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# Response to Government proposals for a reform transfer of undertakings (protection of employment) regulations 1981 as set out in public consultation documents and detailed background paper of September 2001

## 1. CMS Cameron McKenna

We are a top 10 international law firm based in the City of London. We have over 180 partners and around 1000 lawyers in total. Our practice in the United Kingdom involves us in advising domestic and foreign clients, in both the private and public sectors, on company takeovers, re-organisations, business sales, outsourcing and change of service providers, and insolvencies, including on the employment and pensions implications of those events. We believe that we are therefore well placed to comment on the subject of this consultation paper.

## 2. Overview

We broadly welcome the proposals, which will help to provide much needed clarification and hopefully certainty in an area of law and practice where those qualities are essential to the efficiency of business. Nevertheless, we believe that, in some areas, the Government should go further than proposed, principally by amending the Regulations rather than relying on case law interpretations, which will only perpetuate uncertainty. We also believe that the Government has perhaps underestimated many practical difficulties inherent in some of its proposals for reform. For example, about the provision of employee information. These points are all explained in the relevant sections of the response set out below.

This paper will follow the section headings and numbering within the general background paper as the structure for its reply.

## (A) General Objectives

We agree with the Government's stated objectives. However, we doubt that these objectives will be met if some of the proposals are enacted in their current form.

## (B) Scope of the Legislation

Paragraph 16

We agree that the Government would be right to adopt the new broader definition of a transfer of an undertaking contained in Article 1(1) of the revised directive.

Paragraph 17

We agree with the Government's decision not to extend the Regulations to takeovers by share transfer.

Transfer Within Public Administration

We share the Government's view that employees of local and central Government should not be less favourably treated than their private sector counterparts. While we agree with Government that a level playing field could be provided by mere administrative action through applying the Statement

of Practice on Staff Transfers in the Public Sector, we do not consider that would be as effective or consistent as bringing the public sector within the scope of TUPE by express provision within the amended Regulations.

In this way, their rights would be secured on an equal basis with private sector workers and there would be no need for case specific legislation, which might not always be entirely consistent. We have seen much of such legislation, which tends only to include a fraction of ht Regulation's content.

Service Provision Changes

We are conscious that this has been a particularly troublesome area under the Regulations, but the problem is far from confined to the public sector. Therefore, we believe, first, that any action to be taken by administrative measures in the public sector would inevitably fail to address much of the problem and second would tend to differentiate between the treatment of public and private sector workers.

On balance, however, we do not favour a general extension of the Regulation's own scope in relation to service provision changes for public and private sectors alike. We believe that such a step would inhibit the achievement of necessary business reorganisations, by increasing the complexity and cost of transactions, which currently and legitimately fall outside the scope of TUPE. Further, it is our experience in a number of the transactions where we have advised, that many employees who are to be transferred under TUPE would prefer to have the choice of receiving their redundancy pay from the transferor and accepting a break in continuity of employment and new contracts from the transferee, rather than the rights they are given under TUPE. They are of this view because they do not want to have to place their trust for the protection of rights in the transferee. We believe that Government should give consideration to including such an option within the new Regulations, or at least give weight to this consideration when considering the issue of changes in terms and conditions of employment following a transfer.

In relation to the specific provisions envisaged in paragraph 27, we question whether the use of word "principal" to qualify "purpose" in the second limb of the first part of the definition is appropriate. The Government may wish to consider whether the phrase "wholly or mainly", which is already well established in employment protection law in relation to the reason for dismissal for example, would be a more appropriate test.

The Government identified three arguable drawbacks in paragraphs 32 to 34 and our comments on these are as follows:-

First Drawback

There are already many disputes in such cases and it is inevitable that there would be cases to test any new provisions.

Second Drawback

We do not believe that the second arguable drawback would be likely to be a material problem in practice.

Third Drawback

We agree with the Government on a third arguable drawback.

