BRITISH HALLMARKING COUNCIL

Minutes of a meeting of the Council held at Birmingham Assay Office, 1 Moreton St, Birmingham B1 3AX on 18th January 2018 at 11 am

PRESENT

Mr Noel Hunter (Chairman) (NH)

Ms Kate Hartigan, Birmingham Assay Office (KH)

Ms Carol Brady, Birmingham Assay Office (CB)

Mr John Stirling, Edinburgh Assay Office (JS)

Mr Tom Murray, Edinburgh Assay Office (TM)

Mr Andrew Hinds, BEIS Representative (AH)

Mr David Sanders, BEIS Representative (DS)

Ms Harriet Kelsall, BEIS Representative (HK)

Ms Louise Durose, BEIS Representative (LD)

Mr Robert Grice, BEIS Representative (RG)

Mr Michael King, BEIS Representative (MK)

Ms Helen Forder, BEIS Representative (HF)

Mr Malcolm Craig, BEIS Representative (MC)

Mr Michael Winwood, (representing London Assay Office) (MW) (also proxy voter)

IN ATTENDANCE:

Mr John Bridgeman, (Adviser to BHC)

Ms Geraldine Swanton (Legal Adviser) (GS)

Ms Katrina Ritters (Secretary) (KR)

Mr Richard Sanders, BEIS (RS)

Ms Marion Wilson, Birmingham Assay Office (MW)

Mr Doug Henry, (Assay Master, Birmingham Assay Office (BAO)) (DH)

Mr Scott Walter (Assay Master- Edinburgh Assay Office (EAO)) (SW)

Dr Robert Organ Deputy Warden - London Assay Office (LAO) (RO)

Mr Ashley Carson (Assay Master- Sheffield Assay Office (SAO)) (AC) (also proxy voter)

1 Welcome and Apologies

Noel Hunter welcomed all to the meeting and said that the Council had received declarations of interest from members prior to the April 2017 meeting. He asked members to indicate if anything material had changed since that time – there was no response at this point.

There were declarations of interest on page 7 para 6 when David Sanders and Andrew Hinds declared they were the authors of the positions stated as being from CTSI and NAJ

Apologies were received from John Pearce, Neil Carson, Bryn Aldridge, Peter Hayes, Matthew Sibley and Sir David Reddaway.

2 Consultation on Overseas Hallmarking

Reports from John Bridgeman and Katrina Ritters had previously been circulated and members had been given access to all responses to the consultation.

John Bridgeman introduced his paper and said that in considering the consultation he had been keen to look for evidence of detriment – not only to consumers, but also to businesses and particularly retailers who had legal responsibilities under the Trade Descriptions Act. He had not explored aspects of British hallmarking as a brand. He was conscious that the BHC was an agency of government and needed to operate within a legislative framework. There were many stakeholders with an interest in the outcome of this discussion and conflicting points of view were put forward both for and against distinctive overseas marking. Some views might be seen as more representative, influential or informed than others, but it would be for members of the BHC to draw their own inferences from this.

HF questioned the validity of the consultation due to the sample size of 125 not being sufficient for a quantitative study.

KR responded by saying that the consultation had followed a standard government format and guidelines that were primarily qualitative in nature. To assist members she had attempted to place this into a quantitative framework but this had been made clear and caveated in her report. All responses had been made available to Council members in order that they could make their own judgement on the categories into which the qualitative responses had been placed. She had not attempted to aggregate responses from official consultees with those from members of the public and trade.

Others pointed out that overseas hallmarking was a specialised field and given the circumstances, 125 submissions was a good response.

There followed a wide-ranging discussion on the question of whether hallmarks struck overseas should be distinguished.

The value of the UK hallmark

RS questioned the thinking behind discounting the value of UK hallmarking as this had formed part of the BHC's original impact assessment, produced for BEIS in 2012. John Bridgeman responded by saying that much could be said about this and valuable work had been done by government. However, Council members were more than qualified to come to their own judgements on this question.

JS questioned what was a 'relevant' consideration for this group.
JB said he was responding to the key question in the consultation, which was around distinctive marking for overseas marks. The question of the value of the UK hallmark was very relevant but the issue at hand was around the value of a UK hallmark struck overseas. This had the potential for a long conversation but all members could take a view.

SW said there had been no mention of the recent ECJ decision on overseas marking, where it had been decided that the jurisdiction of where the mark was applied was relevant and that EU states were within their rights to reject marks from other countries. This had been supported by the IAAO survey. He did not think this was Brexit-neutral as we were about to move to a situation where the UK as a brand would be very much in the spotlight.

