These notes refer to the Employment Relations Act 2004 (c.24) which received Royal Assent on 16 September 2004

EMPLOYMENT RELATIONS ACT 2004

EXPLANATORY NOTES

COMMENTARY

Part One: Union Recognition

11. Schedule A1 of the 1992 Act (inserted by section 1 of, and Schedule 1 to, the 1999 Act) established a statutory procedure for the recognition and derecognition of trade unions for the purposes of collective bargaining on behalf of a particular group of workers.

12. The Government's approach was to create a mechanism which enabled recognition of the union(s) by the employer where the majority of the relevant workforce wanted this. The aim of the mechanism is to encourage the voluntary settlement of claims wherever possible, the statutory procedure therefore acting as a fall-back system.

13. Most of the changes made by Part 1 of this Act are to Schedule A1 (unless otherwise stated). The following paragraphs briefly describe the Schedule.

14. ***Part I*** of Schedule A1 provides that in certain circumstances a trade union (or trade unions) may make an application to the Central Arbitration Committee (CAC) for a declaration that it should be recognised for the purpose of conducting collective bargaining on behalf of a group or groups of workers employed by an employer in a particular bargaining unit.

15. ***Part II*** of the Schedule provides that where a voluntary agreement for recognition is made between the parties, after a request for recognition has been made under the Schedule, the employer has to maintain that agreement for three years unless the union ends it before that time. This is known as semi-voluntary recognition. If, following the conclusion of an agreement for recognition, the parties are unable to agree a bargaining procedure, an application may be made to the CAC for it to determine one. Part II is designed to afford protection to unions which withdraw from the statutory process to agree a voluntary deal, and therefore to encourage the voluntary settlement of claims.

16. ***Part III*** sets out a procedure to be followed by the parties and the CAC where a union has been recognised through the statutory procedures and, as a result of a change in the employer's business, either the union or the employer believes the bargaining unit has changed or has ceased to exist.

17. ***Parts IV and V*** of the Schedule provide that where recognition results from an earlier declaration by the CAC, it may in certain circumstances, on application from the employer or one or more workers in the bargaining unit, declare a union to be derecognised.

18. ***Part VI*** provides for workers to be able to invoke the statutory derecognition procedure where an employer has voluntarily recognised a union which does not have a certificate of independence.

19. A significant number of the changes made by Part 1 of the Act relate to Part I of Schedule A1**.** There are a number of stages in the process contained in Part I of the Schedule, usually with a specific timetable for each.

The procedure for recognition: Part I of Schedule A1

20. ***Stage 1 - Trade union writes to the employer seeking recognition.*** The process is triggered by the union(s) writing to the employer, requesting recognition, and identifying the bargaining unit of the workers concerned. For a request to be valid, the employer (together with associated employers) must employ 21 or more workers.

21. The employer has a period in which to respond. If the employer agrees voluntarily to recognise the union (or unions), the statutory recognition procedure is regarded as closed. However, the parties can have such an agreement declared an agreement for recognition by the CAC under Part II of the Schedule. This applies to a voluntary agreement at whichever stage in the process it is agreed.

22. Alternatively, if the employer agrees to negotiate, the parties have a time period to conclude discussions. The parties may call on the Advisory, Conciliation and Arbitration Service (Acas) to assist. If the employer refuses to negotiate or does not respond to the union's letter or, if negotiations fail to reach an agreement, the union(s) may make an application for recognition to the CAC.

23. ***Stage 2 – Application by trade union to the CAC***. The CAC has a fixed period to decide, against a number of criteria, whether to accept the application. These criteria include a requirement for at least 10% of the workers in the proposed bargaining unit to be members of the union(s), and for the CAC to be satisfied that a majority of the workers in the bargaining unit would be likely to favour recognition.

24. ***Stage 3 – Agreement or determination of a bargaining unit***. If the union's application is accepted, the parties have a period to agree a bargaining unit if they have not already done so. If the parties fail to agree a unit, then the CAC will determine it. In doing so, the CAC must take a number of matters into account, in particular the need for the unit to be compatible with effective management. If a bargaining unit agreed between the union and employer or determined by the CAC is different from the unit originally proposed by the union when making its application, then the CAC must reapply the acceptance criteria in respect of the new bargaining unit.

25. ***Stage 4 – Determining whether to award recognition***. Once the bargaining unit is established, the CAC must decide whether to declare the union(s) to be automatically recognised or to hold a ballot. If the CAC is satisfied that a majority of the workers in the bargaining unit are union members it must make a declaration of recognition, unless it decides that a ballot should be held for any of the reasons listed in paragraph 22(4) of the Schedule.

26. ***Stage 5 – Recognition ballot***. A ballot is held if the union(s) does not have majority membership in the bargaining unit, or if the CAC decides that despite majority membership, a ballot should still be held. Unless during the period immediately following the CAC's notification of the holding of a ballot the union, or the parties jointly, inform the CAC that they do not wish the ballot to be held, the CAC will appoint a Qualified Independent Person (QIP) to conduct the ballot. The CAC must also determine the form of the ballot: workplace, postal, or a combination of these methods. During the ballot the employer has a general duty to co-operate with the ballot.

27. In addition, the employer must allow the union(s) to communicate with the workers in the bargaining unit during the balloting period. A statutory Code of Practice applies. The employer must also supply to the CAC the names and addresses of the workers in the bargaining unit. The costs of the ballot are borne equally by the parties. If the result of the ballot is that the union's application is supported by a majority of all those voting, and at least 40% of those entitled to vote, the CAC must issue a declaration that the union is (or unions are) recognised for the purposes of collective bargaining on behalf of the bargaining unit. Otherwise the union is not recognised.