(C) **Occupational Pensions**

We agree with the Government that the present situation is unsatisfactory, but only as to certain aspects of the current law. In particular, there were and remain good reasons for excluding pensions

from the scope of TUPE to do with the complexity of pensions and the need to avoid a single employer having to provide a multiplicity of pension arrangements as a result of TUPE and transfers. Further, it is important to recognise that, where employers currently provide occupational pensions, they normally retain the right to make fundamental changes in the nature and extent of provision, even to end the provision altogether, on a unilateral basis. It will be vital to preserve this flexibility after a transfer of undertaking.

We are concerned the Government has not specifically addressed, at least for the avoidance of doubt, the continuing need to exclude (from the transfer of rights and obligations under TUPE) any transfer of rights and obligations in respect of past pension rights. We believe strongly that this is a matter that Government must specifically address in the revised Regulations. This is a commercial imperative. Any transfer of accrued pension rights from the transferor's pension scheme to the transferee's pension scheme should remain a matter for agreement between those parties. Such obligations are not easily quantifiable, may be transient rather than permanent due to fluctuations in scheme assets and liabilities, and the transferred liabilities could be enormous and difficult to quantify. The risk to a transferee is likely to be such as to deter many of the business reorganisations that have to be effected by means of a transfer of an undertaking from taking place. In any event, we strongly urge a clarificatory provision to confirm that past pension liabilities are not transferred. This is an area where no uncertainty can be allowed.

Turning to paragraph 38, our view is that the Government should legislate for the public and private sector alike, but we have no objection to the Government (or any other transferor for that matter) making it a condition of the transfer that employees should receive more favourable treatment in respect of pensions than might be required by law.

We have a view, expressed later, that there should be flexibility as regards other contractual rights (for example, membership of employee share schemes, the provision of free banking facilities or sports facilities) which many transferees would find impossible to replicate, exactly on the same pragmatic grounds as are accepted to exist in relation to pension rights. We also note with concern, the dramatic effect that recent tax and accounting changes are having in reducing pension provision by employers and believe that the changes proposed by Government will only increase the trend away from defined benefit schemes.

We believe that the Government is right to conclude that transferees should not be required to provide identical occupational pension rights across a transfer, but we would go further and say that the current legal position should be preserved. We repeat the point, because of its fundamental importance, that at least for the avoidance of doubt an express statement must be made that there is no transfer of accrued pension liabilities at the point of transfer.

Turning to paragraph 41, our experience is that it is far from uncommon for employers to have a single pension scheme with different sections each providing different levels of benefit. Admittedly such arrangements tend to appear in only the larger and longer established employers. We do not therefore necessarily agree with the Government's view that this would require separate schemes; neither do we necessarily agree that this would always be unfeasible. It is however, the case that such arrangements will at least be in- convenient to and expensive for employers and might be wholly unfeasible for smaller employers.

On paragraph 43, we welcome this proposal to allow employers to negotiate compensation to buy out pension obligations where it is not reasonably practicable to meet pension obligations. The Committee would, in the interests of achieving the objectives stated by Government, urge Government to extend this approach to all terms and conditions, not just occupational pension terms and conditions. This would indeed be broadly in line with the approach taken in the MoD's "Code of Practice on TUPE Transfers in MoD Contracts", where there is recognition that certain types of benefit cannot in effect be transferred. As indicated above, there are many arrangements that are not capable of replication (in particular participation in employee share schemes, group wide profit sharing schemes, social and sports clubs and so on) where this flexibility would provide a legitimate basis for eliminating such terms on a fair basis.

Pension Options

We are somewhat surprised that the options outlined did not include an option requiring the transferee to offer the transferred employees membership of any existing occupational scheme it has, on the same terms and conditions as equivalent members of its own existing workforce. We are conscious that providing different pension benefits for transferred staff from existing staff will, (together with other differences in terms and conditions of employment) present a continuing source of friction between the two groups. The unfortunate employer may even be confronted with leapfrogging claims, where one group demands the same treatment as the other, without giving up any of its existing terms and conditions of employment. Such differentials may anyway be potentially the subject of sex/race discrimination claims, which is a source of unnecessary problems in itself.

This option, of course, carries with it the risk that transferred employees may be better off because the new pension rights are more favourable than the old ones. Equally, the new arrangements might be less favourable. The particular advantage from this option would be simplicity and its fairness as between the transferred workforce and the transferee's existing workforce. Particularly if levelling off of the transferred workers' terms and conditions was expressly permitted as a condition of getting pension rights.

