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<p>1 Monday, 23 September 2019</p> <p>2 (10.04 am)</p> <p>3 H O U S E K E E P I N G</p> <p>4 MR PENNICOTT: Sir, good morning. Good morning,</p> <p>5 Prof Hansford.</p> <p>6 Sir, before we move on, I thought it would be</p> <p>7 appropriate to say a few words about essentially what</p> <p>8 has happened with regard to the Commission and its</p> <p>9 proceedings since 17 June 2019, when we adjourned,</p> <p>10 following what was thought to be the conclusion of the</p> <p>11 factual evidence in the second or extended part of the</p> <p>12 Inquiry, and also to make mention of what is planned to</p> <p>13 happen over the next few months.</p> <p>14 Sir, for which purpose I have prepared a brief</p> <p>15 procedural and timetable matters note which I will</p> <p>16 quickly go through. This is a process which I hope will</p> <p>17 assist the public and the press to understand where we</p> <p>18 are, what's happened and where we are going.</p> <p>19 Sir, following the conclusion on 17 June of the</p> <p>20 factual part of the Inquiry, the parties were informed</p> <p>21 of future hearing dates. The first one was this</p> <p>22 session, starting on 23 September and running through to</p> <p>23 the 27th. What was planned at that stage, back on</p> <p>24 5 July, was that the substantive hearing would hear</p> <p>25 expert evidence in relation to structural engineering</p>	<p>1 its closing submissions.</p> <p>2 Sir, on 31 July, the Commission and its legal team</p> <p>3 having considered the holistic report, the verification</p> <p>4 report and the closing submissions of the involved</p> <p>5 parties in COI 2, explained its preliminary view that</p> <p>6 structural engineering expert evidence might not be</p> <p>7 necessary in relation to the subject matter of COI 2,</p> <p>8 that is the Extended Inquiry. The reasons for that were</p> <p>9 set out in a fairly detailed schedule. But it was only</p> <p>10 a preliminary view.</p> <p>11 On 7 August, the parties in the original part of the</p> <p>12 Inquiry were directed to indicate whether they wished to</p> <p>13 file further structural engineering expert evidence in</p> <p>14 relation to matters in the holistic report and, if so,</p> <p>15 which topics they intended to cover by such further</p> <p>16 evidence. Given that the substantive hearing was due to</p> <p>17 resume on 23 September, that is today, it was expected</p> <p>18 that all further structural engineering expert reports,</p> <p>19 if any, would be submitted to the Commission by</p> <p>20 13 September.</p> <p>21 That letter was followed up by a letter of</p> <p>22 10 August, with a further direction that the parties</p> <p>23 should, apart from setting out the topics to be covered</p> <p>24 by their expert evidence, that is the structural</p> <p>25 engineering expert evidence, indicate the specific</p>
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<p>1 issues, both in COI 1 and, to the extent it was</p> <p>2 required, COI 2; secondly, some dates in October, that's</p> <p>3 4, 8, 10 and 11 October, were set aside to hear expert</p> <p>4 evidence in relation to project management; and some</p> <p>5 further dates, that is 16 to 18 October, were set aside</p> <p>6 to hear any closing submissions the parties may wish to</p> <p>7 make in both the original and extended part of the</p> <p>8 Inquiry. These dates were set following informal</p> <p>9 consultation by myself and my colleagues with the other</p> <p>10 parties' counsel.</p> <p>11 Sir, what happened next was that on 18 July, MTRC</p> <p>12 published, with the approval or non-objection of the</p> <p>13 government, a holistic report and a verification report,</p> <p>14 the holistic report effectively dealing with matters</p> <p>15 considered in the first part or the original part of the</p> <p>16 Inquiry and the verification report dealing with matters</p> <p>17 in the extended part of the Inquiry. So that was</p> <p>18 18 July.</p> <p>19 On the following day -- not mentioned in my note but</p> <p>20 I thought I would mention it anyway -- on 19 July the</p> <p>21 involved parties served their closing submissions in</p> <p>22 relation to the extended part of the Inquiry. Those</p> <p>23 submissions were directed at the factual evidence that</p> <p>24 had been heard at the back end of May and into June.</p> <p>25 Sir, on 26 July, the Commission's legal team served</p>	<p>1 issues in relation to each topic in the holistic report</p> <p>2 the party intended to raise, provide reasons for that</p> <p>3 and explain how the Commission might be assisted by such</p> <p>4 evidence.</p> <p>5 So that's what happened on 7 and 10 August.