

立法會
Legislative Council

LC Paper No. CB(1)2080/99-00
(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 Thursday, 27 January 2000, at 9:00 am
in the Chamber of the Legislative Council Building**

Members present : Hon Mrs Miriam LAU Kin-ye, JP (Chairman)
Hon Edward HO Sing-tin, SBS, JP
Hon Albert HO Chun-yan
Hon LEE Cheuk-yan
Hon Ronald ARCULLI, JP
Hon CHAN Yuen-han
Hon Bernard CHAN
Hon CHAN Wing-chan
Hon CHAN Kam-lam
Hon SIN Chung-kai
Hon Howard YOUNG, JP
Hon LAU Chin-shek, JP
Hon Andrew CHENG Kar-foo

Members absent : Hon Kenneth TING Woo-shou, JP
Hon HO Sai-chu, SBS, JP
Hon Cyd HO Sau-lan
Ir Dr Hon Raymond HO Chung-tai, JP
Hon Eric LI Ka-cheung, JP
Hon NG Leung-sing
Hon Mrs Selina CHOW LIANG Shuk-ye, JP
Hon Andrew WONG Wang-fat, JP
Hon LAU Kong-wah
Hon FUNG Chi-kin
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 Clement KWOK
Finance Director

Mr Phil GAFFNEY
Operations Director

Mrs Miranda LEUNG

Corporate Relations Manager

Mr Martin BROWN
Head of Operations

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(1)889/99-00(01))

The Chairman drew members' attention to the response of the Administration to issues raised by members at the meeting on 25 January 2000 in respect of clauses 57, 60 and 62 of the Bill (issued vide LC Paper No. CB(1)889/99-00(01)).

Clause 57 - No civil liability for breach of statutory duty

2. The Senior Assistant Law Draftsman advised that on the suggestion of members, the Administration would move a Committee Stage amendment (CSA) to replace the existing clause 57(2) so as to reflect more clearly the legislative intent. At the invitation of the Chairman, the Assistant Legal Adviser (ALA) advised that the drafting of the provision was in order. Members agreed to the proposed CSA.

Clause 60 - Corporation not a public body

3. Members noted the explanation and examples given by the Administration and raised no further queries on the clause.

Clause 62A - Service of notices

4. Members noted that the Administration had accepted their views and would move a CSA to replace the word "competent" by "authorized" in the English text of subclause (5).

5. The Bills Committee then proceeded to discuss the draft CSAs to be proposed by members.

Draft CSAs proposed by Ms CHAN Yuen-han

(LC Paper No. CB(1)889/99-00(02) issued vide LC Paper No. CB(1)904/99-00)

Clause 7 - Directors of Corporation

6. Members noted that Ms CHAN Yuen-han would move a CSA to the effect that one of the directors of the Corporation appointed under clause 7 of the Bill should be a staff representative directly elected by the employees of the Corporation. Responding to Mr Edward HO's questions about the role of this director and the possibility of conflict of interests, Ms CHAN said that the staff representative would have a clear understanding of his role as a director and his decision made in such a capacity would reflect the interest of the company. Even though it was not a usual practice to impose a statutory requirement on the composition of the board of directors, there were cases where some listed companies would invite staff representatives to be directors. The fact that the representative was "directly elected" could ensure that he was not bound by any loyalty to the staff unions which elected him and hence, the prospect of conflict of interests should not arise. In fact, such an appointment would help enhance communication between the staff side and the management and in turn, benefit the Corporation as a whole.

Clause 29 - Offence of negligent act or omission by employee

7. Members noted that Ms CHAN would move a CSA to the effect that the concerned employee would only be liable to imprisonment for offence of negligent act or omission under clause 29 if such negligent act or omission had resulted in serious injuries or deaths. Mr Edward HO was concerned that with such an amendment, employees of the Mass Transit Railway Corporation (MTRC) would be treated differently under the law as the staff of other public transport operators such as franchised bus companies were subject to similar regulation. He also pointed out that it might give the public an impression that the MTR safety standard would be lowered after privatization. In reply, Ms CHAN said that clause 29 of the Bill which was modelled on section 23D of the existing Mass Transit Railway Corporation Ordinance (Cap. 270) was already outdated as the provision did not take into account the definition of "negligence". Her proposed amendment was aimed at striking a right balance between public interest and staff protection and was also in line with the common law principle that negligence would generally give rise to civil claims only.

