

STATES OF JERSEY



INCORPORATION OF PORTS OF JERSEY (P.70/2012): COMMENTS

**Presented to the States on 9th October 2012
by the Economic Affairs Scrutiny Panel**

STATES GREFFE

COMMENTS

1. Introduction

- 1.1 This report sets out the comments of the Economic Affairs Scrutiny Panel to the States on *P.70/2012 Incorporation of Ports of Jersey*. Owing to the short timeframe that we have been operating in since the reference back on 12th September, we trust that Members will understand that the Panel has been unable to present these Comments within the deadline (before noon on Friday 5th October) set out in Standing Orders.
- 1.2 During the debate on *P.70/2012 Incorporation of Ports of Jersey* on 12th September 2012, when questions were raised about the level of detail provided by the Minister for Economic Development in his report, it was apparent that in addition to the Chairman's speech outlining the Panel's work to date and current position on the issue, some Members would have welcomed written comments from the Panel. The Panel is pleased to take the opportunity arising from the reference back to the Minister to present its written comments on *P.70/2012*.

2. Panel Work on Incorporation of Ports of Jersey

- 2.1 At the Panel's first meeting on 8th December 2011, we identified plans for the incorporation of Ports of Jersey as a key topic of our Work Programme. Since that point, it has formed an integral part of our ongoing work, and has been the subject of discussion at Quarterly Hearings, requests for written information (including draft versions of the Report and Proposition, the first of which was received by the Panel in May 2012), two dedicated briefings from the Chairman of the Shadow Board and Group Chief Executive Ports of Jersey, and a site visit to Jersey Airport. Arrangements for a site visit to the harbours are ongoing, pre-dating the States debate on 12th September.
- 2.2 Subsequent to the States debate, the Panel held a Public Hearing with the Minister for Economic Development on 19th September, which included questioning on a number of the key issues raised by Members during the initial debate. A podcast and full transcript of that Public Hearing have been uploaded to access on the Scrutiny website (www.scrutiny.gov.je).

3. An 'In Principle' Decision?

- 3.1 Establishing the 'in principle' context of *P.70/2012* is important. The Panel appreciates the concern expressed by some States Members, and indeed Union representatives, that in the absence of specific wording to that effect, the Proposition goes beyond establishing an 'in principle' decision, thereby taking away the opportunity for meaningful 'scrutiny' and discussion of some of the notable issues that incorporation raises. However, the Panel has been of the understanding from the outset of its work that this Proposition was intended to be, and remains, an 'in principle decision'. It sets a direction of travel, but requires detailed work to be undertaken in a number of areas, and ultimately legislation to be brought to the States at a later date to establish the new incorporated body.

- 3.2 Our position has been based not only on the wording of the draft and lodged versions that we have been provided with by the Minister for Economic Development, but also from our discussions with the Minister and the Ports of Jersey throughout the time that we have been looking at this matter (see below). It has shaped our approach to the work that we have undertaken to date, and the work that we believe should be undertaken from a Scrutiny perspective at a later, more appropriate time, a point which we hope is of reassurance to those with understandable concerns.
- 3.3 We also felt that Scrutiny of this issue should properly focus on the detail of the proposals, not the political ideology of the rights and wrongs of incorporation that understandably form part of the discussions at this stage of the project. We believe that these issues are more appropriately the remit of individual States Members than the impartial, objective role prescribed to a Scrutiny Panel.
- 3.4 Members will be aware that during the original debate on 12th September, the Deputy Bailiff confirmed through his ruling the ‘in principle’ nature of this Proposition. During the Public Hearing held with Minister, he told us that subsequent to the debate, for the avoidance of any doubt he had contacted the States Greffe with a view to amending his Proposition to include the wording ‘in principle’, but had been told that the Bailiff had determined that this was not in order as the position was already established.
- 3.5 The Minister confirmed at the Public Hearing his intentions, explaining –

“...I would just like to emphasise that this is the start of a process. What we were seeking in the States last week was to get an in principle decision – and I use this specifically, this term: ‘in principle’ – that we were going to take a direction of travel to incorporate the ports.

There is an awful lot of detail and work still to be delivered upon ... I intended, as a result of the concerns by Members about the in principle issue, to take an amendment to my own proposition to reinsert: ‘in principle’ for absolute clarity, notwithstanding what the Deputy Bailiff’s ruling had identified in the States, and I have been told that such an amendment would be or has been ruled out of order by the Bailiff, because by default, the proposition is in principle because of the amount of work still to be done and the fact that the legislation needs to come back for the States consideration, plus other details...”

