Dear Steve

Thank you for sending us the Counsel Opinion and the subsequent report dated 11 December from DLA Piper. We note the points made in both documents and are now prepared to entertain an application by Halton Borough Council for an Order under the Transport and Works Act 1992 together with other necessary orders required to promote the Mersey Gateway scheme. In conjunction with this we note your proposal for a charging order for the Silver Jubilee Bridge.

We have provisionally scheduled a meeting on 19 December to discuss the way forward on these issues. As you are aware, we feel that it would be more productive if that meeting were postponed and that in advance of a new date you arranged to send to the Department a revised list of all the Orders and Consents you will require for the project together with a summary of all the matters to be covered in any orders for which DfT is responsible, and a draft timescale for the statutory processes. You will also want, when providing this documentation, to set out clearly what you believe to be the parts of the project that are "ancillary" to the construction of the bridge, and hence intend to cover in the TWA Order. A map indicating how the different orders and consents relate to the specific elements of the scheme would be helpful. We feel that providing this material in advance will make the subsequent meeting more productive.

In drafting the TWA Order you will want to keep in mind that you will need to consider the proposed enforcement provisions and that whilst we recognise that you would prefer to keep open the possibility of operating the tolling system through an open tolling regime, it may not be possible to include the necessary powers in a TWA Order. The Department would need to be satisfied that any powers contained in the proposed TWA Order which are additional to the carrying out of works interfering with navigation rights can genuinely be regarded as "ancillary" powers under the provisions of the TWA.

We would also wish to be satisfied that any tolling provisions included in the proposed TWA Order (including related enforcement provisions) were acceptable in principle to the Department in policy terms. Past experience shows that these would need to be settled long before the holding of a public inquiry.

In relation to the charging order for the Silver Jubilee Bridge, it will be for Halton to draft a charging order in accordance with the provisions of Part III of the Transport Act 2000, which will then need to be submitted for approval by the Secretary of State. A draft order...
HALTON BOROUGH COUNCIL

THE MERSEY GATEWAY

REPORT ON THE PROPOSED STATUTORY AUTHORISATION ROUTE

FOR THE MERSEY GATEWAY

December 2007
Introduction

1. This paper sets out a justification for promoting the Mersey Gateway by means of an order under the Transport and Works Act 1992 (TWA 1992). It follows receipt of Counsel's Opinion following a meeting with the Department for Transport (DfT). It addresses DfT's concerns about the use of a TWA Order and also sets out certain concerns of Halton Borough Council (HBC) in relation to other application routes.

2. The paper addresses the following areas:

2.1 whether HBC could promote the Mersey Gateway by means of a Concessionaire Toll Order under the New Roads and Street Works Act 1991 (NRSWA);

2.2 the reasons why it would not be appropriate in this case for HBC to promote the Mersey Gateway by means of a Highway Authority Toll Order under NRSWA; and

2.3 whether an order under the TWA 1992 is properly available as a means by which to promote the Mersey Gateway.

3. Reference is made throughout to a number of documents that are set out in the appendices.

Concessionaire Toll Order

4. DfT agreed that HBC should seek Counsel's Opinion as to whether HBC could seek to promote the Mersey Gateway by means of a Concessionaire Toll Order under NRSWA, which HBC would make and then submit to the Secretary of State for confirmation.

5. The following questions were put to Counsel for his Opinion (see paragraph 62 Instructions to Counsel, Appendix 1):

5.1 Is it the case that under the provisions of Part I of NRSWA, for HBC to make a Concessionaire Toll Order and submit the same to the Secretary of State and for the Secretary of State to confirm such an order, a concession agreement would have to be in place between HBC and the appointed concessionaire at that time?

5.2 Accordingly, would a statement of the proposed terms of a concession agreement still to be entered into with a concessionaire be sufficient to meet the procedural requirements of Schedule 2 of NRSWA, and would the Secretary of State be able to confirm an order on the basis of such a statement?
10.2.1 Minimise user tolls by avoiding VAT (VAT);

10.2.2 Ensure flexibility to grant lenders security over revenue stream (Security);

10.2.3 Avoid primary liability for claims under S41 Highway Act 1980 (HA S41); and

10.2.4 Ensure sound enforcement regime (Enforcement).

11. A detailed assessment of these considerations is also set out in the report, *Commentary on the Powers Available to Secure Private Sector Construction, Operation and Investment in the Mersey Gateway and Silver Jubilee Bridges* (Appendix 4).

12. HBC considers that a HATO presents fundamental difficulties that would not allow HBC to meet its objectives for the Mersey Gateway. These are summarised in *Mersey Gateway Statutory Powers - Implications Matrix* (see first row of table on page 2, Appendix 3) and also assessed comprehensively in the *Commentary on the Powers Available to Secure Private Sector Construction, Operation and Investment in the Mersey Gateway and Silver Jubilee Bridges*. In HBC's view, a HATO is designed to enable a highway authority to toll a facility *in its own right*, which is not consistent with how the Mersey Gateway is proposed to be delivered and operated, and in particular with HBC's primary objective of transferring revenue risk.

13. By reference to HBC's objectives, its concerns about a HATO are as follows:

13.1 A HATO would not meet HBC's objective of transferring revenue risk as the right to charge tolls would be conferred on HBC as highway authority, not on the concessionaire. The concessionaire needs to have the right to charge tolls so that it can set toll levels and derive the economic benefit from the tolls. Whilst HBC would retain some control or influence over toll levels - which it wishes to do - it does not want to be in the position where only it as highway authority can charge or vary tolls if that means the concessionaire cannot derive the economic benefit and thereby take on the revenue risk. This would mean that the concessionaire relied on HBC to vary tolls. HBC would then bear the risk. HBC is simply not in a position to take on the revenue risk.

13.2 HBC does not believe that a HATO would be off-balance sheet because it is much harder to transfer the revenue risk under this route.
way that the bridges will be operated, are clearly different. Whilst a HATO may be suitable for TFL, HBC does not consider that it would be an appropriate or suitable means to promote the Mersey Gateway.

19. In conclusion, HBC is concerned that to promote the Mersey Gateway by means of a HATO would result in a number of serious difficulties for the scheme which would call into question whether its objectives for the Mersey Gateway, and its aspirations for the Borough and wider region - to which the Mersey Gateway is central - could be met.

**TWA 1992**

20. The DT asked HBC to seek Counsel’s Opinion on a number of matters in respect of the TWA 1992 that related to the availability of the procedure in respect of the Mersey Gateway.

21. The questions put to Counsel are repeated below (see paragraphs 62.1 to 62.8 of the Instructions to Counsel, Appendix 1) and reference is made to Counsel’s Opinion (Appendix 2) in respect of each of those.

**Enabling Act**

22. *Would the Secretary of State be able to make an order under section 3 of the TWA 1992 authorising the carrying out of the works for the Mersey Gateway, which would allow both the construction of the works and their subsequent operation (to the extent discussed above) and tolling?*

22.1 Counsel deals with this question at paragraphs 35 to 51 of his Opinion.

22.2 At paragraph 48 he concludes:

> "It appears to me clear that the s. 3 power includes the power to construct and maintain road [sic], to charge tolls and to create offences and byelaws with regard to the operation of the infrastructure authorised by the order."

22.3 Furthermore, with reference to the ability of an order made under s. 3 TWA 1992 to authorise tolling (pursuant to section 5(3)(a) of the TWA 1992), he concludes at paragraph 51:

> "If the relevant aspects of the operation of the infrastructure are able to be authorised by an order within s. 3 and Schedule 1, then the s. 5(3)(a) power will apply. As I have already advised, the provisions of the TWA empower
Would it be within the powers of the Secretary of State to make an order under section 3(1)(b) that authorised works to link the Mersey Gateway into the highway network (as shown on the Plan) and to authorise the construction (and operation) of the toll plazas (but not the more remote works) on the basis that such works are ancillary to the works that interfere with navigation?

25.1 This question is addressed at paragraph 61 of Counsel’s Opinion.

25.2 Counsel refers to his preceding advice that a TWA order would permit the construction of the works. However, he states that “the works must not exceed what could reasonably be considered ancillary to the construction of the bridge.”

Section 13(2) TWA 1992

26. Counsel addresses the question of Section 13(2) of the TWA 1992 at paragraphs 62 to 68 of his Opinion. In summary, he does not consider that the provisions of this section would require the Secretary of State to reject the use of the TWA procedure here and also that the circumstances of the Mersey Gateway do provide a reasonable and appropriate basis for reaching a conclusion that section 13(2) should not be invoked. (See paragraphs 62 and 63 of his Opinion). The particular questions put to Counsel are set out below.

27. Would it be within the powers of the Secretary of State to make an order for the Mersey Gateway (assuming an enabling Act was not required) having regard to section 13(2) of the TWA 1992, in a case where the objects might technically be available by other means, notwithstanding the disadvantages or otherwise of those procedures?

27.1 This question is addressed at paragraphs 64 to 66 of Counsel’s Opinion.

27.2 Counsel distinguishes the availability of other procedures from instances where the availability of such procedures require the Secretary of State to refuse to make an order (i.e. where the procedure under the Harbours Act 1964 is applicable - see paragraph 64 of Counsel’s Opinion).

27.3 Therefore, in a case where other available procedures plainly present serious practical problems for the proposals (or are unsuitable i.e. a Concessionaire Toll Order) and the TWA is not being used to avoid the public consultation requirements of other
Highway Authority Toll Order

30. HBC has a number of fundamental concerns about the use of a HATO for the Mersey Gateway, particularly its ability to transfer revenue risk.

31. Furthermore, HBC considers that the use of a HATO for the Mersey Gateway would constrain the way in which a concession agreement could provide for the construction and operation of the bridge by a concessionaire. This is because HBC would retain the right to charge tolls, the maintenance duty under s. 41 Highways Act 1980 and the enforcement responsibilities. This position can be distinguished helpfully from the role of TfL in relation to the Thames Gateway Bridge.

32. Having considered Counsel's Opinion, HBC considers that an order under the TWA 1992 is an appropriate and suitable means by which to promote the Mersey Gateway. Counsel's opinion is unequivocal in respect of the matters on which he was asked to advise.

33. In particular, the difficulties presented by a HATO would satisfy Counsel's assertion that the Secretary of State is allowed, and required, to consider the practical and factual problems which an alternative procedure might create (see paragraphs 64 to 68 of Counsel's Opinion, in particular paragraph 68). Whilst a HATO may be one possible route by which to promote the Mersey Gateway, it clearly presents a number of problems that in HBC's view are fundamental and which, given the importance of the Mersey Gateway to the Borough and wider region, present a considerable degree of risk for the project. These concerns do not arise or can be addressed using an order under the TWA 1992. Given that Counsel's Opinion is that the Secretary of State is allowed, and required to consider such problems inherent in the use of a HATO, in such circumstances there would be no compelling reasons to exercise the power in section 13(2) TWA 1992. It follows, therefore, that the DfT should be satisfied that the Mersey Gateway can be promoted under the TWA 1992 procedure.

34. The reasons why an order under the TWA 1992 is appropriate for the scheme have been set out a number of times, in particular in the Commentary on the Powers Available to Secure Private Sector Construction, Operation and Investment in the Mersey Gateway and Silver Jubilee Bridges and also in the Mersey Gateway Statutory Powers - Implications Matrix. In summary, a TWA Order would enable HBC to achieve its objectives, both in terms of the transfer of revenue risk and in how the Mersey Gateway can be constructed and operated. It is clear to HBC that the reasons for promoting a TWA Order arise from the requirements for the scheme alone. The TWA presents a means to overcome the difficulties, both legal,
IN THE MATTER OF
HALTON BOROUGH COUNCIL
MERSEY GATEWAY

__________________________
INSTRUCTIONS TO COUNSEL
__________________________

1. Counsel is instructed by DLA Piper UK LLP ("DLA Piper"), who act on behalf of Halton Borough Council ("HBC"). HBC is the unitary authority that covers the areas of Runcorn and Widnes in Merseyside, in the north-west of England. Its administrative area straddles the River Mersey, including the towns of Runcorn on the south side of the river and Widnes on the north. As a unitary authority HBC is the local highway authority for its area. There are few trunk roads in HBC's area. These instructions relate to proposals by HBC to construct a new bridge over the river Mersey, to be known as Mersey Gateway.

