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<p>1 Friday, 11 October 2019 2 (10.03 am) 3 MR PENNICOTT: Sir, good morning. Good morning, 4 Prof Hansford. 5 Sir, exactly two weeks ago, on 27 September, the 6 Commission requested the legal teams of the involved 7 parties then in attendance at the hearing, which at that 8 time was dealing with statistical evidence arising from 9 the holistic and verification reports, to attend 10 a meeting in chambers. That happened because the 11 Commission wished to raise a number of points with the 12 involved parties. 13 Sir, in order to make some sense of the written 14 submissions that have recently been received by the 15 Commission, and further submissions that will be made 16 orally this morning, in particular from the government 17 and MTRC, it is perhaps necessary for me just to give 18 a very brief summary of what transpired at that meeting. 19 Sir, at the outset of the meeting, the Commission 20 expressed two primary concerns. The first was that in 21 its ongoing consideration of the holistic and 22 verification reports, it did not want the Inquiry to be 23 used as a rehearsal of potential further litigation or 24 arbitration between the various involved parties, since 25 that was not, of course, the function of the Inquiry and</p>	<p>1 MR PENNICOTT: -- the Commission indicated that it would 2 contact the involved parties on a more formal basis, 3 seeking their views as to the way forward in the 4 Inquiry. 5 Sir, on 4 October 2019, that's a week ago, those 6 instructing me, Messrs Lo &amp; Lo, the Commission's 7 solicitors, wrote a letter to all the involved parties, 8 not just those present but all the involved parties, 9 both in the Original Inquiry and the Extended Inquiry, 10 and I'll come to that letter in a moment. 11 Sir, the position is that the Commission has taken 12 the view that the holistic report and the verification 13 report are items of evidence which, as such, need to be 14 investigated and interrogated. The issue perhaps is one 15 of degree. The Commission takes the view that it would 16 be a derogation of its duties and function simply to 17 rubber stamp those reports, particularly as, on one 18 view, the reports appear to assert that without the 19 execution of the suitable measures, at potentially 20 considerable cost, certain of the structures at the 21 Hung Hom Station Extension are not or may not be safe 22 and/or fit for purpose, leaving aside any question of 23 code or statutory compliance. 24 A question arises as to the precise status of the 25 holistic and the verification reports, as a matter of</p>
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<p>1 nor is it the appropriate forum for that to take place. 2 Sir, the second concern that the Commission had was 3 that, given various indications that had been received 4 from the government and the MTR, that the suitable 5 measures recommended to be taken to certain areas of the 6 structures of the Hung Hom Station Extension, as 7 recommended in the holistic and verification reports, 8 might be commenced, if not completed, by the time the 9 Commission submits its report in March of next year. 10 Concern was expressed as to the extent to which, if 11 at all, those suitable measures should be looked at and 12 investigated by the Commission itself, during of course 13 the remaining part of the Inquiry. 14 Sir, an alternative articulation of that second 15 point might be phrased in this way, in the terms of 16 a question: how best can the structural engineering 17 experts best assist the Commission going forward, both 18 in respect of the outstanding matters in the Original 19 Inquiry and the matters that have been raised in the 20 Extended Inquiry? 21 Sir, after some discussion between the legal teams 22 on the matters raised by the Commission -- I hope I have 23 identified the two principal concerns and the two 24 principal matters -- 25 CHAIRMAN: That's my recollection, certainly.</p>	<p>1 evidence. Their status is, it seems to us, somewhat 2 nebulous because, apart from Mr Ng and Mr Yeung of MTR 3 who you have heard from, and of course Prof Yin from 4 Hong Kong University, nobody else is being called to 5 speak to or justify the contents of those reports. 6 Nobody else from MTR or its consultants, nobody amongst 7 the largely anonymous government advisers, nobody from 8 the expert advisory team, nobody else is coming along to 9 speak to those reports. 10 As a consequence of that state of affairs, the 11 Commission and its legal team has, over the last few 12 months, with the technical assistance of its independent 13 expert, Prof McQuillan, raised a number of requests for 14 information with both MTR and the government, and both 15 MTR and government have of course, as one would expect, 16 helpfully cooperated in that process and have sought to 17 provide the information that has been requested. And 18 I don't rule out the possibility, going forward, that 19 there may be further requests, depending upon how the 20 Commission decides it's going to proceed after this 21 morning's hearing and submissions. 22 Sir, against that background, and as the parties 23 have been advised, the Commission takes the view, having 24 heard the statistical evidence, that the only 25 individuals really who can now assist the Commission, as</p>

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<p>1 I have mentioned already, to properly understand and</p> <p>2 fully appreciate the meaning and implications of the</p> <p>3 holistic and verification reports, are the independent</p> <p>4 structural engineers, and the real practical question</p> <p>5 is: how can those structural engineers help us?</p> <p>6 Sir, the current state of play is this, that on</p> <p>7 29 August 2019, directions were issued concerning the</p> <p>8 structural engineering expert evidence, and in</p> <p>9 particular, as I think I might have mentioned</p> <p>10 previously, Mr Southward, Leighton's independent</p> <p>11 structural engineering expert, was directed to produce</p> <p>12 two reports, one in relation to the outstanding issues</p> <p>13 in the Original Inquiry and one in relation to the</p> <p>14 issues in the Extended Inquiry. He was directed to do</p> <p>15 that by reference to certain defined issues. It might</p> <p>16 just be very useful to quickly look at those.</p> <p>17 If one looks first of all at I think the Original</p> <p>18 Inquiry issues. That's at OU6/3738. Sir, as</p> <p>19 I understand it, these were issues drafted by Leighton,</p> <p>20 or no doubt the legal team for Leighton, perhaps with</p> <p>21 the assistance of Mr Southward, I don't know, but</p> <p>22 approved by the Commission, and the issues for the</p> <p>23 Original Inquiry break down into three questions.</p> <p>24 There's the coupler connection/coupler engagement</p> <p>25 questions. So the first issue is: for structural safety</p>	<p>1 letter that I mentioned earlier of 4 October. Perhaps</p> <p>2 we can get that up on the screen as well, please. It's</p> <p>3 AA1/419. If we could scroll down, please. I won't read</p> <p>4 all of this out. I'm sure it's familiar to everybody.</p> <p>5 Then if we could keep going, please -- scroll down;</p> <p>6 sorry, can we go back up to the previous page, just at</p> <p>7 the bottom -- picking it up at the bottom:</p> <p>8 "As stated in the interim report, the Commission's</p> <p>9 primary mandate is to determine whether the relevant</p> <p>10 works are fit for purpose, or put more directly, whether</p> <p>11 they are safe. It was indeed the issue of safety of the</p> <p>12 relevant works as constructed which had raised public</p> <p>13 concern and led to the establishment of the Commission.</p> <p>14 The issue was addressed in the interim report. The</p> <p>15 Commission considers that it should also be addressed in</p> <p>16 the final report.</p> <p>17 Subject to further submissions, the Commission</p> <p>18 provisionally takes the view that the implementation of</p> <p>19 'suitable measures' is relevant to the issue of safety</p> <p>20 and fitness for purpose. A question also arises as to</p> <p>21 whether the 'suitable measures' are necessary for the</p> <p>22 purposes of statutory or code compliance.</p> <p>23 To conclude, the Commission's view at this stage is</p> <p>24 that in relation to structural issues, the involved</p> <p>25 parties and the structural engineering experts should</p>
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<p>1 purposes, what is the required minimum engagement length</p> <p>2 of the threaded rebar into the couplers? And so forth.</p> <p>3 Then question 2 is also directed at the PAUT tests and</p> <p>4 so forth. Again, question 3 refers specifically to the</p> <p>5 defective coupler connections.</p> <p>6 But question 4, perhaps for the purposes of this</p> <p>7 morning is most relevant, where it says; are the</p> <p>8 proposed suitable measures in appendix C5 of the</p> <p>9 holistic report necessary to ensure that the as-built</p> <p>10 works are structurally safe and so on.</p> <p>11 If one scrolls down this list, one can see that</p> <p>12 under the next heading, "Shear link reinforcement and</p> <p>13 partial utilisation of shear", a similar question at 7,</p> <p>14 first sentence, is asked. Then if we carry on over the</p> <p>15 page, under the heading "Construction joint" -- and you</p> <p>16 will probably recall some of that evidence on that</p> <p>17 particular topic -- a similar question at 11.</p> <p>18 Sir, that is the position at the moment. I don't</p> <p>19 take you to the Extended Inquiry issues, but they are,</p> <p>20 for reference, at AA1/239, and the issues are of</p> <p>21 a similar nature. As we understand it, Mr Southward, as</p> <p>22 Mr Chang told us last night, is working hard to complete</p> <p>23 his report, which is in fact due today, and we look</p> <p>24 forward to receiving it.</p> <p>25 Sir, turning back, if I may now, to the Lo &amp; Lo</p>	<p>1 focus on whether the relevant works as constructed are</p> <p>2 safe and fit for purpose, and whether the suitable</p> <p>3 measures are necessary for safety and statutory or code</p> <p>4 compliance. To assist the Commission in reaching a view</p> <p>5 [that's a final view] on these matters, any involved</p> <p>6 party who wishes to address the Commission should</p> <p>7 submit ... written submissions ..."</p> <p>8 Sir, in response to that letter, three submissions</p> <p>9 have been received. The first is indeed a letter, in</p> <p>10 fact, from Lim &amp; Lok, who are the solicitors to China</p> <p>11 Technology, you may recall. Their letter is at</p> <p>12 OU7/10073. I don't propose to look at it.</p> <p>13 The further submissions that have been received are</p> <p>14 from government, and they are in the bundle at</p> <p>15 AA2/441-6, and from MTRC at AA2/447-55, and we thank the</p> <p>16 government and MTR in particular for their submissions</p> <p>17 which I understand have now been read by the Commission.</p> <p>18 Rather than me attempting to summarise what those</p> <p>19 submissions say, I propose to leave it to Mr Khaw for</p> <p>20 the government and Mr Boulding for MTR to make their</p> <p>21 respective submissions on behalf of their clients, and</p> <p>22 no doubt make observations on each other's submissions</p> <p>23 at the same time.</p> <p>24 Sir, with that introduction, I will sit down. I'm</p> <p>25 not sure whether Mr Khaw and Mr Boulding have agreed</p>

