

The Government of the Hong Kong Special Administrative Region

政府總部  
環境運輸及工務局  
香港花園道美利大廈



Environment, Transport  
and Works Bureau  
Government Secretariat  
Murray Building, Garden Road,  
Hong Kong

本局檔號 Our Ref. ETWB(T) CR 18/986/00

來函檔號 Your Ref.

Tel. No. 2189 7447  
Fax. No. 2537 5246

By fax: 2877 5029

Ms Connie Fung  
Assistant Legal Advisor,  
Legislative Council Secretariat,  
4/F., Prince's Building,  
Central, Hong Kong.

14 June 2007

Dear Connie,

**Draft Subsidiary Legislation relating to the Rail Merger**

Thank you for sending us on 31.5.07 your comments on the draft Mass Transit Railway (Amendment) By-laws prepared by MTR Corporation Limited. Please find attached the response from MTR Corporation Limited for your follow up please.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brian Choi'.

(Brian Choi)

for Secretary for the Environment,  
Transport & Works

**Response to ALA's Comments of 31/6/2007 in relation to the draft Mass Transit Railway  
(Amendment) Bylaw**

By-law 2

- (a) Is it necessary to include in by-law 2 definitions of “automatic processing device”, “invalid ticket”, “luggage” and “smart card”? As you are aware, the definitions of these terms are provided in the Kowloon-Canton Railway Corporation By-laws (Cap. 372 sub. leg. B) (“KCRC By-laws”).

**1. “invalid ticket”**

- A definition of “invalid ticket” is not required in the Mass Transit Railway By-laws (Cap.556 sub. leg. B) (“existing MTR By-laws”) as proposed to be amended by the Mass Transit Railway (Amendment) By-laws (“Draft Amended MTR By-laws”) as the meaning of “invalid ticket” under the KCRC By-laws is already reflected in the proposed expanded By-law 15(1) of the Draft Amended MTR By-laws. The term “invalid ticket” is not used in the Draft Amended MTR By-laws.

**2. “smart card”**

- According to the Oxford English Dictionary (*1989 Second Edition as supplemented by 1993 Addition*), “smart card” means “a plastic bank card or similar device with an embedded microprocessor, used in conjunction with an electronic card-reader to authorise or provide particular services, esp. the automatic transfer of funds between bank accounts”. The Concise Oxford Dictionary (*10<sup>th</sup> Edition*), which is even more widely available, contains a similar entry for “smart card”. Thus we are of the view that “smart card” is a common dictionary term and therefore a definition is unnecessary.

**3. “automatic processing device”**

- This is used twice in the Draft Amended MTR By-laws (definition of “first class ticket” in by-law 2 and by-law 15(1)(aa)). In both instances, it is used in the phrase “a smart card which...had the authorization code for first class travel encoded on it by an automatic processing device”. We are of the view that the words “automatic processing device” used in such a context have already sufficiently reflected what the device is – it is a device that is automatic and is for processing and the process it performs is the encoding of authorization codes on smart cards.
- We should note that the drafting style of the KCRC By-laws and the existing MTR By-laws is different. KCRC By-laws are much more prescriptive in style e.g. it contains a definition for “automatic gate” (which means “any passenger operated ticket barrier”) whilst this noun

phrase is also used in the existing MTR By-laws without the need for a corresponding definition. Also, although “automatic vending machine” is used in the existing MTR By-laws, a corresponding definition was not included. Similar to these phrases which all speak for themselves, we do not think that “automatic processing device” requires a definition; providing one is in fact inconsistent with the drafting style of the existing MTR By-laws.

#### 4. “luggage”

- “luggage” has been used in the existing MTR By-laws without the need for a definition (e.g. by-law 27(a)).
- According to the Oxford English Dictionary (1989 Second Edition as supplemented by 1997 Addition), “luggage” means “bags, suitcases, etc., designed to hold the belongings of a traveller”. The Concise Oxford Dictionary (10<sup>th</sup> Edition), which is even more widely available, contains a similar entry for “luggage”. Thus we are of the view that “luggage” is a common dictionary term and therefore a definition is unnecessary.
- Also, the definition for luggage in the KCRC By-laws (i.e. “an article or thing (excluding animals) which a passenger may keep with him on a train including the luggage compartment thereof in accordance with these by-laws”) is very similar to the term’s ordinary dictionary meaning. We do not think that “luggage” requires a definition and providing one is in fact inconsistent with the drafting style of the existing MTR By-laws.

- (b) In the proposed definition of “railway premises”, the reference to “North-west Railway By-law” appears to be ambiguous as it is not clear whether it refers to the existing North-west By-laws made under the Kowloon-Canton Railway Corporation Ordinance (Cap. 372) (KCRCO) which will be suspended from operation, or the new one to be made under the Mass Transit Railway Ordinance (Cap. 556) (MTRO). To avoid ambiguity, please consider setting out the full meaning of “railway premises” for the purposes of the North-west Railway.

