

MEMORANDUM TO THE BOARD

CORPORATE SERVICES REPORT – JANUARY 2012

Report by Legal and Corporate Services Director

1. PURPOSE

- 1.1 To inform the Board of the anticipated Parliamentary process for approval of the Transfer Order and its consequences for the timing of the transfer date.
- 1.2 To inform the Board of the recommendations of the Audit Committee as regards the preparation, audit and laying before the parliaments of BW Annual Report and Accounts in the light of a mid-financial year transfer date
- 1.3 To seek approval of the creation of a 'Scotland Committee' of the Board and the delegation to it of all Board oversight of BW activities in Scotland and the delegation of all Chief Executive duties and powers, so far as they relate to BW activities in Scotland, to the Scotland Director, all to take effect from 1 April 2012.
- 1.4 To inform the Board of recent legal developments and to provide an overview of the work and role of the Legal Department.

2. PUBLIC BODIES ACT 2011

- 2.1 The Public Bodies Bill received Royal Assent on Wednesday 14 December 2011. Sections 10 and 11 (consultation and procedure) come into force immediately; the remainder of the Act comes into force on Valentine's Day.

3. PARLIAMENTARY SCRUTINY OF THE TRANSFER ORDER

- 3.1 The making of the Transfer Order is subject to an enhanced 'super-affirmative' process in the Westminster Parliament that must last a minimum of 40 days, though it is almost certain the BW/CRT Order will be made subject to an enhanced scrutiny period of at least 60 days. As a consequence it is virtually certain that the original target date for the transfer of 1 April 2012 will not be achievable, with it more likely to take place in the last quarter of May 2012.
- 3.2 The draft Order will be considered by as many as 5 parliamentary committees together with a debate on the floor of each House. The Committees are:

- Merits of Statutory Instruments (HL)
- Joint Committee on Statutory Instruments
- Environment, Food and Rural Affairs Select Committee (HC)
- Delegated Legislation Committee (HL)
- Delegated Legislation Committee (HC)

For all of the committees it is expected to be a paper process other than for the Efra Select Committee. It is anticipated that the Efra Committee will wish to hold public sessions at which it takes evidence from witnesses. This element of the scrutiny process is the reason for an extension of the default 40 day scrutiny to a 60 day period and is also the source of greatest risk of general delay. The view of government is that, because the BW Order will be the first significant order under the PBA 2011, Parliament will want to demonstrate both to Government and to the public generally, its intent to fully scrutinise public body reform proposals made by ministers under the 2011 Act and not to be treated as a rubber stamp.

4. TRANSITIONAL PROVISIONS FOR ANNUAL REPORT AND ACCOUNTS

- 4.1 At its meeting on 11 January the Audit Committee considered the transitional provisions for the preparation, audit and laying before the parliaments of the Annual Report & Accounts of BW in the light of the near certainty of the transfer date not being co-terminous with the financial year end.
- 4.2 The recommendation of the Committee to the Board and to the two governments is that the transfer be handled, in accounting and reporting terms, in a manner that as far as possible emulates a major asset sale by an on-going corporate entity in the commercial sector.
- 4.3 Thus, rather than have an extended accounting period from 1 April 2011 to the actual transfer date (as contemplated in the current draft of the Transfer Order), instead BW will prepare, have audited and report on the 12 months 1/4/11 to 31/3/12 in the usual way. If by the end of that process the transfer has taken place (e.g. on 1 June 2012), it will be the 'Scottish Board' of BW that delivers the AR&A to the governments for laying before the Westminster and Holyrood Parliaments. The current provisions in the Transfer Order for support from CRT in that process would be retained. Grant Thornton would be the external auditors of the 11/12 AR&A.
- 4.4 For completion of the transfer transaction, a completion financial statement would be prepared immediately after the transfer date, to be audited by Grant Thornton and delivered to both governments. This statement would provide an opening balance sheet for CRT and an 'in-year' balance sheet revision for BW(S).
- 4.5 The effect of the transfer would then be reported in the 2012/2013 AR&A of BW as prepared by the 'Scottish Board' and would be laid before both parliaments given that the AR&A will report on GB wide activities of BW for part of the year. The 2012/2013 accounts would be audited by the Auditor General for Scotland who from the transfer date will be the BW auditor. Nevertheless it is anticipated that (subject to finalisation of detailed arrangements) they would rely on the work of Grant Thornton, as reported by that firm to them, in respect of the completion financial statement and in respect of the period of GB wide activity from 1 April 2012 to the transfer date.
- 4.6 This preferred methodology recommended by the Audit Committee requires the agreement of both governments and a (relatively minor) amendment to article 5 of the draft Transfer Order. Whilst Mr Hargreaves was unfortunately unable to attend the Audit Committee meeting, the paper raising the issue was sent to him shortly before the Committee meeting took place. The Audit Committee recommendation has now been put to Defra who are taking up the matter with the Scotland Government.

