

WATERFRONT ENTERPRISE BOARD LIMITED

**REVIEW OF CORPORATE GOVERNANCE
FINAL REPORT**

24 NOVEMBER 2008

SECTION ONE ~ INTRODUCTION

1. On Monday 16 June 2008, I announced my intention of conducting a review of various matters which had come to public attention concerning Waterfront Enterprise Board Limited (WEB). In general, these matters relate to the decisions of WEB regarding development of what has come to be known as the Esplanade Quarter. The terms of reference for this review are as follows:

“To investigate the circumstances surrounding the decisions made by the board of WEB concerning the proposed development to establish:

- (1) *Whether proper rules of corporate governance have been established and applied by WEB;*
 - (2) *In particular, whether proper arrangements were made by the board of WEB to identify potential conflicts of interest and ensure that Board decisions were not affected by them;*
 - (3) *Whether in all the circumstances, the decisions which were made by the Board of WEB in respect of the development were appropriately based on all of the commercial evidence and advice which the Board might reasonably have been expected to obtain and to take into account; and*
 - (4) *Any other issues that appear relevant to the matters set out in (1), (2) and (3) above”.*
2. On 30 June 2008, I published an interim report on the work that I had been able to do by that date: principally certain aspects of items (1) and (2) in the above terms of reference. I have now completed my review of corporate governance within WEB and the results of that work are set out in this report.
 3. The review has consisted of an examination of records held by WEB itself, augmented by discussions with each of the members of WEB’s board (both past and current members) and with senior officers of WEB. I have also spoken to a number of others who appeared to have relevant information about the matters with which I have been concerned. A list of those people to whom I have spoken in the course of this review was set out in Appendix One to the interim report published on 30 June 2008.
 4. In accordance with my normal practice, copies of a draft of this report were provided to the people who assisted me in this review of corporate governance so that they were able to

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alert me to any respects in which the report inadvertently distorted their recollection of events. I have sought to reflect their observations on matters of fact. I am grateful to all of those who have assisted in the conduct of the review and the preparation of this report.

5. A summary of my findings and recommendations is set out in Section Two of this report. My more detailed observations are set out in succeeding sections.

SECTION TWO ~ SUMMARY OF FINDINGS AND RECOMMENDATIONS

Corporate governance

Finding

6. The effect is that WEB is now in compliance with normal corporate governance practice.

Recommendation

7. I recommend that WEB should recruit a professional company secretary.¹

Accountability

8. I recommend that WEB should be accountable to a single Minister.

9. As it is evident that the existing position of States Director has placed those who have held this position in an irresolvable conflict of interest and has not served well the interests of the States because it has not provided a reliable means of protecting the States' interest in WEB, I recommend that:

(1) the position of States Director currently enshrined in WEB's Memorandum of Association should be discontinued;

(2) States Members should not ordinarily be members of WEB's board unless they serve as representatives of the Sponsoring Minister (for example, it may be thought appropriate for an appropriate Assistant Minister to serve as a director). In this capacity, the Assistant Minister would be accountable to the relevant Minister.

10. It would be inappropriate for this change in existing practice to be made unless appropriate arrangements are made to ensure that there is proper accountability to the States. I recommend that these arrangements should at least include the following:

(1) the Sponsoring Minister should be accountable to the States for oversight of WEB's activities.

¹ I understand that WEB has started a recruitment process.

- (2) the role of the Sponsoring Minister should be to maximise the long term value of the States' interest in WEB and to ensure that WEB operates in accordance with the agreed policies of the States.
 - (3) where appropriate, the Sponsoring Minister's decisions in respect of WEB (for example approving proposed transactions) should be recorded in the form of Ministerial Decisions. The effect of this would be that the decisions would be in the public domain so that members of the States would be able to subject them to such scrutiny as they think appropriate.
 - (3) the Sponsoring Minister should be responsible for laying WEB's annual report and accounts before the States formally when received.. The effect of this would be that members of the States would be formally notified of the results of WEB's activities and would thus be afforded another opportunity to subject them to such scrutiny as they think appropriate.
11. An analysis of the implications of these proposals for the protection of the States' interest in WEB is set out in Appendix Three.
12. Accordingly, I recommend that WEB's Memorandum and Articles of Association should be reviewed and then revised thoroughly.

