These notes refer to the Employment Relations Act 1999 (c.26) which received Royal Assent on 27 July 1999

EMPLOYMENT RELATIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Trade unions

Section 1 and Schedule 1: Collective bargaining: Recognition

15. Section 1 and Schedule 1 establish new statutory procedures for the recognition and derecognition of trade unions as entitled to conduct collective bargaining on behalf of particular groups of workers, and for the right of workers to take part in these processes without fear of detriment or dismissal. Section 1 inserts a new Schedule A1, as contained in Schedule 1 to the Act, into the 1992 Act. References to paragraphs, sub-paragraphs and Parts in what follows are references to the paragraphs, sub-paragraphs and Parts of the new Schedule A1 to the 1992 Act.

16. The statutory process for recognition of a union to conduct collective bargaining on behalf of a particular group of workers is set out in Part I. The procedure gives the union and employer the opportunity to agree an appropriate group of workers (referred to as the bargaining unit) and whether the union should represent them in collective bargaining, but if no agreement is reached there is a mechanism for the Central Arbitration Committee (CAC) to decide on the appropriate bargaining unit or whether the union should be recognised, or both.

    The *Central Arbitration Committee* is established under sections 259-265 of the 1992 Act. Sections 24-25 of the Act amend the arrangements for the appointment of CAC members and for the proceedings of the CAC in respect of its functions under the new Schedule A1.

17. Part II deals with agreements to recognise a union which are made after a formal application for statutory recognition under Part I. It also contains a procedure for unions or employers to obtain an imposed bargaining method if the agreed method is not honoured. With the exception of Parts II and VI, voluntary recognition is unaffected by the Act.

18. Part III sets out procedures which may be followed if a union is recognised through the statutory process and, as a result of a change in the employer's business, either the union or the employer believes the bargaining unit has changed. It also deals with cases where the bargaining unit has ceased to exist.

19. Part IV deals with the derecognition of a union whose recognition resulted from a declaration by the CAC but which was not recognised "automatically" on the basis that more than 50% of the bargaining unit were union members. The derecognition of "automatically" recognised unions is dealt with in Part V.

20. Part VI provides for workers to be able to invoke the statutory derecognition procedure where an employer has voluntarily recognised a union which does not have a certificate of independence. Part VII sets out the effect of a union recognised through the statutory process losing its certificate of independence.

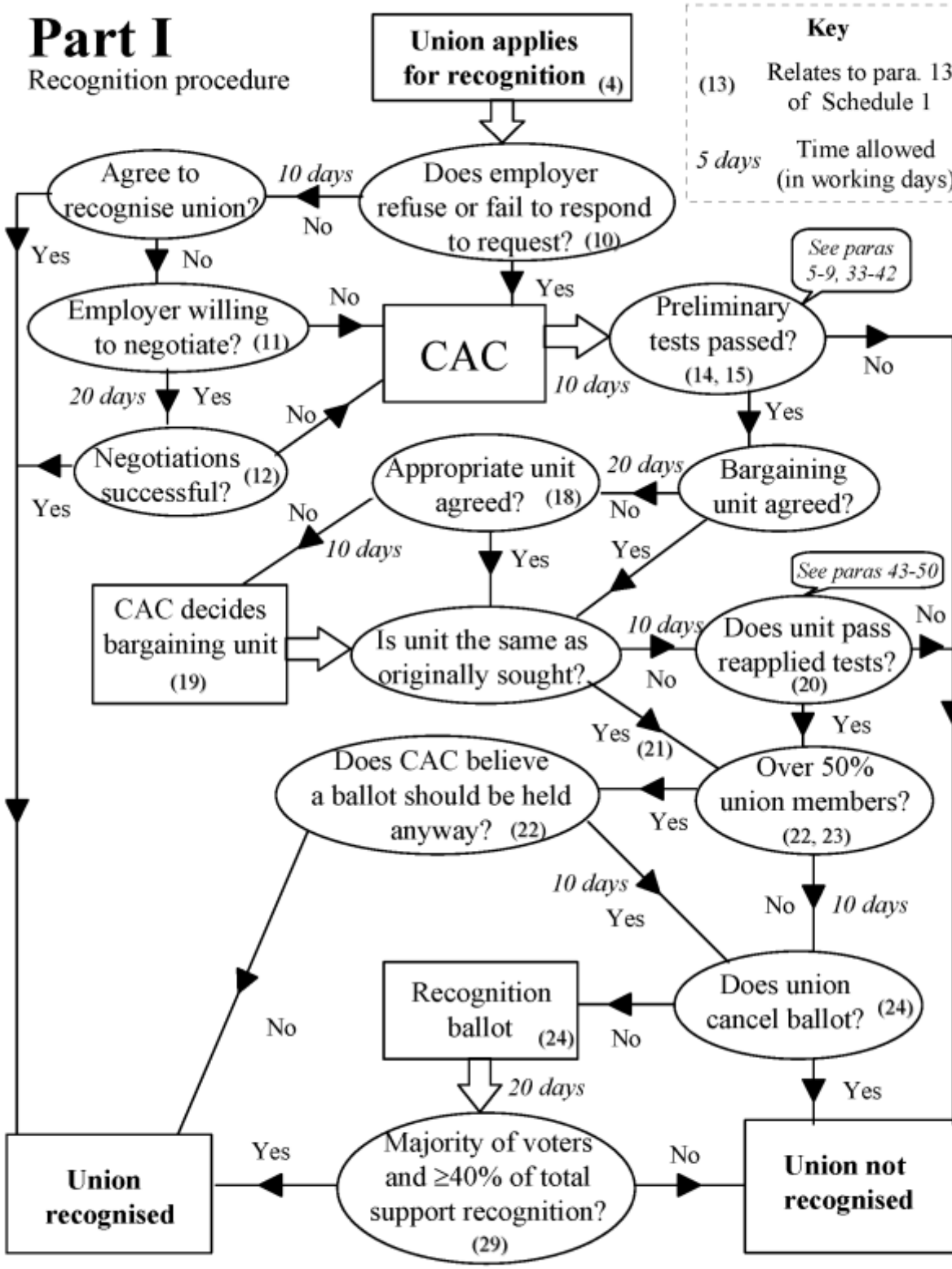
21. Part VIII provides protection for workers against detriment arising from participation or non-participation in activities relating to recognition or derecognition. Part IX contains general provisions and powers for the Secretary of State to issue guidance on or to amend certain procedures.

