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**Paper for the House Committee meeting
on 11 February 2000**

**Report of the Bills Committee
on Mass Transit Railway Bill**

Purpose

This paper reports on the deliberations of the Bills Committee on Mass Transit Railway Bill (the Bill).

Background

2. On 3 March 1999, the Financial Secretary announced in his Budget Speech the intention of the Government to privatize part of the Mass Transit Railway Corporation (MTRC) shares. MTRC in its present form as a statutory corporation is, however, not an appropriate vehicle for private ownership. The Administration therefore introduced the Bill on 13 October 1999 with a view to facilitating the subsequent listing of the Corporation.

3. Under the Bill, all assets and liabilities of the existing MTRC will be vested in the MTR Corporation Limited (MTRCL) on a date to be appointed by the Secretary for Transport. The new company will be granted a 50-year franchise to operate the Mass Transit Railway (MTR) and to construct and to operate any extension to the railway. The Bill requires MTRCL to maintain a proper and efficient service in accordance with an Operating Agreement (OA). The OA will be a legally binding document entered into between the Government and MTRCL, similar to the franchise documents for buses and ferries.

The Bills Committee

4. The House Committee agreed at its meeting on 15 October 1999 to form a Bills Committee to study the Bill. The Bills Committee first met on 11 November 1999 and Hon Mrs Miriam LAU was elected Chairman. The membership list of the Bills Committee is in **Appendix I**.

5. The Bills Committee has held a total of 15 meetings with the

Administration and MTRC. It has received written submissions from eight organizations/academic, and met the representatives from six of them. In response to the Bills Committee's request, the Administration has provided a copy of the latest draft of the Principal Headings of the OA and arranged for its financial adviser to brief members on the Initial Public Offering process. The Administration has also arranged for five financial/railway experts to appear before the Bills Committee to give their opinions in relation to the proposed privatization of MTRC and the associated regulated framework including fare determination mechanism. The list of organizations, academic and financial/railway experts who have presented views to the Bills Committee is given in **Appendix II**.

Deliberations of the Bills Committee

6. The Bills Committee has discussed with the Administration on the reasons for the privatization of MTRC. The Administration advises that as the Corporation has become one of the most efficient and profitable railway systems in the world and gained good credit ratings, the Government considers it timely to partially privatize MTRC. The introduction of private ownership will reinforce MTRC's commitment to competitiveness and efficiency. Privatization will bring strengthened market discipline to the running of the railway, promoting even greater levels of efficiency. It will also broaden MTRC's access to sources of capital and financing alternatives for new railway projects. This will facilitate the development of rail transport in Hong Kong. The privatization of MTRC will also reinforce the Government's commitment to a free market economy and competition. MTRCL's access to equity from the market will mean that Government resources which would otherwise go into funding of railway projects can be diverted to other priority areas of investment. The listing of MTRCL will help diversify the local stock market, which in turn will help enhance the attraction of Hong Kong as an international financial centre.

7. The Bills Committee notes that the Bill has set out the detailed arrangements for the grant of a franchise to the MTRCL to operate the MTR. It has also provided for the regulation of the railway under the franchise and the vesting in the MTRCL of the property, rights and liabilities of the MTRC. The Bills Committee also notes that detailed terms of the franchise, including the monitoring process by the Government and fare setting process by the Corporation are set out in the OA to be signed between the Government and MTRCL. As such, the Bills Committee has also examined the latest draft of the Principal Headings of the OA and made various suggestions with a view to strengthening the monitoring mechanism of the future privatized Corporation.

8. In the course of deliberation, members of the Bills Committee are particularly concerned whether the proposed arrangements can adequately safeguard public interest. Detailed discussion have taken place in respect of the following:

- (a) whether there is any conflict of interest as Government will be the majority shareholder, the service regulator, the safeguarder of public interest, the protector of minority shareholders all at the same time and whether the continued granting of property development rights above new railway stations and depots to MTRCL after privatization is appropriate;
- (b) whether the proposed appointment and composition of the future board of directors can help strike a balance between the interests of different parties;
- (c) whether a fare determination mechanism shall be introduced to regulate the fare of MTR and whether sufficient safeguards are in place to promote competition among different modes of transport;
- (d) whether the performance of MTR including the safety of the railway will be compromised as a result of privatization; and
- (e) whether employees' rights are adequately protected under the Bill.

A summary of the deliberations of the Bills Committee is set out in the following paragraphs.

Conflict of interest and property development rights

Conflict of interest

9. The Bills Committee has expressed concern that there could be a conflict of interest between the Government as a shareholder and a regulator, in particular where the Government, for public interest purposes, ask MTRCL to take on railway projects which are not commercially viable, bearing in mind the fact that the interests of the minority shareholders may be affected in the course of the process. Some members of the Bills Committee have also suggested that Government should consider establishing an independent committee to monitor and assess the performance levels of the Corporation.

