

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

CLOSING SUBMISSIONS OF PYPUN-KD & ASSOCIATES LIMITED

I. INTRODUCTION AND OVERVIEW

1. This Closing is made pursuant to the Commission's directions of 16 December 2019. PYPUN's earlier submissions remain relevant. This document incorporates the necessary material therefrom, so as to avoid reference back, and also uses the abbreviations and other definitions given therein.
2. PYPUN's role was the same throughout the SCL Project and the issues – with regard to PYPUN's role, its performance and whether its role should have been more extensive than it was – remain the same for each part of the Inquiry. This Closing as well as considering the project management evidence¹ also addresses the initial general comments made by the Commission on PYPUN's performance in the Commission's Interim Report.
3. PYPUN was appointed by HyD of the Government as a monitoring and verification consultant for various phases of the design and construction and commissioning of the SCL Project. For the construction, testing and commissioning phase (the final phase of the SCL Project), this was by the M&V Agreement dated 20 August 2012.²
4. This Agreement refers, inter alia, to the Entrustment Agreements between the Government and MTRCL. The relevant Entrustment Agreement for present purposes is dated 29 May 2012 and is referred to in that Entrustment

¹ It is only Mr Rowsell's project management evidence which is relevant for PYPUN. Neither Mr Huyghe nor Mr Wall gave evidence in respect of the Government's monitoring and control mechanisms under which PYPUN's role arises.

² G9/7638-7753.

Agreement, and below, as EA3.³ This related to the carrying out by MTRCL, or others engaged by MTRCL, of the Entrustment Activities detailed in Appendix B to EA3, which (inter alia) involved the completion of any outstanding design and the remaining construction and commissioning activities forming the final part of the SCL Project.

5. Leighton was one of the contractors engaged by MTRCL for the SCL Project and was engaged to carry out construction works at the NAT, the SAT and the Hung Hom station and Hung Hom Stabling Sidings under Contract 1112. The present problems with Contract 1112 were first discovered in early 2018 – with problems with the stitch joints identified first and then media reports from May 2018 suggesting potential problems with the diaphragm wall and EWL slab construction.
6. PYPUN’s lack of knowledge of such matters prior to 2018 was dealt with by Mr Yueng, Mr Mak and Mr Chiu, who gave evidence to the Inquiry on behalf of PYPUN. There is nothing exceptional or indeed surprising, when one considers the extent of the SCL Project and PYPUN’s inevitably limited checking scope set out in the M&V Agreement, that PYPUN was unaware of such matters during the course of construction.
7. The other parts of this Closing provide first a section on the M&V Agreement and EA3, secondly one on the performance of the Agreement to date, thirdly a section on the specific matters the subject of the Inquiry which remain relevant to PYPUN and finally a conclusion.
8. In overview, PYPUN’s lack of knowledge of the matters considered in the Original and Extended Inquiry⁴, before they were discovered or raised in 2018, does not show any failure by PYPUN in the performance of its obligations under the M&V Agreement. PYPUN was not obliged thereunder to monitor or check the construction quality or construction record keeping

³ G7/5595-5714.

⁴ Referred to below as COI 1 and COI 2.

and, in particular, had no obligation to check whether or not RISC forms had been properly completed or the content thereof.

9. (1) Further, the M&V Agreement was differently worded from the earlier monitoring and verification agreement for the XRL project for which PYPUN had been invited to tender. It is difficult to see how the change of wording could have been other than so as to seek to reduce scope. Anyone involved in the tender for the monitoring and verification agreement on both the XRL project and the SCL Project would likely have thought it was. That both parties treated the scope as reduced would have then become obvious, when it was proposed and accepted that no separate designated team for quality audits (as had been provided under the earlier XRL project agreement) would be provided.⁵

(2) Additionally, HyD / Government and PYPUN have each operated on the basis that PYPUN has properly performed its duties under the M&V Agreement over the 7 year period of this performance. This has effectively been stated repeatedly in the Consultant's Performance Reports issued to PYPUN⁶ and was reflected in the daily exchanges on the work to be performed by PYPUN. Mr Rowsell also spoke about his understanding of the evidence pertinent to PYPUN's performance at COI 2 Day 18/92/9 – 95/12, 96/11 – 97/23, 99/25 – 101/6, 102/19 – 106/20, 110/13 – 113/1 & 113/2 – 113/21.

(3) In such circumstances (even were there an initial obligation to carry out specific construction quality checks or to look at the RISC forms – which there was not), no criticism could properly be levelled against PYPUN in the performance of its duties, when both parties were plainly of the view that

⁵ See Mr Yueng's evidence at paras 64-66 of his second witness statement – GG1/38-39. That the XRL project monitoring and verification agreement was earlier has not been disputed and is clear from clause 2.19 of the Brief for the M&V Agreement which refers to the XRL project already being under construction – G7/7652. See also Mr Rowsell's evidence on the change of wording at COI 2 Day 18/90/23 – 92/8.

⁶ At G1/70-222 and Attachment 1 hereto. Comments are on the final pages of the reports.

these were being properly performed and PYPUN was effectively being repeatedly told so.

II. THE M&V AGREEMENT AND EA3

10. This section primarily deals with matters of legal interpretation, in relation to the M&V Agreement and EA3, germane to the issues before the Commission. Government has now stated what it alleges were PYPUN's obligations in its Closing of 19 July 2019. Response thereto is provided at paragraphs 23 and 24 below.
11. PYPUN's responsibilities with regard to the monitoring and verification roles and its assessment roles on building submissions and building safety standards under the M&V Agreement are (it is submitted) clear. However, it is respectfully submitted that it is unnecessary for the Commission to comment on or seek to form a view on PYPUN's original obligations in relation to construction quality checking or checking of RISC forms (were there any) in the light of the parties consistent understanding of PYPUN's responsibilities and obligations over the 7 period since the execution of the M&V Agreement⁷, as demonstrated by the evidence – see paragraph 9 above and paragraphs 26 to 33 below.
12. (1) The recitals of the Memorandum of Agreement⁸ identified the professional services required of PYPUN in the following terms:

“Whereas the Employer requires the Consultants to provide professional services in respect of SHATIN TO CENTRAL LINK (SCL) MONITORING AND VERIFICATION FOR CONSTRUCTION, TESTING AND COMMISSIONING PHASE – INVESTIGATION (hereinafter called “the Assignment”) details of which are set out in the Brief annexed hereto.”

⁷ In any event, there would with regard to legal obligations (because it is now alleged that PYPUN had such obligations) be issues of estoppel by convention, estoppel by representation and waiver germane to whether any such obligation still pertained at the relevant time. Were these to be investigated, it is difficult to see how an estoppel by convention would not arise after Government's first acceptance and lack of comment on the various deliverables produced at the start of the M&V Agreement and PYPUN then operating in accordance with those deliverables.

⁸ G9/7640-7645.

(2) Clauses 3.1 and 3.2 of the Brief⁹ stated, in relation to PYPUN's monitoring, verification and assessment roles, as follows:

“3.1 The overall objective of the Assignment is to provide monitoring and verification services in relation to the work undertaken by MTRCL (including submissions by its consultants, contractors or agent to MTRCL) during the construction, testing and commissioning phase of the Project so as to provide assurance that the MTRCL's obligations stated in the EAs for the SCL advance works and construction phases have been properly fulfilled. The monitoring and verification shall focus on cost, programme and public safety of the Project.”

