

立法會
Legislative Council

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by the Administration)

Ref: CB1/BC/1/99/2

**Bills Committee on
Mass Transit Railway Bill**

**Minutes of meeting
held on Tuesday, 23 November 1999, 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
Ir Dr Hon Raymond HO Chung-tai, JP
Hon LEE Cheuk-yan
Hon Eric LI Ka-cheung, JP
Hon NG Leung-sing
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon Ronald ARCULLI, JP
Hon Ambrose CHEUNG Wing-sum, JP
Hon CHAN Kam-lam
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon LAU Chin-shek, JP
Hon LAU Kong-wah
Hon Andrew CHENG Kar-foo
Dr Hon TANG Siu-tong, JP

Members absent : Hon CHAN Yuen-han
Hon Bernard CHAN
Hon CHAN Wing-chan
Hon Andrew WONG Wang-fat, JP
Hon FUNG Chi-kin

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)

Transport Department

Ms Zina WONG
Assistant Commissioner for Transport

Department of Justice

Mr Jonothan ABBOTT
Senior Assistant Law Draftsman

Attendance by invitation : **MTR Corporation**

Mr Leonard TURK
Legal Director and Secretary

Mr Phil GAFFNEY
Operations Director

Mrs Miranda LEUNG
Corporate Relations Manager

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

Staff in attendance : Miss Connie FUNG
Assistant Legal Adviser 3

Miss Irene MAN
Senior Assistant Secretary (1)6

I Meeting with the Administration

(LC Paper nos. CB(1)422/99-00(01) and (02))

The Chairman informed members that the meeting originally scheduled for 30 November 1999 had been cancelled. She drew members' attention to the revised meeting schedule as follows:

<u>Meeting</u>	<u>Subject</u>
7 December 1999	Initial Public Offering Process and Valuation
10 December 1999	Presentation on Fare Determination Mechanism by Overseas Experts (1)
16 December 1999	Presentation on Fare Determination Mechanism by Overseas Experts (2)
Early January 1999	Views on Privatization of Mass Transit Railway Corporation (MTRC) by Local Organizations

Operating Agreement

2. At the invitation of the Chairman, the Deputy Secretary for Transport(1) (DS for T(1)) briefly explained the Operating Agreement. It would be a legally binding document to be signed between the Government and the Mass Transit Railway Corporation Limited (MTRCL) as required by the Bill to ensure that MTRCL maintained a proper and efficient railway service. The Agreement would contain provisions which would ensure safe operation of the railway, stipulate the performance levels required and strengthen the existing voluntary consultation arrangement for fare determination.

3. The Operations Director/MTRC (OD/MTRC) elaborated on the two main railway operation aspects, namely "safety" and "performance requirements and customer service pledges", of the Operating Agreement. The safety sections of the Operating Agreement were based primarily on the current Memorandum of Agreement between MTRC and the Government. The Operating Agreement would provide for the establishment of a safety management system which would control and minimize risks as far as possible, while regular external reviews would be conducted by independent experts to ensure safety. In addition, there would be provisions to require the Corporation to satisfy the requirements of the Railway Inspectorate appointed by the Government before opening any new railway extensions or major alterations.

4. Regarding performance requirements and customer service pledges, OD/MTRC said that the Operating Agreement would require the Corporation to meet certain performance levels, failure of which might result in revocation of franchise. This would be a new regulatory regime for the Corporation. Furthermore, the Operating Agreement would require the Corporation to publish Customer Service Pledges and strive to seek continuous improvement in service delivery to passengers.

(*Post-meeting note*: The speaking note of OD/MTRC tabled at the meeting was subsequently circulated to members vide LC Paper No. CB(1) 441/99-00).

Railway Passenger Services

5. Mr LEE Cheuk-yan sought clarification on: (a) ticket reliability as contained in clause 4.11.3 (v) of the Operating Agreement; and (b) the Customer Service Pledges as contained in clause 4.11.3 and how customer satisfaction could be measured through passenger satisfaction surveys as quoted in clause 4.12.2. DS for T(1) said that ticket reliability referred to the reliability of the ticket hardware which included both octopus and single trip tickets. He also clarified that not all of the twelve items in the Customer Satisfaction Pledges listed in clause 4.11.3 would call for passenger satisfaction surveys. Such surveys would only be conducted when subjective opinions, such as railway cleanliness, were involved. On the other hand, surveys on well documented subjects such as the punctuality of trains, would not be warranted.