JB said that the ECJ ruling was detailed and should be read in its entirety. It had talked about proportionality. The UK had a 600-year tradition that differentiated hallmarking is valued and the BHC should make any judgement on differentiation using the same logic.

SW said that the ECJ ruling gave overseas competitors the opportunity to impose barriers. The Dutch had already taken a decision not to apply a differentiated mark and this had worked out badly for them – this had led directly to the bankruptcy of one Dutch assay office.

JB said we needed to come back to the question of whether there is any evidence of current detriment to UK consumers, manufacturor retailers.

SW said that the detriment would be to Assay Offices who were not marking overseas to the extent that they would be drawn into that side of the business.

HK questioned the relevance of differentiated hallmarks within the UK.
JB restated that he was referring to the tradition of each Assay Office having its own differentiated mark. It was seen as a prized asset to have differentiation within the UK hallmarking brand and nothing in our deliberations should seek to undermine that.

DH said that the first question in the consultation had produced an overwhelming response in the negative if you stripped out the responses of the Assay Offices and those with a vested interest. There had been an emphatic 'no' from the trade. Also if we took the decision now to have a differentiated mark it would preclude further action on overseas offices, including those in the EU. It would be counter to existing legislation.

KH said that if we decided to differentiate this would be regarded as an import mark. If we changed the law to require differentiation this could also apply in the other direction – an unintended consequence could be that other EU countries could require a differentiated mark for goods marked in the UK.

JB said the Council may want to consider adding a mark rather than changing the one used currently, thereby not undermining the brand. The UK mark was valuable and capable of attracting premium pricing.

DH said that the brand was already valuable and he didn't see how adding a further mark would help to add value.

JB said that he didn't think that differentiation needed necessarily to be associated with a change in value. If it did, the same logic would need to be applied to individual Assay Office marks.

SW said that within the UK we were all subject to the same legislative and enforcement whereas this was not always the case overseas.

Other EU countries reaction

JS said that he and DH had read the submission from the NAJ differently. The NAJ, whilst against differentiation, this was not by an overwhelming majority and did not feel qualified to comment on the result of the ECJ ruling. However, the view of Edinburgh Assay Office was that this was the defining thing because other EU states would want additional safeguards if we don't differentiate. In their view it would be worth 20% of their turnover. It would cause a shrinkage in the market which may well affect facilities in the UK. The question was also urgent as the IAAO was waiting to hear what the UK decides. The decision had the potential to affect 20% of the UK hallmarking trade.

KH said it was her understanding that the ECJ had said that countries could not reject out of hand all marks. As each UK Assay Office had its distinctive mark, this would imply that if that office did not mark overseas its marks would not be open to challenge.

JS said that this was covered in p59 of the IAAO response which said that 43% of respondents said they would treat marks differently were UK marks not to be differentiated. France would require all UK struck marks to have been in circulation in the UK.

DH pointed to the uncertainties post Brexit: the ECJ may no longer be relevant. In the past, the UK has always complied with the Court's ruling, while other countries had not necessarily done so.

AC said one of the reasons the Sheffield overseas office in Malpensa had closed was due to the French reluctance to accept Italian-stamped marks. At that time, had the BHC decided to require differentiation for overseas marks as Sheffield had proposed, this may not have happened. He said that the Sheffield proposal for a wheatsheaf mark to be struck abroad was still on the table.

RS said he had written to the French at least twice about this, but his letters had both been ignored.

The question of whether an overseas mark might be taken as an indication of lower quality

MK began by declaring his interest as being a member of CTSI, although he had had no hand in their response to the consultation. The proposition being put forward was the question of whether an additional mark would be a benign addition to the existing Assay Office mark. The risks of this were firstly that the public would take the mark to be an indication of place of origin and secondly that a distinguishing mark might imply that the BHC had less faith in the integrity of the overseas mark.

JB said we had to go back to the fact that we already have differentiation but there was no suggestion of any difference in quality. This is the underlying case which is Brexit-neutral. However, there was no reason why we couldn't have as many differentiating marks as we wished.

KH reminded the meeting that the BHC had been obliged to remove the import mark.

The question of the government's intention

RG said that it was clear that in Hansard, the government's intention had been that there should be a distinguishing mark and we ought to ask ourselves the question, why did they want that?

