

COMMISSION OF INQUIRY
INTO THE CONSTRUCTION WORKS
AT AND NEAR THE HUNG HOM STATION EXTENSION
UNDER THE SHATIN TO CENTRAL LINK PROJECT
(“THE COMMISSION”)

(formerly COMMISSION OF INQUIRY
INTO THE DIAPHRAGM WALL AND PLATFORM SLAB CONSTRUCTION WORKS AT THE
HUNG HOM STATION EXTENSION UNDER THE SHATIN TO CENTRAL LINK PROJECT)

OPENING ADDRESS FOR THE EXTENDED INQUIRY
BY COUNSEL FOR THE COMMISSION
(for Preliminary Hearing on 6 May 2019)

A. The Commission

1. On 10 July 2018, the Commission was appointed by the Chief Executive in Council of the Hong Kong SAR under section 2 of the Commissions of Inquiry Ordinance (Cap. 86)(the “**Ordinance**”). The appointed Chairman and Commissioner was Mr. Michael Hartmann, with Professor Peter Hansford as Commissioner. Pursuant to its original Terms of Reference, the Commission submitted an Interim Report to the Chief Executive in Council on 25 February 2019.
2. On 19 February 2019, in exercise of the powers conferred by section 3 of the Ordinance, the Chief Executive in Council expanded the original Terms of Reference by adding paragraph

(a)(2) thereto. The Expanded Terms of Reference (“**Expanded ToR**”) of the Commission will be found at **Annex 1** hereto.

3. The matters set out in the Expanded ToR will be addressed as and are referred to herein as the “**Extended Inquiry**”. The part of the Inquiry covered by the original Terms of Reference is referred to as the “**Original Inquiry**”.
4. The Chief Executive in Council has directed that the Chairman of the Commission may sit alone to consider procedural matters and to give directions for the efficient conduct of the inquiry. As Commissioner Professor Hansford is presently unable to come to Hong Kong due to prior commitments, in the interest of time, the Chairman has decided to conduct the Preliminary Hearing today, in Professor Hansford’s absence, to determine the rules and procedures of the Extended Inquiry so that the Substantive Hearing can begin at the earliest possible date, namely 27 May 2019.

B. Brief background to the Extended Inquiry

5. On 30 January 2019, the Government held a press conference announcing that there were problems of, *inter alia*, missing RISC Forms, unauthorised design changes and incomplete testing records of materials under Contract 1112 in relation to construction works at the North Approach Tunnels (“**NAT**”), the South Approach Tunnels (“**SAT**”) and the Hung Hom Stabling Sidings (“**HHS**”).
6. On 31 January 2019, the Government announced that the Chief Executive in Council would consider expanding the scope of the Commission’s investigation to cover the various construction issues at the NAT, SAT and HHS.

7. On 19 February 2019, the Chief Executive in Council approved the Expanded ToR as stated above, which was subsequently gazetted in the Gazette Notice No. 1539 dated 22 February 2019.

C. The Issues under the Expanded ToR

8. According to the information gathered by the Commission to date, it is apparent that the following primary matters are relevant to the Expanded ToR:
 - (i) Three defective stitch joints at NAT (“**Issue 1**”);
 - (ii) Non-compliance issues at the NAT Shunt Neck (“**Issue 2**”);
and
 - (iii) Lack of inspection and supervisory records, including RISC Forms, unauthorised design changes and incomplete testing records of materials at NAT, SAT and HHS (“**Issue 3**”).

D. The Commission and its powers

9. The Commission has wide statutory powers. Persons may be compelled to disclose documents and give evidence; witnesses may be examined on oath or affirmation. Oral evidence of witnesses will be adduced in public and in the presence of involved parties who, subject to the Commission’s permission, will have the opportunity to ask questions of witnesses and make such submissions to the Commission as may be appropriate.
10. It should be noted that the inquisitorial procedure adopted by the Commission is not the same as that adopted in ordinary adversarial civil litigation or more formal arbitration proceedings. The Commission may take a proactive role in investigating the subject

matter of its Expanded ToR, and the course of the proceedings is not directed by any involved party. Within the Expanded ToR, a number of lines of inquiry can be opened up and old lines of inquiry can be closed down, all within a short timeframe, subject to procedural fairness to the parties.

11. Potentially, the Commission's final report to be submitted to the Chief Executive ("**the Final Report**") could subject individuals, companies, institutions or departments to criticisms, and make recommendations which may have a long term impact on the future conduct of such entities. There is, therefore, a need to ensure fairness to all parties who may be affected by the Commission's work or criticised in the Final Report. Consequently, at this Preliminary Hearing and pursuant to the notice published on 10 April 2019, the Commission will deal with applications by individuals or entities who may apply to participate in the Substantive Hearing and also hear the involved parties on any particular directions they may wish to seek. To date, the Commission has not received any such applications.

