## Abstract

In 2000 the UK government introduced, under the Employment Relations Act of 1999, a new statutory union recognition procedure, while in 2003 it published a consultation document on its Review of the Act. The document concluded that the union procedure was broadly working and confirmed that the government would not be changing the procedure's basic features, but outlined some changes that it was proposing and issues on which it sought opinions. This paper assesses, on the basis of the authors' research, whether the procedure is indeed achieving the government's objectives, and then draws on this to comment on the main points raised in the government's consultative document. The latter was submitted as the authors' response to the review.

The authors concur with the document's overall judgement that in the first three years of its operation, the procedure is working effectively. It is providing a right to union recognition where the majority of workers want it, encouraging the voluntary resolution of recognition disputes and being used as a last resort, whilst no judicial reviews have, as yet, undermined its operation as happened with the last statutory procedure in the 1990s. Nonetheless there are problems particularly relating to the ability of employers to influence both how the CAC uses its discretion and workers exercise their rights with respect to union recognition, whilst the applications are in the procedure and during recognition ballots. On the basis of this, the author's response to the consultative document gauges that many of its arguments for making only limited changes in the procedure's fundamentals are sound, as are those where change is envisaged. However, in certain areas more consideration should be given to change, and particularly of ways of limiting the actions of employers that the document concedes might be deemed 'unfair labour practices'.

JEL Classifications: J5
Keywords: Trade Unions, Collective Bargaining, Union Recognition, Statutory Union Recognition Procedures, Employment Relation Act (UK) 1999, Review of Employment Relation Act (1999) 2002, Employers' Unfair Labour Practices.

This paper is produced under the 'Future of Trade Unions in Modern Britain' Programme supported by the Leverhulme Trust. The Centre for Economic Performance acknowledges with thanks, the generosity of the Trust. For more information concerning this Programme please e-mail **future_of_unions@lse.ac.uk**

## Acknowledgements

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Published by
Centre for Economic Performance
London School of Economics and Political Science
Houghton Street
London WC2A 2AE



ISBN 0 7530 1644 3

Individual copy price: £5

# Reviewing the Statutory Union Recognition (ERA 1999)


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## September 2003




The Centre for Economic Performance is financed by the Economic and Social Research Council.

# 1. Introduction

In February 2003, the UK Government published a consultation document on its Review of the Employment Relations Act of 1999 (DTI, 2003). It outlined the Review's findings and their proposals for reforms, which the government plans to legislate upon within this Parliament. The areas covered by the Review included statutory recognition, trade union and industrial action law, the institutional framework (e.g. The Central Arbitration Committee and The Advisory and Arbitration Service), tribunal awards for unfair dismissal, the dismissal of school staff, the National Minimum Wage, and the Partnership Fund. This discussion paper contains our response to the Review's proposals on statutory union recognition. It is limited to this as it is based upon our research on the effects of the procedure for union recognition that was introduced under the 1999 Employment Relations Act. This forms part of the Leverhulme Trust's Future of Trade Unionism in Britain programme at the Centre of Economic Performance (London School of Economics).

In this paper firstly we outline the main features of the procedure, secondly we describe its use so far, thirdly we assess, on the basis of our research, the extent to which the statutory recognition procedure is achieving its objectives; and finally, we reproduce our submission to the Review, in which we comment on all the points concerning statutory union recognition that are made in the consultative document.

# 2. The Statutory Trade Union Recognition Procedure under the Employment Relations Act: 2000-3

In *Fairness at Work* the government presented three main objectives which it was aiming to achieve:

(1) 'to provide for representation and recognition where a majority of the relevant workforce wants it' (Department of Trade and Industry,1998: 23);

(2) to introduce 'a procedure which will work' (Department of Trade and Industry, 1998: 24);

(3) to 'encourage the parties to reach voluntary agreements wherever possible' (Department of Trade and Industry, 1998: 25), so that the statutory recognition procedure would only be used as a last resort, where reaching an agreement outside of the procedure 'proves impossible'.

It was thus not an explicit objective of the Labour government to promote recognition, as it was keen to emphasise choice in industrial relations and appear not to be prejudging the value of trade unions. Nonetheless, the government was concerned to design a procedure that would encourage the voluntary settlement of disputes over recognition without recourse to the legal procedure. The introduction of a statutory recognition procedure both provides trade unions with a legal route for achieving recognition and transforms any negotiations about recognition that they may have with employers, since both sides know that the union can resort to the legal machinery. It is thus possible that a statutory procedure can stimulate recognition agreements if employers become more willing to sign agreements knowing the alternative is union recognition imposed by the state.

The CAC is responsible for handling recognition claims. To trigger the new procedure, a trade union must formally approach the employer for recognition; if the employer rejects the request or fails to respond, the union may refer the case to the CAC. For such an application to be valid the application must be made in writing, the union must be independent and the employer must employ at least 21 workers. Under the ERA procedure, the criteria for the acceptance of applications are much tighter than they were in the last procedure enacted under the Employment Protection Act 1975 (see Wood, 2000 for a comparison between the two). An application can be accepted only if at least ten per cent of the workers are union members, if there is not already a collective bargaining agreement covering some or all workers in the proposed bargaining unit, and if the CAC is satisfied that a majority of the workers in the bargaining unit are likely to be in favour of recognition. The requirement to demonstrate baseline support before a claim can proceed was designed to deter insubstantial claims (DTI, 1998: 24).

Once the application has been accepted, there is a 20-day period for the employer and union to agree the bargaining unit. If the parties are unable to reach an agreement, the bargaining unit will be determined by the CAC, with the main consideration being the need for the unit to be compatible with effective management. Other factors that the CAC has to consider include the views of the employer and union, existing national and local bargaining arrangements, the desirability of avoiding small fragmented bargaining units, and the characteristics and location of workers. If the

bargaining unit decided by the CAC or agreed by the parties differs from that proposed by the union, the application must be reconsidered against the acceptance criteria.

Where a majority of the bargaining unit are not union members, the CAC will then order a ballot. If the union has a majority of the bargaining unit in membership, the CAC may grant recognition without a ballot. The CAC may, however, still order a ballot when it:

(1) deems that it is 'in the interests of good industrial relations' (Trade Union and Labour Relations (Consolidation) Act, 1992 (TULR(C)A), Schedule, A1, para 22(4) (a)) to hold a ballot;

(2) is informed by a significant number of union members that they do not wish the union to represent them for collective bargaining; or

(3) has evidence that leads it to doubt that a significant number of union members want the union to bargain on their behalf.

Where a ballot is ordered, the union is entitled to have access to the workforce and there are legal duties on the employer to co-operate in the conduct of the ballot. The union must secure a majority in favour of recognition, but also the support of at least 40 per cent of the workers in the bargaining unit. If recognition is granted, the parties are expected to reach agreement on a method for conducting collective bargaining. If the parties are unable to reach an agreement, the CAC may assist and ultimately determine a legally enforceable bargaining procedure that is limited to pay, hours and holidays. Adherence to this imposed procedure is enforced by an order of specific performance, in which non-compliance means contempt of court with the possibility of unlimited fines and imprisonment.

## 3. Use of the Statutory Recognition Procedure 2000-03

The number of applications to the CAC made in the first three years of the procedure has been small. Figure 1 shows the progression of the cases in the first three years. Of the 233 distinct applications, 205 cases have been decided or withdrawn; of these 64 had resulted in statutory recognition and in a further 59 cases the application had been withdrawn at some stage because the employer and the union had reached a voluntary agreement or desired to enter into voluntary discussion. Thus 60 per cent of the completed cases passing through the CAC procedure have

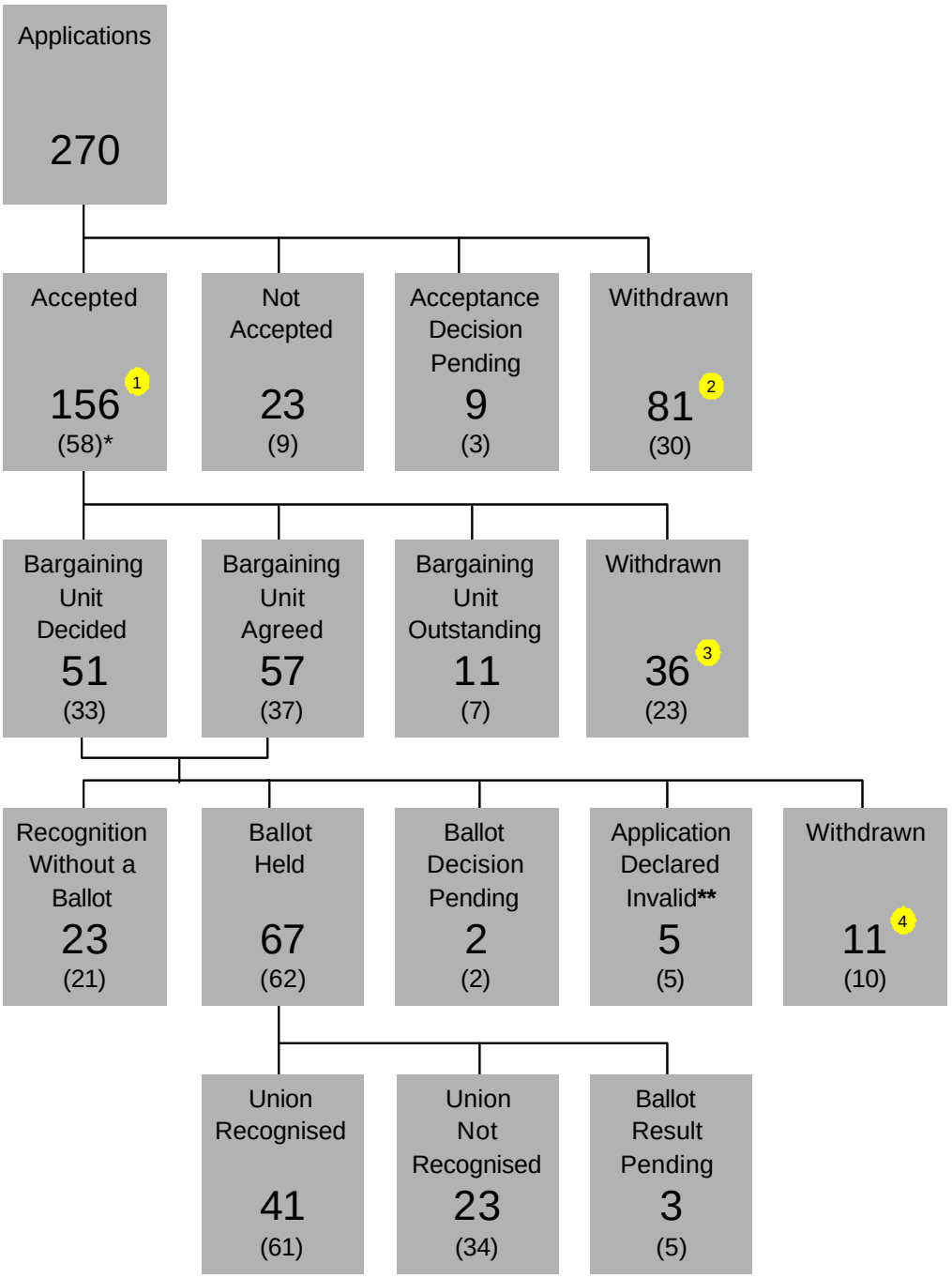
resulted in recognition or discussions on recognition. Of the 64 ballots completed by the CAC in its first three years, unions have won 41 (64 per cent, with the outcome of three others unknown at 31 May 2003).