6. On clause 4.2.2 of the Operating Agreement regarding notice on train services to be given by MTRCL to the Commissioner for Transport (C for T), Mr LEE Cheuk-yan considered that the situation might be embarrassing if Secretary for Transport (S for T), being a member of the Board of Directors of MTRCL, were to give notice to C for T on material modifications in train service arrangements. He also asked for the definition of material modification and the consequence if such definition was not mutually agreed between the Government and MTRCL.

7. OD/MTRC explained that material modification referred to major changes to the operation of the railway. The Corporation would determine whether an amendment was a material modification and notify the Government once it was so considered. Deputy Secretary for Transport (4) (DS for T(4)) supplemented that the Corporation would require to make minor adjustments to the train service arrangements which should not be considered as material modification. These minor adjustments might refer to unexpected and urgent incidents that required immediate rectification and advance notice of which would be difficult to serve. At members' request, he undertook to define clearly the extent to which an amendment to train service arrangements would constitute a case of material modification.

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8. Mr HO Chun-yan considered there to be insufficient provisions in the Operating Agreement for the Government to monitor the performance levels of MTRCL. In many areas, the Corporation would only have to notify C for T instead of seeking his approval concerning changes in railway services. He was also concerned that the Corporation had the autonomy to decide on items to be included in the Customer Service Pledges and be accountable only for those services listed.

9. The Assistant Commissioner for Transport (AC for T) advised that according to the Operating Agreement, MTRCL would be required to give prior notice to C for T regarding proposed service changes. The Corporation would have to provide reasons

for such changes and the assessment result of the likely impact on passengers upon implementation of the changes. In addition, C for T could request the Corporation to review its services whenever necessary and recommend measures for improvement; the Corporation was obliged to report the outcome of the review and provide full justifications in case recommendations made by C for T were not adopted.

10. Mr HO Chun-yan remarked that the Government would not be able to effectively monitor railway services provided by MTRCL as C for T did not have the ultimate authority to overrule the Corporation's decision on changes in railway services. He also enquired about penalties which could be imposed if the Government and MTRCL could not reach mutually acceptable performance levels.

11. OD/MTRC pointed out that the achievement of MTRCL would be reviewed regularly against the performance levels as stipulated in the Operating Agreement. Considerations would also be given to the results of passenger satisfaction surveys, the market situation and other data in deciding on the need for adjusting the levels. AC for T reiterated that MTRCL would be bound to observe the performance levels as stipulated in the Operating Agreement, and these would be reviewed regularly for improvement. She pointed out that clause 13 of the Bill empowered the Chief Executive in Council to give directions to the Corporation when public interest required. Should the performance levels be considered unsatisfactory, the Corporation could be liable to penalties as specified in clauses 14 to 18 of the Bill.

12. Noting that disputes between the Government and MTRCL could be submitted to arbitration according to clause 10.2 of the Operating Agreement, Mr HO Chun-yan enquired whether disagreement on the Corporation's performance levels between the two parties could also be taken to arbitration. The Principal Assistant Secretary for Transport(3) (PAS for T(3)) emphasized that there would not be any dispute over the performance levels since the two parties would have reached an agreement on these levels before signing the Operating Agreement. Clause 10.3 of the Agreement also provided that there was no legal obligation for either party to agree to submit a dispute to arbitration. However, if MTRCL failed to provide satisfactory service in accordance with the Operating Agreement, the Government could invoke the relevant penalty provisions in the Bill.

13. Mr HO Chun-yan pointed out that since the privatized Corporation would enjoy administrative autonomy and could put forward its own reasons for not adopting the Government's recommendations, it would be difficult to take the matter to arbitration. He was also concerned whether disagreement on matters such as routine operation would be taken up by the Chief Executive in Council.

14. DS for T(4) assured members that MTRCL could not unilaterally downgrade the agreed performance levels as set out in Schedule III to the Operating Agreement. OD/MTRC also remarked that MTRCL would only introduce material modifications for the interest of passengers and would not introduce any modification in breach of the Operating Agreement. DS for T(1) added that if MTRCL acted beyond the acceptability of the Government, the latter could bring the matter to the attention of the Chief Executive in Council for a decision.

15. Some members quoted a scenario of a rescheduling of train services by MTRCL from a four-minute interval to a 40-minute interval and enquired about actions which the Government would take under such circumstances. In response, PAS for T(3) advised that MTRCL would already be in breach of clause 9 of the Bill which required the Corporation to maintain a proper and efficient service. Under such circumstances, the Chief Executive in Council might give directions to the Corporation under clause 13 or impose financial penalty on the Corporation under clause 14 as appropriate. Clauses 15 to 18 also provided the Government with sufficient mechanism to ensure that the Corporation would maintain the performance levels.

