon Sin Chung Kai. They were:
 - (1) Without the proposed rearrangement, before PWSC could reach the items he named, it must first have completed dealing with one or all of some highly controversial items presently listed before them, including, but not limited to,
 - (a) PWSC(2014-15)11: Strategic studies for artificial islands in the Central Waters;
 - (b) PWSC(2014-15)33: Liantang/Heung Yuen Wai Boundary Control Point and associated works – site formation and infrastructure works; and
 - (c) PWSC (2014-15)34: Planning and engineering study on Sunny Bay reclamation.

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- (2) Items named under (1) above are major construction projects involving expenditure of large sums of public moneys and the consequences of premature approvals are not what Hong Kong public should or could bear.
- (3) From what the Administration has disclosed to date in respect of these major construction projects, Hon Sin Chung Kai does not think PWSC members could or should be persuaded to approve them, and expects procrastinated deliberations when PWSC will be considering them.
- (4) Items Hon Sin Chung Kai wants to be considered first include 5 schools, a community hall, a sports centre, 3 sewage treatment works, a government complex, a waste electrical and electronic equipment treatment and recycling facility, and refitting of noise barriers.
- (5) Those items listed under (4) are uncontroversial and have received general support from the local communities. And, they are long-awaited items that could benefit the public at large, and bring immediate improvements to livelihood of the targeted beneficiaries concerned.
- (6) It would be blatantly against public interest to delay those items under (4) by postponing them to after the highly controversial items under (1).

Follow-up actions taken on Hon Sin Chung Kai's letter

Meeting of PWSC on 22 October, 2014

- 4. At the PWSC Meeting held on 22 October, 2014, Hon Sin Chung Kai seized of the opportunity during discussions of the agenda item “**Overview of potential submissions to Public Works Subcommittee**” to inform members about the letter he had written dated the day before, which provoked extensive

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discussions, and indeed debates, amongst members about his proposal.

5. During such discussions, I informed members that I believed I had the necessary power to make the proposed re-arrangement, but if I did exercise such a power it would mean a departure from the established practice of PWSC in respecting the Administration's proposed order of agenda items. I, therefore, indicated that I would first seek the advice of the Legal Adviser before I further considered the request.

Advice from Legislative Council's Legal Adviser

6. On 31 October, 2014, the Council's Legal Adviser responded to my request for advice and provided me with a letter setting out his advice on whether I had the power to rearrange items on the agenda of PWSC.
7. I shall quote relevant parts of the learned advice of the Council's Legal Adviser as follows (with emphases supplied by me):
 - (1) “... despite the lack of specific provisions in the Rules of Procedure and PWSC Procedure on the PWSC Chairman's power of agenda setting (including the power to re-arrange the order of agenda items), **this power should come within those reasonably incidental to the Chairman's power to convene meetings under Paragraph 10 of the PWSC Procedure, his power to direct the Clerk to give notice of meetings under Paragraph 11 of the PWSC Procedure and his power to chair a meeting under Paragraph 12 of the PWSC Procedure.**”
 - (2) “Nevertheless, it would be advisable for you to follow the established practice to **refer the members'**

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requests for re-arrangement of the order of the agenda items on the agenda of PWSC to the Administration for its consideration.”

- (3) “Subject to the Administration’s response, you may wish **to follow the established practice of respecting the Administration’s view or seek PWSC’s view** before you decide on this matter.”
- (4) “How you should exercise your power would depend on the particular circumstances of each case subject to the limitations that the exercise of **the chairman’s power would not be inconsistent with the constitutional principle in public finance that it is for the government to make the demand and for the legislature to grant.**”

- 8. I thank the Council’s Legal Adviser for his advice, and he should be glad to know that it had already been acted upon even before it was rendered.