28. ***Stage 6 – Method of collective bargaining***. Following a CAC declaration of recognition, the parties have a period to reach an agreement on the method for

conducting their collective bargaining. If the parties do not agree a method, they can apply to the CAC for assistance. If there is still no agreement, the CAC specifies a bargaining method.

29. A CAC specified method is enforceable as though it were a contract between the parties. If either party believes the other is subsequently not following such a method, it may seek an order of specific performance from the courts.

Determination of appropriate bargaining unit

30. ***Sections 1 and 4*** clarify how an appropriate bargaining unit is to be determined by the CAC. ***Section 2*** provides a power for the CAC to reduce the 20-day negotiation period for the parties to agree a bargaining unit. ***Section 3*** imposes a duty on the employer to supply information to the union(s) to assist with this process.

31. *Section 1* amends paragraphs 11(2) and 12(2) of Schedule A1, under which a union may make an application to the CAC where the employer refuses or fails to respond to a request for recognition (paragraph 11(2)), or where negotiations with the employer fail (paragraph 12(2)).

32. The union(s) may currently ask the CAC to decide whether the union's proposed bargaining unit or some other bargaining unit is appropriate, and whether the union(s) have the support of a majority of the workers in the appropriate bargaining unit. Section 1 clarifies that unions may apply to the CAC to decide only whether the union's proposed bargaining unit is appropriate and whether the union(s) have the support of a majority of the workers in the appropriate bargaining unit. Section 1, together with section 4, ensures that the CAC first considers the union's proposed bargaining unit. Only if it decided that this unit is not appropriate will it move on to decide a unit which is appropriate.

33. *Sections 2 to 4* apply where the CAC accepts a union's application for recognition (under paragraph 11(2) or 12(2)). The next stage is for the parties to try to agree a bargaining unit. Paragraph 18(2) of Schedule A1 provides that the parties, with the CAC's assistance, will have 20 days (or some other longer period specified by the CAC) to try to reach agreement. This is called the "appropriate period".

34. *Section 2* amends paragraph 18.

35. *Subsection (3)* inserts sub-paragraphs (3) to (7) into paragraph 18. Sub-paragraphs (3) and (4) permit the CAC, where it sees no reasonable prospect of the parties reaching an agreement, or on the request of both parties, to shorten the appropriate period.

36. Sub-paragraph (5) allows the CAC to extend the period, where it has previously reduced it at the parties' request under sub-paragraph (4). This allows the parties more time to try to reach an agreement if needed.

37. Sub-paragraphs (6) and (7) oblige the CAC to state the reason(s) respectively why it considers that the parties have no reasonable prospect of reaching an agreement on the bargaining unit and for extending the period under sub-paragraph (5).

38. *Section 3* inserts paragraph 18A into Schedule A1. It requires the employer to supply information to the union and to the CAC about the workers in the union's proposed bargaining unit.

39. Paragraph 18A(2) provides that the information must be supplied to the union and CAC, within 5 working days of the day after the CAC gives notice of its acceptance of the union's application. It makes clear that the information to be supplied by the employer is:

- a list of the categories of worker in the proposed bargaining unit;

- a list of the workplaces at which the workers in the proposed bargaining unit work; and
- the number of workers the employer reasonably believes to be in each category at each workplace in the proposed bargaining unit.

40. Paragraph 18A(3) obliges the employer to ensure that the information supplied is as accurate as reasonably practicable, given the information he possesses at the time. Paragraph 18A(4) requires that the lists supplied to the union(s) and the CAC are the same.

41. *Section 4* replaces paragraph 19 of Schedule A1. The new provisions set out the way in which the CAC will determine the appropriate bargaining unit where the parties have failed to reach agreement. It clarifies that the CAC, when deciding the bargaining unit, must first consider the bargaining unit proposed by the union (the "proposed" bargaining unit). If the CAC does not consider the unit proposed by the union to be appropriate, it must decide a unit which is appropriate. The CAC has 10 days (or an extended period) to make this determination.

42. The new paragraph 19 applies if:

- the CAC has accepted a union's application;
- the parties have not yet agreed an appropriate bargaining unit; and
- either no request has been made under paragraph 19A by the union or, if that request has been made, the CAC is not of the opinion that the employer has failed to comply with the duty imposed by paragraph 18A.

43. Paragraph 18A, as explained above, requires the employer to supply the CAC and the union with information about the workers in the union's proposed bargaining unit. If the new paragraph 19 applies, then the CAC must decide, within the decision period, whether the union's proposed bargaining unit is appropriate. In deciding whether the proposed bargaining unit is appropriate, the CAC must take into account the factors listed in paragraphs 19B(2), (3) and (4). Paragraphs 19B(3)(a) and 19B(4) make clear that the views of the employer must be considered and set out how these views will be taken into account. It provides that the CAC, in deciding whether the union's proposed bargaining unit is appropriate, must take into account any view the employer expresses about an alternative unit(s).

44. Additionally, new paragraph 19A permits the CAC, where so requested by the union(s), to move to decide the bargaining unit before the expiration of the 20-day negotiation period, if the employer fails to provide the information required under the new paragraph 18A inserted by section 3. Thus, where an employer fails to provide information that may assist agreement on the bargaining unit, the union(s) may request a move to the determination of the bargaining unit and prevent unnecessary delay to the process. New sub-paragraphs 19A(2) to (4) mirror the provisions of paragraph 19 setting out the order of the CAC's decision-making and the period within which it must decide.