“3.2 Provision of professional services in respect of the assessment of building submissions for compliance with the BO and other relevant ordinances, regulations and standards.”

13. Clause 4.1 of the Brief¹⁰ gave an inclusive description of the work PYPUN was to perform in carrying out this assignment, by reference to its monitoring, verification and assessment roles, in the following terms:

“The Assignment shall include but not be limited to the following:

- (a) a review of the documents relating to the following –*
 - (i) construction programmes;*
 - (ii) contractors' method statements and proposals bearing major implications and significance to the Project in terms of costs, programme and public safety;*
 - (iii) project finance including reports/information on contract expenditure/forecast, contract commercial issues;*
 - (iv) submissions to the Project Control Group (PCG) meetings, which bear significant implications to the Project in respect of cost, programme and public safety;*
 - (v) public safety plans; and*
 - (vi) other key documents relating to the SCL works.*
- (b) carrying out monitoring on MTRCL's works through a review of the concerned documents and necessary site inspection and identification of and providing advice on key issues, which bear significant implications in respect of cost, programme and public safety to the Project;*

⁹ G9/7653-7654.

¹⁰ G9/7654.

- (c) *carrying out verification by conducting audits (including process and/or technical audits) to the activities/processes undertaken by the MTRCL, reporting and the necessary follow-up work;*
- (d) *provision of professional services in respect of the assessment of building submissions for compliance with the BO and other relevant ordinances, regulations and standards;”*

14. Clause 4.2 of the Brief¹¹ went on to make it plain that PYPUN did not have any site supervisory role, nor the role of on-site checking of the detailed design of the works:

“Notwithstanding Clause 4.1 above, the Consultants shall not be required to carry out site supervision or any checking of detailed design of the works.”

15. Section 5 and clause 6.6.2 of the Brief¹² identify deliverables required to be produced by PYPUN and section 6 also identifies the services to be provided in respect of the matters within PYPUN’s scope. The deliverables included the Inception Report, the Monitoring Plan, the Verification Plan and the Building Submission Review, Assessment and Checking Procedure.¹³ These were to be provided in draft to the Director’s Representative from HyD for comment, before finalisation. The M&V Agreement has PYPUN providing professional services to a professional client.

16. Section 6 contains clauses relating (inter alia) to: monitoring and verification being in respect of cost, programme and public safety and based on a risk based sampling approach; assessment of building submissions and compliance with building safety standards; the proactive nature of PYPUN’s performance of its obligations under the Agreement; the access which might be obtained to the project areas and construction works sites and provision of the Monitoring and Verification Plans and the Building Submission Review, Assessment and Checking Procedure (see, in particular, clauses

¹¹ G9/7654.

¹² G9/7655-7658 & 7664.

¹³ K1/36-143, 146-179, 180-226 & 759-792.

6.1.7, 6.1.8, 6.2.2, 6.2.4, 6.3.1, 6.3.4, 6.4.1, 6.4.2, 6.4.3, 6.4.5, 6.4.6, 6.6.1, 6.6.2, 6.6.3, 6.6.4 and 6.7.1 to 6.7.4).¹⁴

17. (1) The monitoring and verification process, which PYPUN undertook under these provisions is – as stated – in respect of costs, programme and public safety. Obviously, were there problems with the quality of the works, this might affect the cost and programme. This point was raised with Mr Yueng in his oral evidence.¹⁵ But the fact that quality issues with the works might affect cost and programme does not mean that PYPUN had an obligation as to quality.

(2) In this regard issues relating to a number of other matters which arise on virtually all construction contracts may well affect cost and programme. For example, were the contractor to have insufficient workers for the works to be carried out, this could lead to programme delays, which in themselves might lead to increased costs due to those delays. As another example, lack of timeous supply of materials may plainly impact on programme and cost. And yet another example, inadequate staffing – for instance in design teams – may lead to delays in the design process during the works and, hence, the progress of the works themselves. Involvement in construction and infrastructure disputes, makes one realize that the interrelationship between the various aspects of the design and the works means that delays and cost increases can arise from a number of different quarters.¹⁶

(3) There is simply nothing in the M&V Agreement to suggest that PYPUN was to undertake an investigative role on any issues on quality, whether or not they would impact on programme or cost, or any of the other matters mentioned above. Such a role would have to be stated in the Agreement to give rise to an obligation, because – other than where terms

¹⁴ G9/7658-7667.

¹⁵ COI 2 Day 15/13/3 – 15/13.

¹⁶ As was Mr Rowsell's evidence – COI 2 Day 18/89/7-90/22.

are implied (not a suggestion here) – that is how an obligation arises in a written contract.¹⁷ Were, however, issues with regard to quality apparent from the monitoring or verification or indeed the BSRC team’s assessment undertaken under the Agreement, this would need to be followed up by PYPUN as to whether and, if so, how cost and/or programme might be impacted. This would also be the position were quality issues identified by others and made known to PYPUN. Prior to 2018, no issues as to quality in respect of the matters the subject of the Inquiry were made known to PYPUN.

(4) An investigation of such matters (absent it becoming apparent from PYPUN’s monitoring, verification or assessment roles or made known to PYPUN by others that there were quality issues) would be opening up numerous and very wide areas of investigation for which there is no remit in the M&V Agreement. Such a broad and wide ranging obligation would require PYPUN investigating virtually all aspects of MTRCL’s and Leighton’s work – which simply is not the obligation.

(5) Further, Mr Yueng’s evidence, in paragraphs 64 to 66 of his second witness statement¹⁸, makes it clear that a decision had been taken by Government to specifically omit construction quality checking from the ambit of the M&V Agreement – see also paragraph 9 above.

18. (1) There was some debate in COI 1 on the scope of PYPUN’s monitoring and verification role with regard to public safety.¹⁹ This was also raised with Mr Yueng in his oral evidence in COI 2.²⁰ The public safety aspect relates to the safety of the public during the construction works and the testing and commissioning phase and any specific testing required with

¹⁷ Whilst a matter of legal interpretation, as Mr Rowsell accepted, there needs to be an accurate and a complete description of the obligations in an agreement of this nature – COI 2 Day 18/90/18-22.

¹⁸ GG1/38-39.

¹⁹ This was dealt with in COI 1 at paragraph 20 of PYPUN’s Closing dated 19 July 2019, following the previous hearings, and footnote 5 thereof.

²⁰ COI 2 Day 15/15/14 – 16/22.

regard to public safety during the testing and commissioning phase of the SCL Project. This is clear from (inter alia) clause 3.1 of the Brief.

(2) The Memorandum itself (paragraph 12(1) above) makes it plain that the professional services relate to this final phase of the SCL Project, referred to in the M&V Agreement as the ‘Project’. The other two phases being design and site investigation (clause 2.16 of the Brief) and advance works – including non-railway works – of the Project (clause 2.17). The relevant Entrustment Agreement, EA3, relates to the construction and commissioning. It is clear that the ‘Project’, as identified in the final sentence of clause 2.1 of the Brief, is the design, construction and commissioning. The distinction is drawn between the Project and the completed railway in clause 2.15. The funding by Government, referred to in that clause for ‘the Project’, is for the design and construction and not the completed operating railway. Clauses 2.16 to 2.25 further demonstrate that the Project is not the completed operating railway, but the design, construction and commissioning.