The Administration’s response

- 9. Both during and immediately after the PWSC meeting on 22 October, 2014, I asked the Administration acting by Mr. Yeung Tak-keung, Deputy Secretary for Financial Services and the Treasury (Treasury)³, to respond to Hon Sin Chung Kai’s proposal before I would rule on it.
- 10. The requested response from the Administration came by a letter dated 5 November, 2014, relevant parts of which are either extracted therefrom or summarized (with emphases supplied by me) as follows:
 - (1) “It has been a long-standing practice adopted by both the executive and legislative authorities on the management of public finance for expenditure

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proposals to be proposed by the Government for the consideration of the LegCo. **The established practice is for the Chairman of the PWSC under the FC to adhere to the order of items proposed by the Government.”**

- (2) **“The arrangement fully demonstrates the mutual respect, co-operation as well as proper checks and balances in the relationship between the executive and legislative authorities.** Unilateral changes to the established practice would not be appropriate.”
- (3) When presented with a not dissimilar proposal made by a member of the Finance Committee (“FC”), **the FC Chairman decided at the FC meeting on 24 October, 2014 to maintain the original sequence** and “deliberate on the 17 outstanding items according to the original order proposed by the Government.”
- (4) “When considering the sequence of PWSC agenda items, the Government would have regard to a host of factors, including the importance, urgency, readiness and consultation progress of the relevant proposals. **The sequencing of PWSC agenda items is driven by practical considerations and a wish to seek the earliest deliberation of all the proposals.”**
- (5) “Priority will not necessarily be accorded on the basis of a particular policy portfolio a PWSC agenda item falls within. Upon giving notice to the PWSC, **the sequence of agenda items reflects the Government’s overall priorities attached to the proposals involved.** Unless in exceptional circumstances such as emergency relief or avoiding expiry of tender validity, the sequence of expenditure proposals will not normally be revised.”
- (6) “The 20 deferred PWSC items all are closely related to the livelihood and long-term development of the

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community. **Their current sequence largely follows the chronological order of the dates when the items were first submitted to the PWSC.”**

- (7) “In the light of the prolonged deliberations in the PWSC, the Government will keep under review the sequence and overall priority amongst the deferred and new items. ... **The 20 proposals have been delayed for six months on average. ... The dire consequences of further delays cannot be overstated.”**
- (8) “**The Government has no intention to alter the sequence of the agenda items at this juncture.”**

- 11. Upon request made by PWSC at its meeting on 29 October, 2014, the Administration supplied under LC Paper No.PWSC27/14-15(01) a list of the tendering positions of the 20 deferred items. In this regard, I note in particular Item 3 on the list, namely, “additional funding for Liantang/Heung Yuen Wai Boundary Control Point and associated works – site formation and infrastructure works”. In the Administration’s letter dated 5 November, 2014, it had this to say: “**The tender validity date for an important contract of this project will expire on 31 December 2014. If additional funding is not approved and the contract not awarded before the expiry of the tender validity, the Government may have to re-tender.”**

PWSC Members’ views

- 12. In order that I am fully assisted by opinions PWSC members may have on Hon Sin Chung Kai’s proposal, I directed the Clerk to PWSC to circulate to all members each of the following documents as soon as they were received, namely:
 - (1) Hon Sin Chung Kai’s letter dated 21 October, 2014;
 - (2) Hon Sin Chung Kai’s letter dated 31 October, 2014,

