

Setting a new course

Britain's waterways in the third sector

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EXECUTIVE SUMMARY

British Waterways (BW) has launched a debate about whether a more socially, environmentally and economically sustainable future for the waterways could be achieved by moving the organisation from the public sector to the third sector. This report aims to advance the debate, promote discussion and further inform stakeholders' views.

PART 1 BRITISH WATERWAYS AND THE THIRD SECTOR

BW today

BW is a public corporation operating under a legislative remit little modified since the 1960s. In the last 20 years in particular, the importance of waterways has increased. They have moved from being seen as a freight transport company to a leisure, heritage, environment and regeneration asset. Despite this progress there is still an annual funding gap of up to £30 million in England & Wales.

The third sector

The 'third sector' consists of a diverse set of organisations that exist between the state and the private sector. It includes charities, voluntary organisations, housing associations, co-operatives and social enterprises delivering a very diverse range of services. BW would be one of the larger organisations in the sector by income and assets, but by no means the largest. A spectrum of organisations sit on the boundary between the public and third sectors. BW could sit comfortably at the third sector end of this continuum.

Public policy

Public policy is currently more aligned with the proposition that BW should move to the third sector than it has ever been since BW was established. Transferring assets to the third sector is supported by the main political parties including those in devolved governments in Scotland and Wales.

The case for moving to the third sector

The case for moving BW to the third sector is that it would give a clearer mission for the future of Britain's

waterways, enhanced stewardship of the network, foundations for greater economic sustainability and opportunities to become more enterprising. There are, however, concerns that will need to be addressed.

PART 2 THE PRACTICAL IMPLICATIONS

Repositioning BW as a third sector organisation

If BW were to become a third sector organisation it would have to position itself as a compelling cause, demonstrate greater independence from government, build a supporter base, ensure its values are expressed at all 'touch points' where users encounter the organisation and review its name.

Developing volunteering

BW could attract more volunteers. It would have to clarify what they could do and provide high quality training for and management of volunteers.

Raising charitable funds

BW could raise significant funding from charitable sources, but it would take considerable investment and would have to be carefully targeted. Funds raised would not be sufficient to fill the long-term funding gap.

Legal considerations

BW could create new legal structures within the current legislative framework or if primary legislation was passed it could become an independent third sector organisation. There are two possible legal structures BW could establish within the current legislative framework. Both could provide greater engagement with stakeholders.

1. INTRODUCTION

In May 2009 BW launched a public debate about the future strategy for the inland waterway network with the publication of *twentytwenty: A Vision for the Future of our Canals and Rivers*. This vision suggested that a more socially, environmentally and economically sustainable future for the waterways could be achieved by moving the organisation from the public sector to the third sector.¹

The response to the debate was encouraging, so BW commissioned a consortium of three firms that specialise in the third sector² to consider the options for such a move in more detail.

This report sets out our findings. Its purpose is to take the debate a step further, clarify the rationale and begin to establish possible forms that the resulting organisation might take. The report:

- Summarises BW's size, scope and activities and the long-term resource challenges it faces
- Describes the modern third sector and public policy towards the sector
- Sets out the case for BW to move to the third sector and some concerns that have been raised about the move
- Explores how BW would need to reposition the way it presents itself to the public
- Looks at how volunteering could be further developed
- Analyses the potential for raising charitable funds

The document aims to promote discussion on the issues raised and therefore does not contain conclusions and recommendations.

Although BW has agreed to publish this report, it is not BW's policy. It builds on the Status Options Review completed by KPMG in 2008 and should be read in conjunction with *twentytwenty A Vision for the Future of our Canals and Rivers*, which can be found on BW's website, www.britishwaterways.co.uk/twentytwenty

BW welcomes your views on this report. They will be fed into the further development of the proposition over the coming months. They should be sent to twentytwenty@britishwaterways.co.uk

¹ The third sector includes charities, voluntary organisations, housing associations, social enterprises and many other types of organisations that are not part of the private or public sectors.

² Compass Partnership, Bates Wells & Braithwaite and Think Consulting Solutions.

PART 1

BRITISH WATERWAYS AND THE THIRD SECTOR

This part of our report reminds readers of the diversity of BW's activities and the financial challenges it faces. It then sets out the scope and scale of the third sector today. It describes government policy towards the sector and the desire of the main political parties to invest in further growth of the sector. The last chapter sets out the case for BW to join the sector and some of the concerns that have been raised about this proposition.

2. BRITISH WATERWAYS TODAY

What does BW do today?
And how large are the financial challenges it faces?

2.1 Status

BW is a cross-border public authority that is essentially the heir of the 1947 nationalisation of the waterways. After passing through a number of formats BW was created by the 1962 Transport Act with substantive further legislation mainly referring to classification of the waterways by usage in the 1968 Transport Act. There have been a number of private Acts promoted by BW since 1968 to further rationalise relatively minor legal issues, the most recent being the 1995 British Waterways Act.

Today BW still operates within a framework designed for a minor freight infrastructure operator almost half a century ago. Yet it is responsible for over 2,200 miles of waterway, including 137 miles in Scotland, for the third largest collection of listed structures in the country, for major environmental areas (including 73 SSSIs) and it underpins £10 billion of regeneration activity.

As a consequence of the Scotland Act 1998, legislative competence for Scotland's inland waterways is devolved to the Scottish Parliament.

2.2 Changing the role of the waterways

On its creation in 1962, BW was seen as a relatively minor player in a declining transport sector with a requirement to minimise losses including closing and filling in waterways if necessary. The network was seen largely as a historic liability, supported by just a handful of far-sighted campaigners. By the late 1960s the role of the waterways as generators of tourism was beginning to be recognised and the 1968 Transport Act gave protection to so called 'cruising' waterways whose primary use was leisure. BW began to develop an interest in leisure and indeed itself was active in, for instance, the hire boat business in the 1970s and 1980s.

The late 1980s and 1990s saw a growing appreciation of the role the waterways could play in driving both rural and urban regeneration. Heritage became an asset not a liability. By the late 1990s waterways were beginning to become desirable places to live, work and play.

At the turn of the 20th century and into the 21st century the network began to grow again, funded largely by astute applications for lottery and European money focusing on volunteer-backed restoration projects. Some 200 miles were added to the network in this time and it is still growing albeit more slowly.

Today a record 33,000 boats are licensed to use the 2,200 mile network managed by BW. In addition, some 11 million people including walkers, cyclists, anglers and others make almost 300 million visits each year to these waterways.

Looking to the future, there is a growing appreciation of the role the waterways can play in combating climate change. Already providing land drainage, the contribution waterways make to the nation's flood defences is becoming increasingly important with canal levels controlled so that they divert flood waters away from deluged areas. BW is exploring ways to use the waterways as a source for renewable energy through schemes such as putting wind turbines on waterside land, hydroelectric schemes at river weirs and using canal water as a more sustainable alternative to traditional air conditioning.

Although a reluctant player in the early years, in the last 20 years BW has consciously set about creating, driving and managing this change. The journey from freight operator to protector of a thriving network offering leisure, tourism, regeneration, heritage and environmental benefits to millions has required culture change from all involved.

2.3 Reporting relationships

Through this time, in England & Wales, BW has reported successively to the Department for the Environment, the Department for the Environment, Transport and the Regions and to the Department for Environment, Food and Rural Affairs. Gradually it has become apparent that with its widespread role, no single government department fully encompasses the role of the waterways. As a result of the devolved powers for BW in Scotland, BW reports to the Freight and Inland Waterways branch of the Transport Directorate within Scottish government.

2.4 Funding

Today BW has an income of £255 million which includes £149 million of earned income and £74 million government grant. BW's grant has fallen by 47% in real terms between 2003 and 2010. Government funding has been replaced by commercial income which has seen 60% growth over the same period. Despite these efforts, a recent report by KPMG³ identified the need to spend up to £30 million p.a. in England & Wales additionally on major maintenance if the waterways were to become truly sustainable for the long term. Without this investment, the overall physical state of Britain's waterway asset would go into decline.

In contrast, whilst recognising potential public spending cuts, to date, Scottish Government support has been clearly demonstrated by a year on year increase in baseline grant and much has been achieved to revitalise the canal network in Scotland. This includes major investment in the Millennium Link, including the Falkirk Wheel, and a significant lock stabilisation programme on the Caledonian Canal.

With activity closely aligned to the Scottish Government's Strategic Objectives, Scotland's inland waterways are viewed as an important national asset for current and future generations. The Scottish Government is keen to see them maintained and developed in a sustainable manner so that they fulfil their full economic, social and environmental potential.