SECTION THREE ~ CORPORATE GOVERNANCE

Introduction

13. In this Section of the report, I will set out the outcome of my review of corporate governance within WEB.
14. As mentioned in my interim report, a similar review of corporate governance was carried out by the States' Internal Audit Department in 2005. The principal outcomes of that review are set out in Appendix Two.

Work undertaken

15. In the course of the review, the following subjects were examined in addition to those covered by the interim report:
 - (1) conduct of general meetings including Annual General Meetings;
 - (2) maintenance of registers (i.e. register of shareholders, directors, interests, gifts and hospitality);
 - (3) records of contracts and agreements;
 - (4) conduct of board meetings and of committee meetings (including the maintenance of minutes of meetings);
 - (5) preparation and audit of accounts; and
 - (6) business plans and accounts.

Outcome

16. My conclusions may be summarised in the following way:
 - (1) on completion of the Internal Audit report in 2005, WEB sought to implement all of the recommendations that were made.
 - (2) at times since then, compliance with the new arrangements has lapsed from time to time (specifically the disclosure of interests as reported in the interim report).

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- (3) certain of the lapses in compliance were caused by the fact that requirements of WEB's Articles of Association do not reflect current practice within the States (e.g. the Articles' requirements with regard to business plans and interim accounting information).
 - (4) throughout 2008 these lapses have been corrected.
17. The effect is that WEB is now in compliance with normal corporate governance practice.
18. Nonetheless it remains the case that lapses in governance have occurred from time to time as explained above. It is possible that compliance with normal corporate practice (and in particular the maintenance of registers and minutes) has been the responsibility of WEB's managers in addition to their normal duties. It would be more satisfactory if WEB were to recruit a professional company secretary whose sole duty it should be to ensure that all necessary records and practices are maintained. In view of the significance of the business handled by WEB, the expense of such an appointment would be well justified.
19. I therefore recommend that WEB should recruit a professional company secretary. I understand that a recruitment process has commenced.

SECTION FOUR ~ ACCOUNTABILITY

Introduction

20. In my interim report dated 30 June 2008, I indicated that I was minded to make various proposals to deal with what I perceived to be conflicts in accountability:

“59. In my view, the States should re-consider its customary practice of appointing members of the States to be members of WEB’s board. I will consider this matter further before making recommendations in my final report, however I am minded to suggest that:

- (1) *WEB’s principal line of accountability should be to the relevant Ministers as representatives of WEB’s shareholder.*
- (2) *States Members should not be members of WEB’s board unless they may serve as representatives of the shareholder (for example, it might be thought appropriate that an Assistant Minister from a relevant department should serve as a director of WEB).*
- (3) *the States’ proper oversight of the activities should be achieved by requiring an existing committee or creating a new committee whose task would be to oversee the actions of States companies such as WEB.*
- (4) *scrutinising where appropriate Ministerial Decisions approving the principal transactions and decisions of WEB (as at present).*

60. It is implicit in this suggestion that a change of practice with regard to States Members of the board should not be made unless appropriate arrangements are made to ensure that there is proper accountability to the States.

61. Any change of this sort will require a change to WEB’s Memorandum and Articles of Association which in turn will require appropriate legal consideration and drafting. It cannot be accomplished by the simple expedient of the States refusing to appoint States Directors because WEB’s Articles require that two States Directors must be present if the directors are to transact business.² If there are no such directors, then WEB’s board will not be able to transact business.”

21. I have considered these matters further and will set out the recommendations that I believe are appropriate.

²

Article 40.