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<p>1 which order they are going in, but I do mention this                  2 point. We haven't heard anything from Leighton in                  3 writing, and I do wonder -- it's a matter for you, sir,                  4 and I imagine Mr Shieh is behind me -- whether it might                  5 in fact be appropriate to hear from Leighton first, as                  6 to whether they wish to say anything at this juncture,                  7 or perhaps they want to wait until they have heard all                  8 the submissions, but since we haven't heard anything                  9 from them, perhaps it would at least be sensible to                  10 enquire with Mr Shieh as to Leighton's position.                  11 CHAIRMAN: Yes.                  12 Mr Shieh.                  13 MR SHIEH: Sorry, Mr Chairman.                  14 CHAIRMAN: Two issues or two questions. First, any                  15 indication of when Mr Southward's report is likely to be                  16 with us? Because apart from anything else, apart from                  17 the value intrinsic to that report itself, it will, we                  18 hope, act as a good reference point for other experts to                  19 be able to make their independent comments. So that's                  20 question 1.                  21 And question 2, an enquiry as to whether you feel it                  22 proper to say anything at this juncture.                  23 MR SHIEH: Can I deal with the second question first --                  24 CHAIRMAN: Yes.                  25 MR SHIEH: -- which is the point raised by Mr Pennicott.</p>	<p>1 still being undertaken. It may well be, and it's indeed                  2 likely, that we would need a shortish extension of time                  3 for a couple of days for him to finalise the response to                  4 the verification report.                  5 So that is the upshot as to where we are in relation                  6 to Mr Southward's work, and obviously things may or may                  7 not change depending upon the nature of the directions                  8 which the Commission may give today, consequential upon                  9 hearing the parties on the precise scope of the                  10 structural engineering evidence the Commission may wish                  11 to hear. Obviously I can't speculate as to what further                  12 steps may or may not be required, but I just lay down                  13 a marker that things may or may not change depending                  14 upon -- for example, if the Commission actually says,                  15 "We want to hear something else", then we may have to                  16 revisit that. But as things now stand, comment on the                  17 holistic report, good to go; comment on the verification                  18 report, we may have to write for a shortish extension,                  19 depending on how Mr Southward is getting on within the                  20 course of today.                  21 CHAIRMAN: Thank you.                  22 Who wishes to speak first?                  23 MR BOULDING: We are happy to go first, sir.                  24 CHAIRMAN: Thank you very much.                  25</p>
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<p>1 The reason why we have not written -- put forward any                  2 submissions in response to Lo &amp; Lo's letter is because                  3 we associate ourselves with the provisional view put                  4 forward in Lo &amp; Lo's letter, the final paragraph, under                  5 the heading "To conclude".                  6 But now having seen what the government and the MTR                  7 have written, we may have some brief comments to make in                  8 response, but I think it best to wait until Mr Boulding                  9 and Mr Khaw have made their respective submissions                  10 before I make responsive remarks.                  11 The short point is we associate ourselves with the                  12 provisional view put forward in Lo &amp; Lo's letter and                  13 there really is little else to add. So I would reserve                  14 anything further until Mr Boulding and Mr Khaw have                  15 addressed this Commission on their written submissions.                  16 In relation to Mr Southward's further engineering                  17 reports, there are two matters that he is expected to                  18 comment on. One is his comment on the holistic report                  19 for the Original Inquiry, and the second aspect is his                  20 comment on the verification report on the Extended                  21 Inquiry.                  22 My understanding is that the work on the holistic                  23 report response is more or less complete and it's good                  24 to go, but in relation to his comments on the                  25 verification report, ie the Extended Inquiry, work is</p>	<p>1 Submissions by MR BOULDING                  2 MR BOULDING: I trust, sir, you've had an opportunity to                  3 read our submissions.                  4 CHAIRMAN: We have. Thank you.                  5 MR BOULDING: Thank you. I'm grateful to my learned                  6 juniors, who did an awful lot of the work, and with your                  7 leave, in due course, Mr Wong, who is sitting to my                  8 right, will respond to government's written submissions,                  9 and indeed answer any detailed questions on our                  10 submissions. But it was thought that it might be useful                  11 for me to introduce our submissions by making what might                  12 be described as big-picture points on the scope of the                  13 structural engineering evidence.                  14 At Mr Pennicott has told you, we were invited to                  15 make our submissions by Lo &amp; Lo's letter dated 4 October                  16 2019. I think, in this context, it's worth reiterating                  17 what Mr Pennicott has already reminded us of, which is                  18 that the Commission has helpfully stated on various                  19 occasions that its primary mandate is to determine                  20 whether the relevant works are fit for purpose or, put                  21 more directly, whether they are safe. Of course that                  22 was stated, amongst other places, in paragraph (a) of                  23 the preface of your interim report.                  24 We submit that, as such, any direction to be given                  25 to the structural engineering experts in relation to the</p>

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<p>1 question of fitness for purpose should be confined to                  2 structural safety only. This direction, we submit,                  3 should embrace the issue of whether the suitable                  4 measures are necessary for safety.                  5 We say, with respect, that there is no need for the                  6 Commission, under the extended terms of reference, to                  7 consider whether the suitable measures are necessary for                  8 statutory or code compliance. There is no need for you                  9 to consider that. We say that nor do the terms of the                  10 extended terms of reference envisage an Inquiry into the                  11 adequacy or otherwise of those proposed suitable                  12 measures.                  13 But of course, having said that, you will recall,                  14 sirs, that MTR's Mr Ng, when he gave evidence to you,                  15 said that even if the relevant works are fit for purpose                  16 or in common parlance safe, the matter of code and                  17 statutory compliance is still of relevance.                  18 Why is that? Firstly, unless and until government                  19 is satisfied that the relevant works are also compliant                  20 with the relevant codes and statutory provisions, it                  21 will not permit the station to be open to the public.                  22 That's why he said they were relevant.                  23 CHAIRMAN: And that in simple terms, I think, may be stated                  24 on the basis that government is obliged, as anybody else                  25 is, by its own statutes, and if its own statutes require</p>	<p>1 is that the question whether the suitable measures are                  2 necessary for statutory or code compliance for the                  3 purpose of this Inquiry is primarily a legal and factual                  4 issue, and that the structural engineering expert                  5 evidence will not assist the Commission's discharge of                  6 its mandate, namely to allay public concerns over                  7 safety. And of course it's an obvious point but                  8 I nevertheless make it: the experts cannot speak for the                  9 ultimate approving authority: government.                  10 CHAIRMAN: Yes.                  11 MR BOULDING: Now, other reasons, we submit, why the                  12 Commission should not deal with whether the suitable                  13 measures are necessary for code or statutory compliance                  14 are as follows. Firstly, in practice, and as                  15 Mr Pennicott has mentioned already, any consideration of                  16 this matter could amount to a public dress rehearsal of                  17 the litigation of private contractual rights between at                  18 least some of the interested parties which might flow                  19 from the matters that the Commission is currently                  20 considering. More importantly perhaps, any such                  21 consideration might serve to interfere or even prejudice                  22 such litigation, and you certainly wouldn't want to be                  23 doing that.                  24 CHAIRMAN: I think as was said by Mr Pennicott, that was one                  25 of the reasons why the Commission called that first</p>
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<p>1 consent to be given only when there is code compliance,                  2 it cannot waive that.                  3 MR BOULDING: Spot on. It's the gatekeeper.                  4 CHAIRMAN: Yes.                  5 MR BOULDING: We say that as the relevant departments of                  6 government are the ultimate approval authorities, we                  7 submit that you will undoubtedly benefit from receiving                  8 relevant factual evidence from government as to why the                  9 suitable measures are indeed required for code/statutory                  10 compliance before the relevant government authorities                  11 can provide the necessary approval for the commercial                  12 use and operation of the SCL project. And of course,                  13 absent that approval, there is absolutely no prospect of                  14 this very expensive, very large structure serving its                  15 intended purpose for the benefit of the people of                  16 Hong Kong.                  17 We also submit that it would be relevant for you to                  18 hear from government on that important matter, that                  19 factual matter, not least to allay any potential                  20 residual public concerns as to why such suitable                  21 measures are being carried out in the event that the                  22 Commission finds -- and we think you surely will -- that                  23 the relevant structures are, in the event, safe and fit                  24 for purpose.                  25 MTR's position -- let there be no doubt about it --</p>	<p>1 meeting. It didn't want to find itself inadvertently                  2 dragged into a position where it was acting as                  3 a rehearsal court for later possible civil litigation                  4 between the parties.                  5 MR BOULDING: We were grateful to you for calling that                  6 meeting and we found it a very useful meeting in which                  7 we could express our views, but now we've got a further                  8 opportunity.                  9 But to conclude all this, the big-picture points                  10 before I hand over to Mr Wong, we would invite the                  11 Commission to make the following directions on the scope                  12 of the structural engineering expert evidence. These                  13 experts should focus on whether the relevant                  14 as-constructed works are safe from a structural                  15 engineering perspective, and only if they are not safe                  16 whether the suitable measures are necessary for safety                  17 from a structural engineering perspective. And                  18 importantly, the structural engineering experts are not                  19 required to look into the question of whether the                  20 suitable measures are required for statutory or code                  21 compliance.                  22 So they are the big-picture points and, with your                  23 leave, I intend to hand over to my learned junior who                  24 can answer detailed questions on our written submissions                  25 and, as importantly, make certain observations on</p>