So far the size of the proposed bargaining units has tended to be small. Of the 193 cases where we have information, the median unit proposed had 93 workers, with 27 per cent having 50 or fewer workers, 25 per cent having between 51 and 100 workers, 22 per cent having between 101 and 250 workers, leaving 25 per cent with over 250 workers. In addition, CAC applications have tended to be in a limited number of industrial sectors. A majority of both applications and successful cases have been in manufacturing and other areas where trade unions traditionally have had a strong presence, such as in transport, print and newspapers.

## 4. The Effectiveness of the Statutory Recognition Procedure

We analyse whether the procedure is achieving the government's three objectives, and hence providing a right to union recognition, proving workable, and is *de facto* being used as a last resort. We also assess whether it is stimulating trade union recognition, and particularly voluntary recognition. Since the main problems of the last procedure in the UK were employers not co-operating and judicial reviews which undermined its operation (Wood, 2000) we assess whether the procedure is able to fulfill its objectives without being constrained by employer behaviour designed to either undermine the procedure or trade union support and judicial reviews of CAC decisions.

## Figure 1 - Progress chart of applications to the CAC for recognition: 6 June 2000 - 31 May 2003




** Application declared invalid following a change in the bargaining unit from the unit proposed by the trade union.

1 The CAC determined at the admissibility stage that two applications were in associated companies and subsequently dealt with them as one application, whilst another application was accepted and subsequently declared invalid.

2 37 were withdrawn and resubmitted; 25 were withdrawn and a voluntary agreement reached.

3 From our research we know that 29 applications were withdrawn and a voluntary agreement reached. In one case the company closed, in the others there was no agreement.

4 Six were withdrawn and a voluntary agreement reached.

Our analysis is based on data from four sources. First, we conducted a survey of 400 private sector employers in July 2000, to coincide with the introduction of the ERA. It concentrated on the employers' experience of union activity. Second, we draw on semi-structured interviews with the general secretary or a senior national officer responsible for recognition in 17 TUC-affiliated trade unions, which we conducted between February and August 2000. These centred on trade union strategies in relation to recognition and recruitment. Third, we carried out a postal survey of all unions and staff associations listed in the Annual Report of the Certification Officer 1999-2000. This was undertaken in December 2000, just after the procedure had been introduced, and was concerned with the union's approach to recognition and the statutory procedure. Fourth, we have analysed information on the cases that have gone through the ERA procedure. This has been gained from a variety of sources, including a survey of union officials responsible for CAC cases that involved a mixture of interviews and self-completion questionnaires; documents made publicly available on the web site of the CAC; observations of CAC hearings; and interviews with CAC officers about details of the ERA procedure.

**The provision of a right for recognition**

Our concern here is whether the operation of the procedure is achieving the (first) objective of providing workers with a right to recognition where a majority of the relevant workforce want it. This right has from the outset been limited by aspects of legislative design that mean that certain workers cannot use the procedure even if there is majority support for a particular union. An application may be invalid because the employer employs 20 or fewer workers, or it may be inadmissible because the employer has already recognised a trade union, even though the union may be neither the union of the workers' choice nor independent. In the first three years, three cases have been dismissed by the CAC as invalid: *GPMU and Keely Print Ltd*, (TUR 1/98[2001]) on the first ground, and *Prison Officers' Association and Securicor Custodial Services Ltd* (TUR 1/5[2000]) and *ISTC and Bausch & Lomb Ltd*, (TUR 1/8[2000]) on the second. Six applications (*TGWU and Kwik-Fit, Edinburgh* (TUR 1/179[2002]); *AMICUS* and *Kwik-Fit GB* (TUR1/181[2002]; *ISTC and Polypipe Building Products* (TUR1/197[2002])*; AMICUS and Polypipe Building Products* (TUR1/199[2002])*; GMB and Faccenda Group* (TUR1/209[2002]) *and GMB and Faccenda Group* TUR1/210[2002]*)* were not accepted

because in three of the cases the proposed bargaining units overlapped with that in three of the other applications and both unions had at least ten per cent membership. But even within these boundaries, the CAC may further limit the extent to which the procedure can provide representation through the way it exercises its discretionary powers when making the three key decisions:

(1) whether a majority of the proposed bargaining unit would be likely to favour recognition.

(2) whether the bargaining unit proposed by the union meets a number of criteria, the overriding one being compatibility with effective management.

(3) whether to order a ballot when the union has majority membership, on one of the three permitted grounds.

**Admissibility**

The test of 10 per cent membership has not presented any great difficulties for the CAC in the cases which it has dealt with so far. Decisions on whether a majority of the workers are likely to support recognition have been made on the basis of the level of membership, letters or petitions by the workers in question, or a recent ballot of the workforce. In some cases a union will claim that a majority are likely to support recognition on the basis of membership alone, even though it has less than half the workforce in membership. The CAC has not adopted a rigid rule for deciding on whether support for collective bargaining is likely, such as a given level of current membership. An application where membership was as low as 16 per cent has been accepted, while one with 67 per cent has been rejected, the latter on the grounds that although ten of a bargaining unit of 15 were union members, seven had written to the CAC opposing recognition for collective bargaining (*GMB and Trafford Park Bakery* TUR1/153/[2002]). The CAC has allowed for the difficulty the union has had in gaining access to the workforce when interpreting this other evidence. Consequently even though the petitions have recorded lower than 50 per cent support, the CAC has accepted some cases; for example at GE Caledonian, it concluded that the 43.8 per cent support of the workforce was affected by anti-union conduct that had been carried to 'extreme lengths' (*AEEU and GE Caledonian Ltd*, TUR1/120/[2001]).

## The bargaining unit

In 51 (47 per cent) of the cases which have reached the bargaining unit stage, the CAC has needed to determine the appropriateness of a bargaining unit, as there was no agreement between the parties on what it should be. Table 1 shows that the CAC has supported the union's proposed unit or a variant of it in 34 (67 per cent) of these.

**Table 1: Cases where the CAC has determined the bargaining unit**

| Employer response to the union's proposed bargaining unit | CAC Decision | | | |
|---|---|---|---|---|
| | Supported Union's proposal | Variation of Union's proposal | Employer supported | Distinctive bargaining unit |
| Employer argued to include additional occupational group(s) | 20 | 3 | 4 | 5 |
| Multi-site employer argued to include more sites | 5 | 1 | 5 | 2 |
| Multi-site employer argued to included less sites | 1 | | | |
| Other | 4 | | | 1 |
| Total (%) | 30(59) | 4(8) | 9(18) | 8(16) |

In all but six of the 51 cases (88 per cent) where the employer has attempted to challenge the union's application, it has proposed an expanded bargaining unit based on including either more occupations or sites than were in the original application. This may have the effect of diluting union strength by including groups of workers among whom there is little evidence of support for the union. Nonetheless, in 23 of the 32 cases where the employer has sought to include more occupations, the CAC has resisted this argument on the basis that the terms and conditions of the occupational group proposed were distinctive.

The trade unions have had more difficulties where the employer has sought to extend the bargaining unit to include all sites in the company, as in 5 of 13 cases the CAC has ruled that the bargaining unit should embrace workers sharing the same distinct terms and conditions on all sites in the organisation, and in one other the CAC included another workplace but proposed a new bargaining unit differing in occupational terms. For further details of these 'multi-site' cases (see Section 5, 2.35, page 25).

**CAC-ordered ballots**

Of the 64 ballots ordered by the CAC, 46 were because the union did not have a majority of the bargaining unit in membership on application. Eighteen ballots have been held in cases where the union, on application to the CAC, was verified by the case manager through a membership check, as having a majority in membership (Table 2). Of these four were ordered because changes to the bargaining unit (either agreed or determined by the CAC) meant that membership was then below 50 per cent. In two other cases, the union submitted that it did not want to claim recognition without a ballot.

