

Mass Transit Railway Bill

Response to Questions raised by Assistant Legal Adviser

Legislative Council Secretariat on 12 October 1999

Q.1 If land is required to be resumed for the construction of an extension to the Mass Transit Railway, do the provisions of the Railways Ordinance (Cap. 519), including the compensation provisions, apply to such resumption? If so, please explain why the Government should assume the liability to pay compensation out of the General Revenue after privatization of the Mass Transit Railway Corporation (MTRC).

A.1 If land is required to be resumed for the construction of an extension of the Mass Transit Railway, the Railways Ordinance (Cap. 519), including the compensation provisions, will apply. The compensation payable, however, will not be a charge on the General Revenue.

The existing Government policy, which applies to MTRC and Kowloon-Canton Railway Corporation, provides that railway corporations should bear costs of acquiring land for railway projects, including compensation to owners and clearerees. It requires the railway corporation awarded with a new railway project to enter into a Project Agreement with the Government. The Project Agreement provides, amongst other things, the mechanism for the Government to recover all land costs, including compensation payable, as follows :-

- (a) the railway corporation bears all land acquisition costs of whatsoever nature and howsoever caused arising from the

implementation of the railway project;

- (b) the Government notifies the railway corporation in writing after the Director of Lands has received a written claim from any person claiming an entitlement to compensation under Part III of Cap. 519;
- (c) the responsibility and authority for considering the claims rests with the Government, including the decision on the amount of payment and ex-gratia allowance payable to the claimants; and
- (d) in the event that the Government makes a payment to a claimant either in settlement of a claim or upon a decision of the Lands Tribunal, the railway corporation reimburses the Government upon demand.

Currently, it is Government's intention that the present policy will continue to apply to MTRC after privatization.

Q2. If it is intended that the MTR Corporation Limited (MTRCL) should be a company limited by shares, should this be provided expressly in the definition of "MTR Corporation Limited"? As you may be aware, companies incorporated under the Companies Ordinance (Cap. 32) may be limited by shares, limited by guarantee or unlimited in liability.

A2. MTRCL will, as a matter of fact, be incorporated under the Companies Ordinance (Cap. 32) as a company limited by shares and its shares will

be listed and traded on the Hong Kong Stock Exchange. It is, however, not strictly necessary for the Bill to contain an express statement that the Corporation will be a company limited by shares.

Q3. What is meant by maintaining “a proper and efficient service” in the proposed section 9? Will the Administration consider setting out some guidelines in a similar manner as in section 2 of the Ferry Services Ordinance (Cap. 104)?

A3. The Bill provides that MTRCL shall provide a proper and efficient service in accordance with the Ordinance and the Operating Agreement. These two documents will provide the benchmarks for a proper and efficient service. Other than meeting the requirements in the Ordinance such as those set out in proposed sections 11 and 28 of the Bill, MTRCL will also need to meet the requirements that the Operating Agreement will set in respect of various aspects of the railway operation (references in brackets are to the Principal Headings of the Operating Agreement annexed to the LegCo Brief issued on 24 September 1999) :-

- (a) monitoring of environmental conditions (cl. 3.6);
- (b) lighting and ventilation (cl. 3.7);
- (c) railway cleanliness (cl. 4.3);
- (d) passenger environment (cl. 4.4);
- (e) ticket and cash handling (cl. 4.8);

- (f) passenger service (cl. 4.9);
- (g) customer services pledges (cl. 4.11);
- (h) handling of passenger complaints (cl. 4.13);
- (i) review of railway safety management (cl. 5.3); and
- (j) maintenance procedures (cl. 5.5).

The Government, as the regulator, will use this system tailor-designed for the MTR system to check if MTRCL is providing a proper and efficient service.

Q4. If a person discloses information in contravention of the proposed sections 12(2) and 27(5), what legal remedy does the “victim” have under the Bill or otherwise? Is the person who contravenes the relevant provisions liable to any sanction under the Bill or otherwise?

A4. Legal remedies available to the Corporation for a breach of the statutory duties in sections 12(2) and 27(5) will include seeking an injunction under the public law and pursuing civil claims for damages.

Q5. At present, notice of the deposit of plans of transport interchanges is published in the Gazette as subsidiary legislation. The relevant notice, namely, the Mass Transit Railway (Transport Interchange) (Deposit of Plans) Notice (Cap. 270 sub. leg.) is proposed to be adopted as and become a notice published under the Bill. However, by virtue of proposed section 62, any notice issued under proposed section 31(6) will not be subsidiary legislation. Please explain why the Bill proposes to change the nature of such notices. If any variation to the existing Notice will not be published as subsidiary legislation, the information contained in the Notice may become outdated in time. What is then the purpose of adopting the Notice as subsidiary legislation under the Bill?