Union communications with workers after acceptance of application

45. ***Section 5*** inserts paragraphs 19C to 19F after paragraph 19B (which is inserted by section 4). At present, a union(s) may only formally communicate with workers during the period for a CAC ordered ballot. Section 5 provides a right for the union(s) to communicate with the workers in the bargaining unit from the point of the CAC's acceptance of the union's application. This communication takes place via a suitable independent person.

46. Paragraphs 19C(1) and (2) provide that, following the acceptance of its application by the CAC, the union(s) may request the CAC to appoint a suitable person for the purpose of communicating with the relevant workers.

47. Paragraph 19C(3) makes clear that if the information is to be sent before the bargaining unit is agreed by the parties or determined by the CAC, the relevant workers are the workers in the union's proposed bargaining unit. If the information is to be sent after the bargaining unit has been agreed by the parties or determined by the CAC, the relevant workers are the workers in the unit that has been agreed or determined.

48. Paragraph 19C(4) provides that where an application has been made under paragraph 12(4) (where the parties have already agreed a bargaining unit before the union's application to the CAC) then the relevant workers are the workers in the agreed unit.

49. Paragraph 19C(5) provides that the union's right of communication starts from the day on which the CAC informs the parties of the name of the suitable independent person and ends when the first of the following occurs:

- the union's application is withdrawn;
- the CAC declares the application invalid following the agreement or determination of a new bargaining unit which is different from the union's proposed unit;
- the CAC issues a declaration that the union(s) are recognised without a ballot; or
- the CAC gives notice to the parties of the appointment of a suitable independent person to conduct the ballot (the union's right of communication continues throughout the ballot period by virtue of the existing provision in paragraph 26(6) of Schedule A1).

50. Paragraph 19C(6) defines the suitable independent person as someone who either satisfies the conditions specified by order for a qualified independent persons (QIPs) to conduct statutory recognition and derecognition ballots or is actually named in that order. To qualify as a suitable independent person, there must also be no reason to doubt that the person in question will conduct their functions competently and independently.

51. Paragraph 19D(1) and (2) set out duties of the employer which apply from the time he is informed by the CAC of the appointment of the suitable independent person. These are to give to the CAC, within 10 working days, the names and home addresses of all the relevant workers and to update this information if the relevant workers change as the result of agreement or decision on the bargaining unit, or if workers join or leave the bargaining unit.

52. Under paragraph 19D(4) the CAC must pass this information to the suitable independent person as soon as possible.

53. Paragraph 19E provides that the suitable independent person must, on the request of the union(s), send to any worker whose name and home address has been passed to him and who is still a relevant worker, any information supplied to him by the union. The suitable independent person's costs (defined in new paragraph 19E(7)) are to be paid by the union(s) on receipt of a demand.

54. Under paragraph 19E(5) if that demand is not paid within 15 working days then in England and Wales it is (subject to any appeal under paragraph 165A of Schedule A1 (see paragraphs 101 to 103)) to be recoverable by execution issued from a county court. Paragraph 19E(6) sets out that execution may be carried out as though the union were a body corporate against any property held in trust for the union which is not protected property. Protected property is defined by section 23 of the 1992 Act as property that:

- belongs to the trustees in a capacity other than their capacity as trustees of the union;

- belongs to a member of the union, otherwise than jointly or in common with the other members of that union;
- belongs to an official of the union who is neither a member nor a trustee;
- is part of a lawfully constituted political fund; or
- is part of a beneficial fund.

55. Paragraph 19F sets out the sanction for a failure by the employer to comply with his duties under the new paragraph 19D(2). If the CAC is satisfied that the employer has failed to comply and the union's right of communication has not yet ended, the CAC may order the employer to remedy that failure within a specified time period. If the CAC is satisfied that the employer has failed to comply with that order, it must notify the union(s) and the employer of that failure, drawing their attention to its discretion to award recognition without a ballot if certain conditions hold. These are:

- that the CAC is satisfied that the employer has failed to comply with an order under paragraph 19F(1);
- that the parties have agreed or the CAC has decided an appropriate bargaining unit;
- that if the validity tests have been applied under paragraph 20 these have been passed; and
- that the union's right of communication has not ended.

56. *Subsections (2), (3) and (5)* makes consequential amendments to certain cross-references. *Subsection (4)* provides that where the CAC decides that there must be a ballot, the employer is not required to provide the names and addresses of the relevant workers where he has already done so under the paragraphs inserted by subsection (1) of this section, and that if the QIP appointed to conduct the ballot is not the same person as was appointed under the paragraphs inserted by that subsection, the CAC must pass the relevant information to the new QIP as soon as possible.

Circumstances in which the CAC must arrange a ballot

57. ***Section 6*** amends paragraphs 22(4) and 87(4) of Schedule A1.

58. Paragraph 22(4) currently sets out the three criteria which the CAC must apply when deciding whether it must arrange a recognition ballot under Part I of the Schedule in cases where the union has more than 50% of the workers in the bargaining unit in its membership. The second of these criteria, set out in paragraph 22(4)(b), requires a ballot to be arranged where "a significant number of the union members within the bargaining unit inform the CAC that they do not want the union (or unions) to conduct collective bargaining on their behalf." The CAC thus needs to assess whether it has been so informed, but it is not empowered to assess whether the information it receives reflects the genuine views of the trade union members concerned. Section 6(1) replaces paragraph 22(4)(b) and provides greater discretion to the CAC when deciding whether a significant number of union members do not want the union to bargain on their behalf by empowering the CAC to assess the credibility of the evidence it receives.