Clause 41 - Employment-related matters

8. Members noted that Ms CHAN would also move a CSA to ensure that the existing benefits enjoyed by the staff and the prevailing pay review mechanism of the MTRC would remain in force after privatization.

Draft CSAs proposed by Mr LAU Chin-shek

(LC Paper Nos. CB(1)904/99-00(01) and CB(1)911/99-00(01))

9. At the invitation of the Chairman, Mr LAU Chin-shek briefed members on his proposed CSAs which were tabled at the meeting and subsequently circulated to members vide LC Paper No. CB(1)911/99-00(01). The Chairman also drew members' attention to the explanatory note prepared by Mr LAU which was issued to members before the meeting vide LC Paper No. CB(1)904/99-00(01).

Clause 4 - Grant of franchise to Corporation to operate railway

Clause 5 - Extension of franchise

Clause 6 - Restriction on transfer of franchise

10. Members noted that in order to increase the accountability of the Corporation, Mr LAU Chin-shek would move a CSA to clause 4 to the effect that the Legislative Council (LegCo) might by resolution amend the terms and conditions of the Operating Agreement (OA) and that the extension of franchise under clause 5 and the transfer of franchise under clause 6 should also be subject to the approval of LegCo. Mr Edward HO did not agree with the proposed amendment to clause 4(3) as the OA was a contractual agreement entered into between the Government and the Corporation and it would not be desirable for LegCo to have the power to amend the terms and conditions of the OA. His view was shared by Mr CHAN Kam-lam.

Clause 8 - Chief Executive may appoint additional directors

11. Mr LAU opined that the interest of the company should not be considered separately from staff interest. If staff interest was not adequately protected, public interest would be undermined. As such, he would move a CSA to provide that one of the additional directors to be appointed by the Chief Executive (CE) under clause 8 of the Bill should include a staff representative and that the maximum number of additional directors that might be appointed by CE should be increased from three to four. The appointment of additional directors should also be subject to the approval of LegCo.

Clause 29 - Offence of negligent act or omission by employee

12. Members noted that Mr LAU would move a CSA to repeal clause 29 as he was of the view that no criminal liability should arise out of negligence of employees and the responsibility of negligent acts or omissions by employees should also be assumed by the company. Given that a negligent act leading to serious injuries or deaths would be covered by other ordinances, Mr LAU considered that there was no such need to retain the provision in the Bill. Further, if a civil claim against an employee were established, the employee concerned would be sacked by the Corporation. This would already be a severe penalty to the employee concerned.

13. Supporting Mr LAU's amendment, Mr LEE Cheuk-yan pointed out that criminalization would not necessarily ensure public safety and the matter should be dealt with by providing proper training to the staff. The Operations Director of

MTRC (OD/MTRC) pointed out that extensive training on safety-related matters had already been provided to the staff to ensure that they were aware of and competent in carrying out the relevant rules and procedures.

14. Mr Edward HO expressed grave concern about Mr LAU's proposal as he considered that it would be of utmost importance to ensure railway safety. In view of the serious consequence that might be resulted, negligent acts or omissions of employees should also be caught.

Clause 34 - Bylaws

15. Members noted that Mr LAU would move a CSA to clause 34(1) to the effect that railway fares would be subject to the approval of LegCo. Mr LAU was of the view that an elected legislature would be in the best position to represent the interest of the general public. However, Mr CHAN Kam-lam was concerned about the political pressure that might be imposed on the management of the Corporation in the course of fare determination. He indicated that he would move a CSA on the fare determination mechanism with a view to striking a proper balance between fare regulation and political pressure.

Clause 41 - Employment-related matters

16. Members noted that Mr LAU would move a CSA to ensure that persons with contracts of employment with the MTRC in force immediately before the appointed day might all remain in employment and their seniority should be retained with pay, allowances, benefits and conditions of service no less favourable than before. In response to the Chairman's enquiry, Ms CHAN Yuen-han said that while her proposed CSA was different from Mr LAU's amendment, the spirit of safeguarding employees' right was the same.