**Agreed. The definition of “railway premises” will be amended to refer to the Mass Transit Railway (North-west Railway) Bylaw made under Cap.556.**

- (c) The proposed definition of “the Ordinance” is not necessary in the light of section 31(1) of the Interpretation and General Clauses Ordinance (Cap. 1). Please consider deleting it to make the drafting of the Mass Transit Railway (Amendment) Bylaw (the Amendment Bylaw) consistent with the drafting convention adopted in Hong Kong.

**Agreed. We will delete it accordingly.**

Proposed by-law 28A

Should all references to “telecommunication” be replaced by “telecommunications”. Please refer to the Telecommunications Ordinance (Cap. 106) for the usage of the term in legislation

**Agreed. We will amend it accordingly.**

Proposed by-law 28C

- (a) In the proposed by-law 28C(2), should the reference to “a member of the staff” be replaced by “a member of the staff of the Corporation”? The reason why the former reference is used in the KCRC By-laws is that in those by-laws, “member of the staff” is defined. However, since no definition is proposed for the term in the draft Amendment By-law, it would appear necessary to specify that the member of the staff belongs to staff of the Corporation.

**Agreed. We will amend it and by-law 32A accordingly.**

- (b) In the proposed by-law 28C(4), is it necessary to add “a member of the staff of the Corporation” before “an official”?

**We will amend it accordingly.**

Proposed by-law 34(3)

This proposed by-law adds a new scenario under which a vehicle left on railway premises will become the property of the Corporation, viz. where the service of notice under paragraph (2) is impracticable. As this scenario does not appear in the existing KCRC By-laws, please explain the purpose of the proposed amendment.

1. **Both by-law 34(2) of the existing MTR By-laws and by-law 39 of the KCRC By-laws provide for the issue of notice by the corporations to registered owners of vehicles left on or near the railway premises.**
2. **The scenario where service of a notice is impracticable does appear in the KCRC bylaws. Please refer to the first part of KCRC Bylaw 39:**

**“the Corporation shall where practicable except in case of emergency serve on the registered owner (as defined in section 2 of the Road Traffic Ordinance (Cap 374)) of the vehicle or conveyance a notice”**

3. **As the wording from the KCRC By-law 39 has been brought across to MTR By-law 34(2), consequential amendments have to be made to by-law 34(3) of the existing MTR By-laws to provide for the case where the service of the notice is impractical. Without this amendment, by-law 34(3) of the existing MTR By-laws, which only provides for scenarios where the notice is not complied with (and thus assumes that a notice must have been served), cannot operate properly with the amended by-law 34(2). It is also conceptually more complete to provide for this scenario**

**because there may not always be “a person registered as owner of the vehicle under the Road Traffic Ordinance” (definition of “registered owner” in Cap.374).**

Question of vires of certain proposed by-laws

Any by-law made by the Corporation must be within the scope of the powers conferred on the Corporation under section 34 of MTRO; otherwise, the bylaw might be subject to legal challenge on the ground that it is *ultra vires*. This means that the powers of the Corporation to make by-laws have to be confined to the areas specified in the existing section 34(1)(a) to (c) of MTRO and the new section 34(1A)(a) and (b) proposed in the Rail Merger Bill. In this regard, please explain the legal basis on which the Corporation proposes to make by-laws on the following matters when these matters do not appear to be authorized under section 34(1) of MTRO, or under section 34(1A) proposed by the Rail Merger Bill:

**The drafting style of the KCRC by-law making empowering section and the KCRC By-laws are more prescriptive than the MTR by-law making empowering section and the existing MTR By-laws. The absence of an empowering subsection which specifically covers a particular by-law squarely in Cap.556 does not necessarily mean that that by-law is *ultra vires*. The by-law will be *intra vires* if the general powers are broad enough to cover it.**

- (a) It appears that the effect of proposed by-law 3A is to control and regulate animals as well. Please clarify which part of section 34 of MTRO authorizes the Corporation to make by-laws controlling animals. You may wish to note that KCRC has such powers by virtue of section 31(1)(j) of KCRCO, but no corresponding provision appears in section 34(1) of MTRO.

**By-law 3A allows the Corporation to stipulate in a notice the times or periods at which a crossing place for animals, motor vehicles, etc. can be used. This by-law aims at regulating humans, although the by-law does not specify that the animals or vehicles are those that are brought by human because only humans can read a notice. The legal basis for this by-law is the Corporation’s power to control and regulate the conduct of members of the public on the railway premises (s.34(1)(b)(i) of Cap.556).**

- (b) While KCRC has the powers under section 31(1)(n) of KCRCO to make by-laws preventing the erection of unauthorized buildings or structures on railway premises, there is no corresponding provision under section 34(1) of MTRO. As such, what is the legal basis for proposing by-law 4B?

