

Mass Transit Railway Bill

The Response of the Administration to Issues raised by the Bills Committee

Section	Issues and Response	Gov't to Propose CSA
4	<p>(a) To ensure that only the proper authority within Government can agree with MTRCL the terms and conditions of the franchise, which are to be set out in the Operating Agreement under section 4(2), the Administration should consider making explicit reference to the identity of that proper authority in this section.</p> <p><i>Response :</i> We understand Members' concern. The Administration will move a CSA to replace the word "Government" in the 4th line of section 4(2) by "the Secretary on behalf of the Government". "Secretary" is defined in section 2 of the Bill as the Secretary for Transport. This will leave no uncertainty that only the Secretary for Transport can enter into the Operating Agreement referred to in that section with the Corporation.</p>	Yes
	<p>(b) The Administration should review the Chinese draft of section 4(2) after (a) has been considered.</p> <p><i>Response :</i> Appropriate amendments will be made to the Chinese text by way of a CSA by the Administration to reflect the change in the English text. Detailed wording will be provided soon.</p>	Yes

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7	<p>D of J should advise how the term “ordinarily resident” in section 7 is defined in law.</p> <p><i>Response :</i> "Ordinary residence" is a concept well known to law. To be ordinarily resident in a place, a person must reside in that place for a settled purpose. This basically means that he has his home in that place. There is no fixed formula by which the question of ordinary residence can be determined.</p>	

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8	<p>(a) The Administration should reconsider the Chinese translation for the term “additional directors”.</p> <p><i>Response :-</i></p> <p>The term "additional director" is translated as "額外董事" in the Public Bus Services Ordinance (Cap. 230) and Ferry Services Ordinance (Cap. 104). The D of J is of the considered view that the term "額外" has the meaning of being surplus of requirement and the term "增補" is a more appropriate way to describe the directors SARCE may appoint under section 8 of the Bill. The Department has advised that the term "增補董事" will be used in drafting other new legislation in future.</p> <p>(b) The Administration should consider whether subsection (4) is redundant given the existence of subsection (3).</p> <p><i>Response :-</i></p> <p>Section 8(3) sets out the general principle that additional directors shall be treated for all purposes as if they had been appointed at a general meeting of the Corporation. Section 8(4) goes on to highlight certain rights of the additional directors which the Government considers to be of particular importance in enabling the appointees to fulfill the roles and functions as additional directors. Without section 8(4), these additional directors can only rely on their Common Law rights and other general rights under Companies Ordinance (Cap. 32) as directors. Specific reference to such rights in section 8(4) will create statutory obligations on the part of the Corporation, breach of which can lead to sanctions by the Government under the Bill.</p>	

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9	<p>(a) A Member has suggested to incorporate the Performance Requirements in Schedule III of the Operating Agreement into a schedule to the Bill.</p> <p><i>Response :-</i></p> <p>We see serious downside in this proposal which 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 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. It would only be to the advantage of MTR passengers and in their interest if the Commissioner is able to make and implement such changes in the most efficient manner. If these specific details 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. In addition, the performance of all other public transport operators are governed by their franchises or licences and monitored by the Commissioner for Transport. The system has worked well for Hong Kong and we do not see any justification for departing from this arrangement and singling out MTRCL. We therefore propose that MTRCL's performance requirements should be set out in the Operating Agreement but not in the legislation.</p>	

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	<p>(b) A Member has suggested to set the Performance Thresholds on a par with the historical performance of MTRCL, i.e. no allowance should be given.</p> <p><i>Response :-</i></p> <p>We do not support the proposal for the reasons we have explained to the Bills Committee :-</p> <ul style="list-style-type: none"> (i) we have to give MTRCL some allowance for occasional minor fluctuations to cater for situations beyond its control. To cite an example of such situations : MTR experiences a sudden upsurge in patronage far exceeding its average carrying capacity and the Corporation, for passenger safety reasons, has to allow much longer boarding time and as a result trains are delayed. Under this situation, it will be reasonable for the regulator to allow a minor drop in, say, MTRCL's "Passenger Journeys on Time" threshold as that minor drop is not due to a fault of the Corporation. Without any allowance, MTRCL would breach the performance requirement. If 99.5% is adopted (instead of 98.5% as is being proposed) for this requirement, MTRCL would have practical difficulties catching up after the drop, particularly if it occurs near the end of an operating period; (ii) an overseas international expert (Professor Tony Ridley, Imperial College, London University) has testified before the Bills Committee that the Performance Requirements in Schedule III of the Operating Agreement which MTRCL would be required to meet would be way higher than international norms; and (iii) the Performance Thresholds are minimum requirements which the Corporation must meet. They are not MTRCL's targets, which will be its Customer Service Pledges. The MTRC representative told the Bills Committee at its meeting on 6 January 2000 that the Pledges would generally be set at 0.5% above the thresholds in schedule III. In the light of the comments made by Members of the Bills Committee, the Corporation has now confirmed that its Customer Service Pledges would be set at 1% above the Performance Thresholds. This in effect would be a commitment by the Corporation to maintain its present levels of performance after privatisation. 	