10. The Administration does not believe that the conflict of interest, as envisaged by members of the Bills Committee, will even arise. The Administration advises that it expects MTRCL to continue to be driven by market competition and the need to achieve a commercial return. As in the past 25 years, the Government will not compel the Corporation to take on railway projects which do not yield a commercial return. In the event that the Government and the MTRCL agree that the Corporation is to undertake railway projects which are commercially unviable, the Government will provide support to MTRCL. Such support must be separately identified and justified publicly, and can take the form of property development rights, contribution to railway infrastructure, etc.

11. The Administration also considers it not necessary to set up an independent committee to monitor the performance levels of the Corporation. The Administration advises that the Government, being also the majority shareholder, will monitor closely the performance levels of the Corporation and make improvements before serious problems occur. Furthermore, under the OA, the Government will have the power to request MTRCL to review its operational arrangements and suggest areas of improvement to MTRCL where appropriate. MTRCL will be required to comply with the Government's requests for such reviews, to give due consideration to the Government's suggestions, and to advise the Government of its reasons for any inability to adopt them.

Granting of Property Development Rights to MTRCL

12. The Bills Committee has expressed concern on whether the existing policy on granting property development rights to MTRC in connection with its railway projects shall continue to apply to MTRCL after privatization as the Corporation is no longer a public body.

13. The Administration has advised that historically, MTRC has played a useful role in the property developments over its railway stations and depots and has established new communities along the railway footprint. It undertakes planning for the property developments, building a substantial part of the foundations and providing other common infrastructure. The property developments also help provide early patronage to the railway systems. The Administration believes MTRC shall be allowed to continue its role in integrating railway and property developments after privatization. Such an arrangement is advantageous to the Government, the Corporation and the railway users because the profits arising from the developments have allowed the cost-effective expansion of railway system in Hong Kong as a whole. After all, Government will charge MTRC the full market value of the land granted for such property developments. As such, there is no question of subsidy to a private Corporation.

14. The Bills Committee also notes that the Administration has considered the feasibility of separating the operating right from asset ownership of railways but has decided against it as the separation will affect the reliability and quality of the highly integrated railway services.

Granting of property development rights - amendment proposed by Mr HO Chun-yan

15. The Bills Committee notes that Mr HO Chun-yan is of the view that in considering that MTRC will be transformed from a Government's wholly owned company to a listed company after privatization, the continued granting of property development rights to MTRC will constitute a case of granting subsidy to a private company. To ensure fairness, Mr HO opines that Government shall tender out the property development rights and inject the cash generated from the

tender bid into MTRCL for railway development. The Bills Committee notes that Mr HO will move a Committee Stage amendment (CSA) to the effect that the franchise granted to MTRCL will not include the granting of property development rights above new stations and along new line extensions.

16. The Administration has advised that in the event that public interest and transport policy require MTRCL to develop commercially unviable rail projects on social and economic grounds, there is a need for Government to bridge the gap so that these projects can provide a commercial return. Open tender will not necessarily result in a higher premium for the development right being achieved than through valuation conducted by the Lands Department as the independent developer may factor into his cost additional expenditure relating to coordination with and possible claims from the railway corporation. Were Government to set aside the proceeds from the tender of property development rights and earmark them for the specific purpose of MTRC railway projects, the MTRC would bear an additional financial burden if it is expected to repay such loan or achieve a return on such equity at commercial rates. Any rates at less than commercial levels would entail a Government subsidy.

17. The Bills Committee has taken note of the amendment proposed by Mr HO Chun-yan without taking a position on its desirability.

Government's vote in connected transactions

18. The Bills Committee has also expressed concern about whether new railway projects undertaken by MTRCL constitute connected transactions and, if that is the case, whether the Government, as the controlling shareholder, will be subject to restrictions on voting on such issues at the general meeting of the company.

19. The Administration has advised that discussion will need to take place between the MTRCL, the Government and the Stock Exchange of Hong Kong in due course. In this regard, the Administration points out that in April 1999, the Stock Exchange of Hong Kong amended its Listing Rules governing the listing of H shares by PRC state-owned enterprises and indicated that the Stock Exchange would not normally treat a PRC government body as a connected person of a PRC issuer. At an appropriate time, discussions will take place with the Exchange on whether the Government will be treated as a connected person for all purposes. Such discussions are likely to include proposals relating to suitable disclosure requirements for transactions with the Government and will take place nearer the time of any decision to proceed with the listing.

Corporate Governance

20. The Bills Committee has examined the appointment and composition of the future board of directors. The Bills Committee notes that in order to facilitate a smooth transition from MTRC to MTRCL and to preserve the efficiency of the present operation of the Corporation, members of the board of

MTRC, which presently consists of nine directors including the MTRC Chairman and Chief Executive, academic, government officials and professionals will be invited to serve as directors of MTRCL. This will help strengthen investors' confidence that MTRCL will continue to enjoy the leadership provided by the existing board of MTRC which has contributed to the success of the Corporation and will provide a good balance of independent non-executive directors.

