

**For discussion on
19 July 2013**

Legislative Council Panel on Transport
The Operating Right of the Peak Tramway

Purpose

This paper seeks Members' view on our proposal to amend the Peak Tramway Ordinance (Cap. 265) ("the Ordinance") to enable continuation of the operation of the peak tramway service after 31 December 2013, for an interim period till 31 December 2015. In due course, the Government will work out the long-term arrangements, including legislative amendments, required for the operation beyond December 2015 and consult Members nearer the time.

Background

Operating right arrangements

2. In operation since 1888, the peak tramway is an icon of Hong Kong and has, over the past few decades, become a popular tourist and recreational facility for locals and tourists alike. Its 1.4 km-long tram track runs on government land, with its termini, at both ends of the track, situated on sites owned by the Peak Tramways Company Limited ("PTC"). Whilst intended and used for public transport service in its early years, the peak tramway has since the 1980s been essentially a tourist and recreational facility, with its public transport role very much taken up by franchised buses, minibuses, coaches and taxis instead. Fares of the peak tramway have therefore since been de-regulated.

3. The peak tramway is run by PTC on the strength of an operating right granted by the Government under the Ordinance. PTC's current 10-year right to operate the peak tramway lasts from 1 January 2004 to 31 December 2013. It was granted by the Chief Executive in Council in 2003 on account of PTC's good performance on service and safety, and its commitment to implement a number of measures to enhance passenger convenience, as well as following its

payment of a prescribed sum of a lump-sum premium for the period¹. In anticipation of the expiry of the current operating right, PTC has since late 2012 started approaching the Government for an extension and subsequently for exploring feasibility of a plan to upgrade the peak tramway system and services in order to tackle the current queuing problem and expand its capacity. PTC has also requested the Government to consider if an operating right of longer than 10 years could be granted to make its proposed upgrading plan, if found feasible and meritorious, financially viable.

4. Over the years, it has been the understanding of the Government and PTC that the Ordinance provides the necessary basis for the continued operation of the peak tramway beyond 2013, subject to application by PTC, payment of a premium by PTC and approval by the Chief Executive in Council. But, during the discussion held on extension of the operating right beyond 2013 between Government and PTC, and upon further examination of the legislation and advice from the Department of Justice (“DoJ”), it has come to the Government’s attention that this is not the case and we need to amend the law to enable the Government to have the power to extend the operating right or grant it anew.

5. The operating right for the peak tramway is provided for under section 2A of the Ordinance. It was on the strength of the legal provisions therein that two separate operating rights, each of 10 years, were granted to PTC to operate the peak tramway from 1984 to end-1993 and from 1994 to end-2003, under sections 2A(1) and 2A(2) respectively. PTC’s current 10-year operating right mentioned in paragraph 3 above was granted, through extension of the right ending end-2003, in reliance on sections 2A(5) and 2A(6).

6. When the operating right was last extended some ten years ago, neither the Government nor PTC considered that sections 2A(5) and 2A(6) were one-off provisions that did not allow further extensions. Hence, neither party made early arrangements to review or update the law. A copy of section 2A of the Ordinance is at **Annex A**.

7. In considering PTC’s request for examining if an operating right of a period longer than 10 years is possible, DoJ has looked into section 2A closely with reference to its legislative history. It has come to the conclusion that the operating right granted to PTC would have to lapse automatically on 31 December 2013, as sections 2A(5) and 2A(6) have already served their purpose

¹ The sum was \$36.8 million. It was assessed by the Lands Department based on full market value of the government land occupied, taking into due consideration of past profits generated from peak tramway service.

when they were invoked in the last extension exercise in 2003; and that unless the right is further extended by way of legislative amendment, there would be no legal backing for the peak tramway's operation beyond 31 December 2013.

Details of the legal advice are set out at **Annex B**.

8. Though still at its preliminary stage, PTC's upgrading plan for the peak tramway system and services envisages the following key features –

- (a) replacement of tramcars with new ones that can increase carrying capacity by over 60%;
- (b) substantial improvement of the two termini to expand the holding capacity and improve the waiting environment;
- (c) installation of an upgraded haulage system to operate the enlarged tramcars whilst maintaining safety and reliability; and
- (d) replacement of all track rails and structural improvement of track foundation and tramway bridges.

9. The plan comprises road, civil engineering, drainage, and other works. It requires heavy investment on the part of PTC and detailed examination on the part of Government to ascertain merits and feasibility. How the operating right should be granted, extended and, where necessary, ended for the long term having regard to the upgrading plan would need to be studied and decided upon too. All these tasks are complex and would take time to complete.

