

## **National Barge Travellers Association (NBTA)**

### **Consultation Response to Proposed Amendments to General Terms and Conditions of Boat Licences 2015 (the “T&C Amendments”)**

#### **General points**

The stated policy of CRT is to force boaters without home moorings to take moorings (Policy for Boaters Without a Home Mooring, 13th February 2015). The T&C Amendments impose equivalent restrictions on those with moorings, which will serve to squeeze live-aboard boaters off CRT waterways, which is a violation of their rights under Article 8 of the European Convention on Human Rights.

To the extent that these proposed conditions are ultra vires the 1962 and 1968 Transport Acts and the 1971, 1983 and 1995 British Waterways Acts, they go beyond CRT's role as navigation authority. This means that anything that falls beyond the scope of CRT as navigation authority gives rise to a commercial contract. It is therefore subject to the Consumer Protection from Unfair Trading Regulations 2008. The proposed changes breach the Regulations. In fact there are so many breaches of the Regulations as to justify bringing a complaint to the attention of the Office of Fair Trading.

Section 43 of the 1962 Act allows CRT to impose terms and conditions. Section 43 has wide-reaching scope. However where a later statute defines specific measures it follows that the wide-reaching scope of Section 43 is muted to the extent that the subsequent legislation provides specifically for a given right or obligation. In the T&C Amendments there are a number of instances in which Section 43 has been used in essence to define a term or condition that circumvents the effect of subsequent legislation, in particular Section 17 of the 1995 Act. This has been done wilfully by CRT. While there is a general principle in law that legislation (and in this case the T&C Amendments) are “right until proved wrong” CRT has been disingenuous in creating this conflict in the T&C Amendments in such an overt manner.

The consultation has not been properly carried out. Too little time has been given for boat licence holders to give proper consideration to the proposals. The consultation has not been publicised widely but has only been advertised on CRT's own web site. Individual boat licence holders have not been contacted, even though CRT has the names and addresses of all the people who will be directly affected.

Indeed CRT published the T&C Amendments on the CRT website with a note saying “anyone with any comments should contact CRT by 31st March 2015”. This suggests that CRT was in fact concealing any concept of an obligation to consult. It also suggests that CRT was making it clear that it was in fact not consulting at all. Given that CRT is under an obligation to consult this places it in breach of that obligation.

The deadline for consultation responses is 31st March 2015 and CRT has declared that the T&C Amendments will be effective from 1st April 2015. This does not give time for proper consideration of the consultation responses by CRT or for the consultation responses to be properly taken into account. The time-scale for immediate implementation also makes it clear that CRT has not carried out the consultation at a time when proposals are still at a formative stage. The T&C Amendments are therefore in breach of CRT's obligations regarding consultations relating to the exercise of statutory powers, which are

required to meet the standards for consultation set out in R v Brent LBC ex parte Gunning [1986] 84 LGR 168:

"To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken".

It is clear that CRT intends to impose the draconian T&C Amendments on boat licence holders regardless of any "comments" from boaters. Insofar that the T&C Amendments give rise to a contract, the contract will therefore be imposed under duress rather than freely entered into by both parties, and will be open to challenge for this reason. The duress exerted by CRT in this instance is its power under Section 8(2) of the British Waterways Act 1983 to seize and remove an unlicensed boat.

It is not clear what consultation has been carried out with CRT's enforcement and licensing staff who will be tasked with enforcing the T&C Amendments but some of these changes will be time consuming and difficult to enforce and will cause an enormous amount of resentment from boaters towards CRT staff. This has serious implications for workload, prioritisation, workplace stress and safety especially when staff are working alone. To the extent that enforcing the T&C Amendments increases the workload of the enforcement staff, this will impact on their ability to carry out their existing duties. This factor alone makes the proposed changes unworkable.

There are a wide number of defects in the T&C Amendments to the extent that the competence of CRT in preparing the T&C Amendments may be called into question. In turn the NBTA obtained both a solicitor's opinion and counsel's opinion on the T&C Amendments, which clarify these defects.

Finally and with regret the NBTA must observe that it has identified a wide range of defects in the the T&C Amendments. It was open to CRT to engage with the NBTA to discuss and, more specifically, work with the NBTA to develop a scheme that was just, lawful and not draconian. It is a matter of regret that not only did CRT not elect to do this but, as usual, has consequently released the T&C Amendments in a form that is defective, erroneous, open to challenge and will attract significantly more cost on the part of CRT than would have otherwise been the case.