Option 1/1(a)

We prefer option 1 to option 1(a) to keep the burden on transferees to a minimum.

Option 2/2(a)

We are conscious that there is a shifting of investment risk from employers to employees with a change from a COSR to a COMP scheme, but the trend is for employers to move away from COSR schemes towards COMP schemes for fiscal and accounting reasons. Equally, we believe it would be wrong to assume that COSR schemes are necessarily more secure than any other form of scheme, for corporate insolvency is a fact of life and in such event the funder of last resort will have empty pockets. Indeed, the need to fund a pension scheme deficit could be the downfall of companies now and in the future.

Therefore, we strongly support transferees having flexibility to provide a COMP scheme rather than a COSR scheme and vice versa (though this seems unlikely to happen in practice). However, once again, we would not be in favour of the safety net approach implicit in option 2(a).

Option 3

We are against minimum benchmarking, so as to minimise the burden on the transferee.

Option 4

We believe that the flexibility inherent in this option, coupled with the fairness to transferring employees, means this is the option which best matches the potentially conflicting interests of the transferee and the transferring employees, at least of all of the options identified by Government in the consultation paper.

In relation to paragraph 58, we would be in favour of maximum flexibility as to the manner of benefit provision. We believe that this would be of particular importance to smaller employers where group personal pensions or stakeholder pensions will be a far more suitable vehicle than other arrangements.

Claims of Constructive Dismissal

We have never been convinced of the merits of the constructive dismissal argument that Government has consistently maintained in relation to the provision of ongoing pension. But we believe strongly that, whatever arrangements Government makes for post-transfer pension provision, Government must, when amending the Regulations, expressly preclude any claim for constructive dismissal (or other claims against the transferor or transferee) provided the transferee complies with the requirements of the Regulations as to ongoing pension provision. Government must also be particularly mindful of the implications of the interpretation put on Reg.5(5) by Rossiter v Pendragon Plc 2001 IRLR 256 in which the Employment Appeal Tribunal holds that any reduction in working conditions after a TUPE transfer is constructive dismissal even if there is no breach of contract. Any situation that left the transferor and transferee vulnerable to such a claim, despite complying with the legal standards, would not be acceptable commercially. Although not directly relevant to this point, the decision of the High Court on 19th October 2001 in the case of Howard Hagen and others v. ICI Chemicals and Polymers Limited, in relation to pension benefits to be provided on a transfer of an undertaking, is evidence of the problems that can ensue in this area. Government should take great pains to try to avoid such problems through careful and comprehensive drafting of the new Regulations.

The Frankling Case

We believe that the issue of redundancy - related enhancement in pension terms cannot be separated from the issue of pensions generally. In our view, it is illogical to maintain redundancy - related pension enhancements across the transfer whilst being prepared to accept the reduction in pension benefits which is implied in the Government's own options on pensions. In any event, bearing in mind that these entitlements are earned through service, it seems to us that it would be inequitable to saddle a transferee with these previously excluded obligations without compensating him for the contingent cost of meeting these liabilities at the time of the transfer. Obligations equivalent to "preservation" of pension rights under the Pension Legislation should be established.

We therefore urge Government to require this liability to be apportioned between the transferor and transferee on a time basis. So, in the event of a redundancy occurring and these benefits being payable, the transferee would have the right to call upon the transferor to meet its share of any additional funding obligations due in respect of the liabilities.

We believe that Government would have scope within TUPE to make such an arrangement given the flexibility of the new enabling provision on pension in the consolidated Directive.

(D) **Notification of Employee Liability Information**

We believe the Government is right to proceed along these lines, but believe that the Government underestimates the complexity of the issues in this area and the practical difficulties.