Accountability

22. It is important that WEB's line of accountability should be clear and unconflicted. This can best be achieved by confirming that WEB's principal line of accountability is to an appropriate Minister as representative of WEB's shareholder (the Sponsoring Minister).
23. It is not necessary for the purpose of this report to specify to which Minister WEB should be accountable. In recent times, the Chief Minister has been fulfilling this role and this may continue to be appropriate in view of the significance of the issues being managed by WEB.³
24. As a result of conditions which were imposed by the States when land was transferred to the company, WEB is obliged to seek the approval of the Treasury & Resources Minister for major land transactions. In effect, for most transactions, WEB is currently obliged to seek approval from two Ministers. I believe that this is unsatisfactory and that WEB should only be required to seek the approval of one minister for any particular transaction. This is not to suggest that the Treasury & Resources Minister does not have a legitimate interest in WEB's management of assets that are so significant to the States' finances. Rather it is to suggest that the Minister to whom WEB is accountable should be responsible for ensuring that all relevant Ministers are in agreement with the approval of any particular transaction. WEB should not be obliged to seek parallel approvals from a number of Ministers.
25. On this basis, I recommend that WEB should be accountable to a single Minister.
26. It would seem sensible that the Minister to whom WEB is accountable should also act in General Meetings of WEB as the representative of the States as shareholder. At present, this role is performed by the Greffier of the States who, before attendance at such meetings, seeks the advice of the Chief Minister's Department on the way in which the States' votes should be used. Where such advice or instructions are issued, they should be confirmed as Ministerial decisions (as, in comparable situations, is currently the practice of the Treasury & Resources Department).⁴

³ Currently, Article 22(a) empowers the Chief Minister to issue directions to WEB.

⁴ If the sponsoring minister were to act as representative of the States at General Meetings, it would be necessary to amend Article 20 of WEB's Articles of Association.

States' long term interest in WEB

27. In making decisions, a sponsoring minister is bound to be concerned with the manner in which WEB is achieving the policy objectives agreed by the States but is also bound to be concerned with the way in which the long term value of the States' assets is being maximised and realised. This aspect of a sponsoring minister's concerns is similar to concerns which must be taken into account when the relevant minister is considering the States' interest in other States-owned companies (such as Jersey Electricity and Jersey Post). The role of the Sponsoring Minister is therefore to maximise the long term value of the States' interest in WEB and to ensure that WEB operates in accordance with the agreed policies of the States.
28. The question of how these interests are managed was raised in the report ("Emerging Issues") which was published in May 2008 at the end of the States' Spending Review, and, since then, has been the subject of further work. As a result of that work, I am minded to propose that the States should establish an Investment Advisory Board to advise sponsoring ministers on the way in which the long term value of the States' interests should be fostered.
29. The reports and recommendations of this Board would be published in the same way that the reports of the Fiscal Policy Panel are published.

States directors⁵

30. In discussions since publication of my interim report, I have not encountered anyone who disagreed with my tentative proposal that the position of States Director should be discontinued. It appears to be accepted that the position is subject conflicts of interest which cause difficulty for the States Directors themselves.
31. Accordingly, I recommend that:

- (1) the position of States Director currently enshrined in WEB's Memorandum of Association should be discontinued;

⁵ Article 23 provides that there shall be seven directors of whom three are to be States Directors, there shall be Non-States Directors and one shall be Managing Director. Article 40 provides that the quorum for board meetings shall be two States Directors and two Non-States Directors. All directors are appointed by the States.

- (2) States Members should not ordinarily be members of WEB's board unless they serve as representatives of the Sponsoring Minister (for example, it may be thought appropriate for an appropriate Assistant Minister to serve as a director. In this capacity, the Assistant Minister would be accountable to the relevant Minister and not the States.
- (3) Directors should be appointed by the States (as at present) but on the recommendation of the Chief Minister.

Accountability to the States

32. It would be inappropriate for this change in existing practice to be made unless appropriate arrangements are made to ensure that there is proper accountability to the States. I recommend that these arrangements should at least include the following:

- (1) the Sponsoring Minister should be accountable to the States for oversight of WEB's activities.
 - (2) where appropriate, the Sponsoring Minister's decisions in respect of WEB (for example approving proposed transactions) should be recorded in the form of Ministerial Decisions. The effect of this would be that the decisions would be in the public domain so that members of the States would be able to subject them to such scrutiny as they think appropriate.
 - (3) the Sponsoring Minister should be responsible for laying WEB's annual report and accounts before the States formally when received. The effect of this would be that members of the States would be formally notified of the results of WEB's activities and would thus be afforded another opportunity to subject them to such scrutiny as they think appropriate.
33. In my interim report, I proposed that the States could appoint a committee to oversee the activities of States companies such as WEB. I have not received favourable responses to this proposal and thus do not recommend the appointment of such a committee.
34. However, concerns have been expressed to me concerning the effectiveness of the States' oversight of WEB. In view of the seriousness of this subject, I have reviewed all of the principal occasions on which the States may wish and need to oversee the activities of WEB to

demonstrate that there are effective arrangements in place and to permit gaps to be more easily identified. The results of this analysis are set out in Appendix Three.