</p> <p>6 Sir, the parties' responses were as follows. First</p> <p>7 of all, by Leighton's solicitors' letter of 7 August,</p> <p>8 Leighton made an application to file a series of expert</p> <p>9 reports in both the original and extended part of the</p> <p>10 Inquiry. I have listed them out there. They wanted to</p> <p>11 serve reports from Mr Southward in relation to both</p> <p>12 COI 1 and COI 2; a report from a Mr Barrie Wells in</p> <p>13 COI 1 and COI 2 in relation to statistical expert</p> <p>14 evidence; and also a report from Mr George Wall in</p> <p>15 relation to project management expert evidence.</p> <p>16 Having received that letter from Leighton's</p> <p>17 solicitors, by further letters of 8 and 9 August,</p> <p>18 Leighton was requested to identify the structural</p> <p>19 engineering issues and amplify the reasons for its</p> <p>20 application to adduce statistical expert evidence. That</p> <p>21 was, we say, particularly important as Leighton was at</p> <p>22 that stage the only party in COI 2 seeking to adduce</p> <p>23 structural engineering expert evidence. All the other</p> <p>24 parties at that stage had indicated that they had no</p> <p>25 intention to adduce structural engineering expert</p>

Page 5	<p>1 evidence in COI 2.</p> <p>2 Then, helpfully, on 16 August Leighton's solicitors</p> <p>3 provided the list of issues and an explanation for the</p> <p>4 COI 1 and COI 2 application, by supplying the list of</p> <p>5 issues, as I say.</p> <p>6 In the meantime, as this correspondence was taking</p> <p>7 place, both MTRC and government, having seen the</p> <p>8 correspondence passing between Leighton's solicitors and</p> <p>9 the Commission, submitted that given Leighton's position</p> <p>10 they should be allowed to file responsive structural</p> <p>11 engineering expert reports rather than filing their</p> <p>12 structural engineering expert reports at the same time</p> <p>13 as Leighton.</p> <p>14 Sir, in relation to the statistical expert evidence,</p> <p>15 the Commission was persuaded by the submissions made by</p> <p>16 Leighton's solicitors and made directions on 25 August</p> <p>17 for such expert evidence to be heard during the course</p> <p>18 of this week. It also, on 27 August, made directions to</p> <p>19 take the evidence of Mr Dean Cowley on 23 September</p> <p>20 2019, that is today -- and Mr Cowley is sat in the</p> <p>21 witness box but more of that in a moment. Mr Cowley is</p> <p>22 a witness of Leighton in COI 2, but his witness</p> <p>23 statement was not served until the same time as</p> <p>24 Leighton's closing submissions in respect of COI 2, on</p> <p>25 19 July, obviously the factual evidence having</p>	Page 7	<p>1 recently made, on 21 August the Commission gave</p> <p>2 directions with regard to the filing of project</p> <p>3 management expert evidence on COI 2. On 25 August, the</p> <p>4 Commission gave directions with regard to the filing of</p> <p>5 statistical expert evidence on COI 1 and COI 2. Sir, to</p> <p>6 date, the following project management expert reports</p> <p>7 and statistical expert/factual reports have been</p> <p>8 adduced.</p> <p>9 Sir, on COI 1, there is the report of Mr Barrie</p> <p>10 Wells dated 13 September; a report on statistical</p> <p>11 analysis dated 13 September submitted by MTR; and then</p> <p>12 the report of Prof Yin dated 16 September submitted on</p> <p>13 behalf of the government.</p> <p>14 So far as COI 2 is concerned, first of all three</p> <p>15 reports have been submitted: by Mr Steve Rowsell, the</p> <p>16 Commission's expert, on 23 August; and then the report</p> <p>17 of Mr George Wall dated 20 September, he's a project</p> <p>18 management expert on behalf of Leighton, Leighton not</p> <p>19 having had a project management expert in the original</p> <p>20 part of the Inquiry; and then, lastly on project</p> <p>21 management, a report of Mr Steve Huyghe dated</p> <p>22 21 September on behalf of MTR.</p> <p>23 Sir, my understanding is, and I'll mention a bit</p> <p>24 more about this in a moment, is that the project</p> <p>25 management experts are still in the course of seeking to</p>