**Table 2: CAC ballots and reasons for balloting where Union had less than 50% on application**

| Reason for ballot | Ballot won | Ballot lost | Total |
|---|---|---|---|
| **Union had 50%+ on application** | | | |
| In the interests of good industrial relations | 4 | 1 | 5 |
| The CAC was informed by a significant number of union members that they did not wish the union to represent them | | 1 | 1 |
| The CAC has evidence which led it to doubt that a significant number of union members want the union to bargain on their behalf | 1 | | 1 |
| Union agrees to a ballot | 1 | 2 | 3 |
| Change to bargaining unit means union membership fell below 50% | 1 | 3 | 4 |
| Union membership fell below 50% | 1 | 3 | 4 |
| **Total** | **8 (44%)** | **10 (56%)** | **18** |
| | | | |
| **Union did not have 50% on application** | **33 (72%)** | **13(28%)** | **46** |
| TOTAL | 41 (64%) | 23 (36%) | 64 |

The first criterion ('in the interests of good industrial relations') has been invoked in five cases; in *GPMU and Red Letter Bradford Ltd*, TUR 1/12[2000], where relations between the union and the employer had been poor, a ballot was justified as an opportunity to 'clear the air'; whereas in *ISTC and Fullarton Computer Industries Ltd*, TUR1/29[2000], recognition was ordered on a membership of 51.3 per cent because a ballot would 'engender further antagonism and divisiveness detrimental to developing good industrial relations'. In the case of *BALPA and Excel Airways*, TUR1/146[2001] a ballot was ordered for the same reasons in the context of the company having set up a 'democratically-elected Business Forum'. The second criterion (that a significant number of union members inform the CAC that they do not want the union to represent them in collective

bargaining) was invoked in *UNIFI and Turkiye Is Bankasi AS*, TUR1/90[2001], when three members of the union wrote to the CAC stating that they did not want the union to conduct collective bargaining on their behalf. The union submitted that these employees had done this under pressure from the employer; nonetheless the CAC considered that a ballot was necessary. Only 35 per cent voted in favour of recognition, despite a union membership level of 83 per cent at the time of the application. The third criterion has been invoked in two cases. In *AEEU and Huntleigh Healthcare*, TUR1/19/[2001] and *TGWU and Economic Skips*, TUR1/121/[2001], the CAC considered that membership evidence raised doubts as to whether a significant number of workers in the bargaining unit wanted recognition. In *Huntleigh Healthcare*, the CAC determined there should be a ballot because union membership had been granted on the basis of no subscription.

The remaining four cases were the result of the CAC ordering a ballot because the union no longer had majority membership (see Section 5, 2.25, page 24).

**A workable statutory recognition procedure**

*Employer intervention in the procedure*

The procedure has scope for employers to influence the outcome of the process, first by allowing them to give evidence to the CAC on their view of the union's proposed bargaining unit and their perception of the likely support for trade unionism.

In some cases, employers have sought to gain the names of the union members and supporters, the implication being that they would act in some way on this information. The CAC has resisted this and has developed a means of conducting a check on the membership by obtaining union membership names from the union and the names of workers in the proposed bargaining unit from the employer (Central Arbitration Committee, 2002: 11). In other cases employers have sought to control the CAC's use of its discretion so the procedure operates to their advantage. A good example of this is the practice of employers seeking to dilute the formal support for the union by expanding the bargaining unit into areas where union support is likely to be lower. As we have shown, the CAC has not always supported the union in such matters. In addition, there are still opportunities for the employer to manipulate the membership of the bargaining unit after its formal determination, and in, at least one case, unions have reported that employers have redefined the

contractual status of employees in order to include them in the employees balloted. When ordering a ballot even though 50 per cent of the workforce is in membership, the CAC also appears to have been influenced by the employer's arguments. In *TGWU and Economic Skips Ltd*, TUR 1/121[2001], one of the reasons for ordering a ballot was 'the sincerely held view of the employer that the majority of the workers in the bargaining unit did not want recognition'.

We have also observed tactics in the process which display a strategy of opposition to the spirit of the process. Two stand out:

a) legalism, whereby the employer - with legal assistance - identifies and exploits technical legal points as a strategy of opposition;
b) litigation, whereby the employer challenges the CAC at every step, including admissibility, the bargaining unit, the need for a ballot and the form of the ballot.

The minimum effect of these approaches is to lengthen the case and to add to the costs for the union. The maximum effect is that the union is defeated on some technicality, as in *GPMU and Keeley Print*, TUR1/98[2001], where it was ruled as a matter of law that a director is not a worker with the result that the employer did not have 21 workers. The CAC is relatively powerless to do anything about such tactics: there is little that it can do but deal with the points raised if employers (or unions) who have chosen to be represented by counsel raise technical arguments about the meaning of a 'worker' or the meaning of a 'trade union member', or the meaning of an 'associated employer'. This is even so when these points may result in the termination of an application which, if tested, would have the support of the majority of the workforce.

**Employer behaviour in the workplace**

The procedure also places few constraints on employers putting their case against the union to the workforce in order to influence the outcome. However, if the procedure is to test for majority support for the applicant union, the environment in which this is conducted must permit a true and fair measure of support. There is a thin dividing line between employers putting their case to the CAC or the workforce and affecting the result by unfair practices. In a number of cases, it appears that the employer has genuinely wanted to test majority support for recognition and not to interfere with the process. In one CAC case that we have observed, the employer did behave in a neutral manner during the ballot; the management simply responded to the claim by answering any questions

posed by the CAC, while clarifying at the outset that it would accept the outcome of the ballot. In contrast, from CAC reports, our observations of CAC hearings, and interviews with union officials who have submitted an application to the CAC, there are a variety of ways in which employers have sought to discourage or defeat an application. The employer may threaten and intimidate workers with the objective of dissipating commitment to the union.

In the first three years of the procedure unions lost over a third of ballots (36 per cent). In just under a third (20 of 64) of ballots, union support has been lower than union membership was at the outset and, in some of these cases, this may be explained by employer behaviour after the application was made or in the ballot period. Employers in CAC ballots have used the type of anti-union tactics reported in US National Labor Relations Board elections (see for example Bronfenbrenner and Juravich, 1998: 22-23), including the use of supervisors to convey employer opposition, one-on-one communication about the implications of recognition between managers and employees; captive audience meetings; victimisations and actual dismissals of activists; redundancies involving union members; and threats to relocate production or close the workplace. In our survey of CAC cases, we found that, where there have been ballots a half (51 per cent) of employers used at least two of these anti-union tactics and that there is a significant relationship between these employers and the outcome of the ballot. In nearly nine out of ten (86 per cent) of unsuccessful ballots employers had adopted at least two tactics compared to under a third (31 per cent) of successful ballots.

The CAC's powers to deal with intimidation are limited, and there is little regulation of employer behaviour before the ballot period. It is true that employers must permit the trade union to have access to the workforce during the ballot period, and that employers are obliged to co-operate during the ballot process; both access and employer conduct are governed by a Code of Practice which sets out minimum access conditions and advises the parties of the kind of behaviour which is not acceptable; and, the CAC can impose recognition where the employer has failed to comply with its duty to co-operate during the ballot, without the need for a ballot to be held. But no such order has either been granted or contemplated. In two cases where the ballot was lost that we observed, an oppositional employer was able to limit the access granted to the union during the balloting period; other cases may also exist.

**The courts and the statutory procedure**

Employers may take their litigation strategy to the point where they challenge the CAC's decision in the courts. The steps that have been taken in the legislation to define and circumscribe the discretion of the CAC and to protect its autonomy do not guarantee immunity from judicial review. It is also the case that the introduction of the statutory recognition procedure coincided with the implementation of the Human Rights Act 1998 which gave the courts new powers to ensure that public authorities (including the CAC) respect the substantive and procedural human rights of the parties appearing before them. Four applications for judicial review have been made so far, and, of these, employers made three and a trade union the other one (CAC, 2002: 18). Two cases were refused leave to be heard and two were heard. The courts have approached the new procedure very differently from the way they approached the earlier procedure in the 1970s where they appeared unsympathetic to the legislation. In *R* (*Kwik - Fit (GB) Ltd) v CAC* [2002] IRLR 395), the Court of Appeal endorsed in 'strong terms' the view that 'the CAC was intended by Parliament to be a decision-making body in a specialist area, that is not suitable for the intervention of the courts' (p. 396). This is a sign that the courts may be willing to allow the procedure to work as intended, and crucially to do so in a way that will enable workers to secure trade union recognition where this is in accordance with the wishes of the majority.

The two cases that have been heard have both endorsed the way that the CAC has been operating. The first, *Fullerton Computer Industries Ltd v CAC* [2001] IRLR 752, dealt with several concerns, including the refusal of the CAC to order a ballot where the union had only a slender majority of the bargaining unit (51.3 per cent) in membership - this being done on the grounds that a ballot 'would engender further antagonism and divisiveness detrimental to developing good industrial relations' TUR1/29[2000]. The employer's challenge to this decision was unsuccessful and the court refused to intervene despite the fact that it recorded that it 'would have been inclined to take the view that a ballot has a stabilising influence and might well improve industrial relations rather than to cause them to deteriorate' (p. 745) and that 'the reasoning' of the CAC 'might be said to be less adequate than might otherwise have been desired' (ibid). Moreover, the court also disputed the decision of the CAC that a narrow majority was not an adequate reason for holding a ballot and the CAC's view that to do so would in effect raise the

statutory threshold for automatic recognition. Nevertheless, the court was not inclined to challenge the decision of the CAC.