A5. The Bill does not make any change to the nature of the notice of deposit of plans of transport interchanges. A notice issued under clause 31(6) of the Bill will not meet the “legislative effect” criterion found in the definition of “subsidiary legislation” in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), and so should not be regarded as subsidiary legislation. The same applies to the notices already issued under section 24A(6) of the existing Mass Transit Railway Corporation Ordinance (Cap. 270). The fact that those notices have in the past been published in the loose leaf edition of the Laws reflects the previous practice whereby no clear distinction was made between instruments that are properly to be regarded as subsidiary legislation and those that are not. The current practice, however, is to make clear, by express reference in the legislation where appropriate, whether an instrument should properly be regarded as subsidiary legislation. Clause 62 reflects this practice.

Q6. In line with the corresponding provision in the UK British Steel Act 1988, should a provision be added under proposed section 48 to the effect that subsections (1) and (2) will not be taken as prejudicing the effect under the law of Hong Kong of the vesting in the Corporation by virtue of proposed sections 37 or 48 of the Bill of any foreign property, right or liability?

A6. We agree with your proposal to add a provision to section 48 along the lines of clause 2(3), Schedule 3 of British Steel Act 1988. The Administration will move a Committee Stage Amendment to that effect.

Q7. (a) Please explain why the MTR Corporation Limited, as a company incorporated under the Companies Ordinance (Cap. 32) should be given the power to bring prosecutions for offences under the Bill in its own name? As you may be aware, companies which have been granted franchises to operate other modes of public transport such as ferry and public bus services are not given such a power.

(b) Is it more appropriate that after privatization of MTRC, officers authorized by the new body corporate should only be given enforcement powers similar to those given to officers authorized by franchisees of other modes of public transport?

(c) Section 56, as drafted, may be construed to apply to offences under proposed sections 10(3), 11(4) and 28(3) with the result that the Corporation may be prosecuting itself. Does this

reflect the Administration's intention?

A7. (a) The Corporation's power to prosecute under section 56 is subject to the overriding principle that such powers shall be exercised without prejudice to any Ordinance relating to the prosecution of criminal offences or the powers of the Secretary for Justice in relation to the prosecution of criminal offences.

It is in fact not uncommon for operators of public transport franchises to be given powers to take out prosecution in their own names against offences set out in the governing legislation and by-laws. Some examples are set out below for your reference :-

(i) section 15A(2)(b), Peak Tram Ordinance (Cap. 265);

(ii) section 32(7), Western Harbour Crossing Ordinance (Cap. 436);

(iii) section 26(7), Tai Lam Tunnel and Yuen Long Approach Road Ordinance (Cap. 474); and

(iv) section 30(5), Discovery Bay Tunnel Link Ordinance (Cap. 520).

(b) The Mass Transit Railway By-laws were enacted in 1986. Prosecution under the By-laws had been conducted by the Government until April 1995 when the Police asked MTRC to take over the prosecution responsibility as the department did not

have adequate resources to continue the prosecution duties. The Corporation has since maintained close liaison with the Department of Justice to ensure that the prosecution practice of the Corporation adheres strictly to the public prosecution policy of the Department of Justice. Trials are conducted by independent external prosecutors to ensure impartiality. The practice has been working well and we do not see any reason for changing it.

- (c) Section 56 only provides that prosecutions for an offence under the Bill may be brought by the Corporation. There is nothing in the Bill which will replace or exclude the general prosecutorial power of the Department of Justice. In reality, any prosecution against the Corporation under the Bill will be conducted by the Department of Justice. The situation of the Corporation prosecuting itself should not arise.

Q8. Please explain why it is proposed that the Corporation's civil liability for breach of statutory duties should be exempted under the proposed section 57(1) given that no such exemption is given to other companies which are granted franchises to operate other modes of public transport.

A8. The enforcement of statutory duties should lie with Government and not the passengers. However, Section 57 will not release MTRCL from its contractual obligations owed to passengers who may be able to sue MTRCL for damages if MTRCL has been in breach of its contract with the passengers.

The purpose of the proposed section 57 is to put things beyond doubt. Without the proposed section 57, breach by the Corporation of a statutory duty could, in addition to contractual claims against the Corporation if that should at the same time constitute a breach of contract with the passenger, arguably give rise to a liability to a civil action in tort. By way of example, this would mean that a person who misses a flight connection or job interview as a result of the late running of trains may be able to bring a civil action in tort against the Corporation. As a matter of policy, it is highly desirable that there should be no doubt about the extent of MTRCL's liabilities for failure to comply with its duties under the new Ordinance. Accordingly, it should be beyond doubt that the enforcement regime contained in the legislation is an exhaustive regime to be invoked only by the Government and no civil action may be brought by passengers for breach of statutory duties under the Ordinance by the Corporation.

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Transport Bureau

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