Page 6	<p>1 previously been completed on 17 June.</p> <p>2 And the project management expert evidence in COI 2</p> <p>3 remained to be heard in October 2019, and that is indeed</p> <p>4 still the case.</p> <p>5 However, sir, given the possible number of</p> <p>6 statistical experts and structural engineering experts,</p> <p>7 the short space of time for the experts to prepare their</p> <p>8 structural engineering expert reports, and -- as</p> <p>9 explained in various emails on 25 August -- the fact</p> <p>10 that the statistical expert evidence would assist and</p> <p>11 inform the work of the structural engineering experts</p> <p>12 and should therefore be heard first, the Commission</p> <p>13 varied and extended the timetable of the Inquiry</p> <p>14 hearing.</p> <p>15 The Commission concluded that it was clearly</p> <p>16 unrealistic to complete the expert evidence and closing</p> <p>17 submissions by October 2019, as originally planned, but</p> <p>18 before further dates were fixed attempts were made, as</p> <p>19 previously, to ascertain the parties' availability</p> <p>20 through their respective counsel. Unfortunately, that</p> <p>21 wasn't an entirely successful exercise, but in the end</p> <p>22 dates were fixed, the availability of the parties was</p> <p>23 taken into account as far as possible, but inevitably</p> <p>24 certain compromises had to be made in that process.</p> <p>25 Sir, coming to the directions that have been more</p>	Page 8	<p>1 prepare a joint statement of matters that are agreed and</p> <p>2 presumably perhaps matters that are not agreed. As</p> <p>3 presently advised, my understanding is that that joint</p> <p>4 statement should be available to the Commission later</p> <p>5 this week, possibly on Wednesday or Thursday. As I say,</p> <p>6 another point arises on the project management expert</p> <p>7 evidence which I will mention in a moment.</p> <p>8 Sir, so far as the statistical expert evidence is</p> <p>9 concerned, again three reports have been received, one</p> <p>10 from Mr Barrie Wells on behalf of Leighton, dated</p> <p>11 13 September -- this is on COI 2, I should say, I beg</p> <p>12 your pardon -- another report from MTR the same date,</p> <p>13 13 September; and another report from Prof Yin on behalf</p> <p>14 of the government dated 16 September.</p> <p>15 So that deals with the statistical expert evidence</p> <p>16 and the project management expert evidence.</p> <p>17 Sir, I will come to the directions in relation to</p> <p>18 the structural engineering experts in a moment, but</p> <p>19 suffice to say that firstly the structural engineers had</p> <p>20 a site visit last Saturday, 21 September, and secondly</p> <p>21 a meeting is taking place of the structural engineering</p> <p>22 experts in another room in this building as I am</p> <p>23 speaking, I imagine with a view to trying to narrow</p> <p>24 issues and at some point in the future produce a joint</p> <p>25 statement, but as I say I will mention a bit more about</p>

Page 9	<p>1 structural engineers in just a moment.</p> <p>2 Sir, following all of that, on 29 August, the</p> <p>3 Commission made the following directions, namely that</p> <p>4 this week, firstly, would be used for statistical expert</p> <p>5 evidence, as well as Mr Cowley, and I should mention</p> <p>6 this, that so far as the MTRC is concerned, they do not</p> <p>7 call independent expert statistical evidence. What has</p> <p>8 been done by the MTRC is prepare both in relation to the</p> <p>9 holistic report and the verification report essentially</p> <p>10 two reports which explain the process by which those</p> <p>11 holistic and verification reports were prepared and</p> <p>12 various other details, background details, to those</p> <p>13 reports, and so forth. What is proposed is that two</p> <p>14 gentlemen -- Mr Neil Ng and Mr Nelson Yeung -- will</p> <p>15 speak to those reports. At the moment, as presently</p> <p>16 advised, those gentlemen will be giving evidence</p> <p>17 tomorrow, albeit at the moment, as I understand it, they</p> <p>18 have been requested to provide short, brief witness</p> <p>19 statements which will hopefully just very shortly</p> <p>20 explain their role in the production of the verification</p> <p>21 and holistic reports, and those short statements</p> <p>22 unfortunately are not expected until 6 o'clock this</p> <p>23 evening.</p> <p>24 Sir, that is what was proposed for this week:</p> <p>25 statistical evidence and Mr Cowley.</p>	Page 11	<p>1 adjourned until 2 January, when you have fixed a number</p> <p>2 of dates, 2 to 10 January -- with Saturday 4 January</p> <p>3 also reserved -- for the hearing of structural</p> <p>4 engineering expert evidence, both in COI 1 and COI 2;</p> <p>5 and then some further dates in January, 20th to 24th and</p> <p>6 29th to 31st, have been set aside either for the further</p> <p>7 hearing of structural engineering expert evidence, if</p> <p>8 it's not completed in the first period, or hopefully and</p> <p>9 more likely, I hope, the hearing of any closing</p> <p>10 submissions from the involved parties and us.</p> <p>11 So, sir, those dates in January are there. I'm sure</p> <p>12 we all hope that we can complete the whole exercise as</p> <p>13 soon as possible and that the latter dates, and some</p> <p>14 dates in February, 10 to 12 February which have also</p> <p>15 been set aside -- hopefully, those latter dates will not</p> <p>16 be required.</p> <p>17 Sir, returning to the question of the structural</p> <p>18 engineering expert evidence, what has happened is that</p> <p>19 because there is a realisation that the statistical</p> <p>20 evidence is relevant to the structural engineering</p> <p>21 expert evidence, and that's why the statistical evidence</p> <p>22 is going first, separate directions have had to be made</p> <p>23 in relation to the filing of structural engineering</p> <p>24 expert evidence. At the moment, the position is this,</p> <p>25 that Leighton were required to serve Mr Southward's</p>