(3) Clause 3.1 refers to monitoring and verification in respect of the work undertaken in the final phase of the SCL Project and the focus is on: “*cost, programme and public safety of the Project*”, not the completed operating railway. Consequently, the public safety monitoring and verification role under the M&V Agreement deals with aspects of the safety of the public during the final phase of the Project, being the construction works and testing and commissioning.

(4) Further, the Inception Report²¹ also confirms this meaning stating at paragraph 4.1.1:

“Public Safety

The extent of the Project covers a large area that increases the risk of accidents involving neighbouring residents.

²¹ K1/37-143 at pages 44-45.

Special construction techniques, such as blasting, tunnelling, and major temporary works should be carefully reviewed and planned ahead before implementation to minimize the safety risks to the public.

An extensive monitoring regime including existing ground movements, existing building movements, utilities movement, and ground and surface water level fluctuations should be closely monitored by MTRCL and its contractors to ensure the existing infrastructure is not affected beyond acceptable levels during construction. We will appraise and audit the monitoring system and monitoring reports.

MTRCL will implement Temporary Traffic Management Schemes (TTMS) where the construction works affect public highways. These TTMS will have to be agreed at Site Liaison Group (SLG) meetings by certain Government Departments including the Hong Kong Police, Transport Department and Highways Department. We will appraise and audit these TTMS to ensure that they are carried out in accordance with the approved Schemes.”

(5) The process was that the deliverables would be sent to HyD in draft for comment (see paragraph 15 above) and, as was Mr Rowsell’s evidence, had Government disagreed with PYPUN’s understanding of public safety, one would have expected it to disagree to the Inception Report.²²

(6) The concern and focus on the potential effect of the works during construction on adjacent buildings and other structures and utilities is understandable when a significant part of the works was underground and located in built up areas of Hong Kong.

(7) Furthermore, "safety" under the monitoring and verification regime in the XRL project was changed to "public safety" here.²³ The fact that Government’s understanding of PYPUN’s monitoring and verification role with regard to public safety was as above can be seen from the comments in the Consultant’s Performance Reports issued to PYPUN.²⁴ This then is another area where what is said at paragraph 11 above applies.

19. (1) The other role which PYPUN undertook (clause 3.2 of the Brief) also clearly related to the design and construction works and not the completed

²² COI 2 Day 18/94/5-17 & 95/7-12.

²³ See Mr Yueng’s evidence identified at paragraph 9 above.

²⁴ GG1/70-222 and Attachment 1 hereto. Comments are on the final pages of each of the reports.

operating railway. This was the work carried out by PYPUN's BSRC team, which Mr Yueng led until January 2019.²⁵ He deals with the documents considered at the audits and site inspections of the BSRC team in his second witness statement,²⁶ frequently by reference to paragraphs from PYPUN's Building Submission Review, Assessment and Checking Procedure²⁷ - one of the deliverables issued by PYPUN to HyD for comment before finalisation under the Agreement (paragraph 15 above).

(2) The assessment process in respect of compliance with building safety standards, which PYPUN undertook as part of its BSRC team duties, involved site inspections and auditing. The system adopted was that in the Buildings Department ("BD")'s PNAPs ADM-13 and ADM-18.²⁸

(3) In accordance with the IOE and IOC issued by the BD and HyD respectively in relation to the SCL Project,²⁹ MTRCL and Leighton had to appoint CPs and TCPs³⁰ to provide confirmation (inter alia) that the works had been carried out in accordance with the approved drawings. This was on a form similar to Form A in BD's Code of Practice for Site Supervision 2009.³¹

(4) Tables 5.1 to 5.4 in BD's Code of Practice³² identify the relevant items shown on the CP's and TCP's confirmation documents – for Table 5.1 this is A8, Table 5.2 – E6, Table 5.3 - G6 and Table 5.4-C12.

(5) This was the system that Government had chosen to introduce in allowing MTRCL to operate under the IOE and IOC, rather than entirely under the Buildings Ordinance. It required confirmation by the CPs and

²⁵ Paras 3 and 6 of Mr Yueng's second witness statement – GG1/26 & 27.

²⁶ Paras 46-63, 85-104 of his second witness statement – GG1/34-38 & 43-47.

²⁷ K1/759-792.

²⁸ See paragraph 26 of Mr Yueng's first witness statement and Annex 2 thereto - K1/732 and 747-757 and paragraph 49 of Mr Yueng's second witness statement – GG1/35.

²⁹ See Annex 2 to Mr Ho's witness statement for COI 1, which attaches various versions of MTRCL's Project Management Plan ("PMP"). The relevant IOE and IOC are (inter alia) at H7/2401-2414 and H7/2416-2431.

³⁰ Whether someone is qualified to be and becomes a CP or TCP is decided by the BD.

³¹ See paragraph 103 of Mr Yueng's second witness statement – GG1/46.

³² B5/2676-2795.

TCPs on a regular basis (i.e. for each CP and TCP in accordance with their reporting periods agreed with HyD/Government) that, amongst other things, the works had been carried out in accordance with the approved drawings. Copies of some of these confirmatory documents for Contract 1112 are at H21/40833-41540, H22/41541-42171 and BB9/6364-6639. They demonstrate that the CPs and TCPs confirmed the relevant items identified in sub-paragraph (4) above. These were the documents referenced in MTRCL's PMP and produced under its site supervision plans and were the documents which PYPUN would audit,³³ when site audits were carried out for a particular area in accordance with the M&V Agreement.

(6) These were, unless the CP or TCP had incorrectly filled out the form, confirmation that the quality of the works was in accordance with the approved drawings.

(7) It is not understood on what basis it could be said that PYPUN should have been looking at RISC forms when performing an audit when:

(i) construction quality checking had been omitted from the ambit of the M&V Agreement (see paragraph 9 above);

(ii) there is no term of the M&V Agreement which obliges PYPUN to consider RISC forms (paragraph 17 above);

(iii) it had been decided by Government that the appropriate system to introduce was confirmation by the CPs and TCPs of quality compliance and there is no mention of or reference to the RISC form system in the IOE or IOC³⁴; and

(iv) PYPUN has been carrying out hundreds of audits with the BO Team (who are individuals from the BD seconded to HyD) in its

³³ See paragraph 103 of Mr Yueng's second witness statement – GG1/46.

³⁴ The RISC forms, rather than the CP's and TCP's confirmation documents, have been the primary focus of the Commission, because RISC forms were missing. But from PYPUN's perspective it was the confirmation documents which PYPUN was to and did audit. There is a possibility that in focusing on the RISC forms they might be given greater significance than they merit and, with respect, Mr Rowsell's view that they are certificates is incorrect – see COI 2 Day 18/77/14 – 89/6.

performance of the M&V Agreement over the last seven years, the work to be carried out thereon was discussed with HyD and the BO Team and throughout that period there has been no suggestion from HyD or the BO Team that PYPUN has failed to carry out those audits properly. Indeed, there has been confirmation that those audits have been carried out properly in HyD's Consultant's Performance Reports.

20. (1) There was evidence during COI 1 about site inspections of the construction works carried out by PYPUN and HyD. Indeed clause 6.6.4(f) of the Brief refers to audits and surprise checks on construction sites, in relation to the compliance with building safety standards, being part of PYPUN's assessment of building submissions role.