There are overriding legal safeguards, which seem not to have been taken into account in the consultation paper. First, the fact that employee information is held by the employer subject to a duty of confidence owed to the employee concerned. Second, the information concerned will most likely be subject to the Data Protection Act 1998, which again imposes further limitation. Indeed, regard should be had to the Code of Practice to be issued by the (now) Information Commissioner on the handling of information in the employee/employer relationship. Third, it is characteristic of transactions that they may fail to complete, or that information may be provided to a number of potentially interested parties. In that event there must be a mechanism for the intending transferor to recover all employee information from the persons to whom it has been provided, and for those parties to be prevented from using it for their own commercial, competitive advantage.

The requirement that there must be written notification of all the rights and obligations in relation to employees who are transferred presents enormous difficulties. Great care must be taken when drafting this provision to be precise as to what information is to be provided and whether it may be provided generically where employees fall into a particular class, (for example, with common terms and conditions of employment) or on an employee specific basis. For example, will it be acceptable

to provide one copy of standard contractual documentation that applies to a group of employees or must each individual contract be copied and handed across? This may be onerous enough in itself.

In addition, Government needs to consider what it means by "rights and obligations". Every employee's contract includes terms that are implied by law, for example, the duty of trust and confidence and the duty of confidentiality. Is Government suggesting that these implied terms must be written down and notified? Secondly, what does Government mean by "liabilities"? Does it mean (1) claims which have been asserted by employees, but where no litigation has ensued, (2) cases where there is litigation current or judgment debts outstanding or (3) cases where the employer believes that it may have a liability to the employee, for example, for breach of contract, but the employee is not aware that he has a claim or at least has not asserted it?

The consultation paper uses the term "notification" whereas the usual practice in private sector cases is for such matters to be "disclosed". We would urge Government to use terminology consistent with long established commercial practice.

Finally in this regard, Government should take notice of the particular difficulties that will be faced in sales of insolvent businesses. These sales are frequently concluded within a matter of hours of the appointment of an insolvency practitioner. It may well be impossible to achieve notification of rights and obligations before completion. Indeed insolvent companies have often been badly run, so there are likely to be inadequate records to enable such information to be given and the senior managers or directors who may have the relevant knowledge in their heads are often unwilling to cooperate. Therefore, there is a need for a very broad "special circumstances" exemption, which would even permit of a situation where no information is provided at all, rather than just allowing late provision, in insolvency sales.

The reference to providing the information "in good time before completion" is a recipe for uncertainty, but at least provides a degree of flexibility for parties to a transfer. But, if Government is going to interfere in the commercial process between consenting parties to a transaction, we feel that Government should at least consider going the further step of providing a minimum period before completion for the provision of this information. This may be particularly important in service provision changes, where the outgoing contractor will have every reason to delay provision. We assume that part of Government's thinking must be influenced by the desire to ensure that employees' entitlements are properly honoured through the transferee being aware of its inherited rights and obligations. There may therefore be a case that there should be certainty by requiring this information to be provided a minimum period before completion. Commercial parties could then plan transactions around it.

In paragraphs 64 to 67 of the background document, Government canvasses the options for sanctions. We feel strongly that the Government's proposals for sanctions are wrong and at odds with the approach of the courts and therefore commercial practice in this area.

We view the Government's proposals as creating (the equivalent of) an implied term in the contract for the sale and purchase of a business. In such an agreement, sellers are usually required to warrant the accuracy of the employee information they have disclosed. The buyer's remedy, where the employee information turns out to be inaccurate, is therefore to sue the seller for damages for breach of contract. In assessing those damages, the court will put the buyer in the position he would have been in had the information been true. In other words, he will be compensated for the loss of his bargain. Those damages will not be the same normally as the extra costs and liabilities he may have assumed over and above those which were disclosed to him. For example, if the buyer thought the business was worth the purchase price of £10 million on the basis of the disclosure, but the court considers he would have paid half a million pounds less for the business if he had been told the truth, the court will award damages of the half million pounds. The fact that the additional liabilities to employees in question might be more or less is not relevant to the assessment of damages. The Government's proposal to require the transferee to meet the costs of satisfying the liability effectively requires him to indemnify the transferee. This is a wholly different basis of assessment from that customarily applied by the courts in these circumstances. This is effectively

penal and this liability may be out of all proportion to the commercial bargain struck between the parties and thus represent a total windfall to the transferee.

