

**INCORPORATION OF
THE PORTS OF JERSEY**

The Regulatory Framework

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1 The Ports of Jersey Limited

The Air and Sea Ports (Incorporation) Jersey Law 201- (the Law) creates a company, to be known as the Ports of Jersey Limited (PoJL), which will take possession of and run the harbours and airport. This company will be controlled by a Board of Directors who will be responsible to the Public as sole shareholder.

The primary purpose of the PoJL, as set by the Law, will be to ensure the provision of safe, secure and efficient port operations for Jersey. 'Port operations' includes the operation of the commercial port, the harbours and the airport. PoJL will be expected to provide facilities and services for commercial passenger travel and freight transport, as well as facilities and services for non-commercial travel and leisure pursuits around the Island.

In some instances these duties will be carried out by PoJL and its employees and in others by agents or sub-contractors. In carrying out these operations PoJL will be required to act in the manner best calculated to secure sustainable growth in the economy in the medium to long term.

The responsibilities of PoJL have been worded to ensure that the new company's core responsibility is the operation of the ports on which our economy relies. It has been kept deliberately simple, and the manner in which PoJL's Board of Directors are expected to provide safe, secure and efficient port operations will be overseen by the shareholder.

Driving for profits is exactly what commercial companies are good at, and creating the pressure for those profits is a key intention of the incorporation project. However, in isolation, this duty would tend to create a single-minded entity, which would be bound to pursue this goal to the exclusion of all others. To balance this commercial drive, the Law creates a framework of regulation around the company and gives other parties duties and responsibilities to fulfil social and other objectives, as well as powers over the company to ensure that it acts in the interests of the Island as a whole.

This creates a deliberate and healthy tension between the company, which will naturally seek profits, and the various oversight bodies who all seek to ensure that the company meets wider objectives. In this situation all parties are doing what they naturally do well.

There is a division between regulation intended to protect the interests of the customers and the economy, which primarily concerns itself with the operation of the company as a commercial entity, and regulation of the safety and security of the harbours and airport, which relates to the company's roles as Harbour Authority and Airport Authority. The Jersey Competition Regulatory Authority (the JCRA) as part of the Channel Islands Competition Regulatory Authority (the CICRA), will be responsible for the economic regulation of the company, while the relevant government Departments will remain responsible for the Regulation of safety and security.

This paper addresses the two regulatory regimes separately, but in practice there will always be a need for the various regulatory agencies to communicate and share information in order to provide a harmonious regulatory framework.

The PoJL will also have a set of duties that falls outside of the normal requirements on a company. These are ultimately responsibilities of the States of Jersey, but after incorporation the personnel and equipment necessary to conduct them will be part of the PoJL. As the name suggests, these Public Service Obligations (PSOs), are legal requirements on the company and their effective

provision is a duty owed by the company to the Public. These include the co-ordination of search and rescue services and the maintenance of aids to navigation, as well as other requirements as detailed in section 4.1.

2 Economic regulation

2.1 The role of the Jersey Competition Regulatory Authority

The Jersey Competition Regulatory Authority (the JCRA), as part of the Channel Islands Competition Regulatory Authority (the CICRA), will be responsible for the economic regulation of the new company.

The Law requires that the role of the JCRA is to oversee the operation of the PoJL, to ensure that the company cannot make unfair use of its status as a monopoly and that it is making efficient use of the public assets entrusted to it. The JCRA will be guided in carrying out its functions by the duties required of it in the Law.

The primary duty of the JCRA is to act in the interests of the customers of the harbour and airport in the short and long term. This includes freight operators, pleasure boaters, the travelling public, airlines and any other people and companies who will rely on the PoJL to provide services.

If the JCRA find that there is an opportunity to promote competition in the provision of port operations, then they will seek to do so. This does not mean that there will be competing ports or airports, simply that if the JCRA finds in the future that some service (be it dock loading operations, pilotage services or anything else) can realistically be opened to competition, it will prefer that option to economic regulation, which is only the best option where competition cannot occur.

Equally important is the JCRA's duty to ensure that provision is made to satisfy all (reasonable) current and prospective demands for port operations, and that port operations are provided efficiently and effectively. This balances the duty to the customers by ensuring that the JCRA consider the interests of the Island as a whole, and that it ensures the PoJL are making sufficient provision for the future needs of port users.