³ British Waterways Status Options Review, June 2008.

3. THE THIRD SECTOR

Is the third sector a natural home for BW or would it be an anomaly? And if BW were to join the third sector, how would it compare with other organisations?

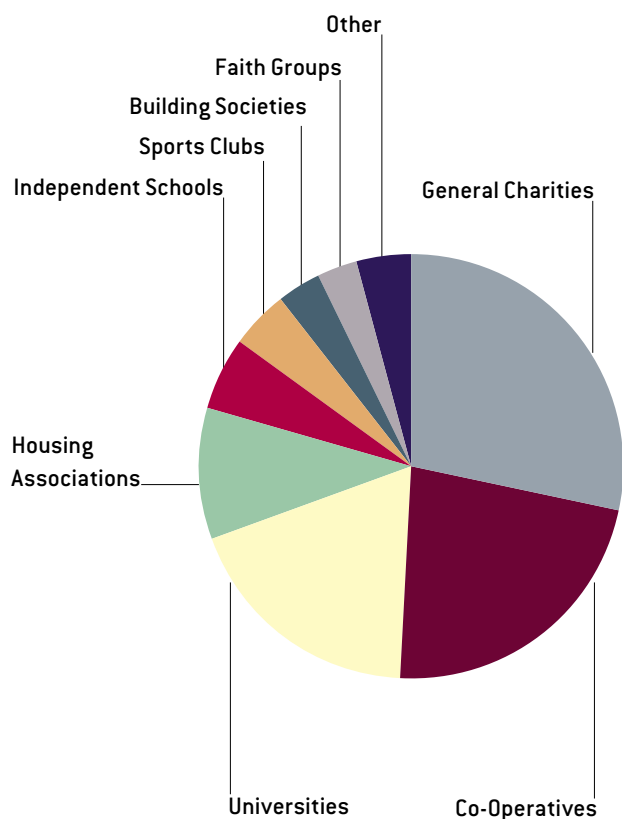
3.1 The size and scope of the third sector

The 'third sector' consists of a diverse set of organisations that exist between the state and the private sector. It includes charities, voluntary organisations, housing associations, co-operatives and social enterprises.

These organisations have three characteristics:

- They exist to achieve social, educational, environmental and cultural objectives
- They are independent from government
- They reinvest their surpluses in furthering their aims rather than distributing them to shareholders

Income of Civil Society Organisations Total: £116 billion



The sector is much larger than is generally recognised. In 2006/7⁴ the slightly more broadly defined civil society sector included:

- 170,900 general charities with an income of just over £33 billion
- 4,500 co-operatives with income of £26.3 billion
- 1,830 housing associations with income of £10.9 billion and assets of £55.6 billion⁵

Source 6

⁴ The latest year for which figures are available.
⁵ The UK Civil Society Almanac 2009, NCV0, (Page 9).
⁶ The UK Civil Society Almanac 2009, NCV0. These figures are for the income of civil society organisations, a term that is wider than the third sector and includes universities, independent schools and building societies.

Charities have grown rapidly over the last 20 years, driven by increases in donations and income earned from delivering services, which now makes up over half of their income. The top charities include diverse organisations, some of which are household names and others less well known.

Top charities by income⁷

Organisation	Income £m	Organisation	Income £m
Nuffield Health	582	Anchor Trust	276
British Council	564	British Red Cross Society	242
Cancer Research UK	476	UFI Charitable Trust	217
Arts Council England	436	Barnardo's	215
Charities Aid Foundations	409	Action for Children	210
National Trust	388	Gatsby Charitable Foundation	199
Children's Investment Fund Foundation	324	Girls' Day School Trust	189
Welcome Trust	305	British Heart Foundation	185
Oxfam	299	Royal Mencap Society	183
CITB-ConstructionSkills	290	Tate	176

If BW was a charity it would be the 13th largest in the UK with an income of £223m p.a. BW would be a little larger than the average Higher Education Institution in the UK which has an income of £140m.⁸ It would be much smaller than the largest universities.¹⁰

BW is an organisation with substantial assets (of £379m). However, it would only be the 24th largest charity by asset value.⁹

Top charities by net assets¹⁰

Organisation	Net assets £ million	Organisation	Net assets £ million
Welcome Trust	12,032	Health Foundation	702
Church Commissioners for England	5,360	British Library	640
Garfield Weston Foundation	3,721	Wolfson Foundation	638
Leverhulme Trust	1,256	British Museum	587
National Trust	1,000	Tate	579
Children's Investment Fund Foundation	802	Royal National Lifeboat Institution	551
Bridge House Trust	798	Natural History Museum	534
Henry Smith Charity	772	Guy's & St Thomas' Charity	522
Esmée Fairbairn Foundation	725	Paul Hamlyn Foundation	514
Charities Aid Foundation	714	Society of Jesus Trust	485

⁷ Charities Direct website July 2009.

⁸ Universities UK Facts and Figures 2007/8.

⁹ For example Oxford University had an income of £755m in 2007/8.

¹⁰ Charities Direct website July 2009.

3. THE THIRD SECTOR (CONTINUED)

3.2 Boundaries between the sectors

If BW was to join the third sector it would sit alongside a wide range of organisations that are on the boundaries between the third, public and private sectors. Organisations at the boundary with the public sector include:

- Further and higher education colleges
- Museums
- Universities

And, in England & Wales:

- Foundation hospitals
- Academies
- Foundation schools

Organisations at the boundary with the private sector include:

- Social enterprises
- Professional and trade associations
- Mutual assurance societies

BW would be moving from the public sector towards the third sector. The three main features that distinguish third sector organisations from public sector ones are that:

1. They have one of the legal statuses that are available to third sector bodies and are independently regulated (e.g. by the Charity Commission, the Community Interest Company Regulator).
2. They strive not to be dependent on a single government source for a high percentage of their income.
3. Board members are not usually appointed or approved by the government.

However, the boundary between third and public sector organisations is surprisingly fuzzy.

Organisations on the boundary can be positioned on a spectrum ranging from those that are pure charities and yet undertake activities that are delivered by the state in other countries (e.g. RNLI) to those that are state organisations but have an affinity with the third sector (e.g. Consumer Focus).

In between there are organisations that are charities that are 'controlled' by the government by virtue of the funding they receive and the constitutional right of the government to appoint trustees (e.g. the British Library). There are also state organisations that are perceived by the public to be independent organisations, but whose Board members are appointed by the government and that are highly dependent on government income (e.g. English Heritage).

To further complicate matters many large third sector and public sector organisations have multiple organisations as part of their overall structure, many large charities have trading subsidiaries and some state organisations have charitable subsidiaries (e.g. hospital trusts).

An additional complexity that muddies the boundary in the public mind is that some charities have statutory powers (such as NSPCC and RSPCA) and some statutory bodies that have no powers and exist only to give advice to government (e.g. ACRE – Advisory Committee on Releases to the Environment), again blurring the distinction between public and third sector organisations.

Over the last 20 years there has been a strong trend of movement towards the third sector, as schools are converted into Academies and given greater management freedoms, hospitals are converted into Foundation Hospitals and given control over their assets, and universities are expected to earn a growing proportion of their income from external sources.

In short, there are many organisations in the third sector of similar size to BW delivering social, educational and environmental services and taking responsibility for large parts of the country's infrastructure. BW would be one of the larger organisations in the sector by income and assets, but by no means the largest, and its activities would have much in common with other third sector organisations.

Many organisations sit on the boundary of the third and public sectors.



4. PUBLIC POLICY ON THE THIRD SECTOR

How would a move to the third sector fit with current public policy? And have significant public assets been transferred to the third sector in the past?

The third sector has moved to the centre of the political stage over the last twelve years. It is no longer seen as playing second fiddle to government, but is now positioned as a key provider of public services.

4.1 The rediscovery of the sector

Prior to 1997, governments did not generally identify the third sector as an entity. They considered charities, housing, cultural and recreational organisations as separate types of organisations that were not given particular priority. Since then, the government has recognised the crucial role that these organisations play in strengthening civil society.

In the last 12 years the UK government has modernised charity law, required charities to demonstrate public benefit, agreed a 'Compact' between the government and the sector and local compacts in virtually all local authority areas, created the new legal form of the Community Interest Company, supported the establishment of social enterprise and encouraged a culture of greater giving and volunteering. Similarly, the Scottish government has substantially overhauled the regulatory framework for charities in Scotland and has supported a number of initiatives directed towards encouraging growth in the third sector.