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<p>1 government's written submissions.</p> <p>2 MR PENNICOTT: Sir, before Mr Wong speaks -- I don't want to</p> <p>3 be accused of cross-examining Mr Boulding, perish the</p> <p>4 thought -- but could I just invite him to address this</p> <p>5 point. He mentioned the possibility of government</p> <p>6 calling further evidence, factual evidence, as</p> <p>7 I understood it.</p> <p>8 It may be that I've misunderstood the MTR's</p> <p>9 position, but looking at paragraph 22 of their</p> <p>10 submissions, my understanding so far is that that</p> <p>11 factual evidence would only be called for in the event</p> <p>12 that the Commission were to decide to look at the</p> <p>13 question of suitable measures in the context of</p> <p>14 statutory or code compliance. To put it around the</p> <p>15 other way, if the Commission reaches the view that</p> <p>16 suitable measures should not be looked at in the context</p> <p>17 of statutory or code compliance, does this evidence</p> <p>18 point fall away?</p> <p>19 MR BOULDING: I don't think it does, sir, because as I trust</p> <p>20 I've made clear, we submit that having relevant factual</p> <p>21 evidence from the government as to why these suitable</p> <p>22 measures are required for code or statutory compliance</p> <p>23 before the government authorities can provide the</p> <p>24 necessary approval for the commercial use and operation</p> <p>25 of the project is indeed very important, and it's</p>	<p>1 question of whether suitable measures are then required</p> <p>2 for statutory or code compliance.</p> <p>3 MR BOULDING: Sorry, it's not quite right.</p> <p>4 CHAIRMAN: I may have got that the wrong way around. There</p> <p>5 are a lot of negatives and double negatives there.</p> <p>6 But to put it simply, my understanding was, if the</p> <p>7 evidence comes through from the structural engineers</p> <p>8 that, from a structural engineering perspective,</p> <p>9 whatever that terminology may mean to each individual</p> <p>10 expert, and if they come to the view that, "Yes, it's</p> <p>11 safe, this particular structure in these particular</p> <p>12 circumstances, having regard to its unique attributes is</p> <p>13 safe and fit for purpose", the fact that government,</p> <p>14 which has the ultimate responsibility for granting the</p> <p>15 right to use it and is itself subject to its own codes</p> <p>16 and statutory compliance procedures wishes then to</p> <p>17 ensure that certain remedial measures are taken because</p> <p>18 the code and the various statutory requirements</p> <p>19 incorporate in the fabric of those injunctures safety</p> <p>20 issues, then they should be entitled to proceed because</p> <p>21 they bear the ultimate responsibility for that, without</p> <p>22 us going down that particular route, because that route</p> <p>23 of looking at all the various issues of code compliance</p> <p>24 could be a very complex and lengthy march.</p> <p>25 Perhaps Prof Hansford might just state his</p>
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<p>1 important not least because, as I've said once already,</p> <p>2 it will allay any potential or residual public concerns</p> <p>3 as to why, if the structure is safe, these measures are</p> <p>4 being carried out. One assumes that government, who are</p> <p>5 the gatekeeper, will turn up with their factual</p> <p>6 evidence, men from the various departments, who say,</p> <p>7 "Look, in order to give this certificate, we have got to</p> <p>8 satisfy ourselves that these codes are complied with",</p> <p>9 and that's all we envisage, so that you can have</p> <p>10 explained to you why that compliance is required. We</p> <p>11 say it goes no further than that.</p> <p>12 CHAIRMAN: Thank you.</p> <p>13 Bear with us just a moment.</p> <p>14 (Tribunal conferring)</p> <p>15 Sorry, just on that issue, we are not opening this</p> <p>16 up for debate and resolution of that debate, but we</p> <p>17 were, Mr Boulding, somewhat taken with what I think was</p> <p>18 in your written submissions, which is that the issue</p> <p>19 perhaps should be -- structural engineering experts</p> <p>20 should focus first on whether the as-constructed works</p> <p>21 are safe, from a structural engineering perspective,</p> <p>22 and, only if the evidence is they are not safe from</p> <p>23 a structural engineering perspective, whether suitable</p> <p>24 measures are then safe -- only if it's not safe, whether</p> <p>25 structural engineering experts required to look into the</p>	<p>1 understanding of the matter which is perhaps a bit more</p> <p>2 coherent than mine.</p> <p>3 COMMISSIONER HANSFORD: Thank you, Chairman.</p> <p>4 The question I have, Mr Boulding, is: is your</p> <p>5 conclusion and your proposal to us in 21(a) and (b)</p> <p>6 conditional on 22?</p> <p>7 MR BOULDING: No.</p> <p>8 COMMISSIONER HANSFORD: Because it seems to me that 21(a)</p> <p>9 and (b) could stand without 22.</p> <p>10 MR BOULDING: Absolutely, sir. We just wanted to make it</p> <p>11 clear --</p> <p>12 COMMISSIONER HANSFORD: Okay.</p> <p>13 MR BOULDING: -- that we thought you might benefit from</p> <p>14 hearing from government -- it doesn't seem to us that it</p> <p>15 would necessarily involve a lot of factual evidence --</p> <p>16 as to why, as the gatekeeper, they need to have code</p> <p>17 compliance and statutory compliance to effectively issue</p> <p>18 the MOT certificate for the building so it can open. We</p> <p>19 thought that might be useful to you and also useful to</p> <p>20 the Hong Kong population as a whole, because they may</p> <p>21 well be thinking to themselves, "Well, if this building</p> <p>22 is safe, why are these works being carried out?" And</p> <p>23 the answer to that would be, "We are the gatekeeper,</p> <p>24 that's what we need in order to give you the MOT to open</p> <p>25 the building", and we thought that might be useful to</p>

