



## **FOWEY HARBOUR COMMISSIONERS**

### **GUIDANCE NOTES FOR BOARD MEMBERS**

#### **A General Guide to the legislation relating to Harbour Authorities**

##### **INTRODUCTION**

1. This guide is intended to give an overview of the main sources of legislation relating to Harbour Authorities. It does not attempt to cover every form of statutory provision which may affect those engaged in the operation of ports and harbours. Instead, this guide aims to highlight the main legislative framework which is particular to Harbour Authorities.

##### **WHAT IS A HARBOUR AUTHORITY?**

2. A Harbour Authority is a body which has been given statutory powers or duties for the purpose of improving, maintaining or managing a harbour. The actual body which is the Harbour Authority can take different forms. Some are local authorities, some are companies registered under the Companies Act 1985 and some are statutory companies (i.e. a company established by Act of Parliament). Many Harbour Authorities are however of the type commonly known as "Trust Ports", these are established by Acts of Parliament but unlike authorities which are companies, are controlled not by Shareholders but by a specially constituted body, sometimes known as Commissioners. Fowey Harbour Commissioners are a Trust Port set up in 1869. The present local act is the Fowey Harbour Order Act 1937 (confirmed 1960). A Harbour Revision Order of 1980 gave additional powers.

##### **LOCAL LEGISLATION**

3. With the exception of the British Waterways Board and Associated British Ports, authorities derive their basic statutory powers and dues from local legislation. Until 1964, this legislation was always in the form of a private Act of Parliament (or in an order contained in, and confirmed by, an Act of Parliament). The Harbours Act 1964 introduced a system whereby such powers and duties can be conferred or varied by an order in the form of a statutory instrument, made by the Secretary of State (or Minister of Agriculture, Fisheries and Food) (see below).
4. Many Harbour Authorities were established by a private Act of Parliament, often in the nineteenth century. In the case of a Trust Port, this Act would set out the constitution (or membership) of the authority and the method by which members were to be appointed (for example, by election from amongst the users of the harbour, by a local authority or other local interests, by central government, or a combination of these).
5. The "Establishing" Act would also usually incorporate a large number of provisions of the Harbours, Docks and Piers Clauses Act 1847. The 1847 Act was passed by Parliament in order to save the promoters of local harbour legislation from having to repeat, in that legislation, standard provisions relating to the construction and/or operation of the harbour. The 1847 Act deals, amongst other things, with -

the construction of the harbour

the setting and collection of rates (but see also now the Harbours Act 1964)

the appointment and functions of a Harbour Master

the regulation of activities and conduct at the harbour, including the power to make byelaws.

6. One of the most important provisions of the 1847 Act is section 33. This provides that, subject to the payment of rates (i.e. harbour dues) the harbour "shall be open to all persons for the shipping and unshipping of goods and the embarking and landing of passengers". The importance of Section 33 was confirmed in the case of *R. v. Dover Harbour Board ex parte Peter Gilder & Sons* [1995] 3 All ER 37 where the High Court held that that section prevented the Dover Harbour Board from refusing to make the Port of Dover available for those wishing to use it for the export of live animals.
7. In many cases a Harbour Authority's local legislation will consist of several different Acts or Orders, passed or made over a considerable period of time.
8. Additional legislation may have been required, for example to authorise the construction of new harbour works such as piers or jetties, to modernise the powers to regulate the harbour or (more recently) to expand the range of activities which the authority may carry on at, or in connection with, the harbour. (The need to obtain statutory authorisation to construct a work below high-water mark is discussed in the Guide to the Legal Aspects of Works below High-water Mark).
9. These later pieces of legislation will often have repealed provisions in earlier Acts or Orders relating to the Harbour Authority, either expressly or because a later enactment is inconsistent with an earlier one. Care should therefore be taken in examining a Harbour Authority's legislation to ensure that a provision has not been repealed or amended by a later piece of legislation.

#### THE HARBOURS ACT 1964

10. Public general legislation, as its name implies, is legislation which is general, as opposed to local, in its effects. The Harbours Act 1964 is perhaps the most important single piece of public general legislation affecting harbour authorities.
11. The 1964 Act modernised the system whereby harbour authorities may levy charges or dues on those using the harbour. Prior to the Act, dues had been specifically set by Harbour Authorities in schedules contained in their local legislation, which required updating as increases or adjustments became necessary. The 1964 Act gave Harbour Authorities a general power to set ship, passenger and goods dues (that is to say, dues in respect of ships using the harbour, passengers embarking or disembarking at the harbour, and goods entering, leaving or passing through the harbour by ship). The 1964 Act also empowers Harbour Authorities to levy combined charges (that is to say, ship, passenger and goods dues and other charges which a Harbour Authority may have power to levy, for example for services provided at the harbour). A procedure is laid down by the Act for making objections to ship, passenger and goods dues (see sections 26-39).