The Proposal

10. It is not possible for all the issues identified in paragraph 9 above and any other relevant matters to be resolved in one go between now and year end. We need a two-step approach in tackling them. First, we need to amend the law urgently before the end of this year to give a one-off operating right, of two years, to PTC following existing terms and upon payment of the necessary premium to be agreed. The duration of this interim period would be from 1 January 2014 to 31 December 2015. This is an interim measure to ensure no disruption to the peak tramway service, and to give time for the Government to work with PTC to: (i) resolve all the issues related to the long-term arrangements for the operation of the peak tramway outlined in paragraph 9 above; and (ii) prepare another bill on the long-term arrangements for consideration by this Council, with a view to it being ready for implementation before the end of the interim period on 31 December 2015.

11. In proposing amendments to the Ordinance to grant an operating right to PTC for an interim period from 1 January 2014 to 31 December 2015, the Government has assessed carefully and is satisfied with PTC's safety and service performance during the current operating right period. Details are set out at Annex C. The Government plans to introduce a bill to LegCo in October 2013 to give legal basis for the interim operating right.

Advice Sought

12. Members' views are sought on the proposal set out in paragraphs 10 to 11 above.

**Transport and Housing Bureau
July 2013**

Chapter:	265	Title:	PEAK TRAMWAY ORDINANCE	Gazette Number:	62 of 1999
Section:	2A	Heading:	Right to run and operate the tramway	Version Date:	01/07/1997

Remarks:

Adaptation amendments retroactively made - see 62 of 1999 s. 3

(1) Upon the payment to the Government by the company of a non-refundable premium of \$2790000 within 14 days after the commencement of the Peak Tramway (Amendment) Ordinance 1986 (57 of 1986), the company shall have the right to run and operate the tramway authorized by this Ordinance, along the route specified in section 3, for a period of 10 years commencing on 1 January 1984.

(2) The Secretary for Transport shall-

(a) if within 2 years after the commencement of the Peak Tramway (Amendment) Ordinance 1986 (57 of 1986) there is produced to him evidence of a commitment by the company to the carrying out of approved works for the modernization and improvement of the tramway and ancillary equipment; and

(b) if such commitment is of a kind and in a form satisfactory to him,

by notice in the Gazette grant to the company the right referred to in subsection (1) for a further period of 10 years commencing immediately after the expiration of the first such period.

(3) For the purposes of subsection (2) "approved works" (獲批准的工程) means works approved by the Secretary for Transport.

(4) The right conferred by subsections (1) and (2) shall be subject to this Ordinance.

(5) The company may, not less than 1 year before the expiry of any further period for which the right to run and operate the tramway is granted under subsection (2), by notice in writing to the Secretary for Transport request an extension of the period. (Added 27 of 1992 s. 2)

(6) The Chief Executive in Council may grant an extension pursuant to a request submitted under subsection (5) for a further period not exceeding 10 years on such terms as may be agreed between the company and the Government. (Added 27 of 1992 s. 2. Amended 62 of 1999 s. 3)

(Added 57 of 1986 s. 2)

**The Department of Justice's Interpretation of
sections 2A(5) and 2A(6) of the Peak Tramway Ordinance**

The Issue

The existing period for which the Peak Tramways Company Limited ("PTC") was granted the right to run and operate the peak tramway will expire on 31 December 2013. PTC has made a request to the Secretary for Transport and Housing under section 2A(5) of the Peak Tramway Ordinance (Cap. 265) ("the Ordinance") for the extension of that period. The question is whether sections 2A(5) and 2A(6) of the Ordinance are one-off provisions which had served their purposes in 2003 when the Chief Executive in Council granted an extension under section 2A(6) for a further period of 10 years pursuant to PTC's request submitted under section 2A(5) in 2002.

Section 2A of the Ordinance

2. The original section 2A which was added to the Ordinance in 1986 only contained subsections (1) to (4). Subsections (5) and (6) were added in 1992. The entire provision reads as follows :

- “(1) Upon the payment to the Government by the company of a non-refundable premium of \$2790000 within 14 days after the commencement of the Peak Tramway (Amendment) Ordinance 1986 (57 of 1986), the company shall have the right to run and operate the tramway authorized by this Ordinance, along the route specified in section 3, for a period of 10 years commencing on 1 January 1984.
- (2) The Secretary for Transport shall -
 - (a) if within 2 years after the commencement of the Peak Tramway (Amendment) Ordinance 1986 (57 of 1986) there is produced to him evidence of a commitment by the company to the

carrying out of approved works for the modernization and improvement of the tramway and ancillary equipment; and

- (b) if such commitment is of a kind and in a form satisfactory to him, by notice in the Gazette **grant to the company the right referred to in subsection (1)** for a further period of 10 years commencing immediately after the expiration of the first such period.
- (3) For the purposes of subsection (2) "approved works" (獲批准的工程) means works approved by the Secretary for Transport.
- (4) The right conferred by subsections (1) and (2) shall be subject to this Ordinance.
- (5) The **company may**, not less than 1 year before the expiry of any further period for which **the right to run and operate the tramway is granted under subsection (2)**, by notice in writing to the Secretary for Transport request an extension of the period. (Added 27 of 1992 s. 2)
- (6) The Chief Executive in Council **may grant an extension pursuant to a request submitted under subsection (5)** for a further period not exceeding 10 years on such terms as may be agreed between the company and the Government. (Added 27 of 1992 s. 2. Amended 62 of 1999 s. 3) (Emphases added)

(Added 57 of 1986 s. 2)"

3. By way of background, subsections (5) and (6) were added to section 2A in 1992 to enable PTC to negotiate for the renewal of its operating right beyond 2003.