### **Specific points in response to proposed new clauses (numbering refers to proposed new clauses)**

1.5 This is unworkable. What if the mooring agreement is due to expire during the licence period and the boater plans not to renew it and become a continuous cruiser? Or if the mooring agreement is unexpectedly terminated or not renewed? Or if it simply does not run concurrently with the licence? This clause removes the right to license a boat with a home mooring and then give up the mooring and become a continuous cruiser and is therefore ultra vires because there is nothing specific in the legislation that states that the boat has to keep the same licence status (Section 17(3)(c)(i) or Section 17(3)(c)(ii) of the British Waterways Act 1995) for the whole of the licence period.

1.9 This is unworkable and unjust. Many boaters now have tenders that are over 3m long. Will all these existing tenders over 3m long be seized and removed? This would breach

Article 1 Protocol 1 of the European Convention on Human Rights in that it violates the right of peaceful enjoyment of one's property. Enforcement of this clause would be very wasteful of CRT's resources. Are enforcement staff going to walk the towpaths measuring all the tenders? If this is not enforced consistently it will be unfair and if it is enforced consistently it will take up a considerable amount of enforcement staff time, creating enormous resentment and damaging CRT's relationships with its customers even further. Have the enforcement staff been consulted about enforcing this clause? If so, what is their reaction?

1.10 There is a difference between owner/lawful keeper and master/ skipper regarding licensing liability. The NBT does not believe that CRT has the power to impose joint and several liability on a person who is not named on the licence application form or renewal form and who is therefore not the licence holder.

2.1 This appears to remove the right to keep a boat out of the water, which discriminates against the owners of trailer launched boats. The wording should be changed to make it clear that Section 17(3)(c)(i) of the British Waterways Act 1995 includes the right to keep a boat out of the water. What consultation has been carried out with the trailer boaters' associations such as the Wilderness Boat Owners Club or the Caraboat Club?

2.2 "Seek to verify with third parties" implies a breach of the Data Protection Act. CRT only has the right to obtain information from third parties for law enforcement purposes, and only from third parties that are other law enforcement bodies such as other navigation authorities or the Police. Any other third party, such as a marina operator, has an obligation and a right not to disclose any personal information about a customer. What consultation has been carried out with the Information Commissioner regarding this proposed change? A secondary effect of this clause will be to discourage boaters from obtaining moorings from providers other than CRT and therefore it amounts to a breach of competition legislation on the part of CRT.

2.3 CRT has no power to set or enforce mooring time limits of less than 14 days. In the 1990 Bill that became the 1995 British Waterways Act, British Waterways (BW) sought powers to impose fines for a breach of a mooring restriction. BW also sought powers in the 1990 Bill to erect signs designating mooring restrictions. Parliament forbade BW to impose fines for violation of a mooring restriction. As a result of this, BW withdrew the wording relating to the erection of signs designating mooring restrictions. BW had previously presented evidence that stated that its signs for mooring restrictions were advisory in nature. BW also withdrew the wording relating to the designation of mooring restrictions. Therefore, signs denoting visitor mooring time limits remain advisory to this day and not compulsory.

3.1 and 3.2 These proposed new conditions are ultra vires. Section 17(3)(c)(i) of the British Waterways Act 1995 does not require a boat licensed under that section to move to a different 'place' after 14 days and it does not require boats licensed under Section 17(3)(c)(i) to be used bona fide for navigation. This is, in essence, an attempt to impose travel requirements on boats with and without moorings similar to the 'Lock Miles Rules' that BW proposed 2003 and dropped following a Letter Before Action by NABO.

In the existing and proposed conditions, Schedule 2 Item 3 uses the word 'location' to refer to the applicability of the 14-day limit to boats licensed under Section 17(3)(c)(i). This means that, according to the conditions they are not obliged to move to a different 'place' after 14 days but can stay in the same 'place' as long as they are in a different 'location'

after 14 days. Schedule 2 Item 3 contradicts the proposed conditions 3.1 and 3.2. In any event, Section 17(3)(c)(i) contains no provision for CRT to enforce a 14-day limit on boats with home moorings.

In 3.1, 'cruise' and 'cruising' are not defined but a CRT response to a Freedom of Information request referred to the Guidance for Boaters Without a Home Mooring (<https://www.whatdotheyknow.com/request/cruising#outgoing-367389>). This is unlawful, as boats licensed under Section 17(3)(c)(i) are not required to be used bona fide for navigation, they are only required not to be houseboats, that is, not to be static when they are away from their home mooring.