The other case involved the CAC's determination of a bargaining unit. In this case, *Kwik-Fit* challenged the CAC's rejection of its proposal for a single unit covering the whole country in favour of the union's proposal for a unit defined as being within the boundary of the London orbital road (the M25). In reaching this decision, the CAC drew attention to the fact that, under the legislation, it is 'not required to decide on the most effective form of management, merely that what we decide is compatible with effectiveness' (TUR 1/126 [2002]). This latter approach was endorsed by the Court of Appeal which pointed out that in determining the bargaining unit, 'the statutory test is set at the comparatively modest level of appropriateness, rather than the optimum or best possible outcome' (2002 ILR (396). But the appeal judgement stressed that this does not mean that the CAC can confine itself to the union's arguments. Its statutory requirement involves considering the views of the employer and thus, it concluded, that the CAC has to consider alternative bargaining units to the extent that these are a part of the employer's argument in order to assess whether the union's proposed bargaining unit meets the statutory criteria. Thus, once the CAC decides that the union's proposed unit is appropriate, 'its inquiry should stop there'.

These judicial review decisions are important, though they would not have undermined the procedure fatally had they gone the other way. If the employers had succeeded in the *Fullarton* case on the ballot point, it would mean that the CAC would have been more likely to have ordered a ballot in cases where the union had only a slender majority in membership of the bargaining unit. The remarks of the judge in that case may in any event be enough to induce caution in future cases. If the employers had succeeded in the *Kwik-Fit* case, it would mean that the discretion of the CAC in bargaining unit disputes would have been significantly constrained and that the employer's voice in these cases would have been enhanced. This would have been particularly important in the case of multi-site employers, where the evidence suggests that in most of the cases where the bargaining unit is disputed, the CAC has tended to prefer a larger multi-site unit rather than a single-site unit. The effect of *Kwik-Fit* is to remove doubt about the nature of the CAC's discretion and may mean that they make different decisions in the future in multi-site companies.

**The effect of the statutory procedure on voluntary action**

If the legislation were achieving its overt goal of encouraging the voluntary settlement of recognition disputes, we would expect that achieving recognition has become more significant for trade unions and that this is matched by their investing more resources into organising and recruitment. We should also expect a significant change in the trend of voluntary agreements across the economy and that the majority of recognition disputes would be settled outside the procedure. If it were working perfectly, there would be no CAC cases. It is too early to test conclusively whether these expectations have been fulfilled and any analysis is constrained by the limited data on recognition cases before the Act came into force. We will nonetheless examine the available data to provide an assessment of this aspect of the ERA procedure so far.

**The Statutory Recognition Procedure as a stimulant of activity**

The union survey revealed that, in the three years between 1997 and 2000, unions have been placing more emphasis on securing recognition. Discounting those for whom recognition is not significant (40 per cent of the sample), 61 per cent of unions claimed that by 2000 achieving new recognition agreements was more significant now than it was in 1997. Two thirds of these unions reported an increase in the number of recognition cases pursued between 1997 and 2000 and well over half reported greater success in securing voluntary recognition during this period. Nearly two thirds of those recording greater success attributed it to the legislation, although two public sector unions said the change was linked more directly to the contracting out of work and the transfer of undertakings law connected with this. Others put it down to union strategy and in particular the increased emphasis placed on recruitment and organising in the light of the TUC's instigation of an Organising Academy. Nonetheless, data from our interviews with union officials in 2002 concerning CAC cases have confirmed that the existence of the ERA procedure has increased their confidence of the union realising a return on any enhanced investment that they may make in recruitment campaigns. As one union official put it, when discussing recruitment, 'The procedure has made all the difference. It has provided people with a reason to build membership, and the individual right to representation (also in the ERA - *authors' addition*) has given the union a way of being visible - the ERA is important as an organising tool'. Consistent with this, the employer survey revealed an

increase in union campaigns with the advent of the ERA procedure. Between 1995 and 2000 - 12 per cent of workplaces had been subject to a campaign - 41 per cent of which had been in the first half of 2000, with 17 per cent in 1999.

The union survey confirmed that unions were not expecting to gain recognition ahead of recruiting members, so that a 'strategy of organising the employer', as one General Secretary called it, was being pursued seriously by only one union, and this was not at the expense of its own organising approach. It also revealed that unions for whom recognition is important were significantly more likely to be adopting a systematic approach to recruitment and organisation. More specifically they were more likely to target particular workplaces for both recruitment and recognition, to employ organisers or recruitment officers whose job is solely to recruit and organise, and to sponsor organisers from the TUC's Academy (Wood *et al*, 2002: 224-227). These unions were significantly more likely to have a formal approach to the CAC procedure and have an internal monitoring procedure to control the submission of CAC cases. The approach of not relying on employers is consistent with the results of the survey of employers, which revealed that the initiation of recognition discussion by employers is rare. Employers had initiated a minority of the discussions that led to new recognition agreements, which we observed between 1996 and 2000 or were live at the time of the survey, and these were largely in response to a union campaign or in anticipation of one. In some cases the employer had approached an alternative union to the one either pursuing recognition or thought by management to be contemplating a claim.

**The statutory recognition procedure as a stimulant of agreements**

The TUC has been monitoring recognition agreements since 1995 (TUC, 2002). It is based on a survey of 75 per cent of the unions affiliated to the TUC and thus is likely to underestimate activity, though recognition may not be important for those not included. The survey population is consistent over time though there is no information on non-respondents to the individual surveys. The data are unfortunately collected in varying time periods. Table 3 reports the recorded voluntary recognition agreements from 1995 - 2002 and we observe that in the period November 2000 to October 2002 the level of recognition agreements increased substantially from the levels for most of the second half of the 1990s. While it appears that the level was never above 100 per year in the latter period, post the ERA it was at 443 in the year November 2000-October 2001 with a further 264

signed between November 2001 and October 2002. It is difficult to gauge the precise effect of the ERA since the reporting period immediately prior to its implementation extends from November 1999 to October 2000. We certainly cannot assume that all of the additional cases beyond the norm for the 1990s (of below 100) were accounted for by cases that occurred after June 2000. It is noticeable that the increase in agreements began before the ERA, indicating that there was some shadow effect of the ERA prior to its implementation. Nonetheless, the main effect is post-the ERA. But, even here, there is some pre-ERA shadow as the initial discussions over recognition could well have begun before its implementation.

**Table 3: Voluntary Recognitions: 1995-2002**

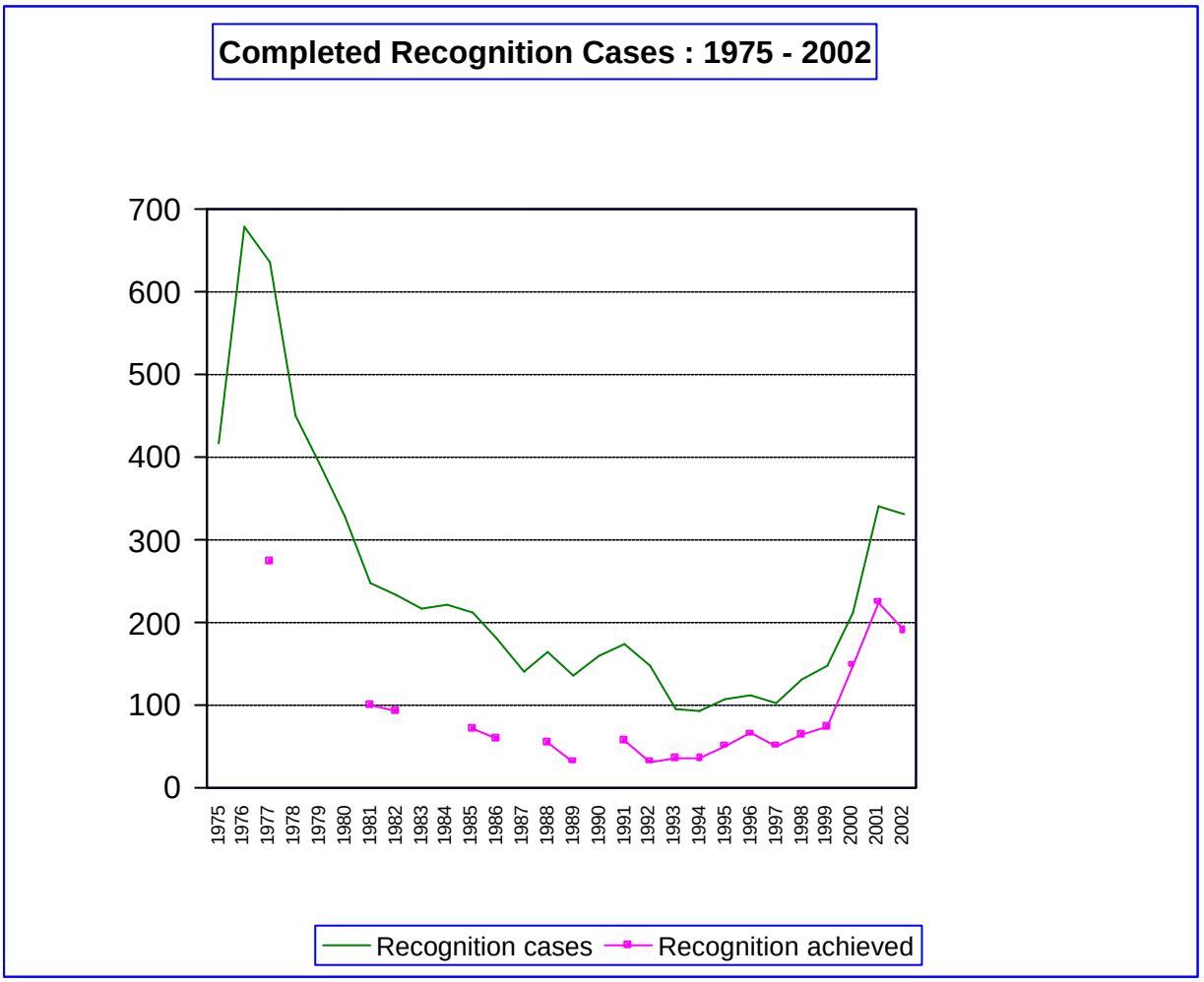
| Period | Number of new agreements |
|---|---|
| July 1995 - December 1995 | 54 |
| January 1996 -June 1996 | 54 |
| July 1996 - December 1996 | 56 |
| January 1997 - June 1997 | 26 |
| July 1997 - February 1998 | 55 |
| March 1998 - November 1998 | 34 |
| December 1998 - October 1999 | 75 |
| November 1999 - October 2000 | 159 |
| November 2000 - October 2001 | 443* |
| November 2001 – October 2002 | 264* |

