

立法會
Legislative Council

LC Paper No. CB(1)1996/99-00
(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 Monday, 17 January 2000, at 2:30 pm
in Conference Room A 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 Eric LI Ka-cheung, JP
Hon NG Leung-sing
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon Bernard CHAN
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 Ronald ARCULLI, JP
Hon CHAN Yuen-han
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)

Mr WOO Kin-ming
Chief Inspecting Officer (Railways)

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

Action

I Clause-by-clause examination
(*LC Paper No. CB(3)32/99-00 - Bill*)

The Chairman informed members that two additional meetings had been scheduled:

Saturday, 22 January 2000 at 9:00 am to 1:00 pm; and
Tuesday, 25 January 2000 at 2:30 pm to 4:30 pm.

Clerk The Clerk was requested to issue a circular to confirm members' attendance at these meetings.

2. Members continued the clause-by-clause examination of the Bill from clause 16 onwards. The gist of the discussion on clauses 16 to 44 of the Bill was summarized in the following paragraphs.

Clause 17 – Defaults capable of remedy

3. Mr Albert HO asked if the period of 28 days specified in subclause (2) for the remedy of defaults might result in urgent matters not being dealt with expeditiously. In reply, the Deputy Secretary for Transport(4) (DS for T(4)) clarified that 28 days were generally allowed under subclause (2) unless the circumstances required otherwise, and the Secretary for Transport (S for T) would then have the power to direct the Corporation to remedy the faults within the period specified in the notice

under subclause (1)(b).

Clause 18 – Revocation of franchise

4. Mr CHAN Wing-chan asked the Administration to give examples where subclause (1)(b) would apply. DS for T(1) replied that if the MTR Corporation Limited (MTRCL) went into liquidation, it would be no use to serve a notice under clause 17, and the Corporation's default would be one that was not capable of being remedied.

5. Given the important consequence of the provision, Mr Albert HO queried whether the drafting of "just and reasonable to do so" in subclause (5)(b) was too broad in relation to the determination by the Chief Executive (CE) in Council to revoke the franchise. Taking members through the procedural steps for revocation of franchise outlined in the proposed provisions, the Administration assured members that a decision would only be made by CE in Council after going through the whole process. The provision was a catch-all provision which specified the spirit of an order made by CE in Council under subclause (5)(a).

Admin. 6. Considering the reference to "in any other case" in subclause (5)(b) might give rise to ambiguity as to whether "default" was a necessary condition for revocation of franchise, Mr HO said that the drafting should be improved by adding the words "of default" after "in any other case". In reply, the Deputy Secretary for Transport(1) (DS for T(1)) agreed to consider the suggestion and revert to the Bills Committee later.

Clause 19 – Use of railway property by Government

7. Responding to questions raised by Mr CHAN Wing-chan on the designation of a third party under subclause (1), DS for T(4) advised that the purpose of clause 19 was to give Government the powers necessary to ensure the minimum disruption to railway services in the event of revocation or expiry of MTRCL's franchise. The role of a third party designated under this provision would be similar to that of an official receiver.

8. On subclause (4), Mr CHENG Kar-foo queried why the Government was not allowed to return the property taken possession of under subclause (1). DS for T(1) explained that the provision was intended to give fair treatment to MTRCL. Under subclause (1), the Government could take any property "as it thinks fit" for the operation of the railway; and if some property was subsequently found to be not suitable for the purpose, the Government could return them to the Corporation under subclause (3). However, considering that the Corporation's franchise had already been revoked, it should also be allowed to refuse to take back those property that it did not want.

9. Accepting the Administration's explanation, Mrs Selina CHOW remarked that as the power under subclause (1) was absolute, the Government should be responsible

for disposing those unwanted property it had taken possession of.

10. Raising his concern on maintaining the integrity of the whole system, Mr Albert HO considered it desirable to specify in the provision all those property which the Government should take possession of in connection with the operation of the Mass Transit Railway (MTR) system, such as the tracks. In response, DS for T(1) assured members that it was the intention of the Government to take such property as was necessary for the operation of the system. In this connection, MTRCL was given a power under clause 21 to request the Government to take from it any further railway property not already taken under clause 19.

11. As a related issue, Mr CHAN Kam-lam enquired about the technical aspects involved in the transition from MTRCL to the new operator. In reply, DS for T(4) assured members that under the Operating Agreement (OA), the Corporation was required to facilitate the continuity of the railway services and it should not take any action which might frustrate the transition to any successor franchisee of the right to provide such services.