E. The involved parties

12. Thus far, the Commission has, for the purposes of the Extended Inquiry, issued (a) letters requesting documentation and witness statements and (b) "Salmon letters" dated 23 April 2019 (that is letters giving advance notice to entities who might be the subject of criticism) to the parties identified below ("**the involved parties**"). Those parties have been asked to consider participating in, and having separate legal representation at, the Substantive Hearing.

The Commission's current understanding of the role of each involved party in the SCL Project is also briefly described.

13. There are four Government bureaux or departments involved namely the (1) Transport and Housing Bureau (“**THB**”), (2) Highways Department (“**HyD**”) including the Railways Development Office (“**RDO**”), (3) Development Bureau (“**DevB**”) and (4) Buildings Department (“**BD**”). THB and HyD/RDO performed a monitoring role in the SCL Project and DevB and BD carried out their statutory duties and functions. As at the Original Inquiry, the four entities are represented by the Department of Justice (“**DoJ**”).
14. By an agreement dated 20 August 2012, PYPUN-KD & Associates Limited (“**PyPun**”) was engaged by RDO on behalf of the Government as a Monitoring & Verification Consultant to, *inter alia*, monitor the performance of Mass Transit Railway Corporation Limited (“**MTRCL**”) under the Entrustment Agreement referred to below. For clarity, this engagement related to the entirety of the SCL Project.
15. MTRCL was appointed by THB on behalf of the Government under an Entrustment Agreement dated 24 November 2008 to design and carry out site investigation works for the SCL Project; by a further Entrustment Agreement dated 17 May 2011 to carry out certain advance works as defined therein and by a further Entrustment Agreement dated 29 May 2012 (“**the Entrustment Agreement**”) to project manage the construction and commissioning of the SCL Project. The Government is the majority shareholder of MTRCL.

16. Leighton Contractors (Asia) Limited (“**Leighton**”) was the main contractor engaged by MTRCL to construct, amongst many other things, the relevant NAT, SAT and HHS works under Contract 1112 dated 7 March 2013. Contract 1112 was a target cost contract.
17. Pursuant to a sub-contract dated May 2013, Wing & Kwong Steel Engineering Co., Limited (“**Wing & Kwong**”) was Leighton’s sub-contractor responsible for carrying out the reinforcement bar cutting, bending and fixing works for NAT and the HHS. Wing & Kwong was not involved in the Original Inquiry.
18. The Commission has also issued letters requesting documentation and witness statements but not a “Salmon letter” to Fang Sheung Construction Company (“**Fang Sheung**”), which was, pursuant to a sub-contract dated 28 August 2015, Leighton’s sub-contractor responsible for carrying out the reinforcement bar cutting, bending and fixing works for SAT. Fang Sheung has indicated its inability, for financial reasons, to engage legal representation.

F. Witness statement and documents

19. Pursuant to the Commission’s requests, witness statements and documents of and from the abovementioned parties have been and are still to be delivered to Messrs. Lo & Lo, solicitors for the Commission.
20. To date, the Commission has received four (4) witness statements from MTRCL and four (4) witness statements from Leighton primarily in relation to Issues 1 and 2. The remaining witness statements from MTRCL and Leighton, and the witness statements from the other involved parties are due to be provided to the

Commission on various dates over the next fortnight or so. By reference to the provisional lists of witnesses helpfully provided by the involved parties many further witness statements are expected and the final number of factual witnesses is currently anticipated to be between 30 and 35. Unless notified otherwise, the deponents of all witness statements will be required to give evidence at the Substantive Hearing.

21. Messrs. Lo & Lo are compiling the hearing bundles based on the witness statements and documents received. Subject to the ‘Rules of Procedure and Practice for the Extended Inquiry’ referred to in paragraph 27 below, the involved parties can apply to receive the electronic version (in the form of a USB Drive/CD/DVD) of the hearing bundles compiled up to 6 May 2019 (which will be regularly updated afterwards) after the Preliminary Hearing. The current index of the witness statements and documents will be available when the witness statements/documents are provided. To assist, the following bundle lettering has been adopted with the number of files compiled to date indicated:

Bundle(s) AA: the Commission [AA1]

Bundle(s) BB: MTRCL [BB1– BB7]

Bundle(s) CC: Leighton [CC1– CC6]

Bundle(s) DD: Government [DD1– DD3]

Bundle(s) EE: Fang Sheung [EE1]

Bundle(s) FF: Wing & Kwong [FF1]

G. Site visit

22. Accompanied by representatives of MTRCL, the Chairman of the Commission and the Commission's legal team visited the construction works at NAT, SAT and HHS on 2 April 2019.
23. Further, arrangements have been made for the Chairman together with Commissioner Professor Hansford to visit the relevant work sites on Friday, 24 May 2019.