12. Section 48A of the 1964 Act (which was added by the Transport and Works Act 1992) required a Harbour Authority, in formulating or considering any proposals relating to its functions under any enactment, to have regard to various environmental matters, including conservation, freedom of public access to places of natural beauty and the availability of facilities for visiting buildings, etc. of archaeological, architectural or historic interest.
13. It should be noted that certain environmental functions are conferred on Harbour Authorities under the Conservation (Natural Habitats, & c.) Regulations 1994.

#### HARBOUR REVISION ORDERS AND HARBOUR EMPOWERMENT ORDERS

14. The 1964 Act also introduced two new forms of order-making procedure, so as to reduce the need for a private Act of Parliament (i) where an existing Harbour Authority requires an addition to its statutory powers and duties and (ii) where it is desirable to create a new Harbour Authority to manage a harbour. Orders of the first kind are called Harbour Revision Orders and orders of the second kind, Harbour Empowerment Orders.

#### HARBOUR REVISION ORDERS

15. Subject to what is said below, a Harbour Revision Order may be made for achieving all or any of the objects specified in Schedule 2 to the 1964 Act. Amongst these objects are the following -

reconstituting the authority or establishing another authority in place of the existing one

varying or abolishing duties or powers of the authority contained in local legislation

adding to or substituting such duties or powers

revising the jurisdictional limits of the authority

authorising the compulsory acquisition of land for the purposes of harbour works

extinguishing or diverting footpaths or bridleways

conferring borrowing powers on the authority

closing part of the harbour or reducing the facilities available there.

16. Except in the case of partial closure or a reduction in facilities, the Secretary of State or Minister is not able to make a Harbour Revision Order unless he is satisfied that it is "desirable in the interests of securing the improvement, maintenance or management of the harbour in an efficient and economical manner or of facilitating the efficient and economic transport of goods or passengers by sea or in the interests of the recreational use of sea-going ships" (section 14(2)(b)).
17. Most applications for Harbour Revision Orders are made by the Harbour Authority itself but it is possible for an application to be made by a body appearing to the Secretary of State/Minister to have a substantial interest or to be representative of persons appearing to him to have such an interest. In certain circumstances the Secretary of State/Minister may himself make a Harbour Revision Order.

18. An order for the partial closure of a harbour, a reduction of facilities in the harbour or the disposal of property no longer required for the purposes of the harbour may be made if the Secretary of State is satisfied that it would be desirable to do so, even though the requirements described in paragraph 16 above are not met. The complete closure of a harbour still requires a private Act of Parliament.

#### HARBOUR EMPOWERMENT ORDERS

19. Harbour empowerment orders deal with the situation where there is no Harbour Authority but it can be shown that it is desirable that one should be established. The body in question might be a pre-existing body; alternatively, the order may itself establish the body and make provision for its constitution. The order may contain all such powers as are necessary to enable the Harbour Authority to create/operate/ regulate the relevant harbour facilities.

#### PROCEDURE FOR OBTAINING HARBOUR ORDERS

20. The procedure for both types of Harbour Order allows for objections to be made to the proposed order and, if necessary, for a public inquiry to be held into those objections, before the decision is taken whether to make the order. The precise procedural requirements are set out in Schedule 3 to the 1964 Act.

#### THE DOCKS AND HARBOURS ACT 1966

21. The Docks and Harbours Act 1966 enables a Harbour Authority -

to provide, maintain and operate inland clearance depots, either alone or jointly with another. (The consent of the Secretary of State/Minister is required where the depot is not to be on harbour land)

to acquire by agreement any business or undertaking which consists wholly or mainly of the carrying out of activities relating to harbours or the provision etc. of an inland clearance depot

to subscribe for or acquire the securities of a body corporate which is (or will be) engaged in such activities or in providing etc. any such depot

to acquire by agreement any land wherever situated.

22. The 1966 Act also contains provisions widening the borrowing powers of harbour authorities.

#### THE DANGEROUS VESSELS ACT 1985 AND THE DANGEROUS SUBSTANCES IN HARBOUR AREAS REGULATIONS 1987

23. The Dangerous Vessels Act 1985 enables a Harbour Master to give directions prohibiting the entry (or requiring the removal) of a vessel into (or from) the harbour if he considers its nature, condition or contents are such that its presence might involve grave and imminent danger to persons/property or grave and imminent risk that the vessel may, by sinking or foundering, prejudice the use of the harbour by other vessels.

24. The Dangerous Substances in Harbour Areas Regulations 1987 control the loading, unloading, storage and movement in a harbour of certain dangerous substances (as defined in Regulation 3). Harbour Masters are given powers to make directions regulating or prohibiting the presence etc. of such substances in the harbour.

#### THE PILOTAGE ACT 1987

25. The Pilotage Act 1987 confers upon a Harbour Authority responsibility for pilotage where the authorities harbour falls wholly or partly within an active former pilotage district. For pilotage purposes, such a Harbour Authority is known as a "competent Harbour Authority" and, as such, has a duty to consider whether there is a need for pilotage and, if so, to make the necessary provision for supplying it. The authority must also determine whether, in the interests of safety, pilotage should be compulsory.

