

立法會

Legislative Council

LC Paper No. CB(1)2079/99-00
(These minutes have been seen
by the Administration and
cleared with the Chairman)

Ref: CB1/BC/1/99/2

Bills Committee on Mass Transit Railway Bill

Minutes of meeting held on Tuesday, 25 January 2000, at 9:00 am 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 Edward HO Sing-tin, SBS, JP
Ir Dr Hon Raymond HO Chung-tai, JP
Hon NG Leung-sing
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon CHAN Yuen-han
Hon CHAN Wing-chan
Hon Howard YOUNG, JP
Hon LAU Kong-wah
Hon Andrew CHENG Kar-foo
Dr Hon TANG Siu-tong, JP

Members absent : Hon Cyd HO Sau-lan
Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon Eric LI Ka-cheung, JP
Hon Ronald ARCULLI, JP
Hon Bernard CHAN
Hon CHAN Kam-lam
Hon SIN Chung-kai
Hon Andrew WONG Wang-fat, JP
Hon LAU Chin-shek, JP
Hon FUNG Chi-kin

Public officers : **Transport Bureau**

attending

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)

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

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 Meeting with the Administration

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

LC Paper No. CB(1)870/99-00(01) - The Administration's response to members' queries raised at the meeting on 20 January 2000

LC Paper No. CB(1)870/99-00(02) - Committee stage amendments to the Bill prepared by the Administration

The Chairman advised that in response to members' request made at the meeting on 4 January 2000, the Staff Consultative Council of the MTR Corporation and the Mass Transit Railway Corporation Staff Union had provided supplementary submissions on their views about various staff-related matters (issued respectively vide LC Paper Nos. CB(1)840/99-00 and CB(1)858/99-00) to the Bills Committee for consideration.

2. Members then proceeded to discuss the Administration's response to members' queries raised at the meeting on 20 January 2000 (LC Paper No. CB(1)870/99-00(01)).

Clause 9 - Corporation to maintain proper and efficient service

3. At the enquiry of the Chairman, the Deputy Secretary for Transport (1) (DS for T(1)) affirmed that the Administration would, whenever possible, report any amendments to the Performance Requirements in Schedule III of the Operating Agreement to the LegCo Panel on Transport before they were implemented.

Clause 15 - Suspension of franchise

4. Mr CHENG Kar-foo stated that the drafting of subclause (6) should be tightened to ensure that compensation would not be payable by the Government under subclause (6)(a) if the suspension was caused by the acts and omissions of MTRCL. He suggested that the expression "except where a franchise is revoked under section 18" be inserted in subclause (6) to cover both subclauses (6)(a) and (b). In response, DS for T(1) said that the Administration did not agree with the suggestion as it was the policy intention to pay compensation to the Corporation in respect of the use of railway property taken over by the Government. Taking note of the reply, Mr CHENG said that he did not agree with the Administration's view and he would re-consider the policy issues involved.

Clause 57 - No civil liability for breach of statutory duty

5. The Senior Assistant Law Draftsman (SALD) took members through the Administration's reply in relation to members' queries about clause 57. He explained that as new obligations for the Corporation were created under the Bill, it was important to have a provision that expressly stated that any obligation under the new Ordinance was a matter of enforcement by the Government. Whilst no additional rights to enforce the Corporation's statutory obligations were conferred on members of the public, clause 57 would have no impact whatsoever as regards obligations of the nature of private rights, e.g. any duty of care the Corporation owed to a member of the travelling public. Hence, all the existing rights of private individuals to sue the Mass Transit Railway Corporation (MTRC) in civil law were preserved.

6. Regarding part (c) of the Administration's reply, Mr CHENG Kar-foo asked and the Assistant Legal Adviser (ALA) advised that she concurred with the Administration's view that clause 57 would not affect the right of a claimant in a civil case to introduce as evidence the fact that the Corporation had breached its statutory obligation under the Bill. However, the breach of statutory obligation would not be conclusive evidence and no civil liability would be constituted by that breach alone.

7. While stating his general acceptance of the explanation given by the Administration, Mr CHENG Kar-foo expressed concern about the effect of this new provision on the legal relationship among public transport operators, the travelling public and the Government and he considered that a change of policy might be involved. As no similar provision was found in the existing Mass Transit Railway Corporation Ordinance (Cap. 270) or the Kowloon-Canton Railway Corporation Ordinance (Cap. 372) and no problem was created by its absence, Mr CHENG sought further advice from the Administration on the rationale and legal basis for introducing this provision.