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11	<p>(a) The Administration should consider whether to require, under section 11, MTRCL to conduct investigations on its own in respect of train accidents and submit the outcome of the investigations to the Government.</p> <p><i>Response :-</i></p> <p>Section 11 empowers the Secretary to require the Corporation to keep certain records on the operation and maintenance of the railway. Safety and accident investigation comes under Part VI (Safety) of the Bill. Section 27 in Part VI of the Bill is copied from section 23B of the existing MTRC Ordinance (Cap. 270) and will empower the Railway Inspector, as at present for MTRC, to require MTRCL to provide copy of any document which the Railway Inspector may require. Regulation 4(3)(b) of the present Mass Transit Railway Regulations requires the Corporation to submit a written report to the Government after any accident. As the Regulations will be adopted by the Bill in their entirety (other than the replacement of "MTRC" by "MTRCL"), there is no need to add to section 11 the requirement for MTRCL to investigate.</p> <p>(b) MTRC should provide the number of incidents causing delays of 20 minutes or more in the last two years.</p> <p><i>Response :-</i></p> <p>MTRC has advised that there were 118 and 56 incidents of the sort in 1998 and 1999 respectively.</p> <p>(c) Government should find out if the relevant UK legislation requires privatised railway operators to keep records similar to those listed in section 11(1).</p> <p><i>Response :-</i></p> <p>We have looked at the UK Railways Act. It does not contain a provision similar to section 11(1) of the MTR Bill. The records MTRCL will be required to keep are similar to the ones the local franchised bus operators are required to keep at present.</p>	

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13	<p>(a) Government should consider whether it is appropriate to make reference to "a specific obligation of the Corporation under the franchise" in section 13(2). Members questioned the relevance of section 13 to the Corporation's obligations under the Operating Agreement.</p> <p>Response :-</p> <p>The CE in Council will not use section 13 to give directions to MTRCL to carry out what would be its obligations under the Ordinance or the Operating Agreement. Government has specific remedies to address breaches by the Corporation of its obligations under the Ordinance and the Operating Agreement. Such remedies have been explained to the Bills Committee during the examination of the Bill.</p> <p>The term "related to a specific obligation" in section 13(2) refers to the situation whereby the CE in Council requires the Corporation to carry out an obligation under the Bill or the Operating Agreement to a degree or magnitude which is over and above its obligations set out in the Bill or Operating Agreement. The point can be illustrated with the example of an extension to the railway which the Government, for public interest, would like MTRCL to build and operate but one which MTRCL considers to be commercially not viable and refuses to take up. Under this situation, the CE in Council can direct MTRCL under section 13 to construct and operate that extension to the railway in addition to its specific obligation under the franchise to operate the present lines in the MTR system. Given that the Corporation will be required to act beyond its obligations under the franchise, the Corporation may claim compensation from Government if it can establish that it has incurred loss attributable to its compliance with such a direction.</p> <p>However, if Members are still concerned that section 13(2) may not be absolutely clear, we can improve the drafting of section 13(2) along the following lines :-</p> <p style="padding-left: 40px;">"(2) The directions may be of a general or specific character in relation to any matter concerning the franchise."</p> <p>(b) Law Draftsman to consider refining the Chinese text of section 13(5).</p> <p>Response :-</p> <p>D of J has proposed to amend the Chinese text of section 13(5) along the following lines :-</p> <p style="padding-left: 40px;">"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。"</p>	Yes

Section	Issues and Response	Gov't to Propose CSA
15	<p>(a) Government should consider whether to give the Corporation an opportunity to make representations to CE in Council before a decision to suspend the franchise is made under section 15(1).</p> <p>Response :-</p> <p>Section 15 provides for suspension of the franchise in case of emergency or substantial breakdown of the railway. Both circumstances require the Government to respond speedily so that the MTR service will not be seriously disrupted. The Corporation has indicated to the Bills Committee that it understands the necessity of section 15 and feels comfortable with the protection offered by section 15(2) where the Government has undertaken to consult the Corporation, as far as is practicable in the circumstances, before the Secretary makes a reference to the CE in Council for suspension. To address the Member's concern without compromising the efficiency required of the Government in submitting a reference to CE in Council, we will add the following to the end of section 15(2) :-</p> <p>"and shall bring to the attention of CE in Council any representations made by the Corporation."</p> <p>(b) Government should consider whether the drafting of section 15(6)(b) should be tightened to ensure that compensation will not be payable to MTRCL if the suspension is caused by the acts and omissions of MTRCL.</p> <p>Response :-</p> <p>Section 15 is for suspension of the Corporation's franchise under emergency or in case of breakdown of services that is not capable of being remedied. Section 15(6)(b) clearly states that the loss or damage MTRCL may claim must be "arising from or attributable to the suspension". If the loss arises solely from, or is attributable solely to, the acts and omissions of the Corporation, MTRCL may not claim compensation for such loss under this subsection.</p> <p>(c) Law Draftsman should consider whether the Chinese text of section 15(7) can be improved.</p> <p>Response :-</p> <p>D of J has proposed that the Chinese text of section 15(7) can be improved along the following lines :-</p> <p>....而在不影響任何根據第(6)款享有補償的權利的原則下，就根據第(5)款接管的財產在保存時所處的狀況或該財產在歸還時所處的狀況方面而言，本條例或任何其他法律並無對政府施加任何義務。"</p>	Yes