(2) These site audits and checks could have been a surprise so far as the construction contractors or sub-contractors were concerned. However, MTRCL was in a different position. The procedure which is to be undertaken in respect of audits and site inspections is set out in the first instance in EA3. This gave the following rights to Government (and PYPUN, being Government's consultant, could be in no better position)³⁵:

"17.10 At intervals which are reasonable, having due regard to the Entrustment Programme and with a view to minimising any delays thereto, following the date of this Agreement, Government shall, in addition to its monitoring rights set out in the preceding provisions of this Clause 17, be entitled to appoint an appropriate consultant to verify the Corporation's compliance with the Corporation's obligations under this Agreement and may, on reasonable notice, notify the Corporation in writing of:

(A) those of the Corporation's obligations compliance with which Government proposes to verify; and

(B) details of the employees and representatives of the appropriate consultant who require access rights to the Corporation's offices and any other places in which the Corporation is performing the Entrustment Activities in order to carry out the verification."

"17.12 For the purposes of any verification pursuant to Clause 17.10 ... the Corporation shall allow, and shall procure that its contractors and consultants allow, the appropriate consultant and/or Government's

³⁵ These provisions from EA3 are at G7/5628-5629.

employees and other representatives (as the case may be), on reasonable notice and where possible during normal working hours, access to the sites referred to in Clause 17.10(B), the Corporation's books and records and relevant personnel, information systems and reasonable office facilities provided that, and only insofar as:

(A) such verification is carried out with due regard for minimising disruption to the Entrustment Activities;

(B) such verification relates to a particular matter or issue which was stated in the notice provided by Government to the Corporation; and

(C) such books, records, personnel and information systems relate to, or hold information about, the relevant obligations of the Corporation”

“17.15 The Corporation shall arrange formal joint site inspections of all work sites on a quarterly basis (or at such other intervals as may be agreed between Corporation and Government from time to time) to allow Government and any persons duly authorised by Government to review the Corporation's compliance with its obligations under this Agreement.”

(3) In this regard the M&V Agreement itself, as well as referring (clause 6.6.4(g)) to conducting audits and surprise checks to construction sites, also stated at clause 6.1.8 of the Brief³⁶:

“..... The Consultants' right of access to the project areas and construction sites shall be subjected to the giving of reasonable advance notice to and with the prior agreement of the Director's Representative and MTRCL. The Consultants shall not unduly interfere with the works of the MTRCL, its consultants or contractors.”

21. Consequently, PYPUN had no right to conduct audits or site inspections without reasonable notice to MTRCL, including identifying (inter alia) the matter or issue to which the audit or inspection related, and the regular site inspections were to be quarterly or as arranged and agreed between MTRCL and the Government. However, as explained by Mr Yueng at paragraph 76 of his second witness statement,³⁷ there were some site inspections and audits carried out, without advance notice to MTRCL and without objection by MTRCL, when particular issues arose.

³⁶ G9/7659.

³⁷ GG1/41 & 42.

22. (1) It is accepted (see the provisions identified in paragraph 16 above) that PYPUN was to be proactive in relation to its obligations under the M&V Agreement. The reference to PYPUN being proactive could only be in relation to the obligations to be performed under the Agreement and, whilst a matter of legal interpretation, this was accepted by Mr Rowsell.³⁸
- (2) Whether or not PYPUN had acted proactively would need to be considered in context, i.e. in relation to a particular activity or set of activities.³⁹ There were many different aspects of PYPUN's involvement and different considerations would likely apply in regard to those different activities and indeed may well apply when the activities were undertaken on different contracts, because of changes in circumstances.
- (3) As also said in PYPUN's oral Opening, it might have happened (although it was not being said it had) that PYPUN put forward proposals which were not taken up by HyD or the BO Team on its behalf. It cannot be said that PYPUN was not proactive in circumstances where it had suggested a course of action proactively and that was not accepted by HyD or the BO Team. Mr Rowsell was effectively saying this in his evidence at COI 2 Day 18/112/4-11. Mr Yueng's undisputed evidence⁴⁰ was that there were almost daily exchanges with HyD and the BO Team where the work that PYPUN was to undertake was discussed and agreed upon.
- (4) The point (made in oral Opening and repeated here) is that, were one considering whether PYPUN had acted proactively, this would need to be looked at in the context of particular activities and in that context investigated in the factual evidence. Absent such investigation, and there has not been such an investigation in either COI 1 or COI 2, it is respectfully submitted that no view could be formed that PYPUN had failed to act

³⁸ COI 2 Day 18/110/13 – 113/1.

³⁹ As was mentioned in PYPUN's oral Opening.

⁴⁰ Paragraph 9 of his second witness statement – GG1/28.

proactively. In this regard, Mr Rowsell said he had not seen anything in the Consultant's Performance Reports or anything else to suggest that PYPUN were not meeting Government's expectations and fairly accepted that those involved in monitoring PYPUN's works would be in a better position than he was to see whether there was any failing by PYPUN.⁴¹

(5) In fact Mr Yueng's evidence, on which he was not questioned, was that PYPUN did act proactively in relation to its obligations under the M&V Agreement. There are also numerous statements in HyD's Consultant's Performance Reports on PYPUN to that effect.⁴²

23. Government addresses the obligations it says PYPUN had under the M&V Agreement at section I of its Closing. Paragraphs 137 to 146 contain Government's case on those obligations and, hence, will (where appropriate) be responded to in this section of PYPUN's Closing. The remaining paragraphs in Government's section I make submissions in relation to the evidence and what Government says it has done and will do and so do not require any response here. Save to say that a comparison with what happened with regard to RISC forms (as set out in paragraphs 27 to 33 below) shows that Government never considered PYPUN needed to check them and see paragraph 32(5) below in respect of Mr Leung's evidence relied on in section I.
24. (1) As to Government's case, the analysis of the relevant provisions of the M&V Agreement above (it is submitted) correctly identifies PYPUN's obligations.
- (2) Paragraphs 138 and 139 (the first six lines – the rest being statements on the evidence) of section I do not, with respect, contain a legal analysis of the language used in the M&V Agreement. They contain a statement of what

⁴¹ COI 2 Day 18/112/22 – 113/21.

⁴² See paragraphs 67-70 of Mr Yueng's second witness statement – GG1/39. The Consultants Performance Reports are at G1/70-222 and Attachment 1 hereto.

the author thinks “*should*” have been included, because it was MTRCL’s obligation under EA3, where entirely different and comprehensive language has been used to found that obligation. This ignores the language of the M&V Agreement, which is the only basis upon which PYPUN’s obligation arose.

(3) With regard to the reference to Mr Yeung’s evidence in the final part of paragraph 139, see paragraph 17 above. The final sentence of paragraph 139, with respect, is not a legal proposition. One has to look at the wording of the contract between the parties to determine their obligations.

(4) Reliance is placed in paragraphs 138 and 139 on the underlined part of clause 3.1, but the process is to provide assurance. This means that the process was to provide Government with some confidence. The level being dependent on the actual obligations imposed under the M&V Agreement, as identified for the monitoring and verification services in the next sentence of clause 3.1, which Government does not address in its Closing. There is no general obligation to investigate everything including construction quality, with regard to which MTRCL has as an obligation under EA3.