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- elaborating on justifications for his proposal;
- (3) Legal Advice from the Council's Legal Adviser dated 31 October, 2014; and
 - (4) The Administration's letter dated 5 November, 2014, signed by Mr. Yeung Tak-keung, for Secretary for Financial Services and Treasury.
13. The latest of deadlines for members to respond to the different circulations expired on 10 November, 2014.
14. Members' views have been helpful, and are summarized as follows (with emphases supplied by me):
- First Circulation:
- (1) Out of 45 members (with I excluded), 40 responded to the **First Questionnaire**, which aimed at ascertaining their views on Hon Sin Chung Kai's proposal. Out of the 40 responses, 21 supported Hon Sin Chung Kai's proposed rearrangement of the sequence of items; 18 did not support; and 1 expressed no view.
 - (2) Ir Dr Hon Lo Wai Kwok specifically made the point that **PWSC should discuss public works items in the nature of public works 「工程問題，工程解決」 and not allow political arguments and considerations to taint such discussions.**
 - (3) Hon Tony Tse queried Hon Sin Chung Kai's criteria for determining the order in which the 20 deferred items should be considered by PWSC by highlighting **the lack of objective criteria in deciding which items were more concerned with livelihood than others, or which items were less controversial than others.**
- Second Circulation:
- (4) By midnight of 10 November, 2014, 43 out of 45 members (with I excluded) responded to the **Second**

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Questionnaire, which aimed at ascertaining any further views they may have on whether I should exercise the power vested in me to rearrange the sequence of items on PWSC agenda, after they have seen the Legal Advice and the Administration's response.

- (5) Out of the 43 responses, 23 were for my exercising such power; 18 against and 2 expressed no views.
- (6) Members who supported my exercising such power had emphasized that
 - (a) The Chairman of PWSC was empowered by **paragraph 12 of the PWSC Procedure** to chair a meeting, which power must include rearranging items on the agenda;
 - (b) While recognizing that there is separation of powers between the Administration and the Legislature, and Hong Kong Government being executive-led, **it never meant that PWSC must always be dictated to by the Administration insofar as the order of items on the agenda was concerned**; and
 - (c) In the circumstances presently obtained, I should exercise such power so as to enable PWSC to consider and make recommendation to FC on such of the public works expenditure proposals presented by the Administration that addressed most pressing livelihood issues and were not controversial.
- (7) Members who were against my exercising such power had emphasized that
 - (a) In not adhering to the established practice of respecting the Administration's proposed order of agenda items, **I would be usurping the function of the Administration, and the**

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exercise of such power would be inconsistent with the constitutional principle in public finance that it was for the Administration to make the demand and for the legislature to grant;

- (b) Any exercise of such power was **unprecedented**, and was not necessary for the PWSC to properly perform its functions;
- (c) **The mere fact that an item being controversial was not justification for it to be postponed to after other less controversial items; and**
- (d) **I ought to follow the decision of the FC Chairman made on 31 October, 2014** when presented with a not dissimilar request from a member.

The Clerk's concern

15. On 7 November, 2014, the Clerk to PWSC sent me an email in which she made the following point, which I quoted in entirety as follows:

“In the event that you would reshuffle the order of the items on the agenda of the PWSC meeting on 19 November, please consider keeping "strategic studies for artificial islands in the Central Waters" as the first item. The reason is that at the meeting on 24 June, the Subcommittee negatived a motion to adjourn the discussion on the item. According to 40(3) of the Rules of Procedure, when such a motion has been negatived, the debate on the question then before the Council shall be continued.

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Your decision, if any, to postpone this item would be inconsistent with (and effectively override) the Subcommittee's previous decision."

My Ruling

16. Having carefully considered the advice of the Council's Legal Adviser, the Administration's response, PWSC members' opinions, the Clerk's concern and all the matters set out under paragraphs 6 to 15 above, **I conclude and rule that I shall accede to the request of Hon Sin Chung Kai to rearrange the sequence of items on PWSC agenda per his letter of 21 October, 2014.**

My Reasons

17. As the Chairman of PWSC, **I am satisfied that there is power vested in me by the PWSC Procedure to do what Hon Sin Chung Kai has asked me to, albeit that in doing so, I shall be departing from an established practice of PWSC in adhering to the order of items proposed by the Administration.** In this regard, I refer in particular to Paragraphs 10, 11 and 12 of the PWSC Procedure.
18. I have duly warned myself that a decision to rearrange the sequence of items on PWSC agenda not respecting the Administration's view is exceptional and ought not to be lightly done. Having thus warned myself, however, I still come to conclude that such a departure from established practice of PWSC is fully justified in the circumstances presently obtained generally in the Legislative Council and

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PWSC, and, in particular, those pertaining to the 20 outstanding items now pending consideration by PWSC.