Public policy is promoting significantly greater management of state functions and increased ownership of assets by the third sector. This policy approach is supported by the main political parties and by governments in England, Scotland and Wales.

Since 1997 the governments in all three nations have invested large sums of money in the delivery of health, social and environmental services by third sector organisations. They recognise that many of these organisations are innovative and have an ability to connect with local communities that is highly valued. As a result, the sector's income from contracts with statutory bodies has doubled since 2000, growing from £3.8 billion to £7.8 billion.¹¹

4.2 The future political landscape

All three main political parties in Westminster are committed to greater partnership with the third sector to achieve social, environmental and cultural goals.¹²

Angela Smith, Labour Minister for the Third Sector, recently said:

“Third sector organisations bring innovation, commitment and quality” and “The benefits of the third sector being involved in service delivery are quite clear.”

¹¹ The UK Civil Society Almanac 2009, NCVO (Page 40).

¹² Scotland and Wales are covered later in this chapter.

The recent Green Paper from the Conservatives stated that:

We are convinced that charities and social enterprises can make a huge difference to the effectiveness and humanity with which public services are delivered, but recognise the harm that a controlling and exploitative relationship with an overbearing state could do – and in many cases is already doing. Our aim is to create a win-win situation for the voluntary sector, widening the choices available for genuine partnership and enabling voluntary organisations to thrive whether they choose to get involved or not.

We believe that the voluntary sector and social enterprise is capable of playing an even greater part in solving the problems of civil society in the future than it does at present.¹³

They pledge to:

- Allow voluntary organisations delivering public services to earn a competitive return on investment by sharing substantially in the rewards that come from successes
- Offer multi-year funding terms on contracts and grant agreements
- Remove the interference and bureaucracy of state funding by agreeing on goals and outcomes, not dictating methods of delivery¹⁴

David Cameron elaborated on the Conservative approach to public services when he said:

- We don't believe in top-down central control: we believe in local control
- That's the principle behind many of our most important reform plans: taking power from the central state and giving it to local people
- We'll invite social enterprises, private companies and community organisations to help run our public services... with passion and enthusiasm, because we really believe in it
- We will pay these new providers by the results they achieve, so there's a real incentive to improve¹⁵

¹³ A stronger society, Conservative Party, 2008.

¹⁴ A stronger society, Conservative Party, 2008, pledges 14 – 16.

¹⁵ Age of Austerity Speech April 26th 2009.



4. PUBLIC POLICY ON THE THIRD SECTOR (CONTINUED)

4.3 Transferring assets from government to the third sector

The principle of moving assets from the state to the third sector is now well established. The most significant transfer programme to date has been 'Large Scale Voluntary Transfers' of local authority housing to housing associations. The value of these transferred assets to January 2008 was £3.8 billion.¹⁶

Many other services that used to be part of the public sector have been transferred to the third sector by establishing them as separate third sector organisations and by selling assets to existing third sector organisations. Examples include local authority residential services that have been 'charitised', services for children, older people, people with disabilities that are now delivered by charities and leisure services that have been converted into social enterprises.

On a smaller scale, in 1998, Historic Royal Palaces (which runs the Tower of London, Hampton Court Palace, Banqueting House, Kensington Palace and Kew Palace) transferred from being an Executive Agency of the Department of the Environment and became an independent charity.¹⁷

More recently the UK government has promoted community ownership and management of other public assets. To encourage this, a £30 million Community Assets Fund was announced in December 2006. This fund will facilitate the transfer of management or ownership of assets from local authorities in England to the third sector, by offering capital to refurbish assets.¹⁸ A total of 38 buildings are expected to be transferred to the third sector by 2011.¹⁹

So transferring BW to the third sector would follow a well established trend of moving public assets to the sector.

4.4 Public policy in Scotland

Public policy in Scotland also aims to strengthen the third sector and encourage asset transfer. The Scottish Government's strategy for the third sector is to create 'a country where an enterprising third sector is valued and encouraged'²⁰ by investing in those organisations that have enterprise skills, and by creating an environment in which such organisations can thrive.

The focus is on opening markets to third sector organisations, investing intelligently in enterprise and promoting social entrepreneurship. There is a commitment to 'investing in those organisations that show the greatest potential to grow sustainably whilst delivering on their social and environmental objectives'.²¹

However, the relationship between the Scottish Government and BW is different from the rest of the UK. There is a view in Scotland that the current relationship between BW and the government works well and as a result significant funding has been forthcoming from the government.

Asset transfer in Scotland

There have been transfers of assets to the third sector in Scotland. Many local authorities have transferred their sports and leisure activities to the third sector and structured them as charities. The largest transfer of this kind in recent years (excluding the housing sector) was the transfer in 2007 by Glasgow City Council to Culture & Sport Glasgow (a charitable company formed for the purpose) of a portfolio of 140 venues – libraries, museums, sports centres and community halls. As with Historic Royal Palaces, ownership of the properties remains with the public sector, but the organisation is managed by a charity.

¹⁶ House of Commons written answer to question by Austin Mitchell MP on 31st January 2008.
¹⁷ The palaces are still owned by the Crown on behalf of the nation.
¹⁸ Consultation on the Community Asset Fund, 2007.

¹⁹ Announcement by third sector minister Angela Smith reported in Third Sector, 26th June 2009.
²⁰ Enterprising Third Sector Action Plan 2008-11 published in June 2008.
²¹ Enterprising Third Sector Action Plan 2008-11 published in June 2008.

In 2003 the Scottish Executive introduced the Land Reform (Scotland) Act providing a right to buy for rural communities in Scotland. In practice, this gives community groups the ability to register an interest in land or buildings, and a first option to purchase when they come up for sale. The related advisory note issued in 2005 mentions 'replacement and remodelling of buildings, roads and bridges'.

In June 2009 the Scottish Government announced its grant of £250,000 for a programme of activities aimed at promoting the transfer of assets from local authorities to community organisations. The community right-to-buy legislation in Scotland has resulted, to date, in 316,461 acres of land being transferred into community ownership.

4.5 Public policy in Wales

In January 2008 the Welsh Assembly Government published The Third Dimension which contained the Strategic Action Plan for the Voluntary Sector 2007/8 to 2009/10. It focuses on empowering communities by valuing and supporting the sector and strengthening 'citizen voice'.

It also sets out a plan for accelerating social enterprise. It says 'we will require each Assembly Government department to identify opportunities for social enterprise solutions within its functional area, and we will encourage other parts of the public sector to do likewise'²²

Transfer of assets in Wales

Recently the Welsh Assembly and the Big Lottery Fund have announced a £13m fund to help Welsh community groups acquire public buildings. Leighton Andrews, Deputy Minister for Regeneration, was reported as saying: "There are many public assets in Wales that are not being used to their full potential, and empowering the community to use these buildings to suit their needs is the main aim of this initiative. This is a win-win situation"²³

In summary, public policy is currently more aligned with the proposition that BW should move to the third sector than it has been since BW was established. Transferring assets to the third sector is supported by the main political parties and by policy in England, Scotland and Wales.

²² The Third Dimension – A Strategic Plan for the Voluntary Sector Scheme, Welsh Assembly Government, Jan 2008, pp32 and 33.

²³ Third Sector, 5th August 2009.



5. THE CASE FOR MOVING TO THE THIRD SECTOR

What are the main reasons for BW to move to the third sector? And what concerns have been raised about such a move?

Whilst conducting our research we have heard many reasons for BW to move to the third sector. The central rationale for making the move is that it would give BW a greater chance of protecting the waterways and maximising the public benefit they could create.

5.1 A clearer mission for the future

Moving to the third sector would enable BW to focus even more clearly on the unambiguous purpose:

To protect the historic waterways in our care, to secure and earn the necessary funding, to grow the numbers who value and invest in them and to optimise the public benefit they can deliver.²⁴

It would establish a clear over-riding objective to focus the organisation and to provide a basis for making difficult resource allocation decisions.

It would also change the perception of the organisation amongst its partners. Currently it is viewed by some as being part of the 'state', with privileged access to government funding. They expect BW to reflect this supposedly advantageous position when negotiating partnerships and contracts. Moving to the third sector would position BW as an organisation that had to balance its books within the context of agreed government funding.

More than this, it would enable BW to establish closer relationships with a wide range of organisations concerned with conservation, heritage, education and community issues. Being part of the third sector and fully engaged with all its intermediary organisations would enable BW to become a more highly respected local collaborator, whilst still working closely with local and regional government.