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<p>1 you. But, to make it clear, our 21 is not dependent</p> <p>2 upon that. I hope that's clear.</p> <p>3 COMMISSIONER HANSFORD: That's very helpful. We will</p> <p>4 consider that. Thank you.</p> <p>5 CHAIRMAN: Thank you. That gives us a clearer view as to</p> <p>6 the way forward. Thank you very much.</p> <p>7 Submissions by MR WONG</p> <p>8 MR WONG: Perhaps just to give a clearer illustration by way</p> <p>9 of an example. First, the Commission will recall that</p> <p>10 these submissions are lodged to address the Commission</p> <p>11 as to whether expert evidence is required to deal with</p> <p>12 the issues stated. It's an entirely different question</p> <p>13 of whether the COI, the Commission, should look at those</p> <p>14 issues.</p> <p>15 So what we are saying is that in relation to the</p> <p>16 suitable measures, we say that structural engineering</p> <p>17 expert evidence is not required, but should the COI look</p> <p>18 at these suitable measures, it is perhaps assisted, in</p> <p>19 its final report, to provide some explanation to allay</p> <p>20 public concerns over safety, as to why these suitable</p> <p>21 measures are put in place.</p> <p>22 Perhaps just by way of example --</p> <p>23 CHAIRMAN: Sorry to interrupt you. I'm sure, from my</p> <p>24 understanding of the written documentation that's before</p> <p>25 us at the moment, that government is firm in the</p>	<p>1 but just so that we know that we are on the same playing</p> <p>2 field.</p> <p>3 MR WONG: We are. Perhaps, I think, at the end of the day,</p> <p>4 it's a question of whether there are sufficient factual</p> <p>5 details for the Commission to write a final report which</p> <p>6 it thinks is of use to discharge its mandate.</p> <p>7 Perhaps I can just illustrate by way of an example.</p> <p>8 May we go to the holistic report, OU3280.</p> <p>9 CHAIRMAN: Yes.</p> <p>10 MR WONG: I think it's OU5.</p> <p>11 Mr Chairman and Professor, 3280 is table 5 of the</p> <p>12 holistic report, and table 5 essentially sets out the</p> <p>13 original design and the updated design, and there are</p> <p>14 ten updated designs which are set out in the table.</p> <p>15 The reason why the updated designs are important is,</p> <p>16 if we go to the narrative -- can we go to page OU3282,</p> <p>17 please. If one reads from paragraph 4.3.6, that</p> <p>18 paragraph states, in view of the workmanship problems</p> <p>19 that were discovered:</p> <p>20 "Based on the original design ..."</p> <p>21 If I skip all the way to the last sentence:</p> <p>22 "Suitable measures to cater for the quality [have to</p> <p>23 be carried out] in areas A, B and C, as well as in HKC,</p> <p>24 are also required."</p> <p>25 But then if we go to the next paragraph, at 4.3.7,</p>
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<p>1 position that (a) it is the final gatekeeper; (b), that</p> <p>2 it has the final responsibility; (c), it's in any event</p> <p>3 bound by its own laws; and (d), its own laws</p> <p>4 incorporate, in the fabric of all the injunctures that</p> <p>5 are there, the need to ensure safety. So it would be</p> <p>6 saying that it has to do this extra work to be</p> <p>7 code-compliant, and that includes ensuring safety, and</p> <p>8 therefore the public is going to be, if I can put it</p> <p>9 this way, doubly ensured, number one, if, and only if,</p> <p>10 the engineering evidence satisfies the Commission that</p> <p>11 the work, this particular structure, in these particular</p> <p>12 circumstances, is safe and fit for purpose, from</p> <p>13 an engineering perspective, whatever that term may mean</p> <p>14 to each engineer. That's one thing. Government is then</p> <p>15 going to say, "That's fine, that's your finding, you've</p> <p>16 determined it, but we have a further obligation, based</p> <p>17 on law, to meet statutory compliance, and that also</p> <p>18 includes issues of safety." That would then be</p> <p>19 a double-win for the public, because they would know</p> <p>20 that all necessary requirements have been met as they</p> <p>21 would be met with any other structure, and that would</p> <p>22 ensure safety.</p> <p>23 That's perhaps the way I see it optimistically at</p> <p>24 this juncture, if it pans out that way, and we're not in</p> <p>25 any way -- that's very much an interim view, of course,</p>	<p>1 in adopting the updated design the Commission will see</p> <p>2 again the last sentence of that paragraph: the suitable</p> <p>3 measures identify, the scope becomes less.</p> <p>4 The question therefore is whether on the existing</p> <p>5 content of the holistic report the Commission feels that</p> <p>6 there is already sufficient evidence, or the Commission</p> <p>7 feels that some explanation as to why the updated</p> <p>8 designs are adopted in table 5 ought to be further</p> <p>9 provided. That's all the purpose of our paragraph 22.</p> <p>10 CHAIRMAN: Yes. Thank you. That is clear. Thank you.</p> <p>11 MR WONG: What I now intend to do is to address our</p> <p>12 submissions when they are juxtaposed against the</p> <p>13 government's submissions. As I understand it,</p> <p>14 Commission and Professor, the difference between the</p> <p>15 government and the MTR boils down to as follows. It is</p> <p>16 the government's position that no structural expert</p> <p>17 evidence is required at all, whereas MTR's position is</p> <p>18 that the Commission will be assisted by hearing expert</p> <p>19 evidence on the issue of safety but not contract or</p> <p>20 statutory or code compliance.</p> <p>21 The differences between the government and the MTR</p> <p>22 may be summarised as follows. There is a difference</p> <p>23 between the government and MTR on the meaning of the</p> <p>24 terms "safe" and "fitness for purpose". Unless the</p> <p>25 Commission wishes me to, our submissions are already set</p>

Page 25	<p>1 out in our written material, paragraphs 4 to 9, and</p> <p>2 I don't intend to read it out. But in essence the</p> <p>3 government links up safety with code compliance, whereas</p> <p>4 MTR adopts the treatment in the interim report.</p> <p>5 The second difference, perhaps it is not so much</p> <p>6 a difference but just an observation: the government and</p> <p>7 MTR are actually ad idem that the Commission will not be</p> <p>8 assisted by hearing structural evidence on code</p> <p>9 compliance, but we approach it from slightly different</p> <p>10 perspectives. We say "apparent difference" but they are</p> <p>11 actually just nuances, and I will come to those nuances</p> <p>12 in a moment.</p> <p>13 Can I go straight to the issue of question 1, which</p> <p>14 is the terminological difference. We say our</p> <p>15 understanding of how the term "safe" is treated in the</p> <p>16 interim report can be illustrated by four examples. The</p> <p>17 first example is -- can we go to OU3372. This is</p> <p>18 a letter from Mayer Brown dated 26 July 2019.</p> <p>19 The purpose of this letter was to invite certain</p> <p>20 directions and clarifications from the Commission on the</p> <p>21 scope of the expert evidence to be adduced in COI 1.</p> <p>22 Can I invite, rather than me reading it out, the</p> <p>23 Commission to read paragraphs 2 and 3 of that letter.</p> <p>24 CHAIRMAN: Yes.</p> <p>25 MR WONG: Already, this letter summarises that the expert</p>	Page 27	<p>1 Hung Hom Station SCL project, having a prudent,</p> <p>2 conservative design has proved beneficial."</p> <p>3 There again is a clear distinction between</p> <p>4 structural safety versus code compliance.</p> <p>5 The third example, if I may, is by reference to the</p> <p>6 government's closing submissions made in COI 1. That</p> <p>7 would be Day 45, page 20. Starting from line 8, the</p> <p>8 government's position:</p> <p>9 "In this regard, when the parties entered into the</p> <p>10 contract and accepted those obligations, presumably they</p> <p>11 must have accepted that those obligations were imposed</p> <p>12 for the purpose of ensuring safety, and in this regard</p> <p>13 we say compliance and safety go hand in hand in that</p> <p>14 particular context.</p> <p>15 But" -- what is important is what follows -- "at the</p> <p>16 same time we have no dispute that for the purpose of</p> <p>17 this Inquiry, the safety issue can be considered as</p> <p>18 a separate and distinct issue from compliance."</p> <p>19 So there, even in closing submissions in COI 1, the</p> <p>20 government appears to have accepted that safety and</p> <p>21 compliance may be delinked.</p> <p>22 Can I take the Commission to the government's</p> <p>23 submissions, paragraph 1, filed for today's hearing. At</p> <p>24 paragraph 1, the government accepts that safety is</p> <p>25 a broad concept. Implicit in that acceptance must be</p>
Page 26	<p>1 evidence that we adduced in COI 1 already drew</p> <p>2 a distinction between structural safety and code</p> <p>3 compliance.</p> <p>4 The second example is the interim report itself.</p> <p>5 Can I take the Commission to paragraph 362 of the</p> <p>6 interim report. That would be at bundle A2, page 882.</p> <p>7 If I can read from paragraph 362 onwards:</p> <p>8 "The independent experts advised the Commission that</p> <p>9 the design of the platform slabs was 'conservative' and</p> <p>10 provided a high degree of under-utilisation as compared</p> <p>11 to that required to properly withstand the loads</p> <p>12 incurred by the structure. The experts also refer to</p> <p>13 this under-utilisation as 'redundancy' or 'spare</p> <p>14 capacity'.</p> <p>15 Atkins, Arup and COWI all agreed that there is at</p> <p>16 least 40 per cent spare capacity at the top mat of the</p> <p>17 EWL platform slab.</p> <p>18 The Commission does not regard the partial</p> <p>19 redundancy of the reinforcement as being a criticism of</p> <p>20 the designers, Atkins. On the contrary, the Commission</p> <p>21 fully understands why it is prudent for a designer to</p> <p>22 specify reinforcement strictly in accordance with the</p> <p>23 code, even in circumstances where conditions requiring</p> <p>24 such reinforcement may not apply. Under the particular</p> <p>25 circumstances that the Commission is faced with at the</p>	Page 28	<p>1 a further acceptance, therefore, that safety can bear</p> <p>2 different meanings in different contexts.</p> <p>3 We say that it is obvious that government, in</p> <p>4 assessing whether to accept a certification submitted</p> <p>5 for completed works, it is duty-bound to conduct such</p> <p>6 assessment by reference to what has been defined as the</p> <p>7 applicable codes at their submissions, paragraph 5. Any</p> <p>8 failure to do so by the government as a gatekeeper would</p> <p>9 be a dereliction of its duties. It is a point raised by</p> <p>10 the Chairman just now himself.</p> <p>11 However, we wish to point out that we are not here</p> <p>12 conducting that approval process. That's not the</p> <p>13 function of the Commission.</p> <p>14 At paragraph 3 of government's submissions, the</p> <p>15 government says that the two concepts of safety and code</p> <p>16 compliance cannot be artificially segregated.</p> <p>17 We have some difficulty with that description. If</p> <p>18 it is suggested that wearing the hat of the approval</p> <p>19 authority the two cannot be legally segregated, that</p> <p>20 seems to me to be a self-evident proposition. However,</p> <p>21 if it is suggested that the segregation is capricious or</p> <p>22 arbitrary, we cannot accept that suggestion, because</p> <p>23 from the passages I read from the interim report just</p> <p>24 now, plainly the structural experts who gave evidence in</p> <p>25 COI 1 all had a view that structural safety can be</p>

