

立法會
Legislative Council

LC Paper No. CB(1)1990/99-00
(These minutes have been seen
by the Administration)

Ref: CB1/BC/1/99/2

**Bills Committee on
Mass Transit Railway Bill**

**Minutes of meeting
held on Friday, 14 January 2000, at 10:45 am
in the Chamber of the Legislative Council Building**

Members present : Hon Mrs Miriam LAU Kin-ye, JP (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon HO Sai-chu, SBS, JP
Hon Cyd HO Sau-lan
Hon Edward HO Sing-tin, SBS, JP
Hon Albert HO Chun-yan
Hon NG Leung-sing
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon Ronald ARCULLI, JP
Hon CHAN Wing-chan
Hon CHAN Kam-lam
Hon Howard YOUNG, JP
Hon LAU Kong-wah
Hon Andrew CHENG Kar-foo
Hon FUNG Chi-kin

Members absent : Ir Dr Hon Raymond HO Chung-tai, JP
Hon LEE Cheuk-yan
Hon Eric LI Ka-cheung, JP
Hon CHAN Yuen-han
Hon Bernard CHAN
Hon SIN Chung-kai
Hon Andrew WONG Wang-fat, JP
Hon LAU Chin-shek, JP
Dr Hon TANG Siu-tong, JP

**Public officers
attending**

: Transport Bureau

Mr Kevin HO
Deputy Secretary for Transport (1)

Mr Thomas CHOW
Deputy Secretary for Transport (4)

Mr Roy TANG
Principal Assistant Secretary for Transport (3)

Mr Eric CHAN
Assistant Secretary for Transport (3B)

Finance Bureau

Mr Martin GLASS
Deputy Secretary for the Treasury (2)

Transport Department

Ms Zina WONG
Assistant Commissioner for Transport (Bus Development)

Department of Justice

Mr Jonothan ABBOTT
Senior Assistant Law Draftsman

Ms Betty CHOI
Senior Government Counsel

**Attendance by
invitation**

: MTR Corporation

Mr Leonard TURK
Legal Director and Secretary

Mr Phil GAFFNEY
Operations Director

Mrs Miranda LEUNG
Corporate Relations Manager

Slaughter & May

Mr Richard THORNHILL
Partner

Mr Jason WEBBER
Solicitor

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

Staff in attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Ms Alice AU
Senior Assistant Secretary (1)5

I Clause-by-clause examination

LC Paper No. CB(3)32/99-00 - Bill

*LC Paper No. CB(1)315/99-00(01) - Letter from the Legal Service
Division to the Administration*

*LC Paper No. CB(1)315/99-00(02) - The Administration's response to
LC Paper No. CB(1)315/99-00(01)*

The Chairman drew members' attention to the Administration's reply on clause 15 of the Operating Agreement (OA) (issued vide LC Paper No. CB(1)796/99-00), as well as information received by the Secretariat shortly before the meeting on relative fare levels of metro railways provided by Professor RIDLEY.

(Post-meeting note: Information provided by Professor RIDLEY was subsequently circulated to members vide LC Paper No. CB(1)797/99-00.)

2. The Chairman also reminded members that in order to allow ample time for detailed scrutiny of the Bill, two additional sessions had been scheduled on 25 January 2000 and 27 January 2000 from 9:00 am to 1:00 pm.

3. Members then continued clause-by-clause examination of the Bill from clause 9 onwards.

Clause 9 – Corporation to maintain proper and efficient service

4. Reiterating his previous request, Mr CHENG Kar-foo urged the Administration to consider setting the performance requirements in Schedule III to the OA on par with

the existing performance levels of the Mass Transit Railway Corporation (MTRC). The Deputy Secretary for Transport(4) (DS for T(4)) replied that as previously explained, the Administration did not support the proposal as it saw a need to build in some sort of margin for occasional minor fluctuations arising out of situations beyond the Corporation's control. Given that the Corporation was obliged to meet these performance requirements and a failure to do so would result in financial penalty, it was reasonable to make an allowance in the OA. Also, the performance requirements were only threshold standards and the real targets which the MTR Corporation Limited (MTRCL) would strive to achieve were the Customer Service Pledges.

