



Re: The National Association of Boat Owners (NABO)'s comments arising from the Canal and River Trust (CRT) consultation on the proposed changes to the current licence Terms and Conditions.

In September 2015 when CRT last changed its Terms and Conditions NABO made the following comment: “As an underlying principle, whilst existing legislation gives CRT some standing it does not follow that the likes of Section 43 of the '62 Act can act as a catch-all to simply allow the CRT to proceed as it sees fit. The legislation is there to be followed, not adapted by CRT. We felt that the changes made warranted further investigation and have consulted further with our legal advisors who have commented that some of the changes introduced are of questionable legality.” Now in 2020 we find ourselves writing to you again and detailing our concerns on several areas of the proposed changes.

We observe that CRT now regards the issue of licences as solely a contractual matter rather than a duty to issue relevant consent to perpetuate the right of navigation with the Conditions of s17 of the 1995 BW Act alone. CRT is unilaterally imposing these T&Cs. Further that CRT is moving enforcement of Byelaws from criminal law to civil law by asserting contractual structure to licencing. We believe that CRT is again seeking powers to which it is not entitled under the 1995 Act.

Taking the consultation as a whole we find it extremely user *unfriendly*. It is estimated to take 40 minutes but there is no capacity to save your comments once you have started, so many prospective respondents will have no doubt exited the consultation and their views have not been recorded. Details of the consultation were not even on CRT’s website nearly two months after it was launched and three weeks before it closed.

In 2015 we drew the Trust’s attention to the readability of the Terms and Conditions. We said: The actual Terms and Conditions should be written in words that users can understand, otherwise it is an unfair contract and self-defeating. Since 2015 time has moved on and public opinion is now only too aware of organisations that create a fog of complicated contract documents written by lawyers in a way that most customers cannot understand. The existing and revised Terms and Conditions have much higher Flesch Ease of Reading and Understanding scores than is recommended. This could invariably lead to many of those at risk of any enforcement action as a result of non-compliance, being unable to understand the terms that they have been required to sign.

We also have concerns that CRT may be acting outside the terms of the General Data Protection Act (GDPR). We believe that the current documents and the changes proposed are currently non-compliant with GDPR as well as containing a mix of bad presentation and lack of clarity. Lack of clarity is in itself a non-compliance. In our view CRT should take immediate steps to ensure all its licensing documentation is GDPR compliant. It may be sensible to halt the current consultation on the proposed terms and conditions pending these changes. We have highlighted an example of our findings at the bottom of our

response and a more detailed review of both Readability and GDPR has been sent to Tom Deards, Head of Governance.

Moving on to the specific areas in the consultation that cause us concern:

Section A. Home Mooring Requirement to Cruise

Proposed Change A1

CRT is proposing that the following is added to the end of clause 3.1 of the existing Terms and Conditions:

“The cruise must be a genuine cruise. Minimal or repetitive movement along a short part of the Waterway or Waterways without use of the Home Mooring (nominal use of which shall be disregarded for these purposes) will not be accepted as a genuine cruise.”

This change appears to be an attempt by CRT to extend its powers beyond the 1995 Act. There is no authority in the 1995 Act for CRT to decide how a boat must travel in order to comply with the requirement to be used for proper navigation. The requirement is simply as per s17 (3) (c) (ii) of the 1995 Act – the boat must not have remained continuously in one place for more than 14 days, unless reasonable in the particular circumstances. A boat remaining in a small area or not travelling a certain distance does not thus contravene the 1995 Act, which appears to be what CRT is driving at with the reasoning given for this change. NABO, supported by our legal advisers, believes that CRT should be required to act in accordance with current legislation and not require boaters to agree to Terms and Conditions that exceed those required under the 1995 British Waterways Act.