Clause 2 - Interpretation

Clause 62 - Whether a notice, etc. is subsidiary legislation

17. Members also noted the technical and consequential amendments to be moved by Mr LAU to the above provisions.

Draft CSAs proposed by members of the Democratic Party

(LC Paper No. CB(1)889/99-00(04) issued vide LC Paper No. CB(1)911/99-00)

18. On behalf of the Democratic Party, Mr CHENG Kar-foo and Mr Albert HO briefed members on the proposed CSAs and the explanatory note (LC Paper No. CB(1)889/99-00(04)) which were tabled at the meeting and subsequently circulated to members vide LC Paper No. CB(1)911/99-00.

Clause 9 - Corporation to maintain proper and efficient service

Clause 14 - Chief Executive in Council may impose financial penalty

Clause 62 - Whether a notice, etc. is subsidiary legislation
New Schedule 7 - Performance Requirements

19. Members noted that Mr CHENG Kar-foo would move a CSA to incorporate the Performance Requirements in Schedule III to the OA into a new Schedule 7 to the Bill and adjust upward the corresponding performance levels to the MTRC's historical performance in the past two years immediately before privatization. In this respect, Mr CHENG Kar-foo drew members' attention that there were some technical omissions in the present draft. He would improve the drafting of the CSAs and put up a fresh proposal for consideration of the Council.

20. In order to enhance railway safety, members noted that Mr CHENG would also move a CSA to include a numerical benchmark for platform screen doors (PSDs) as one of the performance requirements in the new Schedule 7. The initial performance level was pitched at 98% which was drawn up on the basis of the two performance criteria, namely passenger journeys on time and train punctuality.

21. Members also noted that Mr CHENG would move CSAs to clauses 62 and 14 respectively to the effect that subsequent amendments to the performance levels in Schedule 7 would be subject to negative vetting of LegCo and that the financial penalty imposed on the Corporation for any substantial or persistent breach of the Ordinance or the OA be increased.

New Part IIIA - Determination of Fares
New Schedule 8 - Revision of Fares

22. Members noted that Mr CHENG proposed a price cap approach in respect of fare determination. Mr CHENG explained that the price cap method, previously adopted by the Administration for regulating the tariff of Hong Kong Telecom, would provide an objective means to determine the magnitude of fare increase. In brief, a formula of "Consumer Price Index (CPI) *minus* X" was to be applied to ensure that the average of proposed fare increase for the coming year and fare increases in the last four years preceding the revision would be kept at a level which was lower than or equal to the yearly average increase of the CPI in the past five years. In other words, the Corporation was at liberty to increase its fare annually provided that the magnitude of increase was within the permitted range under the formula. The value of "X" was initially pitched at zero. The formula including the factor "X" should be reviewed jointly by the Administration and the Corporation once every five years and amendments to the formula would be subject to the approval of LegCo. According to Mr CHENG, this approach had a built-in mechanism for fare increase and would help eliminate uncertainty among investors.

23. Some members had reservation about the proposed mechanism. Mr Bernard CHAN opined that there would be difficulty in explaining the proposed approach to investors during the Initial Public Offering. Highlighting various shortcomings in the proposal, Mr CHAN Kam-lam and Mr Howard YOUNG also cited different scenarios

in which inequitable fare increases might be derived from the formula. For example, fare increase might be proposed in deflationary times provided that the magnitude was within the cap.

New Part IIA - Development Projects above New Stations

24. As the MTRC would be transformed from a Government's wholly-owned company to a listed company after privatization, Mr Albert HO opined that the continued granting of property development rights to the Corporation would constitute a case of granting subsidy to a private company. To ensure fairness, he was of the view that the Government should tender out the property development rights and inject the cash generated from the tender bid into the Corporation for railway development. He therefore would move a CSA to the effect that the franchise granted to the Corporation would not include the granting of property development rights above new stations and along new extensions.

Clause 13 - Chief Executive in Council may give directions

25. Members noted that Mr HO would move a CSA to the effect that CE in Council would be required to take into account the policy of promoting competition among different modes of public transport whenever he gave directions to the Corporation under clause 13 of the Bill.