* Excludes statutory and semi-statutory agreements

*Source:* TUC Trends Surveys (TUC, 2002)

The second data source is the ACAS conciliation cases involving recognition disputes. Figure 2 records the ACAS conciliation activity in this area since its inception. It shows a gradual decline in cases from a peak of 697 to a low of 93 in 1994. There was a gradual increase from then on, with a substantial increase in 2000, taking the figure beyond 200 for the first time since 1985, followed by an even greater increase in 2001, when 339 cases were recorded, a figure that was maintained in 2002 when there were 330 cases. Moreover, the proportion of ACAS cases where recognition for collective bargaining was achieved has increased substantially since the early 1990s. From a low of 21 per cent in 1992 (when ACAS handled 148 cases the proportion was around 50 per cent each year between 1996 and 1999), in 2000 it was 70 per cent; in 2001, 66 per cent, and in 2002, 57 per cent of ACAS's conciliation cases that involved recognition.

**Figure 2**




Source: ACAS annual reports and internal statistics.

The analysis of the TUC and ACAS data thus suggests that the ERA procedure did initially stimulate recognition on a voluntary basis, while the ACAS data suggest that it increased the chances of the unions achieving recognition when recognition is in dispute, at least when they or the employer have involved ACAS. It does not of course follow that this initial effect will be maintained.

**The statutory recognition procedure as a last resort**

It is difficult to establish the proportion of recognition disputes that are settled outside the statutory procedure relative to those within. There is the initial problem of identifying the commencement of a recognition dispute. It could be when either a union or an employer makes a formal approach to

the other party for recognition, or when a union campaign begins, or an employee makes an approach to a union. But regardless of how defined, there is the problem that there is no available data set of such disputes. In the absence of this, we (1) compare the number of recognition agreements which have been determined by the CAC relative to the number of those settled voluntarily, using the TUC data, and (2) examine the disputes whose resolution involves state machinery, and thus compare the use of the CAC procedure with the use of ACAS conciliation.

Unfortunately the TUC's post-ERA data cover only the period November 2000 to October 2002. During the period November 2000 to October 2001, the TUC recorded 449 full and partial voluntary recognitions (of which six were semi-statutory having initially been in the CAC procedure), while in the same period there were 90 distinct CAC applications by TUC affiliated unions (and six by non-TUC unions). The CAC subsequently awarded recognition in 25 cases (with 32 cases withdrawn and a semi-statutory agreement concluded). CAC cases thus represented 11.4 per cent of all new recognitions achieved by the unions reported to the TUC during that period. During the second year of TUC data, November 2001 to October 2002 the TUC recorded 280 full and partial voluntary recognitions (of which 16 were semi-statutory); in the same period there were 77 distinct CAC applications by TUC affiliated unions (and two by non-TUC unions). At the time of writing the CAC had awarded recognition in 27 cases (with 16 withdrawn and a semi-statutory agreement concluded). CAC cases represented 14.0 per cent of new recognitions reported to the TUC in that period. Overall during the two-year period November 2000 to October 2002 CAC cases represented 12.4 per cent of new recognitions reported.

The comparison of the use of the CAC procedure with that of the ACAS facilities reveals a similar picture. During the period June 2000 to December 2001 the CAC received 126 distinct applications, which compares with 608 requests for conciliation over recognitions that the ACAS handled. In 2002 the CAC received 77 distinct applications whilst ACAS handled 343 requests. However, there is likely to be some overlap between the two groups as ACAS may have been involved in some CAC cases before they entered the procedure (though this may have been before the period which our data covers) or even where the case is in the procedure (as we observed happening in some cases e.g. *Benteler Automotive*). Nonetheless, we can conclude that overall CAC cases represent no more that 21 per cent of all recognition disputes that involved a government agency.

In terms of the numbers of workers affected by the procedure relative to voluntary cases, again the impact of the CAC procedure has been limited: 18,600 workers are covered by the recognition orders which were made in the first three years of the scheme's operation. Of these, almost 4,000 are accounted for by AMICUS' (then the AEEU) successful recognition ballot at Honda (*AEEU and Honda* TUR1/129[2001])). In addition we estimate that around 10,000 workers are covered by agreements reached in the statutory cases that were withdrawn from the CAC as the parties had reached or were discussing an agreement. (For convenience we call these semi-statutory agreements.)

To put these figures in perspective, we estimate that the number of workers covered by recognitions with TUC-affiliated unions resulting from CAC cases (including semi-statutory agreements) represent 15.5 per cent of those covered by new recognitions (voluntary ones recorded by the TUC or through the CAC) during the period November 2000 to October 2001 and 4.3 per cent in the period November 2001 to October 2002, the two periods covered by the TUC figures on voluntary recognition. Over the entire two-year period the figure is 8.5 per cent. Nonetheless the increase in the number of recognitions is not insignificant relative to the number of 'ready-made' CAC cases when the ERA was implemented. On the basis of our employer survey in private sector workplaces with 50 or more employees, we estimated that, while there was scope for recognition in 89 per cent of private sector workplaces (with 50 or more employees), i.e. 32,464 workplaces, in only six per cent (2,284) was there over 10 per cent union membership with no recognition and 0.5 per cent of workplaces (183) with more than 50 per cent membership (Wood, *et al*, 2002: 220).

Finally, the overall effect of the new recognitions is that the fall of membership (of 36,765) recorded by the TUC in 2001 would, we estimate - on the assumption that 80 per cent of those in the new bargaining units had joined the union following recognition - have been nearly four times greater than it was. The fall (of 118,900) recorded by the Certification Officer for the same period (Certification Office for Trade Unions and Employers' Associations, 2002: 21) would likewise have been nearly double what it was. Put another way the decline in membership of 0.5 per cent registered by the TUC for 2001 would have been nearer to 2.0 per cent had the new recognitions not occurred, and that of 1.5 per cent recorded by the Certification Officer would have been 2.6 per cent. For 2002 the further drop in membership (of 49,303) would have been nearly five times greater than it was. That is, the membership loss of 0.7 per cent registered by the TUC would have

been nearer to 3.2 per cent had the new recognitions in 2002 not occurred, and that of 0.4 per cent recorded by the Certification Officer would have been 2.4 per cent.

**Conclusions to analysis of the procedure's use: 2000-3**

Our analysis of the first three year's operation of the CAC's procedure implies that, it is largely achieving the objectives against which we have judged it. It is providing a right to union recognition, seemingly encouraging the voluntary resolution of disputes and being used only as a last resort. It is not however problem-free.

One problem relates to the CAC's approach to the bargaining unit, particularly in multi-site cases. Unless the CAC is consistently to take a different approach to the one adopted in the majority of such cases, the difficulties for unions in these cases could be insurmountable, with the result that the procedure will be confined in practice to small employers operating in a single location where bargaining units remain as now, small. A second problem involves the CAC's ordering of ballots in cases where the CAC has verified that the union had a majority in membership on application, but where union membership has declined since the application was submitted. A third problem is that unions are vulnerable to a number of strategies adopted by employers which may defeat applications, and in these cases the CAC appears inadequately empowered to make an effective response. Employers are apparently free to recruit into a proposed bargaining unit before a ballot is held with a view to diluting union strength and unions have access to the workforce only during the balloting period. The employer has access to the workforce at all times, and there is little regulation in practice of hostile conduct (short of dismissal or discriminating conduct directed at specific individuals) outside the balloting period. The failure rate in ballots of 36 per cent is likely to reflect such pressure and is not insignificant, especially given that the cases have been through the admissibility tests.

# 5. A Response to the Consultative Document on the Review of the Employment Relations Act

In this section we comment on all the points that are made in the consultative document, both the areas where the document suggests improvements on the procedure and where no changes are envisaged. We have structured our comments following the sequence of the consultative document. The numbers refer to the paragraphs in the text and the headings reflect the main point made by the consultation document within them.

### 2.9 The view that the scheme has been a success

Our analysis of the first three year's operation of the CAC's procedure suggests that, within the terms of the government's initial objectives, it is a qualified success. On the one hand, the procedure is providing a right for union recognition in the majority of cases where more than 50 per cent of the workforce wants it. On the other hand, the experience of the first three years has highlighted problems with the procedure and its operation that may be constraining this right.

