

Bills Committee on Mass Transit Railway Bill Administration's Response to Outstanding Issues

PURPOSE

This paper serves to address the issues arising from the Bills Committee meetings on 4 January and 6 January 2000.

THE BILL

Clause 29 - Offence of Negligent Act or Omission by Employees

2. A Member has proposed to remove the imprisonment penalty from Clause 29 of the Mass Transit Railway Bill (the Bill). The clause provides that an employee of the MTR Corporation Limited (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.

3. 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. Since the enactment of this section, no MTRC staff has been prosecuted under it. Under the Operating Agreement, the Corporation will be required to continue to provide a Safety Management System and adequately trained staff in the operation and the maintenance of the railway. We believe Clause 29 will be sparingly invoked, if at all.

4. The inclusion of Clause 29 in the Bill is to ensure that the safety of the railway is continued after privatisation to protect both commuters and MTRC employees. Any reduction to the penalty imposable will give the public the impression that the Corporation will not be required to operate under the same stringent safety standards after privatisation. The continuation of the legal provisions in Section 23D of Cap. 270 is appropriate.

5. It was suggested at the Bills Committee meeting that the prospect of a custodial sentence as a result of a negligent act or omission may inhibit an employee in deciding how to deal with an incident on the railway or the railway premises. In this connection, it should be noted that the effect of subclause 2 of Clause 29 is, that in judging whether an employee's act or omission is "negligent", the test is whether the employee has failed to exercise the care or skill that a **reasonable** employee would exercise in the situation. In addition, it should be noted that not every negligent act or omission would be an offence. Liability will only arise if the negligent acts and omissions have endangered or are likely to endanger the safety of other persons on the railway or railway premises.

6. We have taken reference from Section 6B of the Factories and Industrial Undertakings Ordinance (Cap. 59) as suggested by a Member. Section 6B of Cap. 59 makes it an offence (punishable by a penalty of \$20,000, without prison term) if any person fails to take reasonable care for the health and safety of himself or other persons who may be affected by his acts and omissions while working in factories or for industrial undertakings. The spirit of the section is to protect the worker, his co-workers and persons present at the work premises.

7. Clause 29 of the Bill, on the other hand, intends to protect the 2.3 million passengers who are travelling daily on the MTR system as well as MTRC staff themselves. Negligence and omissions of MTRC employees clearly will under normal circumstances, have a much greater impact on the public than that could have been caused by the acts and omissions of a person envisaged under Cap. 59.

Clause 41 - Vesting of Employment Contracts and Staff Benefits

8. It is the clear intention of the Corporation that contracts of employment and other employee benefits should remain unaltered as a consequence of the privatisation and that the obligations and liabilities of MTRC should be passed on to the new company on vesting. This is achieved in three ways :-

(a) **Contracts of Employment**

Clause 41(1) of the MTR Bill provides for the vesting of contracts of employment from the existing MTRC to MTRCL and for the

continuity of those contracts, so that each contract is deemed to constitute a single, continuing and unbroken employment. The reference in this subclause to "contracts of employment" covers, not only the basic terms of employment typically signed by employees at the start of their employment, but also other contractual arrangements relating to staff benefits which are granted to the staff. In other words the **total terms** of employees will not be affected by the transfer to the new company.

(b) **Employment Benefits - Clause 41(2)**

This provides specifically for the vesting from MTRC to MTRCL of all employee benefits. The purpose of this provision is to cover the established retirement and retention bonus schemes and, in addition, **all other employee benefits**. Clause 41(2) - particularly refers to the "pensions, allowances or gratuities of **every description**".

(c) **General vesting provisions**

In addition to the specific Clause 41(1) and 41(2) there are general vesting provisions in the Bill (see in particular Clauses 37 and 38) which would also apply to contracts of employment and employee benefits. Under Clause 37(1) the vesting applies to all "property rights and liabilities" of MTRC and these are very broadly defined in the Bill. In addition to that Clause 38, another of the general vesting provisions, provides for **any "agreements made, transactions affected or other thing done by, to or in addition to MTRC" shall have effect as if made by MTRCL**. The effect of all of these is that the Bill effectively transfers existing employee contracts and benefits from MTRC to MTRCL.

THE OPERATING AGREEMENT

Clause 4.9.1 - Performance Threshold for Platform Screen Doors

9. A Member has suggested that a separate performance threshold should be set regarding the mechanical reliability of Platform Screen Doors (PSDs) on the Tung Chung Line and Airport Express Line, similar to the performance thresholds for passenger lifts, escalators, ticket gates and value-adding machines. 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 would be reflected in the performance requirements for passenger delay and

train punctuality. It is therefore not appropriate nor necessary for the reliability PSDs to form a separate performance requirement or customer service pledge.

10. A Member has suggested that it should be made clear that clause 4.9.1(i) and clause 4.9.1(iv) are to be read independently so that the Corporation will not inadvertently be absolved from the legal consequence of its failure to meet performance thresholds by simply providing explanations of such failure to the Commissioner for Transport. We confirm that the Government and the Corporation are in agreement that the two clauses are separate and independent of each other and we will ensure that the drafting will be improved to put this beyond doubt.

COMPETITION

Submission of the Consumer Council

11. The submission of the Consumer Council to the Bills Committee states that :-

- (a) the Council welcomes the Government's commitment to relying on the competitive process to ensure consumer welfare;
- (b) the public transport services sector in Hong Kong presently operates in a highly competitive environment; and
- (c) the Council supports the use of competition mechanism to achieve high level of services for consumers, in conjunction with the scrutiny of fare increases by the Transport Advisory Committee and the Transport Panel of the Legislative Council.