12. On subclause (6), Mr Albert HO enquired whether the deeming provision was adequate to cover the vesting required for the purpose of clause 19. In reply, DS for T(4) and the Senior Assistant Law Draftsman (SALD) said that subclause (6) was drafted as a deeming provision because it was not considered necessary to actually vest such property in the Government, and the provision should be read together with subclause (3) which conferred on the Government the power to dispose of property taken possession of under clause 19. The purpose of subclause (6) was to ensure that upon such disposal, good title would be acquired by the person to whom the property was disposed. The Administration was of the view that clause 19 (6) adequately served this objective. However, Mr HO still opined that a specific vesting procedure might be necessary to give the property a good title. In response, SALD agreed to consider the suggestion.

Admin.

Clause 20 – Compensation for use of railway property under section 19

13. Mr CHENG Kar-foo expressed grave concern on subclause (1) which failed to take into account the element of the Corporation's default in the revocation of franchise. He questioned whether MTRCL would have any incentive to provide better services with such a provision. In response, DS for T(4) emphasized that the provision provided for the compensation payable in respect of railway property taken over by the Government. It was not compensation for the loss the Corporation incurred as a result of the revocation of franchise. DS for T(1) added that notwithstanding the default of the Corporation, the Government would still be liable to pay compensation because private property was involved, and the interest of shareholders of the company would have to be safeguarded.

14. Both Mrs Selina CHOW and Mr CHAN Kam-lam disagreed with Mr CHENG. Mrs Selina CHOW said that in case of the Corporation's default, the ultimate

punishment was revocation of its franchise, while the Government should be responsible for compensating the Corporation for the use of, loss of or damage to any property it had taken possession of for the continued operation of the railway.

15. In this connection, DS for T(4) advised that according to the OA, compensation payable under clause 20 would be based on the fair value of the relevant property as determined by an independent expert appointed by the Government and the Corporation.

16. Reiterating his stance, Mr CHENG Kar-foo said that while it was fair for the Government to pay compensation in respect of any loss of and damage to railway property, he could not accept the payment of compensation for the use of such property because such loss and damage could only arise when the property had been used. Expressing similar concern, Mr Albert HO remarked that it was confusing to set out the concepts of "use" together with "loss" and "damage".

17. In response, DS for T(1) said that the Corporation would incur a loss in one way or another when its property was taken possession of under subclause (1). For example, if the Government took possession of the Octopus machines, MTRCL would sustain a loss in revenue as it might otherwise rent out those machines to bus companies. Another example was the revenue derived from advertisement space in MTR stations which would be forgone when the Government took over the station premises.

Clause 21 – Government may be required to take possession of railway property

18. Responding to Mr Albert HO's question, DS for T(4) advised that in default of an agreement as regards whether the property which the Government was requested to take possession of under this provision was "for the purposes of or in connection with the franchise", the matter could be determined by arbitration.

Clause 24 – Provisional payment pending determination of compensation

19. In reply to Mr CHAN Kam-lam's question, the Deputy Secretary for the Treasury(2) (DS for Tsy) said that funding approval would be sought from the Finance Committee of the Legislative Council in the normal manner when it became clear that the Government would be incurring the liability for compensation.

Clause 25 – Interest on compensation

20. The Chairman sought clarification on the expression "the date on which the sum becomes payable" in subclause (1) in relation to the calculation of interest on compensation. DS for T(1) explained that it would depend on the type of property for which compensation was paid, and in case the matter was submitted for arbitration, these dates could also be determined by the arbitrator.

Clause 26 – Appointment of inspectors

21. In reply to Mr CHAN Kam-lam's enquiry, DS for T(4) said that the Transport Bureau had in-house inspectors responsible for the monitoring of railway safety. If considered necessary, S for T might appoint overseas experts under subclause (1) to investigate into major accidents or review the safety of the railway system.

Clause 27 – General powers of inspectors

Admin. 22. Referring to the disclosure of information under subclause (5), Mr Albert HO opined that the provision should be amended to put it beyond doubt that the railway inspector was not required to give reasonable notice to the Corporation before passing information to S for T. Acknowledging Mr HO's concern, DS for T(1) agreed to consider whether any amendment was necessary taking into account the meaning of "disclosure" in law.

Admin. 23. Given that criminal sanction was provided under subclause (6)(c), Mr CHAN Wing-chan worried that MTRC staff might inadvertently be held liable for obstructing the railway inspector in the course of their duty. In reply, DS for T(1) said that clause 27 (6) adopted an identical provision (i.e. section 23B (3)(c) of the existing Mass Transit Railway Ordinance (Cap. 270)), and no problem had been encountered. The spirit of the provision was to ensure that no one would intentionally obstruct the railway inspector in the exercise of his powers. Sharing Mr CHAN's concern, Mr Albert HO opined that subclause (6)(c) should be qualified by adding "without reasonable excuse" at the beginning of the provision, taking into account the similar provision in the Police Force Ordinance (Cap. 232). DS for T(1) agreed to consider Mr HO's suggestion.