3.4 This is unworkable, disproportionate and unjust. It removes the freedom to decide to give up your home mooring and become a continuous cruiser. People who lose their mooring (a common occurrence given there is no security of tenure for boat moorings) and then start to continuously cruise because they cannot find another mooring will inadvertently fall foul of this clause through no fault of their own. See also the comments to clause 1.5 above.

It is not normally possible to "buy a mooring permit that covers the duration of your licence" as CRT explains in its comments to the proposed changes. In most cases, mooring fees are paid on a month-by-month basis and not in a lump sum for the whole year. Many boaters cannot afford to pay for a whole year's mooring fees up-front, which means that this clause discriminates against boaters on low incomes and those on Housing Benefit. The contracts for CRT's directly managed moorings run for either three years or one year, which again has the secondary effect of discouraging boaters from obtaining moorings from providers other than CRT and therefore amounts to a breach of competition legislation on the part of CRT.

4.1 To carry out enforcement based on CRT's "understanding" of what is required to comply with the 1995 Act is ultra vires. CRT is on responsibility to "know" and it is liable if its actions are non-compliant under the legislation.

6.4 CRT has no authority to recover sums equivalent to the licence fee pro-rata in this way. Sections 17(4) and (5) of the British Waterways Act 1995 provide for 28 days for the boater to remedy a breach of the Act. This means that the boat owner has 28 days in which to buy a licence. If the owner does not do so, CRT has the power to remove the boat using its powers under Section 8(2) of the British Waterways Act 1983 but the 1983 Act does not provide CRT with the power to charge a pro-rata equivalent of the licence fee, and there is no other legislation that provides CRT with the power to do this. If the boat is the boat owner's home, the boat owner has the right under Articles 6 and 8 of the European Convention on Human Rights to have the proportionality of the removal of their boat determined by a Court. The Minister gave an undertaking to Parliament of and in recognition to this on 26th June 2012, binding CRT.

6.5 (i) to (iv) This clause is draconian in the extreme, especially 6.5 (iv). It is an unfair contract term contrary to the Consumer Protection from Unfair Trading Regulations 2008.

6.5 (i) Only the courts can order the recovery of legal costs from the boater; this is ultra vires.

6.5 (ii) As stated in the comments to clause 2.3, CRT has no power to set or enforce mooring time limits of less than 14 days and therefore it has no power to recover charges

for exceeding such time limits. These charges are ultra vires. Time limits of less than 14 days are advisory only. Section 17(3)(c)(ii) of the 1995 Act entitles boats licensed under this section to stay longer than 14 days if it is reasonable in the circumstances, therefore this cannot be charged for: it is a right conferred by the 1995 Act.

6.5 (iii) and 8.6 If a boat is moved under Section 8(5) of the 1983 Act, CRT has no power to recover its costs. It can only recover costs if a boat is removed under Section 8(2) of the 1983 Act. If the boat is the boat owner's home, the boat owner has the right under Articles 6 and 8 of the European Convention on Human Rights to have the proportionality of the removal of their boat determined by a Court. See the comments on 6.4 above.

6.5 (iv) CRT has no power to recover the costs of third parties, it is for the third party to do so. This is an unfair contract term in breach of the Consumer Protection from Unfair Trading Regulations 2008. It is also a breach of the Data Protection Act. What consultation has been carried out with the Information Commissioner regarding this proposed change?

7.2 See the comments on 2.3 and 6.4 above.

7.6 It is not specified how boat owners can prove that they have taken reasonable steps to prevent their visitors causing a nuisance. This gives CRT carte blanche to terminate licences unjustly. 'Nuisance' is undefined, which adds to the possibility of this clause being used in a disproportionate and oppressive way. In any case, 'nuisance' requires proof of damage; see the judgement in *Booth v Ratté* [1890].

7.7 This clause is far too wide, to the extent that it is unreasonable. Therefore it fails the *Wednesbury* reasonableness test that statutory powers must be exercised reasonably.

7.7 (i) Part II of the British Waterways Act 1995 deals with CRT's powers of access over private land. These powers provide for access to carry out planned and emergency maintenance of the waterways. The 1995 Act does not confer an entitlement to access over private land in order to affix notices or correspondence on a boat. Only Part 55 of the Civil Procedure Rules permit this, and CRT cannot use CPR Part 55 to serve notices or correspondence pertaining to the British Waterways Acts, Transport Acts, General Canal Bye-laws or to CPR Part 7 or Part 8.