GS stated that she wished to clarify from a legal perspective two issues that were being discussed i.e. (i) JS referred to the Czech case and the judge's "obiter" comment that additional paperwork could be requested to satisfy consumers. GS explained that the term "obiter" meant that the statement was an expression of the judge's opinion and did not form part of the judgment per se. If any EU country relied on an obiter comment to require additional paperwork, it was in principle capable of challenge; (ii) references to the Mumbai office being outside of the jurisdiction; she stated that the Hallmarking Act applied to hallmarking by assay offices including their sub-offices, irrespective of location.

MW said it was important to go back to basics and think about what the government intended. A clear thread running through the discussion was the intention to have a distinguishing mark. The LAO view was that it was important to have a distinguishing mark for items marked overseas to protect the consumer.

LD said she thought the consumer ought to have the additional information that a distinguishing mark would give.

DH questioned the benefit this would give to the consumer, given the high volume of imports.

RS said he struggled to understand why the BHC had changed its position on overseas hallmarking between its 2012 impact assessment and now. In that assessment the Council had said that overseas hallmarking was unlikely to be in the consumer interest, but that this could be ameliorated by having a distinguishing mark.

NH said the position was that there had been no consultation prior to the 2012 impact assessment.

TM said that the BHC/Hallmarking Act did have jurisdiction over the 4 UK Assay Offices but did not have that same jurisdiction abroad. In his view there was a difference between different countries in terms of their regulatory environment and we could reasonably look at where India stood in world corruption rankings. In Europe hallmarking was excluded from the services directive and this discussion could have an impact on recognition between countries.

DH said that TM's point was irrelevant as fraud could occur anywhere in the world.

Summing up

John Bridgeman summed up the debate by saying he wanted to come back to the consumer interest. The ultimate protection a consumer had was served by a British hallmark instituted in law and applied by the Council. Responsibility for ensuring a proper understanding of British Hallmarks, by both consumers and the retail trade, lay with the BHC.

The BHC now had 5 years of experience of operating overseas without a distinguishing hallmark; it had the benefit of the survey and each member had their own individual views. In his opinion it was always good to come back to the consumer interest and wherever there was a conflict to err on the side of more rather than less information and greater rather than lesser education.

Voting

It was agreed that all members now felt they had enough information on which to take a vote.

The question of who should be allowed to vote was then discussed.

GS opened the debate by saying that as a statutory regulator the BHC is a public body performing public functions. Accordingly, the decisions it makes and the process by which it makes them must be fair, reasonable and impartial, otherwise those decisions are vulnerable to successful challenge. The decisions that the BHC makes must therefore be made without actual or apparent bias.

The question for the BHC was whether in the particular circumstances, a fair-minded and informed observer would conclude that there was a real possibility that the decision-maker was biased. In other words, can those members participating in the decision-making bring an impartial and objective mind to bear, unclouded by private commercial interests, irrespective of whether those interests are direct or indirect?

It was clear that in a position of oligopoly, the four assay offices are in fierce competition with one another. That is the case at any time but particularly so in the current challenging market for precious metal. The decision which the BHC is being asked to make is whether hallmarks struck overseas should be distinguishable. The outcome of that decision will have direct consequences for BAO alone, and BAO has argued throughout that those consequences will be commercially adverse. In these circumstances, would a fair-minded and informed observer conclude that the other assay offices' votes were motivated in whole or in part by competitive, commercial interests, irrespective of whether they have in fact been so motivated? If the answer is yes, then a conflict exists and the relevant members will have to comply with the BHC's standing orders on conflicts and remove themselves from the vote.

She emphasised that in raising this question, it does not imply that the BHC has a policy on excluding assay-office-appointed members from the decision-making process. Rather it was the application of clear, well-established public law principles whose object is to ensure fair and reasonable decision making and to deter abuses of the powers conferred on the BHC by statute.

There was then a discussion on who should be allowed to vote; specifically on whether the Assay Office members should be excluded from the vote.

AC said he would like to clarify the question of whether Birmingham was the only Assay Office affected. Sheffield currently had an application for an overseas office in New York which had been approved by the BHC. Although this was not open yet, the application had been approved.

GS clarified that the BHC had not taken a vote on the question of the Mumbai office. When the matter had been discussed there had been no opposition to it and hence no vote.

DH said that we were not just talking about Mumbai, but about the future of overseas hallmarking. Whatever we decide today will affect all four offices.

KH said that Birmingham had a direct commercial interest in the outcome and we had heard in the discussion clear commercial interests put forward by each of the other offices (excluding London). It would therefore be difficult for a fair-minded person to rule that there isn't a conflict of interest on the part of all offices.