19. Firstly, the exercise of such power would not be inconsistent with the constitutional principle in public finance that it is for the Administration to make the demand and for the Legislature to grant. The Administration has listed on the agenda all 20 items concerned since the 2013-14 session of PWSC. **Based on the fact that these items have been listed on the agenda and have remained so to date, I could safely conclude that the Administration's demands for the Legislature to grant each of the 20 items are still extant. In the premises, PWSC will be responding to the Administration's demand for grant from the Capital Works Reserve Fund, whether or not PWSC chooses to consider these items in the order they are being listed on the agenda.**
20. Secondly, all the 20 outstanding items were deferred from PWSC agenda of 2013-14. Each of them, therefore, has either been treated as uncontroversial and therefore not gone to the relevant policy panels of the Legislative Council or received the blessings of these panels as per the requirements of the House Rules.
21. Having proposed these 20 items for consideration by PWSC since last year, the Administration ought to have been ready since last year for any of these items to be considered by PWSC at any time. **From the Administration's point of view, there is no question of any of the items nominated by Hon Sin Chung Kai not being ready for presentation to PWSC at any time when called upon to do so.**
22. Thirdly, by reason of paragraphs 19, 20 and 21 in particular, **I could not agree to the views expressed by some PWSC**

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members that in so exercising my power, I would be usurping the function of the Administration.

23. **Fourthly, both the Administration and the engineering sector have been complaining about the substantial drop in the number of public works contracts approved by the PWSC and FC during the last legislative session.** According to the Administration's figures, in the 2012-13 FC approved a total of 39 funding proposals for new capital works items amounting to a total of HK\$90 billion. In the 2013-14 legislative session, however, FC only approved a total of 13 such funding proposals amounting to a mere HK\$3.6 billion.
24. The Administration has complained about such delay causing increase of construction costs due to inflation. The engineering sector has complained about there being not enough works to go round to make the engineering profession and related construction sectors sustainable. I am well aware of the dire consequences such delays have been causing and am anxious for both the spending public and personnel in the engineering and construction industry who have fallen victims to a situation not of their own making.
25. By rearranging items on PWSC agenda in such a way as to accord precedence to the uncontroversial projects such as schools, community hall, sports centre, sewage treatment works, government complex, waste treatment and recycling facility, and refitting of noise barrier, and with the expected expediency in their passage, **PWSC will make its contribution to allowing more public works projects to be launched and thus alleviating the pressure of inflated costs and burden on the engineering and construction sectors.**
26. **Fifthly, I ask rhetorically why beneficiaries of such**

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uncontroversial projects listed under paragraph 25 should be made to suffer simply because the Administration insists on listing such projects that anticipate expedient disposal after controversial proposals that call for careful scrutiny and procrastinated deliberations. It is more so if one bears in mind the fact that hasty passage of premature public works proposals would result in such approved items coming back to haunt the Legislature years later in the form of, *inter alia*, request for increased funding. High Speed Rail is a case in point.

27. Sixthly, a decision that is unprecedented does not mean that it should not be done. **When the Administration has unjustifiably refused to rearrange items on PWSC agenda when it could have easily done so and to bring about the desired effects elaborated under paragraphs 19-26 above, it is incumbent on PWSC to effect the necessary rearrangement itself.** This is a way of practising legislative oversight of the actions and inactions of the Administration as envisaged in the system of separation of powers in the HKSAR.
28. Seventhly, **the decision of FC Chairman made on 31 October, 2014 in no way binds me.** The 20 outstanding items have yet to reach the agenda of FC, and my decision herein will not in any way affect the order of items on FC agenda that is within FC Chairman's prerogative to list for FC's consideration.
29. Eighthly, there was nothing in the Administration's response summarized under paragraph 10 above that compelled me to not depart from the established practice. The only matter that may be worth a separate mention is that summarized under paragraph 11 above.