WEB's Memorandum and Articles of Association

35. A decision to discontinue the appointment of States Directors of WEB will require a revision of the Articles of Association.

36. Revision of the Articles of Association to remove references to States Directors would afford an opportunity to up-date the Articles generally in the light of experience. A list of the individual Articles that should be considered for revision is set out in Appendix Four including the following principal issues:

- (1) the possible removal of a limit on the number of directors; and
- (2) the possible removal of over-detailed references to business planning and accounting information to be provided periodically by WEB. These requirements could be specified more effectively by means of Ministerial Decisions.

37. Accordingly, I recommend that WEB's Memorandum and Articles of Association should be reviewed and then revised thoroughly.

APPENDIX ONE ~ INTERIM REPORT ~ SUMMARY OF CONCLUSIONS

Introduction

App1-1 This summary of conclusions is taken from the interim report of the review which was dated 30 June 2008.

Register of Directors' Interests

App1-2 It is the policy of WEB to maintain a register of directors' interests. I regard this practice as representing good practice.

App1-3 It is evident that between 2005 and 2008, whilst WEB continued to hold the Register that had been prepared in 2005, directors were not asked by WEB to up-date their declarations and in practice did not do so. As a result, WEB's Register was not accurate. I have not enquired into what happened before 2005.

App1-4 It is also evident that WEB has up-dated its records recently.

Disclosure of conflicts of interest

App1-5 The evidence suggests that WEB's board generally observed normal practice with regard to the disclosure of conflicts of interest⁶.

Conflicts of interest ~ cases of difficulty

States Members of WEB's board

App1-6 In my view, the States should re-consider its customary practice of appointing members of the States to be members of WEB's board

⁶ The normal practice is described in Section Four of this report.

Mr Voisin

App1-7 In my view:

- (1) Mr Voisin should have disclosed to WEB his appointment to the board of AIB CI Limited (AIB CI) for inclusion in the Register of Directors' Interests. He did not do this.
- (2) On a strict interpretation, Mr Voisin's appointment to the board of AIB CI did not represent a conflict of interest as defined by Companies Law and thus he was not required to disclose a conflict of interest at board meetings at which WEB's transactions with Harcourt were discussed.
- (3) Notwithstanding this strict interpretation, it would have been wise for Mr Voisin to make such disclosures.
- (4) I have found no evidence that Mr Voisin's failure to disclose distorted WEB's decisions.

APPENDIX TWO ~ RECOMMENDATIONS IN INTERNAL AUDIT REPORT 2005

Introduction

App2-1 This is a summary of the recommendations made in the 2005 report of the States' Internal Audit Department together with notes on the actions that have been taken since the preparation of that report to deal with the issues that were identified.

Annual General Meetings

App2-2 Paragraph 4.6 of the 2005 report recommended that:

"We were informed that no AGM's had been held since WEB was first incorporated but also that no request has been made to WEB to instigate one . . . It is recommended that WEB holds AGM's annually and considers the appointment of auditors at these meetings. Since our audit an AGM for 2005 has been organised for 3 June 2005".

App2-3 Annual General Meetings have take place regularly since completion of the 2005 report.

Register of interests and gifts and hospitality

App2-4 Paragraph 4.7 of the 2005 report recommended that:

"We were concerned to note that at the time of our audit there was no register of interest available for scrutiny at the offices of WEB . . . Whilst a register of gifts and hospitality was located in the safe at WEB's offices we were surprised to note that this only contained three entries, the last one being on 16 May 1996 . . . It is recommended that from now any gifts received and provided are entered into the register".