Quite apart from the legal aspect, there is the question of proportionality. CRT has been unable to quantify the size of the problem it is trying to address, nor provide a definition of ‘genuine cruise’ or ‘minimal’ or ‘repetitive’ in this context. The reasoning given is: “to ensure all boaters get fair access to the whole of their network, as presently some boaters with a home mooring remain in a small area, not returning to their home mooring, preventing others access to mooring space.” This could best be addressed by the provision of mooring spaces of varied durations in popular areas and the enforcement thereof, which is available under the existing legislation. To obtain a licence, a boater has no choice but to agree to CRT’s Terms and Conditions. NABO strongly believes that boaters should not be required to agree to terms that are not enforceable in law.

Since 2015 when the Terms and Conditions were revised for boats with a home mooring not one enforcement case has been made as a result of this change in the subsequent 5 years. We would refer CRT to two legal cases that highlight the difficulties they will have in enforcing this further change:

Attorney-General v. Great Eastern Railway Co. (1880) 5 App.Cas. 473, Lord Blackburn said, at p. 481: ‘where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited; ...’ This was cited with approval by the same House in the 1991 judgment in McCarthy & Stone v Richmond LBC, with all five Law Lords in unanimous agreement on the point.

The comments of Judge Halbert in Canal and River Trust v Mayers:

6.3 ‘However, neither the statutory regime in subsection 17(3) nor the guidelines can deal with this problem. A boat which has a home mooring is not required to be “bona fide” used for navigation

throughout the period of the licence, but neither is it required to ever use its home mooring. The act requires that the mooring is available, it does not say it must be used. The guidelines also have this effect. The boat is still subject to the restriction that it must not stay in the same place for more than 14 days but there is nothing whatever to stop it being shuffled between two locations quite close together provided they are far enough apart to constitute different places. If those who are causing the overcrowding at popular spots have home moorings anywhere in the country the present regime cannot control their overuse of the popular spots. Such an owner could cruise to and fro along the Kennet & Avon canal near Bristol and the home mooring could be in Birmingham and totally unused.

And 6.4 ‘....It was conceded on behalf of CRT in the course of argument that if GDM acquired a home mooring for Pearl, he would be left undisturbed provided he did not infringe the 14 day requirement....’

Section B. Insurance

We support the general requirement to declare insurance. We suggest there should be an option to submit documents by email. Confirmation that CRT maintain confidentiality of information passed to them and will maintain standards as required by the General Data Protection Regulations should be explicitly set out with any changes. In a similar way explicit provision that CRT will not sell or disclose any information held to commercial parties should also be included. Appropriate security provisions for data should be clear in this and other sections which ask for boaters' data.

Section C. Termination

At C2 a proposed change of 28 days for removal has been introduced and we consider that this is potentially unduly onerous. Perhaps ‘28 days or within such time as may be reasonable’ might better cover all circumstances. Any termination must take into account the licensing provisions of the British Waterways 1995 Act. A licence holder might not be in CRT’s view observing ‘genuine cruising’ however the termination could potentially be challenged as the boater might be cruising in line with the provisions of the 1995 Act.

Section D. Obligation of Refunds

The proposed first two sentences at D1 are not acceptable or boater friendly. We do not buy a licence to moor in a pond. “The Licence fee grants permission for the licensed boat to be present on Trust owned or managed Waterways. The licence is not a guarantee of access or availability of the Waterway.” Navigation was originally said to be the most important aspect of CRT’s obligations as confirmed in Clause 2.1.1. in your Articles of Association. The existing first sentence at 9.1 should be reinstated.

The proposed change seeks to widen refund policy in the CRT’s favour. There are issues with the existing wording that is carried through with the proposed changes – what for instance is an ‘unforeseen event’ or a circumstance beyond their ‘reasonable control’? An example of both would be useful for clarity. What happens for instance if a particular area of the waterways becomes blocked off? There is no right of challenge to refund as it stands or with the proposed revision. We suggest that change is needed to the existing wording to lay some further definition down against closures and emergencies and how these are to be dealt with. This would provide some balance of fairness to licence holders. We further suggest that the D3 proposal should be: “save for any damages arising from personal injury or death caused by our negligence, or any other damages arising from statute that are prohibited from exclusion.”