2. Counsel is instructed in advance of a consultation to be held at Counsel's chambers at 10 am on 1 November 2007. In attendance will be: Steve Nicholson of Halton Borough Council; and Howard Bassford and Benjamin Dove-Seymour of instructing solicitors.

3. Counsel will find with these instructions the documents referred to in the attached Index.

Introduction

4. It will assist Counsel to have some background to the proposals for the Mersey Gateway to which these instructions relate.

The Scheme

5. Within the administrative area of HBC there is an existing bridge over the River Mersey, the Silver Jubilee Bridge ("SJB"). It is the sole road link within the borough between Runcorn and Widnes. It is not a trunk road notwithstanding being one of the principal road links between Manchester and Liverpool. Current capacity on SJB is very restricted; over 80,000 vehicles use the bridge each week day, which is approximately ten times more than the traffic levels for which it was designed. In order to provide relief for SJB, to provide extra capacity for crossing the Mersey, to improve links between Runcorn and Widnes, to assist in regeneration, and to tackle
transfer as much revenue risk relating to the Scheme to the private sector as possible, because it cannot feasibly take on the financial risk of the Scheme itself. It is a relatively small authority for a relatively deprived area. For this purpose it needs to be certain that any authorisation for tolling the Scheme will allow a concessionaire to derive the economic benefit from the tolling. That is, that the statutory provisions relating to any such order do not restrict, whether explicitly or implicitly, the ability of a concessionaire to charge and collect tolls itself, set tolling levels (in consultation with HBC) and, if necessary, assign the benefit of tolling income by way of security to funders for debt raised. This has VAT and risk transfer benefits of commercial importance to the project, its funding and the toll levels that can be achieved.

10. Counsel is referred to two Documents that illustrate the concerns of HBC about the transfer of financial risk. Document 2, *Mersey Gateway Statutory Powers - Implications Matrix*, has been prepared by KPMG and explains the difficulties, in HBC's view, associated with the various statutory authorisation routes in relation to the transfer of risk. Counsel is also referred to Document 3, which analyses in further detail how the transfer of risk is effected depending on the statutory authorisation process. These documents are included to illustrate HBC's concerns about the transfer of financial risk and the context within which Counsel's opinion is sought on certain requirements of the process for authorising the tolling of the Mersey Gateway under the provisions of the New Roads and Street Works Act 1991.

11. Against this background, HBC has undertaken discussions with DfT, which are ongoing, concerning the appropriate statutory framework under which an application or applications are to be made for the Mersey Gateway and the wider works comprised in the Scheme, including the imposition of the tolls or charges for the use of the SJB. These instructions are concerned with the appropriateness of two alternative application routes for the Mersey Gateway itself and, in particular, the means by which tolls may be imposed:

11.1 the first includes: an order under section 106 of the Highways Act 1980 ("HA 1980") to authorise the construction of Mersey Gateway over navigable waters; an order under section 16 of HA 1980 for the designation of Mersey Gateway as a special road; and a further order under section 6 of the New Roads and Street Works Act 1992 ("NRSWA") to authorise the charging of tolls for use of the special road by a concessionaire; and

11.2 the second possibility being considered is for an order under section 3 of the Transport and Works Act 1992 to: authorise the carrying out of works which interfere with navigation, namely a bridge (section 3(1)(b) of the Act); the dedication of those works as highway; and the incorporation under s5 of that Act of provisions allowing tolls to be levied for the use of the works. An order under the Transport and Works Act is not being considered
charge tolls. This would satisfy the objective of transferring revenue risk from HBC to a concessionaire. (Counsel is referred to paragraphs 8 and 9 above).

18. The particular question on which Counsel's advice is sought relates to the procedural aspects of making a Concessionaire Toll Order. In particular, it is asked whether the concession agreement must have been entered into (between the concessionaire and HBC as local highway authority) at the time that the order is made by the highway authority and submitted to the Secretary of State for confirmation. This is considered in detail below. Counsel is also referred again to Document 3, which is a paper prepared by DLA Piper on this subject and presented to DfT. Counsel will also find at Document 4 (see pages 8 and following) DfT's response to this paper.

19. The procedure for making a toll order under section 6 of NRSWA is set out in schedule 2 of that Act. Paragraphs 1(2) and 1(3) of that schedule provide as follows:

"(2) where a toll order is submitted to the Secretary of State by a local highway authority, the authority shall publish in at least one local newspaper circulating in the area in which the proposed special road is to be situated, and in the London Gazette, a notice -

(a) stating the general effect of the order as submitted to the Secretary of State;

(b) naming a place in that area where a copy of the order may be inspected by any person free of charge at all reasonable hours during a period specified in the notice, being a period of not less than 6 weeks from the date of publication of the notice; and

(c) stating that, within that period, any person may by notice to the Secretary of State object to the confirmation of the order.

(3) where the special road to which the toll order relates is to be subject to a concession, the Secretary of State or the local highway authority shall make available for inspection with the copy of the draft order or of the order, as the case may be, a statement containing such information as may be prescribed with respect to the concessionaire and the concession agreement."

20. Counsel will note that sub-paragraph (3) of paragraph 1 requires that where the special road is the subject of a concession, a statement (a "Concession Statement") containing such information as may be prescribed about the concession agreement shall be made available for inspection by the public with the copy of the draft order.

21. The information prescribed to be included in the Concession Statements (Prescribed Information) Regulations 1993, the relevant provisions of which are as follows:
proper consideration to the potential effects of a Concessionaire Toll Order. This is because the Concession Statement will give key information about the concessionaire itself and the nature of the obligations and functions that it will undertake under the concession agreement. Those instructing consider that if this information is to be provided to - and to be given any weight by - a decision-maker, then the concessionaire and hence the concession agreement must exist at the time of the Concession Statement.

23. Counsel's attention is also brought to section 1(1) of NRSWA, which defines a concession agreement as:

"an agreement entered into with a highway authority under which a person (the "concessionaire") in return for undertaking such obligations as may be specified in the agreement with respect to the design, construction, maintenance, operation or improvement of a special road, is appointed to enjoy the right (conferred or to be conferred by a toll order under this Part) to charge tolls in respect of the use of the road."

24. On the basis of this provision, the concession agreement - the principal terms of which are to be set out in a Concession Statement - is the agreement that has been entered into between the highway authority and the concessionaire. Counsel will note the use of the past tense in the definition of "concession agreement" and "concessionaire" in section 1(1) of NRSWA. This also indicates that a concession agreement should be in place prior to a Concessionaire Toll Order being submitted to the Secretary of State for confirmation.

25. Furthermore, it is arguable that the requirement to prepare a Concession Statement, and the strict requirements as to its contents, indicate that the intention of the legislation is that the statement should set out the contents of a concession agreement that has already been completed. Otherwise, the aim of ensuring that interested parties, including the decision-maker, are properly informed as to the rights and obligations of the concessionaire would be defeated. If that were the case, a Concession Statement might only set out the aspirations of a concession agreement, yet to be concluded, the contents of which may change as obligations proposed between the concessionaire and the local highway authority were negotiated.

26. Even if a concession agreement were concocted purely to address the requirement of a statement, two risks would also arise:

26.1 First, the agreement would need to be varied in due course to reflect the requirements of a real concessionaire appointed thereafter. The agreement before the decision-maker (and summarised in the Concession Statement) may well seem to be a sham; and
NRSWA), whether it would nonetheless be within the power of the Secretary of State under the TWA 1992 to make an order having regard to section 13(2) of the TWA 1992. This section provides that the Secretary of State may determine not to make an order if he considers that any of the objects of the order applied for may be achieved by other means.

31. These questions are addressed in detail below. Counsel is also referred to Document 4 (pages 9 and following) that sets out concerns raised by DfT in relation to the TWA 1992 powers being used here, which are also set out in the letter from Philip Mills of the Department for Transport to Steve Nicholson dated 16 November 2006 (Document 6). Counsel will also find at Document 5 a letter from Steve Nicholson to Philip Mills of 19 October 2006, to which Philip Mills was responding on 16 November, and at Document 7 Steve Nicholson's response to that letter. These documents will illustrate to Counsel the concern of the DfT in relation to the use of the TWA 1992.

Carrying out of works

32. As already set out, HBC has proposed to DfT that a TWA Order made under s 3(1)(b) of the TWA 1992 could be used to authorise construction of the Mersey Gateway works. Counsel will note that the Secretary of State may make an order under Section 3(1)(b) of the TWA 1992 relating to, or to matters ancillary to:

   "(i) the carrying out of works which interfere with navigation of waters within or adjacent to England and Wales, up to the seaward limits of the territorial sea; and

   (ii) are of a description provided by order made under section 4 below."

33. Works which may be authorised by an order made under section 3 of the TWA 1992 are described in The Transport and Works (Description of Works Interfering with Navigation) Order 1992 (S.I.1992/3230). Counsel will note that a bridge is listed at paragraph 2(b) of that instrument. It is clear, therefore, that the Secretary of State may authorise the interference with navigation caused by the carrying out of works to construct a bridge by means of an order made under section 3 of the TWA 1992.

34. The likely extent of a TWA Order is indicated by the dotted brown ink line on the Plan. This comprises the bridge itself, which interferes with several navigable waterways as explained in paragraph 7 above. It would also relate to certain landside works that would be part of or ancillary to the interference with navigation, including works to link the bridge into the major highway network and the toll plazas. The toll plazas are a necessary adjunct of the new bridge itself because they are required in order for it to be a tolled crossing. Their location is a matter of practicality.
"Without prejudice to the generality of sections 1 and 3 above, those matters as to which provision may be made by an order under either of those sections include those set out in Schedule 1 to this Act."

39. Counsel will note first, that the wording is inclusive and second, that although the wording of sections 1 and 3(1)(a) are different to section 3(1)(b), this provision applies to section 3(1)(b) with equal force. Third, there is no requirement that the matters as to which provision may be made must necessarily satisfy a requirement that they are ancillary to the section 3(1)(b) works or, crucially in respect of an order under section 3(1)(b), that they must be ancillary to the operation of the Scheme. The concern here is that in the absence of a reference to operation in section 3(1)(b), the matters to which an order would be made would be limited to only those matters that related to the carrying out of the works. However, there is no such indication in the section itself that this is the case and indeed there is clearly no specific provision to this effect. The same is true in respect of section 5(4) which further sets out, although not exhaustively, what provision may be made by an order.

40. Counsel is referred to the explanation at paragraph 36 in respect of the absence of reference to operation. Those instructing consider that the power of the Secretary of State is an express one: arguably if the matter is at least set out within Schedule 1 the Secretary of State may make provision for it in an order without concern as to vires. In respect of an order under section 3(1)(b), her power to make provision for any matter within Schedule 1 is not limited by whether any such matter is ancillary to the operation of the authorised works.

41. Schedule 1 to the Act is entitled "Matters within sections 1 and 3". At paragraph 1, these are listed as including:

"the construction, alteration, repair, maintenance, demolition and removal of ...roads...buildings and other structures",

at paragraph 12:

"the charging of tolls..."

It is submitted that Parliament must have had in mind the charging of tolls for the use of bridges, not least because the term is applicable to those circumstances. Those instructing have been unable to discover any other type of work (within section 1 and/or section 3(1)(a)) to which the term "tolls" would apply.

42. Therefore, it is considered to be the case that an order under the TWA 1992 may provide for the necessary power to repair and maintain works and to charge tolls in relation to the use of the
charging of tolls for the use of it, which is the type of works that the TWA 1992 was designed to be able to deal with in preference to the private bill procedure. Provided that it is within the power of the Secretary of State to make provision for matters that relate to the operation of the Scheme, which those instructing submit is indeed the case, then ipso facto the Secretary of State would be empowered to apply, etc. statutory provisions in respect of those matters.

Tyne Tunnels Act 1998

47. Counsel will have noted from the preceding section that a number of questions have been raised about the scope of the Secretary of State's power to make provisions in an order made under section 3(1)(b). In particular, the Tyne Tunnels Act 1998, which was stated to be an enabling act for a proposed TWA Order for the new Tyne tunnel, has been referred to as an indication that such questions exist. It is, therefore, important to consider whether similar enabling legislation would be required to authorise the Mersey Gateway by means of a TWA Order.