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<p>1 delinked from code compliance.</p> <p>2 So the Commission has received structural expert</p> <p>3 evidence from eminent experts that these two concepts do</p> <p>4 not necessarily have to be linked.</p> <p>5 On that note --</p> <p>6 CHAIRMAN: Depending on the structure that's being</p> <p>7 considered. My understanding -- and I'm open to</p> <p>8 correction here -- is that the experts were, and what</p> <p>9 they will say of course when they come back again we</p> <p>10 don't know at this juncture, but they were looking at</p> <p>11 a particular structure --</p> <p>12 MR WONG: Yes.</p> <p>13 CHAIRMAN: -- embedded into a particular geographical</p> <p>14 location, subject to particular stresses and strains,</p> <p>15 et cetera, and were making their decision or giving</p> <p>16 their comments in that regard.</p> <p>17 That doesn't necessarily require dislodging the fact</p> <p>18 that the building code in Hong Kong is built essentially</p> <p>19 in order to ensure, in all buildings, the necessary</p> <p>20 levels of safety.</p> <p>21 MR WONG: Yes. Perhaps --</p> <p>22 (Tribunal conferring)</p> <p>23 CHAIRMAN: Sorry.</p> <p>24 COMMISSIONER HANSFORD: Sorry, Mr Wong, could you repeat the</p> <p>25 point that you made just before the Chairman's response</p>	<p>1 does not meet the code and it becomes impossible,</p> <p>2 without knocking the whole thing down and starting</p> <p>3 again, to meet the code. Then there must be some room</p> <p>4 for compromise, because otherwise you have two results.</p> <p>5 (a) you have a very big, beautiful building that nobody</p> <p>6 can ever use, or (b) you have to knock it all down and</p> <p>7 start again."</p> <p>8 Then Mr Ng's answer was:</p> <p>9 "To a degree, yes. I do believe, as an engineer,</p> <p>10 you do have to have the freedom to adopt certain</p> <p>11 practices. But it comes to a point where adopting the</p> <p>12 certain practice also needs agreement with certain</p> <p>13 authorities."</p> <p>14 Again, Chairman and Professor, Mr Ng clearly draws</p> <p>15 a distinction between sound structural engineering</p> <p>16 practice versus code compliance.</p> <p>17 "All I'm saying" -- going back to the transcript --</p> <p>18 "is I'm not in the privilege to ask for waiver, unless</p> <p>19 it is something which I strongly believe in, which I</p> <p>20 propose.</p> <p>21 Chairman: No, I'm not suggesting -- sorry, I think</p> <p>22 you missed my question and it's my fault, obviously --</p> <p>23 but what I'm saying is if you end up without necessarily</p> <p>24 meeting the code in all respects with a building which</p> <p>25 has been completed, and it is fit for purpose, everybody</p>
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<p>1 to you? I'm sure it's on the transcript but I can't</p> <p>2 easily find it.</p> <p>3 MR WONG: The point that I was making was that during COI 1,</p> <p>4 the Commission has received expert evidence from eminent</p> <p>5 experts that the issues of structural safety and code</p> <p>6 compliance do not necessarily have to be linked</p> <p>7 together.</p> <p>8 CHAIRMAN: We accept that, absolutely. All I was doing,</p> <p>9 perhaps muddying the waters again, was by saying that's</p> <p>10 because essentially they are looking at a particular</p> <p>11 structure, built into a particular set of circumstances,</p> <p>12 and code compliance looks generally at all buildings and</p> <p>13 the requirement for general safety standards.</p> <p>14 But I'll stay with what you put, because that is</p> <p>15 right, as we see it at this moment.</p> <p>16 MR WONG: Perhaps one -- I say this with no disrespect --</p> <p>17 a more commonsense way of looking at it is can we go to</p> <p>18 Mr Neil Ng's evidence, which is the combined hearing</p> <p>19 transcript Day 2, combined inquiries Day 2, page 94.</p> <p>20 Starting from page 94, line 23, there the Chairman</p> <p>21 asked this question:</p> <p>22 "But there must be, must there not, some level of</p> <p>23 compromise? Because you may have a building, a very</p> <p>24 detailed, complex public structure, which everybody</p> <p>25 accepts is fit for purpose, but in a number of respects</p>	<p>1 accepts that, but there has been negligence and there</p> <p>2 has been a failure to meet the code in certain respects.</p> <p>3 At that juncture, you've got limited choices, have you</p> <p>4 not? All I'm asking is: do you believe there's any room</p> <p>5 for manoeuvre at that stage, with the authority, in</p> <p>6 those circumstances?</p> <p>7 Answer: With all due respect, I do think this is a</p> <p>8 question that should be answered by the authority."</p> <p>9 I make two points in relation to this exchange. The</p> <p>10 first is again there is a clear delineation between code</p> <p>11 compliance versus structural safety. But the second</p> <p>12 point echoes what Mr Boulding was submitting to the</p> <p>13 Commission earlier, that ultimately the Commission may</p> <p>14 be assisted by some factual evidence as to what the</p> <p>15 government had in mind as finally accepting the updated</p> <p>16 design which I have already taken the Commission to.</p> <p>17 CHAIRMAN: All right. That's a matter we will obviously</p> <p>18 take on board. Thank you. You have explained it no</p> <p>19 better than Mr Boulding but we have a second explanation</p> <p>20 and it makes it easier for us to weigh the issue. Thank</p> <p>21 you.</p> <p>22 MR WONG: Unless I may be of further assistance, that's all</p> <p>23 I wish to say in relation to question 1. Now, of course</p> <p>24 we adopt everything that we have put in our written</p> <p>25 submissions.</p>



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<p>1 Now, question 2(a), which is the question of whether                  2 expert evidence should be received as regards whether                  3 the suitable measures are required for safety. Now,                  4 of course, having accepted -- having adopted the                  5 position in question 1, necessarily our position in                  6 question 2(a) is, insofar as safety in the structural                  7 engineering sense is concerned, we say that the                  8 Commission would be assisted, but we inserted                  9 an important proviso or clarification.                  10 Can I take the Commission to paragraph 13 of our                  11 submissions. That is perhaps a point which has been                  12 already picked up by the Commission. It's that if the                  13 Commission answers question 1 in the positive, then                  14 really question 2(a) falls away.                  15 COMMISSIONER HANSFORD: Sorry, you said if the Commission                  16 answers question 1. You mean if the expert answers, do                  17 you?                  18 MR WONG: Yes, if the experts answer question 1 in the                  19 positive, question 2(a) falls away.                  20 Finally, I will proceed to question 2(b), which is                  21 whether structural engineering evidence should be                  22 adduced on whether the suitable measures are required                  23 for compliance. Again, I wish to emphasise that on this                  24 issue, the end game is that both the government and MTR                  25 say that the Commission will not be so assisted, but</p>	<p>1 even if the Commission is against us on the construction                  2 point, is that where, as far as MTR understands it,                  3 no one is saying that the suitable measures are too                  4 little. Everyone perhaps is saying -- perhaps not                  5 everyone -- the structural evidence that is to be                  6 adduced, as we understand it, is that the suitable                  7 measures are probably excessive. We say that really is                  8 a private matter.                  9 The government makes the same point in their                  10 submissions, paragraph 7 and paragraph 9. If we go to                  11 their submissions at paragraph 9, their construction                  12 point is taken slightly differently. If I can invite                  13 the Commission to read with me paragraph 9:                  14 "In order to make a determination on the necessity                  15 of the 'suitable measures' or the extent of the same in                  16 this Inquiry, the COI would effectively have to look                  17 into all the details of stage 3 structural assessment                  18 and the verification study, including the modelling of                  19 the structures, the design assumptions adopted, the                  20 structural analysis carried out, engineering                  21 calculations performed ... and make various findings                  22 accordingly."                  23 So although it's put differently, basically it is                  24 also an invitation to the Commission to refrain from                  25 looking into the adequacy of the suitable measures.</p>
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<p>1 perhaps I can just list out what I see to be the nuances                  2 between the government and MTR.                  3 MTR and the government both take the point that the                  4 Commission should not concern itself with excessiveness                  5 of the suitable measures. In that respect, perhaps                  6 I can just summarise our position first. The position                  7 is set out really at paragraphs 15 and 16 of our written                  8 material. We take two points. The first point is                  9 a construction point of the terms of reference, and the                  10 second, perhaps I can put it this way, is a more                  11 commonsensical point.                  12 If I may address the Commission on the first point,                  13 which is the construction point of the terms of                  14 reference. Can we go to the terms of reference which is                  15 in OA1. I believe it's item 1(ii). Can I take the                  16 Commission to paragraph (a)(1)(iii):                  17 "to ascertain whether the works in (2)(i) and (ii)                  18 above were executed in accordance with the contract. If                  19 not, the reasons therefor and whether steps for                  20 rectification have been taken".                  21 Mr Boulding has already addressed the Commission.                  22 We say that, as a matter of proper construction, that                  23 paragraph does not require the Commission to look into                  24 the adequacy of the rectification steps.                  25 The second perhaps is a more commonsense point, that</p>	<p>1 Also in this respect, the Commission will recall                  2 from our respective written material that we both take                  3 a point on proportionality, is that whether the                  4 Commission's time is usefully spent on reopening up the                  5 stage 3 structural analysis.                  6 Another point that we both take is that the                  7 Commission should not second-guess the consensus reached                  8 between government and MTR that the suitable measures                  9 are required to be carried out to render the structures                  10 code or statutorily compliant, so to that extent we are                  11 also ad idem.                  12 But the MTR takes the matter slightly further, and                  13 in that respect, and I think I'm repeating myself,                  14 depending on whether the Commission feels that the                  15 existing factual evidence is already sufficient, we                  16 believe that the Commission may be assisted by further                  17 factual evidence, by reference to table 5 of the                  18 holistic report which I have already shown to the                  19 Commission.                  20 (Tribunal conferring)                  21 Unless I can be of further assistance, those are                  22 MTR's submissions.                  23 CHAIRMAN: Thank you very much. That's assisted us. Thank                  24 you.                  25 Mr Khaw?</p>