Section E. Boat Safety Scheme

CRT should state the authority by which they can enter a boat without a police warrant or court order. There needs to be evidence of immediate safety concern to warrant entering a boat. Any inspection needs to be undertaken by a qualified Boat Safety Examiner.

Section F. Wider or larger dimensioned boats

F2 More and more widebeams are being built with straight sides and damage is being caused to bridge arches. Maximum widths have to be reduced to take this into account or the angle of tumblehome perhaps needs to be specified.

F3 It should be made clear that navigational dimensions will not change but required craft dimensions may do from time to time.

F4 This clause needs to be rewritten to the effect that all wide beam boats should have bow and stern fenders. In addition fenders should be available to be deployed where there is a risk of collision with any boat or canal infrastructure. Boats should not cruise with fenders down.

Section G. Change of Ownership

Boaters should be able to submit confirmation of the requested details by email.

Section H. False Declarations

If a boater knowingly makes a false declaration then the usual route is litigation which if successful would normally lead to the licence being declared invalid. We are concerned that CRT will use any ambiguity to its advantage. Any ambiguity should in fact be interpreted in favour of the party that would suffer from it.

We believe that this proposed inclusion might ultimately lead CRT to say it has rights under the licence terms to act as it sees fit where a false declaration has been determined. This action would bypass some provisions in the Acts (see for instance our concerns regarding point A1 above). In fact false representations can be quite properly dealt with under general civil procedure rules via standard litigation practice. There is also no distinction as to seriousness of false representation i.e. a 'minor' error or a flagrant safety disregard are potentially very different. If CRT introduces such provision we feel it would be better put in a guideline or separate paper as to how they would expect to deal with any false declarations found, rather than incorporating this into the Terms & Conditions of the licence itself.

Section I. Behaviour towards Trust colleagues

Judging by the issue explained by CRT, the motivation here is to give another route to licence termination as that is specifically mentioned in the issue section. We do not believe the potential loss of a licence is an appropriate penalty for accusations of this nature. If the situation was reversed the boater would expect it to be dealt with by the appropriate authorities as well as CRT.

We suspect this may be motivated by the desire to bring in the ability to perform 'spot-checks' where there may be safety concerns with certain boats. We would question why this addition is necessary. Genuine abuse whether by a boater to a Trust colleague or vice versa is properly a matter for the police. It is also covered under the current existing byelaws. We are concerned there is no right of appeal or

indeed appeal process which should be independent of CRT. This clause regrettably is one sided and gives scope for it to be used for CRT's own ends.

Readability

The Data Protection Act requires, under data protection principles, that information is used fairly, lawfully and transparently. It also requires under the 'right to be informed' that the information the Trust provides to people must be concise, transparent, intelligible and easily accessible. It must also use clear and plain language. We believe that none of the current licensing documents or the changes proposed meet a simple test for ease of reading.

NABO also notes that the proposed new wording for the 2020 Terms is not an improvement. Below is just one example taken from the current consultation of what could be done to make this document comply with plain English requirements. This approach would engage respondents from the outset and would also achieve the added bonus of shortening the consultation document.

CRT wording is in the left hand column, NABO's suggested wording in the right hand column.