48. Counsel is referred to the Tyne Tunnels Act 1998 (the "1998 Act") at Document 8 and specifically to its preamble. This explains that the 1998 Act was required in order to: amend the provisions of existing legislation regarding the charging of tolls in the tunnels; give the Tyne and Wear Passenger Transport Authority (the "PTA") the power to provide (including promoting an order for) and operate the new Tyne crossing (the PTA had no such existing power to do so under the statutes that govern it and the existing tunnel); and to enable the PTA to operate both the old and new tunnel as one undertaking and apply tolls to the tunnels on that basis (see also section 3 of the Act). Section 3(3) of the 1998 Act also allowed tolls from the existing tunnel to be expended upon promoting and constructing the new tunnel. There is no similar requirement for the Mersey Gateway because the SJB is untolled at present.

49. Counsel will note that the eighth paragraph of the recital to the 1998 Act (Document 8) states the following:

"Whilst necessary powers for the construction and operation of the proposed additional tunnel can be secured by an order made under section 3 of the [1992 c.42] Transport and Works Act 1992, there is some uncertainty as to whether such an order can also make provisions in relation to the Authority's tunnel undertaking."

50. Whilst a preamble to an Act is only relevant to the general interpretation of its provisions, this paragraph is illustrative in that it identifies that an order made under section 3 may authorise not only the carrying out of works, but their operation as well. Importantly, by way of distinguishing the Tyne Tunnel and the Mersey Gateway, this paragraph raises doubt - new works aside - as to whether such an order could also make provision for the existing tunnel undertaking. The
"For the avoidance of doubt, in addition to or as part of any order which may be made under section 3 of the [1992 c. 42] Transport and Works Act 1992 relating to or to matters ancillary to the construction of a new tunnel crossing, provision may be made by an order under that section relating to or to matters ancillary to the operation of the tunnel and the new tunnel crossing, including provision applying, modifying or excluding any statutory provision and provision amending, repealing or revoking any statutory provision of local application including a provision of this Act."

55. Those instructing consider that this provision is to be interpreted as follows: an order authorising the carrying out of works interfering with navigation may, by virtue of this section, also make provision for matters relating to the operation of both the new and existing tunnels because for the purposes of the Tyne scheme the existing tunnel, and matters associated with it, may be considered ancillary to the works authorised in respect of the new tunnel. This would not be the case in the absence of an enabling act to provide for this explicitly - or least it was sufficiently doubtful that it would lawfully be the case in the absence of such an act. Furthermore, whilst section 5(3) of the TWA 1992 enables a TWA order to apply or amend any statutory provision that relates to any matter as to which an order could be made, because the existing tunnel would not be ancillary to the works authorised by the proposed order (in the absence of the enabling act), the Secretary of State could not make an order that applied, etc. statutory provisions in respect of the existing tunnel. For him to have done so would have been ultra vires. This would have been on the basis that the existing tunnel was not ancillary to the principal works proposed to be authorised by a TWA Order, as opposed to whether the application, etc. of statutory provisions was ancillary to either the new or the existing tunnels or both.

56. It is clearly stated in an Act of Parliament that an order under section 3 (in this case under section 3(1)(b)) includes the powers necessary to construct and operate the proposed additional tunnel. Whilst this statement is specific to the proposed Tyne tunnel, it is considered that the same would be true in the case of an order under section 3(1)(b) of the TWA 1992 to authorise the Mersey Gateway. It is also considered that the scenario of the Tyne Tunnels can be distinguished from the Mersey Gateway for the reasons set out above. The 1998 Act legislated in respect of two particular difficulties - promotion of the new tunnel and its incorporation in the PTA's existing undertaking, neither of which is applicable to the Mersey Gateway and HBC.

57. However, now that the question has been raised the Secretary of State will need to be satisfied that it would be ultra vires for her to make an order in respect of the Mersey Gateway, in particular where such an order proposes to apply, amend or exclude provisions of other legislation. In this respect Counsel is asked to consider the order HBC would propose is made, as described at
another procedure be available. Rather, the provision gives a discretion to determine not to make the order.

61.2 The basis upon which the Secretary of State may determine not to make an order because the objects could be achieved by other means would appear to be a matter of discretion for the Secretary of State. Instructing Solicitors are not aware of any reported precedent or publicly stated policy that provides otherwise.

61.3 That discretion may also be considered to relate not only to whether the objects of the order applied for could be achieved by other means but whether the objects of the order could be best achieved by a TWA Order. In that sense, the Secretary of State would be entitled to consider factors including, for example, the complexity of any alternative, any pitfalls or procedural difficulties (for example any doubt as to the requirement for a concession agreement to be entered into in order for HBC to make a Concessionaire Toll Order), or any other matter being a relevant and material consideration as she saw fit.

Instructions

62. Having regard to the above, Counsel is instructed to review the statutory provisions and advise in consultation as follows:

Concessionaire Toll Order

62.1 Is it the case that under the provisions of Part I of NRSWA, for HBC to make a Concessionaire Toll Order and submit the same to the Secretary of State and for the Secretary of State to confirm such an order, a concession agreement would have to be in place between HBC and the appointed concessionaire at that time?

62.2 Accordingly, would a statement of the proposed terms of a concession agreement still to be entered into with a concessionaire be sufficient to meet the procedural requirements of Schedule 2 of NRSWA, and would the Secretary of State be able to confirm an order on the basis of such a statement?

Enabling Act

62.3 Would the Secretary of State be able to make an order under section 3 of the TWA 1992 authorising the carrying out of the works for the Mersey Gateway, which would allow both the construction of the works and their subsequent operation (to the extent discussed above) and tolling?
IN THE MATTER OF
HALTON BOROUGH COUNCIL
MERSEY GATEWAY

INSTRUCTIONS TO COUNSEL

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HALTON BOROUGH COUNCIL
MERSEY GATEWAY

OPINION

Introduction

1. This opinion is written confirmation of the advice which I gave in consultation on 1
   November 2007.

2. I am instructed by Halton Borough Council ("HBC") in connection with proposals for a
   new bridge over the River Mersey, to be known as Mersey Gateway. HBC is the
   Merseyside unitary authority with an administrative area which straddles the Mersey,
   including Runcorn on the south side of the river and Widnes on the north. As a unitary
   authority HBC is the local highway authority for its area.

The Scheme proposals

3. Within HBC's area there is an existing bridge over the River Mersey, the Silver Jubilee
   Bridge ("SJB"), which provides the only road link within the borough between
   Runcorn and Widnes. It is not a trunk road despite being one of the principal road
   links between Manchester and Liverpool\(^1\). Current capacity on SJB is very restricted
   and over 80,000 vehicles use the bridge each week day, which is approximately ten
   times more than the traffic levels for which it was designed.

4. In order to provide relief for SJB, to provide extra capacity for crossing the Mersey, to
   improve links between Runcorn and Widnes, to assist in regeneration, and to tackle
   emissions, HBC proposes to construct the Mersey Gateway\(^2\).

5. Although Mersey Gateway is intended to reduce congestion on the existing SJB, it will

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\(^1\) I am instructed that HBC's area, as a whole, does not include many trunk roads.

\(^2\) See the plan at Document 1 in my Instructions.
10. It is a key consideration that HBC wishes to transfer as much revenue risk relating to the Scheme to the private sector as possible, because it cannot feasibly take on the financial risk of the Scheme itself. It is a relatively small authority for a relatively deprived area and thus needs to be certain that any authorisation for tolling the Scheme will allow a concessionaire to derive the economic benefit from the tolling.

11. I am instructed that, in reality, this means ensuring that the statutory provisions relating to any such order do not restrict the ability of a concessionaire to charge and collect tolls itself, set tolling levels (in consultation with HBC) and, if necessary, assign the benefit of tolling income by way of security to funders for debt raised. This has VAT and risk transfer benefits of commercial importance to the project, its funding and the toll levels that can be achieved.

12. I have been provided with two documents which illustrate HBC’s concerns about the transfer of financial risk:

   (1) *Mersey Gateway Statutory Powers - Implications Matrix*[^4] which explains the difficulties, in HBC’s view, associated with the various statutory authorisation routes in relation to the transfer of risk;

   (2) A document[^5] analysing in further detail how the transfer of risk is affected depending on the statutory authorisation process.

Discussions as to the appropriate statutory basis for the Scheme

13. HBC has undertaken discussions with DfT (which are continuing) concerning the appropriate statutory framework under which authorisation can be obtained for Mersey Gateway and the wider works comprised in the Scheme, including the imposition of the tolls or charges for the use of the SJB.

14. My instructions raise the appropriateness of two alternative application routes for Mersey Gateway itself and, in particular, the means by which tolls may be imposed:

   (1) A combined package of authorisations including the following

       (a) an order under section 106 of the Highways Act 1980 ("HA 1980") to authorise the construction of Mersey Gateway over navigable waters;

[^4]: Document 2 in my Instructions, prepared by KPMG.
[^5]: Document 3 in my Instructions.
more bespoke authorisation processes. If used inappropriately, for projects for which it was not designed – which we believe to be the case here - serious problems and delays are very likely to arise. It is in order to protect the integrity of the TWA and other authorisation regimes that section 13(2) of the TWA gives the Secretary of State the power to refuse to make an Order where other more appropriate means exist.

It is appreciated that, in this case, you are arguing that other, more custom-built powers currently available would not provide you with the necessary authority for what you wish to achieve (i.e. a new bridge with open road tolling). However, this does not in itself make use of the TWA appropriate, or in any way lessen the potential difficulties from using the TWA process for authorising a tolled road crossing. What it does suggest in our view is that you should be considering alternative means, which I will come on to later in this letter, for implementing the scheme.

It would in any event be wrong to assume that an Order under s.3(1)(b) of the TWA could necessarily provide all the powers that may be required for the construction and operation of the bridge, including tolling provisions, as the powers in that section are by no means unconstrained.

Under s.3(1)(b), the Secretary of State may authorise the carrying out of works which interfere with rights of navigation and ancillary (i.e. subordinate) matters. Whether something is truly “ancillary” must be a matter of fact and degree, but the more remote that matters are from the carrying out of the works interfering with navigation rights, the less likely it is that they can properly be considered to be ancillary. For example, it is very doubtful whether a s.3(1)(b) Order could properly authorise any highway works which were geographically remote from the MGB. More significantly, we have serious doubts about the extent to which a TWA Order could provide the full range of powers likely to be needed to establish an open road tolling scheme. We believe that the link between the powers in s.3(1)(b) and what you wish to achieve is too tenuous.

To illustrate this point, before applying for a TWA Order to authorise the new Tyne crossing, the Tyne and Wear PTA considered it necessary to promote a private Bill to clarify that the Order could authorise the aspects of the scheme which were ancillary to the operation, as distinct from ancillary to the construction, of the new tunnel. In any event, the Tyne Tunnels Order does not provide for open road tolling. Your Council’s scheme would almost certainly require a wider and more complex set of powers, increasing the risk of vices problems and uncertainty.

For the reasons discussed further below, the Department is not convinced that the TWA is the only source of powers available to Halton to deliver its key objectives for the Mersey Gateway. However, if, after considering these points, Halton should still consider that there are no other feasible option, and still wished to consider further the TWA option, we would need you to identify in very much more detail (preferably by way of a draft Order) the powers you require to implement the MGB project and open road tolling. The Department would then have to consider very carefully whether a TWA Order application including those powers would be likely to be within the scope of s.3(1)(b) – although you will appreciate that, ultimately, only a Court could give an authoritative view.

In addition to the above points about the scope of s.3(1)(b), we consider that there are also likely to be serious practical difficulties associated with the TWA option. An
(2) To the extent that there is any doubt as to whether a power to operate is required, would HBC's inherent powers as regards the operation of highways as a local highway authority be sufficient to enable it to operate the Mersey Gateway without an express power to operate being provided in a TWA Order following the dedication and adoption of the Mersey Gateway;

(3) If not, whether it would be necessary for an enabling Act to provide such a power and what in particular would such an Act provide;

(4) Whether it would be within the powers of the Secretary of State to make an order under section 3(1)(b) that authorised works to link Mersey Gateway into the highway network and to authorise the construction (and operation) of the toll plazas (but not the more remote works) on the basis that such works are ancillary to the works that interfere with navigation.

21. Section 13(2) TWA 1992

(1) Whether it would be within the powers of the Secretary of State to make an order for the Mersey Gateway (assuming an enabling Act was not required) having regard to section 13(2) of the TWA, in a case where the objects might technically be available by other means, notwithstanding the disadvantages or otherwise of those procedures;

(2) Whether, in exercising a discretion under section 13(2) and in considering the availability of any alternative procedures, the Secretary of State would be entitled to have regard to -

(a) the difficulties or uncertainties presented by those alternative procedures to the extent that they exist; and

(b) the commercial advantages presented by an order under the TWA vis-à-vis matters such as risk transfer and/or efficiency of procedure,

assuming that no person's interests would be prejudiced by using that procedure.