5. PROPOSED SCOTLAND COMMITTEE OF THE BOARD

- 5.1 Notwithstanding the anticipated delay to the transfer to CRT, there is a preference that the governance of BW, in the period from 1 April 2012 to the transfer, emulates, as far as possible, the post transfer position. To that end it has been agreed in principle with the respective governments that a Scotland Committee of the BW Board be created and the powers and duties of the Board in respect of its oversight of the activities of BW in Scotland be delegated to that Committee. In addition it is planned that the powers and duties of Robin Evans as Chief Executive of BW be delegated to Steve Dunlop, Scotland Director, so far as they relate to the activities of BW in Scotland.
- 5.3 It is proposed that Jon Hargreaves and Duncan Sutherland comprise the Scotland Committee and that the Board members designate who are awaiting taking up their posts upon the transfer to CRT taking place attend meetings of the Scotland Committee as observers and assist in its deliberations.
- 5.4 Terms of Reference for the Scotland Committee are annexed to this paper and the Board is invited to approve them and formally resolve to establish the Committee.

5.5 The Board is also invited to resolve that the powers, authority and duties of Robin Evans as Chief Executive of BW be wholly delegated to Steve Dunlop, Scotland Director, so far as they concerns the business, powers, duties, obligations and liabilities of BW undertaken in Scotland.

6. LEGAL DEVELOPMENTS

6.1 The following recent legal developments are reported to the Board for it to note:

[Confidential material exempt from disclosure under s42 Freedom of Information Act 2000 removed]

6.2 The work of the Legal Department is very extensive in respect of both its legal scope and the range functions of the organisation supported. Such work is however rarely very visible as its outcomes are reported as projects or work of the functions supported. To assist awareness I highlight a few issues below where awareness of the scale of the particular activity (either way) has sometimes been misconstrued. I have listed in Annex 2 to this paper examples other currently live work of the Department.

6.3 *Moorings enforcement* – Of the 1,458 incidents opened for investigation by the Boating Enforcement Team around 334 became active enforcements of which just 6 cases involved the commencement of claims in the County Court. The rest were resolved by boats moving on, lawful moorings being found or boats leaving the network altogether.

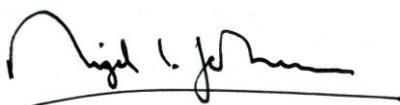
6.4 *Employer and Public Liability Claims* – Claims with a reserve in excess of £10,000 are managed by legal department using the services of claims adjusters or external lawyers. The role of the in-house lawyer is to act as intelligent client and to ensure cases are handled and resolved in the most cost effective way consistent with BW values.

6.5 There are currently 30 'live' employer liability claims of which 20 are claims in excess of £10k managed by legal – most involve industrial 'disease' (e.g. vibration white finger) but some involve injury from incidents.

6.6 There are currently 217 open public liability claims of which 157 are claims in excess of £10k overseen by the department. Some 24 of these are being handled by external solicitors on instruction from the legal department, the remainder by loss adjusters on instruction from legal (mainly to ensure the appropriateness and proportionality of settlement figures). The largest claim is for £5m and although PL claims are insured, effective management is required to protect the group insured 'deductible'.

6.7 *Valuation Officer v BW* - This case relates the valuation for business rates purposes of the majority of non-investment hereditaments in England and Wales (which includes the track). BW has consistently asserted (and won in the tribunal at each quinquennial valuation round) that such valuation should be zero. We won (again) at the Valuation Tribunal stage in the latest valuation round and HMRC are now appealing the decision to the Upper Tribunal. The case is worth £2.4m (approximately) in retrospective rates paid to date.

6.8 Notwithstanding the above, the majority of the work of the department is 'non-contentious' and a flavour of such work is given from the examples listed in Annex 2 to this paper.



NIGEL JOHNSON

Corporate Services Director & Secretary to the Board

18 January 2012

BRITISH WATERWAYS BOARD

SCOTLAND COMMITTEE - TERMS OF REFERENCE

1. MEMBERSHIP

- 1.1 The Committee shall comprise those members of the Board appointed to it by the Scottish Ministers pursuant to section 1(2A)(b) Transport Act 1962.
- 1.2 The Committee may invite to attend its meetings, as observers, Board members designate who have been selected for future appointment to the Board by the Scottish Ministers.
- 1.3 The quorum shall be one member of the Committee provided at least one of the observers referred to in 1.2 above or the Scotland Director is able to participate in the deliberations of the Committee.

2. PROCEDURE

- 2.1 The Committee may appoint a secretary to the Committee who shall take minutes of the proceedings of the Committee. The minutes shall be copied to the Board.
- 2.2 Meetings may be held by telephone or video conferencing whenever convenient and appropriate, provided the persons participating in such meetings are at all times in simultaneous two-way audio contact with all other participants in that meeting.

3. AUTHORITY

- 3.1 The Committee shall exercise all of the powers of the Board and shall ensure due performance all of the Board's duties and obligations, statutory or otherwise, so far as they relate to its activities and business in Scotland.
- 3.2 Any proposed transaction, or other proposal, initiative or event that requires the prior approval of Scottish Ministers shall be reported to the Board before such approval is given.
- 3.3 The Internal Audit Department, if so requested by the Board Audit Committee, shall have authority to make any enquiries into the business and activities undertaken under the authority of the Scotland Committee.