16. Mr HO Chun-yan remained unconvinced and believed that there would be disputes over the provision of railway service between the Government who acted for public interest and MTRCL for commercial considerations. He made reference to clause 4.15.2 of the Operating Agreement which stated that MTRCL would not be obliged to make changes in railway operation as proposed by the Government. He doubted the extent of influence which the Government could have on the Corporation if the latter insisted on acting on its own without sound reasons being given.

17. DS for T(1) advised that if MTRCL were unable to adopt certain Government proposals, the Government would consider the impact on passengers and might solicit assistance from other modes of transport where necessary. Nevertheless, he reiterated that the three additional directors to be appointed to the Board of Directors of MTRCL by the Chief Executive would give due consideration to the Government proposals notwithstanding that the Corporation operated on prudent commercial principles. If proposals from the Government were regarded not feasible by both the Board of Directors and the management of MTRCL, the Government would consider escalating the matter to the Chief Executive in Council if giving up such proposals were to have significant impact on the general public.

18. Referring to clause 15 of the Operating Agreement, Mr NG Leung-sing questioned whether C for T would respond to the report prepared by the external auditors. He asked whether recommendations would be given to MTRCL if the control systems and procedures were found inadequate, and whether such inadequacies would be made known to the minority shareholders. AC for T advised that the Operating Agreement would empower C for T to give recommendations to MTRCL for rectification after viewing the auditors' report. The Corporation would have to provide explanations for C for T should it refuse to adopt the recommendations. DS

for T(4) explained that the Operating Agreement would only make MTRCL accountable to the Government, and disclosure of inadequacies of the Corporation to minority shareholders was outside the Agreement's ambit.

19. Mr NG Leung-sing asked whether C for T had the statutory power to order MTRCL to rectify its inadequacies. DS for T(4) explained that the purpose of appointing external auditors was to seek independent professional advice in determining whether the Corporation had an internal system to adequately measure the performance levels as required. If the Government considered that the Corporation had failed to comply with the performance levels, the Corporation was already in breach of the Agreement and would be liable to penalties.

20. Mr CHENG Kar-foo was concerned about the time for finalizing the details of the performance criteria in Schedule III to the Operating Agreement. DS for T(4) advised that Schedule III would show relevant figures derived from matching the achievement of overseas railway companies with the recent performance of MTRC. The Schedule was near completion and would be submitted to the Committee for examination once available.

21. Mr CHENG was of the view that the performance criteria as listed in Schedule III to the Operating Agreement required more elaboration. He also suggested amending clause 4.2.2 of the Operating Agreement to enable the Government to overrule material modifications on train services arrangement to be implemented by MTRCL, and strengthening the regulatory framework for material modifications. DS for T(4) undertook to examine the member's suggestion.

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Interim Review

22. Mr Ambrose CHEUNG regarded it necessary to establish a mechanism to review both the operational aspects and the major development items of MTRCL, say once every 10 years, jointly by the Government and the Corporation. The Corporation's long-term capital investment plan, standard of facilities, design and construction plans and other relevant aspects might be included in the interim review to ensure that they met international standards.

23. In reply, DS for T(4) highlighted clause 4.9.2 of the Operating Agreement which stated that review on the performance requirements would be conducted by the Government and MTRCL at least once a year. The application of new technology to upgrade the performance levels of the Corporation would also be considered whenever necessary and the performance levels as listed in Schedule III might be amended from time to time. In fact, the standard of requirements as set out in the Customer Service Pledges was higher than that of the performance levels in the Operating Agreement.

Admin. 24. Mr CHEUNG considered such operational reviews inadequate. He suggested taking a more active approach of comparing the standard of performance of MTRCL with overseas railway corporations on a wide range of services, and making known the results to the public on a regular basis. Thereafter, the Corporation should make pledges to the public as regards improvements to service in order to bring the service up to international standard. He pointed out that the Operating Agreement did not contain such provisions and even the reviews mentioned in clause 13 could only be carried out with the agreement of both parties. DS for T(4) undertook to consider the member's suggestion.

Conflict of Roles

25. Given that the Government would be the majority shareholder and the regulator of MTRCL at the same time, Mr LAU Kong-wah was concerned with the conflict of roles. He asked if there could be an independent regulator to assess the Corporation's performance levels on a regular basis.