22. To advise generally in respect of any other matter considered relevant.

23. I will deal with the issues in the order set out above.
“3. A concession statement shall contain the following information -

(a) the name and address of the concessionaire or, if the concessionaire is a company within the meaning of the Companies Act 1985, the name, registered number and registered office of the concessionaire;

(b) if the concessionaire is a company with issued share capital, the name and address of each member of the company who is the registered owner of at least 10 per cent of the issued share capital when the concession statement is made available for inspection in accordance with paragraph 1(3) of Schedule 2 to the Act;

(c) a statement of the maximum duration of the concession period and as to whether, in accordance with the provisions of the concession agreement, that period may be terminated early;

(d) a summary of any provisions in the concession agreement regarding the management of traffic (whether by the exercise of the powers conferred on the concessionaire by section 3 of the Act or otherwise) during the execution of works for improving, repairing or maintaining the concession road, including provisions as to maintaining liaison between the concessionaire and the police and other authorities;

(e) a brief description of any highway functions specified in the concession agreement which the concessionaire is or is to be authorised to exercise pursuant to section 2(1) of the Act;

(f) a summary of any obligations undertaken by the concessionaire in the concession agreement -

(i) to take steps to minimise or avoid any adverse environmental effects arising out of the construction, existence or use of the concession road; and

(ii) with regard to the provision of service areas by him or pursuant to an agreement with him; and

(g) a statement of any improvements of the concession road which the concessionaire has undertaken to make during the concession period and of the nature of those improvements, the time when he proposes to execute them and any conditions (such as the use of the concession road by a specified average number of vehicles during a specified period) to be fulfilled before the concessionaire would execute the improvements.”

29. The purpose of providing the statement under para. 1(3) at the time the Order is made appears to be to enable interested parties (and the decision maker) to understand and be able to express views with regard to the effects of the proposed Order. The statement will give key information about the concessionaire itself and the nature of the obligations and functions that it will undertake under the concession agreement. As appears below, it seems clear that the statement must refer to an agreement in existence at the time of the statement and, therefore, at the time of the making of the Order.
(6) an order which was put forward for confirmation without an existing concession agreement would be ultra vires the provisions since it could not comply with the regulations.

33. In conclusion on this issue, in my opinion the 1993 Regulations do not permit the order to be made on the basis of a proposed agreement but only allow information by reference to an agreement in existence at the time of the making of the order. It therefore appears that the requirements of Schedule 2 coupled with the prescribed information place a significant practical limitation on the utility of the concession toll orders, at least for the present proposals.

(2) Enabling Act

34. I will deal with the questions under this heading in the order in which they are put.

(1) Whether the Secretary of State be able to make an order under section 3 of the TWA 1992 authorising the carrying out of the works for the Mersey Gateway, which would allow both the construction of the works and their subsequent operation (to the extent discussed above) and tolling

35. I am instructed that the likely extent of a TWA Order is indicated by the dotted brown ink line on the plan at Document 1 and that this will comprise the bridge itself, which interferes with a number of navigable waterways.

36. The works are also proposed to include landside works that would be part of or ancillary to the interference with navigation, including works to link the bridge into the major highway network and the toll plazas. The toll plazas are a necessary part of the bridge in order for it to operate as a tolled crossing. It appears that the location of the toll plazas, though not immediately adjacent to the crossing, is a pragmatic decision since there are more suitable proximate locations and they are connected to the bridge by the road which would also be the subject of the order.

37. In my opinion, s. 3 TWA does contain powers which would allow the works for the construction of the Mersey Gateway, their operation and tolling. The works to construct the access road and the toll plazas may legitimately be regarded as part of the bridge works themselves (since it is to be a toll bridge) or, in any event, as ancillary works.

38. S. 3 provides:
42. Indeed, as DfT’s Brief Guide (2006) states under “Q2 What types of scheme can a TWA order cover?”

“TWA orders can also relate to:
- the construction or operation of an inland waterway; and
- certain types of works that interfere with rights of navigation in waters up to the limits of the territorial sea. These include bridges, piers, barrages, tunnels, offshore wind farms and so on.”

43. Note, for example, the Secretary of State for Transport’s confirmation of the TWA for the Proposed New Tyne Crossing by decision letter dated 21.7.05 which included the provision of toll plazas to serve the immersed tube form of the new crossing.

44. In addition, I consider that the power to authorise ancillary works would include the infrastructure which (if not part of the works in any event) could reasonably be regarded as ancillary to the bridge works including not only the toll plazas but the road connections to enable connection into the highway network.

45. The question of what is ancillary is plainly a matter of fact and degree, and reasonable judgment, and whilst it would include some extent of highway ancillary to the main works it would not, for example, permit wide ranging, general highway works in the wider area. That said, it would in my opinion allow connections to the new crossing from the existing highway network since they could properly be regarded as ancillary since they enable the bridge works to be used for the purpose for which they have been authorised. There would be little point to a toll bridge which did not connect into the highway network.

46. With regard to the operation and tolling of the bridge, this is plainly authorised by s. 5 TWA which provides (in part):

“5 Subject matter of orders under sections 1 and 3

(1) Without prejudice to the generality of sections 1 and 3 above, the matters as to which provision may be made by an order under either of those sections include those set out in Schedule 1 to this Act.

(2) An order under section 1 or 3 above may make provision in relation to more than one scheme, system or mode of transport. ...”

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7 See www.dft.gov.uk/pgr/twa/dlrivortynetunnelssorder?page=14&i=102. This issue did not turn on the amendments made by the Tyne Tunnels Act 1998 considered below.
50. Further, given the powers in s. 5(3)(a) TWA to "apply, modify or exclude any statutory provision which relates to any matter as to which an order could be made under section 1 or, as the case may be, 3" it appear to me that any statutory schemes for tolling (e.g. under NRSWA) could be applied in a modified form to the proposed tolling arrangements for the Mersey Gateway as an alternative to setting them out in full in the TWA order.

51. If the relevant aspects of the operation of the infrastructure are able to be authorised by an order within s. 3 and Schedule 1, then the s. 5(3)(a) power will apply. As I have already advised, the provisions of the TWA empower the tolling of bridges and therefore s. 5(3)(a) does allow the application or adaption of tolling provisions in other legislation to apply to the tolling of the Mersey Gateway.

(2) To the extent that there is any doubt as to whether a power to operate is required, would HBC's inherent powers as regards the operation of highways as a local highway authority be sufficient to enable it to operate the Mersey Gateway without an express power to operate being provided in a TWA Order following the dedication and adoption of the Mersey Gateway.

52. As I have already explained, I consider the powers under s. 3 combined with Schedule I provide authorisation for the operation of a toll bridge.

53. In my opinion, this would be the case provided that the surface of the roadway carried by the new crossing was designated or dedicated as public highway. Although the highway would be subject to tolling, HBC would have the power to act as highway authority for the carriageway of the new bridge and the access roads and plaza associated with it.

(3) If not, whether it would be necessary for an enabling Act to provide such a power and what in particular would such an Act provide.

54. In my opinion, the circumstances of the Tyne Tunnels Act 1998 are plainly distinguishable from the present case and do not cast doubt on the applicability of s. 3 TWA to the Mersey Gateway.

55. The preamble to the 1998 Act stated:

"An Act to amend provisions of the Tyne and Wear Act 1976 concerning tolls in relation to the Tyne Tunnels; to confer further powers upon the Tyne and Wear Passenger Transport Authority to facilitate the provision and operation of an additional tunnel crossing of the river Tyne; to enable provision to be made for the operation of the existing tunnels in conjunction with such a new crossing; and for connected purposes"
HBC, the PTA had no power to operate, maintain or repair roads or highways whereas HBC has all the powers of a highway authority.

59. The above passages also make it clear that the 1998 Act proceeded on the basis that was considered that the TWA powers permitted the operation of the new tolled tunnel, which provides incidental support for the view I have already expressed above and does not support the view set out in the DfT letter quoted above. One of the issues the 1998 Act addressed was whether s. 3 TWA could apply to the existing tunnel since the powers for the operation are part of, or ancillary, to the power to build the infrastructure being tolled. In the case of the existing Tyne Tunnel, it was existing infrastructure and s. 3 TWA does not appear to me to confer power merely to amend the operation of such an existing installation. As a result, s. 4(2) of the 1998 Act provided:

"(2) For the avoidance of doubt, in addition to or as part of any order which may be made under section 3 of the [1992 c. 42.] Transport and Works Act 1992 relating to or to matters ancillary to the construction of a new tunnel crossing, provision may be made by an order under that section relating to or to matters ancillary to the operation of the tunnel and the new tunnel crossing, including provision applying, modifying or excluding any statutory provision and provision amending, repealing or revoking any statutory provision of local application including a provision of this Act."

60. It follows, that I do not consider that the 1998 act provides a reasonable basis for concluding that s. 3 TWA is inapplicable or inappropriate. Indeed, if anything, it supports the use of the TWA in the circumstances of the present case.

(4) Whether it would be within the powers of the Secretary of State to make an order under section 3(1)(b) that authorised works to link Mersey Gateway into the highway network and to authorise the construction (and operation) of the toll plazas (but not the more remote works) on the basis that such works are ancillary to the works that interfere with navigation.

61. As already stated above, I consider that s. 3(1)(b) would permit the construction of the works which would allow the Mersey Gateway to connect into the highway network and existing infrastructure but that the works must not exceed what could reasonably be considered ancillary to the construction of the bridge.

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8 See Document 9 in my Instructions.
(2) The difficulties with regard to the concession agreement and statement are plainly create serious practical problems for the proposals and, even if arguably a means to achieve the objects of the Mersey Gateway in principle (which I consider doubtful), then at least a compelling for not invoking the power under s. 13(2) to decline;

(3) The use of TWA powers are being used to avoid the public consultation or scrutiny under NRSWA but will equally be subject to these requirements under the TWA procedure.

66. The use of the TWA process would not undermine the public and transparent scrutiny of the proposals at inquiry, nor would the process be any more complicated than the process suggested by DfT in the correspondence referred to above. Both NRSWA and TWA procedures would involve the use of HA 1980 procedures in parallel\(^9\) and it seems to me that the criticism (if it is such) of the use of the HA is an objection in parallel with the TWA process is equally applicable to the NRSWA procedure. I therefore do not consider that DfT can reasonably use the need for parallel HA procedures as a means to invoke the s. 13(2) power.

(2) Whether, in exercising a discretion under section 13(2) and in considering the availability of any alternative procedures, the Secretary of State would be entitled to have regard to (a) the difficulties or uncertainties presented by those alternative procedures to the extent that they exist and (b) the commercial advantages presented by an order under the TWA vis-à-vis matters such as risk transfer and/or efficiency of procedure, assuming that no person's interests would be prejudiced by using that procedure.

67. In my opinion, the question whether the objects of the order could be achieved by other means entitles the Secretary of State to have regard to both the legal requirements and constraints of the "other means" and the extent to which the objects would be assisted or impeded by the application of the "other means". The difficulties or uncertainties of the other procedure, whether legal, procedural or practical\(^10\), must be relevant to the exercise of the discretion provided that they relate to the achievement of the object of the proposed order. In my opinion, it would not be correct to limit the concept of "achievement" to the bare applicability of the alternative legal scheme since it would have been simple for the statutory provision to refer to the application of the other

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\(^9\) See the description of the powers needed above.
\(^10\) See Document 10 in my Instructions.
HALTON BOROUGH COUNCIL

MERSEY GATEWAY

OPINION

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Your ref: BDDS/SJG/96801/120000/16289344.2
Our ref: Case 104503 [DE]
Mersey Gateway Statutory Powers – Implications Matrix
2 October 2007

Introduction
Following a progress meeting with DfT officials on 19 September HBC agreed to produce an implications matrix which briefly describes the implications of the various statutory routes currently available to HBC to secure the powers necessary for the Mersey Gateway project against HBC’s primary and secondary objectives for those powers. For clarity HBC’s objectives are:

**Primary Objectives:**
1) Transfer revenue risk to the private sector (Revenue risk)
2) Retain a degree of control over toll levels (Control)
3) Ensure robust off balance sheet opinion (Balance Sheet)
4) Deliverability, on time and fixed price (Deliverability)

**Secondary Objectives:**
1) Minimise user tolls by avoiding VAT (VAT)
2) Ensure flexibility to grant lenders security over revenue stream (Security)
3) Avoid primary liability for claims under S41 Highway Act 1980 (HA S41)
4) Ensure sound enforcement regime (Enforcement)

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<th>Deliverability</th>
<th>VAT</th>
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<td>Yes – MG Revenue risk</td>
<td>Debateable – Need for</td>
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No - can not authorise the de-criminalised recovery of unpaid tolls by HBC
Other Comments:

- **NRSWA Concessionaire Toll Order** - These powers were designed to facilitate a Birmingham Northern Relief Road (M6 Toll) type of scheme where the concessionaire is the promoter and takes all the risks and rewards of the scheme. This is not consistent with HBC’s assumption that it would be the scheme promoter, and would maintain a degree of control over toll levels.