App2-5 As I indicated in my interim report, the register of interests was not in fact maintained. Since publication of my interim report, the register has been brought up to date. Directors have confirmed their understanding of the duty to declare their interests and possible conflicts and the board has made a commitment to refresh the register annually.

App2-6 A register of gifts and hospitality is now maintained electronically.

App2-7 I have also inspected the company's other registers (i.e. register of directors, shareholders, sealing of documents). At the time of my interim report, the registers of directors and of sealing of documents was not up to date. I have been informed that although the written register of the sealing of documents has not been maintained, a complete register of all documents signed for or on behalf of the company is maintained electronically.

Audit Committee

App2-8 Paragraph 4.9 of the 2005 report recommended that:

"WEB has an audit committee that meets four times a year. As part of the audit we reviewed the minutes of audit committees held since September 2004. However, it was not possible to review any of the minutes prior to this date as they could not be located in the offices of WEB during our audit visit".

App2-9 Minutes have been prepared and filed. I was able to inspect them.

Remuneration Committee

App2-10 Paragraph 4.10 to 4.15 of the 2005 report recommended that:

"Formal minutes of the Remuneration Committee have not been kept, many of the decisions being taken have been recorded by memo letter and email exchanges . . . It is also recommended that the membership of the Remuneration Committee be considered.

It is recommended that in 2005 and future years the Remuneration Committee should undertake the salary review for the Managing Director in advance of any pay awards being agreed for the rest of the WEB staff. This is to ensure that the staff pay award does not set a precedent for the increase to the Managing Director's salary".

"It is recommended that future decisions of the Board regarding remuneration of the Managing Director should be formally recorded in the minutes".

"It is recommended that all future recommendations regarding the remuneration of the Managing Director should be made to the Board by the Remuneration Committee and should be formally documented".

App2-11 These recommendations have been implemented save that some difficulty arises over the recording of decisions as the company's full time staff do not attend meetings at which their remuneration is to be discussed. In these circumstances it is for the chairman of whichever meeting is considering these matters to ensure that a proper record is included in the minute book and confirmed at the next board meeting.

Business Plans and Accounts

App2-12 Paragraph 4.17 of the 2005 report recommended that:

"Article 25 (a)(ii) of the Articles of Association reads as follows:

The Directors shall cause to be prepared annually and in consultation with all relevant Committees of the States a Business Plan and Report which shall be sent to the Committee at such time as may be reasonably required by the Committee setting out the objectives, policies and programmes of the Company and reporting on progress".

Article 3 states:

"The Directors shall cause to be kept proper accounts of the Company for each accounting period to be prepared in accordance with the generally accepted accounting principals in the Island of Jersey consistently applied and that such accounts shall be forwarded to the Committee not more than four months after the end of the period to which they relate".

WEB accepts that this may not have happened in as formal a manner has been desired. WEB does send a copy of its accounts to every States Member and the Chief Officers of every States Committee, including Policy and Resources. Copies are also sent to the States Treasury. It is intended that in the future six monthly financial reports will be submitted to the Accounts Committee which will include actual spending budgetary information and that a more summarised report will be submitted to cover the intervening quarters."

App2-13 In practice, the company complies with whatever requests for information are received from the Chief Minister's and Treasury and Resources Departments.

APPENDIX THREE ~ ARRANGEMENTS FOR STATES' OVERSIGHT OF WEB

<i>Subject</i>	<i>Arrangement (assuming that the proposals in this report are implemented)</i>	<i>Comments</i>
Amendment to Memorandum and Articles of Association	Requires prior approval of the States on a proposal from the Chief Minister	
Appointment of Directors	Requires approval of the States on the recommendation of the Chief Minister	
Removal of Directors	Requires prior approval of the States .	
Appointment of Auditors	Approved in General Meeting of WEB's shareholders at which the sponsoring minister acts as representative of the States as shareholder in WEB	This arrangement is different from the general arrangements of audit of the activities of the States
General strategic purpose of WEB	Requires the approval of the States in response to proposals submitted by the Council of Ministers	
Transfer of land to WEB	If such a transfer were a significantly new policy direction, such a proposal would presumably be submitted by the relevant Minister to the States for prior approval. For a transfer in accordance with a policy already approved by the States, and subject to conditions similar to those already in force, the transfer would require the approval of the Treasury & Resources Minister which would be expressed in a Ministerial Decision which would be made public in the normal way and would then be subject to scrutiny by the States according to the normal process.	
Issue of directions to WEB by the Chief Minister (as envisaged by the Articles of Association)	To be recorded as Ministerial Decisions which would be subject to scrutiny by the States according to the normal process.	