(5) Indeed such an interpretation would be contrary to clause 4.2 of the M&V Agreement, because Government’s argument is in effect that PYPUN has to check that the detailed design has been implemented. When this is contrary to the more limited requirements in clauses 3 and 4.1 and the specific exclusion in clause 4.2.

(6) There are only general references to documents in clause 4.1, as referred to in paragraph 140(1) to (4). This clause does not impose any obligation in respect of RISC forms, which relate to quality control that PYPUN had no obligation to monitor. The final paragraph, in paragraph 140 of section I, also ignores the system introduced by Government and the documents, which were created under that system and inspected by PYPUN as part of its obligations under clause 3.2 of the M&V Agreement. These

should (if properly prepared) have given confirmation that the quality of the works was in accordance with the approved drawings – see paragraph 19 above.

(7) Clause 6.1.7 of the M&V Agreement (paragraph 141 of section I) does not impose any additional or separate obligation to clauses 3.1, 3.2 and 4.1 and 4.2, but explains what is to be done in fulfillment of the obligations in very general terms. Clause 6.1.9 thereof (paragraph 142) merely states that the works extend to all the construction contracts including the E&M contracts, i.e. it is not limited to part of the Project. Clause 6.6.4(g) (paragraph 143) is actually not to do with the monitoring and verification activities, for which Government relies on it – see paragraph 145 of section I, but relates to the services provided by the BSRC team under clause 3.2 of the Agreement – see paragraph 19 above. Paragraph 144 of Section I takes the matter no further in relation to whether there was a requirement to inspect RISC forms.

(8) There is nothing, it is respectfully submitted, in anything submitted in section I of Government's Closing that shows that either there was an obligation to carry out quality checks or to look at RISC forms. Further, quite apart from issues of estoppel and waiver, PYPUN could not be criticised for not so doing, when the wording of the Agreement was changed as it was, no quality checking team was required, the parties proceeded on the basis that there was no such requirement for 7 years and no criticism was levelled at PYPUN for not checking RISC forms (even after Government was informed about the issue of a failure to produce RISC forms in June 2018 and thereafter) and, other than under the supplementary agreements on Contract 1112, even now PYPUN has not been told it should check RISC forms in respect of any other contract. Government's Closing says one thing and its actions since before even commencement of the M&V Agreement, with respect, demonstrate the opposite.

III PERFORMANCE OF THE M&V AGREEMENT TO DATE

25. It is considered worthwhile (prior to dealing with the specific matters before the Commission germane to PYPUN's involvement in the SCL Project) to put those matters in the context of the scheme and size of the SCL Project as a whole and PYPUN's participation therein. Additionally, HyD/ Government's stance on PYPUN's participation over the 7 year period (since the execution of the M&V Agreement) must, it is respectfully submitted, also be central to any consideration of PYPUN's performance.
26. (1) With regard to the size and scale of the SCL Project, there were 86 contracts identified in the M&V Agreement (see Appendix G to the Agreement and clause 6.4.4 thereof)⁴³ in respect of which PYPUN was to perform some or all of its functions under the Agreement. PYPUN's Verification Plan, the finalised version of which was provided under the Agreement in June 2013, identified 100 such contracts at paragraph 3.4.3 thereof.⁴⁴ Mr Yueng refers to a total of 340 contracts at paragraph 80 of his second witness statement, which are listed in Appendix C thereto.⁴⁵
- (2) The functions which PYPUN undertook were a monitoring and verification process in relation to three aspects – costs, programme and public safety – and further an assessment process on two more – building submissions and compliance with building safety standards.
- (3) The tentative overall programme for the SCL Project (clause 2.20 of the Brief and Appendix D to the Agreement)⁴⁶ ran through to 2020, i.e. over a period of 8 years from the execution of the M&V Agreement.
- (4) (i) The very significant scale of the SCL Project and necessarily limited scope of PYPUN's checking obligations, inevitably meant that an inspection arranged at any given construction site might well not identify

⁴³ G9/7690-7693 & 7662.

⁴⁴ K1/181-226 at pages 196-200.

⁴⁵ GG1/42 & 43 and 64-69.

⁴⁶ G9/7652-7653 & 7684.

failures by a contractor to comply with what was required under its contract with MTRCL. The problem might be with works already covered up or completed or with those being performed at a different location. There could also be problems on other sites not at that time being inspected.

(ii) Indeed MTRCL's risk register used by PYPUN, which did not identify the stitch joints or shunt neck as candidates for inspections or audits, was also discussed with the RDO at regular meetings⁴⁷ and the work to be undertaken by PYPUN was discussed with HyD and the BO Team on an almost daily basis.⁴⁸ There was no suggestion by HyD or the BO Team that the stitch joints or shunt neck should be included in the limited inspection or auditing process.⁴⁹

(5) (i) The point was raised with Mr Yueng in his oral evidence (by reference to what was said about interfaces in PYPUN's Monitoring Plan) as to whether PYPUN should have seen the interface between Contract 1111 and 1112 as a key risk with regard to the defects which eventuated.⁵⁰ Mr Yueng's evidence in that passage of his oral evidence, as well as in his witness statement,⁵¹ was that the construction process for the stitch joints and shunt neck themselves was simple and straightforward and, hence, this was not seen as an area of particular risk. He also said in oral evidence that the interface between Contracts 1111 and 1112 was not seen as a particular risk generally, because the same people being involved with both contracts meant the necessary information from both contracts should have been available to that team. His evidence was that PYPUN's staff had carried out an exercise to determine which contract interfaces did and which did not pose a key risk.⁵²

⁴⁷ Paragraph 19 of Mr Yueng's second witness statement – GG1/29.

⁴⁸ Paragraph 9 of Mr Yueng's second witness statement – GG1/28.

⁴⁹ Paragraph 62 of Mr Yueng's second witness statement – GG1/38.

⁵⁰ COI 2 Day 15/7/21 – 13/2.

⁵¹ Paragraph 62 of his second witness statement – GG1/38.

⁵² COI 2 Day 15/10/18 – 25.

(ii) PYPUN's Monitoring Plan was one of its deliverables. But the first deliverable was the Inception Report and this needs to be looked at for an understanding of what is said about key issues in relation to the interfaces. This states that the key issues identified with regard to interfaces were (a) a design issue – contract interfaces poorly defined and (b) on construction – contractors' responsibilities on construction interfaces poorly defined. Neither of these, on the evidence, arose at the interface between Contracts 1111 and 1112⁵³.

(6) One line of questioning of both Mr Yueng from PYPUN⁵⁴ and Mr Leung from the Government⁵⁵ related to whether there was an issue of under-resourcing in the light of the number of contracts let for the SCL Project. Mr Yueng's evidence was that PYPUN was adequately resourced throughout and Mr Leung's evidence was to the effect that PYPUN was sufficiently experienced, so (irrespective of the number of contracts) it should have been adequately resourced. HyD's Consultant's Performance Reports⁵⁶ are also relevant were this an issue. The reports frequently state that PYPUN had sufficient competent staff to deal with its duties satisfactorily and the contrary is never stated.

27. (1) A decision was made by Government (see paragraph 9 above) to change the language of the obligations in the M&V Agreement from that used in the consultancy agreement for the earlier XRL project, so as not to require monitoring and verification of the construction quality of the works. However, even ignoring this change, had it been thought that PYPUN had such an obligation under the M&V Agreement, including one of looking at RISC forms (by sampling or otherwise), then it would have been readily

⁵³ See section 4 of the Inception Report and, in particular, the third bullet point under Design Issues and the second bullet point under Construction Issues at paragraph 4.1.2 – K1/44-49.