8. In reply, DS for T(1) stressed that no policy change was involved with the enactment of clause 57. It had to be made clear that the nature of the present Bill was different from Cap. 270 and Cap. 372 as the purpose of those ordinances was simply to establish the respective statutory corporations to operate the Mass Transit Railway and the Kowloon-Canton Railway. However, under this Bill, a franchise would be granted to the privatized Corporation and new legal obligations were created thereunder. From the perspective of establishing a clear regulatory regime which was an essential part of the privatization exercise, it was considered both appropriate and desirable to include the provision in case there was any doubt on the part of the travelling public as regards their private rights. The interests of the prospective shareholders of the privatized Corporation would also be protected. Moreover, the arrangement was in line with other franchised public transport services such as buses. If a franchised bus operator failed to provide a proper and efficient service, any member of the public could lodge a complaint with the Government who would enforce the relevant terms of the franchise agreement but that person could not bring a civil action against the bus operator in court.

9. SALD also advised that the provision was for the purpose of avoidance of doubt and from a purely drafting point of view, it was considered by some legal authority a recommended good practice to include a similar provision so as to put the matter beyond doubt. In this connection, the Legal Director and Secretary, MTRC (LD&S/MTRC) added that the proposition that a breach of statutory duty did not by itself give rise to civil liability as expounded by Lord BROWNE-WILKINSON (LC Paper No. CB(1)837/99-00(01) refers) was only a general one and there could be exceptions. It was precisely for those exceptions that subclause (1) was needed in this case, to put it in no uncertain terms that the legislature did not intend to give an individual additional private rights to enforce any statutory obligations.

Admin. 10. Mr CHENG was not totally convinced that clause 57 was necessary for the purposes stated by the Administration. He opined that without the provision, the matter could still be argued in court on the basis of common law principles. Notwithstanding the Administration's good intention, he was worried that this statutory provision might become an escape clause for the Corporation. Mr CHENG requested the Administration to provide information on relevant precedent cases in support of its view.

11. Mrs Selina CHOW queried whether the position would remain the same after clause 57 was enacted, particularly with regard to subclause (2) which seemed to suggest that only the civil liabilities of the Corporation in respect of negligence and those which were not related to its statutory obligations were unaffected. She sought clarification from the Administration in this regard.

12. In response, SALD advised that from the legal point of view, negligence at common law and a breach of statutory obligation were two distinct legal situations. Notwithstanding the difference, there might however be situations where there was a certain overlap in which the fact of non-compliance with a statutory obligation was relevant to establishing a claim of negligence. The Administration's view was that if a person had a cause of action in negligence, clause 57 would not affect that person's right to pursue that cause of action even if the negligence was related to the breach of statutory obligation. In other words, if a claim was brought on the basis of negligence, the fact that the negligence also constituted a breach of statutory obligation would not affect the person's right to bring that claim.

Admin. 13. Echoing Mrs Selina CHOW's views, the Chairman considered that the legislative intent was not adequately reflected in the drafting, particularly the ambiguity created by the expression "which arises apart from this Ordinance" in subclause (2). At the Chairman's request, the Administration agreed to consider improving the drafting of the provision.

14. While expressing appreciation for MTRC's performance in relation to providing access for the disabled, Ir Dr Raymond HO sought clarification from the Administration on MTRC's statutory obligations in this regard. He was also concerned about whether the existing rights of an individual to sue the Corporation for

accidents arising out of inadequate facilities provided for the visually- and physically-impaired were adequately safeguarded. In reply, SALD explained that this matter would not be covered under clause 57. Although the Bill had no provision covering regulations governing facilities for the disabled, there were provisions regarding compliance with other ordinances and one of those was the Buildings Ordinance (Cap. 123).

15. The Operations Director, MTRC (OD/MTRC) further explained that MTRC was not subject to the regulation of the Building Authority (BA) for access of disabled persons. However, it had agreements and pledges to provide full accessibility for the visually- and physically-impaired on all its lines, even for the urban lines which predated any of the statutory requirements. In supplement, LD&S/MTRC said that BA's exemptions were given on a project by project basis in relation to specialized railway structures, i.e. track support structures and railway stations etc. But if the structures were associated with property development, they would be subject to BA's regulation and covered under the Buildings Ordinance. In response to Mr Edward HO, LD&S/MTRC confirmed that the Corporation was indeed subject to BA's regulation unless given exemption. However, even for works that had been exempted, the Corporation would consult the Security and Safety Committee of which BA was a member on their design and development.