26. The 1987 Act contains detailed provision for (amongst other things) authorisation of pilots, pilotage directions (making pilotage compulsory), exemption certificates, charges, agents and joint arrangements.

#### THE AVIATION AND MARITIME SECURITY ACT 1990

27. The Aviation and Maritime Security Act 1990 confers important responsibilities on Harbour Authorities for the purpose of protecting ships and harbour areas against acts of violence.

#### THE PORTS ACT 1991

28. The Ports Act 1991 makes provision for a Trust Port to transfer its undertaking to a specially formed company whose shares are then sold (under the direction of the Secretary of State), thereby "privatising" the port or harbour in question. A number of former Trust Ports, including Tees and Hartlepool, Medway, Clyde and Forth, were privatised under the "voluntary" procedure contained in the 1991 Act. That Act also contains a mechanism whereby the Secretary of State can require a trust port to privatise itself, but it is not the policy of the Government to have recourse to this mechanism.

#### THE MERCHANT SHIPPING ACT 1995

29. Part VI of the Merchant Shipping Act 1995 and the regulations made under it confer certain powers in a Harbour Master in connection with oil pollution from ships. Under Part VI the Secretary of State has power to make orders relating to the provision at ports and terminals of reception facilities for the discharge from vessels of oil and other specified substances (section 128). He may also make regulations requiring a Harbour Authority to prepare a Waste Management Plan (Chapter 1A). The Merchant Shipping (Port Waste Reception Facilities) Regulations 1997 have been made under this power.

30. By virtue of Part VIII of the 1995 Act a Harbour Authority is a local lighthouse authority as respects its harbour. A Harbour Authority has power to carry out its harbour operations consisting of the marking or lighting of the whole or any part of its harbour.

31. Local Lighthouse Authorities are subject to the general supervision of the General Lighthouse Authority. In the case of England and Wales, this is Trinity House; in the case of Scotland it is the Commissioners of Northern Lighthouses. A General Lighthouse Authority is required (by section 198 of the 1995 Act) to inspect all

lighthouses, buoys and beacons provided by a Local Lighthouse Authority. With the approval of the Secretary of State, a General Lighthouse Authority may direct a Local Lighthouse Authority to lay down buoys, or remove or discontinue any lighthouse, buoy or beacon, or make alterations to the operation etc. of any lighthouse, buoy or beacon (section 199). Similar provision is also found in the local legislation of some Harbour Authorities as a result of the incorporation of sections 77 and 78 of the Harbours, Docks, and Piers Clauses Act 1847 (see above).

32. The 1995 Act also contains powers for Harbour Authorities to deal with wrecks in their harbours (section 252).

*Please note that the list of statutory provisions in this Guide, whilst intended to cover the most significant statutory provisions concerning Harbour Authorities, is not exhaustive.*

### PUBLIC GENERAL LEGISLATION REFERRED TO IN THIS GUIDE

33. Harbours, Docks, and Piers Clauses Act 1847 (10 and 11 Vict. c.27)

Harbours Act 1964 (c.40)

Docks and Harbours Act 1966 (c.28)

Dangerous Vessels Act 1985 (c.22)

Pilotage Act 1987 (c.21)

Dangerous Substances In Harbour Areas Regulations 1987 (S.I. 1987/37)

Aviation and Maritime Security Act 1990 (c.31)

Ports Act 1991 (c.52)

Conservation (Natural Habitats, &c) Regulations 1994 (S.I. 1994/2716)

Merchant Shipping Act 1995 (c.21)

Merchant Shipping (Port Waste Reception Facilities) Regulations 1997 (S.I. 1997/3018).

### **Personal liability of Board Members.**

Trust Board Members have a duty of care to the Trust they are appointed to oversee. Board members who have acted honestly, reasonably, without negligence and in good faith will not be faced with personal civil liability for actions taken as a Board Member. Board Members should note that the Commissioners Clauses Act 1847 (Section 9) provides for automatic disqualification of any Board Member entering into a contract or other arrangement for personal gain with the Board. Anyone entering into such an arrangement is personally liable for any actions taken in purported execution of Board functions from that point onwards. All

Boards should adopt the provisions of the Commissioners Clauses Act into their Local Act in the interests of good corporate governance.

Although Board Members cannot be indemnified for a criminal act (this includes offences under the Water Resources Act) and the Government judges the risk of any civil liability being incurred in good faith as extremely small, it has provided an indemnity for its own non Departmental Public Body appointees in the following terms:

“The Government has indicated that an individual Board Member who has acted honestly, reasonably, in good faith and without negligence will not have to meet out of his personal resources any personal civil liability which is incurred in the execution or purported execution of his Board function”.

Fowey Harbour Commissioners insurance policy has been expanded to cover Commissioners liability risks.