Page 10	<p>1 Sir, just one point of detail on that.</p> <p>2 Unfortunately, Mr Wells is unable to come to Hong Kong,</p> <p>3 as the Commission has been advised, and at the moment</p> <p>4 the plan is that Mr Wells will be questioned by</p> <p>5 videolink from London at 3 o'clock on Wednesday</p> <p>6 afternoon this week, 25 September.</p> <p>7 Sir, there is a potential glitch about that which it</p> <p>8 perhaps would be appropriate for me to mention now, and</p> <p>9 that is that the government have on Saturday served the</p> <p>10 Commission with a list of questions that they would like</p> <p>11 Mr Wells to address on his reports. That came with</p> <p>12 a covering letter also making complaint about certain</p> <p>13 content in Mr Wells' COI 2 report. The letter and list</p> <p>14 of questions have been passed to Leighton, to presumably</p> <p>15 pass to Mr Wells, and a response is awaited to the</p> <p>16 government's letter and list of questions. I don't know</p> <p>17 what reaction we are going to get from Leighton to that,</p> <p>18 but no doubt we will know in due course.</p> <p>19 Sir, going back to the directions that were made:</p> <p>20 secondly, the 4, 8, 10 and the morning of 11 October</p> <p>21 have been fixed for the hearing of project management</p> <p>22 expert evidence in COI 2.</p> <p>23 Sir, there is then something of a hiatus, which</p> <p>24 I will explain the reasons for shortly, but after the</p> <p>25 hearing in October the Commission will then stand</p>	Page 12	<p>1 reports on 30 September. However, in response to</p> <p>2 a recent application, that date has been extended to</p> <p>3 11 October. Then what is to happen is that the</p> <p>4 government, MTR and indeed the Commission will serve its</p> <p>5 expert evidence in relation to structural engineering on</p> <p>6 6 December of this year.</p> <p>7 So, sir, essentially, if one is looking to explain</p> <p>8 why we are adjourning essentially on 11 October and</p> <p>9 resuming in January, it is because the statistical</p> <p>10 evidence is going to be heard this week, we hope; the</p> <p>11 project management expert evidence is going to be heard</p> <p>12 in October; but then the structural engineers need</p> <p>13 sufficient time to take on board the statistical</p> <p>14 evidence in order to be able to prepare their reports,</p> <p>15 and that is why the timetable has been structured as it</p> <p>16 is, and that is why, unfortunately, we are unable to</p> <p>17 resume until the beginning of next year.</p> <p>18 Sir, largely as a consequence of all of that, on</p> <p>19 10 September, as you are aware, the Chief Executive</p> <p>20 extended the date for the submission of the final report</p> <p>21 of this Commission until 31 March 2020.</p> <p>22 Sir, that, at least for now, completes the sort of</p> <p>23 procedural update, as it were.</p> <p>24 Could I just mention one related topic, I guess, and</p> <p>25 that is: you may observe that so far as representatives</p>

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<p>1 in the hearing room this morning are concerned, there 2 are only three involved parties represented and the 3 Commission. I think Mr Shieh and Leighton are behind 4 me, then MTR and then the government. Sir, what has 5 happened to everybody else, people may be asking, to 6 which the answer is this. So far as China Technology 7 are concerned, they have written and asked to be excused 8 from any further involvement in the Commission hearings. 9 That, as it were, application has been granted, but they 10 have not been released as an involved party. It's 11 simply that they have indicated they don't wish to 12 participate and that is obviously their choice. 13 Sir, similarly, Fang Sheung, who had already 14 indicated -- 15 CHAIRMAN: Sorry, as far as that's concerned, it's their 16 choice, subject of course to the Commission not 17 requiring to hear from them as to specific matters. 18 MR PENNICOTT: Indeed, sir, and that's been made clear to 19 them, that if the Commission takes the view that it does 20 need to hear from them further, then obviously they will 21 be contacted and suitable requests will be made. 22 CHAIRMAN: Yes. 23 MR PENNICOTT: That's entirely right. 