The JCRA also has a wider set of general responsibilities to the Island. It is expected to fulfil these to the extent that they are consistent with the primary duties above. It must act-

- So as best to encourage sustainable growth in the economy of Jersey in the medium to long term.
- So as to impose a minimum of restriction on persons engaging in commercial activities.
- With due regard to any relevant policies of the States of Jersey.
- With due regard to preserving and maximizing the benefits of Jersey's resources.
- With due regard to the special needs of persons who are disabled.

Taken all together, this framework is intended guide the JCRA in exercising its regulatory powers.

2.2 The powers of the Jersey Competition Regulatory Authority

The Law grants the JCRA certain powers over the PoJL. The most notable is that the company must hold a licence to operate the harbours and airport.

The licence will ensure that the PoJL acts in accordance with the interests of the island and the public. The JCRA says that-

“In the case of a single operator like PoJL, the purpose of the licence the JCRA issues is mainly to determine how PoJL performs, as if it were a performance contract between the JCRA and PoJL unilaterally determined by the JCRA to reflect legislation enacted by the States.”

This licence will be granted subject to conditions, and if the company breaches those conditions the JCRA will have the power to take action. For example, the licence might set a maximum charge for a particular service or require that the service is provided for free (as telecoms licences require that emergency calls are handled for free).

If PoJL were to breach that condition of their licence, then the JCRA would have the power to direct that the company comply, or in serious cases to impose a financial penalty on the company up to the value of 10% of the company's annual turnover. This would clearly be last resort, as the company will be expected to make a financial return to the government and imposing penalties on the company could have a negative effect on such a return.

Taken together with the other provisions of the draft law and the existing Competition (Jersey) Law 2005 which will also apply, the JCRA have the powers to-

- Obtain information from PoJL, through which the JCRA can scrutinise the effectiveness of PoJL's operations, apply benchmarking standards and set price-caps – a range of activities that tend to stimulate efficiency improvements, especially when associated with good shareholder governance.
- Introduce competition where feasible, meaning where PoJL's activities can be identified, separated from others and opened up to competitors.
- Improve accountability to customers - both immediate customers such as airlines and shipping companies and ultimate customers such as passengers and freight dispatching companies.
- Provide incentives for the structuring of PoJL's operations so as to facilitate the extension of competition to some of its activities and, thus, increase pressures for greater efficiency.

There is no requirement in law that only PoJL hold a licence for port operations, and if PoJL makes arrangements in future to have port operations conducted on its behalf by another party than that party will be licenced as required.

Further, the JCRA has discretion over the licensing regime for Port operations, so if it considers that any particular function can be carried out without a licence (for example the laying of moorings) then it has the power to remove that function from the licensing regime. This allows the JCRA to have flexibility in its regulatory approach and ensures that the JCRA is not bound by the Law to act in response to situations that it considers trivial.

The company has a right of appeal to the Royal Court against the exercise of the regulators powers.

2.3 The role of the shareholder

The Treasury and Resources Minister will represent the Public as the shareholder. The role of a shareholder, as in any company, is to oversee the operation of the business, set the broad strategic direction for the Board, and to derive a return from the company in return for their investment. As the investment in this case takes the form of a significant transfer of assets from the Public, the Treasury and Resources Minister will seek to realise a return on those assets in the form of a dividend which will be paid to public funds.

In matters concerning the shareholding, the Treasury and Resources Minister will be required to act in the best interests of the States of Jersey

2.4 The powers of the shareholder

The Treasury and Resources Minister will be able to exercise the normal shareholder powers over the company, and will ultimately have the power to dismiss the Board of Directors should the Minister feel it appropriate to do so. This is not provided for in the Incorporation Law, instead these powers arise naturally from the 100% shareholding the Public will retain in the company and form part of the standard Articles of Association of any company.

In addition, the Treasury and Resources Minister will have oversight of the Board, and potentially one board member will act as a shareholder representative, who will act directly in the interests of the Public at Board level. The exact relationship between the shareholder and the company will be set by the memorandum and Articles of association which will also define the general responsibilities of the directors.