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<p>1 Submissions by MR KHAW</p> <p>2 MR KHAW: Yes. I believe the latest exchange between the</p> <p>3 Commission and my learned friends Mr Boulding,</p> <p>4 Mr Pennicott and also Mr Wong has firmly reiterated our</p> <p>5 stance, in fact loud and clear. That is, we are the</p> <p>6 gatekeeper, so we have to be fully satisfied that all</p> <p>7 the necessary requirements have been complied with,</p> <p>8 before we can give an endorsement as to whether</p> <p>9 a structure is safe or not.</p> <p>10 We have been asked to state our position as to</p> <p>11 whether certain matters are necessary for the purpose of</p> <p>12 ensuring safety, leaving aside the question of code</p> <p>13 compliance or statutory requirements. Now, this is not</p> <p>14 a criticism at all, but this question in fact</p> <p>15 presupposes that safety and code compliance are two</p> <p>16 separate and distinct issues, and I believe we have</p> <p>17 explained why we cannot accept that.</p> <p>18 From the government's point of view, code compliance</p> <p>19 is intrinsically linked to the issue of safety. In</p> <p>20 fact, it is not just what we say here. In fact, if one</p> <p>21 looks at the holistic report, that approach in fact has</p> <p>22 been adopted jointly by both MTR and also the</p> <p>23 government.</p> <p>24 If I may just invite the Chairman and also the</p> <p>25 Commissioner to have a look at, very briefly, one</p>	<p>1 That's our point mainly.</p> <p>2 If any party wishes to, for example, examine the</p> <p>3 question of structural safety from another point of</p> <p>4 view, for example, purely on the basis of the question</p> <p>5 regarding strength reduction, for example, the stress</p> <p>6 level, parties can do so. But again, from the</p> <p>7 government's point of view, I have to say that we cannot</p> <p>8 accept that such assessment would be able to provide</p> <p>9 a holistic assessment on the question of structural</p> <p>10 safety, because it would not be looking at all the</p> <p>11 parameters that the government has been looking at. So</p> <p>12 that is our main concern, if one is trying to look at</p> <p>13 the question of safety, from that particular perspective</p> <p>14 only.</p> <p>15 Obviously, evidence can be adduced from various</p> <p>16 parties' experts on the question of strength reduction,</p> <p>17 et cetera, and we can also ask our expert to comment on</p> <p>18 that. But then we still have to come back to this,</p> <p>19 I would say our old friend; that is, we have to say:</p> <p>20 even if you satisfy this, we are the gatekeeper, we will</p> <p>21 ask you to satisfy more. That is why we believe that if</p> <p>22 the Commission directs that all the involved parties</p> <p>23 should make an assessment on a particular area regarding</p> <p>24 structural safety, I'm afraid that we cannot accept that</p> <p>25 this will be a complete answer to this question in order</p>
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<p>1 paragraph of the holistic report: OU5, and I think it</p> <p>2 starts from 3229. If I can take the Commission to 3233,</p> <p>3 the second paragraph:</p> <p>4 "... there have been concerns that Leighton ... has</p> <p>5 adopted revised slab to D-wall connection details which</p> <p>6 were different from the design drawings accepted by the</p> <p>7 Building Authority. In light of these allegations, the</p> <p>8 MTRCL prepared and submitted a holistic proposal to the</p> <p>9 Railway Development Office ... to verify the</p> <p>10 as-constructed conditions and workmanship quality of the</p> <p>11 HUH Extension and to provide assurance on the structural</p> <p>12 integrity of the works. The holistic proposal consists</p> <p>13 of three stages."</p> <p>14 So, to start with, the objective of this stage 3</p> <p>15 assessment was to provide assurance on structural</p> <p>16 integrity and safety, and then we proceeded on the basis</p> <p>17 as to whether the code had been complied with, and also</p> <p>18 whether the MTR's own design manual had been complied</p> <p>19 with. These are the two major areas that we looked at.</p> <p>20 So in fact that MTR itself had used the parameters,</p> <p>21 being the code and also its own design manual, for the</p> <p>22 purpose of providing assurance on structural safety --</p> <p>23 so that is why we say that if we look at the stage 3</p> <p>24 assessment as a whole, we can't really artificially</p> <p>25 segregate the issue of safety from code compliance.</p>	<p>1 to alleviate all the public concern.</p> <p>2 CHAIRMAN: No, we are not suggesting -- as I understand what</p> <p>3 is being said by the MTR, we are not suggesting that</p> <p>4 that should alleviate all public concerns. Perhaps, if</p> <p>5 I might put it this way, it may be advanced in simple</p> <p>6 terms as follows, that the Commission was informed that</p> <p>7 there was much public agitation over certain building</p> <p>8 works. The Commission was informed that certain of</p> <p>9 those building works may have been malicious, resulting</p> <p>10 in deficient workmanship, and the Commission was</p> <p>11 informed that whatever these concerns, whatever the</p> <p>12 public agitation, all of it went to one critical issue.</p> <p>13 It went to the issue of safety. That's why the</p> <p>14 Commission was formed, not because the public were out</p> <p>15 there waiting for the number 37 omnibus, saying, "Wow,</p> <p>16 think of the money the arbitrators are going to make in</p> <p>17 determining whether clause 75 of the contract has been</p> <p>18 met." That wouldn't bother the public; it's happening</p> <p>19 every day. What was bothering the public was the issue</p> <p>20 of safety: "Will we ever be able to actually use this</p> <p>21 place? Will we be able safely to take our children down</p> <p>22 there in order to get a train?" That's what we are</p> <p>23 talking about.</p> <p>24 So to some extent, it would seem, and I'm not going</p> <p>25 against you, perhaps it may be advanced on the basis of</p>