24 Sir, Fang Sheung similarly, I think historically 25 they have been given permission not to appear any</p>	<p>1 with. 2 So that explains the absence of those parties, as 3 I say, none of whom have been released as involved 4 parties but are simply not required to attend. 5 CHAIRMAN: Yes, on the very simple and logical basis that to 6 ask parties perhaps to spend money, good money, on legal 7 representation, when their lawyers have no questions to 8 ask -- 9 MR PENNICOTT: Yes. 10 CHAIRMAN: -- does not help this Commission and certainly is 11 contrary to prudent and decent management of these 12 proceedings. 13 MR PENNICOTT: Yes, sir. That's entirely right, sir. As 14 I concluded that submission, both of my juniors passed 15 me a note which said "Intrafor". That is also the 16 position with Intrafor on COI 1. They have also been 17 asked to be released from any further involvement at 18 all, similar to China Technology, and that permission 19 has also been given on the same basis; that is, that 20 they are not released from being an involved party but 21 will not be appearing from now on, unless asked to do 22 so. 23 CHAIRMAN: Yes. Thank you. 24 MR PENNICOTT: So that's that. 25 Sir, could I then turn to the topic of project</p>
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<p>1 longer, but again have not been formally released as 2 an involved party. Of course they were only involved in 3 COI 1, as indeed China Technology were only involved in 4 COI 1 as well. 5 Sir, as far as Wing & Kwong are concerned -- 6 remember they were the steel fixers in COI 2 -- they 7 again have written saying that they do not wish to 8 appear either at the statistical evidence hearing, the 9 project management hearing or the structural engineering 10 evidence hearing, but hold themselves again out as 11 willing to continue to assist the Commission as 12 necessary, and certainly reserve the right to appear on 13 any further hearings dealing with closing submissions. 14 Again, that has been acknowledged and accepted by the 15 Commission. 16 Sir, so far as Atkins and Pypun are concerned -- and 17 they were parties both in COI 1 and COI 2 -- as 18 I understand the position, they have simply asked to be 19 excused, having written polite letters to that effect, 20 from this particular hearing this week. I'm not sure 21 what their position is yet in relation to the project 22 management hearing and the structural engineering expert 23 hearing, but certainly for this week they are not here 24 because they say that they are not going to be 25 represented this week on matters that are being dealt</p>	<p>1 management expert evidence. As I say and as I have 2 indicated, three and a half days have been set aside at 3 the beginning of October for the taking of that project 4 management expert evidence. At approximately 6.50 last 5 evening, the Commission's solicitors received a letter 6 from MTR's solicitors, Mayer Brown, making a number of 7 points about the scope, nature and content of the 8 project management expert evidence. 9 As I indicated earlier, all three experts -- 10 Mr Rowsell, Mr Wall and Mr Huyghe -- have served reports 11 and are in the process of trying to put together a joint 12 statement. 13 The thrust of the letter from MTR's solicitors is 14 that the way they see it or the way the MTR see it, is 15 that there is -- at least potentially -- a substantial 16 element of unfairness associated with the current 17 position on the project management expert evidence, so 18 much so that they contend that there is -- and I think 19 they put it on the basis of potential but I'm not 20 sure -- they contend there is a plain example of 21 procedural unfairness which may deprive the Commission 22 of important evidence that could be highly material to 23 its findings. 24 Sir, as I say, that letter was received last 25 evening, read by me and my team last evening, and</p>

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<p>1 I think brought to the attention of yourselves this 2 morning. It's an important letter. It bears upon, as 3 I say, the nature and scope of the project management 4 expert evidence. It's a matter, frankly, that I need to 5 look at with some care, given the assertion of potential 6 procedural unfairness. It's not a matter that I've had 7 an opportunity of properly considering myself, let alone 8 discuss with the team or advise the Commission. I need 9 time to do so.</p> <p>10 One practical problem that arises is that of course 11 Mr Cowley, who is sat in the witness box and whose 12 statement I know you have read, deals with certain 13 aspects of Leighton's project management practices and 14 procedures, if I may say so, looking forward rather than 15 looking back, certainly from say about 2018 onwards and 16 to the future.