Section 6(2) makes the same change to paragraph 87(4) of the Schedule which deals with the case where the CAC is deciding whether it must arrange a ballot in respect of a new bargaining unit which has been agreed or determined under Part III of the Schedule, and more than 50% of the workers in that new bargaining unit are members of the union.

Power of the CAC to extend notification period

59. ***Section 7*** amends paragraph 24 of Schedule A1. Paragraph 24 applies where the CAC gives notice under paragraph 22(3) or 23(2) that it intends to arrange for the holding of a ballot to determine whether the workers in the bargaining unit want the union(s) to be recognised to conduct collective bargaining on their behalf.

60. Paragraph 24(5) provides a fixed time period in which the union(s) alone or the union(s) and employer jointly may notify the CAC that they do not wish the CAC to arrange a ballot.

61. *Section 7* replaces the existing paragraph 24(5) with new paragraphs 24(5), (6) and (7) to give the CAC the ability to extend the notification period on the request of both parties to give the parties more time to try to reach a voluntary agreement on recognition.

Postal votes for workers absent from ballot at workplace

62. ***Section 8*** amends paragraphs 25 and 117 of Schedule A1. Paragraph 25 applies where the CAC arranges to hold a ballot on union recognition. Paragraph 25(4) provides that the ballot must be conducted, depending on the CAC's preference, at a workplace, by post or by a combination of these methods. The CAC's decision on the form of the ballot must take into account:

- the likelihood of the ballot being affected by unfairness or malpractice if it were conducted at a workplace or workplaces;
- costs and practicality; and
- such other matters as the CAC considers appropriate.

63. The CAC may not decide that the ballot is to be conducted by a combination of postal and workplace voting unless special factors make this appropriate. Paragraph 117 mirrors these provisions in the case of ballots on derecognition.

64. *Section 8* amends the provisions of these paragraphs to allow workers who are allotted a vote at the workplace to vote by post if they are unable for reasons specific to them to attend their workplace on the day of the ballot.

65. *Subsection (1)* inserts sub-paragraph (6A) into paragraph 25. Where the CAC decides that the ballot must be conducted (in whole or in part) at the workplace, subparagraph (6A) enables it to require arrangements to be made to allow workers who are unable to vote at the workplace for reasons relating to themselves as individuals (for example illness, leave etc.) to vote by post.

66. *Subsection (2)* inserts sub-paragraph (8A) into paragraph 117, and allows for postal votes in similar circumstances when the CAC decides that a ballot on derecognition must be conducted wholly or in part at the workplace.

67. In combination, the paragraphs inserted by subsections (1) and (2) make clear that a ballot should not be considered to be a combination ballot solely because the CAC makes arrangements, in accordance with the paragraphs, under which a worker or workers voting in a workplace ballot will receive a postal vote.

Additional duties on employers informed of ballots

68. ***Section 9*** places new duties on employers who have been informed by the CAC under paragraph 25(9) of Schedule A1 that a ballot is required. At present, an employer who is so informed must comply with three duties. The first duty is to co-operate generally, in connection with the ballot, with the union (or unions) and with the person appointed to conduct the ballot. The second duty is to give the union (or unions) such access to the workers in the bargaining unit as is reasonable to enable the union to inform the workers of the purpose of the ballot and to seek their support and their opinions on the issues

involved. The third duty is to supply to the CAC the names and home addresses of the workers in the bargaining unit, and to update that information when workers leave or join the bargaining unit.

69. *Subsection (3)* amends paragraph 26 of Schedule A1 to the 1992 Act by inserting sub-paragraphs (4A) to (4E). Sub-paragraphs (4A) and (4B) introduce two new duties in addition to the three duties mentioned above. Paragraph 26(4A) places a fourth duty on the employer to refrain from making an offer to any or all of the workers in the bargaining unit which has the effect, or is likely to have the effect, of inducing any or all of those workers not to attend a relevant meeting, unless that offer is reasonable in the circumstances. Paragraph 26(4B) places a fifth duty on the employer not to take or threaten to take action against a worker solely or mainly because that worker attended or took part in a relevant meeting or because that worker indicated that he intended to attend or to take part in such a meeting.

70. Paragraph 26(4C) defines a relevant meeting as one which is organised either in accordance with an access agreement reached in relation to the employer's duty to provide reasonable access, or as a result of an order of the CAC under paragraph 27 of the Schedule (where the CAC is satisfied that the employer has failed to comply with one of his duties) and further is a meeting which the employer is required to allow the worker in question to attend under the terms of the agreement or the order.

71. Paragraph 26(4D) makes provision in relation to the second duty (to provide reasonable access to the union) under paragraph 26(3) of Schedule A1 by making clear that an employer will have failed to comply with that duty if:

- he unreasonably refuses a request for a meeting between the union (or unions) and any of the workers in the bargaining unit to take place without the employer or a representative of his being present; or
- he or a representative of his attends such a meeting without having been invited to do so; or
- he seeks to record or otherwise be informed of what occurred at the meeting, unless it is reasonable in the circumstances for him to do so; or
- he refuses to give an undertaking that he will not seek to record or be informed of the proceeding unless it is reasonable for him to do so in the circumstances.

72. This paragraph does not affect the generality of the second duty under paragraph 26(3); an employer could fail to comply with that duty even where his actions are not those mentioned in paragraph 26(4D).

73. Paragraph 26(4E) makes clear that the fourth and fifth duties do not confer new rights on workers, but also do not affect any other right a worker may have.

74. *Subsection (4)* makes it clear that Acas (under its powers under section 199(1) of the 1992 Act) and the Secretary of State (under powers under section 203(1)(a) of the same Act) can issue Codes of Practice in respect of both the second and fourth duties on the employer.