- **NRSWA Highway Authority Toll Order** - These powers are really designed for a Highways Authority tolling a facility in its own right, which again is not consistent with HBC primary objective of transferring revenue risk.

- **TA 2000** – HBC has been advised by Counsel that the use of TA 2000 for a road not already in existence may be *ultra vires*, which is likely to be a concern raised by bidders/funders. However, so far as these powers relate solely to SJB for which TA 2000 is available, and which represents a small proportion of the traffic and revenue, such issues are not considered as important. Other application routes are not available for SJB in any event.
MERSEY GATEWAY AND SILVER JUBILEE BRIDGE

COMMENTARY ON THE POWERS AVAILABLE TO SECURE PRIVATE SECTOR CONSTRUCTION, OPERATION AND INVESTMENT IN THE MERSEY GATEWAY AND SILVER JUBILEE BRIDGES

8 AUGUST 2007
1. INTRODUCTION

1.1 Halton Borough Council ("HBC") are seeking to promote orders for the design, construction, financing, maintenance and tolling of a new road bridge across the Mersey estuary providing improved connections between the north and south of the borough and across the wider region. At the same time the existing Silver Jubilee Bridge and its access roads, which are currently subject to severe congestion at peak travelling times, will be converted to act primarily as a crossing for public transport and local journeys.

1.2 The proposal is that the new bridge (the "Mersey Gateway") should be financed under the private finance initiative as the primary north - south crossing in the area. It is envisaged that most of the financing for the Mersey Gateway project will be secured from private sector funders, who once the bridge is open to traffic, will receive usage related payments plus performance related availability payments to make up the total payment. Over 70% of the total payments (projected at some £35 million per annum) will be related to usage and made from toll income, with the balance of the private funding being serviced by grants from DfT under the Private Finance Initiative.

1.3 HBC is currently proposing to retain the Silver Jubilee Bridge ("SJB") in its own control, although it may consider delegating the proposed modifications, maintenance and/or toll collection functions to the contractor appointed to design, build and operate the Mersey Gateway, if this is the most efficient and value for money option. However, in order to ensure that the planned level of traffic use of, and toll income from, the Mersey Gateway is achieved, it will be necessary to moderate the use of the alternative SJB crossing. In addition to modifications to the traffic lanes on the bridge and the access roads to it, this is likely to require tolling powers being obtained for the SJB (which is currently toll free).

2. PREVIOUS CONSIDERATION OF THE APPROPRIATE STATUTORY AUTHORIZATION ROUTE AND THE CONSIDERATIONS GOVERNING THAT CHOICE

2.1 Between October and December 2006, three potential statutory routes to obtain the powers to build and operate the Mersey Gateway Bridge as a toll bridge were
whether the powers which could legally be conferred by a TWA Order would be sufficient to authorise an open road tolling system, in any event, and the procedural difficulties of obtaining tolling powers under a TWA Order.

2.6 On the basis of Mr Mills' advice, HBC instructed HBC's legal and financial advisers to review in detail whether powers to toll and award a contract for the design, building, financing and operation of the Mersey Gateway ("a DBFO Contract") under the bridge construction and special roads provisions of the Highways Act 1980 and the concession and tolling provisions of Part I of NRSWA would be sufficient to deliver the project, whilst in relation to the SJB, it was decided to review whether adequate powers to toll that crossing could be obtained under the road charging scheme provisions of Part III of TA 2000.

2.7 The adequacy of such potential statutory authorities had to be reviewed against the following considerations, which became apparent as the project was further progressed:

The Acceptability of Early Concessionaire Procurement ("ECP")

2.7.1 Following consideration of the appropriate mechanisms to procure tolling powers for the two bridges, discussions took place with DfT's Major Projects Division, to review the advantages and disadvantages of procuring and engaging private sector partners for the DBFO Contract in advance of the application for statutory powers to build, operate and toll that crossing.

2.7.2 Some potential benefits from such an early procurement approach were identified by HBC and its advisers; particularly in providing early verification for HBC's cost, traffic and revenue forecasts for the crossing, providing value engineering and cost control disciplines during the design stage as well as making additional resource and expertise available to assist with pre-inquiry stakeholder negotiations and the preparation and presentation of evidence at public inquiry.

2.7.3 However, concerns were expressed by DfT about the ability to fix the project costs from a procurement which was completed before the empowering orders were made, maintain those costs over an 18 month to two year approvals procedure and secure overall value for money in the absence of alternative proposals if the chosen private sector partners resiled from their
2.7.5.2 it must do so under a special legal regime applying to it and not the private sector

2.7.6 This is an important consideration for HBC, as the business case on the basis of which Programme Entry was awarded by DfT is based on no tolls being charged for crossing the Mersey Gateway and tolls being at the same level as for the Mersey Tunnels, some 15 miles downstream from the proposed new crossing. Increasing tolls to provide for VAT would impinge upon HBC's key objective of maintaining the affordability of the crossing to the local community; this being a key issue in an area of comparative social deprivation, such as Halton. This consideration therefore militates against the use of legislation which would confer the primary responsibility for operating the Mersey Gateway and entitlement to tolls on the private sector.

Composite Trader Relief

2.7.7 In March 2007, the Chancellor announced that Industrial Buildings Allowances ("IBAs"), which allow investors in building and civil engineering works to write off a proportion of the cost of such works, each year, against their corporation tax bills were to be phased out between 2008 and 2011. Previously it had been assumed in the Project Business Case that construction expenditure on the Mersey Gateway and SJB de-linking would be eligible for such allowances at the rate of 4% per annum of the outturn construction costs. This tax saving would be passed through to HBC in terms of lower unitary charges from the private sector.

2.7.8 In accordance with HM Treasury Guidance on accommodating the abolition of IBAs in PFI project planning, HBC and their advisers have sought to restructure the project so as to replace the lost IBAs with composite trade tax treatment, under which, in strictly defined circumstances, construction costs can be treated by a private sector contractor as a revenue expense to be offset against future mainstream corporation tax. In particular, however, for such treatment to be applied:

2.7.8.1 the contractor's main business objects must incorporate the design, construction and maintenance of the building or structure;
manage the risk of fluctuations in toll revenue than HBC which has a prescribed budget on which there are already very many demands.

2.7.13 Additionally, the level of risk transfer in relation to the key demand risk will have a significant effect on the quantified risk assessment to be used to assess the likely scheme outturn costs to the public sector\(^5\) as part of the overall DfT and Treasury appraisal of the value for money of the scheme, on which their final funding decision will be based.

2.7.14 Furthermore, although the accounting status of the project is not considered by HM Treasury to be the overriding factor in approving or not approving PFI Schemes, as was once the case, overall affordability considerations for Government still appear to dictate that PFI projects which are "off balance sheet" are more likely to be affordable to Government, and therefore approved, than projects which are "on balance sheet". The accounting principles to be determining the economic owner of an asset\(^6\), on whose balance sheet an asset and its associated liabilities should appear depend on a number of different factors. However, the question of who bears the risk of fluctuations in demand from that asset is a most important factor to take into account, and coupled with the catastrophic loss risk (see paragraph 3.1.4.2 below) are likely to be determining, if both primarily rest with HBC.

Bankability

2.7.15 As stated in paragraph 1.2 above, over 70% of the debt servicing payments necessary to secure private sector funding of the project is projected to come from tolls charged for the use of the crossings (with 80% of this revenue being generated by the Mersey Gateway). Whilst senior debt funding is commonly raised against revenue in this type of project, the banks will require first call on such revenues. The ability to confer such priority is, however, complicated where a local authority is the direct recipient of such

\(^5\) As described in the Transport Analysis Guidance- The Estimation and Treatment of Scheme Costs - October 2006- TAG Unit 3.5.9

\(^6\) Accounting Standards Board Application Note F (September 1998) - Amendment to FRS 5 - Reporting the Substance of Transactions-Private Finance Initiative and Similar Contracts
2.7.18.1 firstly, there are no powers in NRSWA for the highway authority (rather than the police) directly to enforce even the criminal penalties which can be provided for under NRSWA, whilst we note that under Article 41(5) of the River Tyne (Tunnels) Order 2005 ("RTTO"). Tyne & Wear Passenger Transport Authority has the power directly to prosecute legal proceedings against toll defaulters. A similar provision would at least allow HBC to take enforcement action to deter toll evasion, whilst the Police have currently indicated to HBC that they have insufficient resources to enforce such a regime themselves;

2.7.18.2 secondly, civil action for recovery of penalty tolls is easier to enforce than action through the Magistrates Courts and is therefore likely to act as more of a deterrent to potential toll evaders. However, it may be possible to set a higher differential toll for those paying the toll in advance, as compared to those who pay the tolls after they have used the crossing, thus providing an incentive for advanced payment where there is less evasion risk.

2.8 In further assessing the suitability of each of a NRSWA Order to promote the design, construction, financing and maintenance of the Mersey Gateway, HBC and its advisers have taken into account the considerations referred to above. In doing so, they have identified a number of issues which may prevent the project being funded, by Government and/or the Private Sector, either at all or on a basis that is affordable to HBC and represents value for money, if a NRSWA Order is used as the primary basis for securing tolling powers for the Mersey Gateway.

2.9 Whilst some of the same issues arise in respect of promoting the proposed works to and tolling of the SJB, through a TA 2000 Charging Order, the lower projected revenues from the existing crossing, coupled with HBC’s proposals for that crossing, may mean that these issues can more easily be accommodated within the overall economics of the project.

2.10 In section 3 of this report, we explain the implications of proceeding down the NRSWA Order route for the Mersey Gateway project; addressing separately the options of conferring tolling powers on a concessionaire, or alternatively conferring such powers on HBC, under such an Order.
schemes and orders under the Highways Acts and traffic regulations, orders and directions.

3.1.2 The term "concessionaire" and "concession agreement" are defined in Section 1(1) of NRSWA as follows:

"1(1) In this Part a "concession agreement" means an agreement entered into by a highway authority under which a person (the "concessionaire"), in return for undertaking such obligations as may be specified in the agreement with respect to the design, construction, maintenance, operation or improvement of a special road, is appointed to enjoy the right (conferred or to be conferred by a toll order under this Part) to charge tolls in respect of the use of the road.

References in this Part to a concession agreement are to the agreement as varied or supplemented from time to time."

3.1.3 As the definition of "concession agreement" in section 1(1) of NRSWA refers to an agreement which confers the right to charge tolls on a concessionaire, it is clear that the functions which may be transferred to the concessionaire under sections 2(1) and 2(2) include the right to set tolls and retain them for the concessionaire's benefit.

3.1.4 In addition to authorising the assignment of the right to set and retain tolls to a private sector concessionaire, a Concessionaire Toll Order has a number of further advantages, from the perspective of an authority seeking to delegate the construction and maintenance of highway structures to the private sector. In particular:

3.1.4.1 because the concessionaire is the primary statutory recipient of the tolls, and indeed the sole party statutorily entitled to receive and retain them, whilst the concession remains in effect (subject to any sub-assignments under section 5(1)), the demand risk referred to in paragraphs 2.7.10 to 2.7.14 above will automatically vest in the concessionaire, reducing the overall risks of the project to HBC and enhancing the prospects of the project being acceptable to DfT and H.M Treasury as compatible with PFI principles and "off balance sheet";
3.1.5.1 first, before a Concessionaire Toll Order can be granted, the concession must already have been entered into, which is contrary to the principle agreed with DfT, as part of the funding negotiations with them to date, rejecting early concessionaire procurement ("ECP") on value for money grounds (see paragraphs 2.7.1 to 2.7.4 above)

3.1.5.2 paragraph (3) of Schedule 2 of NRSWA sets out the additional requirements for applying to the Secretary of State for confirmation of a Concessionaire Toll Order, as follows:

"(3) where the special road to which the toll order relates is to be subject to a concession, the Secretary of State or the local highway authority shall make available for inspection with the copy of the draft order or of the order, as the case may be, a statement containing such information as may be prescribed with respect to the concessionaire and the concession agreement."