⁵⁴ COI 2 Day 15/30/20 – 32/20.

⁵⁵ COI 2 Day 15/92/3 – 93/7.

⁵⁶ Annex 12 to Mr Yueng's second witness statement - GG1/70-222 and Attachment 1 hereto. The comment, where it appears, is on the final page of the reports.

apparent to Government from day 1 and over the 7 year period thereafter that PYPUN was not fulfilling any such obligation.

(2) There is no evidence of any suggestion being made to PYPUN in the almost daily meetings⁵⁷ over the period of operation of the M&V Agreement, when the work PYPUN was carrying out was discussed and agreed upon, or in correspondence that it was failing or had failed to fulfill any such obligation.⁵⁸ Further, the quarterly Consultant's Performance Reports were produced by HyD on PYPUN's performance.⁵⁹ These reports issued from when PYPUN was first appointed through to January 2019 are, except for the quarterly report to September 2018, attached to Mr Yueng's second witness statement as identified in the last footnote. The quarterly report to September 2018 was omitted by mistake and, for completeness, this had been included at Attachment 1 hereto.

(3) These reports make no criticism or suggestion that PYPUN has failed to fulfill its obligations in this regard and are, on many occasions, specifically complementary about the way PYPUN was performing its monitoring and verification activities. The reports repeatedly state that PYPUN had obtained the necessary information for its monitoring and verification roles and identify, each quarter, the number of the many audits carried out. Were PYPUN under any such obligation with regard to construction quality or RISC forms, it would be failing to obtain the necessary information for each of these many audits and this would inevitably have been repeatedly pointed out, as would any inadequacy, so far as Government was concerned, with the number of audits or indeed inspections performed.

⁵⁷ Paragraph 9 of Mr Yueng's second witness statement – GG1/28.

⁵⁸ The Government's Mr Li's oral evidence was that PYPUN had not been asked to look at the RISC forms – COI 2 Day 15/73/19 – 74/24.

⁵⁹ Paragraph 70 of Mr Yueng's second witness statement and Appendix B and Annex 12 thereto – GG1/39, 59-63 & 70-222. The reports are in Annex 12 and the comments on the last page of each report.

(4) In such circumstances, it is hopeless to suggest that HyD/Government ever thought during this period that there was any such obligation under the M&V Agreement and plainly from the evidence PYPUN did not either. Consequently and as already said, it would, it is respectfully submitted, not be appropriate to level any criticism against PYPUN (irrespective of PYPUN's actual original obligations in this regard, although those are clear anyway – see section II above), because it performed its obligations properly as both parties saw them and as was effectively repeatedly confirmed in the Consultant's Performance Reports.

28. (1) It would also have been apparent to HyD from day 1 that PYPUN was not going to perform a monitoring and verification role in respect of construction quality, because PYPUN was not proposing any construction quality audit team, which due to the wider scope of the equivalent consultancy agreement for the XRL project was deployed there.⁶⁰

(2) The large number of audits and site inspections carried out and reports thereon and monitoring and verification and BSRC activities can be seen from the records. PYPUN's preliminary findings to be included in the reports were discussed with HyD before the reports were finalised.⁶¹ As already mentioned, the work which was undertaken by the M&V team of PYPUN was discussed and agreed with HyD on a daily basis and by the BSRC team with the BO Team, seconded to HyD, again on a daily basis.⁶² The evidence is that BSRC team's audits were carried out together with the BO Team.⁶³ It is inconceivable that HyD and the BO Team were not fully aware of the work which PYPUN has undertaken over the operational period of the M&V Agreement to date, including the fact that specific construction

⁶⁰ Paragraphs 64-66 of Mr Yueng's second witness statement – GG1/38, 39.

⁶¹ Paragraph 23.2 of Mr Mak's witness statement – K1/17.

⁶² Paragraph 9 of Mr Yueng's second statement – GG1/28.

⁶³ Paragraph 5 of Mr Yueng's second witness statement – GG1/27.

quality audits were not carried out and RISC forms were not asked for or looked at.

29. HyD has been aware of the lack of RISC forms, which should have been issued by Leighton on Contract 1112 for more than a year now. Due to problems with the EWL slab (the subject matter of the Commission's COI 1 hearings), PYPUN was engaged by the RDO on about 1 June 2018 under a supplementary engagement to carry out a check of inspection and supervision records (including RISC forms) in respect of the EWL slab.⁶⁴ This led to a number of interim reports and a final report on 12 December 2018.⁶⁵
30. (1) Further, MTRCL wrote to HyD on 26 June 2018⁶⁶ providing HyD with a list of NCRs issued by MTRCL to the SCL Project contractors, including stating on the list whether those NCRs had been closed out or not. Only the part of this list with the NCRs relevant to Contract 1112 is enclosed in the hearing bundle. This shows⁶⁷ that 113 NCRs had been issued by MTRCL to Leighton in April 2018 about missing RISC forms on Contract 1112 and none had been closed out by the end of June 2018.
- (2) One sees a number of letters and exchanges thereafter, between HyD and MTRCL, complaining about the lack of provision and non-availability of RISC forms under Contract 1112. One sees, however, nothing from HyD or Government suggesting to PYPUN that this was something that it might or should have picked up and reported and asking why it did not on the audits carried out on Contract 1112,⁶⁸ or even asking PYPUN (otherwise than

⁶⁴ Paragraph 43 of Mr Yueng's first witness statement – K1/739 and paragraphs 8-11 of Mr Chiu's witness statement – GG2/434.

⁶⁵ G18/13414-13850. Mr Yueng in his oral evidence at COI 1 explained the process leading to the final report – COI 1 Day 35/44/13 – 46/25.

⁶⁶ DD3/1135-1153.

⁶⁷ DD3/1147-1151.

⁶⁸ For the BSRC team alone, the evidence was there were in excess of 80 site witness and site audits on Contract 1112 between March 2013 and May 2018 – COI 1 Day 35/20/25-21/7.

under supplementary agreements) to make sure its audits looked at RISC forms in the future on Contract 1112 or any other contract on the SCL Project.

31. (1) At paragraph 44 of his witness statement for COI 1 dated 29 August 2018, Mr Chung (the then Director of Highways) speaks of changes for further enhancing the monitoring system for the SCL Project, which had been introduced since discovery of the problems.⁶⁹ These changes arose from discussions by a high level task force, with an additional independent expert adviser, set up for this purpose.⁷⁰ There is an update on this from Mr Leung in his second witness statement dated 10 May 2019 for COI 2.⁷¹ The only changes identified and implemented in respect of PYPUN's roles under the M&V Agreement up to May 2019 are to increase the site visits to monthly from quarterly on contracts considered critical and to increase the number of audits.

(2) The quarterly site inspections had been agreed between Government and MTRCL under the relevant Entrustment Agreement (clause 17.15 of EA3)⁷², with any changes in frequency to be agreed between them. No-one from Government's side had, prior to the problems which have arisen, suggested more frequent site visits or audits should be implemented. As was Mr Yueng's evidence, the work which was to be and was carried out under the M&V Agreement had been discussed and agreed between PYPUN, HyD and the BO Team from the start.⁷³ Hindsight is a marvellous thing and, in any event, in the context of the SCL Project regular monthly site inspections or more frequent audits are inevitably not going to be a panacea. Proper site supervision by MTRCL and Leighton was necessary.