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30. I am well aware of the tender validity expiry dates listed in PWSC27/14-15(01), and the fact that the tender validity date for an important contract of the Liantang/Heung Yuen Wai Boundary Control Unit will expire on 31 December, 2014. That, however, has not deterred me from concluding the way I had because
- (1) **Given the state of FC agenda, this item in no way could reach FC in time for the 31 December 2014 expiry date; and**
 - (2) **Such item will indeed stand a better chance of being reached earlier with the rearrangement of sequence of PWSC agenda items than without.**
31. Ninthly, I shall deal with the Clerk's concern. Given my above conclusions, I rule that nothing in PWSC Procedure prevents me from postponing the item of "Strategic Studies for Artificial Islands in the Central Waters" to after the 12 items proposed by Hon Sin Chung Kai for rearrangement, and I reason as follows:
- (1) My power to rearrange the PWSC agenda for the purpose of ensuring the orderly, efficient and fair disposition of PWSC business is within the Chairman's prerogative and cannot be subject to Rule 40(3) of the Rules of Procedure;
 - (2) There are still 59 motions in respect of the relevant item yet to be disposed of by PWSC;
 - (3) Hon Gary Fan already informed PWSC meeting on 29 October, 2014 that he had been preparing at least another batch of Rule 32A motions which would be submitted to me for ruling;
 - (4) By reason of (2) and (3), I could not realistically estimate when this item would be finally disposed of; and
 - (5) The purposes to be served by my rearranging the

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sequence of items of PWSC agenda, as elaborated in my reasons above, would be largely, if not completely, defeated by allowing the item of “Strategic Studies for Artificial Islands in the Central Waters” to be pursued to its final disposal.

32. Lastly, I am particularly grateful to the Council’s Legal Adviser for drawing my attention to the decision of the Court of Final Appeal in the case of **Leung Kwok Hung – v. – The President of LegCo and SJ** (FACV No. 1 of 2014), where it was held, applied *mutatis mutandis* to PWSC Chairman, that so long as the PWSC Chairman in presiding over PWSC meetings was exercising his powers for the purpose of ensuring the orderly, efficient and fair disposition of PWSC business, it is not for the Court to consider whether or not such powers were properly exercised.
33. For the reasons given above, my ruling in this matter is clearly made in the exercise of my powers for the purpose of ensuring the orderly, efficient and fair disposition of PWSC business.

My Directions

34. In exercising the power vested in the Chairman of PWSC to direct the Clerk to give notice of meetings, **I now direct the Clerk to give notice of the meeting of PWSC to be held on 19 November, 2014 with agenda items arranged in such manners so that the 12 items set out in Hon Sin Chung Kai’s letter dated 21 October, 2014 will be listed before PWSC(2014-15) 11 on the subject of Strategic studies for artificial islands in the Central Waters.**
35. The remainder of the 20 deferred items will be considered in

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the order they are now listed on the agenda after the 12 items nominated by Hon Sin Chung Kai will have been completely dealt with and recommendations already made to FC.

Epilogue

36. When the Administration does not seem to have the public's interest foremost to heart, it is incumbent on the Legislative Council to do whatever is within its powers to rectify the situation, or else the credibility of the Legislative Council will be sacrificed.
37. I see this ruling of mine as a special measure to cope with the uniquely unfortunate political situation we are finding ourselves in.
38. Let me finally say that it is my genuine hope that we could soon see normality resumed for the *modus operandi* of the HKSAR Government, and in the relationship between the Administration and the Legislature.

Hon Alan Leong Kah Kit SC
Chairman
Public Works Subcommittee

11 November, 2014