By a procedure that would work, we take the Government to mean one that is acceptable to both sides of industry and can be operated in a way that is likely to withstand (a) employer behaviour calculated to undermine trade union support, and (b) any judicial review of the agency charged with the responsibility of administering it. The CAC does not appear to be unduly constrained so far by the judicial reviews of its procedures and decisions. But it is in the area of employer behaviour that most problems appear to be arising.

In terms of the government's aim that the statutory procedure should encourage voluntary resolution of disputes and be used only as a last resort, the experience of the first three-years suggests that there has been some success. The unions, coordinated by the TUC, have been concerned to ensure that the CAC procedure was not discredited or made unworkable in its first years. Its ability to act as a device that influences voluntary discussions clearly depends on its being perceived to be working. Ensuring that the voluntary route is pursued in the first instance is a vital part of this, the implication being that the unions will not submit CAC applications as a first move in a recognition campaign prior to their having secured a base of membership. A survey of unions that we conducted in 2000 revealed that unions only intend to use the procedure when they have

gauged that the employer is unwilling to discuss a voluntary agreement and are confident that they had sufficient support to win a ballot (Wood *et al*. 2002: 227-228). They are thus not over-relying upon building up membership or support once they are in the CAC process. This approach is reflected in both the low number of cases that have gone to the CAC and their proportion relative to voluntary recognition agreements. We estimated (see page 19 above) that statutory recognition awards and semi-statutory agreements (i.e. agreements reached after a CAC claim has been withdrawn) represented just over ten per cent (12 per cent) of all agreements reached in the first two years of the procedure.

The number of new recognition cases has increased. Of course, we have to be mindful that we cannot unequivocally attribute all the increase to the procedure and its impact. But its does seem reasonable to suggest that the significant increase in the number of recognition agreements in recent years is due principally to the ERA. The factors other than labour law and policy that have been used to account for the union decline in the past two decades, such as product market competition, the economic policies of the government and labour market conditions, have not changed substantially in the past two years. It is also not possible to separate the influence of the procedure itself from the government employment policy of which it is a part. The pursuit of partnership, a central plank of this policy, may also have some influence, although this is difficult to determine. Our evidence does, however, suggest that employers have not initiated recognition agreements with unions on any significant scale as a means of kick-starting a new partnership approach to employment relations.

### 2.16 Maintenance of the size threshold of 21 or more employees for applications to be accepted

Our research does not bear directly on this, but there have been CAC applications for bargaining units with under 30 employees (and more with between 31 and 50 employees), where it is known that the bargaining unit comprises almost all the workforce in a small firm (examples would include the *GMB and Northbourne, TUR1/183[2002]* and the *AEEU and BSW Timber, TUR1/67[2001]*). This suggests there is demand for recognition by workers in small firms. The threshold does deny the basic right that the legislation was intended to provide to the sizeable number of workers who work in small firms.

### 2.21 Maintenance of the 10% membership and the 'majority likely' test

Our research suggests that the ten per cent membership has not presented any great difficulties for the CAC in the cases that it has dealt with so far.

The application of the majority-likely test has been helped by the fact that the CAC has not adopted a rigid rule for deciding on whether support for collective bargaining is likely, such as a given level of current membership and that it has been willing to use other evidence e.g. petitions provided by the union in making its decision. No case thus far has been accepted with a membership of lower than 36 per cent without there being other evidence about the support for collective bargaining (see page 7 above). In earlier cases there was some inconsistency over the confidentiality of petitions of support for recognition; in the case of the *TGWU and Peter Black Healthcare, TUR1/78[2001],* where the union had undertaken not to reveal to the company the names of those that have signed a petition, the CAC stated the petition was not admissible unless copied to the employer. In later cases the CAC appears to have taken the view this information can be made available to the CAC on a confidential basis.

### 2.25 Maintenance of the CAC's discretion to order a ballot in cases where membership exceeds 50%

The CAC appears to have used this discretion sparingly. But from the reports on cases it might appear on the surface that the 'in the interests of good industrial relations' criteria might have been applied inconsistently, when this may not be the case. It would be helpful if greater detail is given on the reasons for ballots being called and the background factors to the case so that, for example, the assumed effects of holding or not holding a ballot are clear. In the case of *the GMB and Northbourne, TUR1/183[2002]*, no substantive reasons for the judgment that a ballot would be 'in the interests of good industrial relations' are provided. The opportunity for employers to intervene in this decision is demonstrated in the case of *TGWU and Economic Skips, TUR1/121[2001],* where the results of an employer internal survey were used by the employer to cast doubt on support for recognition. Despite the union having over 50 per cent membership the CAC called a ballot 'in the interests of good industrial relations' on the basis of 'conflicting evidence' as to the wishes of the workforce, 'the sincerely held view of the employer that the majority of the workers in

the bargaining unit did not want recognition, and the willingness of the company to co-operate fully with the Union if a ballot demonstrated that the majority of the workers in the bargaining unit supported recognition'. The union lost this ballot.

In four cases, the CAC has ordered ballots when there has been an apparent decline in the number of union members from the time when the application was made to a level of below 50 per cent. The reasoning is that the requirement for the CAC to be satisfied that a majority of the workers in the bargaining unit are members of the union (paragraph 22(1)(b) of the Schedule) is worded in the present tense. Thus what matters for the CAC is whether the union has a majority in membership at the time it takes the decision on whether to hold a ballot or grant recognition without a ballot. This is an area for concern, since union membership can be fragile and sensitive to labour turnover, redundancies, and employer pressures and intimidation. In Canada votes are expedited to avoid this, and a union may be legally recognised if it is determined that employer intimidation prevented a union from reaching or maintaining majority support. There is a similar provision in the USA, although labour unions must establish that they did at some point have majority support.

**2.28 The Government does not propose to make any changes to or abolish the 40% threshold requirement in the ballot**

This has thus far only affected one case, but it remains unclear why a ballot threshold not applied in any other area of public life should be applied in these circumstances.

**2.35 The government proposes to clarify the statute to make clear that the employer's comments on the union's proposal and any counter proposal are taken into account in determining whether the union's proposal is compatible with the statutory criteria**

In the majority of cases where the bargaining unit has been contested, the CAC has upheld the union's proposed bargaining unit. In most of the cases where management has proposed a broader range of occupations than were in the union's submission, the CAC has accepted the original unit. However, in certain cases, the CAC has broadened the unit. In one of the three exceptions, the application by the NUJ at the *Staffordshire Sentinel, TUR1/65[2001]*, the CAC ordered that the bargaining unit include both journalists and editorial staff, even though the NUJ does not - and has

no power under its rules - to recruit the latter (see section 1, p.8 above). This also highlighted some inconsistency in the CAC's approach as in other NUJ cases where the bargaining unit was contested this decision was not made.

Our research suggests that the main problem for unions has been when an employer with multi-sites has sought to extend the bargaining unit beyond the single site upon which the union's submission is based. In five of 13 cases the CAC has ruled that the bargaining unit should embrace workers sharing the same distinct terms and conditions on all sites in the organisation, while in one other the CAC included another workplace but proposed a new bargaining unit differing in occupational terms. In five of these six cases, the union could not subsequently demonstrate sufficient support for recognition amongst the workers on the other sites that the CAC included in the revised bargaining unit (the sixth had at the time of writing not been revalidated). In these cases the application has either been ruled by the CAC as no longer valid (*ISTC and Hygena, TUR1/33[2001]*); withdrawn by the union (*GPMU and Getty Images, TUR1/104[2001*]; *TGWU and Maxims Casino, TUR1/105[2001]* and *TSSA and Airmiles Travel Promotions, TUR1/195[2002]*); or failed as a majority did not vote for recognition (*BFAWU and Seabrook Potato Crisps, TUR1/54[2001]*. In the one case, where the union supported a company-wide bargaining unit but the company argued for less sites to be included (*BALPA and Ryanair, TUR1/70[2001]),* the CAC ruled in favour of the union.

The judicial review's judgement (*Kwik-fit versus CAC),* which clarified that the CAC does not have to select the optimum bargaining unit but only has to assess if the proposed bargaining unit is compatible with effective management, may mean that such decisions in 'multi-site' cases will no longer be made. Since the judgement, the CAC has upheld three bargaining units based upon one region of companies with wider geographical bases, in another case it determined that the bargaining unit include two call centres, rather than the one that formed the basis of the union's application. In one other recent case the CAC has upheld the regional nature of the bargaining unit, but widened the occupational group.

The proposal to clarify the statute to ensure that the employer's comments on the union's proposal and any counter proposal are taken into account is probably simply formalising the current practice. It is also in line with the Appeal Court's caution that because the statutory test is set at the '…. level of appropriateness, rather than the optimum or best possible outcome', it does not mean that the CAC can confine itself to the union's arguments. The wording of the statutory change could

also clarify that the statutory test is concerned with appropriateness, not optimality, of the bargaining unit. It might also be helpful to state that in the event that the union's proposed unit is found not to be compatible with effective management, the CAC is not obliged to accept the management's proposal and must consider fresh proposals from the union.

**2.37 The Government does not propose to make any changes to the 'small and fragmented' bargaining unit criteria**

We have no evidence that the criterion has not worked. It should be noted that in a significant proportion of CAC cases with bargaining units of 50 or less, the unit comprises a majority of the workforce.

**2.39 The government welcomes views on whether it should allow the CAC to determine an 'appropriate' bargaining unit that would encompass associated employers**

There have been two cases where employers have successfully argued that workers in the unions' proposed bargaining unit are employed by two associated employers, despite the fact that this ran counter to the experience of both the union and workers. The current definition does not constrain employers from dividing up companies into small units in order to avoid the statutory threshold of 21 employees. The proposal would allow the CAC to consider cases where the union feels this has been done or artificial distinctions have been made between companies and hence employees e.g. for tax purposes.