⁶⁹ G3/2072 & 2073.

⁷⁰ The task force is identified at paragraph 44 of Mr Chung's witness statement and footnote 17 thereto – G3/2072-2073.

⁷¹ Paragraphs 12-14 and 16(b) thereof – DD3/1358-1360.

⁷² G7/5629.

⁷³ Paragraph 9 of Mr Yueng's second witness statement – GG1/28.

(3) However, this evidence demonstrates and emphasises the fact that HyD/Government has not suggested to date that PYPUN should under the M&V Agreement be carrying out construction quality checks or looking at RISC forms. The frequency of site visits and audits were changed, but not their nature.

32. (1) It is fair to say that one of Government's witnesses, Mr Leung, did express a view in his oral evidence that quality issues were relevant to PYPUN's monitoring and verification role and possibly that RISC forms should have been looked at by PYPUN in a sampling check.⁷⁴ However, even then it was not entirely clear whether on quality he was referring to PYPUN not being entitled to ignore quality issues, had those been identified on say a site inspection. There is no issue that were quality issues actually identified, by PYPUN when performing its duties, then they should be pointed out and, if they affected cost, programme or public safety, dealt with in the ensuing report and considered thereafter until resolved.

(2) It is of note that Mr Leung was the person who received and dealt with MTRCL's letters from 26 June 2018 relating to the missing RISC forms and, as stated in paragraph 30 above, it was not suggested to PYPUN at the time or thereafter that it should have checked these or that it should do so on this or any other contract in the future.

(3) Were Mr Leung's view on this (which would be a legal issue anyway) now that PYPUN should have been carrying out construction quality audits or inspecting the RISC forms, then he would be wrong in that view – see section II and paragraph 27 above. It is also contrary to Government's stance with PYPUN in the period from before the M&V Agreement was executed to date (see paragraphs 9 and 26 to 31 above).

⁷⁴ COI 2 Day 15/89/12 – 92/2.

(4) Furthermore, a sample check of RISC forms on site inspections and/or site audits: (i) were it looking at RISC forms for hold point inspections – as opposed to for other inspections, testing or survey checks⁷⁵ - would be a duplication of the exercise in relation to the CP and TCP confirmation (paragraph 19 above), unless those confirmation forms had been incorrectly completed by the CP/TCPs; (ii) would not involve (even on a sample basis) the consideration of the matters which may well affect cost and programme (paragraph 17 above); (iii) as can be seen from the exercises undertaken by PYPUN under supplementary agreements to date – for two of the hold point inspections only and for only part of the RISC forms produced for such inspections on one contract alone – would likely be a very significant exercise and require a separate full-time team were it to be carried out in any meaningful way and (iv) depending on what was asked for in the sampling process might well even miss entirely the serious failing in respect of the provision of RISC forms on Contract 1112, because what one asked for may be within the percentage of RISC forms which were produced.

(5) Mr Leung's evidence⁷⁶ in relation to why PYPUN was entitled to separate payment for the second exercise undertaken (which involved PYPUN looking at RISC forms under supplementary agreements⁷⁷), with respect misses the point. The exercise instructed under this supplementary agreement was comprehensive within the area for which it was instructed. However, had PYPUN been obliged to carry out a sampling exercise on RISC forms for the last 7 years, it should have looked at and reported on a significant proportion of those for which it would now be paid separately for undertaking this work.

⁷⁵ See the sample RISC form at Exhibit 7.3 to MTRLC's PIMS/PN/11-4/A5 at B3/1654. This shows the form is to be provided not just for hold point inspections, but for other inspections, testing and survey checks as well.

⁷⁶ COI 2 Day 15/90/24 – 92/2.

⁷⁷ The first is referred to in paragraph 29 above.

33. In summary, HyD/Government's stance on PYPUN's obligations throughout the period of the operation of the M&V Agreement has been the same as PYPUN's. There was no obligation to consider construction quality or to look at RISC forms under the Agreement.

IV SPECIFIC MATTERS (INCLUDING MATTERS RAISED IN THE INTERIM REPORT) AND CONSIDERATION OF THE PROJECT MANAGEMENT EVIDENCE.

34. For COI 1, it is not believed that PYPUN needs to specifically address anything other than the initial comments in the Interim Report. Although, as already stated, PYPUN's role was the same throughout the SCL Project and what is said in this and the earlier sections on its role generally is obviously relevant to both parts of the Inquiry. For COI 2, the following paragraphs deal with the requests in Lo & Lo's letters of 4 April 2019⁷⁸ and any other issues, which might be understood as potentially relevant to PYPUN from matters on which witnesses were examined.

35. PYPUN's liaison with HyD and the BO Team, during the course of the services provided under the M&V Agreement, is addressed in general terms in paragraph 9 of Mr Yueng's second witness statement.⁷⁹ HyD's role generally and PYPUN's involvement in meetings and the process undertaken by HyD, the BO Team and PYPUN is also referred to COI 1 and COI 2 witness statements of HyD's and BD's witnesses.⁸⁰

36. The areas of the work under Contract 1112, in which the problems that are the subject of COI 2 arose, are the locations of the three stitch joints and the shunt neck and there is specific reference in Lo & Lo's letter of 4 April 2019

⁷⁸ GG1/1-14, 15-17 & 18-20.

⁷⁹ GG1/28.

⁸⁰ See, in particular, paras 16-34 of Mr Chung's witness statement - G3/2063-2068; paras 17-20 & 22-28 of Mr Ho's witness statement - H7/2173-2176; paras 10-22 of Mr Leung's first witness statement - G3/2077-2081 and paras 5-7 and 10-14 & 16(b) of Mr Leung's second witness statement - DD3/1356-1360; paras 6-11 of Mr Li's first witness statement - G3/2090-2092 and paras 1, 17-20, 27-30, 33, 35 & 36 of Mr Lok's first witness statement - H7/2187, 2194-2195, 2197 - 2200 and paras 6, 24 & 25 of Mr Lok's second witness statement - DD7/10272 & 10278.

on NAT to RISC forms. In addition to the RISC forms, PYPUN has been asked to provide evidence in respect of materials testing records and QSP checklists. These have all been addressed in Mr Yueng's second witness statement and Mr Yueng and Mr Chiu also deal in summary with the additional work which has been undertaken since the problems were discovered (see further below on both aspects).

37. In relation to the areas where the problems arose and the question of inspections/ audits in respect of those areas, Mr Yueng addresses this in particular at paragraphs 26, 43, 61 to 63, 86 to 92, 94 to 100 and 104 of his second witness statement⁸¹. The extent of the SCL Project and PYPUN's involvement in the same is addressed in general terms at paragraph 26 above.
38. (1) With the scale of the SCL Project and the necessary limited scope of PYPUN's checking obligations, the fact that PYPUN was not involved in a site inspection or audit which did identify the matters now raised and had no knowledge of the same does not (it is respectfully submitted) mean that there was any failure by PYPUN to comply with its obligations or that there could be any legitimate criticism levelled against PYPUN.
- (2) This is particularly so in circumstances, where the processes which MTRCL's own documentation stated MTRCL and its contractors would undertake were appropriate, but MTRCL and its contractor did not follow those processes. PYPUN's function was not to supervise MTRCL's supervision (either on site or in respect of the documentation produced), but to provide a check to the extent provided for in the Agreement.
- (3) Mr Yueng has explained in his second, third and fourth witness statements why the stitch joints and the shunt neck were not areas where it was considered that site inspections or audits should be undertaken.⁸² This

⁸¹ GG1/30, 33, 38, 44, 45-47. See also paras 8 and 9 of Mr Leung's second witness statement produced as part of HyD's evidence – DD3/1357.