</p> <p>17 Sir, I have taken the view, looking at the detail of 18 the Mayer Brown letter, that it would be inadvisable at 19 this stage for me to cross-examine Mr Cowley on the 20 contents of his statement until I have worked out and 21 had a chance to work out the ramifications of the 22 Mayer Brown/MTRC letter. So, with the greatest of 23 apologies to Mr Cowley, what I would respectfully 24 suggest is this, that given his evidence perhaps -- 25 well, not "perhaps" -- his evidence is project</p>	<p>1 necessary to seek the assistance of experts who have 2 already given evidence and who are therefore apprised of 3 the whole problem. But these are people of high repute, 4 they are very busy, most of them come from outside of 5 Hong Kong, and it has been very much to their credit 6 that they have found time in their very busy diaries, 7 often at personal expense, to make sure that they can 8 come to give evidence before the Commission.</p> <p>9 Exactly the same can be said of the lawyers who are 10 appearing in front of the Commission or will be 11 appearing in front of the Commission.</p> <p>12 So it is not a question merely of the Commission 13 taking its time. It's very much a matter of the 14 Commission, with the assistance of the legal team, 15 working to try and bring together a number of expert 16 witnesses, a number of other witnesses, and counsel, so 17 that they can all come together with the minimum of 18 delay in order to put the relevant evidence before the 19 Commission.</p> <p>20 That I think is important to understand.</p> <p>21 As far as this matter that has arisen literally 22 yesterday evening, and this morning as far as 23 Prof Hansford and myself are concerned, the suggestion 24 made that in the manner in which the Commission was 25 intending to deal with certain evidence, it may have</p>
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<p>1 management related, the best thing to do would be to 2 defer his evidence until 4 October, when we are hearing 3 the project management expert evidence. This will give 4 me and anybody else who is interested in the point 5 an opportunity of trying to sort out where we are with 6 the project management expert evidence and try to look 7 at the detailed response, as is necessary, to the 8 Mayer Brown letter.</p> <p>9 Sir, it's unfortunate but there it is, because these 10 are important matters, it seems to me, that need to be 11 looked at, considered and an answer found.</p> <p>12 CHAIRMAN: Yes. Thank you.</p> <p>13 MR PENNICOTT: Sir, that's all I wish to say. Obviously the 14 floor is now open to anybody else, if they wish to make 15 any observations, unless you have anything you want to 16 say at this stage, sir.</p> <p>17 CHAIRMAN: If I might just say a couple of general things to 18 just add to your very full statement, for which many 19 thanks.</p> <p>20 As far as the work of the Commission is concerned, 21 it is of course a pity that it has not been able to come 22 to a final report already, and will not in fact be able 23 to do so until March of next year. But one of the 24 factors that has to be taken into account is that 25 because of the unexpected extensions, it has been</p>	<p>1 stumbled into an area of procedural unfairness.</p> <p>2 The Commission agrees entirely that it would be 3 wrong to call the present witness until this issue has 4 been resolved, until for example other parties have had 5 an opportunity to make comment, I think in particular of 6 Leightons. All proceedings of this kind must of course 7 be dealt with fairly. Questions of procedural 8 unfairness are sometimes not obvious on their face and 9 need to be brought to the attention of the Commission, 10 and now that that issue has been brought to the 11 attention of the Commission it will be exhaustively 12 considered, and expeditiously considered, before the 13 Commission determines its best way forward.</p> <p>14 Thank you. I just wanted to make those points 15 clear.</p> <p>16 MR PENNICOTT: Sir, that's extremely helpful and certainly 17 raises a point that I should have mentioned which is 18 of course, apart from myself not having had the proper 19 opportunity of researching and looking into the 20 Mayer Brown letter, of course neither Leightons nor the 21 government nor anybody else has had that opportunity 22 either.</p> <p>23 Thank you.</p> <p>24 CHAIRMAN: Good. Thank you.</p> <p>25 From there, perhaps we may just see if counsel have</p>