4. Forthcoming Details: Key Issues

- 4.1 The work we have already begun in examining the incorporation project will continue. Amongst other matters, the report accompanying *P.70/2012* establishes a range of assertions (e.g. Section 3.3 ‘Performance improvement’) and objectives (e.g. Section 4 The benefits of change’) that will require testing, as well as the need to examine the development of critical regulatory, governance and legislative frameworks. Other elements such as the proposal to locate the Coastguard Service within the new company might also need further examination. Indeed the Risk Matrix appended to *P.70/2012* outlines the Minister’s acknowledgement of a number of important issues, and

signposts areas of work, amongst the others we highlight in these Comments, to be followed up as more detailed proposals emerge.

- 4.2 During the course of our work to date outlined above, the Panel has identified what it sees at this stage as specific, key issues that will require particular attention and examination as the project develops and more details emerge. It is likely that some, if not all of the issues set out below, and of course potentially others as yet unforeseen, will form the basis of a formal Panel Review at the appropriate time.

- **Staff Transfer to the Incorporated Ports of Jersey:**

- 4.3 The position of the Minister and Economic Development/Ports of Jersey/ED management regarding staff transfer was summed up by the Department's Chief Officer at the Public Hearing held on 19th September –

“In the report and proposition, and consistently in meetings with staff and union representatives, and it is enshrined in the proposition, is that the terms and conditions that apply at the time of incorporation will be carried through, including pension rights, which is a far greater commitment than is made under U.K. (United Kingdom) T.U.P.E. (Transfer of Undertakings (Protection of Employment)) legislation, for instance, but I do not think there is any doubt in anybody's mind, because it is in the proposition that was presented to the States that that is the case.”

- 4.4 Whilst broadly accepting the principle outlined above, the Panel is confident that all parties understand that the position regarding staff is more nuanced and will require significant attention should the States approve the direction of travel set by P.70/2012. For instance, the report itself (4.3) indicates laudably that the incorporated company will be looking to create a new rewarding culture for employees, but requiring a separate remuneration model that goes beyond that deliverable within the States system. It acknowledges, therefore, that terms and conditions could be changed (but not 'worsened') for the purpose of enabling this reward for 'success' culture.
- 4.5 The Panel is also aware of some current discrepancy between the position of the Minister and Ports of Jersey management on the one hand, and Union representatives from the JCSA/Prospect and UNITE on the other, regarding the level of information sharing and discussion by the management with staff and the Unions about incorporation. The Panel has received considerable information from the Group Chief Executive about the engagement, including meetings with Unions, staff questionnaires and an explanation of a dedicated intranet site for staff to be provided with information and on which they could post comments, questions and feedback.
- 4.6 The Panel has invited UNITE to inform us about the number of meetings it has held, or been invited to attend, with the Ports of Jersey management in the last year and the agendas of those meetings. Unfortunately, despite email requests and telephone contact, we have not received a reply at this stage.
- 4.7 The Panel has however received correspondence from Prospect/JCSA, who made it clear to us that their members are deeply concerned about statements

that they are happy or content with incorporation. They also highlighted several issues that cause them concern about incorporation, from the principle itself to areas that we have also flagged up for further attention, such as the validity of the business case and assurances over staff terms and conditions. Prospect/JCSA have told us that further in-depth scrutiny of an improved plan is required which includes discussions with all affected parties.

- 4.8 The Group Chief Executive has acknowledged the significant work still to be undertaken in this area, but explained why this is the case –

“We have not engaged ... in what I would classify as a formal negotiation between an employer and an employee representative body, and the main reason for that is there has been, in my opinion, no reason to do so, because what we are trying to do, in a way that I do not know has been done in Jersey before, is use the power of the knowledge and the benefit of the trade unions to develop the concepts, the policies at an early stage in the process, so we are at an early stage. There will be formal consultation when we have a formal proposal on the table that will be developed as a part of this joint working party that we are creating around the staff transfer, but equally, within the overall staff terms and conditions, around that, if there are changes to policies, procedures, handbooks, whatever there may be that are going to affect staff, we will have the necessary formal consultation, but the project has not moved on far enough to have those formal consultations.”