Draft CSAs proposed by Mr CHAN Kam-lam
(LC Paper No. CB(1)889/99-00(03))

New Part IIIA - Determination of Fares

26. Members noted that according to Mr CHAN Kam-lam's proposal, fares charged by the Corporation would be subject to the approval of CE in Council having regard to the views expressed by the Transport Advisory Committee (TAC). Mr CHAN considered that this mechanism had been in use for years for regulating the fares of franchised bus companies and had not adversely affected the share prices of the concerned companies. To enhance the efficiency and effectiveness of the mechanism, the membership of TAC should be enlarged with the establishment of a subcommittee to provide an independent assessment on fare increase applications from the Corporation.

27. In response to some members' questions about the difference between making CE in Council and LegCo the fare determining authority, Mr CHAN said that the individuals involved in "CE in Council" would not be subject to the same degree of political pressure as in the case of LegCo. While acknowledging that fare autonomy would be in the best interest of the Corporation, he was of the view that as the Mass Transit Railway (MTR) was one of the major modes of transport for the commuting public, its fare increases would have significant impact on people's livelihood and should therefore be subject to more stringent scrutiny.

The Administration's response to draft CSAs proposed by members

28. At the invitation of the Chairman, the Administration gave its initial response to the major proposals contained in the four sets of draft CSAs proposed by members.

Fare determination mechanism

29. The Deputy Secretary for Transport (4) (DS for T(4)) said that the Administration did not support any proposals that would upset the fare setting autonomy currently enjoyed by the MTRC. He stressed that preserving fare autonomy for the future privatized Corporation was of the utmost importance. Any fundamental change to the existing mechanism would have far-reaching implications on the Corporation and would affect its credit rating and costs of borrowings, and future development and maintenance plans. Such view was also borne out by banking and financial experts who had appeared before the Bills Committee. Indeed the loss of fare autonomy might have the risk of rendering shares of the Corporation unmarketable and frustrate the plan for privatization. Given that the existing determination mechanism system had proved to have worked well, it would be unwise to alter the system in the course of privatization.

30. DS for T(4) further advised that the Administration would continue to promote healthy competition between MTR and other public transport modes so as to ensure that market forces would act as a constraint on fare increases. In the course of implementation, the Administration would continue to adhere to the Government's Statement on Competition Policy, having regard to the overall interest of Hong Kong. As the majority shareholder of the Corporation after privatization, the Administration would ensure that all its activities would be compatible with that Statement. Hence, the Administration did not support the amendment proposed by Mr Albert HO to clause 13.

31. In supplement, the Finance Director of MTRC said that the proposals to alter the existing fare-setting mechanism would restrict the Corporation's autonomy in fare determination, thus lowering its credit rating and increasing its borrowing costs. These might result in even more pressure on future fare increases. Moreover, uncertainty over projected future revenue would handicap planning on long-term maintenance and improvement programmes and would upset the privatization plan as investors' confidence might be shaken as a result.

Staff representation on the board of directors

32. DS for T(4) said that the Administration was of the view that such an appointment was not appropriate or necessary. The Corporation was to be established as a listed company with public shareholders charged to operate on prudent commercial principles. The board of directors would have a legal and contractual duty to consider the interest of the company as a whole and it would not be appropriate

to have individual directors to represent specific sectorial interests. Internationally, there was no legal requirement for a company to include an employee representative on the board of directors in the United Kingdom or the United States. The Corporation had made clear that its staff were its primary asset and that its management would continue to consult its staff on important issues affecting them through the existing staff consultation mechanism.

Performance Requirements

33. In respect of the incorporation of the Performance Requirements in Schedule III to the OA into a Schedule to the Bill, DS for T(4) stated that the Administration had reservation on the proposal as it would undermine the proper regulatory functions of the Commissioner for Transport (C for T). To ensure that the Corporation would provide a proper and efficient service, C for T, as the regulator, would review the requirements in Schedule III to the OA regularly and to make necessary changes to them in the light of changing passengers' demands and technological and technical progress made by the Corporation for the management and operation of the railway. If the Performance Requirements were written into the law as a schedule, any changes would have to be effected by way of subsidiary legislation, the enactment of which would take time.

34. On the proposal to adjust upward the performance levels, DS for T(4) advised that the Administration did not support the Democratic Party's proposed amendment as it would only be fair to give the Corporation some allowance for occasional minor fluctuations to cater for situations beyond its control.