This structure leaves the ultimate ownership of the assets of the company in the hands of the Public, and introduces a commercially focussed and accountable executive structure to manage and operate the assets.

Although the Treasury and Resources Minister have the normal powers of a 100% shareholder in almost all respects, certain rights will be reserved to the States of Jersey, which will be the only body with the power to create new shares in the company, to sell those shares or to wind up the company. Any of these actions would require a vote of States members.

2.5 The role of the Economic Development Minister in economic regulation

In terms of economic regulation, the Economic Development Minister has the same duties as the JCRA as detailed above. His role in many ways mirrors that of the JCRA, but rather than be involved in the day-to-day licensing and oversight of the company he will be responsible for the strategic oversight of regulatory policy. He will have the ability to give written directions or guidance to the JCRA about how it should carry out its functions under the Law if he considers it necessary.

He will also have strategic control over the sea transport links that bring food, goods and fuel into the Island through the commercial port, which are clearly to be of critical importance to the Island. This is recognised in Law, and control of the policy regarding sea transport will remain firmly in the

hands of government, although the day-to-day operation of the facilities etc will sit with the Ports of Jersey Limited.

3 Safety and security regulation

3.1 The Harbour Authority and Airport Authority

It is intended that PoJL will serve as the Harbour Authority and the Airport Authority for Jersey. These are legal creations designed to allow powers and duties relating to the harbour and airports to be placed in the right hands without giving PoJL as a company those powers. While this appears to be a philosophical distinction it is based on sound legal reasoning, as the objectives of the PoJL as a commercial company seeking to make the best return for the States may not always be fully in alignment with the legal responsibilities of a harbour operator in dealing with wrecks, inshore safety, pilotage etc. There will always be tensions of this kind in having a private company provide services to government, be it an incorporated entity or a private contractor. By recognising the various roles required of the incorporated entity and establishing a division between them we can avoid potential conflicts in this regard.

Additionally, such a division adds flexibility to the operation of the law in the longer term. One option this will permit is the existence of different harbour authorities in future if, for example, a parish wished to take over the running of an outlying harbour within its boundaries. The parish could then become the Harbour Authority for that harbour and run it as it wished (under licence from the JCRA and subject to the same type of controls as the PoJL). While there is no suggestion that this will be the case even in the long term it is unwise to rule out such possibilities in the future.

3.2 Oversight of safety and security

The ultimate oversight of the safety and security of the harbours and airport will remain with government. For the avoidance of doubt, where there is any conflict between the pressure to make a return to the States and considerations of safety and security, safety and security will come first. This is the current situation and will remain so after incorporation. The law and wider regulatory framework has been specifically developed to ensure that this is the case.

There will be no change to the arrangement for the safety and security of the airport after incorporation. Safety and security in respect of aviation is overseen by the Director of Civil Aviation (the DCA), who performs in Jersey a similar role to that of the Civil Aviation Authority in the UK. The DCA is part of the Chief Minister's Department, not the Ports of Jersey, and has overall responsibility to ensure the safety of civil aviation in Jersey and its airspace. The DCA is responsible for issuing a licence to Jersey Airport to operate as an aerodrome, which certifies that the airport is safe and secure for that use. The staff at the airport will continue to carry out their roles with due consideration of safety and security, and their responsibilities in this area will not change.

The Economic Development Minister will retain his current legal responsibility for oversight of the safety and security of the harbours. The day to day maintenance of safety and security will still be the responsibility of the staff at the harbours, in particular the Harbour Master, albeit as a company employee rather than as a civil servant. The Harbour Master will retain some legal rights and powers, albeit he will be a company employee, and in the exercise of the powers he will be subject

to the oversight of the government via the Harbour Authority. Although the details differ this is not an unusual situation in the UK, where Harbour Masters of trust ports and private ports have legal powers.

3.3 Changes to local laws to allow incorporation

Historically, harbours and airport have been operated by government. Even since the 1990s, when the operations have been run as 'Trading Funds' and so have had some degree of separation from Ministers, they have been treated in law as integral parts of government.