**2.42 The Government proposes to make no change to allow for the bargaining unit to change after an award had been made and before the method is decided**

This seems sensible as such proposed changes are likely to reflect employer dissatisfaction with the award.

**2.43 The Government does not propose to make any change to Part III of the Schedule**

There have been no cases on which to judge whether Part III is working and we agree that there are currently no grounds on which to propose changes.

**2.44 The Government proposes to change the law so that workers who are unable to attend their workplace on the day of the ballot would be able to vote by post**

The attempt to ensure maximum participation in the ballot is to be welcomed, and the redrafting should enable combination ballots to be used unconditionally, i.e. without any special factors having to be designated. It could allow postal ballots to be used in conjunction with a workplace ballot for reasons other than simply to ensure absentees are covered.

**2.45 The Government proposes to introduce a reserve power for the Secretary of State to enable the CAC to order a recognition ballot to be carried out with electronic voting as one of the options**

The facility to use e-mail should be encouraged, though it is unlikely that it can be used as the only means of voting in the foreseeable future. The value of e-voting in the statutory union recognition procedure might indeed be used as one spur for ensuring the piloting of e-voting and the ironing out of the security issues is done quickly.

**2.48 The Government proposes to allow the union access to the workers by means of postal communication, via a third party such as a Qualified Independent Person and invites views on whether this could be extended to electronic systems of communication**

The provision of access for the union to the workforce only during the balloting period is widely seen by unions as restrictive. The proposal to allow the union access through a postal communication, via a third party, is minimalist. A communication via e-mail would extend it. But access via the post or e-mail through a third party gives little opportunity for dialogue between the union and workers or for the union to understand the workers' desires. Our preliminary analysis of ballot results

demonstrates the influence that employers can have on workers either through direct contact or through their supervisors, and that such personal contact can begin well before the official balloting period. The current access arrangements allow the parties to develop their preferred methods and the same principles which underlie them might be extended to any access arrangements beyond the ballot period. Consideration should be given to bringing forward the timing of the negotiations on access to the point when the application is accepted.

**2.51 The Government does not intend to add training to the current list of core bargaining issues for the purposes of the statutory recognition procedure**

While training may not be something that is best dealt with, or often dealt with, via zero-sum bargaining, it is a prime example of a potential topic for integrative bargaining. Given the importance of training to the modernisation of employment relations (and the economy) its inclusion in a list of core topics for union-management discussions would have an important symbolic value that would help tilt the balance more in favour of a partnership ethos. On the one hand, it might be helpful if this matter were treated along with pensions as one that could be added were it to become clear that training was included within the scope of typical recognition agreements. It would also be helpful if research were commissioned on the nature and variety of the bargaining and discussions over training that currently do take place. On the other hand, it might be argued that the government should not be led by typical practice but be leading good practice. If this argument were accepted, there is a case for including training as a core issue.

Conceiving training as an area that should be excluded from core bargaining topics on the grounds that it is not an issue for bargaining may have the effect of reinforcing the concept that all bargaining is antagonist and zero-sum. A public discussion of training as a bargaining issue could help to develop a richer and less confrontational concept of bargaining, more in keeping with the concept of partnership that foreshadowed the Employment Relations Act.

**2.52 The Government does not intend to add equality to the current list of core bargaining issues for the purposes of the statutory recognition procedure**

Pay, hours and holidays are clearly core aspects of equality but not the only ones: access to promotion, training and fringe benefits are all equally important. Again there is a case for treating this issue in equivalent terms to that proposed for pensions or for including it in the list on the basis that equal opportunity is both good practice and government policy and required by law, as for example in the duty on public sector organisations to promote race equality in the Race Relations (Amendment) Act 2000.

**2.56 The Government proposes, first, to clarify that pensions shall not be regarded as 'pay' for the specific purposes of the procedure for the present time. At the same time, the Government proposes to give the Secretary of State an order-making power to add pensions to the three core topics, with a view to exercising that power when there is evidence that typical practice in recognition agreements is for pensions to be included as a bargaining topic**

The proposal to clarify the status of pensions relative to pay for the purpose of the procedure is to be welcome. There might also be other dimensions to the definition of pay which could usefully be clarified at the same time e.g. does it include payment systems?

The inclusion of pensions as a core bargaining matter would appear to be warranted given their apparent increased importance to workers and the need to avoid further cases of the misuse and misunderstanding of pension funds. There is again the argument that the government should not be led by typical practice, but be leading good practice. If this argument were accepted, there is a case for clarifying pensions are not included in pay, but adding it as a fourth core bargaining issue.

**2.59 The Government proposes to clarify the law ensuring that unions are able to apply for top-up statutory recognition where their voluntary agreement does not include any one or more of pay, or hours, or holidays**

This clarification is clearly needed if there is any uncertainty surrounding the original intention that an application for topping up issues could be for any one or more of pay, hours or holidays.

**2.62 The Government proposes to establish in the procedure a general requirement on both the union and employer to co-operate with a CAC membership check**

Given that the membership check has caused some problems for the CAC and in some cases increased the antagonism between the parties, the desire to ensure cooperation is to be welcome. We assume that the sanctions will be that (a) if the union does not cooperate the application will be deemed unacceptable and the union can not apply for recognition within the same bargaining unit for a three year period; and (b) a lack cooperation on the part of the employer will fall under the existing requirement to cooperate, which provides the CAC with the powers to award recognition where cooperation is not forthcoming.

**2.66 The Government invites views on the treatment for the purposes of CAC checks of workers who receive free or reduced-fee union membership**

There are problems for trade unions (as with any 'experience good' - see Bryson and Gomez, 2003) that workers are not necessarily able to appreciate the full benefits of trade unions without their having had some experience of them or exposure to them, e.g. through friends or their family. Trade unions have been encouraged to modernise and discriminatory pricing is one method of modern management that is available to those marketing experience goods. Discounting membership in the first year(s) of joining or for those studying or having just returned to work is common practice in other areas of economic life (e.g. health clubs or insurance companies). There seems no reason why these methods should not be available to trade unions. However, legislation could stipulate that the conditions for discounted membership are clearly defined in the union rulebook.

**2.68 The Government does not propose to change the current system whereby membership checks can be made at various stages of the procedure and does not propose to freeze the check on union membership at the point of acceptance**

This issue has most relevance to cases where applications have entered the system with above 50 per cent union membership and thus the union could be awarded recognition without a ballot. As we said under our comments on 2.25 (page 24 above), this is an area for concern as the level of union membership may change due to labour turnover, internal mobility and redundancies, all of which may be affected by the employer, or even be the result of employer pressure and intimidation. Also the ratio of union members to the workforce (union density) may be affected by changes in employment levels, including non-replacement of leavers, redundancies and recruitment into the bargaining unit. In the case, for example, of the GMB's application for recognition at *Richmond Mirrors TUR1/191[2002]* the company recruited new staff into the bargaining unit, which diluted the union's membership from 52 per cent to 39 per cent. The CAC report includes the concern of the union officer at this rapid recruitment 'in the light of the adverse trading conditions described by the company in their correspondence with the CAC and the redundancies that had been made in September of three union members'. In the case of *GPMU and Ritrama TUR1/178/[2002]*, the union's majority dipped below 50 per cent after the recruitment into the bargaining unit of one worker since the application - it then lost the ballot.

The government should consider freezing the membership check at the point of acceptance, or after the bargaining unit has been revalidated, since this is in line with the spirit of the legislation that recognition should be granted where a majority of the bargaining unit are in favour. Our evidence (Wood *et al*, 2002) shows that unions are aiming to submit claims where they have majority membership, since they are conscious of the uncertainty surrounding ballots and the risk that employers will mobilise opposition to the claim. It appears unfair to penalise unions for the intervention of circumstances beyond their control, such as recruitment or redundancies. Nonetheless, should existing union membership genuinely decline, even if the idea of freezing the membership figure were accepted, the CAC could still evoke one of the qualifications and insist on a ballot on the grounds that the membership had fallen or was highly uncertain. Equally the CAC could discount the decline on the basis that it still anticipates that there is 50 per cent support for union recognition and the decline reflects factors beyond the union's control.

**2.70 The Government welcomes comments on whether there may be value in further guidance being available from the CAC for parties considering the submission of a petition**

The present arrangement has the virtue of allowing for variety in the use of petitions, which are used in a stage of the process where the CAC has been given perhaps its most discretion i.e. to gauge the likely support for the union recognition. Overprescribing the format of petitions would be a step further down the road of making petitions part of the formal process. Nonetheless the CAC guidance could ask the party submitting the petition to provide a full statement of the methodology used for collecting the data, including the administration of the data collection and the question(s).

**2.72 The Government proposes that the employer should be required to disclose the number of workers in the bargaining unit, together with their grade and location, at the CAC stage for negotiating the bargaining unit**

The lack of information on bargaining unit numbers and grades on the part of the union has led to confusion in the early part of the process and the earlier a shared picture can be achieved the quicker the case can be validated and the greater the chance of achieving agreement on the bargaining unit.

There is also a problem that the parties do not have access to each other's proposed list of workers in the bargaining unit at the time of the ballot. There have been cases where the employer has submitted names of workers outside of the bargaining unit e.g. in other occupations or who are freelance or temporary workers.