Moving to the third sector would also liberate staff to further exercise their passion about the waterways. It would be clear to everyone that the results of their efforts would be reflected in the state of the waterways and the innovative ways in which they were being used.

Visions and missions

Third sector organisations are driven by visions for making the world a better place and missions that describe their contribution to achieving the vision.

Sustrans is the UK's leading sustainable transport charity. Its vision is a world in which people choose to travel in ways that benefit their health and the environment. Its mission is to work every day on practical and imaginative solutions to the transport challenges affecting us all.

RNIB's vision is a world in which blind and partially sighted people enjoy the same rights, freedom, responsibilities and quality of life as people who are fully sighted and one in which no one needlessly loses their sight. Its mission is to challenge blindness by empowering people who are blind or partially sighted, removing the barriers they face and helping to prevent blindness.

Third sector organisations also strive to have clear and simple aims:

The Woodland Trust's four key conservation aims are to:

- Ensure no further loss of ancient woodland
- Increase woodland biodiversity
- Increase the area of new native woodland
- Increase people's understanding and enjoyment of woodland

5.2 Enhanced stewardship

Moving to the third sector would allow the board and management to work to much longer time horizons. Like the National Trust, board and management would know that they were responsible for the waterways in perpetuity and would act accordingly. Having a long-term contract with government would remove the insecurity that inevitably results from short-term grant funding and allow the organisation to invest over extended time horizons.

It would also open up opportunities for new governance arrangements involving a wider range of stakeholders. BW currently has a public sector board, appointed by the Secretary of State, reflecting the skills needed to govern the organisation. Moving to the third sector would open opportunities to enrich the governance arrangements, for example by allowing the creation of groups with rights to present their views to the governing board, or users electing a representative to the main or to subsidiary boards. Such arrangements could create greater unity between BW, waterway users and the communities around the waterways.

Clearly, many users of the waterways are also customers with financial relationships with BW. But they all share a common interest in securing the future of the waterways and together they would be able to champion the waterways cause and accomplish much more collectively than could be achieved separately.

5. THE CASE FOR MOVING TO THE THIRD SECTOR (CONTINUED)

Governance structure of The National Trust

The National Trust works to preserve and protect the coastline, countryside and buildings of England, Wales and Northern Ireland. It is one of the largest charities in the UK, with 3.5 million members and an annual income of over £335m.

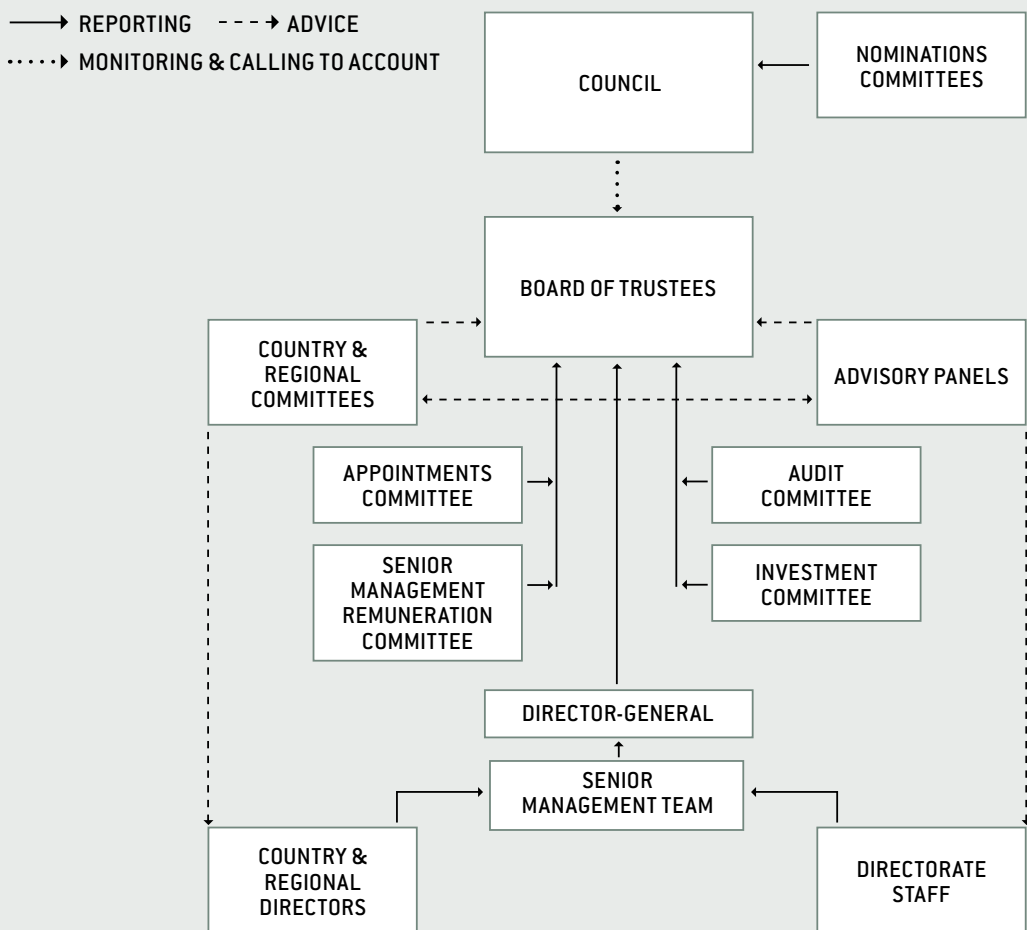
It is governed by the Board of between 9 and 15 trustees who are appointed by a council of 52 people. The council consists of 26 people who are elected by the members of the National Trust and 26 who are appointed by organisations whose interests coincide with those of the Trust.

Four committees report to the Board of trustees, all focusing on governance matters. The Trust also has eight expert panels whose role is to advise

staff and the Board of trustees. These include panels for archaeology, architecture, arts, gardens and parks, land use, learning, commercial and nature conservation.

The chair, deputy chair and the senior member are elected by the council. The senior member cannot be a trustee.

The appointments committee recommends suitable candidates for chairs of country and regional committees and chairs of advisory panels to the Board. The nominations committees assist the council in the selection or election of the chair and deputy chair, members of the Board of trustees, external members of council and elected members of the council.



5.3 Foundations for economic sustainability

BW can not survive without government funding. Even at the current level of government funding, KPMG estimated that there is a £30m per year funding gap between current income and what is required to secure the long-term future of the waterway network in England and Wales.²⁵

Moving to the third sector would require agreement with the government on a long term funding contract. BW would then be responsible for securing funds from other sources to fill the rest of the gap. However, knowing the size of the gap would provide the focus and the incentive needed to find ways of filling it.

Moving out of the state sector would allow increased borrowing capacity. At present BW is limited to borrowings of £30m by statute. Greater freedom to borrow would allow BW (over the longer term) greater flexibility in the management of its property endowment and some (perhaps limited) 'invest to save' prospects for cost-effective maintenance of the waterways.

Moving to the third sector would allow greater freedom to exploit and earn more money from joint ventures. At present BW is limited by public accounting rules to holding a maximum of 50% ownership of joint ventures. The freedom resulting from becoming a third sector organisation would allow BW greater flexibility in the structuring of joint ventures or other development vehicles where it could justify greater returns without commensurate increases in risks.

Commitment to changing to third sector status would also provide a clear rationale for driving cost reductions. BW believes there are further opportunities for making efficiency savings. Staff would be more motivated to pursue them if they knew that the resulting funds would be used to improve the network, rather than just reduce the government grant.

Moving to the third sector would also give BW access to charitable funds, details of which are set out later. Although these alone would not fill the funding gap, they could make a significant contribution.

Finally, becoming more independent would allow BW to work more closely with other waterway authorities. This might involve integration of back office support, offering to manage waterways on behalf of other authorities and, in some cases, taking over responsibility for other waterways. All of these would present opportunities for exploiting economies of scale.

5.4 Opportunities to become more enterprising

The best third sector organisations are renowned for being innovative and entrepreneurial. They are brimming with ideas to advance their cause and make the world a better place.

Third sector status could encourage BW to be bolder in the future it seeks for the network in its care. As examples, it could explore much deeper and more proactive community adoption of significant stretches of waterway, draw on a much wider range of support from the heritage and environment lobby and create affinity products such as credit/debit cards that would benefit the waterways. Third sector status would open up thinking and require much more creativity in gathering support and involvement.