75. *Subsections (6) to (10)* make amendments with the same effect to paragraphs 118 and 119 of the Schedule, which deal with the duties on employers informed of ballots pursuant to an application for derecognition of a union (or unions).

Unfair practices in relation to recognition ballots

76. ***Section 10*** inserts paragraphs 27A to 27F into Schedule A1 of the 1992 Act.

77. Paragraph 27A requires each of the parties informed by the CAC under paragraph 25(9) that a ballot is to be held must refrain from using any unfair practice. Paragraph 27A(2)

provides that a party uses an unfair practice if it does any of the following with a view to influencing the outcome of the ballot:

- offers to pay money or give money's worth to a worker in the bargaining unit in return for that worker agreeing to vote in a particular way or to abstain from voting in the ballot;
- makes an outcome-specific offer to a voter (see paragraph 27A(3));
- coerces or attempts to coerce a worker in the bargaining unit to reveal how he intends to vote or did actually vote, or whether he intends to vote at all;
- dismisses or threatens to dismiss a worker;
- takes or threatens to take disciplinary action against a worker;
- subjects or threatens to subject a worker to any other detriment;
- uses or attempts to use undue influence on a worker in the bargaining unit.

78. Paragraph 27A(3) defines an "outcome specific offer" as an offer to pay money or give money's worth which is contingent on the outcome of the ballot as reflected in a declaration by the CAC that the union is (or is not) entitled to be recognised. However, offers which are contingent on anything which might subsequently occur or be done as a result of the CAC's declaration - say, the outcome of any collective bargaining resulting from a CAC award of recognition - are not categorised as an "outcome specific offer".

79. Paragraph 27A(4) makes it clear that this paragraph does not confer any new rights on a worker but does not affect any other right a worker may have.

80. Paragraph 27A(5) provides that Acas and the Secretary of State may issue Codes of Practice for the purposes of this paragraph in accordance with their powers under sections 199(1) and 203(1)(a) of the 1992 Act respectively.

81. Paragraph 27B provides that a party (a union or an employer who is informed of a ballot by the CAC) may complain to the CAC if it considers that another party has used an unfair practice. The complaint must be made within one working day of the last date on which votes can be cast in the ballot (or within one working day of the ballot if it took place on a single day). The CAC has 10 working days (or such longer period as the CAC may specify in a notice to the parties containing its reasons for extending the period) in which to decide whether a complaint is well-founded. Under paragraph 27B(4) a complaint is well-founded if the following two conditions are both met:

- the CAC finds that the party complained against did use an unfair practice;
- the CAC is satisfied that the use of that unfair practice changed or was likely to change the voting intentions (in terms of how he would vote or whether he would vote at all) or the voting behaviour (in terms of how he voted or whether he voted at all) of a worker in the bargaining unit.

82. Under paragraph 27B(6) if the ballot has not yet begun when the CAC comes to consider a complaint the CAC may postpone the ballot until a date after the end of the decision period. If it does so, the CAC must inform the parties and the qualified independent person of this by notice.

83. Paragraphs 27C to 27F set out the consequences of a decision by the CAC that a complaint is well-founded. Paragraph 27C(2) requires the CAC in such circumstances to issue a declaration that the complaint is well-founded.

84. Paragraphs 27C(3), 27C(4) and 27C(6) provide a discretionary power for the CAC to issue one or more remedial orders requiring a party to mitigate the effects of the unfair practice. Where a party fails to comply with such an order, the CAC is empowered under paragraph 27D to award recognition (if the party was an employer) or to reject

the union's application for recognition (if the party was a union). Paragraph 27D also provides for the CAC to award recognition where an unfair practice committed by an employer involves the use of violence or the dismissal of a union official, or where the CAC makes a second declaration against the employer about a further unfair practice. Similarly, the CAC may reject a union's application if it is responsible for an unfair practice involving violence or the dismissal of a union official, or where it is found to have committed a further unfair practice.

85. Paragraph 27C(3)(b) provides a discretionary power to the CAC to arrange for a further ballot where an unfair practice has occurred. Paragraph 27E (together with an amendment to paragraph 29 made by subsection (2) of this section) provide powers for the CAC to cancel the initial ballot where it is not completed, or to annul a completed initial ballot without disclosing its result. (These powers to cancel or annul the ballot without disclosing the result can also be used where the CAC awards recognition or rejects the union's application under paragraph 27D.) Paragraph 27F provides how the CAC should organise any further ballot and specifies the obligations on the parties in relation to this further ballot. The requirements are mostly the same as applied to the original ballot. The main differences are that (i) after being notified that the CAC intends to hold a further ballot, the parties are given 5 working days to inform the CAC that they do not want a ballot to be held, and (ii) the costs of the ballot do not have to be shared equally by both parties, thereby providing scope for the CAC to require the party which committed the unfair practice to pay all or the majority of the costs.

Application where agreement does not cover pay, hours and holidays

86. ***Section 11*** clarifies that a union may apply to the CAC when any one or more of the "core bargaining" topics are not included in the pre-existing agreement.

87. Where the CAC declares a union recognised, it is for collective bargaining on pay, hours and holidays (although the parties may vary this by agreement). These three items are regarded as the "core" issues for collective bargaining. Under paragraphs 35 and 44 of the Schedule, an application to the CAC for recognition is inadmissible or invalid if the applicant union is already recognised under a collective agreement covering any of the workers in the proposed bargaining unit and that agreement covers pay or hours or holidays. There has been some confusion over the meaning of these paragraphs in the 1992 Act. It has been contended that they imply that the CAC may only accept an application in these circumstances where the existing agreement covers none of pay, hours or holidays. An alternative view is that an application would be admissible if the collective agreement already in force covered one or more (but not all) of pay, hours and holidays. Section 11 provides that in such circumstances a union's application to the CAC is admissible if the collective agreement already in force does not cover all of pay, hours and holidays. Accordingly the CAC will be able to proceed with an application if the existing collective agreement only covers one or two of the matters (or none) but not if it covers all three.