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<p>1 comments.</p> <p>2 MR SHIEH: We obviously have not yet had an opportunity of</p> <p>3 looking at that late letter from Mayer Brown which</p> <p>4 Mr Pennicott said came in yesterday evening, but</p> <p>5 obviously we entirely accept the judgment call made by</p> <p>6 Mr Pennicott and also the decision by the Commission,</p> <p>7 except to say that the late timing is perhaps a little</p> <p>8 bit surprising. I'm not complaining about the</p> <p>9 Commission, I'm making a comment about the timing of the</p> <p>10 letter. But there's very little we can do about it</p> <p>11 because obviously everyone needs time.</p> <p>12 The next point is we have not yet had a chance of</p> <p>13 speaking to the witness as to his availability in the</p> <p>14 proposed time slot for his calling next, but again,</p> <p>15 obviously, in order to assist the Commission, I'm quite</p> <p>16 sure my client would do his very best to accommodate and</p> <p>17 assist, and if there's a need to maybe juggle a day or</p> <p>18 two within that time slot, I hope that would be or could</p> <p>19 be accommodate.</p> <p>20 CHAIRMAN: Of course.</p> <p>21 Mr Cowley, please don't think that we are taking no</p> <p>22 notice of your own very busy diary. It will be best if</p> <p>23 you discuss this matter with your lawyers, and then you</p> <p>24 can come back to us and let us know when you will be</p> <p>25 free.</p>	<p>1 MR BOULDING: Good morning, sir. There's only one matter</p> <p>2 I would like to deal with, and deal with it very, very</p> <p>3 shortly, and that is the letter from Mayer Brown that my</p> <p>4 learned friends have referred to already.</p> <p>5 There was obviously no intention on our part to</p> <p>6 derail the timetable in any way. The points being made</p> <p>7 by my learned friend for Leightons that he is a bit</p> <p>8 surprised that it came in so late -- the reality was</p> <p>9 that we did not get Mr Wall's project management report</p> <p>10 until about 4 pm on Saturday afternoon, and it was only</p> <p>11 when we read that report that what we thought might</p> <p>12 happen actually we saw had happened; namely, in</p> <p>13 responding to Mr Rowsell's report, not only had Mr Wall</p> <p>14 sought to exonerate Leighton from any responsibility for</p> <p>15 what had occurred, but he took the opportunity to</p> <p>16 criticise us, and it seemed to us that it was only fair,</p> <p>17 in those circumstances, that the experts be invited to</p> <p>18 consider not only our alleged project management</p> <p>19 failings but also Leighton's project management</p> <p>20 failings, if any.</p> <p>21 So far as we are concerned, we do not think this is</p> <p>22 going to impact upon Mr Cowley's evidence. We had</p> <p>23 already made clear at the beginning of August that we</p> <p>24 didn't want to ask him any questions and that still</p> <p>25 remains our position, unless something dramatic changes</p>
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<p>1 MR COWLEY: Understood.</p> <p>2 CHAIRMAN: Thank you very much.</p> <p>3 MR SHIEH: One last point is perhaps I should take this</p> <p>4 opportunity of associating ourselves with what has come</p> <p>5 from the chairman just now as to the reason for the</p> <p>6 extension of the hearing time and date, because some</p> <p>7 unfortunate remarks have been publicised by a certain</p> <p>8 party who had been excused from attending these</p> <p>9 proceedings, outside of these proceedings, perhaps in</p> <p>10 a public arena, as to the reasons for the delay.</p> <p>11 Suffice it to say that insinuations were made that</p> <p>12 certain parties in this room have been trying to</p> <p>13 engineer a situation whereby the proceedings are</p> <p>14 delayed.</p> <p>15 Those are quite misleading statements, quite</p> <p>16 unsubstantiated and irresponsible. For my part and on</p> <p>17 behalf of my client, I would associate myself with what</p> <p>18 had just come out from the chairman as to the reasons</p> <p>19 underlying the extension of time. We all know how much</p> <p>20 work has had to go in and how relevant those matters are</p> <p>21 to assisting the Commission in its work.</p> <p>22 On that note, perhaps, I have nothing more to add,</p> <p>23 except to thank the Commission for perhaps making those</p> <p>24 remarks just now.</p> <p>25 CHAIRMAN: Thank you.</p>	<p>1 over the course of the next day or so.</p> <p>2 So Mr Cowley, so far as we are concerned, could in</p> <p>3 fact give his evidence today.</p> <p>4 Mr Wall's report is a different matter. We trust</p> <p>5 the letter speaks for itself and no doubt you will give</p> <p>6 it due consideration over the course of the next day or</p> <p>7 so.</p> <p>8 CHAIRMAN: Thank you.</p> <p>9 MR KHAW: Mr Chairman and Commissioner, we are not in</p> <p>10 a position to say anything in relation to the project</p> <p>11 management issue which just arose last night, because we</p> <p>12 have not been given a copy of the letter, but we will</p> <p>13 have a look at that.</p> <p>14 (Letter handed by Mr Boulding to Mr Chow)</p> <p>15 But we have no objection to the arrangement which</p> <p>16 has been made for the time being.</p> <p>17 Just one issue regarding statistical expert</p> <p>18 evidence. Mr Pennicott has kindly referred the</p> <p>19 Commission to a short list of outstanding information</p> <p>20 that we have asked for, and hopefully that will come by</p> <p>21 the end of today. Obviously, we will need to ask</p> <p>22 Prof Yin to comment on the new information before he</p> <p>23 actually comes to give evidence. We are not sure to</p> <p>24 what extent he will be able to fully address the new</p> <p>25 information, but we trust that we will certainly make</p>