5. While accepting the need for a safety margin to cater for minor fluctuations arising out of mechanical failures etc., Mr CHENG considered that the performance requirements should initially be set at the existing level when MTRCL was listed. Such requirements could subsequently be reviewed taking into account the state of the system.

6. Mr CHENG Kar-foo also suggested that the performance requirements in Schedule III to the OA should be incorporated into a schedule to the Bill, so that any amendments thereto would be effected by way of an order which was subsidiary legislation. In this way, the Administration's concern on the need for a flexible arrangement would be alleviated as future revisions would only be subject to negative vetting of the Legislative Council (LegCo), while LegCo would have the power to vet such requirements as and when required. Mr CHENG sought the opinion of the Assistant Legal Adviser (ALA) on his suggestion.

7. In reply, ALA advised that from a legal point of view, it would be in order to incorporate the performance requirements in the Bill as it would come under the scope of the regulation of the operation of the Mass Transit Railway (MTR) under the franchise. However, whether such requirements should be put in the Ordinance or not was a policy issue for members to decide. In terms of efficiency, Mr CHENG's suggestion of scrutiny by negative vetting would expediate the process as no amendment bill would be necessary.

8. DS for T(4) stated that the Administration saw serious downside in Mr CHENG's suggestion which would not be to the advantage of the passengers. As the Government would review the requirements in Schedule III to the OA regularly and make necessary changes to them in the light of changing circumstances, the process of enactment, albeit subsidiary legislation by negative vetting, would take time and such changes might not be made in a timely or efficient manner. In the interest of the public, MTRCL should not have to wait before effecting such necessary changes to the performance requirements.

9. Given ALA's comments about the enactment process being expediated by negative vetting, Mr CHENG Kar-foo was unconvinced of the Administration's reply, and he informed the Bills Committee that Members of the Democratic Party would propose relevant amendments to this clause.

Clause 10 – Secretary may obtain informationClause 11 – Records

10. Referring to the keeping of record of incidents causing a service breakdown of 20 minutes or more under clause 11 (1)(e), Mr Albert HO sought clarification on whether the Corporation was also required to keep record of the results of its investigation on such incidents. DS for T(4) replied that such investigation might be conducted by the railway inspector under the power conferred by clause 27 (3)(b) in relation to the safety of the railway. In addition, the Principal Assistant Secretary for Transport(3) (PAS for T(3)) advised that the Corporation was required under regulation 4(2) of the Mass Transit Railway Regulations (Cap. 270, sub. leg.) to supply information concerning accidents or occurrences happening on the railway. The Operations Director/MTRC (OD/MTRC) supplemented that incidents requiring investigation were set out in the Corporation's safety management system, and the relevant information would be shared with the railway inspector during their regular meetings.

11. However, Mr Albert HO pointed out that his concern was more about the power of the Government to request the Corporation to investigate such incidents and to obtain the investigation reports. In his view, the Corporation should take the initiative to conduct its own investigation and the railway inspector should conduct his own investigation only when he considered the Corporation's investigation insufficient. Mr HO urged the Administration to consider specifying such power under clause 10 and requiring the Corporation to keep record of investigation reports on train accidents under clause 11.

12. Mr NG Leung-sing took a different view. He opined that with the reference to the Secretary for Transport (S for T) "obtaining information with respect to the business and affairs of the Corporation in connection with the franchise" in clause 10 (1), it would essentially cover any information relating to the safety of the system and train accidents.

13. Mr NG remarked that the records kept under clause 11 might need to be classified, so that different time limits could be set for the purpose of record keeping. In reply, DS for T(4) said that the time limit for record keeping would normally depend on operational needs. The Legal Director and Secretary/MTRC (LD&S/MTRC) advised that the Corporation would keep its records for a long time and much of the information would be retained in printed form through publication in the Corporation's annual reports and accounts. In this connection, Mr Edward HO drew members' attention to subclause (4) which provided the Corporation with a defence of "reasonable excuse".

