



Winding up Non-Departmental Public Bodies

BRIEFING

Background

Following the Treasury's "Reforming Arm's Length Bodies" paper published in March 2010, the National Audit Office's (NAO) "Reorganising Central Government" published on 18 March 2010 and latterly the emergency Budget on 22 June, it should come as no surprise that the Government is seeking to achieve significant cost savings from the reform of arm's length bodies, or non-departmental public bodies (more commonly referred to as "NDPBs").

With the NAO paper recognising that "*central government bodies are weak at identifying and systematically securing the benefits they hope to gain from reorganisation*" there is more focus than ever before on ensuring that reform brings with it the cost savings anticipated at the outset. No longer can one initiate a process in the hope that its outcome will be cheaper than the result of not doing anything. As a consequence, it is important that those dealing with NDPBs fully understand the landscape and the road down which they must travel to wind up, or dissolve, the relevant entity.

Introduction

An NDPB is generally recognised to be a "*body*

which has a role in the processes of national Government, but is not a Government department or part of one, and which accordingly operates to a greater or lesser extent at arm's length from Ministers".

NDPB's do not have a single specific legal nature. Their constitution and governance arrangements will differ depending on their purpose and the manner in which they were established. At one end of the equation, NDPBs may be "creatures of statute" owing their existence to primary or secondary legislation, which sets out their legal characteristics including such things as their functions, duties and accounting responsibilities. In the other extreme, an NDPB may start life as something as basic as a company limited by guarantee to whom departmental responsibilities are delegated.

Regardless of their structure, NDPB's will generally be vested with:

- An obligation or discretion to make decisions relating to certain matters;
- The ability to contract (which usually brings with it the capacity to sue and be sued)



- The ability to acquire, own and dispose of assets;
- Employees;
- Funding; and
- Accounting responsibilities.
- Assets should be transferred with an eye at all times on best value and accountability for monies received in return;
- Employees must be dealt with fairly and in accordance with their legal rights, having regard to any compensation due and pre-existing pension entitlements;

Considerations

As a consequence, on the dissolution of an NDPB one must give consideration not just to the procedural technicalities associated with the dissolution, but also to the practical and legal issues associated with a transfer or distribution of all that it is responsible for. Put simply, once created an NDPB will not cease unless active steps are taken to remove all that it is and does:

- Functions must have reached the end of their useful, or at least legal, life or alternatively must be lawfully transferred back to the original delegating authority or across to a suitably empowered alternative entity;
- Contractual arrangements with suppliers, customers and others (if any) must be brought to an end, preferably without financial penalty and at the very least in a manner which mitigates any loss;
- Statutory accounting requirements must be satisfied.

Approach

Each of the above issues must be reviewed on its own, but also as a contributory element to the greater objective – the dissolution. The dissolution must be approached in a strategic manner so as to ensure the costs sought to be gained from any dissolution are not inadvertently used up, and possibly exceeded by any costs payable to third parties as a consequence of the NDPB ceasing to trade.

More specifically, one must be careful to:

- Avoid breaching contractual obligations owed to others, since that could give rise to legal action and an obligation to pay compensation and costs in relation to cancelled arrangements;



- Avoid statutory duties and functions being abandoned or neglected when they are properly required to be carried out;
- Satisfy any consultation obligations owed to staff, whether by reason of the fact that they may be made redundant by virtue of the reorganisation, or alternatively as a precursor to their possible transfer to an alternative public sector or, indeed, private sector employer;
- Have regard to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (usually referred to as “TUPE”), any legislative requirements obliging transfer on no less favourable terms and the Cabinet Office Statement of Practice: Staff Transfers in the Public Sector. This more or less provides that staff should be treated no less favourably than had TUPE applied, whether or not in fact it does);
- Have regard to pension liabilities and the HM Treasury document “Fair Deal for Staff Pensions: procurement of bulk transfer arrangements and related issues” which essentially requires transfer of employee pension rights to a broadly comparable scheme and an ability to maintain a link with past service pension benefits where employment is transferred to a private sector partner;
- Ensure liabilities are settled and assets are distributed in an appropriate manner;
- Review the NDPB’s legal ability and financial capability to deal with and satisfy any of the above;
- Consider all legislation, such as the Freedom of Information Act, that needs updating to reflect the cessation of the NDPB as a legal entity.

The Dissolution

NDPBs set up by Ministers pursuant to an Act of Parliament or statutory instruments made pursuant to such Acts on behalf of the Government can only be dissolved via legislation, although this may not prove to be as much of a hurdle as it might first sound. Firstly, the legislation giving rise to the establishment of the entity may contain a “sunset provision”, or wording which empowers specified persons to wind up the entity upon the satisfaction of certain conditions and in a prescribed manner at a later date. Secondly, it is anticipated that the Government will find parliamentary time for the Public Bodies (Reform) Bill following the summer recess. It is anticipated that the Bill will provide Ministers with new powers to abolish, merge or transfer functions from public bodies.



NDPBs set up utilising a Companies Act entity, such as a company limited by guarantee, will be subject to the usual rules that apply to the winding up of such bodies. In broad terms, the approach will depend on the solvency of the organisation and the obligations owed to others. Assuming liabilities can be settled, and all responsibilities and assets are transferred from its ownership, winding up should be capable of being achieved in fairly short order having undergone the appropriate notice and advertisement necessary for the cessation of a company's existence pursuant to the terms of the Companies Act 2006.

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