35. Regarding the suggestion to set a numerical benchmark for PSDs, DS for T(4) stated that whilst PSDs could enhance safety of passengers, they were not a pre-requisite for safe railway operations. Further, PSDs formed an integral part of the Train and Signaling Control System and, as such, any deficiency in the operation and reliability of these doors would result in disruption to the train service. Such disruption would be reflected in the performance requirements for passenger delay and train punctuality. It was therefore not necessary for the reliability of PSDs to form a separate performance requirement or customer service pledge.

Employment-related matters

36. DS for T(4) advised that while it was the clear intention of the Corporation that contracts of employment and other employee benefits should remain unaltered as a consequence of the privatization, the Administration would have to study in further details Ms CHAN Yuen-han's proposed amendment in relation to the continuation of the prevailing pay review mechanism. As clause 41 was related to the vesting of the obligations and liabilities of MTRC in the new company on privatization, it was doubtful whether the pay review system, which was in fact an internal policy of the Corporation, would be within the scope of the provision.

Offence of negligent act or omission by employee

37. DS for T(4) said that clause 29 of the Bill in fact repeated section 23D of the existing Mass Transit Railway Corporation Ordinance. That provision had been in existence since 1979 and formed an essential part of the legislative framework for ensuring railway safety. The inclusion of clause 29 in the Bill was considered to be necessary so that the same standard of safety requirement would be adopted after privatization to protect both commuters and employees of the Corporation. Furthermore, there were similar provisions in other Ordinances such as the Kowloon-Canton Railway Ordinance (Cap. 372), Peak Tramway Ordinance (Cap. 265), and Aerial Ropeways (Safety) Ordinance (Cap. 211) and in respect of the operation of franchised bus companies, drivers were required to take all reasonable precautions to ensure the safety of passengers in or on or entering or alighting from buses.

LegCo approval in respect of the OA and the franchise

38. DS for T(4) said that the Administration did not support Mr LAU Chin-shek's relevant amendments because by introducing a new element of LegCo scrutiny, the proposals would represent a major departure from the existing regulatory relationship between the Government and the franchise operators of public transport services. The Administration was of the view that MTRC should not be treated differently from other public transport operators merely because it had been privatized.

Granting of property development rights

39. DS for T(4) said that the Administration did not support Mr Albert HO's proposed amendments because it believed that MTRC should be allowed to continue its role in integrating railway and property developments after privatization. The property developments would help provide early patronage to the railway systems. Such an arrangement was advantageous to the Government, the Corporation and the railway users because the profits arising from the developments had allowed the cost-effective expansion of railway system in Hong Kong as a whole. After all, the Government would charge the Corporation the full market value of the land granted for such property developments. As such, there was no question of subsidy to a private company.

40. The Deputy Secretary for Transport (1) (DS for T(1)) added that in respect of the granting of property development rights for the development of commercially unviable rail projects, open tender would not necessarily result in a higher premium than through valuation conducted by the Lands Department. As to the suggestion that the Government should inject the proceeds from the tender of property development rights into the Corporation for railway development, DS for T(1) cautioned that the interest of other public shareholders would also have to be considered.

41. Thanking the Administration for its response, the Chairman said that as some of the amendments had only been tabled at the meeting, both the Administration and MTRC would be welcomed to provide further response to the draft CSAs proposed by members if considered necessary.

42. Summing up the discussion, the Chairman said that the Bills Committee had concluded its deliberations on the Bill. Whilst individual members had briefed the Bills Committee on their proposed CSAs, the Bills Committee had not taken a position on the desirability of each proposal. Members agreed that individual members would proceed with their own amendments.

43. The Chairman then sought members' views on the timetable for the Bills Committee to report to the House Committee and for the resumption of Second Reading debate. Members agreed that the Bills Committee would make a report to the House Committee on 11 February 2000 and that it supported and recommended the Administration's proposal to resume Second Reading debate of the Bill on 23 February 2000. To this end, the Chairman reminded members that the deadline for giving notice of CSAs would be 14 February 2000.

II Any other business

44. There being no other business, the meeting was adjourned at 11:15 am.