7.7 (ii) CRT cannot lawfully enter or step on a boat without permission from the skipper or master.

7.9 and 7.10 These clauses imply breaches of the Data Protection Act. Sharing personal information is only lawful if the information is shared for law enforcement purposes and then only with other law enforcement bodies. It is not lawful to share such information with private contractors, mooring providers or other individuals and organisations that are not law enforcement bodies. What consultation has been carried out with the Information Commissioner regarding these clauses?

7.12 This contradicts Schedule 4 which allows boat licences to be held in two names. What if one of the joint licence holders dies, or if they divorce? This clause also contradicts the proposed imposition of joint and several liability in Clause 1.10. The prohibition on inheritance of a boat licence by a surviving spouse, civil partner, cohabiting partner or relative with whom the deceased lived on the boat is callous and unfair. It may cause the boat to become unlicensed through no fault of the surviving resident(s) of the boat if they were financially dependent on the deceased boat licence holder. To prohibit the transfer of

the boat licence in such circumstances will cause unnecessary distress or expense to the survivor(s) and lead to enforcement action and a threat of homelessness to a spouse or family already in a vulnerable state due to bereavement. This could be avoided by allowing the transfer of a boat licence through inheritance. This clause is unreasonable.

8.3 There needs to be a clear definition of what a "serious or persistent breach" might require. For example, if a boat persistently stayed one day over the 14 days at each place (even the boater was otherwise complying with Section 17(3)(c)(ii) in using the boat bona fide for navigation), would that entitle CRT to immediately suspend the boat licence?

Internal investigations are unlawful because the person under investigation has the right not to incriminate themselves. See *Blunt v Park Lane Hotel Ltd* [1942]; Section 14(1) of the Civil Evidence Act 1968; *Heaney and McGuinness v Ireland* [2001] paragraph 40 and *JSC BTA Bank v Ablyazov & ors* [2009]. Internal investigations violate the boater's Article 6 rights by conducting what is effectively a criminal investigation in the context of the civil terms and conditions of the boat licence without the rigorous standard of proof that is required in a criminal case. If a licence of a live-aboard boater is terminated following an internal investigation the resulting Court hearing would also be conducted without the rigorous standard of proof required to prove guilt which could lead to the serious injustice of a boat dweller being deprived of their home as the result of questionable evidence.

8.4 This is ultra vires; you still have the right to re-apply since termination of the licence may be disputed. This clause is draconian in the extreme and is open to challenge on grounds of reasonableness.

8.5 This is ultra vires. CRT is obliged to license a boat provided the conditions in Section 17 (3) (a) to (c) are met.

8.6 See 6.5 (iii). Sections 17 (4) and (5) of the 1995 Act provide for 28 days notice of removal; a requirement to remove the boat immediately is ultra vires. It conflicts with the right of a live-aboard boater under Articles 6 and 8 of the European Convention on Human Rights to have the proportionality of the removal of their home determined by a Court. CRT cannot lawfully limit its liability for damage in this way. This gives CRT carte blanche to be negligent in removing or moving boats. This is unreasonable.

8.7 This clause simply seems to be nonsense. It is not possible to understand it. If a clause in a contract cannot be understood, the boat owner cannot honestly tick the box saying that they have understood and accept the licence conditions. This makes the contract irrational and therefore unreasonable, and consequently open to challenge on both of these grounds.

10.1 To deem that the boat owner has accepted these and unspecified future contractual changes by keeping the boat on the waterway is draconian in the extreme. The clause is far too widely drawn. This is an unfair contract term and it will fall foul of the Consumer Protection from Unfair Trading Regulations 2008. The Terms and Conditions should include a commitment by CRT within this clause to carry out consultation with boat licence holders according to the principles set out in *R v Brent LBC ex parte Gunning* [1986] 84 LGR 168 well in advance of the proposed implementation date of any changes.

11.1 Third parties' lack of rights to enforce these Terms and Conditions under the Contracts (Rights of Third Parties) Act 1999 in this clause conflicts with clause 7.10 (ii) regarding "persons who are assisting us with managing the situation" such as solicitors,

process servers, bailiffs and boat haulage contractors, which are all third parties that CRT is known to subcontract specific aspects of its enforcement process to, such as service of enforcement notices and removal of boats.