3.1.5.3 these provisions were made after representations in Parliament during the passage of the New Roads and Street Works Bill, that objectors and the inspector could not give proper considerations to the potential effects (in particular environmental effects) of a Concessionaire Toll Order without knowing certain key information about the concessionaire itself and the nature of the obligations and functions it was to undertake under the concession agreement. The reference in the definition of "concession agreement, in section l(1) of NRSWA to "an agreement entered into with a highway authority" clearly indicates that the concession agreement to be summarised in the concession statement must already have been "entered into" rather than it summarising proposed terms to be entered into in future.

3.1.5.4 the view that the concession agreement must be procured in advance of applying to the Secretary of State for confirmation of a

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7 The prescribed information to be contained in the statement required by paragraph 1(3) ("the Concession Statement") is set out in the Concession Statements (Prescribed Information) Regulations 1993
competitive disadvantages of charging VAT and the absence of an effective toll enforcement regime, HBC has provisionally rejected the Concessionaire Toll Order as a viable option for the Mersey Crossing and therefore proceeded to examine the Highway Authority Toll Order route.

3.2 Highway Authority Toll Orders

3.2.1 Under such an order, the Highways Authority (in this case HBC) would be authorised to "charge tolls in respect of the use of the road".

3.2.2 The expression, "charging of tolls" in section 6(1) of NRSWA, which a Highways Authority Toll Order confers on the Highways Authority rather than on a concessionaire, is not further defined. However, in the Skye Bridge case\(^6\), a distinction was drawn between sub contracting the function of tolling a bridge to an agent, who paid over the tolls collected to the body authorised to charge tolls by an order under the Scottish provisions of NRSWA, and arrangements under which such a sub contractor to the authorised tolling body set the level of the tolls and derived the economic benefit from them. The former was found not to represent an unauthorised use of the toll charging powers, as the sub-contractor was collecting the tolls as agent for the authorised tolling body, but there are clear indications that had the sub-contractor, rather than the authorised tolling body, been setting the level of tolls or deriving the economic benefit from them, the result would have been different.

3.2.3 The normal legal definition of a "concession agreement" is an agreement under which the contractor engaged to carry out works or services is entitled to exploit those works and services by charging users of the asset or service thereby provided or maintained. This, together with the outcome of the Skye Bridge case (albeit in a different legal jurisdiction) leads us to conclude that a body which receives the benefit of toll income is the body which is "charging the tolls". This interpretation is reinforced if it is that body which also sets the level of the tolls in question. We therefore conclude that under a

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\(^6\) Smith, Miller, McMorrine and the Pict v The Procurator Fiscal (Scottish Appeal Court cases, case 280/98)
wider powers available to local authorities to sub-contract the provision of works or services to private sector contractors would, on normal principles, be available to enable HBC to delegate design, construction and maintenance of the Mersey Gateway to the private sector\(^\text{11}\), these powers would not extend to the assignment of the right to set the level of tolls or to derive the economic benefit of the tolling income to a concessionaire or to a funder by way of security for its loans.

3.2.7 In particular such an arrangement would contraven the legal principle, that where Parliament has made procedural rules governing the circumstances in which financial powers are to be exercised in the public realm, there is no room to imply wider powers from more general legislation\(^\text{12}\). Section 6(1) specifically requires a tolling order to state whether it authorises a highway authority or a concessionaire to charge tolls and NRSWA then prescribes a different order confirmation procedure and different powers consequent upon the type of order stated. To circumvent such a statutory regime by the use of wider sub-contracting and delegation powers in other statutes is likely to be outside HBC's powers, in accordance with principles established in the Waltham Forest and Allerdale cases\(^\text{10}\).

3.2.8 In the absence of any express authority in NRSWA for the Highways Authority which benefits from a Highways Authority Toll Order to grant any form of security or priority over toll income, section 13 of the Local Government Act 2003 would preclude any such arrangement.

3.2.9 The use of a Highways Authority Toll Order would also mean that HBC retains the statutory duty to maintain the Mersey Gateway, in a safe and serviceable condition, imposed by section 41 of the Highways Act 1980. Even if equivalent obligations, backed by appropriate indemnity and insurance provisions, were to be inserted in the agreement with a third party contractor engaged to perform the maintenance function on behalf of HBC, HBC would still bear the primary risk.

\(^{11}\) a view reinforced by the distinction between physically collecting tolls and retaining them for one's own benefit recognised in the Skye Bridge case.

by that order\textsuperscript{13}. This is inconsistent with transferring the level of demand risk to the private sector which HBC's financial position dictates as prudent, with the general Government principles for PFI projects and with achieving "off balance sheet" status (see paragraphs 2.7.10. to 2.7.14 above).

3.2.13.2 we have reviewed alternatives to reduce the demand risk retained by HBC, even where it exclusively retains the right to set and charge the tolls to crossing users, based on the model we understand TfL, who are promoting the Thames Gateway Crossing through a Highway Authority Toll Order\textsuperscript{14} may be adopting for the Thames Gateway. Their proposal is as follows\textsuperscript{15}:

(a) TfL will set the level of tolls in consultation with the London Boroughs and the DBFO Contractor, subject to the maximum levels provided for in the Thames Gateway toll order; and

(b) the unitary charge will be based on a volume based payment per vehicle set at the same level as the toll per vehicle assumed in the business case (essentially a "shadow toll"), subject to adjustments where the tolls are set by TfL at levels other than those assumed in the project business case to reflect the effect on overall volumes of traffic and deductions for non-performance against the availability/performance regime.

Commercially, this is a reasonably attractive option as a similar approach would close out HBC's demand risk up to the point at which it altered the tolls for the first time from the levels assumed in the business case. However, it may be less attractive to the private sector, as it precludes them using pricing as a throttle for demand

\textsuperscript{13} Section 9(1) of NRSWA

\textsuperscript{14} Thames Gateway Bridge Prequalification Document (May 2007)

\textsuperscript{15} having unsuccessfully sought an extension to its statutory powers so it could award a concession arrangement, with the standard level of revenue risk and reward transfer to the DBFO Contractor
significant delays in implementing the Mersey Gateway proposal. Alternatively, if made after the Mersey Gateway is in use, the challenge could be to the obligation of any crossing user to pay the tolls under an allegedly defective order, as was the case with the Skye Bridge case referred to above.  

3.2.13.5 furthermore, whilst we believe on balance that such a challenge might be resisted, there is likely to be little appetite from the finance market to take any legal risks with regard to entitlement to receive the toll income (directly or indirectly), and any level of legal risk is likely to deter financial institutions from funding the project;

3.2.13.6 additionally, for the reasons set out in paragraph 2.7.15 and 2.7.16 above, HBC would be precluded under Local Government legislation from granting security over the toll income itself to the DBFO Contractor or its funders and there are no powers under NRSWA to assign rights over the toll income to funders where a Highways Authority Toll Order is being utilised, unlike in relation to a Concessionaire Toll Order. Funders would therefore be reliant on HBC's covenant alone to meet both the "shadow toll" payments and any payments for "compensation events" under the DBFO Concession, termination events or otherwise, with no priority over HBC's other creditors in relation to the toll income or generally. Given the small size and limited financial resources of HBC, we are not clear that this will be a bankable proposition and believe that many potential sources of finance would be deterred by such a limitation on the security for repaying their debt;

3.2.13.7 furthermore, as HBC will retain primary section 41 liability for the safe and serviceable condition of the Mersey Gateway to third parties, who will therefore pursue any personal injury or other actions for breach of this statutory liability against HBC, HBC will therefore need to rely upon the DBFO Contractor's insurance and, in the absence of sufficient security, contractor indemnities from the DBFO

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16 Smith, Miller, McMorrine and the Pict v The Procurator Fiscal (Scottish Appeal Court cases, case 280/98)
3.2.14.4 the inability to grant any priority over toll income to funders of the project, is likely to be a significant impediment to raising private sector finance for the project; and

3.2.14.5 coupled with which the absence of direct enforcement rights for non-payment of tolls will increase the risks associated with the project, particularly under an open tolling regime, and may in fact render such a regime inoperable.

3.2.15 In this regard, it would be essential that HBC is 100% certain that the Highways Authority Toll Order route is appropriate, before proceeding with this. A Highways Authority Toll Order cannot be converted into a Concessionaire Toll Order without completing the whole statutory confirmation procedure again from the start\(^{17}\), so that any problems experienced in procuring or funding the project under this route cannot easily be rectified. Our own view is that such an order does not provide a sufficiently robust basis for pursing HBC's proposals for the Mersey Gateway.

4. POTENTIAL FOR USING A TA 2000 CHARGING ORDER TO PROMOTE THE MERSEY GATEWAY

4.1 Under section 163 of TA 2000, a non-metropolitan local traffic authority (defined in the Road Traffic Regulation Act 1984 as the county council) has power to make a scheme for imposing charges in respect of the use or keeping of motor vehicles on specified roads. As with an NRSWA Order, that scheme must then be confirmed by the Secretary of State.

4.2 A local charging scheme can only be made if it appears desirable for the purposes of directly or indirectly facilitating the achievement of policies in the authority's local transport plan (section 164(2) of TA 2000). However, it is clear from section 171 of the TA 2000 that the scheme may either remain in force indefinitely or for a fixed

\(^{17}\) This differs from the Concessionaire Toll Order provision which can be used by a Highways Authority for up to 2 years from premature termination of the concession to charge tolls (section 5(3)(b) of NRSWA) and can be converted by statutory regulation made by the Secretary of State under section 12 of NRSWA into a Highways Authority Toll Order without the local consultation and public inquiry procedure required for the original order.
challenge. The overall terms of Part III of TA 2000, and in particular the requirement
to apply the net proceeds in accordance with LTP plan objectives from time to time,
are not consistent with allowing a concessionaire to apply the proceeds from a road
charging scheme (whatever these may be) to reward its own shareholders. Although
Paragraph 8 of schedule 12 only applies, for a period of 10 years from the date when
schedule 12 came into force (expiring on 31 January 2011) we understand that the
Secretary of State is likely extend that period, by statutory regulation and is unlikely
to release any highway authority from its provisions.

4.6 Again, structures could be devised for getting around the legal restrictions on the use
of road charging proceeds, for example by linking payments to the contractor who
builds and maintains the crossing to the level of income derived by HBC from the
tolls. This faces the same potential objections as using a Highways Authority Toll
Order under NRSWA to authorise an arrangement under which charges are made by
the highways authority, but then linking the contractor's rewards to the income
generated by the crossing (see paragraph 3.2.13.4 above); namely that the overall
arrangement is a "sham" which is inconsistent with the statutory scheme and therefore
beyond HBC's powers.

4.7 Additionally, although section 164(2) of the Transport Act 2000 empowers a traffic
authority to make a local charging scheme if it appears desirable for the purpose of
directly or indirectly facilitating achievement of policies in its local transport plan,
and there appears to be no specific requirement that the charging scheme should be
introduced to tackle congestion, there is no doubt that the focus of the legislation was
on demand management measures to tackle congestion (indeed the whole focus of the
White Paper and regulatory impact assessment which preceded the Transport Act
2000 was that the new provisions would give local authorities new means to tackle
congestion and pollution through new demand management tolls).

4.8 It is therefore questionable whether the Secretary of State would consider it
appropriate to confirm a road charging scheme for a crossing which has not yet been
built and is therefore not subject to traffic congestion, such as the Mersey Gateway,
under the provisions of the Transport Act 2000. The considerations may well be
different, however, for an existing highway, such as the Silver Jubilee Bridge, which
is already subject to significant congestion problems.
2. The carrying out of any civil engineering or other works.

3. The acquisition of land whether compulsorily or by agreement.

4. The creation and extinguishment of rights over land (including rights of navigation over water), whether compulsorily or by agreement.

7. The protection of the property or interests of any person.

8. The imposition or exclusion of obligations or of liability in respect of any acts or omissions.

9. The making of agreement to secure the provision of police services.

10. The carrying out of surveys and taking of soil samples.

11. The payment of compensation.

12. The charging of tolls, fares (including penalty fares) and other charges and the creation of summary offences in connection of non-payment.