In addition, as a third sector organisation, BW could engage on a more equal footing with other organisations and social enterprises to exploit these opportunities. Many of these opportunities would be local, so BW would need to have entrepreneurial people in communities with waterways who were motivated to establish partnerships that would use the waterways in an ever increasing range of ways.

²⁵ British Waterways Status Options Review, KPMG, June 2008.



5. THE CASE FOR MOVING TO THE THIRD SECTOR (CONTINUED)

The entrepreneurial spirit of the third sector

The Eden Project attracts 1 million people per year to what used to be a 160 year old exhausted china clay quarry at Bodelva in Cornwall.

Sustrans was inspired by the idea of converting disused railway lines into cycle tracks and has created a national network of over 12,000 miles of cycle routes.

The Landmark Trust has rescued 180 historic buildings by restoring them and letting them out to holidaymakers.

WaterAid, originally a response by the UK water industry to the UK Decade of Drinking Water and Sanitation, now brings water supplies to over 1 million more people every year and sanitation systems to over 2 million more people every year.

Children's Charity **Absolute Return for Kids** raised a record £26.6 million at a single gala fundraising dinner.

5.5 The concerns

Whilst there is a strong case for the move, we have also heard a number of concerns that will need to be considered.

At present the government is the funder of last resort. If, for example, there were a series of breaches of canals, there is an expectation that as BW is a public body the government would step in with emergency funding. However, this has not happened in the recent past. For example, BW had to fund £8.5m of repairs to the Monmouthshire & Brecon Canal following a serious and unforeseeable breach in 2007.

We have also heard a concern that it will be difficult to agree a financial settlement that is acceptable to both the government and the BW Board. The board would have to be confident that any contract with the government enabled it to meet the organisation's financial commitments. However, this might require a level of funding that the government did not feel it was able to commit to in a longer term contract.

A further point we have heard is that in attempting to become more independent, BW would give the government greater opportunities to reduce government funding. Some argue that if BW was no longer part of the state, the expectation that funds should be raised from other sources would grow and commitment from central government would dwindle. However, others point out that central government funding has been falling recently and in the current economic climate it is possible that government funding will fall anyhow.

We also heard that becoming independent could provide the government with an opportunity to take part of the property portfolio that BW has created over recent years to increase its income.

Another concern that has been expressed is that if BW was an independent organisation with a contract from government to pay part of the costs of maintaining the waterway network, then that contract might be subject to EU procurement regulations.

We also heard concerns from trade unions about possible cost cutting and further restructuring resulting from a move to the third sector. Some believe that the move could lead to reduced pay or job losses or to current roles being delivered by volunteers in the future.

Any move would also need to recognise that the relationship between BW and the Scottish government is different from the UK government. There is a view that public ownership is appropriate in Scotland and that a move might upset the current 'settlement' described earlier.

In summary, the case for moving BW to the third sector is that it would give a clearer mission for the future of Britain's waterways, enhanced stewardship of the network, foundations for greater economic sustainability and opportunities to become more enterprising. There are, however, concerns that will need to be addressed.

6. REPOSITIONING BW AS A THIRD SECTOR ORGANISATION

What would the implications of a move to the third sector be for marketing and branding BW? And how would it have to position its communications?

If BW were to become a third sector organisation, it would need to position itself in a very different way. People support third sector organisations through fundraising and volunteering. To secure such support organisations have to market themselves as a powerful cause that requires their support.

The last two decades have seen a significant shift in the main drivers for supporting third sector organisations. Historically, large organisations like NSPCC, Red Cross, RNLI and The Salvation Army attracted support because they were a trusted part of the fabric of society.

This began to change in the 1980s. Many of the generation who have emerged into adulthood since then have been part of a society with a different approach to charitable support. These people generally look first within themselves to identify their beliefs about what needs to change in this world and what they feel passionate about. Then they look for organisations that share their beliefs and are capable of delivering action and bringing about change.

6.1 Establishing a compelling cause

To engage support in today's third sector, BW's low profile as a third sector organisation means that it would need to make a powerful and compelling presentation of its cause, and not just market itself as a worthy organisation.

The cause will need to be convincing enough to engage the heart as well as the head, and be able to stand comparison with starving children, life-threatening diseases and abused animals. All of its supporters will have to become waterways champions.

The basis for every strong charity cause is a heartfelt and widely shared belief – a wrong

that needs to be righted, a threat that needs to be stopped, a disease that must be eradicated – accompanied by a clear vision for what needs to change, and a set of actions that will make that change happen.

To move beyond shared belief into engagement and action, the cause needs to be facing a threat. For BW the need to rescue disused waterways, protect waterways from closure, save heritage from decay or preserve threatened wildlife habitats could be the threat that triggers supporters to take action and give their time or money.

BW would need to shift the internal and external perception of who they are and what they do from 'maintenance engineering' to people who are 'fighting a constant battle to rescue and protect our canal and river heritage and environment'. Commitment to the cause will need to permeate the entire organisation and turn everyone into champions of the waterways.

6.2 Demonstrating independence from government

A significant factor in people's motivation to support a cause is the extent to which it is financially linked to government. In general, supporters applaud third sector organisations' ability to obtain funding from the government, but only in a way or to a level that does not impinge on the organisations' independence.

If potential donors saw their contributions as supporting the government they would be less inclined to donate. Their attitude will usually be that 'the government should pay'. If the government doesn't pay, potential donors may become irritated on the organisation's behalf, and may campaign for more government funding, but they are less likely to donate money themselves.

Exceptions to this are situations that are critical or life-threatening where there is no time to wait for the government. This is how hospitals raise money for essential equipment. Another exception is where the government provides funding to an acceptable minimum, but the donors and volunteers want services to be 'above minimum standard', for example raising funds for hospices.

For these reasons many charities emphasise their independence from government. Where government funding is limited, charities emphasise this to make a stronger case for support from private donors. For example:

“The National Trust is a charity and is completely independent of government”.

“The RNLi receives no government funding”.

Greater independence from government would therefore help considerably in raising significant funds from charitable sources. In Scotland there is a stronger tradition of public funding for services so the issue of distance from government is not so acute.

6.3 Building a supporter base

With total visitors of around 11 million each year,²⁶ BW has a large potential audience, which is mainly untapped for financial and volunteer support.

The number of visitors to BW waterways is increasing in contrast to the number of visitors to other waterways.²⁷

Around 60% of visitors are behaving in a way that demonstrates an appreciation and enjoyment of the canal environment rather than just passing through: walking, running, rambling, dog-walking, cycling, fishing.²⁸ These 7 million people could be categorised as already in the 'interested visitor' stage of an engagement journey. The remaining 4 million are at least in the 'aware' category.

The profiles of visitors to the waterways are very close to being representative of the population overall.²⁹ Men tend to dominate certain activities such as fishing, cycling and jogging, but overall the male/female presence is balanced.

The core charity donor segment is ABC1³⁰ and people over the age of 45 are the best donors,³¹ with 35-44 year-olds the next best group of donors. From BW's visitor profiling we estimate that 40% of visitors may fall into this core ABC1 35+ segment, equating to around 2.5 million of the 'interested visitors' who match the general profile of a charity donor.

So there would appear to be potential for BW to begin building a base of supporters. The journey for increasing engagement could be along the following lines.

ENGAGEMENT JOURNEY			
NO AWARENESS/INTEREST	VISITORS & 'INTERESTED' NON-VISITORS		
AWARENESS AND INTEREST	SHARED BELIEF	UNDERSTANDING OF THE THREAT → DESIRE TO HELP	ACTION (VOLUNTEER OR DONATE)
'YOURS TO ENJOY'	'OURS TO TREASURE'	'OURS TO PROTECT'	'MINE TO PROTECT'
CREATE AWARENESS: WATERWAYS ARE ON MY DOORSTEP AND RELEVANT TO ME.	EMBRACE THE WATERWAYS CAUSE: WATERWAYS ARE A WONDERFUL LOCAL AND NATIONAL TREASURE. TOGETHER WE CAN PROTECT THEM AND OPEN UP THEIR POTENTIAL.	CREATE CONCERN: I AM WORRIED THAT THE WATERWAYS ARE UNDER THREAT AND WE MAY LOSE THIS IMPORTANT PART OF OUR HERITAGE. WHAT CAN I DO TO PREVENT THIS HAPPENING?	TAKE ACTION: I WILL PERSONALLY HELP TO PROTECT OUR WATERWAYS FROM THIS THREAT. I WILL MAKE A REGULAR DONATION, AND IF I HAVE TIME, I WILL VOLUNTEER WITH BRITISH WATERWAYS.