**2.84 The Government proposes, to give the CAC a power to reduce the 20-day bargaining unit negotiation period**

On the one hand, the high proportion of cases where the timetable has over-run could be seen as vindicating the legislator's provision of discretion for the CAC to encourage voluntary agreement. On the other hand, it could be viewed as being above the level that the spirit of the legislation would suggest it should be. A quarter of cases have been in the system for six months or more. In our survey of union officers responsible for CAC cases, a significant proportion have raised concerns

about delays to the procedure, and particularly the willingness of the CAC to grant extensions to time periods at the request of the employers when they appear, to the union, to have been delaying the progress of cases.

The time periods as specified seem appropriate but the issue is to ensure that the CAC applies them more rigidly than they have in the past, is not seen to be indulging either party, and that none of the delays are caused by their own administrative or staffing problems.

**2.88 The Government believes that a time limit on formal approaches to the employer under Schedule A1 would not be appropriate, and proposes no change in this area**

Our survey of unions in 2000 and 2003 have confirmed that union policy is to treat the statutory procedure as a last resort and not to use claims indiscriminately and ahead of any systematic recruitment of members. We do not have any information on the extent to which such letters have been sent and not followed up with CAC applications. In our analysis of CAC cases there are only two where no approach had been made to the employer before the formal letter under Schedule A1 requesting recognition was sent as laid down in the statute. This suggests that unions will only send such letters when they are convinced that the employer will not respond positively to a request for voluntary recognition or is unwilling to have discussions on it. The case where the statutory letter is sent in anticipation that the employer will respond positively would seem to be very rare. Furthermore, some of the long periods between the letter and CAC submission arose, we have observed, precisely because the union wanted to ensure through its internal auditing processes that all chances of a voluntary agreement had been exhausted. There are also clear examples of employers engaging in discussions with the union with no real intention of reaching agreement.

**2.92 The Government proposes not to introduce any penalty on unions who withdraw cases**

In most cases where withdrawals have been made, the union had made the application on the basis of information that was subsequently augmented and revealed their claim was not sustainable. In a number of cases the union had withdrawn the application on hearing that another union had completed a recognition agreement.

**2.94 The Government intends to make no change to the existing procedure for determination of the effective date for an existing bargaining agreement**

There have been cases where a union has signed an agreement with an employer after an application has been made for a similar bargaining unit by another union. On the one hand, the spirit of the legislation would appear to be that a union is blocked from making an application if a prior agreement existed. This would imply that agreements signed on or after the application would not be permitted to block an application. On the other hand, the way the procedure has been designed to ensure inter-union disputes are dealt with by the TUC, and not within it, is important. In keeping with the former, the law could be clearly amended to ensure that the effective date for an existing bargaining unit must be prior to the application not as now the date of the CAC's admissibility decision. In keeping with the latter, it could be argued that it is a matter for the TUC to decide the nature of its self-regulation. If it wishes to ensure that no union signs an agreement with an employer after an application to the CAC is made it could require all affiliates to circulate evidence of the application to other unions on the day it is submitted, which with the advent of e-mail should be possible.

**2.97 The Government does not propose to allow unions to apply for the derecognition of independent unions**

There seems no basis on which a union could apply to have another union derecognised, even if it were acting on behalf of its members. Even if unions were allowed this provision, there would seem no grounds for distinguishing between independent and non-independent unions. The current provision allows the union to support individuals making a claim for derecognition of the union, be it non-independent or not. The key issue that underlies this concern is whether agreements between employers and non-independent unions should be permitted to block claims from independent unions. There is a tension in the underlying concerns of the legislation. On the one hand, the legislation is designed to ensure a right for people to be represented by a union of their choice for collective bargaining which implies an independent union; on the other hand, it is part of a government policy designed to ensure that industrial relations are based on partnerships and hence preferences that are mutually shared or at least overlapping. In theory, if there is sufficient support

for a union recognition claim to succeed, an application to derecognise a union that exists prior to the application should succeed. But the time that may elapse between the two may inhibit employees from proceeding in this way, and the uncertainty about the level of support for both claims may constrain any application. Moreover, the employer's reaction to the initial derecognition claim may be so hostile as to inhibit individuals from voting for derecognition.

**2.99 The government does not propose to change the rule that does not allow unions to make a claim after an unsuccessful application within a three-year period**

This rule is a useful way of discouraging frivolous claims. The argument, as in the consultation document, that it is a means of ensuring stability in employment relations is not so convincing. It may even be seen as incompatible with the Government's argument for ensuring scope for choice in employment relations that is often made on the basis of the need for change. It is in fact likely that a fresh claim will only be forthcoming if there has been a change e.g. that has precipitated a renewed interest in rectifying grievances and managing change through a union. It may be that the main change in employment relations has been a change in the composition of the workforce. Consideration might then be given to permitting applications where the union can show that say only 20 per cent of the workforce is the same as in the original application or that the employer has introduced a change that has destabilised or fundamentally changed employment relations, e.g. derecognised a union or a staff association, disbanded a consultation committee or introduced a major change without any consultation with the workforce in contravention of any statutory obligation.

**2.102 The Government will consider further and keep under review the operation of the law concerning employer dismissal or detriment for acts related to obtaining or preventing statutory recognition**

There is sufficient statutory provision for individuals to pursue claims against employers for unfair dismissal. But, as happened at the *TGWU and King Asia, TUR1/111[2001]*, where a tribunal case was won, the individuals who were dismissed were key to the unions organising campaign and

the effects of their victimisation was that support for the union declined. The redress came well after the recognition campaign was defeated.

There have been a number of cases where the union had over 40 per cent or even 50 per cent membership but not won the ballot. Unions have lost around a third of ballots and the failure rate is significant given that the cases have been through the admissibility tests. Our preliminary analysis of ballots suggests that in many cases the ballot result reflected at least the influence of employer's campaigning against the union. This may involve one-to-one meetings of managers with employees or the use of supervisors or team leaders primed to campaign in the workforce against the union, hostile campaigning including threats to individuals or to close or relocate the workplace *(*see BECTU's journal, *Stage, Screen & Radio*, 'Taking on Sky', February 2003, pages 8-9*)* or employers making redundancies or recruiting into a proposed bargaining unit in order to dilute the strength of the union. Such practices are not confined to the ballot period. In fact if used prior to it the impact may be such that the employer is in a position to appear relatively neutral in the balloting period and step back from engaging in anti-union campaigns. The employer may also inhibit the implementation of the access agreement.

If consideration were to be given to an unfair labour practice provision, which we concede is probably the only way of addressing this problem, the code of practice already provides some basis for defining these practices. In effect making the provision would be largely a matter of transforming the code into a statutory regulation. The provisions would need though to extend beyond the balloting period to apply from the time the application is made. The consultation document questions whether workable sanctions could be devised to support the unfair labour practice provision, but we are unsure why the existing sanction for non-cooperation with the procedure i.e. the CAC's ability to impose recognition on an employer, is not deemed appropriate. The North American experience may be relevant here, as in both Canadian and USA jurisdictions, unfair labour practices are defined in the law, backed by "make whole" remedies, with a civil law standard, and in extreme cases in Canada, criminal remedies with a criminal law standard.

**2.103 The Government proposes to require the CAC to treat the new employer where there has been a change in the employer during the CAC case as if it were the original employer**

This seems sensible and fair.

**2.104 The Government does not intend to make any other changes in this area to allow for cases where a union applies to the CAC to extend an existing voluntary recognition agreement, because the original bargaining unit, or part of it, has been affected by a transfer**

We are aware of no reason to pursue an alternative course.

**2.106 The government does not propose to introduce a new appeals process**

The argument that allowing appeals at any stage of the procedure conflicts with the desire, as expressed in the setting in the statute of a timetable for the procedure, that there should be a momentum to the processing of reviews seems sound. The availability of the judicial review system is adequate as the cases thus far suggest. The evidence from our survey of CAC cases is that union officials, as the consultation document suggests, are relatively happy with the way the procedure has been operated and the behaviour of the officers and panels. Adverse comments about procedural justice have been largely a reflection of perceptions of substantive injustice e.g. when a union loses a ballot after being confronted by anti-union behaviour on the part of the employer which the CAC is perceived as powerless to do much about.

**2.109 The Government proposes to allow the Secretary of State to amend the statutory procedure by order where requested to by the CAC**

Given (a) the broad parameters of the procedure seem to have been embedded in to the British system of industrial relations and to be accepted by at least the unions and most employment specialists, and (b) the current emphasis on learning from experience and evidence-based policy, it is

likely that further changes will be of a detailed nature and may arise from unanticipated evidence. It is therefore appropriate that the Secretary of State is empowered to react to this in order to finesse the system as we learn more; but the government should ensure that he or she is not empowered to abandon the procedure or to alter its fundamental principles; the precise powers should therefore be defined for the purposes of this provision.

**2.113 The Government proposes no change to the enforcement of bargaining via specific performance through the courts**

Given the lack of cases, no assessment can be made of this. It should be made clear that the Secretary of State's powers to amend the procedure should include this provision. Our research following up CAC cases suggests that it is not inevitable that a collective bargaining agreement will be readily or speedily reached.

**2.116 The Government does not see any logic in amending the definition of a worker solely for the purposes of statutory recognition**

We agree it is sensible to leave this to the DTI's review of employment status.

**2.117 Changes to allow the statutory procedure to apply to seafarers will be decided in the context of the Department for Transport review of the employment position of Seafarers**

Given that the Secretary of State will have powers to change the procedure, this seems sensible.

**2.119 The Government proposes to change the law to deal with issues relating to changes in union circumstances during an application to the CAC, or after an award of recognition.**

This should be changed in the light of *MSF and Unipart DCM Jaguar TUR1/94[2001]*, where the employer used the union's merger to challenge the validity of the application that delayed the case substantially.

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