Employer's notice to end bargaining arrangements

88. ***Section 12***amends those provisions in Part IV of Schedule A1 which deal with an employer's notice under paragraph 99 of the Schedule that he wishes the bargaining arrangements (that are the result of an earlier declaration of statutory recognition by the CAC) to cease to have effect. Such notice may be given if both the employer believes that he, taken with any associated employer(s), employed an average of fewer than 21 workers in a given 13 week period and three years have passed since the CAC awarded recognition. The CAC must decide if such a notice complies with the requirements of paragraph 99(3). These are that the notice:

- identifies the bargaining arrangements;
- specifies the period of 13 weeks in question;

- states the date on which the notice is given;
- is given within 5 working days of the day after the day on which the specified 13-week period ends;
- states that the employer, taken with any associated employers, employed an average of fewer than 21 workers in the specified 13-week period; and
- states that the bargaining arrangements are to cease to have effect on a date at least 35 days later than the day after the date on which the notice has been given.

89. If the notice complies with the above the bargaining arrangements will cease to have effect on the day stated unless the union makes an application to the CAC under paragraph 101 of the Schedule, asking it to decide whether the period of 13 weeks specified by the employer in fact ended on or after the expiry of three years starting with the date of the CAC's declaration of recognition and whether it is correct that the employer, and any associated employers, employed an average of fewer than 21 workers in the specified 13-week period. If the CAC accepts this application by the union, it must allow both union and employer to put their views on the questions to be decided and reach a decision about them. If the CAC decides that the employer's notice is correct and three years have passed since its declaration, then the bargaining arrangements will cease to have effect on the termination date. If the CAC finds that the employer's notice has been given within three years of its declaration, or that the notice is not correct, the employer's notice is treated as though it had not been given.

90. Currently, an application by the union under paragraph 101 to challenge the employer's notice cannot be accepted by the CAC if within the period of three years prior to that application the CAC has accepted an application

- by the union under paragraph 101, or
- by the employer or a worker or workers under paragraph 106, 107, 112 or 128, that the bargaining arrangements should cease to have effect.

and the two applications are in respect of the same bargaining unit. This has the effect that if the union has successfully challenged an employer's notice to end bargaining arrangements or has won a derecognition ballot in the previous three years, it cannot challenge a further application by the employer under paragraph 99, thus allowing the union to be derecognised without having an opportunity to put its views before the CAC.

91. *Section 12* rectifies this anomaly by providing that a previous relevant application (either a challenging application by the union, or an application to have bargaining arrangements ended by the employer or worker(s)) does not render an application by the union under paragraph 101 inadmissible. The section also provides that any unsuccessful application or notice to derecognise the union by the employer or a worker (or workers) renders any further such applications inadmissible for a period of three years.

92. *Section 12(4)* inserts paragraph 99A which provides that a derecognition notice given by the employer under paragraph 99 is invalidated if a relevant application or earlier notice relating to the same bargaining unit was given within three years prior to the date on which the current derecognition notice is given, that relevant application was accepted by the CAC, or the CAC decided that that notice complied with paragraph 99(3). A relevant application is an application for derecognition made by the employer under paragraph 106, 107 or 128, or an application by a worker (or workers) under paragraph 112.

93. *Subsections (1) to (3) and (5)* make consequential amendments to paragraphs 99 and 100.

94. *Subsection (6)* removes the bars (which are explained in paragraph 90 above) on a union's application in response to an employer's notice contained in paragraph 101(4) and (5). These paragraphs restricted a union's ability to challenge an employer's notice to end bargaining arrangements.

95. *Subsection (7)* inserts new sub-paragraphs into paragraph 103 to ensure that a derecognition notice by the employer under paragraph 99 shall be treated as given for the purposes of deciding the admissibility of derecognition applications by the employer or worker(s) under paragraphs 106, 107, 112 and 128 or for deciding the validity of later notices under paragraph 99 even though it is not treated as being given for other purposes.

96. *Subsection (8)* amends paragraphs 109, 113 and 130 of the Schedule. It has the effect that if there is a derecognition application by the employer or worker(s) under paragraphs 106, 107, 112 or 128 and within the three years prior to the date of the application a notice under paragraph 99 was given which the CAC decided complied with paragraph 99(3) the CAC must not accept the derecognition application.

97. *Subsection (9)* ensures that an application by the union(s) under paragraph 101 in the three years prior to the date of a derecognition application under paragraph 106, 107, 112 or 128 does not render that later application inadmissible.

Unfair practice in relation to derecognition ballots

98. ***Section 13*** inserts paragraphs 119A to 119I into Schedule A1, which concern unfair practices during recognition ballots. In particular, the provisions:

- create a duty on the parties to refrain from unfair practices;
- set out how complaints of unfair practices are to be handled; and
- provide for the consequences of a decision by the CAC that a complaint of unfair practice is well-founded in respect of a ballot on derecognition of a union held in accordance with paragraph 117 of the Schedule.