- 4.9 It is clear that staff transfer is a critical issue, acknowledged as such by all parties. It is also understandable that there are outstanding issues around staff transfer at this stage of the project. Despite the unfortunate discrepancy between the Unions and the Ports of Jersey regarding the depth of discussions to date, it is arguably more important to note that the Group Chief Executive and the Minister have outlined to the Panel their commitment to a formal consultation process with staff and the Unions as the important details are worked on over the coming months, alongside continued informal information exchange and discussion platforms.
- 4.10 The issues raised to date, and indeed other matters that might emerge in this area, would form part of any future Scrutiny work on Incorporation, crucial as they are to the successful establishment, or not, of an incorporated Ports of Jersey.

- **Financial Model Validation:**

- 4.11 There have been a number of reports since 2004 that have developed the business case and financial model for incorporation to the current position, including Vecta’s 2005 strategic analysis of the ports and the 2011 Capita Symonds report. The Panel welcomes the Minister’s decision to present the Capita Symonds report to States Members ahead of the re-scheduled debate to add to the financial information presented in the Proposition and accompanying report. It effectively represents the most up to date validation of the financial model underpinning the proposals to move towards incorporation.

- 4.12 The Panel is satisfied that the financial modelling and business planning work undertaken to this point represents a credible basis for the Minister's proposals contained within P.70/2012. However, we are also clear that the assumptions and modelling it contains are not in themselves a stable enough financial platform on which to take the final step to incorporation. Before that stage, considerable work will need to be undertaken to develop, update and validate an acceptable financial plan. This sentiment was put to the Minister at the Public Hearing we held on 19th September, who told us –

“Well, you are absolutely correct. It is making some assumptions at this stage. Clearly as we move towards the final point of being able to lodge the report and proposition for incorporation, all that and those assumptions would need to again be validated.”

Group Chief Executive:

One of the things we would embark on doing upon the States endorsement of the direction that we are going in is to do a validation, have an independent validation of our assumptions and our financial model. In appendix B, which lays out our programme of work, in our programme costs of £1.8 million, there is £35,000 that is set aside specifically to do that validation, and we would look embark on that early. We would also then be considering that when we bring the primary legislation back for States debate that we would have therefore a more robust and validated set of figures, where today the numbers that are in the report are an illustration of what we strongly feel is possible under incorporation, but these figures do need to be validated independently.

The Minister for Economic Development:

It is an important point, again just to re-emphasise, the reason that this proposition came to the States in the first place as an in principle decision was because there is a requirement to spend close to £1.8 million and we did not want to embark on that unless we have the direction of travel in place. Part of that £1.8 million, as Doug has just said, is validation of the financial model.”

- **Protection of Historic Harbours:**

- 4.13 The Panel is aware of Members' and indeed harbour users' concerns over the future of the historic harbours under an incorporated, 'commercialised' Ports of Jersey. Why would a commercially focused body take on what is essentially an ongoing liability? Will the historic harbours fabric be neglected? Will users simply be forced to pay more to re-coup the associated costs? The Panel shares such concerns, and they have formed part of the ongoing discussions that we have had with the Minister and Group Chief Executive as the proposals have developed. It is an area that is likely to require more detailed examination, but at present the Panel is re-assured by plans as they exist that appear to offer a stable, resourced future within the incorporated body. The Minister outlined his position –

“I think that if we were looking purely from a commercial perspective, we would not take the historic harbours. You might well say they would be better housed with, I do not know, Jersey Heritage or something similar, but

whichever way one went with it, they have got to be looked after. I mean, they are a part of the Island's historic infrastructure that needs to be maintained. Now, whether it is through revenues generated by the ports or whether it is through general taxation, at the end of the day the public purse, arguably the States of Jersey, has to provide that funding. We felt the responsible way forward was to include them in the model and the model shows that over the period we can maintain them, at a cost, and we can also make a return, a substantial return, to the States at the same time."

- 4.14 Addressing some of the specific concerns raised by Members during the original debate, the Minister responded –

"There was misinformation that was made and that was around the capital project over the 20-year financial model. It was suggested, curiously, I think, by a fellow Minister of mine, that there was only £64 million left over for investment in capital repairs and so on. That was after £302 million which was included in the 20-year financial model for maintenance, capital reinvestment and so on. So it is a significant amount of money, £302 million plus the £64 million potentially that is there for looking after the assets of the 2 entities, of the ports.

The Connétable of St. Ouen:

There is a sum there in case there was an unforeseen disaster?