H. The Commission's Experts

24. As previously indicated to the involved parties, the Substantive Hearing of the Extended Inquiry from 27 May to 19 June 2019 will deal with factual evidence only. The Commission has not yet formally instructed any expert for the purpose of assisting in the Extended Inquiry.
25. However, it is anticipated that the Commission will require independent expert opinion on project management issues and/or structural safety issues in due course. The Commission's position in this regard is being kept under constant review and the involved parties will be kept informed accordingly.
26. If any of the involved parties wish to adduce independent expert evidence in due course, an application should be made to the Commission on reasonable notice, and any such application should be accompanied by a written report of the proposed expert. The Commission will deal with any such application as soon as possible and, in the event that the application is granted, give directions as to when the expert concerned is to be called to give evidence. For

guidance, the Commission expects any expert evidence to be based on the relevant factual evidence of all witnesses (not just the party seeking to call the expert); there should be no attempt at factual analysis by the expert, although factual assumptions may be stated when necessary or appropriate; factual witnesses should not seek to rely on, refer to or adopt matters set out in an expert report, and an expert report will not be admitted unless the Commission is satisfied as to the independence of the expert.

I. The Commission's Directions for the Extended Inquiry

27. At the Preliminary Hearing on 6 May 2019, the Commission will give directions on the further conduct of the proceedings. At **Annex 2** hereto is a document entitled 'Rules of Procedure and Practice for the Extended Inquiry' which sets out the directions which the Commission intends to make. Particular attention is drawn to the following:
- (i) Paragraphs 6 and 7 which deal with the procedures to be adopted by any involved party who wishes to gain access to the documents received by the Commission.
 - (ii) Paragraphs 8 and 9 which deal with the use of materials provided by the Commission.
 - (iii) Paragraph 18 which deals with the procedure by which the Commission will receive oral evidence.
 - (iv) Paragraphs 20 to 24 which deal with the arrangements for the Substantive Hearing.

28. With specific regard to paragraph 18(1), the Commission's current intention is to call the factual evidence of the involved parties in the order set out below. It is emphasised, however, that the process is flexible and, if the Commission concludes that it wishes to hear from a particular witness (or witnesses) at a particular stage, it will issue appropriate directions.

- (1) Fang Sheung
- (2) Government (THB, HyD, DevB & BD).
- (3) PyPun
- (4) Wing & Kwong
- (5) Leighton
- (6) MTRCL

29. If a witness gives evidence in respect of more than one of the issues identified above, it is expected that, unless the Commission directs otherwise, the witness concerned will give oral evidence only once for all issues.

30. Within each involved party's witnesses, the Commission expects to call those witnesses who deal with Issues 1 and 2 alone first, followed by those witnesses who deal with all 3 Issues and then followed by those who deal with Issue 3 alone.

31. Whilst it is not possible, at this stage, to give even a rough timetable of when each involved party's witnesses will be called, it is hoped that the indication above will, at least in broad terms,

assist the planning of each involved party. All that can be stated with some certainty at this moment is that the witnesses from Fang Sheung, the Government and possibly PyPun will be required to attend to give evidence in the first week of the Substantive Hearing.

32. Further, the Commission's legal team will, in due course, set out the order in which it would prefer each involved party's witnesses to be called. If, however, any involved party wishes, for good reason, to alter the preferred order, the Commission's legal team is prepared to be flexible and accommodate any reasonable alteration request. In this regard, any involved party should give reasonable notice to the Commission's Solicitors of any desired alteration so as to minimise any potential disruption to the hearing.

J. The Commission's further directions for the Original Inquiry and the Extended Inquiry

33. As stated in paragraph 23 of the 'Rules of Procedure and Practice for the Extended Inquiry' at **Annex 2**, the Commission will make further directions as necessary in relation to matters pertaining to the Original Inquiry, and the original involved parties shall be notified in writing accordingly in due course.
34. In relation to the subject matter of the Original Inquiry and the Extended Inquiry, MTRCL is in the process of implementing a Holistic Proposal and a Verification Proposal respectively. The Commission has recently been informed by MTRCL and the Government that the Milestone Date for the completion and submission of the Final Reports to the Commission in respect of the Holistic and Verification Proposals is 30 June 2019. The

achievement of this date is likely to be critical to (a) the further directions to be issued by the Commission in relation to the Original Inquiry and the Extended Inquiry and (b) the Commission's objective of submitting its Final Report to the Chief Executive by 30 August 2019, as required by the Expanded ToR.

Dated 6 May 2019

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