99. *Section 13* closely resembles section 10 applying the same or very similar provisions for defining unfair practices, and the consequences for a party which commits them, to the setting of a derecognition ballot. New paragraphs 119G to 119I contain distinctive additional provisions which apply to the case where a worker has made an application to derecognise the union and the CAC arranges a ballot. Additional provisions are needed because there are three parties (the worker, the union and the employer) which could commit an unfair practice in such ballots, in contrast to just two parties (the union and the employer) in recognition ballots and derecognition ballots on an application by an employer. New paragraph 119G has the effect of dis-applying the remedies provided in paragraph 119D from these cases, whilst applying the other provisions covering unfair practices which are set out in new paragraphs 119A to 119C and 119E to 119F.

100. Paragraph 119H provides for particular remedies, in certain situations, which might arise where a ballot is held in relation to an application under paragraph 112. It provides for the CAC to declare that the union is derecognised where it fails to comply with a remedial order to mitigate the effect of an unfair practice. It similarly provides for the union to be derecognised where the unfair practice involves the use of violence or the dismissal of a union official or where the CAC declares that the union has committed a second unfair practice. In corresponding situations where the applicant worker is found to have committed one or more unfair practices, been guilty of an unfair practice which included the use of violence or the dismissal of a union official, or failed to comply with a remedial order, the CAC is empowered to declare that the worker's application to derecognise the union is rejected. Where the employer has committed one or more unfair practices, used violence or dismissed a union official or failed to comply with a remedial order, the CAC may order that the employer should cease all further campaigning activity in relation to the ballot. Paragraph 119I specifies that such

orders (in addition to the remedial orders requiring the employer to mitigate an unfair practice) can be enforced through the courts by the union or the applicant worker in the same way as orders of the county court (in England and Wales) or orders of the sheriff (in Scotland). Paragraph 119I also establishes the same enforcement mechanism in relation to any orders under paragraph 119 which the CAC may issue to an employer to remedy a failure by the employer to fulfil the three duties set out in paragraph 118 to assist with the running of the ballot.

Appeals against demands for costs

101. ***Section 14*** inserts a paragraph 165A into Schedule A1. It provides a right of appeal for the union(s) and/or employer against a demand for costs from a qualified independent person for the conduct of a ballot, or from an appointed person for sending information to the relevant workers.

102. Paragraph 165A provides that the recipient of a demand under paragraph 19E(3) (for the costs of sending information), paragraph 28(4) (for the costs of a ballot on recognition) or paragraph 120(4) (for the costs of a ballot on derecognition) may appeal against the demand to an employment tribunal within four weeks of receiving it. The employment tribunal must dismiss the appeal unless it is shown that the amount demanded is too great, or the amount specified as the share of the costs to be borne by a particular recipient is too great.

103. Paragraph 165A(6) provides that if an appeal is allowed, the tribunal must rectify that demand and the rectified demand shall have effect as though it were the original demand. Paragraph 165A(7) provides that a demand for costs is not enforceable until an appeal has been withdrawn or determined, but that after that time it shall be enforceable.

Power to amend Schedule A1 of the 1992 Act

104. ***Section 15*** amends paragraph 166 of Schedule A1. At present paragraph 166 contains limited powers for the Secretary of State to amend paragraphs 22 and 87 of the Schedule, by order, if the CAC informs the Secretary of State that either of these paragraphs has an unsatisfactory effect.

105. *Section 15* widens the scope of paragraph 166, by giving the Secretary of State a general power to amend any provision of the Schedule, if requested to do so by the CAC.

106. *Subsection (2)* replaces paragraphs 166(1) and (2) and inserts new paragraphs 166(2A) and 166(2B).

107. New sub-paragraphs 166(1) and (2) provide for the CAC to ask the Secretary of State to amend any provision of the Schedule if it considers that the provision has an unsatisfactory effect and should be amended. The Secretary of State may seek to rectify the problem either by using other powers to amend the Schedule where the provision is among those to which the powers apply or by using the new power in paragraph 166(2)(b).

108. Sub-paragraph (2A) clarifies that the Secretary of State has a discretion to amend the Schedule in any way and not just in a way suggested by the CAC. Sub-paragraph (2B) makes clear that the Secretary of State may use the powers, mentioned in sub-paragraph (2)(a), to amend the Schedule without the need for any representation from the CAC.

109. This section will not alter the requirement in paragraph 166 that any change to the Schedule, whether under the specific or general power, must be by means of an order that is approved by both Houses of Parliament.

Means of communicating with workers

110. ***Section 16*** inserts a new paragraph 166A in Schedule A1.

111. Paragraph 166A(1) provides that paragraph 166A applies in relation to any provision of paragraph 19D(2), paragraph 26(4) or paragraph 118(4). These paragraphs require the employer to provide the names and home addresses of workers for the purposes of their being sent information by the union, or for the purposes of a ballot on recognition or derecognition.

112. Paragraph 166A gives the Secretary of State an order-making power to provide that the employer must give to the CAC, in addition to the workers' home addresses, an address of a specified kind, which may include any address or number to which information can be sent by any means. Such an order must be made by statutory instrument and approved by both Houses of Parliament. The power contained in this section will enable the Secretary of State to provide that employers must give the CAC addresses for workers which enable communication or voting in ballots to take place by other means as well as by post (see also commentary on section 54).

Unfair practices: power to make provision about periods before notice of ballot

113. ***Section 17*** inserts a paragraph 166B into Schedule A1 to the 1992 Act. This paragraph provides an order-making power for the Secretary of State to prohibit employers and unions from using specified unfair practices during a specified period. Paragraph 166B(1) sets out that the Secretary of State may provide by order that employers and unions are prohibited from using practices which are specified as unfair practices in relation to particular kinds of application under Schedule A1. Such an order may also set out a specific period in which this prohibition will apply.

