

香港特別行政區政府

The Government of the Hong Kong Special Administrative Region

政府總部  
運輸及房屋局  
運輸科

香港添馬添美道 2 號  
政府總部東翼

本局檔號 OUR REF.:  
來函檔號 YOUR REF.:



Transport and  
Housing Bureau  
Government Secretariat  
Transport Branch  
East Wing, Central Government Offices,  
2 Tim Mei Avenue,  
Tamar, Hong Kong  
電話 Tel. No.: 3509 8192  
傳真 Fax No.: 3904 1774

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Miss Evelyn LEE  
Assistant Legal Adviser  
Legal Service Division  
Legislative Council Secretariat  
Legislative Council Complex  
1 Legislative Council Road  
Central  
Hong Kong

Dear Miss LEE,

**Eastern Harbour Crossing Legislation (Amendment) Bill 2015**

Thank you for your letter dated 18 February 2016. Our response is set out below.

**Power to collect tolls**

As mentioned in paragraph 2 of your letter, you would like to know why the Government would not be able to collect tolls from vehicles passing through the Eastern Harbour Crossing (“EHC”) in the event that the Eastern Harbour Crossing Legislation (Amendment) Bill 2015 (“the Bill”) were not passed before the expiry of the Build-Operate-Transfer franchise.

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You may be well aware that it is a well-established common law principle that clear and express statutory authority is required to provide for the imposition of fees and charges by the Government (*A-G v. Wilts United Dairies Ltd* (1921) 37 TLR 884, CA, approved by the House of Lords in (1922) 38 TLR 781).

The principle was re-affirmed in *McCarthy & Stone (Developments) Ltd v. Richmond Upon Thames London Borough Council* [1992] 2 AC 48, in which the House of Lords held the view that statutory authority was required for the local authority to levy a charge on developers for consultation in relation to development proposals. The fee charged was ultra vires the power of the local authority unless such power was given by express words or by necessary implication.

There is no express provision in the existing Eastern Harbour Crossing Ordinance (Cap. 215) ("EHC Ordinance") which provides authority for the Government to collect tolls for using EHC. If the Bill were not passed before the franchise expires, any attempt by the Government to collect tolls for the use of EHC in the absence of any statutory authority could be subject to challenge of the charge being ultra vires. Clear and express statutory provision is thus required upon the franchise expiry to provide the legal backing to put the authority of the Government to collect tolls for using EHC beyond doubt.

#### **Power to appoint personnel to regulate EHC traffic and tunnel operations not covered by existing Ordinance**

In paragraphs 3 and 4 of your letter, you sought our clarification on the areas of tunnel operation, apart from toll collection, that would not be properly covered if the Bill were not passed before the franchise expiry; and also why the Government would not have the power to manage EHC, including the appointment of personnel to manage and regulate traffic at EHC.

While section 70(4) of the EHC Ordinance provides that the assets of the franchisee shall vest in the Government upon expiry of the franchise, there is no provision in the EHC Ordinance that enables the Government to take up the rights and obligations of the franchisee. As the franchisee will no longer have the rights and obligations under the

EHC Ordinance after the franchise expiry, the tunnel operation that are currently discharged by the franchisee by exercising its rights and obligations under the EHC Ordinance would no longer be properly covered if the Bill were not passed.

If the Bill were not passed before the franchise expiry, EHC will continue to operate under the regulatory regime of Cap. 215. While the Government may operate or manage EHC under the Road Traffic Ordinance (Cap. 374) ("RTO"), it can do so "only to the extent that the provisions in Cap. 374 are not inconsistent with the regulations or by-laws made under the EHC Ordinance" pursuant to section 48(1) of the EHC Ordinance.

To illustrate the constraints, by-law 18 of the Eastern Harbour Crossing Road Tunnel By-laws (Cap. 215E) ("EHC By-laws") provides for the issuance of permit to certain vehicles (e.g. vehicles exceeding certain height or length) by the Tunnel Manager<sup>1</sup>. Under the EHC Ordinance regime, the Government does not have any power to issue permit for the purpose of by-law 18. Another example is the power to give directions to EHC tunnel users. At present, tunnel officers<sup>2</sup> are empowered to give directions to regulate traffic at EHC under certain provisions in the EHC By-laws (e.g. by-laws 5, 8, 11, 12, etc.). Upon the expiry of the franchise, the tunnel officers will no longer have the rights and obligations to give directions under the EHC By-laws. Again, there is no provision in the EHC Ordinance that gives the Government the power of the tunnel officers to give directions.

Another major area of operation that lacks authority is the appointment of personnel to manage and regulate traffic at EHC. Under the EHC Ordinance, only the franchisee has the rights to appoint Tunnel Manager or employ tunnel officers to manage and regulate traffic at EHC, and there is no provision which empowers the Government to do the

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<sup>1</sup> As defined in Regulation 2 of the EHC Road Tunnel Regulations (Cap. 215D), a "Tunnel Manager" is a person appointed by the franchisee to control and manage the tunnel area.

<sup>2</sup> As defined in Regulation 2 of the EHC Road Tunnel Regulations (Cap. 215D), a "tunnel officer" means the Tunnel Manager and any other person employed by the franchisee for the control, restriction and safety of traffic in the tunnel area.

same. In other words, the Government has no power under the EHC Ordinance to stand in the place of the franchisee to appoint other personnel to enforce the relevant provisions.

We hope that our reply above helps clarify the issues.  
Thank you.

Yours sincerely,



( Ms Cordelia LAM )

for Secretary for Transport and Housing

c.c. Department of Justice (Attn: Miss Emma WONG)  
Transport Department (Attn: Ms Macella LEE)  
Hong Kong Police Force (Attn: Mr Matthew LINDSAY)  
Legal Adviser, LegCo  
Senior Assistant Legal Adviser 1, LegCo  
Clerk to Bills Committee