Therefore, we consider this should be expressed to operate as a statutorily implied term, and that the normal remedy for breach of contract should apply.

Of course, in the context of a change of service provider (where there is unlikely to be any contract at all between the outgoing contractor and his successor) the concept of damages for loss of bargain is much less apt. It may be the consultation paper was focusing upon this problem when making the specific proposal set out in paragraph 65. If so, we believe that it would be appropriate to have two entirely separate regimes. First, where there is a contract for the sale or transfer of the business, there should be the implied term and damages for loss of bargain. Second, in the case of service providers (and whether or not there is actually a contract between the outgoing contractor and the incoming contractor) perhaps the Government's proposal in paragraph 65 should apply. However, we see no good reason why that proposal should apply in the run of the mill business transfer where such a remedy would run counter to the entire scheme of the arrangements between the parties. Perhaps the new Regulations should provide for a right to apply to a court or perhaps an employment tribunal on the part of a transferee for an order for disclosure under a "quickie" procedure.

As regards the specific proposal in paragraph 65, we believe that this has a number of serious faults.

First, a requirement for litigation will increase the burden on the courts or particularly the employment tribunals at a time when the Government by other means, is seeking to reduce the number of such cases.

Second, and perhaps more importantly, to limit the remedy to the situation where the employee has commenced litigation will have a number of undesirable effects:-

a) Employers might rely it upon as a means of denying employees their proper terms and conditions or satisfying transferred liabilities. Employers might well refuse to honour such claims unless and until the employee actually sues.

b) There seems to us no good reason why the transferee should not be able to begin his own legal proceedings against the transferor. He might well wish to do so where the liability was plain. Equally in a case where the dispute was about a liability for personal injuries transferred from the transferor to the transferee, then third party proceedings in connection with the ordinary personal injury claim would be standard. However, this would hardly be a standard procedure where employees were, for example, seeking to establish an entitlement to a contractual right, such as overtime pay at a certain rate.

c) The proposal for the court apportioning liability makes sense in the case of an accrued and transferred liability, such as for a personal injury resulting from an accident before the transfer. However, it makes little sense and would be highly impractical where the dispute was about an undisclosed term or condition of employment such as, for example, a right to overtime pay at a certain rate. A decision on that might create an ongoing financial obligation that would last for many years.

Finally, there is a danger in these proposals in relation to unknown liabilities that are transferred. There is a risk that such a proposal might prejudice the position proposed by the Government in relation to Section J on employers liability compulsory insurance. We are confident the Government does not intend to prejudice the position painstakingly established by case law in relation to personal injury liability which transfers and that it will therefore be at pains to make sure that this will not take place.

Nevertheless, we believe that the simplest route and the one which would be most effective would be to make the transferor jointly liable with the transferee to the employee for undisclosed

obligations, whether those be in the nature of crystallised liabilities existing before the time of transfer (e.g. personal injuries claims) or in respect of entitlements under ongoing terms and conditions of employment.

There is a number of issues, which we think, are not adequately canvassed in the paper: -

First, the option of making the client the responsible party in the case of service provision change. The client will, of course, have had the benefit of the services provided by the relevant employees and, in the case of undisclosed liabilities, it would after the change but for the new provisions the Government is proposing in this respect, have the benefit of an unreasonably cheap price for the services it is receiving. There is therefore a case, albeit a fairly weak one, which might justify making the client bear at least a share of the responsibility.

Second, none of these remedies provide any protection for a transferee where the transferor becomes insolvent after the transfer. There might be a case for holding the directors of an insolvent company personally liable where the non-disclosure was deliberate. On the other hand, this may be an excessively penal sanction, particularly because many transferors will be small businesses with little or no capital backing in any event.