Staff representation on the board of directors

21. Some members of the Bills Committee consider it necessary to appoint a staff representative to the board of directors as it will help enhance communication between the staff side and the management and, in turn, benefit the Corporation as a whole. They opine that the interest of the company shall not be considered separately from staff interest. If staff interest is not adequately protected, public interest will be undermined. The suggestion is welcomed by some of the representatives of the staff side who have appeared before the Bills Committee to give oral presentation. Some other members, however, opine that such an arrangement is not acceptable and will hamper the operation of the board, not to mention the possible conflict of interest that may arise.

22. The Administration has advised that such an appointment is not appropriate or necessary. MTRCL is to be established as a listed company with public shareholders charged to operate on prudent commercial principles. The board of directors will have a legal and contractual duty to consider the interest of the company as a whole and it will not be appropriate to have individual directors to represent specific sectorial interests. Internationally, there is no legal requirement for a company to include an employee representative on the board of directors in the United Kingdom or the United States. MTRC has made clear that its staff are its primary asset and that its management will continue to consult its staff on important issues affecting them through the existing elected MTR Corporation Staff Consultative Committee.

Staff representation on the board of directors - Amendments proposed by members

23. The Bills Committee notes that some members do not accept the Administration's explanation. To this end, the Bills Committee has taken note of the CSAs proposed by Ms CHAN Yuen-han and Mr LAU Chin-shek on the appointment of a staff representative to the board of directors.

24. Ms CHAN Yuen-han proposes that one of the directors of the Corporation appointed under clause 7 of the Bill shall be a staff representative directly elected by the employees of the Corporation. According to Ms CHAN, staff representative will have a clear understanding of his role as a director and his decision made in such a capacity will reflect the interest of the company. Even though it is not a usual practice to impose a statutory requirement on the composition of the board of directors, there are cases where some listed

companies will invite staff representatives to be directors. The fact that the representative is "directly elected" can ensure that he is not bound by any loyalty to the staff unions who elect him and hence, the prospect of conflict of interest shall not arise.

25. Mr LAU Chin-shek proposes that one of the additional directors to be appointed by the Chief Executive under clause 8 of the Bill shall include a staff representative and that the maximum number of additional directors that may be appointed by the Chief Executive shall be increased from three to four. The appointment of additional directors shall also be subject to the approval of the Legislative Council.

26. Whilst the Bills Committee has initially discussed the proposals put forward by Ms CHAN Yuen-han and Mr LAU Chin-shek, it has not taken a position on the desirability of the proposals.

Fare determination mechanism

(Clause 8 of the OA)

27. The Bills Committee notes that under the existing Mass Transit Railway Corporation Ordinance (Cap. 270), MTRC is empowered to determine its own fares and the Administration has no intention to alter the existing system. The Bill therefore does not contain any provision relating to fare regulation. However, to strengthen the existing voluntary consultation arrangement, the Administration will include in the OA explicit requirements for MTRCL to consult the LegCo Panel on Transport and the Transport Advisory Committee before changing the level of fares. In addition, when determining new fare levels, MTRCL is also required to take into account the level of public acceptance through conducting passenger surveys (clause 8.1 of the OA).

28. The Bills Committee notices that the matter has raised wide public concern. Even among members of the Bills Committee, there are divergent views on the fare determination mechanism for the future privatized Corporation. Some members consider that the present framework based on prudent commercial principles have proved to have worked well and the operator's freedom from political influence in fare setting shall be upheld. Some other members, however, are of the view that as the MTR is one of the major modes of transport for the commuting public, its fare increases have significant impact on people's livelihood and shall therefore be subject to more stringent scrutiny. Several proposals have been put forward aiming at making fare increases of MTR to be subject to some form of regulation. The Bills Committee has invited individual members to present their proposed CSAs to the Committee at a meeting. The Administration is also invited to give an initial response to the views of these individual members.

Price cap regulation - proposed by Mr CHENG Kar-foo

29. Mr CHENG Kar-foo proposes a price cap approach. According to Mr

CHENG, the price cap method, previously adopted by Hong Kong Telecom, will provide an objective means to determine the magnitude of fare increase. In brief, a formula of "Consumer Price Index (CPI) *minus* X" is 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 will be kept at a level which is lower than or equal to the yearly average increase of the CPI in the past five years. In other words, the Corporation is at liberty to increase its fare annually provided that the magnitude of increase is within the permitted range under the formula. The value of "X" is initially pitched at zero. The formula including the factor "X" shall be reviewed jointly by the Administration and the Corporation once every five years and amendments to the formula will be subject to the approval of the Legislative Council. This approach has a built-in mechanism for fare increase and will help eliminate uncertainty among investors. Members' initial view to this proposal is that there will be difficulty in explaining the proposed approach to investors during the Initial Public Offering.