26. In response, DS for T(4) stressed that the Government had been the sole owner of MTRC for the past 20 years and had been monitoring the Corporation effectively. Moreover, since details of the performance criteria in Schedule III to the Operating Agreement would be finalized with MTRCL and submitted to the Committee for examination, the performance levels would be absolutely transparent and readily available for public inspection and assessment. As such, the Government's role in monitoring the Corporation's performance would not be hampered due to inaccessibility of information. Conversely, the Government's monitoring role would be strengthened through the Operating Agreement. DS for T(4) emphasized that the Government had been successful in monitoring the Corporation in the past years, and this role would not be diminished after privatization.

27. Following on Mr LAU's concern, Mr Ambrose CHEUNG pointed out that the Government would be the majority shareholder, the service regulator and the protector of minority shareholders of MTRCL all at the same time. There was bound to be conflict of interest among the three roles. He asked if the Government would consider establishing an independent committee to monitor and assess the performance levels of the Corporation.

28. In response, DS for T(4) explained that there should not be conflict of roles. Currently, S for T and the Secretary for the Treasury were members of the Board of Directors of MTRC. They were capable of looking after the interest of the Corporation as Board members and at the same time assuming a regulatory role. He did not see a conflict of roles under the current practice.

29. Expressing concern on the subject, Miss HO Sau-lan was worried that there might be conflict of roles if the Government, as both the regulator and the majority shareholder of MTRCL, revoked the franchise of the Corporation and then took

possession of its assets. She was concerned that the interest of the minority shareholders would thus be neglected. DS for T(1) advised that the purpose of the Bill was to grant a franchise to the Corporation, whereas the distribution of shares was outside the ambit of the Bill. He stressed, however, that the Government, being also the majority shareholder, would monitor closely the performance levels of the Corporation and make improvements before serious problems occurred. Likewise, minority shareholders would share the same concern from the viewpoint of investment after listing. He drew members' attention to the fact that the Board of Directors of MTRCL should be held responsible to majority and minority shareholders alike.

30. Miss HO doubted if the minority shareholders' interest could be fully protected if the performance levels of MTRCL dropped significantly and the Government, being the majority shareholder, seized control of the Corporation. DS for T(1) explained that all shareholders were investors and their interest should be looked after. While the management of MTRCL would be held responsible for the operation of the Corporation, shareholders would have reasonable expectations of the management to perform at its best. In the event of revocation or expiry of the franchise, the Government would make appropriate arrangements to ensure continuity of railway services.

Disclosure of Information

31. Referring to clauses 10 and 11 of the Bill and clause 17.4 of the Operating Agreement, Mr LEE Cheuk-yan noted that the Government would be able to obtain restricted information of MTRCL but the Corporation's consent had to be sought for any public disclosure. He was concerned about the transparency of the operation of the Corporation and whether the public's right of access to information would be affected if the Government could only release the information upon the Corporation's consent.

32. DS for T(4) advised that the Government would consult MTRCL, not seek its consent, on the disclosure of commercially sensitive information which would probably affect the listing activity. The Legal Director and Secretary/MTRC (LDS/MTRC) supplemented that clauses 10 and 11 of the Bill fully empowered the Government to obtain from MTRCL information on its business affairs which was important for open market transparencies. The Corporation would also be bound by stock exchange rules for the information to be released in certain ways. As such, the Corporation would only have to be notified before the release of such information for the benefit of the shareholders.

33. Mr LEE requested the Administration to clarify the definition of commercially sensitive information. LDS/MTRC drew members' attention to clause 17.4.3 of the Operating Agreement and emphasized that the Government would only be required to consult MTRCL regarding the disclosure of information. However, the Government would retain the authority to decide on release of the information to the public. LDS/MTRC quoted an example of information concerning an operational

breakdown, and said that information on incidents like this would not be regarded as commercially sensitive.

34. In response to Mr LEE's suggestion for a clear identification of whether certain information was commercially sensitive or accessible publicly, DS for T(1) explained that the Government was not against the disclosure of commercially sensitive information, but the timing for disclosure would be important so as not to impact adversely on investors. The reason for consulting MTRCL before the disclosure was to allow the Corporation to be prepared for the consequence should sensitive market information be released. He stressed that the Corporation could by no means restrain the Government from disclosing any information.

Fare Regulation

35. Mr LEE Cheuk-yan questioned the exclusion of the reasonableness of fare from the customer service pledges. DS for T(1) advised that the reasonableness of fare should best be determined by market forces. As stated in clause 8.1(i) of the Operating Agreement, the level of public acceptance would also be considered in adjusting the fare level. However, Mr LEE was of the view that such inclusion was essential.