114. Paragraph 166B(2) provides that an order may make provision for the consequences of using a prohibited practice, including provision which modifies the effect of an existing provision of the Schedule which deals with the situation where a prohibited practice is used.

115. Paragraph 166B(3) makes clear that an order by the Secretary of State can confer functions on the CAC.

116. Paragraph 166B(4) sets out that an order may contain provisions which extend either or both the power of Acas under section 199(1) of the 1992 Act, or the power of the Secretary of State under section 203(1)(a) of that Act, to issue Codes of Practice in relation to the provisions laid down in the order.

117. Paragraph 166B(8) provides a definition of the term "specified", which is to mean specified in an order under this paragraph.

Power to make provision about effect of amalgamations etc.

118. ***Section 18*** inserts paragraphs 169A, 169B and 169C into the Schedule. Paragraph 169A provides an order-making power for the Secretary of State to make provision for any case where anything has been done under or for the purposes of the Schedule by or in relation to a union and that union amalgamates or transfers all or any of its engagements. For example, such an order may specify what will happen to an award of recognition where the union(s) in respect of which the award was made merges with another union or unions. The term "transfer of engagements" also covers the case where a union breaks up with the result that a section that was formerly a part of it becomes a union in its own right.

119. Paragraph 169A(2) has the effect that an order under this paragraph may make provision for cases where an amalgamated union, or union to which engagements have been transferred, does not have a certificate of independence.

120. Paragraph 169B contains a similar order-making power for the Secretary of State to make provision for any case where anything has been done under the purposes of the Schedule by or in relation to a group of workers and the employer of any of those workers is no longer their employer, by reason of a business transfer or otherwise.

121. Paragraph 169C provides that an order under paragraphs 169A or 169B must be approved by both Houses of Parliament.

Information about union membership and employment in bargaining unit

122. ***Section 19*** inserts a paragraph 170A into the Schedule. The new paragraph provides a power for the CAC to require the employer, the union(s) and applicant workers to give to a CAC case manager specified information to help inform its decisions under the Schedule. It also specifies the CAC's processes in handling and making use of such information.

123. Paragraph 170A(1) provides that the CAC may exercise the powers if it considers it necessary to do so to enable or assist it to exercise any of its functions under the Schedule.

124. Paragraphs 170A(2) and (3) provide that the CAC may require an employer, a union or an applicant worker to give the CAC case manager specified information about:

- the workers in a specified bargaining unit;
- union membership among those workers;
- the likelihood of a majority of those workers being in favour of recognition of a union(s) on their behalf; or,
- the likelihood of a majority of those workers being in favour of having bargaining arrangements ended.

125. Paragraph 170A(5) provides that the recipient of a requirement from the CAC must provide, within the specified period, as much of the specified information as is in his possession.

126. Paragraph 170A(6) provides that the CAC case manager must prepare a report from the information supplied to him and submit this to the CAC. Under new paragraph 170A(8) he must also give a copy of this report to the employer, the union(s) and, if appropriate, the applicant worker(s).

127. Paragraph 170A(7) provides that if an employer, union or worker fails to comply with a requirement the case manager's report must mention this failure and the CAC may draw an inference against the party concerned. Paragraph 170A(9) defines the terms "applicant worker", "CAC case manager" and "specified" for the purposes of paragraph 170A.

"Pay" and other matters subject to collective bargaining

128. ***Section 20*** inserts paragraph 171A into the Schedule. A CAC declaration of recognition is for collective bargaining on pay, hours and holidays. Paragraph 171A(1) clarifies that for the purposes of the Schedule, the definition of "pay" does not include any matters relating to a worker's membership of an occupational or personal pension scheme, his rights under that scheme, or his employer's contributions to it.

129. Paragraphs 171A(2) to (4) permit the Secretary of State, by order, to amend relevant parts of the Schedule to add matters relating to pensions to the "core" bargaining topics of pay, hours and holidays. New paragraph 171A(5) allows the order to deem that the inclusion of pensions as a topic for collective bargaining shall have effect with regard to declarations of recognition and methods of collective bargaining already awarded under the Schedule.

130. Paragraph 171A(7) provides that any order made by the Secretary of State under the paragraph must be approved by both Houses of Parliament.

Information required by Acas for ballots and ascertaining union membership

131. ***Section 21***inserts a new section 210A in the 1992 Act. *Subsections (1) and (2)* of the new section have the effect that where Acas is exercising its function to give assistance for the purpose of bringing about the settlement of a trade dispute, and the dispute is a recognition dispute, the parties to the dispute may jointly request Acas to hold a ballot of the workers involved or to ascertain their union membership.

132. *Subsection (4)* of the new section provides that if such a request is made, Acas has the power to require the parties to the dispute to give it, within a specified period, such information as it may specify about the workers involved in the dispute. However, under*subsection (5),* Acas may use the power only where it considers this is necessary to enable it to exercise its function to bring about a settlement and to assist it to comply with the parties' request for a ballot.

133. *Subsection (6)* of the new section provides that the recipient of a requirement from Acas must provide, within the specified period, as much of the specified information as is in his possession. *Subsection (7)* of the new section provides that a request for Acas to conduct a ballot or ascertain union membership may be withdrawn by any party to the dispute at any time and that, if this occurs, Acas is to take no further steps to conduct the ballot or ascertain union membership. Under *subsection (8),* Acas is also required not to take those further steps if a party fails to comply with subsection (6). *Subsection (9)* provides that Acas is not required to comply with any request made under the new section.

134. *Subsection (10)* defines the terms "party", "recognition dispute", "specified" and "workers" for the purposes of the new section.