Fare to be determined by the Legislative Council - proposed by Mr LAU Chin-shek

30. Mr LAU Chin-shek proposes that railway fares shall be subject to the approval of an elected legislature which is in the best position to represent the interest of the general public. The proposal has however aroused deep concern among some members of the Bills Committee about the political pressure it has on the management of the future privatized Corporation in the course of fare determination which may run against the prudent commercial principle adopted by the Corporation.

Fare to be determined by the Chief Executive in Council - proposed by Mr CHAN Kam-lam

31. Mr CHAN Kam-lam proposes that fares of MTRCL shall be subject to the approval of the Chief Executive in Council having regard to the views expressed by the Transport Advisory Committee. He considers that this mechanism has been in use for years for regulating the fares of franchised bus companies and has not adversely affected the share prices of the concerned companies. To enhance the efficiency and effectiveness of the mechanism, the membership of Transport Advisory Committee shall be enlarged with the establishment of a subcommittee to provide an independent assessment on fare increase applications from the Corporation. The individuals involved in "Chief Executive in Council" will not be subject to the same degree of political pressure as in the case of Legislative Council if it were made the fare determining authority.

The Administration's stance

32. The Bills Committee takes note of the Administration's view that the MTRC has been operating on prudent commercial principles and enjoying fare setting autonomy since its establishment in 1975. According to the Administration, it is important that, after privatization, MTRC should continue to

retain fare autonomy which will enable it to invest in the development and maintenance of the railway system. Indeed the loss of fare autonomy may have the risk of rendering MTRC shares unmarketable and frustrate the plan for privatization. The Administration further advises that it will continue to promote healthy competition between MTRC and other public transport modes so as to ensure that market forces act as a constraint on fare increases. In the course of implementation, the Administration will 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 MTRCL after privatization, the Administration would see to it that all its activities would be compatible with that Statement.

33. According to MTRC, the existing process of setting fares after consultation has also struck a fine balance between the autonomy and accountability of the Corporation. The Corporation has over the years adhered to a self-imposed discipline of ensuring fare increases to remain below the rate of inflation. The proposals to alter the existing fare-setting mechanism will restrict the Corporation's autonomy in fare determination, thus lowering its credit rating and increasing its borrowing costs. These may result in even more pressure on future fare increases. Moreover, uncertainty over projected future revenue will handicap planning on long-term maintenance and improvement programmes and will also upset the privatization plan as investors' confidence may be shaken as a result.

34. The Bills Committee also takes note of the views of the representatives of a banking institution, an international credit rating agency, a fixed income research analyst and an international expert in the privatization of public utilities. All of them advised the Bills Committee that altering the existing fare-setting mechanism will have far-reaching implications on the Corporation and will affect its credit rating and costs of borrowings, and future development and maintenance plans. Given that the existing system has proved to have worked well, they consider it unwise to alter the system in the course of privatization.

The Bills Committee's stance

35. The Bills Committee has not come up with a consensus on a particular proposal put forward by members and notes that individual members will proceed with their own proposals.

Performance standards and safety

Performance levels and penalty for breach of these performance levels (Clauses 9, 14 and 18 of the Bill and Clause 4.9 of the OA)

36. The Bills Committee notes that the OA will stipulate the performance levels required of MTRCL and that substantial or persistent breaches of these performance levels will be grounds for imposition of financial penalties (clause 14 of the Bill) or revocation of franchise (clause 18 of the Bill). However, some members of the Bills Committee are dissatisfied with the pitching of the proposed performance levels specified in Schedule III to the OA at 1% below the Corporation's historical performance in the past two years immediately before privatization. Some members of the Bills Committee also consider there to be insufficient provisions in the OA for the Government to monitor the performance levels of MTRCL as the Commissioner for Transport does not have the ultimate authority to overrule the Corporation's decision on changes in railway services.

37. The Administration's response is that under clause 9 of the Bill, MTRCL is obliged to maintain a proper and efficient service, and the performance requirements in Schedule III to the OA are only threshold standards. The real targets which MTRCL will strive to achieve under the OA are the Customer Service Pledges (CSPs) which will be 0.5% above the performance requirements. As confirmed by an international railway expert who appeared before the Bills Committee, the proposed thresholds are extremely high by any international standards. The Administration further advises that MTRCL would be bound to observe the performance levels as stipulated in the OA, and these would be reviewed regularly for improvement. Clause 13 of the Bill empowers the Chief Executive in Council to give directions to the Corporation when public interest requires. Should the performance levels be considered unsatisfactory, the Corporation could be liable to penalties as specified in clauses 14 to 18 of the Bill.