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Proposals by WEB to dispose of land or enter into major developments of land (within existing policy approved by the States).	Require approval of the Treasury & Resources Minister which would be expressed in a Ministerial Decision which would be made public in the normal way and would then be subject to scrutiny by the States according to the normal process.	
Proposals by WEB to raise funds by borrowing or by other means	If the proposal to raise significant funds lay outside existing policy, the proposal would require approval by the States. If the proposal lay within existing policy approved by the States, it would require the agreement of the Sponsoring Minister which would be recorded as a Ministerial Decision and thus be subject to scrutiny by the States according to the normal process.	
Proposals by WEB to apply the company's reserves either to the payment of a dividend or in some other way (e.g. to fund a further development)	Requires the approval of the Sponsoring Minister which would be recorded in a Ministerial Decision and thus be subject to scrutiny by the States according to the normal process.	
Issue of an instruction by the Sponsoring Minister to WEB to apply its reserves either to the payment of a dividend or in some other way	Would be recorded as a Ministerial Decision which would be subject to scrutiny by the States according to the normal process	

APPENDIX FOUR ~ REVISIONS TO WEB'S MEMORANDUM AND ARTICLES OF ASSOCIATION

Introduction

App4-1 In this Appendix I will identify the individual Articles of Association which would require revision if the recommendations set out in this report were to be accepted.

Article 1 – Interpretation

App4-2 This Article would require amendments if the distinction between States and non States directors were to be abolished.

Article 20 – Representative of the States

App4-3 Assuming that it is agreed that the sponsoring minister (or his delegate) should act as the representative of the States at General Meetings, this Article will require amendment.

Article 22 – Direction

App4-4 This Article refers to the “Committee”, which is a reference to the Policy and Resources Committee of the States of Jersey and thus to the arrangements that preceded ministerial government. This Article requires amendment to reflect changes to the machinery of government.

Article 23 – Numbers of Directors

App4-5 This Article will require revision if the distinction between States and non States directors is abolished. In addition, the Article limits the size of the Board to eight (i.e. seven directors together with an additional director who shall be the managing director). Consideration should be given to whether this maximum number remains appropriate.

Article 25(b) – Powers of Directors

App4-6 In its current form Article 25 states that the objectives of the company include the promotion, co-ordination and implementation of a comprehensive strategy for the development of the St Helier Waterfront. It may be appropriate to consider whether this description is a correct reflection of the current policy of the States. Further, on occasion, it has been expedient for WEB to undertake development directly. It may be prudent to give consideration to whether the words “implement a comprehensive strategy” include such direct activities and, if not, then the Article should be amended to permit appropriate activity.

Article 25 – Powers of Directors

App4-7 This Article requires the directors to prepare and submit an annual business plan and report to be sent to the Policy and Resources Committee. Consideration should be given to changing this Article so that it obliges the Board to co-operate with whatever reasonable requests for information and reports are made to it. In other words, the Article should take account of the fact that the States’ systems for accounting and reporting change from time to time and would be better stated in practice notes than in formal constitutional documents.

Article 28 – Directors

App4-8 This Article requires revision if the distinction between States and non States Directors is abolished (also Articles 29 and 30).

Article 33 – Remuneration of Directors

App4-9 This Article will require revision if the distinction between non States directors and States directors is abolished.

Articles 38/45 – Proceedings of Directors

App4-10 These Articles require revision in the event that the distinction between States directors and non States directors is abolished.

Article 56 – Accounts and Audit

App2-14 This Article provides that an audited interim accounts should be preferred in respect of each quarter in each accounting period of a company. In my view, it would be better for this detailed information to be covered by practice notes and decisions of the Board (also Article 58).