Section	Issues and Response	Gov't to Propose CSA
18	<p>The Administration should consider adding the words "of default" after "in any other case" in section 18(5)(b) for sake of clarity.</p> <p><i>Response :-</i> We agree with Members' suggestion. A CSA will be moved by the Administration to section 18(5)(b).</p>	Yes
19	<p>The Administration should consider whether the deeming provision under section 19(6) is adequate to cover the vesting required for the purpose of section 19.</p> <p><i>Response :-</i> Clause 19(6) should be read together with clause 19(3). Clause 19(3) confers on the Government the power to dispose of property taken possession of under that section. The purpose of subclause (6) is to ensure that upon such disposal good title is acquired by the person to whom the property is disposed. In our view, section 19(6) will adequately serve this objective.</p>	

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27	<p>(a) The Administration should consider whether section 27(5) should be amended to put it beyond doubt that the Railway Inspector is not required to give reasonable notice to the Corporation before passing the information obtained under this subsection to the Secretary.</p> <p><i>Response :-</i></p> <p>We agree with Members' suggestion. A CSA will be moved to insert the words ", other than to the Secretary," before the word "unless" in section 27(5).</p> <p>(b) The Administration should consider whether section 27(6)(c) should be qualified by adding "without reasonable excuse" at the beginning of section, taking into account the similar provision in the Police Force Ordinance.</p> <p><i>Response :-</i></p> <p>Section 27(6) adopts an identical provision (i.e. section 23B(3)(c)) of the existing Mass Transit Railway Ordinance (Cap. 270). It serves the important purpose of enabling the Railway Inspector to carry out his duties under section 27(1) in respect of railway safety. The spirit of section 27(6)(c) is to ensure that the Railway Inspector will not be obstructed in the collection of evidence or investigation of accidents. It is legal advice that "obstruction" under this section has to be intentional and carried out with a clear motive to impede the Railway Inspector.</p> <p>The Police Force Ordinance (Cap. 232) itself does not specifically provide for an offence of obstructing police officers on duty. Section 23 of the Summary Offences Ordinance (Cap. 228) makes it a criminal offence for any person who obstructs a public officer from the performance of his duties. No defence of "reasonable excuse" is provided.</p>	Yes

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41	<p>The Administration should advise why it is not necessary to transfer section 8 of the existing Mass Transit Railway Corporation Ordinance (Cap. 270) to section 41 of the Bill or other sections under Part IX?</p> <p><i>Response :-</i></p> <p>Section 8 of the existing MTRC Ordinance does not grant benefits to MTRC staff. Instead, it confers on MTRC a power to grant certain benefits to MTRC staff. This power is needed for the present MTRC because, as a statutory corporation, it only has the power to do those things which it is specifically empowered to do under the law.</p> <p>The converse is true for the new privatised entity. As a company that is incorporated under the Companies Ordinance (Cap. 32), it will have the power to do anything which it is not prohibited from doing. It will have the power to grant and provide staff benefits. Accordingly, it would be inappropriate to include in the new MTR Ordinance a provision along the lines of section 8 of the existing MTRC Ordinance, as its existing powers as prescribed in Cap. 270 will be granted to it under Cap. 32.</p> <p>In any event, MTRC staff benefits are protected under section 41 of the Bill. This is achieved as follows :-</p> <p>(a) First, subsection (1) provides that all existing contracts of employment are vested in the Corporation (and employment with MTRC and the Corporation is treated as a "single" unbroken employment).</p> <p>(b) Secondly, subsection (2) provides for the vesting from MTRC to the Corporation of all employee benefits. In addition, the general vesting provisions contained in sections 37 and 38 of the Bill operate to carry staff benefits from MTRC to the Corporation.</p>	

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57	<p>D of J should provide judicial precedent or legal authority in support of the view that a breach of statutory duty does not by itself give rise to civil liability.</p> <p>Response :-</p> <p>This question was considered by the House of Lords in the case of <i>X (Minors) v. Bedfordshire Country Council</i> [1995]2 A.C. 633. In his speech, Lord Browne-Wilkinson said (at page 714) -</p> <p>"The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty."</p> <p>Lord Browne-Wilkinson went on to discuss in more detail the circumstances in which a statute would be construed as imposing civil liability for breach of a statutory duty.</p>	