Performance Requirements and Financial Penalty - Amendment proposed by Mr CHENG Kar-foo

38. The Bills Committee notes that Mr CHENG Kar-foo will move a CSA to incorporate the Performance Requirements in Schedule III to the OA into a Schedule to the Bill and adjust upward the corresponding performance levels to the Corporation's historical performance in the past two years immediately before privatization. The Bills Committee also notes that Mr CHENG will also move CSAs to the effect that subsequent amendments to the performance levels in the Schedule to the Bill will be subject to negative vetting of the Legislative Council

and that the financial penalty imposed on MTRCL for any substantial or persistent breach of the Ordinance or the OA be increased.

39. The Bills Committee notes that the Administration has reservation on Mr CHENG's proposal to incorporate the Performance Requirements in Schedule III to the OA into a Schedule to the Bill as it will undermine the proper regulatory functions of the Commissioner for Transport. To ensure that MTRCL will provide a proper and efficient service, the Commissioner for Transport, as the regulator, will 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 MTRCL for the management and operation of the railway. If the Performance Requirements are written into the law as a schedule, any changes will have to be effected by way of a subsidiary legislation, the enactment of which will take time.

40. To reinforce its stance, the Administration also refers the Bills Committee to the conclusions reached from an analysis based on benchmarking data from 16 major metro systems in Asia, Europe and America that service regulation, including time-tabling is best done by the metro operator on a routine and comprehensive basis and that the correct level of regulation allows companies to be responsive to the market and to be capable of changing quickly. To allay members' concern on the possible lowering of service standards after privatization, the Administration undertakes to report to the Legislative Council Panel on Transport on any amendment to the Performance Requirements in Schedule III to the OA.

41. On the proposal to adjust upward the performance levels, the Administration advises that the present arrangement aims at giving MTRCL some allowance for occasional minor fluctuations to cater for situations beyond its control. To ensure high level of performance, the Administration would take on board the Bills Committee's suggestion that there should be a mechanism for interim review whereby MTRCL will be required to review its adoption of technological and technical advances used internationally for railway operations. The Administration also undertakes to review the OA including the performance requirements in Schedule III every year or more often if necessary. In response to members' concern, the MTRC also agrees to fix the Corporation's CSPs at 1% above the Performance Thresholds instead of 0.5% as originally proposed.

42. The Bills Committee takes note of the amendments proposed by Mr CHENG without taking a position on the desirability of the proposals.

General safety standards

(Clauses 26 to 30 of the Bill and clause 5 of the OA)

43. Safety of railway is one of the major concerns expressed by members of the Bills Committee. In examining whether the safety of the MTR will be compromised as a result of the privatization, the Bills Committee notes that clause 28 of the Bill impose statutory obligations on the Corporation. According to the Administration, these are statutory duties of the Corporation to

ensure that the conditions of the railway system and the manner of railway operation will not pose danger to passengers and employees. In addition, a number of safeguards will be put in place in the OA to ensure that the MTR system will be maintained to very high safety standards. The OA also provides that MTRCL shall employ an independent external expert to review its safety management system at a regular interval of not more than five years. To allay members' concerns in this regard, the Administration and the MTRC agree that the review shall be conducted more frequently at a regular interval of not more than three years.

Platform screen doors (PSDs)

44. A member has suggested to set a numerical benchmark for PSDs to enhance railway safety. The Administration advises that whilst PSDs can enhance safety of passengers, they are not a pre-requisite for safe railway operations. Indeed, PSDs are far from being standard provision in most railway systems around the world. With a wide range of precautionary measures, MTRC has maintained a very high safety standard and has achieved very good safety records for its passengers over the years. Further, PSDs form an integral part of the Train and Signaling Control System and, as such, any deficiency in the operation and reliability of these doors will result in disruption to the train service. Such disruption will be reflected in the performance requirements for passenger delay and train punctuality. It is therefore not necessary for the reliability of PSDs to form a separate performance requirement or customer service pledge. Notwithstanding the above, MTRC will proceed with a phased programme of fitting PSDs at 30 stations to further enhance the safety of railway operation.

Numerical benchmark for PSDs - amendment proposed by Mr CHENG Kar-foo

45. The Bills Committee notes that Mr CHENG Kar-foo is not satisfied with the Administration's explanation and will move a CSA to include a numerical benchmark for PSDs as one of the performance requirements in a separate schedule to the Bill. The initial performance level is pitched at 98% which is drawn up on the basis of the two performance criteria, namely passenger journeys on time and train punctuality.

Employees' rights

Employment-related matters (clause 41 of the Bill)

46. The Bills Committee notes the concern expressed by the staff side of MTRC that after public listing, the Corporation may reduce manpower and thus jeopardizing the job security and increasing the workload of those who stay. The Bills Committee also notes that the staff side is worried about the possible change to the existing compensation package and salary and benefit review mechanism after privatization.