26-29 British Waterways Inland Waterways Visitor Survey.
30 UK Giving 2008; profiles of donors or organisations known to THINK.
31 British Waterways Inland Waterways Visitor Survey.

6. REPOSITIONING BW AS A THIRD SECTOR ORGANISATION (CONTINUED)

6.4 Strengthening the profile of the waterways

BW has made good headway in building awareness and appreciation of the waterways as a leisure destination.³² This will need to continue both to grow the size of the waterways potential audience, and to deepen use of the waterways as part of people's lives.

BW can offer a strong combination of leisure and heritage – 'an enjoyable day out combined with a worthwhile cause'. This is the basis for engagement used by organisations such as the RSPB and the Woodland Trust.

The profile of 'British Waterways' is less well developed. The ability of the public to name British Waterways as the organisation that manages the canal system is relatively low at 22%.³³ Although British Waterways is the most dominant brand in this sector, it will have to build a much higher organisational profile if it is to capitalise on increasing enthusiasm for waterways.

The boating community is arguably the 'core' of BW's supporter base i.e. people who are the most passionate about waterways. Views are generally positive and supportive. However, there is a small but vocal minority which is publicly quite critical of BW.³⁴

This highlights an issue for the move to a third sector organisation. It is part of the culture of third sector causes and organisations that they attract people who are passionate supporters of their cause, some of whom can be vocal and critical. Third sector organisations tend to be more accepting of this behaviour, partly because stakeholders are expected to be more emotionally engaged, and sometimes because the organisation is itself engaged in activism of some kind as part of their mission, and this type of 'campaigning' behaviour is therefore part of the culture.

BW will need to further develop arrangements that encourage greater engagement with its core stakeholders and provide mechanisms for their views to be heard and be seen to be taken into account in decision taking.

BW will also need to become more inclusive – actively welcoming of debate and involvement of people who are often less than expert, even when this slows things down. It will need to offer warmth and patience towards all supporters, volunteers and stakeholders, and a genuine belief that the mission could not be delivered if it were not for them.

32-33 British Waterways National Asset Research 2008.

34 See for example blogs on narrowboatworld.com

6.5 Creating a living brand

A third sector brand is driven by its core belief, its cause, its vision and its values. These fundamental core messages will need to be defined by BW in terms that resonate with supporters and volunteers, and can be fully adopted by the majority of staff and stakeholders.

Above all, the brand must live, not on paper, but at the 'touch-points' where visitors, supporters and volunteers encounter the organisation in action. BW has thousands of such touch-points, and a significant proportion of these are face to face on the canal bank. Every encounter with a BW staff member or representative builds the British Waterways brand, for better or for worse.

So investment will be needed to further establish a culture throughout the organisation that demonstrates a huge passion for the cause, dedication to customer service and a unity of purpose.

6.6 Reviewing the name

There are a number of arguments for changing the name of BW if it moved to the third sector:

A new name could leave behind the associations of British Waterways as a government controlled company.

The inclusion of the word 'board' in the full name 'British Waterways Board' is not in the third sector style and it would be difficult to convince people that this is a charitable organisation.

Trust is an important concept for donors and volunteers, and the adoption of a name similar to 'National Trust' or 'Woodland Trust' would create a position that would be well understood.

In summary, if BW were to become a third sector organisation it would have to position itself as a compelling cause, demonstrate greater independence from government, build a supporter base and ensure its values are expressed at all 'touch points' where users encounter the organisation and review its name.

7. DEVELOPING VOLUNTEERING

If BW moved to the third sector, could more volunteers be attracted to waterways causes? And how would BW avoid competing directly with existing canal societies and other organisations that work on the waterways?

7.1 Numbers of volunteers

BW already uses volunteers. The number of people already volunteering with BW is estimated at around 350 volunteer groups with perhaps 2-3,000 active members.³⁵ Many of these groups operate without any BW involvement. Recent tracking of those groups where BW has had direct contact indicates that their volunteering totalled 16,000 volunteering days valued at £1 million in 2008/9.³⁶

These numbers are small compared to similar organisations in the third sector.

The number of 'interested visitors' to BW sites is around 7 million people.³⁷ The typical profile of a formal volunteer is ABC1,³⁸ and, as half of BW's visitors are ABC1,³⁹ this indicates that at least half of the 3.5 million 'interested visitors' might fall within this broad profile of potential volunteers. This suggests that if BW could create interesting volunteering opportunities, it could significantly increase the voluntary effort put into the waterways.

NUMBER OF VOLUNTEERS SUPPORTING SELECTED CHARITIES

ORGANISATION	VOLUNTEERS	ACTIVITIES
BTCV	228,000	PRACTICAL CONSERVATION WORK
NATIONAL TRUST	55,000	PROPERTIES: ROOM GUIDES, GARDENING, LAND CLEARANCE, FUNDRAISING, EVENTS, ADMIN
RNLI	42,000	4,500 BOAT CREWS, 4,000 SHORE CREWS, SEA SAFETY ADVICE, FUNDRAISING, SHOPS
WILDLIFE TRUSTS	34,000	RESERVES, GARDENING, SURVEYS, WILDLIFE WATCH
RSPB	14,000	BIRD SURVEYS, NEST PROTECTION, RESERVES WORK, VISITOR CENTRE, GUIDES
RAMBLERS ASSOCIATION	5,000	FOOTPATHS, WALK GUIDES
WOODLAND TRUST	2,800	TREE PLANTING, WOODLAND WORK, MEDIA, OFFICE; WT ALSO HAS 58,000 CLIMATE CHANGE MONITORS
INLAND WATERWAYS ASSOCIATION	2,000	RESTORATION
THE WATERWAYS TRUST	1,000	EVENTS, EXHIBITIONS, FUNDRAISING, MUSEUMS, TREE PLANTING

³⁵ British Waterways.

³⁶ British Waterways 2008/09 Annual Report.

³⁷ Based on type of activity undertaken, BW Inland Waterways Survey 2008.

³⁸ NFP synergy: Charity Awareness Monitor 2000-2007.

³⁹ BW Inland Waterways Visitor Survey 2008.

7.2 The volunteering proposition

Some charities use 'expert' volunteers as the primary provider of the organisation's service. In others, volunteers undertake supporting activities such as fundraising.

In the former category are organisations like Samaritans, whose 16,800 volunteers provide 2.3 million hours of services at a value of £25 million. The British Red Cross and St John Ambulance provide their first aid services through volunteers, and many RNLI lifeboat and shore crews are volunteers.

Many charities involve their volunteers primarily in fundraising – some of the mass events such as Cancer Research UK's Race for Life require thousands of volunteers from around the country. Many fundraising events would not be viable if the charity had to pay for staff to organise them. Charity shops also depend heavily on volunteers, often to support a paid manager.

In BW, volunteers might provide trained labour for construction and clearance work, or they could support canal-side and office-based staff.

There are potentially significant opportunities for volunteers to help the organisation to raise the profile of the waterways in a very cost-effective way by interacting with visitors at a local level. In addition, if BW decided to recruit members or regular givers, volunteers could be trained to work as recruitment teams on the waterways, considerably increasing the financial viability of individual giving.

Care would need to be taken to ensure that BW was expanding the pool of volunteers and not just attracting people from other waterways organisations. This would need a distinctive proposition that offered different types of opportunities and good working relationships with other volunteer using organisations.

There are considerable costs associated with training and managing volunteers. BW would need to establish a management structure capable of recruiting, inducting, training and supporting volunteers and ensuring that they have a good experience.

In summary, BW could attract more volunteers. It would have to clarify what they could do and provide high quality training and management.



8. RAISING CHARITABLE FUNDS

What approaches could be taken to raising charitable funds? And how much might a third sector waterways organisation envisage raising?

One of the advantages of moving to the third sector is that it would open up the potential to raise funds from a variety of charitable sources. The main sources of support for the waterways would be trusts, the lottery and individuals.

8.1 Trusts

The majority of UK trusts and foundations require an organisation to be a registered charity in order to qualify for funding. The largest and most prominent of comparator charities are raising around £1-2 million per annum from trusts.⁴⁰

Looking at funding by cause, BW's potential focus areas are most likely to be found under the three quite broad categories of arts/culture, environment/conservation and housing/community affairs. These three together account for a total of £195 million per annum of grants made in the UK.

Of 20 charities selected for comparison with BW, all received some form of trust income in 2007/8. The largest and most successful of these organisations appear to be achieving up to £2 million of trust funding, although as funding can be quite short-term, this is not necessarily sustainable.