Page 25	<p>1 good use of the time available this week to deal with</p> <p>2 all the statistical evidence.</p> <p>3 CHAIRMAN: All right. We hope that material will be</p> <p>4 available.</p> <p>5 MR KHAW: We hope that too.</p> <p>6 CHAIRMAN: When I say that, I've been advised by</p> <p>7 Mr Pennicott that that issue is not exactly cemented</p> <p>8 because I think the person who's going to try to supply</p> <p>9 the information has a medical appointment or something</p> <p>10 of that kind in London, so that may just, but hopefully</p> <p>11 will not, delay matters by a day or so. Okay? Good.</p> <p>12 Anything further? No? Good.</p> <p>13 I think what we now need to do, outside of the</p> <p>14 tribunal, is to discuss between the parties --</p> <p>15 Leightons, for example, want to consider the content of</p> <p>16 the letter, determine what's best as the way forward,</p> <p>17 and the tribunal can leave the parties to their own</p> <p>18 discussions and we can continue tomorrow morning,</p> <p>19 perhaps receiving a report first thing from</p> <p>20 Mr Pennicott.</p> <p>21 MR PENNICOTT: Yes, sir. Obviously it's primarily Leighton</p> <p>22 and the government who need to consider the letter, as</p> <p>23 well as ourselves. I note what Mr Boulding says about</p> <p>24 the calling of Mr Cowley but, as I say and as I think</p> <p>25 I indicated earlier, I think the concern is risk --</p>	Page 27	<p>1 process.</p> <p>2 MR PENNICOTT: Yes.</p> <p>3 CHAIRMAN: It doesn't want to be in a position where it says</p> <p>4 to Mr Cowley, "Please get into your canoe and start</p> <p>5 paddling down the stream", if in fact the very act of</p> <p>6 getting into a canoe and paddling down the stream is</p> <p>7 going to present that danger. We would rather say to</p> <p>8 him, "Please sit on the bank and make yourself a cup of</p> <p>9 tea and wait for a while." I'm sure Mr Cowley</p> <p>10 understands --</p> <p>11 MR COWLEY: Yes.</p> <p>12 CHAIRMAN: -- and I'm sure members of the public listening</p> <p>13 to this will understand that that is the safer</p> <p>14 methodology, especially as it's not going to result in</p> <p>15 a delay in any event.</p> <p>16 MR PENNICOTT: Yes, sir.</p> <p>17 CHAIRMAN: Counsel can then consider this letter from</p> <p>18 Mayer Brown and we can be advised tomorrow morning.</p> <p>19 MR PENNICOTT: Yes.</p> <p>20 CHAIRMAN: All right? Anything further? No.</p> <p>21 Thank you all very much indeed.</p> <p>22 MR PENNICOTT: Thank you.</p> <p>23 (10.51 am)</p> <p>24 (The hearing adjourned until 10.00 am the following day)</p> <p>25</p>
Page 26	<p>1 CHAIRMAN: Absolutely.</p> <p>2 MR PENNICOTT: -- of going down a particular track. It's</p> <p>3 a risk that hopefully will not arise, but I don't, from</p> <p>4 my perspective, want to put the Commission in a position</p> <p>5 where that risk eventuates, when one is not 100 per cent</p> <p>6 sure of where all this is going to end up, in the</p> <p>7 circumstances or against the backdrop of a letter which</p> <p>8 uses the words "procedural unfairness", albeit</p> <p>9 potential. Really, that's me being ultra-cautious</p> <p>10 perhaps, but there it is.</p> <p>11 CHAIRMAN: I've also taken into account, in the tribunal's</p> <p>12 decision, the fact that this will not in fact, it would</p> <p>13 appear, lead to any form of delay, because although</p> <p>14 Mr Cowley may not give his evidence today, we can fit</p> <p>15 him in in early October to a series of witnesses who</p> <p>16 will deal with project management then.</p> <p>17 MR PENNICOTT: Yes, sir.</p> <p>18 CHAIRMAN: Even if it means sitting a little later that day</p> <p>19 or something like that.</p> <p>20 MR PENNICOTT: Yes, sir.</p> <p>21 CHAIRMAN: Subject of course to Mr Cowley's availability.</p> <p>22 MR PENNICOTT: Yes.</p> <p>23 CHAIRMAN: To use an example, this tribunal takes matters of</p> <p>24 threats of procedural unfairness very seriously, on the</p> <p>25 basis that one doesn't want anything that can poison the</p>	Page 28	<p>1 INDEX</p> <p>2 PAGE</p> <p>3 H O U S E K E E P I N G1</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>