47. Both the Administration and MTRC have advised that it is the clear intention of the Corporation that contracts of employment and other employee benefits should remain unaltered as a consequence of the privatization and that the obligations and liabilities of MTRC should be vested in the new company on privatization. Clause 41(1) of the Bill provides for the vesting in MTRCL of MTRC's rights and liabilities under the existing contracts of employment and for the continuity of those contracts, so that each contract is deemed to constitute a single continuing employment. The terms of employment will not be affected as a result of privatization. Clause 41(2) also provides specifically for the vesting in MTRCL of all employee benefits payable by MTRC. In addition, there are general vesting provisions in the Bill (in particular, clauses 37 and 38) which would also apply to contracts of employment and employee benefits. The effect of all of these is that the Bill effectively transfers the rights and liabilities under existing employee contracts and all employment benefits from MTRC to MTRCL. MTRC also advises that they see no reason to deviate from the current pay review system which is well-proven and considered fair and reasonable. The Corporation will continue to benchmark its salary and benefit levels against the market after public listing.

Amendments to clause 41 - Proposed by Ms CHAN Yuen-han and Mr LAU Chin-shek

48. The Bills Committee notes that Ms CHAN Yuen-han will move a CSA to clause 41 to ensure that the existing benefits enjoyed by the staff and the prevailing pay review mechanism will remain in force after privatization. The Bills Committee also notes that Mr LAU Chin-shek will move a CSA to ensure that persons with contracts of employment with MTRC in force immediately before the appointed day may all remain in employment and their seniority shall be retained with pay, allowances, benefits and conditions of service no less favourable than before.

49. Whilst the Bills Committee had invited the two members to brief the Bills Committee on their proposed amendments, it has not taken a position on the desirability of their proposals.

Offence of negligent act or omission by employee (clause 29 of the Bill)

50. The Bills Committee notes that clause 29 provides that an employee of the MTRCL is liable to a fine at level 2 and to imprisonment for six months if the employee, in connection with his duty, commits an offence by negligently doing or omitting to do something in relation to the operation of the railway and, by that act or omission, the safety of a person in the railway system is endangered or is likely to be endangered. Given that the prospect of a custodial sentence as a result of a negligent act or omission may inhibit an employee from deciding how to deal with an incident on the railway or the railway premises, some members of the Bills Committee share the concern expressed by the staff side of MTRC about the imprisonment penalty in the concerned provision.

51. The Administration advises that clause 29 of the Bill in fact repeats section 23D of the existing Mass Transit Railway Corporation Ordinance (Cap. 270). This section has been in existence since 1979 and forms an essential part of the legislative framework for ensuring railway safety. The inclusion of Clause 29 in the Bill is to ensure that the safety of the railway will continue after privatization to protect both commuters and MTRC employees. Employees who have endangered the safety of other persons as a result of their negligent acts or omissions shall be liable to punishment under the law. Hence, the continuation of the existing section 23D is appropriate. Furthermore, there are similar provisions in other Ordinances such as the Kowloon-Canton Railway Corporation 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 are required to take all reasonable precautions to ensure the safety of passengers in or on or entering or alighting from buses.

Amendment to clause 29 - Proposed by Ms CHAN Yuen-han

52. The Bills Committee notes that Ms CHAN Yuen-han is not satisfied with the Administration's explanation and will move a CSA to the effect that the concerned employee will only be liable to imprisonment if his negligent acts or omissions have resulted in serious injuries or deaths. According to Ms CHAN, the specific provisions in the legislation quoted by the Administration are already outdated as they do not take into account the definition of "negligence". The proposed amendment is aimed at striking a right balance between public interest and staff protection and is also in line with the common law principle that negligence will generally give rise to civil claims.

Amendment to clause 29 - Proposed by Mr LAU Chin-shek

53. The Bills Committee notes that Mr LAU Chin-shek will also move a CSA to repeal clause 29. Mr LAU is of the view that no criminal liability shall arise out of negligence of employees and the responsibility of negligent acts or omissions by employees shall also be assumed by the company. Given that a negligent act leading to serious injuries or deaths will be covered by other ordinances, he considers that there is 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 will already be a severe penalty to the employee concerned.

54. In discussing the subject matter, a member has expressed concern that the proposals may give the public an impression that the safety standard is lowered with MTRC's privatization. He also expresses concern about the inconsistency in treating employees of different public transport companies. Whilst the Bills Committee has taken note of the intention of individual members to move CSAs in this regard, it has not taken a position on the desirability of the proposals. Individual members would therefore proceed with their own amendments.

Committee Stage amendments

55. Apart from the CSAs mentioned above, the Bills Committee also notes that Mr LAU Chin-shek has proposed two CSAs to the effect that the Legislative Council may by resolution amend the terms and conditions of the OA and that the transfer of franchise under clause 6 and the extension of franchise under clause 5 shall be subject to the approval of the Legislative Council. The Bills Committee also notes that Mr HO Chun-yan will move a CSA to the effect that the Chief Executive in Council will be required to take into account the policy of promoting competition among different modes of public transport whenever he gives directions to the Corporation under clause 13 of the Bill.