14. Miss Cyd HO considered that the scope of records under clause 11 (1) should be extended to include matters such as incidents involving the failure of air-conditioning system and Octopus machines. In reply, DS for T(4) assured members that the

records in relation to those matters raised by Miss HO would be covered under clause 10. He further explained that clause 10 was a general provision setting out S for T's power to obtain any information with respect to the business and affairs of the Corporation, while clause 11 was a specific provision listing those matters relating to passenger safety and train service which should be checked regularly. The list under clause 11 (1) was by no means exhaustive, and the Corporation was also required to keep extensive records on other matters.

Admin. 15. Sharing Miss HO's concern, Mr CHENG Kar-foo requested the Administration to consider the drafting of clause 11 (1) with reference to relevant British legislation. While agreeing to the suggestion, DS for T(4) advised that the records required to be kept by MTRCL were similar to the ones listed under section 18 of the Public Bus Services Ordinance (Cap. 230).

16. Referring to clause 11 (1)(e), Mr CHENG Kar-foo considered that any disruptions of train service for 10 minutes or more would be serious incidents, and he queried the rationale of adopting the threshold of 20 minutes. In reply, PAS for T(3) and OD/MTRC stated that 20 minutes was the threshold level for the red alert system, whereby MTRC would advise the Transport Department and other transport providers that train service would be delayed for 20 minutes or more and supplementary transport was required.

Admin. & MTRC 17. Mr CHENG further asked if information on the number of delays for less than 20 minutes in the past two years was available. In reply, OD/MTRC and LD&S/MTRC advised that extensive record of delays were kept by MTRC as management information and most of them came directly from the control and communication systems. However, the Corporate Relations Manager/MTRC added that the information requested might not be readily available as the relevant data had already been incorporated into various performance requirements, such as train punctuality and service reliability. It would take some time to convert those data back in the form of individual incidents. Mr CHENG asked and the Administration and MTRC agreed to provide the number of incidents in the past two years causing delays of 20 minutes or more, and if possible, the number of incidents involving delays between 10 and 20 minutes.

Clause 12 – Limitation on powers under sections 10 and 11

18. Both Mr Albert HO and Mr Edward HO expressed concern about the effect of the requirement to consult the Corporation before disclosure of information. The Administration assured members that such consultation did not oblige S for T to obtain the agreement of the Corporation to disclose the information, as clearly provided under clause 61. As sensitive commercial information might be involved, the Corporation would be notified of such disclosure through consultation, so that it would have time to comply with the relevant requirements of the listing rules of the Stock Exchange of Hong Kong.

Clause 13 – Chief Executive in Council may give directions

19. Mr LAU Chin-shek enquired about the definition of "public interest". DS for T(4) advised that the provisions were copied from section 20 of the existing Mass Transit Railway Corporation Ordinance (Cap. 270). The Senior Assistant Law Draftsman (SALD) added that the term was not and could not be defined in law. It could only be taken to mean in the interest of Hong Kong generally.

20. Given the directions were made in "public interest", Mr LAU was concerned about the conditions under which the Government was liable to pay compensation. Sharing this concern, Mr CHAN Wing-chan asked the Administration if there were cases where the Government was not liable to pay compensation to MTRC for the loss incurred from its compliance with a direction given under clause 13.

21. The Administration clarified that "public interest" only defined the scope of directions given by CE in Council under subclause (1), and this element had nothing to do with compensation. Under subclause (4), the Government was liable to pay compensation if the Corporation sustained any loss or damage from its compliance with such directions. For example, if a direction was given in public interest to MTRCL to build and operate an extension to the railway and provided that such direction was not inconsistent with the Ordinance, the Corporation would have to comply with that direction even if it considered the project against prudent commercial principles. However, under the circumstances, MTRCL could claim compensation for any loss it incurred.

22. In supplement, LD&S/MTRC said that the whole thrust of this clause was to cover directions given by the Government in its role as the safeguarder of public interest. Under the common law principles and according to the rule of law, when the Government made decisions on public interest which cut across private interest, it should pay compensation for it. The situation remained the same both previously when MTRC was a public corporation and in future when it became a private company. The Government had to pay compensation to a private company when this company was directed to follow through its policies. Both LD&S/MTRC and Deputy Secretary for Transport(1) (DS for T(1)) assured members that clause 13 was not intended to cover the obligations of MTRCL under the Bill or the OA as it had specific powers under the Bill to order the Corporation to carry out works in the interest of safety and other statutory obligations.