A review of published accounts indicates that the National Trust received grants from over 60 trusts, and receives £2 million per annum from smaller grant-makers. The National Trust for Scotland receives around £0.9m from 50+ trusts. BTCV raised £1.9 million from trusts and companies. The RSPB received £1.1 million from 40+ trusts. The Woodland Trust is known to have received grants of at least £750,000.

8.2 Lottery

Currently eligibility for Heritage Lottery Fund money is restricted to remainder waterways and those navigable waterways for which BW does not have a statutory responsibility for maintenance. The HLF could be a growth opportunity for BW if a move to the third sector were to release BW from some part of its statutory responsibility, thus expanding the length of navigable waterways eligible for HLF funding. This would also apply to other lottery funders and grant makers who do not fund statutory obligations.

8.3 Individuals

Benchmarking against 20 comparator heritage/conservation/water/leisure organisations suggests that BW might aspire – in the long-term – to building a supporter base and voluntary income on the scale of the Woodland Trust. The Woodland Trust is supported by 80,000 households (memberships) and raises £10 million per annum from individuals excluding legacies.

Some organisations have the advantage of having buildings where entry fees can be charged and discounts offered to members. BW charges boat users, and anglers have to pay Environment Agency licence fees. There are, however, difficulties with charging other users such as walkers and cyclists.

BW's medium term fundraising aspirations might be informed by the experience of the Historic Royal Palaces which has built 9,000 memberships and income of £0.5 million over the ten years it has been in the third sector. The Inland Waterways Association has 18,000 memberships and income of £0.8 million from individuals.

The speed with which BW could build a member/regular giving programme will depend crucially on its ability to invest long-term in individual supporter recruitment at a level that will achieve net growth. This income stream is likely to be loss-making at least during the early years of investment, but it would provide foundations for longer term sustainable income as well as appeal and legacy income.

COMPARABLE CHARITIES: VOLUNTARY INCOME 2007/08 ⁴¹						
ORGANISATION	SECTOR	M'SHIP	APPEALS	LEGACIES	TRUSTS CORPORATE	TOTAL VOLUNTARY INCOME [1]
WOODLAND TRUST	ENVIRONMENT/ CONSERVATION	£4.9M	£5.2M	£8.2M	£2.3M	£20.6M
NATIONAL TRUST FOR SCOTLAND	HERITAGE	£10.3M	£0.8M	£3.7M	–	£15.8M
WILDFOWL & WETLANDS TRUST	WATER	£4.2M	–	£1.4M	–	£10.7M
KEW GARDENS	ENVIRONMENT/ CONSERVATION	£3.0M	–	£0.8M	–	£9.2M
RAMBLERS ASSOCIATION	LEISURE	£2.8M	–	£1.1M	–	£5.0M
BTCV	LEISURE	£0.4M	–	–	–	£3.2M
WATERWAYS TRUST	HERITAGE	–	£1.1M	–	–	£1.4M
INLAND WATERWAYS ASSOCIATION	WATER	£0.5M	–	£0.1M	–	£0.9M
HISTORIC ROYAL PALACES	HERITAGE	–	–	–	–	£0.5M

[1] Totals include other sources of voluntary income

Given that it takes investment over long timescales to build charitable sources of income, experience from other organisations suggests that BW might envisage raising up to £4m per annum from voluntary sources after ten years.

In summary, BW could raise significant funding from charitable sources, but it would take considerable investment and would have to be carefully targeted. Funds raised would not be sufficient to fill the long-term funding gap.

BW would need a charitable entity to raise funds from most charitable sources. With this in place, there is no reason why BW could not start building its charitable fundraising capacity immediately.

41 Charities' published accounts.

9. LEGAL CONSIDERATIONS

What legal structures could BW adopt? And how might its governance structures be arranged?

This section sets out legal options for reconfiguring BW as an organisation that would be defined as being in the third sector.

9.1 BW's needs

If BW were to change its current legal structure, it would need a legal form which is incorporated so that it has limited liability and legal personality. The legal structure must allow BW to borrow, although it does not seem necessary for BW to be able to attract equity finance.

Any legal form would need to bring a proper degree of public accountability and transparency to reinforce its mission, and the idea that it is established primarily for the benefit of the public not commercial gain. The legal form should allow for a range of stakeholders to be involved in BW's governance. Further considerations are whether the chosen legal form is regulated and whether there is an up to date legislative framework for that governance model.

9.2 Types of legal personality

Legal structures for third sector organisations include:

- Companies limited by guarantee
- Non-charitable third sector companies
- Community Interest Companies (CIC)
- Industrial and provident societies
- Royal charter bodies
- Charities
- Charitable Incorporated Organisations (CIO)⁴²

These can exist in certain combinations (e.g. a company and a charity) and as part of group structures involving more than one legal entity.

Many of the proposals in this report could be implemented without changing the legal structure of BW, so considerable progress on the journey to the third sector could be made before changing the legal structure of the organisation.

Changes to the legal structure would not all have to happen at once – the final structure could be achieved in a series of steps.

9.3 Top level alternatives

There are two high level alternatives for the top level legal structure of BW. It could:

- Create new legal entities below the current board
- Establish an entirely new set of legal structures

Creating an entirely new set of legal structures to take responsibility for the waterways would require primary legislation. However, it would be possible to provide substantial independence by establishing an operating company outside the public sector below the statutory Board. Under Section 14 (1) Transport Act 1962 the British Waterways Board has the power:

“To enter into and carry out agreements with any person for the carrying on by that person, whether as agent for the board or otherwise, of any of the activities which the board may themselves carry on.”

⁴² For a Scottish based organisation, the Scottish Charitable Incorporated Organisation.

Furthermore, under section 16 of the same Act:

“A board may enter into any working agreement to which this section applies notwithstanding it involves the delegation of the functions of the board under any enactment relating to any part of their undertaking.”

In this arrangement the statutory board would transfer the waterway assets and responsibility for their stewardship to the new third sector body through a long lease and delegation arrangements, retaining only a regulatory/monitoring role.

The new operating body would be formally independent of the government with a governance structure that could include representatives from a broad range of stakeholder groups.

The new arrangement would require the economic resource of the endowment property portfolio, to be transferred outright to the new operating body, albeit with a number of protective provisions.

9.4 Options for the legal structure

From all the possible combinations of third sector organisations listed above, there are two models which BW could consider, both of which involve establishing a group structure which includes a charitable entity and one or more non-charitable entities. The key drivers for this are:

- The need for a charitable body to enable BW to accept donations and reclaim tax
- The fact that NOT all BW's current activities, in particular, commercial developments, are charitable – even though the profits may be reinvested in delivering public benefit through maintaining and improving the waterways network

A secondary consideration is that BW's Board of non-executive directors are currently paid for their services as board members. As a general principle, trustees of a charity are not normally paid for acting as a trustee (and cannot be so paid in Scotland).

Option 1 – Charitable holding entity with one or more non-charitable subsidiaries

In this model, the charitable entity would be established as a company limited by guarantee. Companies have the advantage that the legislative framework is updated on a regular basis and that many issues have been tested and clarified in the courts.

A Charitable Incorporated Organisation would not be a suitable legal form because it will be a new and untested structure. There are risks that the legislative framework may have gaps which only become apparent after CIOs have been operating for some time and also that it may not be kept up to date.

Advantages

The advantages of this structure are that BW would have the kudos and reputational benefits of being a charity which may encourage support, particularly in the form of volunteering and donations. The fact that charities must operate for public benefit may help in dealing with the perception among some users that BW is currently 'too commercial'. It would also benefit from the tax reliefs available for charities which would mean it would not pay corporation tax on surpluses or tax on interest on savings. It would also benefit from rate relief on its operational properties and the network.

Disadvantages

BW would be subject to regulation by the Charity Commission and the Office of the Scottish Charity Regulator. Any subsidiary companies carrying out commercial activities would also have to operate within the Commission's and HMRC requirements for the funding of trading subsidiaries. In particular, these restrict how the trading subsidiaries can be financed by the parent charity, and finance generally has to be by way of a loan at market rates of interest and with security. In deciding to invest in a trading subsidiary, the trustees of a charitable BW would be subject to the duties set out in the Trustee Act 2000.

9. LEGAL CONSIDERATIONS (CONTINUED)

There is a difference between the factors trustees must consider when deciding to establish new subsidiary companies or to use charitable resources to invest further in existing companies, when compared with the duties that would apply to directors of a commercial company who were considering investing in a subsidiary. In particular, there are express duties on trustees to review investments from time to time and one of the factors which must be considered is the need to diversify investments. So it would not be possible to invest charitable funds in one class of asset, such as a property portfolio.