13. The making of byelaws by any person and their enforcement, including the creation of summary offences.

14. The payment of rates.

15. The transfer, leasing, discontinuance and revival of undertakings."

5.3 It is clear that a TWA Order could be used to promote the construction and tolling of the Mersey Gateway, subject to two conditions:

5.3.1 the Guide to TWA Procedures published by DfT in June 2006 indicates that provisions relating to the carrying out of a scheme, where the primary object of the order could be achieved under other legislation, is considered to be outside the scope of TWA Orders. In this case, the primary object of the order would be to authorise the design, construction, financing and maintenance of the Mersey Gateway. For the reasons set out in sections 3 and 4 above we do not believe that the other potential routes to authorise the Mersey Gateway can be achieved under other legislation because:
accordingly works remote from the bridge and its approach roads may not be the subject of an order under that provision;

5.3.2.3 the procedural difficulties of managing and co-ordinating a separate procedure for authorising charging of the Silver Jubilee Bridge, under separate legislation, to the legislation used to authorise the charging of the Mersey Gateway; and

5.3.2.4 the requirement to justify the proposed tolling arrangements at public inquiry, before the PFI partners had been identified and the funding arrangements finalised;

We address each of these matters below

5.4 The Absence of Operating Powers

5.4.1 This is of less significance to a bridge, where the “operational” elements of the project would all fall within the headings of repair, maintenance, tolling and enforcement of byelaws in respect of which schedule 1 of the TWA 1992 confers express powers to make orders. This differs from a railway, light railway or waterway, where the promoting authority will often wish to reserve powers not only to build, maintain and charge for use of the infrastructure built but actually to operate the vehicles or craft on the system.

5.4.2 In terms of specific powers which would be sought, in addition to the standard construction, maintenance, compulsory acquisition and access powers, the main additional powers which would be sought under the proposed TWA Order would be as follows:

5.4.2.1 powers to install structures or equipment and to charge tolls, either through a conventional barrier system or through remote electronic tolling. In either case, the structures and equipment would be installed either on the bridge itself or on the approaches and would clearly fall within the category of structures or other works required to finance the construction, repair and maintenance of the bridge and for the purposes of charging tolls. They would thus be clearly ancillary to the purpose of constructing the Mersey Gateway, and
(d) the disclosure of information by Government, public and local authorities for the purposes of operating open road tolling.

Each of these powers should either fall within the byelaw making powers or the powers conferred by Schedule 1 to make provision for tolling of the Mersey Gateway.

5.4.2.5 powers authorising the delegation of HBC's highway functions in relation to construction, repair, maintenance or reinstatement of the Mersey Gateway. This is a standard provision in such orders, authorised, inter alia, by paragraph 1 and paragraph 15 of Schedule 1;

5.4.2.6 powers to grant to any person a lease, licence or other interest or right over land or the Mersey Gateway itself, for the purposes of exercising functions delegated under the powers referred to in paragraph 5.4.2.5 above. A common provision (contained for example in Article 43(3) of the RTTO) authorised, inter alia, by paragraph 15 of Schedule 1;

5.4.2.7 exemption from the Section 41 Highways Act 1980 liability for the duration of the DBFO contract. We would anticipate this provision would reflect the wording of section 2(3) of NRSWA that "the highway authority shall not be liable for anything done or omitted by [its DBFO Contractor] in the exercise or purported exercise of any highway function". This would fall squarely within paragraph 8 of Schedule 1 to the TWA; and

5.4.2.8 powers for the purposes of securing funding for the construction, maintenance, repair and tolling costs associated with the Mersey Gateway to provide guarantees and assign the benefit of toll income to a third party. As the purpose of such a provision would be to finance the construction, maintenance and repair of the Mersey Gateway and its approaches, this is clearly ancillary to the main purpose of the order.

5.4.3 So long as the order is limited to the Mersey Gateway and its approaches, therefore, we see no particular difficulties in bringing the powers which we
other complex projects\textsuperscript{19} that have been promoted successfully and decided in relatively short order without controversy.

5.6.2 Using a TA 2000 Charging Order route, a Highway Authority Toll Order or a Concessionaire Toll Order would result in a greater number of applications, including at least the following:

5.6.2.1 Planning Application for the Mersey Gateway;

5.6.2.2 Planning Application for works to the SJB;

5.6.2.3 Planning Application for remote works;

5.6.2.4 Planning Application for works area (temporary);

5.6.2.5 Listed Building Consent Application in relation to Silver Jubilee Bridge;

5.6.2.6 s106 Highways Act 1980 Order;

5.6.2.7 Side Roads Order;

5.6.2.8 Tolling Order/TA 2000 Charging Order for Mersey Gateway;

5.6.2.9 TA 2000 Charging Order for SJB;

5.6.2.10 Compulsory Purchase Order for Highways Act 1980 purposes and/or Town and Country Planning Act 1990 purposes; and

5.6.2.11 Consent of the Mersey Conservator.

\textsuperscript{19} For example, we are aware that the Felixstowe South Reconfiguration Inquiry in 2005 considered applications for planning permission (to the local planning authority, called in by the then First Secretary of State), under the Harbours Act 1964 (to the Secretary of State for Transport via the Ports Division), under the Transport and Works Act 1992 (to the Secretary of State for Transport via the TWA Orders Unit), under the Coast Protection Act 1949 (to the Secretary of State for Transport via the Marine Consents and Environment Unit) and for Scheduled Ancient Monument Consent (to the Secretary of State for Culture, Media and Sport). These applications were conjoined quite comfortably and decisions were made in relatively short order.
applications and orders process described, allowing for the product of the consultation to be properly considered.

5.6.4.2 prior to promoting an order under the TWA 1992, a public authority such as HBC must pass a resolution by an absolute majority of its members to promote the relevant procedure\textsuperscript{21}. However, resolutions are also needed to make Side Roads Orders, Compulsory Purchase Orders, and Road User Charging Orders. Suitably advertised, a meeting would be held of the full Council of HBC on a given day to resolve to make all of these orders and applications.

5.6.4.3 at some date (the "Application Date") shortly after the above resolutions (say four weeks) the TWA 1992 Application would be delivered to the TWA Orders Unit and the objection period would start to run\textsuperscript{22}. On the same day the planning application (s) and listed building consent application would be delivered to HBC's planning department. On the Application Date the Compulsory Purchase Orders, Side Road Orders and charging Order would be sealed.

5.6.4.4 the advertised objection period for the Compulsory Purchase Orders, Side Road Orders and Road User Charging Order\textsuperscript{23} would be made coterminous with the TWA 1992 Application objection period - Application Date plus six weeks. After the expiration of these objection periods\textsuperscript{24} HBC would request that the confirming Secretaries of State defer any decision as to whether to hold a public

\textsuperscript{21} Section 20 TWA 1992 and Section 239 Local Government Act 1972.

\textsuperscript{22} At least six weeks from the Application Date.

\textsuperscript{23} The TA 2000 does not provide for a given objection period, but the Road User Charging Order does require Secretary of State confirmation. Before confirming an order the Secretary of State is empowered by s170 (4) (a) to cause a public inquiry to be held.

\textsuperscript{24} On the assumption that objections had been made.
State. All Secretaries of State - through the Planning Inspectorate and TWA Orders Unit could then decide to hold public inquiries. The inquiry processes themselves are capable of running in parallel\textsuperscript{29}. It is clear from the above that the various procedures can be managed so as to avoid unwelcome consequences for timescales. The timings are not dissimilar to any large and complex project requiring more than one procedure.

5.6.5 It has been suggested that the inclusion of a tolling regime in a TWA order would expose it to scrutiny at a public inquiry. This is also the case in relation to a Highways Authority Toll Order and a TA2000 Charging Order. Both of these would be subject to exactly the same level of scrutiny in respect of tolling and funding, at exactly the same time and in all cases before PFI partners had been identified. Similarly, at a Concessionaire Toll Order public inquiry, the concession agreement containing details of the tolling regime would be subject to scrutiny. Therefore, the TWA procedure is in this respect no different from the other tolling powers discussed in this paper.

5.6.6 It is not the case that the TWA was not designed with scrutiny of tolling in mind. Tolling is the subject of express provision in TWA 1992 itself (see Schedule 1). The process itself is not in any material sense different from the processes used for any other consent regimes and there is no difference between how an inspector would approach a TWA 1992 Inquiry and a Toll Order inquiry. In each case any public inquiry will wish to make sure that a tolling/charging regime is operable and fundable and in this sense, the TWA is again no different from other procedures.

5.6.7 Nonetheless, the manner of addressing tolling provisions in the RTTO was very long by TWA standards. In our view, this arose because the tolling provisions and the manner of their operation, required further work before the TWA order application was made and before the order went to public inquiry. This meant that the tolling provisions were the subject of discussion

crossing, set too low to deter over use, especially by long distance travellers, and that the flexibility given to TfL to set tolls well in excess of those proposed, with no minimum floor, could be used in a way which undermined the objectives of the scheme. However, the Inspector concluded that flexibility in setting the level of tolls was desirable, given its importance in regulating traffic on the bridge and funding the costs associated with it. And that the inability to fix a precise toll in advance of confirmation of the order was not an impediment to making the toll order. There is no reason why the considerations in relation to a TWA Order should be different.

5.7.3 The projected level of tolls has already been set for the purposes of the business case presented to DfT, at a level which HBC considers affordable for the local community, and economic, on the basis of external economic analysis. This analysis is continuing, with a further report from external consultants engaged by HBC expected in September or October 2007. Whilst some latitude to raise or decrease tolls to reflect the developing economics of the project would be sought under the TWA Order (similarly to that sought by TfL under the Thames Gateway Bridge Tolling Order), there are toll levels at which HBC would not proceed with the project given affordability considerations. Accordingly, whilst the principle of tolling the Mersey Gateway is likely to attract some adverse comments (particularly if coupled with a proposal to toll the SJB), the principle that some mechanism to control the maximum level of tolls will be required is not contested, so long as these allows some leeway to flex the tolls to control demand and secure the bridge’s finances.

5.7.4 Accordingly, given that by the time when confirmation of the order is sought, HBC will already have extensive evidence of the economic levels at which tolls can be set, we see no particular difficulty in presenting proposed toll levels at the evidential stage of the public inquiry, or arguing that the maximum permissible toll levels should be set some way above those proposed at that stage to cater for unexpected economic or traffic related changes as the project proceeds.

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32 Report to the Secretary of State for Communities and Local Government and the Secretary of State for Transport - The Thames Gateway Bridge Inquiry - Michael Ellison Inspector (17 November 2006).
(b) to account for the balance to HBC; and

5.8.5.2 the bank receives a guarantee of the payments due from the DBFM Contractor to the bank from HBC, limited to the amount standing to the credit of the trust account from time to time; and

5.8.6 the transfer of the statutory duty, under section 41 of the HA 1980, to maintain the highway in safe and serviceable condition could be facilitated under a TWA Order;

5.9 In our view, the constraints imposed on risk transfer by the Highways Authority Toll Order route or the TA 2000 Charging Route, coupled with the uncertainty about the level of risk transfer which could safely be achieved under these routes, mean that they are not suitable for authorising the tolling of the Mersey Gateway. This limited capacity for risk transfer, and the associated risk of the funding liabilities being "on balance sheet" could prevent the Government’s VFM’s principles for awarding PFI funding being satisfied. Furthermore, the inability to provide funders with any priority in respect of the tolls generated from the Mersey Gateway could fundamentally affect the ability to raise private sector funding for the project.

5.10 Furthermore, the objections which DfT have raised, and HBC have accepted, in relation to early concessionaire procurement and the inevitability of having to charge VAT on Mersey Gateway tolls, if this route is pursued, mean that it cannot be guaranteed that the Government’s value for money criteria will be met, and funding released, if a Concessionaire toll Order is used as the primary authorisation route.

5.11 In summary therefore, if any of the alternative statutory routes are used, the project may not proceed, as the funding necessary to construct and maintain the Mersey Gateway will not be able to be attracted. The TWA Order therefore appears to be the only route under which the necessary level of funding can be safely secured and the objects of the project accordingly achieved. Whilst an application under the other legislation would be possible as a matter of procedure we believe it may be futile as a matter of practice, due to the risk of either public or private sector elements of the funding package being unavailable if such a route is adopted.