Clause 60 - Corporation not a public body

16. SALD advised that clause 60 was another avoidance of doubt provision arising out of the unique situation involving the privatized Corporation whose majority shareholder would be the Government. As it was common for the laws of Hong Kong to confer special privileges or additional burdens on public bodies, the provision would make it clear that no such privileges or burdens were intended to be enjoyed by or imposed on the MTR Corporation Limited (MTRCL). In this connection, Mrs Selina CHOW asked and SALD agreed to provide drafting precedents for clause 60, as well as examples of special privileges for or additional burdens on public bodies under the laws of Hong Kong.

Admin.

17. Members went on to examine the three sets of draft Committee stage amendments (CSAs) proposed by the Administration (Annexes A to C to LC Paper No. CB(1)870/99-00(02)).

CSAs proposed in response to members' suggestions

Clause 15(2) - Suspension of franchise

18. In response to Mrs Selina CHOW's question about the difficulty involved in allowing the Corporation to appear before the Chief Executive (CE) in Council to make representations, the Deputy Secretary for Transport (4) (DS for T(4)) said that in case a suspension of the franchise was ever needed to be considered, the emergency situation would require the Government to respond quickly. The proposed

amendment would ensure that any representations made by MTRCL when consulted would be conveyed to CE in Council by the Secretary for Transport (S for T). Mrs CHOW however disagreed with the Administration's view as she considered that if given the opportunity to appear before CE in Council to state its case, the Corporation would be most willing to oblige no matter how hasty the meeting was arranged.

19. Mr Edward HO pointed out that according to his understanding, CE in Council would not normally meet with commercial organizations. However, he enquired about the arrangement for taking over public utilities such as power companies in case of emergency. In reply, DS for T(1) said that under other statutory appeal mechanism to CE in Council, similar arrangement for making written representations was adopted. As the representations would be prepared by the Corporation independently, it would be no different from appearing before CE in Council. Taking Mr HO's point, Mrs Selina CHOW agreed that the proposed amendment would suffice for its purpose and that her suggestion might involve wider policy issues.

Clause 62A - Service of notices

20. DS for T(4) drew members attention to this new provision which set out the practice and procedure for giving notices to S for T and the Corporation under the Ordinance. Raising query about the expression "a person apparently competent to receive communication" under subclause (5), Mrs Selina CHOW asked whether it was an established concept in law. ALA replied that although the expression might not be commonly used in other ordinances, the expression "任何表面看來有權收取.....通訊的人" in the Chinese text would be acceptable. Agreeing with ALA's view, members requested the Administration to consider whether the word "competent" could appropriately reflect the meaning of "有權" ("authorized") in the Chinese text.

Admin.

21. Members considered that except for clause 62A(5), both the Chinese and English versions of the draft CSAs as set out in Annex A of the paper were in order.

CSAs on technical or drafting points raised by the Administration and ALA

22. SALD took members through the proposed amendments one by one.

Clause 19(4) - Use of railway property by Government

23. In reply to Mr CHENG Kar-foo's enquiry about the Chinese rendition of "無權", instead of "不可" for the English expression "is not entitled", Senior Government Counsel (SGC) advised that the term "無權" was the closest equivalent in meaning for the English expression.

24. At the request of the Chairman, ALA confirmed that both the Chinese and English versions of the draft CSAs as set out in Annex B of the paper were in order.

CSAs to improve the Chinese texts

25. SGC took members through the proposed amendments one by one and no specific questions was raised by members.

26. At the request of the Chairman, ALA confirmed that the draft CSAs as set out in Annex C of the paper were in order.

27. Summing up the discussion, the Chairman said that the Bills Committee supported the CSAs to be moved by the Administration. However, Mr CHENG Kar-foo would further consider the CSA in relation to clause 15. The Chairman also reminded members that the next meeting would be held on 27 January 2000 at 9:00 am to discuss draft CSAs to be moved by members and such CSAs should preferably reach the Secretariat by 26 January 2000 for timely circulation.

II Any other business

28. There being no other business, the meeting was adjourned at 10:47 am.

Legislative Council Secretariat
28 September 2000