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<p>1 if there's evidence -- we've looked at what went wrong,                  2 but from an engineering perspective, whatever that may                  3 mean in real terms, it's not going to fall down                  4 tomorrow, we consider it to be safe, in addition to                  5 which it still has to pass the gatekeeper who will look                  6 to code compliance.                  7 There's nothing that I personally can see at this                  8 moment, subject to further representations, in the terms                  9 of the Commission, that says that we have to                  10 double-guess the government on code compliance.                  11 COMMISSIONER HANSFORD: Correct.                  12 CHAIRMAN: Unless, of course, it was so outrageous that                  13 somehow or other it was intrinsic.                  14 MR KHAW: In fact, I'm in entire agreement with Chairman.                  15 I believe the only point I wish to add is that in order                  16 to address the public concern, it is also important to                  17 actually set out the objective benchmark for the purpose                  18 of assessing the question of safety.                  19 CHAIRMAN: Yes.                  20 MR KHAW: That is the main point that we wish to emphasise.                  21 From the government's point of view -- I will be at the                  22 risk of repeating myself -- that is code compliance,                  23 because that ties in with the question of safety.                  24 CHAIRMAN: Yes.                  25 MR KHAW: But if one is trying to assess the question of</p>	<p>1 comes forward and says, "You know, I think there's                  2 a fundamental problem with the shear links and I've had                  3 a look at what government intends to do in order to                  4 ensure code compliance; I don't think it's going to be                  5 sufficient. I think you've got a major structural                  6 problem here", and he comes up and we have convincing                  7 argument.                  8 Now, isn't that evidence of some value? Because you                  9 are looking then at a question of, from an engineering                  10 perspective, are there concerns as to safety, and yes,                  11 there are, and perhaps code compliance which itself is                  12 concerned with safety will not be sufficient.                  13 So what I'm saying is that surely there can on                  14 occasions, although you cannot delink them entirely,                  15 they don't inhabit separate galaxies. Of course they                  16 are linked. But with one particular specific unique                  17 structure and the generalisation of code compliance, the                  18 two can be viewed perhaps separately, for purposes of                  19 safety and fit for purpose, without necessarily the one                  20 having to reduce the effectiveness of the other.                  21 MR KHAW: Yes.                  22 CHAIRMAN: That's not a statement, that's just a question to                  23 get your views.                  24 MR KHAW: I have nothing further to add on this point, save                  25 and except that I only wish to, with no disrespect, give</p>
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<p>1 safety by way of a particular factor, assessment of                  2 a particular factor, then the public may have some                  3 concern as to whether a different standard is applied by                  4 the government, when one compares the standard you apply                  5 to this station and the standards you apply to other                  6 building structures in Hong Kong. That is a message                  7 that we do not want to convey to the public, and that is                  8 why we say that if one can segregate this element of                  9 safety from code compliance, if one is trying to adopt                  10 certain standards, then those certain standards must be                  11 made clear to the public, so that they could understand                  12 well as to why they could satisfy themselves that this                  13 is a safe structure.                  14 CHAIRMAN: Yes, I appreciate that. Let me emphasise at this                  15 stage, as I hope I have emphasised on a number of                  16 occasions, anything that I say is not to be taken in any                  17 way as anything other than a way of trying to tease out                  18 the argument and see where we stand, you know.                  19 MR KHAW: Of course.                  20 CHAIRMAN: But let's approach it from another angle. Let's                  21 approach it from the angle that in fact one of the                  22 engineers, as indeed I think on the last occasion                  23 I think there were certain reservations by one engineer                  24 relating to particular aspects of the design which had                  25 caused him concern -- let's say one of the engineers</p>	<p>1 a kind of note of caution. If one is trying to                  2 segregate the question of safety, any elements of safety                  3 from code compliance, then it is necessary to set out                  4 certain objective benchmarks.                  5 COMMISSIONER HANSFORD: Understood.                  6 CHAIRMAN: Yes, understood. I would say, Prof Hansford has                  7 said that too.                  8 MR KHAW: Yes.                  9 CHAIRMAN: One of the benefits of having two persons sitting                  10 on a Commission of Inquiry like this is that wherever                  11 I fire loose cannons, I have Prof Hansford next to me,                  12 to bring the range back into reality.                  13 COMMISSIONER HANSFORD: That seems to be part of my role                  14 here!                  15 MR KHAW: Perhaps I should just very briefly address MTR's                  16 position, if I may.                  17 CHAIRMAN: Yes, of course.                  18 MR KHAW: Only point that I wish to say in respect of their                  19 first point, ie whether the question of safety and the                  20 question of fitness for purpose in fact could be                  21 considered without having regard to strict code                  22 compliance.                  23 On this point, in fact I only wish to say that if                  24 one decides to do so, then it is important to set out                  25 the relevant parameters, because we do not wish to</p>

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<p>1 address this issue of safety in a vacuum. We wish to                  2 address it by referring to certain standards which would                  3 help the public understand why we come to a particular                  4 conclusion.                  5 In relation to the suitable measures, the necessity,                  6 or whether suitable measures are excessive or                  7 unnecessary, I think we are in agreement with MTR in                  8 that we do not believe that any expert evidence would                  9 need to be introduced for that particular purpose.                  10 Perhaps the only difference between -- which                  11 I believe is a minor one -- is whether further evidence                  12 would need to be introduced in order to explain to the                  13 public as to why we need suitable measures, given our                  14 role as gatekeeper. I think that is what they are                  15 trying to demonstrate to the public by suggesting what                  16 they have said in paragraph 17 of their submissions.                  17 If we can just take a brief look at that paragraph.                  18 What they say is:                  19 "... it is anticipated that the Commission may                  20 consider it necessary to address the question of whether                  21 the purpose of the suitable measures are necessary for                  22 statutory or code compliance to allay any potential,                  23 residual public concerns as to why such suitable                  24 measures are being carried out in [the] event that the                  25 Commission finds that the structure is in any event</p>	<p>1 But if we look at the second part of their                  2 suggestion, which is slightly more complicated -- that                  3 is --                  4 CHAIRMAN: Sorry, bear with us.                  5 (Tribunal conferring)                  6 Carry on. Sorry. Thank you very much.                  7 MR KHAW: Not at all.                  8 If I can take Chairman and Mr Commissioner to the                  9 last sentence on the same page, starting from (b):                  10 "... secondly, factual and technical issues as to                  11 what preventive or remedial actions are the approval                  12 authorities prepared to accept to remedy Leighton's                  13 non-compliant works and provide assurance in respect of                  14 those parts of the as-constructed works in respect of                  15 which Leighton's as-built records are incomplete, so as                  16 to enable the approval authorities to provide the                  17 necessary approval and certification ..."                  18 I believe Mr Wong has stated clearly that we are not                  19 interested in the approval process. So, insofar as this                  20 request relates to the administrative measures or steps                  21 that would need to be taken before we could give any                  22 certification or approval, I believe that that is not                  23 within the terms of reference, to actually examine those                  24 administrative measures.                  25 As to why remedial actions would need to be carried</p>
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<p>1 safe ... It is submitted that this question involves:                  2 (a) firstly, a legal question as to the approval                  3 authorities' ... powers under the IoE and IoC to require                  4 MTR and Leighton to take preventive or remedial                  5 [measures], which question can be dealt with by which of                  6 legal submissions ..."                  7 I trust that MTR is not saying that in fact having                  8 prepared the holistic proposal, having conducted the                  9 holistic assessment, and also having accepted that                  10 suitable measures would need to be carried out, they                  11 still want to find out what powers the government in                  12 fact has for the purpose of asking them to carry out                  13 these remedial measures. I believe they are not saying                  14 that. I believe what they are trying to say is that it                  15 would be helpful for the public to know why suitable                  16 measures would be necessary, in view of our role as                  17 a gatekeeper. That can be easily solved, I believe,                  18 because I'm sure that as a result of stage 3 assessment                  19 MTR itself would know why suitable measures would be                  20 necessary. I believe that perhaps a joint statement                  21 could be made in order to explain to the public the                  22 powers that we have and the regime under which we say                  23 that those measures would need to be taken. I believe                  24 that can be easily done by way of submission, if not                  25 a separate witness statement.</p>	<p>1 out, that would be addressed in reply to paragraph (a)                  2 that they have set out in this paragraph.                  3 CHAIRMAN: I think that also touches upon another area which                  4 it seems to me that everybody has raised the flag of                  5 concern in respect of, and that is this Commission                  6 becoming a court of rehearsal for future civil                  7 litigation.                  8 MR KHAW: Yes, and we have set that out in our written                  9 submissions --                  10 CHAIRMAN: Yes.                  11 MR KHAW: -- where we try to explain why we should not                  12 revisit this question regarding the necessity of the                  13 suitable measures. We have also set out the practical                  14 difficulties in doing so in our written submissions, and                  15 we adopt those submissions.                  16 In fact, the short point that we were trying to make                  17 is that if we are going to revisit the whole stage 3                  18 holistic proposal, we do not know how long this                  19 Commission of Inquiry will last, so we hope that we have                  20 made our point clear.                  21 The last practical point that I wish to say, that                  22 goes back to one of the earlier points that I just                  23 discussed with the Commission. That is -- if we                  24 consider, for example, certain expert's view on various                  25 elements of structural safety, for example strength</p>