6. THE PROPOSED STATUTORY ROUTES TO PROCURE THE SILVER JUBILEE BRIDGE AS A TOLL BRIDGE
question of whether it is consistent with the local transport plan, and subsequent changes in local transport plan strategies or objectives, would not affect the validity of the scheme.

6.6 A road charging scheme has many of the same constraints as a Highways Authority Toll Order. In particular:

6.6.1 a road charging scheme is unlikely to be able to authorise HBC to transfer revenue risks and rewards to the private sector. The overall terms of Part III of TA 2000, and in particular the requirement to apply the net proceeds from a road charging scheme in accordance with LTP plan objectives from time to time, are not consistent with allowing a concessionaire to apply the proceeds from a road charging scheme (whatever these may be) to reward its own shareholders;

6.6.2 a road charging scheme would not enable any security or priority to be given to senior debt providers over road charging income, as the restrictions on such security or priority being given by a local authority in section 13 of the Local Government Act 2003 cannot be overruled by such a scheme; and

6.6.3 the section 41 statutory duty to maintain the SJB and its approach roads in a safe and serviceable condition, irrespective of any catastrophic event which might destroy the SJB, will continue to be a duty of HBC, whether or not maintenance responsibilities are sub-contracted to the private sector (subject to any indemnities or insurances maintained by any maintenance contractor).

However, as the SJB is only expected to account for around 20% of the overall revenue from the two crossings and HBC already has the section 41 liability for the SJB, these are less of an impediment to proceeding with a TA 2000 Charging Order for the SJB than for the Mersey Gateway.

6.7 Road charging schemes do, however, have one advantage which is not available under a Highways Authority Toll Order made under NRSWA. Under section 173(2) of the TA 2000, regulations may be made in connection with such a scheme for levying penalty charges for non-payment of road charges.

6.8 As with a Highways Authority Toll Order, the restriction on assignment of charging powers should not prevent the design, construction, maintenance or operation of the
amend them every 5 years to reflect local transport requirements. Accordingly, no contractor, or funder, is likely to place any long term reliance on such income, when a change of policy could result in this income stream ceasing to be available to meet HBC's liabilities to them.

6.12 In order to proceed down this route, therefore, HBC would request the Secretary of State to consider making a statutory order to ring fence sufficient income generated by the SJB tolls to meet its liabilities to contractors and funders, which is an option open to the Secretary of State by regulation made under paragraph 2(2) of Schedule 12 to the TA 2000.

6.13 The manner in which this could be achieved has already been demonstrated by the Trunk Road Charging Schemes (Bridge and Tunnels) (Keeping of Accounts) England Regulations 2003 (SI 2003 No. 298). In the case of trunk roads, where a road charging scheme has been made, this order defines the income and expenditure to be deducted before calculating the "net proceeds" which the charging authority is required to apply for the achievement of transport related policies. In particular, this order expressly authorises the following categories of expenditure to be deducted from the income generated by a road charging scheme before the surplus available to fund the authorities transport policies is assessed:

6.13.1 the capital costs associated with the construction or improvement of any road, bridge or tunnel of at least 600 metres in length;

6.13.2 the capital costs of planning, procuring, installing and implementing any toll collection system;

6.13.3 the revenue costs of maintaining bridges, tunnels and roads comprised in the scheme including the costs of improvements (where not of a capital nature), repairs, strengthening, renewal and ancillary works;

6.13.4 the costs of maintaining, repairing and improving any toll collection system;

6.13.5 the costs of administering and operating a toll collection system including staff and pension costs;

6.13.6 financial and other charges incurred in respect of the scheme;
settled. Continuing uncertainty about the appropriate statutory authorisation route to be used will therefore quickly delay the overall programme.

7.2 HBC would therefore welcome an early meeting with DfT and the TWA Orders Unit to resolve the issues raised in this report and if in the meantime there are any questions relating to the legality of the proposals, contact should be made with:

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E-mail howard.bassford@dlapiper.com

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Princes Exchange
Princes Square
Leeds, LS1 4BY
Telephone: 0113 369 2470
E-mail: nick.painter@dlapiper.com

(Please note, Nick is on holiday from Monday 6 August 2007, returning on Tuesday 21 August 2007)
<table>
<thead>
<tr>
<th>Article</th>
<th>Action</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>17 - Additional powers</td>
<td>Yes</td>
<td>With consequential amendments as required for the purposes of the scheme</td>
</tr>
<tr>
<td>18 - Prohibitions within the tunnel area</td>
<td>Yes</td>
<td>With consequential amendments as required for the purposes of the scheme</td>
</tr>
<tr>
<td>19 - Protection of tunnel etc</td>
<td>Yes</td>
<td>With consequential amendments as required for the purposes of the scheme</td>
</tr>
<tr>
<td>20 - Restriction on mooring of vessels, etc</td>
<td>Yes</td>
<td>With consequential amendments as required for the purposes of the scheme</td>
</tr>
<tr>
<td>21 - Power to acquire land</td>
<td>Yes</td>
<td>With consequential amendments as required for the purposes of the scheme</td>
</tr>
<tr>
<td>22 - Application of Part I of the Compulsory Purchase Act 2965</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>23 - Power to acquire new rights</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>24 - Power to acquire subsoil only</td>
<td>No</td>
<td>--</td>
</tr>
<tr>
<td>25 - Cases where powers of acquisition limited to subsoil</td>
<td>No</td>
<td>--</td>
</tr>
<tr>
<td>26 - Vesting declarations</td>
<td>Yes</td>
<td></td>
</tr>
<tr>
<td>27 - Temporary use of land for construction of works</td>
<td>Yes</td>
<td>With consequential amendments as required for the purposes of the scheme</td>
</tr>
<tr>
<td>28 - Temporary use of land for maintenance of works</td>
<td>Yes</td>
<td>With consequential amendments as required for the purposes of the scheme</td>
</tr>
<tr>
<td>29 - Disregard of certain interests and improvements</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>30 - Acquisition of part of certain properties</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>31 - Extinguishment and suspension of private rights of way</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>32 - Use of subsoil</td>
<td>No</td>
<td>--</td>
</tr>
<tr>
<td>33 - Noise insulation regulations</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>34 - Time limit for exercise of powers of acquisition</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>35 - Power to operate, use and maintain the tunnel crossing</td>
<td>Yes</td>
<td>With consequential amendments as required for the purposes of the scheme</td>
</tr>
<tr>
<td>Article 45 - Saving for Trinity House and protection of navigation</td>
<td>Yes</td>
<td>Subsequently determined to be a lease.</td>
</tr>
<tr>
<td>Article 46 - Protection of certain persons</td>
<td>Yes</td>
<td>Subject to the exact detail of the protective provisions to be negotiated with Trinity House.</td>
</tr>
<tr>
<td>Article 47 - Statutory undertakers etc</td>
<td>Yes</td>
<td>Subject to consequential amendments negotiated with the relevant statutory undertakers.</td>
</tr>
<tr>
<td>Article 48 - Minerals</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>Article 49 - Application of local legislation</td>
<td>See comments opposite</td>
<td>To be reviewed in the light of local legislation</td>
</tr>
<tr>
<td>Article 50 - Repeal of enactments</td>
<td>See comments opposite</td>
<td>To be reviewed in the light of legislation</td>
</tr>
<tr>
<td>Article 51 - Certification of plans, etc</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>Article 52 - Service of notices</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>Article 53 - No double recovery</td>
<td>Yes</td>
<td>--</td>
</tr>
<tr>
<td>Article 54 - Arbitration</td>
<td>Yes</td>
<td>With consequential amendments</td>
</tr>
<tr>
<td>Schedule 1 - Scheduled Works</td>
<td>Yes</td>
<td>To reflect the circumstances of this scheme</td>
</tr>
<tr>
<td>Schedule 2 - Streets subject to works</td>
<td>Yes</td>
<td>To reflect the circumstances of this scheme</td>
</tr>
<tr>
<td>Schedule 3 - Streets to be stopped up</td>
<td>Yes</td>
<td>To reflect the circumstances of this scheme</td>
</tr>
<tr>
<td>Schedule 4 - Streets to be temporarily stopped up</td>
<td>Yes</td>
<td>To reflect the circumstances of this scheme</td>
</tr>
<tr>
<td>Schedule 5 - Access to Works</td>
<td>Yes</td>
<td>To reflect the circumstances of this scheme</td>
</tr>
<tr>
<td>Schedule 6 - Land comprising open space excluded from compulsory acquisition</td>
<td>See comments opposite</td>
<td>To be reviewed in the light of open space in the vicinity of the Mersey Gateway</td>
</tr>
<tr>
<td>Schedule 7 - Modification of compensation and compulsory purchase enactments for creation of new rights</td>
<td>Yes</td>
<td>With consequential amendments</td>
</tr>
<tr>
<td>Schedule 8 - Land of which temporary possession may be taken</td>
<td>See Comments Opposite</td>
<td>To be reviewed in the light of requirements for temporary possession and circumstances pertaining to local land</td>
</tr>
<tr>
<td>Schedule 9 - Protection of navigation</td>
<td>Yes</td>
<td>With consequential amendments</td>
</tr>
</tbody>
</table>
SCHEDULE 2

The River Tyne (Tunnels) Order 2005
Mersey Gateway
Consideration of Thames Gateway approach to tolling
1 October 2007

Introduction

DfT has requested that HBC review at a high level the approach to tolling being proposed by TfL for the Thames Gateway Bridge and consider to what extent that approach would or would not deliver the commercial objectives of HBC in relation to the tolling of Mersey Gateway.

Comparison of commercial approach

<table>
<thead>
<tr>
<th>TfL approach for TGB</th>
<th>HBC approach for MG</th>
</tr>
</thead>
<tbody>
<tr>
<td>• TfL sets tolls</td>
<td>• Concessionaire sets tolls within agreed framework</td>
</tr>
<tr>
<td>• TfL manages demand through setting tolls</td>
<td>• Concessionaire has ability to manage demand through variation of tolls</td>
</tr>
<tr>
<td>• TfL collects tolls through pre- and post-pay arrangements, similar to congestion charge</td>
<td>• Concessionaire collects tolls, probably cash, as agent for HBC</td>
</tr>
<tr>
<td>• TfL supplies tolling technology, Concessionaire supplies camera records to TfL</td>
<td>• Concessionaire operates electronic or barrier system as part of project</td>
</tr>
<tr>
<td>• Concessionaire earns a fixed availability payment</td>
<td>• Concessionaire earns a fixed availability payment</td>
</tr>
<tr>
<td>• Concessionaire earns toll revenues (or an income figure based on toll revenues)</td>
<td>• Concessionaire earns toll revenues (actual toll revenues)</td>
</tr>
<tr>
<td>• Approx 40% of Concessionaire’s income is fixed availability payment, 60% is tolls</td>
<td>• Approx 20% of Concessionaire’s income is fixed availability payment, 80% is tolls</td>
</tr>
<tr>
<td>• As TfL controls toll level, there will be a floor and ceiling on total payments to Concessionaire i.e. concessionaire has minimum total income guarantees.</td>
<td>• There will be no guaranteed level of payment above the availability payment</td>
</tr>
</tbody>
</table>

Result: Demand risk “shared”

Result: Demand risk fully transferred to Concessionaire

Commentary

As can be seen by the above high level comparison of the key points of each proposed approach to tolling there is a significant difference in both the level of involvement of the promoter in the toll setting and collection process and, in our view, the level of risk transfer that can be achieved.

It is HBC’s view that because under TfL’s proposed approach the concessionaire has no ability to manage demand by varying tolls it is not capable of delivering the degree of revenue risk transfer that HBC are seeking. In the case of TfL this is not an issue due to the scale of the financial resources available to it to manage such a risk, however it is important to recognise that HBC is a much smaller entity whose financial resources are much more limited and therefore its ability to manage such a risk is greatly reduced when compared to TfL. The relatively limited resources of HBC may also be a matter of concern to potential bidders if any minimum revenue guarantees were offered.

Furthermore, discussions with TfL advisors suggest that the view reached that is driving the expected Composite Trade tax treatment of the project is that the eventual concessionaire will be doing little more than making the bridge available to TfL and undertaking maintenance, rather than operating a toll bridge way of a trade, which is likely in the case of MG. This reduced risk transfer means that the eventual off balance sheet treatment may be doubtful, which we understand is not a significant issue for TfL, but is one of DfT’s funding conditions for MG.

Finally we note that the bankability of the elasticity factors mechanism proposed for TGB remains untested in the market.