An effect of this integration is that various roles within the ports have been assigned powers in law that would not normally be granted to a person within a limited company, even one wholly owned by the government. In particular, the Harbour Master and Airport Director are currently empowered to take decisions and carry out actions on behalf of government, such as urgent removal of wrecked or abandoned vessels, allowing ships to load and unload cargo etc. They also have the powers of Centeniers for the purposes of arrest and detention within the limits of their relevant port.

A significant part of the work towards incorporation has been to manage the transition of the ports out of government in such a way that leaves the necessary functions with the operator (PoJL), while simultaneously reserving the necessary powers to government and ensuring that PoJL does not inherit powers that are not suitable for an incorporated entity.

This has required revision (in some cases very significant) to 17 local Laws, Regulations and Orders, which make up the latter part of the law. In broad terms, these serve to remove powers from the Harbour Master and Airport Director and assign them to either a government representative (in the form of a Minister) or the newly developed Harbour Authority and Airports Authority.

3.4 Harbours and harbour limits

Amendments to the Harbours (Administration) (Jersey) Law 1961 make provision, for the first time, for detailed mapping of the limits of the various harbours in Jersey. For these purposes, harbours are in the following locations-

- Port and harbour of St. Helier
- St. Aubin's Harbour
- St. Brelade's Harbour
- St. Catherine's Harbour
- Bouley Bay
- Bonne Nuit
- Grève de Lecq
- Gorey Harbour
- La Rocque Harbour
- Rozel Harbour
- The Echrehous

- The Minquiers

Within the limits of these harbours, the Harbour Authority (the Ports of Jersey Limited) will have authority to control vessels movements, and the responsibility to ensure safe navigation, including dredging channels etc. Outside of these limits, the government will retain overall responsibility, although it may require that some functions in territorial waters are conducted by PoJ on a day-to-day basis.

The charts of harbour limits are available from the Port of Jersey website (see below). The limits of the Port of St Helier are very widely drawn, and encompass a significant area of the south coast of the Island. This is due to the number vessel movements and size of vessels operating in the approaches to the commercial port. The Harbour Authority needs to have the capacity to manage shipping some distance from the Port itself, in order to maintain safety and security of operations.

3.5 Management of moorings

In order to ensure that there is proper oversight of moorings in the harbours, the Harbour Authority will be given authority to control the laying and use of moorings within harbour limits. It will be up to the Harbour Authority to permit (or not) additional moorings in the harbours, and to oversee the safe and lawful use of the harbours in general.

The rules about mooring outside of harbour limits will not change – and the traditional right for a person to moor a boat outside of harbours where they think fit will not be affected, although the Harbour Authority will retain the traditional right of the Harbour Master to require that moorings be moved if they constitute a danger to navigation.

There will be a change in the status of some moorings on the south coast. The harbour limits for the port of St. Helier are by necessity drawn so widely that they encompass a significant entire area of the south coast. The port limits are published separately on the Ports of Jersey website www.ports.je/jerseyharbours/Pages/ReportsDocuments.aspx as they are the subject of a separate consultation that has been ongoing for some time.

The effect of this is potentially to bring moorings laid in this area into the administration of the Harbour Authority. The Minister recognises that this might cause concerns for boat owners who have historically moored in these areas and who were not expecting to have any involvement with the Harbour Authority. To ensure that traditional rights are not affected, the management of Ports of Jersey have given assurances that when Ports of Jersey Limited becomes the Harbour Authority after incorporation there will be no charges levied for moorings outside of the harbours which PoJL has not been involved in laying, managing or maintaining.

4 Duties of the new company to government

4.1 The Public Service Obligations

The Public Service Obligations are functions that government would normally carry out but which will be conducted by Ports of Jersey as that body has the resources and expertise to do so. The Economic Development Minister is responsible for overseeing the conduct of most these obligations, but the Treasury and Resources Minister and the Minister for External Affairs also have some involvement.

The Economic Development Minister is responsible for overseeing the conduct of-

- the co-ordination, or provision of resources for the co-ordination, of maritime search and rescue within the Jersey Search and Rescue Region.

This requires the Ports of Jersey Limited to manage and resource the control room for the local search and rescue services. It does not require the PoJL to conduct those services directly, as they will continue to be provided by various organisations including the RNLI and the Fire and Rescue Service.