<p>Insurance You must have in force an insurance policy for the Boat, provided by a company that is authorised and regulated by the UK Financial Conduct Authority, which covers third-party liabilities of at least two million pounds per event. The insurance cover must:</p> <ul style="list-style-type: none"> • be maintained for the full duration of the Licence; • be appropriate for the intended use of the Boat; • insure the licence applicant, the owner of the [vessel/ boat] and such other person, persons or classes of persons (if any) as is or as authorised by the owner [and or licence applicant] to have control of the vessel, in respect of any liability which may be incurred by the owner or any such other person resulting from the presence of the vessel on any inland waterway in respect of the death of or bodily injury to any person or any damage to property. <p>When applying for the Licence, you are asked to declare the following details of the Boat's insurance:</p> <ul style="list-style-type: none"> • the name of your insurance provider; • the policy number; 	<p>Insurance You must have valid boat insurance, provided by a company authorised and regulated by the UK Financial Conduct Authority.</p> <p>The insurance must:</p> <ul style="list-style-type: none"> • Cover the Licence holder, boat owner and all people allowed to helm the Boat. • Be suitable for the intended use of the Boat. • Be in place for the full period of the Licence when the Boat is on any inland waterway. • Cover any liability, which results in damage to any property or the death or injury of any person. • Cover third party liability of at least £2 million per event. <p>When you apply for a Licence you must provide:</p> <ul style="list-style-type: none"> • The name of your insurance company. • The policy number. • The expiry date of the policy.
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<ul style="list-style-type: none"> the expiry date of the policy. <p>You must provide a copy of your insurance certificate and/or policy Schedule to Us at the point of licensing via our online portal or by sending a copy by post within 14 days of licensing your boat. You agree to provide a copy of your insurance certificate, policy terms and conditions and policy Schedule upon request.</p> <p>You agree that we may contact your insurer and/or broker to check the validity of your policy, and you consent to the insurer and/or broker giving us such information as we may reasonably require.</p> <p>You agree to us providing information that we hold about the use, apparent structure and construction of your boat to your insurer and/or broker.</p> <p>If your current insurance certificate expires during the Licence (including any renewal), you must provide evidence of the renewed (or new) insurance and the Conditions of B.1, B.2, B.3, B.4, B.5 and B.6 apply.</p>	<ul style="list-style-type: none"> Within 14 days of Licencing your Boat, a copy of your insurance certificate or policy schedule, via our online portal or by post. <p>You agree that</p> <ul style="list-style-type: none"> We may check with your insurance company that the policy is valid. We may give information we hold about your Boat to your insurance company. Your insurance company gives us any information we may require. You will give us a new insurance certificate if your insurance period runs out during the Licence period.
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NABO is sure that a poor response rate was not CRT’s intended outcome for what is an important consultation, bearing in mind the possible lifestyle changing consequences for a licence holder who is regarded as failing to comply in the future. It is not too late for remedial action to be taken. By resetting the consultation using plain English and reducing the length of the document, potential respondents will be more able and inclined to take an active and informed role. Adequate publicising that this has been recognised as a problem and rectified, inviting further engagement with this consultation would reflect very positively on CRT’s reputation with their customers.

GDPR

NABO has undertaken a review of the privacy documents that form part of the private licence relationship. We find shortcomings that are a mix of bad presentation, lack of clarity and non-compliance with GDPR. In NABO’s view the Trusts documents do not provide the necessary justification and explanation of the ‘necessary’ data processing.

It is clear that the Trust has asked for data that is not covered under Public Task. By way of example, the in the Licence application form, the Trust asks for agreement to: “share your details with our subsidiaries and other affiliated companies”. No justification is offered as to why this is ‘necessary’ for the Public Task. In NABO’s view this is not part of the Public Task. This requires other defined ‘consent’.

There are a number of items in the Privacy documents that are unclear and lack an explanation of how they apply specifically to licensing. This in NABO’s view is not a satisfactory justification for ‘Public Task’. If it is not clear to users, it is not satisfactory.

The text for privacy issues for the Equality Act is divided and incomplete. There is no place for specific consent, which is required.

We are not content with the language used in the Privacy documents. By way of example, we draw your attention to the last bullet point of the 'Privacy Schedule for Customers'. This comprises a sentence of 77 words. It is self-evident that this is not an appropriate wording. Privacy laws require that the information provided to people must be concise, transparent, intelligible, easily accessible, and it must use clear and plain language.

NABO concludes that the current documents are not fit for purpose and are non-compliant.

Conclusion

NABO concludes that significant improvements on readability and GDPR compliance can be made with very limited effort and without impact on legal meaning.

We are keen for the Trust to see the comments above as constructive criticism of the proposed changes to the current license terms and conditions.

We hope to hear from you shortly on the action that you propose to take.

End of document.

7.12.20