The Minister for Economic Development:

Well, I suppose there is in a sense. The: 'once in a lifetime' I think was what was raised. Clearly one has got insurance that would take into consideration many issues around that. There is this capital programme here. Ultimately, if there was something so extraordinary that happened, a shareholder is the States of Jersey, and yes, there may well be a requirement for the shareholder to step up to the plate, but that would be in extremis."

- 4.15 Addressing the concerns that the Panel has identified for further work, and that Members and harbour users have also highlighted, in relation to mooring fees and the fear that recent rises are a sign of things to come under a commercial focused body, the Panel was told by the Minister that this had been done to bring historically low fees into line with comparable rates in places such as France and the South of England. He explained –

"Well, I think in a commercial entity, if you continue to do that, you will ultimately see that your revenues are going to drop, because people will say: 'I am not going to pay it any more.' What has happened, and I think this is a positive sign, is that there have been increases in charges, particularly to outlying harbours, because they were so low previously that it was just unsustainable. So yes, there have been increases, but that has been done prior to incorporation. The big difference here to any other incorporation that has taken place is that a lot of the work in terms of getting the ports into a fit state has been undertaken and is currently being undertaken, and that has not been previously the case..."

- 4.16 The Group Chief Executive also reminded us about the scope that the JCRA would have to act in relation to an incorporated Ports of Jersey –

“I think just maybe on overall consumer protection and price increases, in order to deliver the cash returns that are required for covering our day-to-day operations and maintaining our considerable asset base, we need to improve our profitability. We have got 3 levers to do that. We can push our prices up, we can reduce our costs or we can grow the business. Incorporation provides us freedom to grow the business in a way that we cannot achieve today, so today we only have 2 levers to pull, and that is reducing our costs, which we are actively pursuing, and then the other one is increasing our prices. That is the only one we have available today really to cover our increasing cost base, and that is what you see today. So by incorporating these businesses and providing them with the commercial freedom to pursue commercial projects and therefore diversify the income stream into the ports, we alleviate pressure on price increases. Being trading operations, of course we are also governed by the J.C.R.A. (Jersey Competition Regulatory Authority), the competition regulation, and that forms a part of the significant piece of regulatory work within our workstreams to make certain that we have got a package of regulation to ensure that what our, in effect, natural monopolies are providing value to the consumers.”

- 4.17 Whilst accepting the rationale behind the recent increases in mooring fees, the Panel has not yet had the opportunity to compare alternative mooring prices on the south coast of the UK, France, or the other Channel Islands.

- **Property/Asset transfer:**

- 4.18 The Panel shares the belief of some Members that more information could have been provided by the Minister regarding the anticipated property/asset transfer and boundary lines, even at this early, in principle stage. It is a point that the Panel had advised the Department on during the work that we have outlined to date. We were pleased, therefore, to hear that the Minister would be circulating the current property portfolio administered by Jersey Harbours and Jersey Airport and which is the anticipated portfolio to be taken on by an incorporated Ports of Jersey. However, we note that the list circulated is not as comprehensive as information that we have previously received in confidence. We would encourage the Minister to circulate more comprehensive information to Members as the project develops (should P.70/2012 be approved), respecting that there may be some information which is commercially sensitive.

- 4.19 It should be noted that the Panel intends to focus again on this important area, with all of the property to be transferred into the incorporated Ports of Jersey still formally unconfirmed and subject to conveyancing. The Panel expects to see consultation undertaken with all relevant stakeholders, for example the affected Parishes and tenants, before any final decision on incorporation is proposed. The Minister explained the process he is following and how that had led to less information than Members may have expected –

“...because it was an in principle decision, all the detail has to be worked through, the conveyancing proposals and all of it has to be brought back as part of the package for the States to debate in due course.”

- 4.20 The underlying principles behind the property/asset were explained by the Group Chief Executive –

“It is really important to understand though that our assumption around being able to provide £42 million worth of cash returned to the States is dependent on sufficiently capitalising the business from the start. So while we do not want to cherry-pick what we bring into the entity, we also cannot afford to have things cherry-picked out, because the less capital injected into the business, the less return or the less ability we would have to be able to provide a solid return to the States.”