Finally, there is no mention of any obligation on the transferor to provide the transferee with the personnel files of the transferring employees. This is of major importance. Merely providing information is not the same as providing the actual documentary records. Government should be familiar with this. The MoD's own "Code of Practice for TUPE Transfers in MoD's Contracts" specifically covers this aspect in section A4. We believe that this is a vital part of this provision. In the ordinary case, there will be no real justification for the transferor retaining the records, as it will have no liabilities left to meet. In such a case, the file should be provided in its entirety to the transferee at the time of transfer. Of course, the personnel file is unlikely to contain everything that a transferee would be likely to need to deal with for example, a claim of personal injury arising before the time of the transfer. In such a case, the transferor's accident book and other records might also be necessary to establish the extent of the liability and/or to defend any unjustified claim. However, as in most cases such liability will be responded to by the transferor's insurers, the issue of evidence in personal injury cases is probably not of paramount importance. Nevertheless the issue of establishing terms and conditions of employment and other day-to-day liabilities is of paramount importance to the transferee. He will wish to be put in possession of full knowledge about the employee so that he will know for example, what past appraisal ratings the individual has received and whether or not he has a good or bad disciplinary record. In particular, a transfer should not be the occasion for giving failing employees a new lease of life by effectively wiping the disciplinary slate clean. We therefore consider that a specific requirement for the transfer of at least the current parts of the personnel file is vital, as our own experience is that in many cases such transfers do not take place on a voluntary basis.

See also the point in Section J about the disclosing employer liability insurance policies.

(E) **Dismissal by Reason of a Transfer of an Undertaking**

We wholeheartedly approve of the Government's intention to improve the drafting of these provisions in the new Regulations, in particular by making clear that ETO reasons are a subset of reasons connected with the transfer. Such clarification is to be welcomed. However, Government needs to have careful regard to the point related to this issue we make in the insolvency section.

(F) **Changes in Terms and Conditions of Employment of Affected Employees**

We approve of the Government's proposal to improve the operation of the Regulations by making clear that they do not preclude transfer-related changes to terms and conditions that are made for an ETO reason – that is an economic, technical or organisational reason entailing changes in the workforce.

We do, however, wish to put one question to Government. Namely whether the scope of such a provision could be broadened to provide the necessary freedom for the parties to renegotiate pension related terms and conditions of employment, without the need for the special provisions about future pension obligations contained in Section C dealing with occupational pensions. We specifically recommend that the specific provision the Government intends to make to deal with the Frankling case should be expressly subject to this new power, to enable such protected age related redundancy rights to be negotiated away.

(G) **Application in Relation to Insolvency Proceedings**

We believe that the right course is for the Government to take advantage of the two new options provided by Article 5.2 of the revised Directive. However, our extensive experience of acting in sales of insolvent businesses leads us to conclusion that these changes will have no meaningful impact on the rescue culture. In our extensive experience, there are 3 main TUPE reasons why a purchase will collapse.

(1) Potential Liability of a Purchaser for Pre-Transfer Dismissals. It is usually inevitable when a business fails, that some employees must lose their jobs as the business is slimmed down to a viable size. Based on many court/tribunal cases, a purchaser will often fear that he will bear the liability for these dismissals if he buys the business soon after. Delay is not an option, for the goodwill in the business is swiftly lost. So, the end result is often that there is no sale and all the employees lose their jobs.

(2) The obligations to inform and consult on redundancies, and the transfer of the liability for default to a purchaser under Kerry Foods Ltd v Creber 2000 IRLR 10, is another factor. In insolvency, everything must be done swiftly if anything is to be saved, and this does not permit full consultation with employee representatives. The risk of this added expense is often sufficient to put a purchaser off.

(3) The transfer of the contracts of the directors of the failed enterprise is the third problem. They are often to blame for the business' failure, but they have the same rights to transfer as the employees they have failed. Usually, they are not needed or wanted by the purchaser, but the cost of terminating their contracts is usually so expensive it will deter purchasers.

So we believe 3 changes would produce a very meaningful improvement in the rescue culture:

(1) no transfer of liability for pre-transfer dismissals;
(2) no transfer of liability for failure to inform and consult an collective redundancy; and
(3) no transfer of director's contracts.