NH suggested that the Secretary of State members should be asked if they wished the other members to withdraw whilst they made their decision on the substantive point.

JS said he reserved the right to take the point that under the standing order, which has statutory weight that there is no power for those not impugned to exclude by vote the statutory right of those impugned. It is a question for the courts and those impugned to apply the test. He would be very interested in the Secretary of State member views but would seek an adjournment after those views had been heard.

GS said she had previously advised that it might look procedurally irregular if a Council member who was involved in the decision-making had been also drafted.the response to the consultation.

RO said that many of the people round the table were customers of the Assay Offices and could also be said to have an interest.

AH said that he was also a customer of the Assay Offices. His shops held stock which had been hallmarked both in the UK and in India.

As regards the BEIS representatives, DS declared an interest in that he had drafted a response to the consultation from CTSI. AH said he had drafted the response on behalf of the NAJ. A number of other members were also members of CTSI (including Malcolm Craig who was Chair of CTSI) but had not been involved in the consultation.

GS said that being a member of a consultee body was a would not preclude a Council member from voting, but if that member had drafted the response to the consultation this may look odd to an objective observer. GS was willing to concede that it did not represent a conflict of interest, real or apparent.

MK said that in assessing questions of conflict of interest, it was customary to draw a distinction between a commercial interest and an opinion someone might hold.

1st Vote:

Secretary of State members were then asked to vote on whether all of them should be allowed to vote or whether DS and AH should be excluded due to their active involvement in the consultation.

For the purposes of this first vote DS and AH were excluded from the voting.

There was no quorum. Noel Hunter sought to add himself to the quorum and to vote. John Stirling objected to him doing so.

The vote was unanimously in favour of allowing DS and AH to vote on the substantive issue of whether a distinguishing Mark should be applied to those items marked overseas.

2nd Vote:

Secretary of State members were then asked to vote on whether Assay Offices should be allowed to vote or whether they should be excluded.

The vote was 6 to 1 in favour of Assay Offices being excluded from the main vote.

SW said the Council would be open to challenge either way. But if Assay Offices were excluded from the vote then any conflict of the remaining members would be fully investigated and exposed.

TM said that Edinburgh had no intention of applying for an overseas office. However, many people in the room were conflicted. He himself was a freeman of the Worshipful Company in London (yet he was at the meeting as a representative of Edinburgh Assay Office).

MK thought it might be helpful to reference Noel Hunter's paper on governance that had been presented to the last meeting in which it had said that members with a potential conflict of interest could be excluded from voting. However, this had not yet been translated into standing orders.

RO questioned the need for any vote at all, given that the findings of the consultation were clear.

RS reminded the meeting that government expected consultations to follow a set process. The analysis and decision resulting from the consultation should be made public. It would look odd if the conclusion was different to the findings of the consultation.

JB said he would be inclined to exclude only those with prejudicial conflicts of interest.

SW said there was only one official consultee member who had surveyed its members (meaning the IAAO. However, the British Hallmarking Protection Alliance had also produced survey evidence as part of their submission). The others were based on personal opinion.

NH said we had two options; either to take a vote at this point, excluding Assay Offices from a final decision; or to take counsel's opinion and to vote at the next meeting.

At this point it was agreed to pause the proceedings to give all parties time to consider their position.

When the meeting re-convened NH said that he had taken advice and decided not to put the matter to a vote at this meeting. Instead the Council would seek counsel's opinion and circulate this in advance of the March meeting in Edinburgh.

CB asked whether those independent members who could not make the meeting in Edinburgh could indicate in advance what their vote would be.

It was agreed that proxy votes would be accepted.

TM said that Edinburgh would make teleconferencing facilites available should this be required.

HK suggested taking a vote at this meeting and dealing with a challenge if this later became necessary.
However, the feeling of the meeting was that this might sway counsel's opinion.

NH said it would be very important to get as many people to the March meeting as possible, re-thinking the date if necessary. We could also use proxy voting.

AOB

NH said that Katrina Ritters would be standing down as Secretary at the March meeting for personal reasons. He had a successor in mind in the form of Sue Green, a qualified solicitor and expert on not for profit organisations with a Company Secretary qualification. Sue had already begun to help Katrina in preparation for the next meeting so members may be receiving communications from her in the coming weeks. He would be bringing a formal proposal on Sue's appointment to the next meeting.

NEXT MEETING

Thursday 22nd March 2018 in Edinburgh (precise location TBA) at 11.00am.

Thursday 4th October 2018 (venue TBA)