- 4.21 On the specific issue of the red boundary lines that also caused some confusion, the Panel had previously identified its intention to return to the specific details as plans develop. The Panel took the opportunity of the Public Hearing with the Minister to raise the issue and establish where things currently stand with the boundary lines as drawn –

“...it was very much a case of looking at what the ports needed and would make them sustainable, and it was believed that the line, as drawn, whatever colour it was represented as, was sufficient. That is not to say in the future that an incorporated body may well come up with opportunities and indeed make further proposals for extending the line, but that again would be subject to shareholder and I suspect States decisions in the future. I do not know, Group Chief, if you want to make a comment on that?”

Group Chief Executive:

Yes, I think the red line is also something that is consistent with the Island Plan, so it is not as if it is something that we have dreamed up necessarily, but we do feel that it represents what is required for a sustainably operating port for the coming 20 years. I think if we were to come up with – given the commercial freedoms, and run by a board of directors beholden to the shareholders – an investment proposal that would say: ‘Listen, we reckon that we can put this new port south in the reclaimed area and we reckon it is going to require an investment of X and a payback of Y, generating a positive return of Z’ that if we were to put a proposal like that in, as long as there was no competing proposals from other entities that could better our proposals, then it would be something that the shareholder board, management would seek to deliver.”

• **States Oversight and Corporate Governance:**

- 4.22 The Panel is aware of the concerns over protection of these key strategic and property assets for the Island, what have been described as the ‘Crown Jewels’, and corporate governance issues that have arisen out of the previous incorporations of Jersey Post and Jersey Telecom. These are important issues, linked through the nature of the relationship that would be established between the States and the company, which the Panel again believes are more appropriately addressed at a later, more detailed stage, rather than through scrutiny of the current ‘in principle’ proposition.
- 4.23 It will be vital to establish precisely how the relationship within the Memorandum of Understanding between the States (as shareholder) and the

new company would be structured to mutual satisfaction (i.e. allowing the company the freedom it requires to operate commercially against the States ability to step in and address its concerns as shareholder, as appropriate, for instance in the event of a proposed key asset sale).

- 4.24 At this stage, the understanding of the Minister around the issues of corporate governance, particularly in the context of past experiences, is perhaps helpfully illustrated by the following exchange at our recent Public Hearing –

“...we ... understand the sensitivities around this, and in fact the management team will tell you that I have already had discussions with them on this, because I understand it. That said, there is a responsibility, quite rightly so, for the board of directors to ensure that the management team is not going to be awarding itself inappropriate bonuses and as a further fallback position, of course the entity would be 100 per cent owned by the States of Jersey, by the Treasury or with an agreement with the Minister for Treasury, a memorandum of understanding, and again, it would be unacceptable to see that type of practice unfolding and there would be appropriate mechanisms available through that route as well.

The Connétable of St. Brelade:

Unfortunately it has happened in the past, so I can understand ... reservations about the future.

The Minister for Economic Development:

... I think there have been a number of lessons learned through incorporations. This is not the first-ever incorporation, as you well know, and there have been areas of learning that have gone on in the previous ones, and I think that is a positive.

Chief Officer:

I was just going to make a comment on a question regarding the staff or the management awarding themselves, but of course with a proper governance structure which the incorporated entity would have, it is not for the management team to award salary bonuses or anything. It is the remuneration committee of the board, which will be properly constituted and it has to operate within defined corporate governance principles, and I think that is one of the lessons learnt, is that that must happen, absolutely. I am very confident that the members of the shadow board, if they were to be passed on as members of the full board, that that will happen, because they operate the shadow board with the highest standards of corporate governance already.”

5. Conclusion

- 5.1 The Panel is content that P.70/2012 represents a significant but far from final step in the incorporation of Ports of Jersey project, establishing an ‘in principle’ decision of the States that confirms a direction of travel for the Minister to pursue if approved. At this stage, we have found nothing of fundamental concern to us to lead us to conclude that this is an inappropriate step to take. However, detailed work is still required to be undertaken in a number of key areas as outlined above, including the crucial regulatory and competition frameworks. Ultimately, legislation will need to be brought to the States by the Minister at a later date to establish the new incorporated body

and to achieve a number of the policy objectives set out in the report accompanying *P.70/2012*.

- 5.2 From a Scrutiny perspective, we do believe that further work should be undertaken, but at a later, more appropriate time when there are more developed proposals and details to examine. We hope this is of reassurance to those with understandable concerns.

Statement under Standing Order 37A [Presentation of comment relating to a proposition]

The panel apologises for the late delivery of these comments but it was unable to meet to finalise them until after the Friday noon deadline in Standing Orders.