Providing that Debts Towards Employees do not to pass to the Transferee

We believe that the rescue culture would be fostered by providing that employee debts did not transfer to the transferee. We recognise that this option would have the harshest effect on employees. Nevertheless it is worth noting that the exemption from transfer would only apply to employee debts and not to ongoing terms and conditions of employment. Furthermore, there would be no prejudice to, for example, personal injury claims as these are outside the category covered by the guarantee under the insolvency payments provisions of the Employment Rights Act 1996. The prejudice to employees is therefore restricted to accrued unpaid wages at the time of the transfer and not more generally. Equally, to provide for the excess of such debts (as is the Government's favoured option) to pass to the transferee is, in effect, to prefer employees above other creditors in the insolvency, as none of the debts due to them will be guaranteed by Government or transfer to the solvent transferee.

Therefore we believe such debts should not pass.

We therefore disagree with the Government's proposal and instead consider that the transferee should have a clean slate in respect of the categories of debt, which are covered by the insolvency provisions of the Employment Rights Act, even to the extent that the actual debts are not satisfied by those payments.

Providing for Changes by Reason of the Transfer to be made to Terms and Conditions of Employment by Agreement Between the Parties

We are strongly in favour of this proposal. Nevertheless we consider that this change is unlikely to make a significant difference to the rescue of companies from insolvency, but this should not be a reason for leaving matters as they stand.

There are, however, some practical difficulties relating to the proposed changes that relate to the process of terms and conditions bargaining. First, and foremost, a collective agreement, that is an agreement between an employer and trade union representing employees, only becomes effective in law by virtue of its incorporation in individual employees' contracts of employment. Therefore, it does not follow from the agreement to certain terms and conditions by the trade union, that this automatically has a binding effect on the employees. That will depend upon their own terms and conditions of employment and in particular the arrangements made in them for collective bargaining.

Therefore, in proposing that agreement with the employee representatives would be sufficient to amend employees' terms and conditions of employment, Government should bear in mind that they would not be enshrining with legislative force a universal practice in relation to collective bargaining. Government does therefore need to take great care.

In paragraph 96, the Government proposes arrangements that would be special to non-union cases, requiring notification of changes to terms and conditions in writing. Our view is that this requirement should apply in all cases, regardless of whether there is union or non-union representation. In any event, changes of significance are likely to be matters in respect of which written particulars must be given under the Employment Rights Act.

Potential Misuse of Insolvency Proceedings

We do not consider that there is substantial or indeed any significant abuse of insolvency proceedings in the UK for this purpose and therefore agrees with the Government in this respect.

Hiving Down

We believe that the Government misunderstands the purpose and effect of these provisions.

We had always believed that these hiving down provisions were in place to ensure that employees' rights to Government guaranteed payments in insolvency were preserved by them remaining the employees of the insolvent enterprise until the hived down entity was sold. The purchaser in that event would obviously be solvent and (as the Government has correctly summarised elsewhere) those debts would then be transferred to and become payable in full by the new owner of the hived down business. Their purpose was not to promote the sale, because of course at the point of sale the employees and their related debts are transferred down and injected into the business vehicle which is then acquired by the solvent purchaser, and he will bound to pay them in full.

Hiving down was not therefore a form of avoidance, let alone evasion. We are not aware that there has in fact been any diminution in the practice of hiving down as a result of the Litster judgement, and we have a large insolvency practice. The Litster judgement is, with respect, entirely irrelevant to this issue.

Hiving down is a perfectly legitimate commercial practice. Its aim is to remove potentially viable businesses from an unviable whole and create them as stand alone entities, which can then be sold

neatly pre-packaged to a purchaser free of any debts or liabilities which afflicted the larger insolvent whole, save in respect of the employees who work in that business. There is therefore a valid and continuing need for such a practice, and there is no prejudice to employees from it in the way TUPE is currently framed.

We therefore believe that the Government is wholly wrong in its appreciation of this situation and that its proposal to abolish the hiving down provisions is misconceived. If proceeded with, it would be the cause of unwanted and unnecessary complications, which would in fact hinder corporate rescue. Indeed, if there was no sale of the hived down business, employees would be prejudiced as they would have lost their original insolvency guarantee under the Employment Rights Act.

(H) **Continuity of Employee Representation**

We agree with the proposal in paragraph 105 making express provision for the avoidance of doubt.

**Information and Consultation of Employee Representatives**

We note the Government's intent to amend the Regulations for the avoidance of any doubt, and contrast this with its reluctance to make legislative changes in other areas for similar reasons.