4. DISSOLUTION

- 4.1 The Committee shall be dissolved upon the transfer of the undertaking of the Board in England & Wales to Canal & River Trust pursuant to an Order under the Public Bodies Act 2011, or at any other time the Board resolves to dissolve the Committee.

January 2012

Examples of work currently handled in the Legal Department

- **Section 106 approved process**- drafting of process to guide BW participation in agreements under section 106 of the Town and Country Planning Act 1990 in its capacity as developer, landowner and statutory consultee, to improve consistency, efficiency and credibility of BW in the context of the emerging community infrastructure levy.
- **Website terms and conditions** – a review of Waterscape and BW’s website terms and conditions and privacy policy in preparation of the launch of CRT’s new website.
- **Probation Trust agreements** – the drafting of a service level agreement with a probation trust that is carrying out bank maintenance work for BW. The idea is that BW will be able to save money as the young offenders carry out the work for free (save the cost of materials and the cost of being supervised by a Probation Trust Officer). BW is also looking at other probation trusts to carry out similar work, therefore this agreement may be used as a template, along with other ancillary agreements such as confidentiality agreements.
- **Enabling Act research** – research into the jurisdiction of parts of the River Severn and ownership of certain navigational structures in preparation of proposed negotiations with the Herefordshire and Gloucestershire Canal Trust. [Confidential material exempt from disclosure under s43 Freedom of Information Act 2000 removed]
- **Tring Reservoir Lease** - Putting in place a lease of the surrounds of the Tring reservoirs to the Herts & Middlesex Wildlife Trust which will allow it to manage the land as a nature reserve and to apply for funding to support its management activities.
- **Water Act 2003** - Liaising with the Environment Agency regarding implementation of the Water Act 2003 whereby the Canal & River Trust will apply for abstraction licences from the Agency for many of its water supplies to the canals.
- **TfL Agreement** - Advising on the arrangements for TfL sanctioning BW’s use of TfL’s standard signage for cyclists on the towpaths in the Olympic Park. This has involved the funding arrangements and also the obligations and rights which will result for BW from entering into this.
- **PLA Delegation** - Advising on the legal agreement for the delegation to the PLA of parts of BW’s navigational jurisdiction over the waterways leading from the Thames to the southern end of the Olympic Park.
- **River Witham wall maintenance** - Advising on the responsibility for maintenance of a river wall on the River Witham in Lincoln and the road above that wall, where over £100,000 of work is needed. The county council believed that BW, as owner of the river, was responsible, but, with research based on the findings of the Estates Technician, it was established that the enabling Act, which authorised the work for making the river navigable in the early 19th century, specifically provided that the section of wall in question was to be the responsibility of the owners of the properties fronting onto the river.
- **Estates Support** - Establishing arrangements for more efficient estates support for the operational parts of the business. Liaising with the Head of Estates, an Estates Manager and a Property Analyst, who were preparing a paper to propose a system to make use of existing resources (internal and external surveyors) for assisting operational staff with the estates aspects of their work.
- **Legal Panel** - Managing Panel solicitors (including agreeing fixed fees for certain types of regular work - eg leases, licences, surrenders). The Panel will shortly be reviewed taking into account CRT’s requirements going forward.

- **Funding Agreements** - Setting up a system for the efficient evaluation of funding agreements for Enterprise, so that the risks of particular agreements may be assessed in a cost effective manner; this includes evaluating proposals from Panel firms as to how they could assist in this process on a fixed fee basis.
- **Charity Act requirements for property transactions** - Advising on how the change to charitable status will affect property transactions, to CIG, surveyors and external solicitors. Such advice will be formed into a paper for CIG concerning the Charities Act requirements for land transactions.
- **Land registration in CRT's name** - Liaising with the Land Registry to make arrangements for the change of all BW titles to the name of CRT once the statutory transfer has taken place, including negotiating the fees which the Land Registry will charge for their time in carrying out this work.
- **Fundraising Agreements** - Drafting and advising upon various fundraising agreements, including an agreement to engage professional fundraisers to work on behalf of CRT.
- **Commercial Agreements** - Drafting and advising upon various commercial agreements, including website hosting, the customer contact centre contract, website design contract and various others.
- **Olympics** - Advising generally on various matters relating to the Olympics including security issues. This involves liaising with the Police and LOCOG.
- **CRT trademarks** - Advising on the application to register the name "Canal & River Trust" and swan logo as registered trademarks.
- **Road bridge liabilities** – clarification of duties in respect of BW bridges carrying public roads, including successful challenge to legality under road traffic legislation of local authority's requirement for BW to pay £250k for replacement bus service during works.
- **Carbon Reduction Commitment** – advising on BW's obligations to register for scheme and explanation of detailed rules for reporting annual emissions together with clarification with the Environment Agency of treatment of CRT and BW Scotland going forward.