36. Mr CHENG Kar-foo and Dr TANG Siu-tong regarded the provision in clause 8.2.1(i) too lenient and were concerned that the provision would relieve the Corporation of the obligation to undertake the consultation procedure specified in clause 8.1 of the Operating Agreement. DS for T(4) clarified that there had been a misunderstanding. He drew members' attention to the word "and" in sub-clause (a), (b) and (c) of clause 8.2.1(i) which provided explicitly that such exemption from the consultation procedure would only apply to fare reduction which should be welcome by the public at all times.

Safety Management

37. Mr LAU Kong-wah was of the view that the terms used in clause 5.4.1 of the Operating Agreement, such as "reasonably practicable" and "speedy", were too vague to ensure maintenance of safety standards. Mr CHENG Kar-foo also remarked that public concern for railway safety would be rising as the railway had depreciated over the years. He considered the provisions for railway safety in clause 5 of the Operating Agreement inadequate and proposed inclusion of the safety item such as the provision of screen doors along the platforms of MTR stations in the performance requirements as well. In reply, DS for T(4) advised that since the performance levels would be represented in figures, it would not be appropriate to include the safety items, which were difficult to express in numerical forms, in the performance requirements. Nevertheless, he assured members that as stated in Part VI of the Bill, S for T would continue to appoint Railway Inspectors to monitor the railway safety of MTRCL.

38. Having regard to the importance of railway safety, Mr CHENG considered it

insufficient to review the safety management system and the Operating Agreement only once every five years as stated in clauses 5.3 and 13.1. LDS/MTRC advised that the framework for railway safety had been provided in clause 28 of the Bill instead of the Operating Agreement. DS for T(4) also clarified that the review was to be conducted at least once every five years by MTRCL while the Railway Inspectorate would be monitoring its service on a daily basis as provided in clause 5 of the Operating Agreement. In fact, a joint review of the performance requirements would be held every year between C for T and the Corporation as set out in clause 4.9.2 of the Agreement. Above all, clause 28 of the Bill also provided explicitly that S for T might require the Corporation to carry out works for safety reasons.

39. Since the Government and MTRCL were not required to report the outcome of their joint review to the Legislative Council, Mr CHENG requested the Government to consider amending clause 13.1 of the Agreement to shorten the interval of reviews and facilitate compulsory consultation with the Panel on Transport after privatization. DS for T(1) assured members that the Government would bring to the attention of the Panel on Transport any significant modifications which were to be implemented after the review.

Revocation of Franchise

40. Referring to clause 9 of the Operating Agreement, Mr LAU Kong-wah enquired about the circumstances under which the franchise of MTRCL would be revoked. DS for T(4) drew members' attention to clauses 16, 17 and 18 of the Bill. He explained that should the Corporation be in default under the franchise which was capable of remedy, S for T would notify the Corporation to take remedial actions. If the Corporation failed to comply with the notice, S for T might report to the Chief Executive in Council whereupon revocation of franchise would be considered. He added that clause 14 of the Bill also empowered S for T to refer to the Chief Executive in Council for imposition of financial penalty on MTRCL if the Corporation failed to comply with the provisions of the Ordinance or the Operating Agreement.

Other Related Agreements

41. Referring to clause 17.2 of the Operating Agreement on restatement of the Eastern Harbour Crossing Agreement and the Airport Railway Operating and Maintenance Terms, Ir Dr HO Chung-tai sought the reasons for the restatement. DS for T(4) responded that the two documents were signed between the Government and MTRC upon construction of the relevant projects; the two documents would be replaced through restatement in the Operating Agreement.

42. Mr LEE Cheuk-yan enquired about the difference between the Memorandum of Agreement and the Operating Agreement as referred to in clause 17.1. DS for T(4) explained that the Memorandum of Agreement was the document currently signed between the Government and MTRC. He undertook to provide further

Admin. information on the Memorandum for members' reference.

(Post meeting note : The required information was circulated vide LC Paper No. CB(1) 635/99-00 dated 20 December 1999).

II Any other business

43. Mr CHENG Kar-foo advised that he would forward his views in writing concerning the Bill to the Government through the Chairman. The Chairman noted his request and reminded members that discussion on the Operating Agreement would resume in January 2000.

44. There being no other business, the meeting adjourned at 12:40 pm.

Legislative Council Secretariat

13 March 2000