We think it may be sensible to have a proposal to lay down a minimum period for the commencement of information and consultation before a transfer takes effect. Such periods already exist with regard to redundancy proposals and many employers and trade unions find it difficult to accept that there is no equivalent timescale laid down for information and consultation in relation to business transfers. This gives rise to a great deal of uncertainty and indeed an increasing amount of litigation.

As a sale is necessarily at least a bilateral process (whereas redundancy is a unilateral process entirely within the control of the employer concerned,) we do not believe it would be appropriate to have a lengthy period of prior consultation and indeed a lengthy period may not always be practicable. We would not favour a period of more than, say, 30 days where 100 or more employees were being transferred, so that the requirement should be in terms of the information being provided in good time and consultation commencing in good time, but in any event in neither case later than 30 days before the date of transfer. A shorter period might well be appropriate for smaller numbers of employees.

**Employee Liability Information**

A proposal to share this information with employee representatives has the same confidentiality, data protection and other issues raised as regards the principal proposal for the disclosure of this information set out in Section D of the consultation background paper.

The issues are, however, of a different quality as the duty of confidentiality applies between the employer and employee as an individual and not as one of a collective mass. That duty of confidentiality would continue to be owed by the transferee once he has become the employee's employer, but there would be no parallel duty of confidentiality because of the absence of any contractual relationship between the employee and his or her employee representative. Therefore, we believe that it would be undesirable for these reasons to extend the disclosure of the actual information to the employee representatives. However, it would be appropriate for the employee representatives to be informed of the nature and extent of disclosure.

(I) **Employers Liability Compulsory Insurance**

We are disappointed that the Government apparently does not consider it necessary to amend the Regulations in this respect "for the avoidance of doubt", though in other areas having arguably much less practical importance, there is no hesitation in amending the Regulations to avoid any doubt. We consider that it is not satisfactory such an important matter should be left on a case law

footing and reminds the Government of its own attitude in relation to amendments in relation to changes in terms and conditions of employment where Government does not even consider it satisfactory to rely on a House of Lords judgement.

Further, to facilitate this process, we believe that there should be an obligation on the transferor to include relevant insurance policy details among the employee liability information that must be disclosed under the Government's latest proposal in this regard.

We are also concerned that the Government is not proposing to apply its proposals for dealing with public to private sector transfers to claims that are in excess of the insurance cover available to a transferor private sector employer. The minimum amount of cover required under the Employer's Liability Compulsory Insurance Act 1969 is only £5 million and it is quite conceivable nowadays that organisations with only the minimum required cover could easily face claims in excess of this amount were there to be some sort of catastrophic accident. It is quite easy to conceive these days of half a dozen accidents at work each giving rise to a damages award of £1 million or more, and so exhausting the cover. Many organisations have much more cover than this.

As the Government is now proposing to limit its proposal to the minimum amount of cover required under the ELCI, we can see no reason why uninsured liabilities on private-to-private transfers could not be dealt with on the same basis.

(J) **Territorial Extent**

We do not think it would be right to remove entirely all territorial limits on the application of the TUPE Regulations. In particular we consider that it would be inappropriate and impractical to attempt to give extra-territorial effect to the Regulations and indeed contrary to established legislative practice.

We have experience of multi-jurisdictional sales where parts of a single undertaking or individual undertakings that are part of a larger multinational company are sold in a single transaction. It is submitted that it would not be appropriate to seek to give, for example, employees working in the USA for a British multi-national, whose part-undertaking is about to be sold along with the British part of that undertaking, rights under TUPE. There are moreover issues as to other employees not actually being transferred who will be "affected by the transfer" and to whom the right of information and consultation will be available. Government should take careful note of these issues when considering reform of Regulation 3.

(K) **Predetermination Procedure**

We agree with the Government's view that it is not appropriate to propose to introduce any predetermination procedure.

**Simon Jeffreys**
**CMS Cameron McKenna**

If you have any comments on our response or on the Government's proposals, please contact Simon Jeffreys by telephone on +44(0)20 7367 3421 or by e-mail at simon.jeffreys@cmck.com.