Page 49	<p>1 reduction, et cetera, I have to say that, again with no  2 disrespect, the government may not be very keen to enter  3 into any debate as to whether those elements, if  4 established, would actually lead us to a conclusion as  5 to whether the structure is safe or not, because we have  6 to abide by our own standards, so that is something that  7 we may perhaps need to consider if the Commission gives  8 directions regarding the scope of expert evidence on  9 structural safety. But I wish to flag that point  10 because I don't want the government to be accused of not  11 providing sufficient contribution if a particular  12 element of structural safety is going to be examined in  13 due course, when we will maintain our stance that this  14 may not be able to constitute a holistic assessment of  15 the issue of safety. That's a point that I wish to flag  16 at this stage.</p> <p>17 CHAIRMAN: Yes. Thank you.</p> <p>18 Mr Shieh, is there anything that has arisen earlier  19 that you would like to speak to?</p> <p>20 Submissions by MR SHIEH</p> <p>21 MR SHIEH: Just three points, all arising out of the  22 materials put forward by the MTR and the government.</p> <p>23 First, we do not accept -- can I put it in  24 a positive way: we submit that there is a distinction  25 between safety considerations and code compliance</p>	Page 51	<p>1 relation to paragraph 21 of the MTR's written  2 submissions, basically what they say should be focused  3 upon and what they say need not be looked at.</p> <p>4 My third point relates to that point which had  5 perplexed the Commission slightly, and that is what the  6 MTRC actually meant by their paragraph 17, and together  7 with it paragraph 22. Reading between the lines, it  8 seems to me that it boils down to this. The MTR,  9 together with Leighton, maintains that the structure  10 that was built was safe structurally. But, on the other  11 hand, the MTR, together with the government, has put  12 forward the stage 3 analysis and the two reports,  13 holistic and verification, which recommended suitable  14 measures. And so the MTRC maybe finds itself in a kind  15 of schizophrenic situation of on the one hand saying  16 that it's safe before this Commission, but on the other  17 hand, through those reports, saying something else needs  18 to be done. So the MTRC may well think it needs to  19 justify to the public why it's taking this position.  20 But it wants the government to take on that  21 responsibility.</p> <p>22 That is why, reading between the lines, in  23 paragraph 17, for example, the MTR says, "There may be  24 public concern as to why, if the Commission says it is  25 safe, why on earth are these suitable measures still</p>
Page 50	<p>1 matters. Code compliance may include matters of safety,  2 but it may also include matters other than safety  3 because, when any governmental authority sets up  4 whatever code it wishes to apply in engineering or  5 building matters, it could conceivably take into account  6 matters other than safety; matters such as, for example,  7 ease of administration; matters such as, to make life  8 easier for the approving gentleman so that he has  9 a cut-off point, without the need to do any detailed  10 calculations; the need to have a bit of a buffer, more  11 than is absolutely necessary to achieve safety; or,  12 I may venture to suggest, in this day and age, matters  13 of environmental friendliness, sustainability; or it may  14 well be that there would be something in the code to say  15 you cannot use materials imported from an authoritarian  16 regime somewhere -- I know not.</p> <p>17 So there is no necessary linkage between code on the  18 one hand and safety on the other. It may well be that  19 in considering matters of safety, one may take reference  20 to what is in the code, but that is not to say the code  21 equals safety.</p> <p>22 That is my first point, the delinking.</p> <p>23 Second, basically, we just associate ourselves with  24 what the MTR has put forward in their paragraph 21 and  25 I need not add to whatever has already been said in</p>	Page 52	<p>1 recommended? Let the government do the dirty job; I'm  2 not going to do it", even though MTRC co-signed the  3 report.</p> <p>4 The Commission need not make findings on what I have  5 just said. I am just putting a perspective on what may  6 be happening behind the scenes. This is a Commission of  7 Inquiry and matters of that could perhaps be  8 realistically taken into account.</p> <p>9 My submission is that it is entirely a matter for  10 the government how, as a matter of PR justification,  11 line to take, to explain to the public why it's doing  12 what it has done. To provide the kind of evidence which  13 the MTRC had suggested in paragraph 17 and paragraph 22  14 seeks to achieve nothing, because let's say after the  15 evidence has been adduced the Commission can do no more  16 than take note of the fact that, "Yes, I hear what you  17 say", but the Commission can't go further and say,  18 "I think it's a perfectly good justification" or it's  19 not a perfectly good justification, because the reality  20 is, if the government and the MTR, through the holistic  21 report and the verification report, want to do the  22 suitable measures, that is their decision. And in  23 a way, can I put it bluntly, the Commission should not  24 accept the alluring invitation to whitewash the  25 government's position. If the government wants to say,</p>

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<p>1 "I don't mind you saying it's safe but applying my 2 yardstick I have many factors to consider"; fair enough. 3 If it wants to go on and do it, fine, take on the 4 burden, but don't use the Commission of Inquiry taking 5 note of that position basically to whitewash the 6 government's stance or the MTR's stance. 7 These are the three points I wish to make. 8 CHAIRMAN: All right. Thank you very much. 9 Mr Boulding, do you have any comments arising? 10 MR BOULDING: No, thank you, sir, unless you have any 11 questions for us. 12 CHAIRMAN: No. Thank you. 13 Mr Khaw, any points arising? 14 MR KHAW: The only point I wish to make is in reply to 15 Mr Shieh's last point, that is if the government or MTR 16 wishes to put forward a statement explaining to the 17 public why suitable measures are necessary. It's really 18 something strictly between the MTR and the government 19 because it arises from the stage 3 assessment, and if we 20 wish to explain to the public the underlying rationale 21 behind in order to alleviate their concern, then we 22 should do it, and that does not concern Leighton at all. 23 CHAIRMAN: Yes. Would you -- I understood earlier that you 24 were saying that this might be something that the 25 Commission might incorporate for the benefit of the</p>	<p>1 observations or submissions to you. Obviously, myself 2 and the rest of the Commission's legal team will take on 3 board all the submissions that have been made, both in 4 writing and orally this morning, and tender such advice 5 and assistance as we can to the Commission as it feels 6 necessary. 7 CHAIRMAN: Good. Thank you very much. 8 MR SHIEH: Sorry, I have just been reminded of one thing, it 9 should be obvious, but perhaps for the record I have 10 been asked whether or not anything arises from the 11 materials that have been put forward. 12 CHAIRMAN: Yes. 13 MR SHIEH: From time to time, there were submissions in the 14 MTR's written materials and the government containing 15 suggestions, such as paragraph 18 of MTR, saying there 16 were breaches by Leighton of obligations. Those matters 17 we have not addressed but we simply put down a marker 18 that those obviously are disputed. 19 CHAIRMAN: Of course, and I think that was what prompted me, 20 perhaps collaterally, to comment that we have to be 21 careful we don't end up being a court of rehearsal for 22 private litigation. 23 MR SHIEH: Thank you very much. 24 CHAIRMAN: Thank you very much indeed. That really has 25 helped us as to the way forward. Myself and</p>
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<p>1 public, not incorporate and necessarily support but just 2 to say, "This is what you -- this fills out for the 3 general public interest" -- 4 MR KHAW: Yes. I didn't go so far as to say the Commission 5 should incorporate those points. I think it's 6 Mr Boulding's point, if I understand correctly. 7 CHAIRMAN: All right. Fine. Good. 8 (Tribunal conferring) 9 MR BOULDING: Sir, perhaps -- 10 CHAIRMAN: So that would be in submissions and maybe 11 incorporating a joint statement. 12 MR BOULDING: Sir, perhaps -- I don't want there to be any 13 misunderstanding about this -- but if you were attracted 14 to the submission we make in paragraph 17, we are not 15 expecting to you to make a finding on it. We were just 16 expecting that you might want to refer to it in your 17 final award, purely by way of an explanation. 18 CHAIRMAN: All right. That helps us a lot. Thank you very 19 much indeed. 20 Mr Khaw, anything further? 21 MR KHAW: No, thank you. 22 CHAIRMAN: Good. 23 Mr Pennicott? 24 MR PENNICOTT: Sir, I don't think, in the circumstances, it 25 would be appropriate for me to make any further</p>	<p>1 Prof Hansford will need to consider the position, and we 2 hope to be able to give written directions as to what we 3 consider to be and will therefore be the way forward in 4 this matter, and to do so in the next couple of days, 5 really, the next three or four days at least. 6 Good. Anything further at all arising? No? 7 MR SHIEH: In relation to Mr Southward's expected report, as 8 I said, the comment on the holistic report is 9 I understand more or less complete and good to go, 10 subject to final touches. The verification report, as 11 I said, we will see how Mr Southward goes today. I'm 12 just laying down a marker, in fairness, that there may 13 be a request in writing for a shortish period of 14 extension. 15 CHAIRMAN: We accept that. 16 MR SHIEH: We need not deal with it now because I'm not 17 fully briefed about that, and a lot turns on the 18 progress which Mr Southward is able to make today, but 19 I will just lay down a marker so that, in fairness, the 20 Commission is not taken by surprise. 21 CHAIRMAN: Good. Thank you very much. 22 So we are adjourned ...? 23 MR PENNICOTT: On one view, to 2 January. 24 CHAIRMAN: Yes. 25 I would add that the reason for that is manifold.</p>

1 A lot of it is to do with the fact that the experts just  
 2 require time, but also, as I emphasised before,  
 3 I wouldn't like it to be thought by the public that  
 4 somehow everybody is sitting just saying, "Why don't we  
 5 just have a holiday now?", but when this Commission  
 6 started, having regard to its importance, persons of  
 7 very high status as experts in the building industry  
 8 were brought on board, and because of the extension of  
 9 the Inquiry and other matters arising, they have had to  
 10 do their very best to re-arrange otherwise very busy,  
 11 often international, commitments. And then to try to  
 12 bring them all together at one place, at one time, has  
 13 required a good deal of ingenuity.

14 We have at all times been aware of the need to get  
 15 this Commission to a position with a final report as  
 16 soon as possible, and I just wanted to emphasise that  
 17 again, it being a question of man management.

18 Thank you very much indeed.

19 (11.45 am)

20 (The hearing adjourned until 10.00 am  
 21 on Thursday, 2 January 2020)

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