56. Whilst individual members have briefed the Bills Committee on their proposed CSAs, the Bills Committee has not taken a position on the desirability of each proposal. The Bills Committee understands that individual members would proceed with their own amendments. To this end, as at 9 February 2000, Mr CHAN Kam-lam and Mr LAU Chin-shek have given notice to move amendments to the Bill. Detailed wordings of their amendments are shown in **Appendix III**.

57. In response to the Bills Committee, the Administration has accepted a number of members' suggestions and agreed to move CSAs to that effect. These CSAs cover technical amendments and improvements to various provisions in the Bill. The major ones include the following:

- (a) to improve the drafting of clause 13(2) so as to put it beyond doubt that compensation for any loss or damage resulting from MTRC's compliance with a direction given by the Chief Executive in Council only applies to situations whereby the Chief Executive in Council requires the Corporation to carry out an obligation under the Bill or the OA to a degree or magnitude which is over and above its obligations set out in the Bill or OA;
- (b) to amend clause 15(2) to the effect that the Secretary for Transport shall bring to the attention of the Chief Executive in Council any representations made by the Corporation during the consultation in connection with the suspension of franchise under clause 15; and
- (c) to improve the drafting of clause 57 (2) so as to put it beyond doubt that the ability to bring an enforcement action against the Corporation for a breach of statutory duty under the Bill lies only with the Government and all of the citizen's existing rights under the civil law to sue the Corporation for negligence or otherwise are preserved.

The Bills Committee supports the CSAs to be moved by the Administration, a full set of which is in **Appendix IV**.

Recommendation

58. The Bills Committee supports and recommends the Administration's proposal to resume Second Reading debate of the Bill on 23 February 2000.

Advice sought

59. Members are requested to support the recommendation of the Bills Committee in paragraph 58 above.

Council Business Division 1
Legislative Council Secretariat
9 February 2000

《地下鐵路條例草案》委員會
Bills Committee on Mass Transit Railway Bill

委員名單
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合共：25 位議員
Total：25 Members

日期：2000 年 1 月 1 日
Date：1 January 2000

**Bills Committee on
Mass Transit Railway Bill**

List of organizations/academic submitted views on the Bill

Professor K C CHAN, Head and Professor, Department of Finance, Hong Kong University of Science and Technology*

Baring Asset Management (Asia) Ltd*

Jardine Fleming Holdings Limited

Moody's Investors Services

Consumer Council*

Hong Kong Mass Transit Railway Staff General Association*

Mass Transit Railway Corporation Staff Union*

MTR Corporation Staff Consultative Council*

Total: 7 organizations and 1 academic

List of individuals invited by the Administration to appear before the Bills Committee to give testimony in relation to the proposed partial privatization of the MTRC

Mr Paul COUGHLIN, Managing Director, Standard & Poor's International Ratings

Mr Fan JIANG, Executive Director, Goldman Sachs (Asia)

Mr Simon LINNETT, Managing Director, NM Rothschild & Sons Limited

Mr Leonard WEI, Managing Director, The Chase Manhattan Bank

Prof Tony RIDLEY, Railway Technology Strategy Centre, Imperial College, University of London

Remark:

"*" denotes the academic and those organizations the representatives of which have given oral presentation to the Bills Committee.

MASS TRANSIT RAILWAY BILL

COMMITTEE STAGE

Amendments to be moved by the Honourable CHAN Kam-lam

Clause

Amendment Proposed

New

By adding –

“ PART IIIA
DETERMINATION OF FARES

14A. FARES

(1) The Chief Executive in Council may determine the fares payable by persons travelling on the railway, and notice of such determination shall be published in the Gazette.

(2) The Corporation shall not charge any person a fare exceeding the fare determined under subsection (1).”.

MASS TRANSIT RAILWAY BILL

COMMITTEE STAGE

Amendments to be moved by [the Secretary for Transport]

<u>Clause</u>	<u>Amendment Proposed</u>
Long title	In paragraph (a), by adding "to the railway" after "extension".
2(1)	<p>(a) In the definition of "extension", by deleting "to the railway" where it secondly appears.</p> <p>(b) By deleting the definition of "operating agreement" and substituting -</p> <p style="padding-left: 40px;">""operating agreement" (營運協議) means any agreement entered into between the Corporation and the Secretary acting on behalf of the Government which is declared by its terms to be an operating agreement for the purposes of this Ordinance or to be an agreement amending or supplementing such an agreement, as having effect from time to time;".</p>
4(1)	In paragraphs (a) and (b), by adding "to the railway" after "extension".
4(2)	By deleting everything after "in" and substituting "the operating agreement."