Clause 28 – Secretary may require Corporation to carry out works in interest of safety

24. Mr Albert HO asked whether the power conferred on S for T under subclause (1) to require the Corporation to carry out works in the interest of safety was too wide. DS for T(1) replied that although such power was absolute in law, the Government would always consider other options put forward by the Corporation to improve safety. The Legal Director and Secretary/MTRC (LD&S/MTRC) also advised that as the provision had worked well in the last 20 years and had not led to any abuse, it would be desirable to maintain the status quo whenever possible, particularly when railway safety was concerned. Moreover, clause 53 had provided the Corporation with a right to appeal to CE in Council.

Clause 29 – Offence of negligent act or omission by employee

25. On account of the grave concern expressed by MTRC's staff bodies at a previous meeting, Mr CHAN Wing-chan informed members that amendments to the provision might be moved by Miss CHAN Yuen-han.

Part VIII – Regulations and Bylaws

26. DS for T(4) said that clauses 33 to 35 were copied from existing provisions of Cap. 270. As a related issue and in response to the Chairman, the Assistant Legal Adviser advised members that with effect from the appointed day, the existing regulations and bylaws made under Cap. 270 specified respectively in Schedules 3 and 4 to the Bill would, subject to necessary modifications, be adopted as and become regulations and bylaws made under the new Ordinance.

Clause 34 – Bylaws

27. Mr Albert HO was concerned about the Corporation's power to make bylaws which prescribed penalty for criminal offences. In reply, DS for T(4) assured members that bylaws made by the Corporation would be subject to the approval of the Legislative Council under subclause (3).

Part IX – Vesting Provisions and Transitional Arrangements

28. DS for T(4) invited members to note that new provisions were made under this Part to provide for the vesting of the whole of the property, rights and liabilities of MTRC in MTRCL on the appointed day. LD&S/MTRC added that the object of these technical provisions was to effect a statutory transfer from the existing MTRC to the new Corporation without having to go through related legal formalities such as novation, assignment and transfer of property, rights and liabilities.

Clause 38 – Agreements, transactions, etc. affecting MTRC

29. Mr Albert HO enquired whether any contracts signed by MTRC would be nullified as a result of privatization. In reply, LD&S/MTRC informed members that a very thorough due diligence exercise had been carried out in respect of the company's documents. For those documents which were subject to Hong Kong law, their provisions would cover the automatic transfer, so none of them would be void or abrogated. However, the Corporation would still have to pursue the matter in some foreign jurisdictions for documents which were subject to overseas law, and certain procedures such as the registration of the new Ordinance might be required.

Clause 41 – Employment-related matters

30. Referring to section 8 of Cap. 270, Mr CHAN Wing-chan asked why those detailed provisions in relation to the granting of staff benefits were not repeated under clause 41. SALD and LD&S/MTRC advised that according to their understanding, section 8 of Cap. 270 was intended to confer on MTRC a power to grant certain benefits to its staff. This power was needed because MTRC, as a statutory corporation, only had the power to do those things which it was specifically empowered to do under the law. On the other hand, as MTRCL would be a company incorporated under the Companies Ordinance (Cap. 32), it would have the power to do

anything which it was not prohibited from doing, including the power to grant and provide staff benefits. Accordingly, it would not be appropriate to include in the new Ordinance a provision along the line of section 8, as MTRCL will have the existing powers as prescribed in Cap. 270 by virtue of Cap. 32. Notwithstanding the explanation given, Mr CHAN Wing-chan requested and LD&S/MTRC undertook to look into this matter further and give the Bills Committee an early reply.

Clause 42 – Share capital

31. In response to Mr Albert HO's question on subclause (3), DS for Tsy explained that on the appointed day, the Corporation would still be 100% owned by the Financial Secretary Incorporated in trust on behalf of the Government. Hence, section 43 (1) of Cap. 32 which required a company to issue its shares by a statement or prospectus would not apply. The time for the issue of shares by prospectus would come when the Corporation proceeded with the Initial Public Offering.

(Post-meeting note: The Administration's response to issues raised by members on clauses 18, 19, 27 and 41 was circulated vide LC Paper No. CB(1)837/99-00(01).)

II Any other business

32. In view of the progress of clause-by-clause examination of the Bill, the Chairman suggested and members agreed that the draft Committee stage amendments to be proposed by members, if any, should reach the Secretariat on or before 26 January 2000, so that they could be discussed at the meeting scheduled on the next day. On Mr CHENG Kar-foo's suggestion, the Chairman requested the Administration to give its response to all outstanding issues raised by members in the course of clause-by-clause examination of the Bill for discussion at the next meeting scheduled for 20 January 2000.

33. There being no other business, the meeting was adjourned at 4:36 pm.

Legislative Council Secretariat
9 August 2000