Whether sections 2A(5) and 2A(6) are one-off provisions

4. It may be argued that in the absence of clear words indicating the legislative intent of the provisions in question to be one-off, the

provisions should not be regarded as such. Further, the words “any further period” in sections 2A(5) and 2A(6) may signify the legislative intent that there could be more than one extension beyond 2003 and further.

5. The argument in paragraph 4 above cannot be valid. Section 2A(5) permits PTC to request in writing within a specified period for an extension of the period “for which the right to run and operate the tramway is granted under subsection (2)”. The specific reference to subsection (2) relates back to the right granted by notice in the Gazette (Cap. 265C refers, see Appendix) by the then Secretary for Transport (“S for T”) under subsection (2) for a further period of 10 years commencing immediately after the expiration of the period granted to PTC in subsection (1), i.e. the right was extended by virtue of subsection (2) for 10 years until 31 December 2003.

6. Given that section 2A(6) refers to a request submitted under section 2A(5) for a further period not exceeding 10 years, it clearly follows that the Chief Executive in Council has no power to entertain a request unless it is one properly made in time by PTC under section 2A(5) which relates back to the right granted by section 2A(2).

7. In 2002, PTC made a request for extension under section 2A(5) to S for T. Upon PTC’s agreeing to pay a premium of \$36.8 million, the Chief Executive in Council extended PTC’s right to run and operate the tramway by a further period of 10 years until 31 December 2013 under section 2A(6). As PTC’s right to operate for a further period of 10 years until the end of 2013 was granted under section 2A(6) by the Chief Executive in Council and not under section 2A(2) by S for T, PTC’s present request is not validly made under section 2A(5) for which the Chief Executive in Council has no power to entertain under the Ordinance or at all. Put simply, it will be ultra vires for the Chief Executive in Council to grant a further extension to PTC to run and operate the tramway beyond 31 December 2013.

8. Having regard to the legislative history of the Ordinance, the specific references in section 2A(5) to the right granted under section 2A(2) and in section 2A(6) to a request submitted under section 2A(5), the correct understanding of the law should be that sections 2A(5) and 2A(6) were enacted to deal with a specific scenario, i.e. to enable PTC to make a request for renewal beyond 2003 for a further period not exceeding 10 years until 31 December 2013.

Appendix to Annex B

Chapter:	265C	GRANT OF RIGHT TO RUN AND OPERATE TRAMWAY NOTICE	Gazette Number	Version Date
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		Empowering section		30/06/1997
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(Cap 265 section 2A(2))

[2 September 1988]

(Originally L.N. 243 of 1988)

Paragraph:	1	Citation		30/06/1997
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This notice may be cited as the Grant of Right to Run and Tramway Notice.

(Enacted 1988)

Paragraph:	2	Grant to Peak Tramways Company Limited		30/06/1997
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The Peak Tramways Company Limited is granted the right to run and operate the tramway authorized by the Ordinance along the route specified section 3 of the Ordinance, for a further period of 10 years commencing immediately after the expiration of the period granted to the Peak Tramways Company Limited in section 2A(1) of the Ordinance.

(Enacted 1988)

**Safety and Service Performance of PTC
under the Current Operating Right**

Safety performance

PTC has carried out regular inspections and maintenance works in compliance with the relevant statutory requirements. It has also implemented a series of measures to further enhance the safety of the system. These include upgrading the signalling and control system, providing additional emergency walkway and safety railings along the track, reinforcing the tramway bridges, strengthening foundations, and repairing the slopes adjacent to the tramway. In addition, PTC has strengthened communication with the relevant government departments, developed a fully updated emergency manual and enhanced staff training for emergency response.

2. Over the period of the current operating right starting in 2004, there has been no major incident involving the operation of the peak tramway. Occasional service suspensions were mainly due to pre-scheduled maintenance works, inclement weather or minor equipment faults. From 2004 to 2012, the peak tramway was out of service for an average of fewer than six hours per year due to unplanned maintenance issues, representing 0.08% of total service hours. Swift actions were taken by PTC to rectify the defects and there was minimal disruption of service.

Service performance

3. The average daily patronage of the peak tramway has increased from about 11,000 in 2004 to about 16,000 in 2012. The service has been maintained at a satisfactory level throughout. From 2004 to the first quarter of 2013, the Transport Complaints Unit received fewer than two complaints on average against the peak tramway every year. This represents a ratio of less than 0.001% of total number of passengers. These cases were mainly about the general standard of service (such as the conduct and performance of individual staff) and did not concern any major issues. Meanwhile, PTC has taken improvement measures as appropriate in response to the complaints and suggestions.