12. At the Bills Committee meeting on 4 January 2000, the Consumer Council representative stated that the proposed regulatory framework as would be provided for under the MTR Bill and the Operating Agreement was acceptable subject to the following :-

- (a) the Government confirming its policy to promote competition among different modes of public transport; and

(b) the MTRCL making a pledge that it would not collude with other public transport operators in fare setting.

13. As the Consumer Council has pointed out, the public transport service sector in Hong Kong operates in a highly competitive environment. Rail service is not immune from competition. The privatised MTR will continue to operate in districts where other public transport services, franchised bus service in particular, provide competing services. The Government will maintain its present policy of promoting competition among different modes of public transport. In pursuing our transport policy, we 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 privatisation, we would see to it that all its activities would be compatible with that Statement.

CORPORATE GOVERNANCE

14. Members have asked for more information on the appointment and composition of the Board of Directors.

Appointment of Initial Board of Directors

15. The Government as the sole shareholder of MTRCL will appoint the initial Board of Directors. The Government confirms its intention to invite the present directors of MTRC to be the first Directors of MTRCL (see **Annex** for list of present Directors of MTRC). With the exception of the present two Government officials and the existing Chairman, the Government views these directors as independent non-executive directors.

16. In addition, pursuant to the proposed legislation, the Chief Executive (CE) will have the right to appoint up to three Directors in view of the importance of the rail network to Hong Kong's transport system. These appointments, if made, may include one or more of the Government officials presently serving on the MTRC Board of Directors.

17. The Government, as the sole initial shareholder of MTRCL, will also consider whether other Directors should be appointed to the Board, either initially, or immediately prior to the IPO. The purpose of these appointments would be to ensure the Board has appropriate resources and experience to undertake its responsibilities in managing a large listed company in Hong Kong, and to meet investors' expectations in this regard. In this context, the

Government takes note of the composition of the Board of Directors of listed companies in Hong Kong with operation of comparable size and complexity.

Ongoing Director Appointments

18. As is the case with most major listed companies, the duly constituted Board will propose as appropriate, replacements for existing Board members as and when this becomes necessary. It is usual in these circumstances for the Board to consult with its major shareholders, including the Government, in the context of any new nominations for appointment. New appointments will be made or confirmed at shareholder General Meetings, at which all shareholders will have an opportunity to vote. The Government will, so long as it retains its majority shareholding, be in a position to determine approval of any Director appointment.

Ongoing Composition of the Board of Directors

19. Following corporate best practice, one third of the Board of Directors must retire each year, but may offer themselves for re-election. In this way, over three years, all Directors will have had to face re-election (with the exception of any Directors directly appointed by the CE under the proposed legislation). MTRCL, itself, through its Board of Directors is responsible for the on-going composition of the Board including maintaining an appropriate mix of business skills and experience.

Staff Representation on the Board

20. The Government has given further consideration to Members' proposal to appoint a staff representative to the Board of Directors of MTRCL and maintains its view that it is neither necessary nor appropriate. The Corporation has had good staff relations in the past, and has been communicating effectively with its staff through existing consultation channels that foster regular and open dialogue between the staff and the management. This was clearly acknowledged by the representatives of the three staff organisations of MTRC at the Bills Committee session on 4 January 2000. Moreover, there is no legal or regulatory requirement in Hong Kong for employee/board representatives and we are not aware of any listed company in Hong Kong that has employee representatives on its board of directors.

21. The Government and MTRC believe that maintenance of the present open and effective communication channels with staff would be prejudiced by an employee appointment to the Board. Any employee/Board representative will generally be constrained in discussions on those areas in which there is most interest to the employees, namely staff arrangements and

conditions, by reason of divided responsibilities with union/staff interests, and therefore the area in which most contribution can be made would not be available. In this context, union views are often diverse. By contrast, the same individual could participate fully in staff arrangements and conditions discussions through existing channels of communication in an atmosphere of transparency and openness.

22. 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. We are not aware of any examples of employee participation on the board of directors of any of the privatised companies in the United Kingdom. In the United States, there are examples of employee participation at board level which have led to unproductive and indecisive conflict in the boardroom.

23. MTRC has stressed that the staff is its most important asset, and has been able to address staff's concerns very effectively in the past. The Government is confident that, as at present, future staff concerns or issues can be addressed and dealt with effectively through existing communication channels.

**Transport Bureau
Finance Bureau
January 2000**

Annex

List of Present Directors of MTRC

Jack So Chak-kwong	Chairman and Chief Executive of MTRC
Professor Cheung Yau-kai	Pro-Vice-Chancellor of University of Hong Kong
Dr. Raymond Ch'ien kuo-fung	Chairman of Inchcape Pacific Limited Member of the Executive Council of the HKSAR
David Eldon	Non-executive Chairman of Hang Seng Bank Director of HSBC Holdings
David W. Gairns	Non-executive director of the Hong Kong and Shanghai Banking Corporation Limited
Edward Ho Sing-tin	Managing Director of Wong Tung & Partners Limited Member of the Legislative Council of the HKSAR
Lo Chung-hing	Deputy General Manager of the Bank of China, Hong Kong Branch
Nicholas Ng Wing-fui	Secretary for Transport of the Government of the HKSAR
Denise Yue Chung-yee	Secretary for the Treasury of the Government of the HKSAR