**The legal basis for this by-law is the Corporation’s power to make by-laws to protect its property on railway premises (s.34(1)(c) of Cap.556).**

- (c) In the proposed by-law 6(d), if the reservoir, tank, ponds, etc. do not form part of the railway premises, it seems that the Corporation does not have power under section 34(1) of MTRO to make this by-law. Please make the necessary amendment to make it align with the corresponding by-law 71 of KCRC By-laws.

To improve clarity, we propose to add the words “or otherwise forming part of or being upon the railway premises or any part thereof” in front of “to be used abstracted or polluted in anyway.”.

The reservoir, tank, ponds, etc. protected by the proposed by-law 6(d) are wildlife habitat compensation areas that the Corporation is obliged to maintain as a result of its railway construction and operation. Therefore these areas are “areas set apart for affording facilities incidental to the carriage of passengers or goods” under the definition of “railway premises”. The legal basis for this by-law 6(d) is the Corporation’s power to make by-laws to control and regulate the conduct of members of the public using the railway or on the railway premises (s.34(1)(b)(i) of Cap.556).

- (d) In the proposed by-laws 10(3) and 41F(2), please clarify which part of section 34 of MTRO authorizes the making of the proposed saving and transitional provision? Should the saving and transitional provision be provided under the proposed Kowloon-Canton Railway Corporation (Suspension of By-laws) By-law 2007 instead?

**To improve clarity, on top of the relevant proposed MTR bylaws that relates to the continuation of validity of the tickets and permits issued by Kowloon-Canton Railway Corporation ("KCRC") before the Merger Date, the Kowloon-Canton Railway Corporation (Suspension of By-laws) By-law 2007 will also be amended to reflect the same.**

- (e) While section 34(1A)(a) of MTRO as proposed in the Rail Merger Bill empowers the Corporation to make by-laws relating to the carriage of goods, there is no provision under Cap. 556 or proposed under the Rail Merger Bill which empowers the Corporation to make by-laws relating to the carriage of luggage. As such, please explain the legal basis for proposing by-laws 39A and 39B.

**1. 39A (Conditions of carriage of luggage)**

- **Carriage of luggage for travellers is part and parcel of the Corporation’s passenger transporting service and thus the legal basis of this by-law is the Corporation’s power to make by-laws for prescribing the terms and conditions relating to the use of its service (s.34(1)(a) of Cap.556).**

**2. 39B (Soliciting for handling luggage)**

- **The legal basis of this by-law is the Corporation’s power to make by-laws to control and regulate the conduct of members of the public on the railway premises (s.34(1)(b)(i) of Cap.556).**

- (f) It is doubtful whether the Corporation has the powers under section 34(1) of MTRO to make by-laws 44A and 45A as proposed in the draft Amendment Bylaw. Corresponding by-laws found in the KCRC By-laws are presumably made pursuant to section 31(1)(p) of KCRCO which provides that KCRC may make by-laws for such purposes as may be

necessary to carry out effectively the provisions of the Ordinance. However, no such provision is found in section 34 of MTRC.

1. **44A (lien)**

- **The grant of a lien over things brought by any persons upon the railway premises are part of the terms and conditions relating to the use of the Corporation's service (i.e. the service for carriage on the railway or storage of goods) (s.34(1)(a) of Cap.556).**
- **To improve clarity, we propose to add the words "and accepted for carriage on the railway or storage by the Corporation under by-law 39C" after the words "the railway premises including any train of the Corporation" in by-law 44(a)(1).**

2. **45A (governing law and jurisdiction clause)**

- **The legal bases of this by-law are (i) the Corporation's power to make by-laws for prescribing the terms and conditions relating to the use of the Corporation's service (s.34(1)(a) of Cap.556) and (ii) the Corporation's power to make by-laws to control and regulate the conduct of members of the public on the railway premises (s.34(1)(b)(i) of Cap.556).**

By-laws found in KCRC By-laws but are not included in the draft Amendment Bylaw

It is noted that some of the existing by-laws in the KCRC By-laws are not included in the draft Amendment Bylaw. Examples of these are by-law 11 of the KCRC By-laws and by-law 11A. Is there any reason for not including these by-laws in the draft Amendment Bylaw?

**We have explained vide LC Paper CB(1)1878/06-07(01) why certain provisions in the existing KCRC By-laws were not brought across to the MTR By-laws. As regards the specific matters in relation to by-laws 11 and 11A of the KCRC By-laws, these matters are currently dealt with by MTRCL under the Conditions of Issue of Tickets and therefore it is not necessary to make separate bylaws on these matters.**