- 13
- (a) In subclause (2), by deleting everything after "general" and substituting "or specific nature."
 - (b) In the Chinese text, by deleting subclause (5) and substituting -
" (5) 第(4)款所提述的損失或損害，包括因地鐵公司遵從根據本條作出而違反審慎商業原則的指示而引致的損失或損害，以及可歸因於地鐵公司遵從該等指示的損失或損害。".
- 14
- (a) In the heading, by deleting "財政罰則" and substituting "罰款".
 - (b) In subclause (1), by deleting "財政罰則" and substituting "罰款".
 - (c) In subclause (2), by deleting "罰則" and substituting "罰款".
 - (d) In subclause (3), by deleting "罰則" wherever it appears and substituting "罰款".
 - (e) In subclause (4), by deleting "罰則" and substituting "罰款".
 - (f) In subclause (5), by deleting "罰則" wherever it appears and substituting "罰款".
- 15(2)
- By deleting the full stop and substituting "; and the Secretary shall bring to the attention of the Chief Executive in Council any representations made by the Corporation during the consultation."
- 15(5)(a)
- By adding "which at the time of such suspension is property" after "any property".

- 15(7) By deleting everything after "原則下，" and substituting "就根據第（5）款接管的財產在保存時所處的狀況或就該財產在歸還時所處的狀況而言，本條例或任何其他法律並無對政府施加任何義務。".
- 18(5)(b) By adding "of default" after "case".
- 19(1) By adding "which at the time of such revocation or expiry is property" after "any property".
- 19(4) (a) By deleting "to the Government" and substituting "to the Secretary".
(b) By deleting "shall not return the property to the Corporation" and substituting "is not entitled to return the property to the Corporation under subsection (3)".
- 20(4) By deleting everything after "this section" where it secondly appears and substituting "in respect of property specified in such a notice shall be calculated as if the property had been disposed of under section 19(3) without that notice having been given.".
- 20(5) By deleting the comma.
- 21(1) (a) By deleting "to the Government" and substituting "to the Secretary".

(b) By deleting everything after "possession of" where it secondly appears and substituting "any other property which the Government, its nominee or a third party designated by the Government was entitled to take possession of, but did not take possession of, under that subsection on that occasion."

21(2) (a) By deleting "有關接管根據第 19 (1) 條進行" and substituting "行使第 19 (1) 條所賦予的權力".

(b) In paragraph (b), by deleting "該項接管進行" and substituting "行使第 19 (1) 條所賦予的權力".

21(3) By adding "referred to in subsection (1)" after "notice".

21(6) By deleting ", in respect of any property taken possession of under this section," and substituting "in respect of the taking of possession of any property under this section".

27(3) By adding "to the railway" after "an extension".

27(5) By adding ", except to the Secretary," after "disclose".

28(2) By deleting "delivered" and substituting "given".

- 30 (a) In paragraph (b), by deleting "a" and substituting "any".
(b) By deleting "the person" and substituting "the first-mentioned person".
- 34(1)(d)(v)(A) By deleting "of" and substituting "or".
- 35(3) By deleting "to".
- 48 By adding -
"(3A) Nothing in subsection (1) or (2) shall be taken as prejudicing the effect under the laws of Hong Kong of the vesting in the Corporation by virtue of section 37 or this section of any foreign property, right or liability."
- 51(2) By deleting "section 55" and substituting "section 46".
- 53 By adding -
"(4A) Any person who has made a decision to which this section applies shall, if so requested by the Corporation, and within a period that is reasonable in the circumstances, furnish the Corporation with reasons for his decision."
- 54(2) By deleting "as he thinks fit".

57(2) By deleting everything after "arises" and substituting "independently of a breach of any duty of the Corporation created by or pursuant to this Ordinance, regardless whether the circumstances giving rise to such civil liability would also be a breach of any duty created by or pursuant to this Ordinance."

59(2)(b) By deleting "ordinary".

- 62
- (a) By deleting "for the purposes of section 34(1) of the Interpretation and General Clauses Ordinance (Cap. 1)".
 - (b) By deleting "for those or any other purposes".

New By adding -

"62A. Service of notices

(1) A notice to be given to the Secretary under this Ordinance may be delivered to the Secretary or sent to him by post.

(2) The address of the Secretary for the purposes of the giving of any notice under this Ordinance is the address specified in the operating agreement as the address for the service of notices on the Secretary under that agreement.

(3) A notice to be given to the Corporation under this Ordinance shall be marked for the attention of the chairman of the Corporation and may be delivered to the Corporation or sent to it by post.

(4) The address of the Corporation for the purposes of the giving of any notice under this Ordinance is the address specified in the operating agreement as the address for the service of notices on the Corporation under that agreement.

(5) For the purposes of this section, a notice is delivered to the Secretary or the Corporation if it is delivered to the address of the Secretary or the Corporation and left with a person apparently authorized to receive communications intended for the Secretary or the Corporation."

63(1) By deleting "is" and substituting ", any subsidiary legislation made under that Ordinance and any other instrument issued under that Ordinance and published in the Gazette are".

Schedule 2 By deleting section 5.

Schedule 6 In section 4, by deleting "ordinary".