⁸² See paragraphs 61 to 63, 89, 97, 99 and 104 of his second witness statement and paragraphs 5 of his third and fourth witness statements – GG1/38, 44, 45, 47, 286 & 327.

was also not just his view. These areas were not shown as of particular significance for checking on the MTRCL risk register or considered as such by HyD or the BO Team, who discussed and agreed with PYPUN the work which it was to undertake – see paragraph 26 above.

(4) There is nothing (it is respectfully submitted) in any of the material placed before the Commission which would suggest PYPUN ought to have known about these problems or indeed failed to act proactively, in relation to any obligation under the Agreement, with regard thereto.

39. (1) PYPUN has been asked to give evidence on three categories of documents. Dealing first with the RISC forms, Mr Yueng speaks about these at paragraphs 102 to 104 and 108 of his second witness statement, paragraphs 5 and 7 of his third witness statement and paragraphs 5 and 8 of his fourth witness statement.⁸³

(2) The nature and purpose of these forms can be seen from the sample form attached as Exhibit 7.3 to MTRCL's PIMS/PN/1104/A5.⁸⁴ This is (as the form shows) a request form to be provided by the contractor for an inspection, test or survey check, but does also contain part to be completed by MTRCL personnel following the inspection, test or survey check. The RISC forms in question all relate to inspections. MTRCL in its PMP and site supervisory plans followed the procedure set out in the BD Code of Practice for Site Supervision 2009⁸⁵ and another form was completed by the MTRCL along the lines of Form A attached to the Code of Practice. This was because, as explained above, that was the system which MTRCL was mandated to follow in the IOEs and IOCs, when it was exempted from full

⁸³ GG1/46-47, 286 & 327. Their function is also spoken about by Mr Li of HyD at paragraph 16 of his second witness statement - DD3/1371 and Mr Lok of BD at paragraph 11 of his third witness statement and paragraph 9 of his fourth witness statement - DD7/10288-10289, 10294.

⁸⁴ B3/1654.

⁸⁵ H8/2664-2783.

compliance with the Buildings Ordinance, and which PYPUN checked (see paragraph 19(3) to (7) above).

(3) Hence, as explained by PYPUN's witnesses in their witness statements⁸⁶, the audit, for site areas where there was an audit, was carried out by reference to (inter alia) the inspection forms provided under the supervisory plans, which were completed by MTRCL and Leighton personnel, and not RISC forms. In consequence, whether or not MTRCL retained the RISC forms was not a matter of which PYPUN was or should have been aware (see paragraph 19 above).

(4) So far as cost and programme are concerned and the potential relevance of RISC forms to those matters, it was not PYPUN's function under the M&V Agreement to undertake an investigative role on aspects of the design or works which might potentially affect cost or programme of which it was not aware. The RISC forms were only one of a number of those anyway (see paragraph 17 above).

(5) Further, as mentioned above in respect of the RISC forms, no-one else has suggested to PYPUN that these forms should form part of its site audit process over the years from when the M&V Agreement was entered into and they have only been looked at in supplementary engagements following the discovery of the problems. In such circumstances, even had PYPUN been originally obliged to look at RISC forms (and it was not – paragraph 17 above), it is respectfully submitted that it cannot be criticised for not doing so – whether on a sampling basis or at all – when the M&V Agreement was operated by both parties on the footing that RISC forms were not to be considered and PYPUN was repeatedly told that it was performing its duties under the Agreement properly (paragraphs 9, 25 and 27 to 33 and section II above).

⁸⁶ See paras 103 & 104 of Mr Yueng's second witness statement – GG1/46, 47.

40. The other documents on which PYPUN has been requested to give evidence are the materials testing records and QSP checklists. These are dealt with by Mr Yueng at paragraphs 105 to 107 and 109 to 116 of his second witness statement, paragraphs 5 to 6 and 8 to 14 of his third witness statement and paragraphs 5 to 7 and 9 to 12 of his fourth witness statement⁸⁷ and in his oral evidence.⁸⁸ The reference in his oral evidence to the review of documents in relation to the EWL slab is to the first supplementary engagement (paragraph 29 above).
41. PYPUN's involvement in the investigation of the problems, once discovered, is summarised by Mr Yueng at paragraphs 93, 101, 117 and 118 of his second witness statement, paragraphs 15 and 16 of his third witness statement and paragraphs 13 and 14 of his fourth witness and by Mr Chiu in his witness statement.⁸⁹
42. The only other matters (not addressed in paragraphs 35 to 41 above) which may be relevant so far as PYPUN is concerned are, it is believed:
- (1) the meaning of public safety as expressed in the M&V Agreement and the parties' understanding of the same – this has been dealt with at paragraph 18 above.
 - (2) the proposition that PYPUN should have carried out surprise checks. This was one of the two examples in respect of PYPUN's performance given by the Commission in the Interim Report. It has now been addressed from a contractual standpoint at paragraphs 20 and 21 above. The checks were carried out not just by PYPUN, but together with the BO Team as well. As mentioned above, all aspects of the work were discussed and agreed between PYPUN and the Government's representatives. What needs to happen it is respectfully submitted, if there are sensibly to be surprise checks in relation

⁸⁷ GG1/47, 48-49, 286-287, 327-328.

⁸⁸ COI 2 Day 15/21/2 – 26/20.

⁸⁹ GG1/45, 46, 49, 287 & 328 and GG1/433-437.

to areas or of documents, is for Government under the agreement with MTRCL to have the right to make such inspections or audits or decide, without informing MTRCL, what is to be looked at in any such inspection or audit. It is not for PYPUN to suggest that Government should breach EA3, by seeking to instigate surprise checks contrary the obligations under EA3.

(3) the Commission also commented in the Interim report PYPUN's obligation to act proactively. This has been addressed at paragraph 22 above.

43. Mr Rowsell's evidence on project management has been addressed above. In paragraph 111 of his Expert Report dated 23 August 2019⁹⁰, when he deals with his view of the role which an M&V consultant should perform, he specifically states that his concern/recommendation: "*should not be taken as a criticism of Pypun and I have no reason to doubt that they performed the required services diligently and professionally*".

V. CONCLUSION

44. PYPUN has endeavoured to assist the Commission to the best of its ability by the provision of witness statements, documents and oral evidence through its witnesses. It is hoped that this has proved helpful.
45. In conclusion and for the reasons given above, whilst no-one is perfect and there may be proper suggestions as to how there might be improvements in future projects achieved through contractual changes, there is nothing in respect of PYPUN's performance of the M&V Agreement which would justify the levelling of any criticism against PYPUN.

Peter Clayton SC
Counsel for PYPUN

MinterEllison LLP
Solicitors for PYPUN
17 January 2020

⁹⁰ Bundle ER (COI 2). This bundle of expert reports has not been paginated.