23. Considering that the provisions as drafted might be too loose for the purpose, Mr CHENG Kar-foo opined that all matters for which compensation would be paid by the Government under the clause should either be specified in the Ordinance or OA. DS for T(1) replied that clause 13 was modelled on section 20 of the existing Ordinance, and that provision had been working well to balance public and private interests. Notwithstanding that the directions were reasonably and legally made by CE in Council, it would only be fair for the Government to pay compensation for loss sustained by MTRCL because private property was involved. SALD added that

MTRCL would be entitled to claim compensation if it could establish that it had incurred loss attributable to its compliance with such directions.

24. Miss Cyd HO queried if it was appropriate to make reference to "a specific obligation of the Corporation under the franchise" in subclause (2). Expressing similar concern, Mr Albert HO said that while he was in support of the spirit of clause 13 which conferred a residual power to the Government to direct MTRCL to do things in public interest, the drafting of subclause (2) would need to be improved to reflect the intended scope of such directions. DS for T(1) explained that subclause (2) was drafted in broad terms to cover those directions that might be of a general character or related to specific obligations under the franchise. He assured members that the provisions would not be used to direct MTRCL to carry out what would be its obligations under the Ordinance or OA. Nevertheless, in view of members' concerns, DS for T(1) agreed to re-examine subclause (2).

Admin.

25. On subclause (5), Mr CHAN Kam-lam asked and SALD confirmed that the provision was necessary to put it beyond doubt that subclause (4) applied even when the direction given was contrary to prudent commercial principles. Both Mr CHAN and the Chairman requested the Administration to improve the Chinese text of subclause (5) so as to reflect more clearly the meaning and drafting of the English text.

Admin.

Clause 14 – Chief Executive in Council may impose financial penalty

26. Responding to Mr Albert HO's question, LD&S/MTRC said that the Corporation accepted the mechanism under which the final decision would be made by CE in Council. It was very important for shareholders and investors to see that the Corporation did have the chance to state its case in the matter.

Clause 15 – Suspension of franchise

27. In reply to Miss CHAN Yuen-han's enquiry, DS for T(1) clarified that "an emergency" under subclause (1) referred to an emergency in relation to Hong Kong, and not an emergency of the railway system.

28. Given the importance of the matter, Mrs Selina CHOW opined that in addition to consultation provided under subclause (2), the Corporation should be given an opportunity to make representations to CE in Council before a decision to suspend the franchise was made. While appreciative of the member's concern, DS for T(1) advised that clause 15 provided the Government with a fallback power to suspend the franchise in case of emergency or substantial breakdown of the railway. Both circumstances required the Government to respond speedily so that MTR service would not be seriously disrupted. He further assured members that the views presented by MTRCL when consulted would be conveyed to CE in Council for consideration. LD&S/MTRC added that the Corporation fully understood the necessity of the provisions.

Admin. 29. Mrs Selina CHOW however remained of the view that without the procedural safeguard of an avenue for the Corporation to state its case to CE in Council, the decision to suspend the franchise would in fact be made by S for T. This view was shared by Mr CHENG Kar-foo and both members urged the Administration to re-consider its position.

Admin. 30. In response to Mr CHENG Kar-foo's requests, the Administration agreed to consider whether the drafting of subclause (6) should be tightened to ensure that compensation would not be payable by the Government if the suspension was caused by the acts and omissions of MTRCL, and to improve the Chinese text of subclause (7).

(Post-meeting note: The Administration's response to issues raised by members on clauses 9, 11, 13 and 15 was circulated vide LC Paper No. CB(1)837/99-00(01).)

II Any other business

31. The Chairman reminded members that the next meeting would be held on Monday, 17 January 2000 at 2:30 pm to continue clause-by-clause examination of the Bill.

32. There being no other business, the meeting was adjourned at 12:45 pm.

Legislative Council Secretariat
3 August 2000