Schedule 1. Where a craft is new, including self-build implemented under the Recreational Craft Regulations 2004 SI 2004 No. 1464 the craft is CE-labelled upon completion, having met the essential requirements during its construction. A vessel licensed by CRT must comply with the standards applicable to that vessel and a Boat Safety Scheme (BSS) certificate is one (but not the only) means of demonstrating that this is the case.

However where a vessel less than four years old is CE-labelled the licensee signs off a BSSC dispensation on the grounds of CE-labelling. The BSS scheme provides for CE labelling to be acceptable as demonstration of compliance with the essential requirements and thus binding for the first four years of a vessel's life, after which routine 4-yearly BSS audits are required).

Once a product is CE labelled it is unlawful for anyone (including an EU member state) to interfere with the fact that the product (the vessel) is deemed to meet the essential requirements (i.e. standards applicable to that vessel). CE labelling guarantees that the vessel is compliant with the essential requirements and may be traded anywhere within the EU or EFTA.

For a member state to impose conditions on the trading or use of CE-labelled products in fact gives rise to an offence. Therefore CRT not only has no power to insist on "spot checks" on CE-labelled products (for the period for which the exception is valid) but is in fact also committing an offence.

It follows that CRT needs three safety status modes:

- (1) verified by BSSC;
- (2) exempt because of an absence of any hazardous devices (gas appliances, petrol or diesel engines, solid fuel burner etc); and
- (3) BSS not applicable because the vessel is CE-labelled in accordance with the essential requirements of the RCD.

It is important to note that the self-declaration scheme under the Recreational Craft Directive and thus SI 1464/2004 was cast specifically to permit construction in this context and CRT is therefore seeking to subvert EU regulation. The NBTA is aware of CRT doing exactly this including requiring audit by a surveyor (the cost of which is obviously borne by the owner).

Schedule 2: The definition of a home mooring should make it clear that a home mooring can be (a) off CRT's jurisdiction and (b) that a boat can be kept out of the water. See above regarding the loss of the right to give up a mooring during the licence term.

Regarding the wording of Guidance for Boaters Without a Home Mooring: 'Reasonable' cannot be defined in advance, see *Moore v British Waterways* [2013] EWCA Civ 73 (quoting from *Original Hartlepool Collieries Company v Gibb* (1877)).

Schedule 3: It is discriminatory not to issue short-term and three-month licences to boaters without home moorings. A boat may have had a 12-month licence and the boater may wish to spend a further three months or less on CRT waterways and then travel to another navigation authority's waters. A boater may wish to travel on or pass through CRT

waterways for three months or less from another navigation authority where they do not have, or no longer have, a mooring, for example to travel from the Thames to Bristol Harbour.

CRT's comments demonstrate that this proposed change is ultra vires. Boats without home moorings are not required to "genuinely navigate for an extended period around the network"; they are required to be used bona fide for navigation throughout the period that the consent is valid (i.e. using the sense of the word "throughout" that is temporal and not geographical: see CRT v Mayers [2013]). The 1995 Act does not provide for a limit on the length of time that the consent is valid. As long as the boat is used bona fide for navigation throughout the period of the licence, it is complying, and it does not matter whether the licence lasts for three, six or 12 months. This is profiteering on the part of CRT.

Indeed given that CRT is currently granting 3 month or 6 month licences to boaters without home moorings as a form of "probation", during which the licence holder is subject to review for alleged previous transgression, the proposed prohibition on 3 month licences is disingenuous. The 1995 Act does not provide for the grant of the relevant consent on a sliding scale in which additional revenue is raised for shorter licences. See Swan Hill (Developments) and Others v British Waterways Board [1997] EWCA Civ 1089; Proprietors of the Stourbridge Canal v Wheeley [1831] 2 B & Ad 792 and McCarthy and Stone (Developments) Ltd v Richmond upon Thames LBC [1989] UKHL 4. Therefore even if CRT is right in that it is empowered to operate a scheme of "probation" (which the NBTA denies) CRT has an obligation to reduce the licence fee pro-rata. There is no power permitting CRT to artificially inflate the shorter term licence fee under the guise of "probation".

On the basis of the issues laid out in this document the NBTA believes that the T&C Amendments are defective and should not be promulgated by CRT. Should CRT elect to promulgate the T&C Amendments then, the NBTA argues, this gives rise to an administrative law challenge in relation to the elements within scope of CRT as the Navigation Authority, and a contract law challenge under the Regulations in relation to the elements that are ultra vires to the extent that they can be considered to fall outside of the scope of CRT as the Navigation Authority.

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