- the maintenance of aids to navigation in territorial waters

The maintenance of aids to navigation (nav aids) in harbour waters is the duty of the Harbour Authority, which will be PoJL. Many nav aids lie outside of the harbours, marking reefs, showing areas of clear water etc, and the responsibility of maintaining these fall ultimately to the States of Jersey. As PoJL will have the necessary equipment and expertise to manage the maintenance of these aids, the States of Jersey will require that the company continues to do so.

- the enforcement of shipping legislation in territorial waters

In particular this will mean continuing to enforce fishing vessel safety provisions, and safety training requirements, and reporting breaches of pollution from ships or safety legislation to the government. This naturally falls to PoJL as it will have the staffing and expertise to conduct this work.

- the conduct of port State control

A 'Port State' is a jurisdiction which is visited by foreign registered commercial vessels. Jersey is responsible for checking that foreign vessels are compliant with international treaties, safe and non-polluting. As this must be done in and around the harbour, PoJL will continue to assist the government in fulfilling this function.

To allow him to discharge his responsibility in these areas, the Minister has the ability to enter into an agreement with PoJL detailing how these duties should be carried out. If no agreement exists in these areas, the Minister will have the power to direct the company in fulfilling these obligations. This is intended to ensure that, for instance, there is always someone responsible for the coastguard co-ordination function.

This is not a significant departure from the existing situation, as the above functions are currently conducted by the harbours staff. The imposition of these requirements by the Law is intended to give the government certainty that they will be conducted in a satisfactory manner after incorporation.

The Minister for External Relations is responsible for-

- the management of the Channel Islands Control Zone

the Channel Islands Control Zone (the CICZ) is the area of airspace for which Jersey is responsible. The management of this area is subject to an agreement between the governments of the UK and France, which gives the responsibility to the States of Jersey. As the Ports of Jersey Limited will have the capacity carry out this management, it will do so on behalf of the government.

The Minister for External Relations will have the ability to enter into an agreement with PoJL for this task, and if no such agreement exists, the Minister will have the power to direct the company in fulfilling this obligation.

The custodianship of the outlying harbours is also a Public Service Obligation, but this is dealt with in detail in section 5.3.5 of The Incorporation Case, as it concerns transferred assets,

4.2 Emergencies

In order to ensure that the government retains the capacity to act in or plan for an emergency situation, provision is made by the Law for the government to take over the operation of the harbours and airport in the event of such an emergency occurring. This is similar to the existing powers of the government to take control of supplies of fuel, electricity, gas, food and water, and telecoms and postal services. In these circumstances, the government would be able to direct the operations of the ports as necessary to ensure the health and safety of the population, and (critically in the case of the ports) to ensure the continued provision of essential supplies.

This power could only be exercised in a genuine emergency (of unprecedented scope) and would first require that the Lieutenant Governor declare that a state of emergency existed in the Island.

In a less serious situation where unforeseen circumstances have a more limited effect on the ports, in the public interest the Economic Development Minister can suspend the need for a licence to be held or make other changes to licensing requirements, after consultation with the JCRA and for up to six months. This would allow for emergency measures to be put in place to respond to, for instance, the collapse or departure of a company providing essential services to the island or to the ports. It could also be used to allow some latitude to PoJL if exceptional circumstances arose, such as damage to or loss of key equipment.

5 Summary of regulatory arrangements

Taken together, the regulatory provisions made in the Air and Sea Ports (Incorporation) Jersey Law 201-, together with the consequential effects of that law on the wider legislative environment, create an effective framework for the governance of the Ports of Jersey Limited.

This creation of the company is intended to instil a dynamic and commercial ethos in the operation of the ports, which is challenging to achieve within government. This is done in the full knowledge that in isolation this ethos would create a corporate entity which would be likely to be single-minded in its pursuit of profit, as any private company might be. Thus the States will retain full ownership of the company, and ultimate ownership of the assets. The company will be bound by Law, constrained by its licence, overseen by the JCRA and subject to its directions as necessary. The Treasury and Resources Minister will provide governance; the Economic Development Minister will oversee safety and security of harbours as will the Minister for External Relations for the airport.

These measures will ensure that the government is in a position to channel and direct this dynamism to serve the public of the Island by making best use of the available assets.