The requirement for a voluntary Board of trustees would be a change from current governance arrangements. However, it is sometimes possible to get the Charity Commission's consent for a minority (and in very exceptional cases, all) of the trustees to be paid for their services.

Option 2 – Non-charitable holding company with a linked or 'subsidiary' charity

In this model the top entity in a group structure could be a non-charitable entity with legal personality and limited liability.

Establishing a company limited by guarantee would have some parallels with Glas Cymru (Welsh Water) and Network Rail. In addition, it would be possible to preserve the social mission of BW by using the new Companies Act 2006 procedures for entrenching provisions in a company's articles of association.⁴³

To give the holding entity a clear public benefit ethos, consideration could be given to establishing it as a community interest company limited by guarantee. However, whilst the CIC Regulator has the power to regulate the reasonableness of the remuneration of a director of a CIC, the Registrar of Companies has no similar power in relation to a company limited by guarantee that is not a CIC.

The holding company could have a parallel or wholly 'owned' subsidiary charitable foundation, which would probably also be incorporated as a company limited by guarantee to provide the benefit of limited liability and legal personality.

Advantages

This would provide greater flexibility and less bureaucratic burden for BW than if the holding company were a charity. If the holding company is established as a CIC, this might help promote a perception among users that BW operates for the public interest (as well as the charity providing a focus for fundraising and volunteering). It would benefit from the social enterprise 'brand' associated with CICs.

Although the holding company would not receive any tax reliefs, it could make donations under Gift Aid to the charitable entity and would not pay corporation tax on any surpluses donated to the charity. (Once funds are donated to the charity they can only be applied to further the charity's purposes and would not be available for the wider range of BW's activities.)

Disadvantages

A CIC established to continue BW's activities would be one of, if not, the largest CICs in existence. There is a risk that it may therefore be subject to more thorough regulatory scrutiny than most CICs, although the CIC regulator has so far proved to be a fairly light touch regulator. The CIC regulator also has a role to champion and promote CICs and in that context may well be supportive of a new and potentially large and high profile CIC.

A company limited by guarantee (whether a CIC or not) would not be able to raise funds through equity finance (although it could have subsidiaries which are share companies or be a part-owner of joint venture companies which have share capital).

⁴³ These allow a company's articles to specify that certain provisions may be amended or repealed only if certain conditions are met or procedures are complied with (overriding the general principle that the articles can be changed by a special resolution of the members, which requires 75% of those voting to be in favour of the resolution). Provision for entrenchment may only be made when a company is first formed or by unanimous agreement of the members.

9.5 Guarantee company and charitable foundation relationship

Many large third sector organisations have both a guarantee company without charitable status and a separate subsidiary charity in their legal structures. Sometimes membership of the boards of these bodies overlap.

A charitable foundation would need to have some trustees who are independent from the company (i.e. neither directors nor staff of the company limited by guarantee). There would have to be sufficient independent trustees to hold a quorate meeting in situations where trustees who are also directors or staff of the company had a conflict of interests. However, independent trustees would not necessarily need to form a majority on the Board of the charity.

All the trustees would have fiduciary duties to act with good faith in the best interests of the charity, rather than in the interests of any other organisation they may 'represent', including the company.

If the top body was a company, it could have control over the charity by being the sole member. This would give the company the power to appoint and remove board members, change the constitution of the charity and change its name.

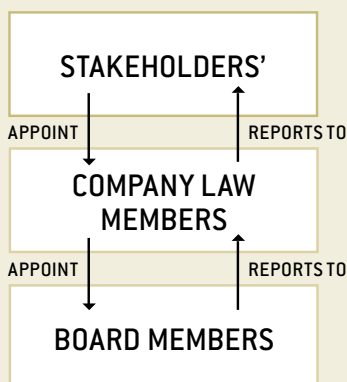
If the holding company were a CIC, it would be subject to the statutory lock on its assets. The memorandum and articles would normally need to identify potential recipients of the assets if the CIC were ever wound up.

9.6 Stakeholders' role in governance and accountability

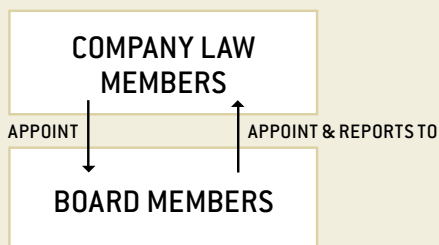
Some third sector organisations have a company law membership which is distinct from members of the board. Some have a structure that allows people who join the organisations an opportunity to elect some or all the members of the board, for example the National Trust. Others have a narrow membership which could be between a handful and a few hundred members who perform a similar role. Sometimes these people are chosen by the board.

Possible relationships between company law members and board members

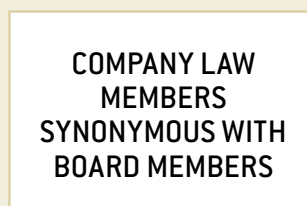
Model A



Model B



Model C



9. LEGAL CONSIDERATIONS (CONTINUED)

One reason for having company law membership which is distinct from its board of directors, is to provide the element of accountability and 'contestability'. The company law membership could be drawn from different constituencies, or stakeholders. Both Glas Cymru (Welsh Water) and Network Rail have a managed process for selecting and appointing company law members to ensure that their oversight helps to further the companies' purposes.

Network Rail case study

Network Rail has two general classes of membership, Public Members and Industry Members. Public Members are drawn from the public and Industry Members are made up of certain rail industry companies (principally the passenger and freight train operating companies and some rail contractor companies), who are automatically eligible to be Members of Network Rail upon meeting certain criteria.

A majority of the Members must be Public Members. Under the company's current Membership Policy, Public Members should not comprise more than 80% of the Members.

In addition, the Department for Transport is a Member of Network Rail and has special membership rights, such as to appoint a Director of Network Rail (not currently exercised), and certain rights in relation to change to the company's constitution. The Department for Transport also provides credit support in relation to the debt funding of the Network Rail group and has certain rights in that capacity.

It would not be possible for a subsidiary charity to be a company law member of the holding company if the company is itself the sole member of the charity, because this is prohibited by the Companies Act 2006. However, it would be possible for individual members of the charity (or, more likely, directors of the charity) to be given some kind of automatic membership rights in the company (while limiting the overall percentage of membership rights in the company which would be linked to the charity).

An option to protect against factionalism within the company, would be for the company to have a nominations committee responsible for proposing a 'slate' of directors. The members would then vote on the 'slate' as a whole.

The members would also be able to remove the directors (either an individual director, or the whole board) using their powers under company law – but no individual 'constituency' would have sufficient power to do this without the backing of the others. Within the constraints provided by company law (and the CIC legislation, if applicable), the members could also change the company's articles of association, and so would have ultimate control over its constitution.

In summary, BW could create new legal structures within the current legislative framework or if primary legislation was passed it could become an independent third sector organisation. There are two possible legal structures BW could establish within the current legislative framework. Both could provide greater engagement with stakeholders.

APPENDIX 1

THE FIRMS THAT PRODUCED THIS REPORT



BWB is unique among City-based legal practices in offering commercial and private client expertise, while specialising in work for the charitable and not-for-profit sector. We act for over 2000 charities and social enterprises, from national and international organisations to innovative startups, including more of the top 3000 charities than any other firm. We also pioneered the idea of the Community Interest Company (CIC) and have written several books and other publications on the key legal issues affecting charities and social enterprises.

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Compass Partnership is a management consultancy specialising in the management and development of independent non-profit-seeking organisations. Founded in 1982, we have worked with over 800 not-for-profit clients and have built up a body of knowledge on management in this field and a tried and tested range of approaches to consultancy. We specialise in strategy, performance and governance. Our particular area of skill and expertise is in combining rigorous intellectual analysis with an understanding of how organisations work and how to achieve change. The Director's book *Managing without Profit* (Mike Hudson, 3rd Edition, DSC, 2009) is the leading management textbook in this field.

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THINK Consulting Solutions is the leading international consultancy dedicated to not-for-profit sector marketing – strategy, management, fundraising, brand, communications and new media. THINK consultants are highly experienced senior practitioners with strong personal commitment to the sector. We offer a unique combination of intelligent thinking, creative problem solving and robust, workable advice and action plans. We work with major international charities, both at the centre and with national offices, and a wide range of large and small national organisations in the UK and Europe.

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