22. In dealing with cases under the new Schedule A1, the CAC is required by *paragraph 171* to have regard to the object of encouraging and promoting fair and efficient practices in the workplace (so far as is consistent with its other obligations under the Schedule).

23. The following is a paragraph by paragraph index to the new Schedule A1:

Part I: Recognition

24. Part I sets out procedures for the recognition of an independent trade union to conduct collective bargaining on behalf of a group of workers, referred to as the bargaining unit. It provides a method for agreeing the appropriate bargaining unit, whether the union should be recognised, and how collective bargaining should be conducted. The key steps in the recognition procedure are illustrated in Figure 1; similarly, the key steps in the process for establishing a method of collective bargaining are summarised in Figure 2.



25. *Paragraph 1* provides that an application for recognition may be made by a single union or by two or more unions acting together. For simplicity these notes generally refer to an application by a single union but such references should be read as covering a union or unions.

26. *Paragraph 2* contains definitions for the purposes of the Schedule. Sub-paragraph (2) defines the bargaining unit, the group of workers on whose behalf a union (or unions) would conduct collective bargaining. Sub-paragraph (3) defines the proposed bargaining unit, the group of workers on whose behalf a union requests recognition. (If the employer does not agree that the unit is appropriate, it may be changed in negotiation. If the employer and union fail to agree, the Central Arbitration Committee (CAC) will rule under paragraph 19.) Sub-paragraph (4) defines employer.

27. *Paragraph 3* defines the scope of collective bargaining for the purposes of Part I. Collective bargaining covers pay, hours and holidays plus any matters which the union and employer agree should be included. However, if the CAC determines the method by which collective bargaining should take place under paragraph 31(3), that method will apply only to negotiations over pay, hours and holidays – it will not apply to any other matters the parties agree under sub-paragraph (4). (If the CAC sets a bargaining method, the parties can agree to vary it to include other matters as well.) Sub-paragraph (6), taken with *paragraph 35*, means that recognition under Part I cannot 'overwrite' an existing collective agreement, even if that agreement does not cover pay, hours and holidays, subject to the exceptions given in paragraph 35.

28. *Paragraph 4* deals with requests for recognition. Sub-paragraph (1) has the effect that the recognition process is begun by a formal request from the union seeking recognition.

29. *Paragraphs 5-9* test whether an application is valid.

30. Paragraph 6 provides that the union making an application must have a certificate of independence from the Certification Officer.

    The functions of the *Certification Officer*, including in relation to *certificates of independence*, are dealt with in sections 2-9 of the 1992 Act.

    - A trade union is defined as *independent* by section 5 of the 1992 Act if it (a) is not under the domination or control of an employer or group of employers or one or more employers' associations, and (b) is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) tending towards such control.

31. Paragraph 7 provides that a request is not valid if an employer has fewer than 21 workers. The term "employer" includes associated employers, as defined below. The Secretary of State may vary the 21 worker threshold, or make other changes to the provisions of this paragraph, by statutory instrument subject to affirmative resolution.

32. Sub-paragraphs (3) and (4) exclude from the calculation of the number of workers people who work for associated employers incorporated outside Great Britain and who do not ordinarily work in Great Britain. The recognition procedure still applies, however, to employers incorporated outside Great Britain which employ more than 21 workers.

    - Two employers are *associated employers* under section 297 of the 1992 Act if one is a company of which the other (directly or indirectly) has control, or both are companies of which a third person (directly or indirectly) has control.

33. Sub-paragraph (5) provides that workers employed on board UK-registered ships by associated employers are also counted towards the 21 workers threshold, unless (a) the ship is registered as belonging to a port outside Great Britain, (b) the employment is wholly outside Great Britain, or (c) the worker is not ordinarily resident in Great Britain.

34. Paragraphs 8 and 9 make provision for the form and content of requests for recognition, including a power for the Secretary of State to prescribe the form of requests by statutory instrument. Further general provisions on applications are made in paragraphs 33-42.

35. *Paragraph 10* provides that the statutory recognition procedure is to end if the parties agree within ten working days both the appropriate bargaining unit and that the union

should be recognised to conduct collective bargaining on behalf of the workers who make up that unit. If the employer agrees to negotiate, then the parties have 20 working days, plus whatever remains of the initial ten working day period, in which to conduct negotiations. They can extend the period for negotiation by mutual consent.

36. *Paragraph 11* provides that, if the employer does not respond to the request or rejects it before the end of the first (ten working day) period, the union may apply to the CAC to decide the appropriate bargaining unit and whether a majority of workers in that bargaining unit support recognition.

37. *Paragraph 12* provides that if the employer and union fail to reach agreement by the end of the second period, the union may apply to the CAC to decide the appropriate bargaining unit and whether a majority of workers in the bargaining unit support recognition. If the parties agree a bargaining unit but cannot agree that the union should be recognised, the union may apply to the CAC to decide whether a majority of workers in the bargaining unit support recognition. However, in either case the union may not apply to the CAC if it rejected or failed to respond to a proposal by the employer (made within 10 working days of having indicated his willingness to negotiate) that the parties should seek the assistance of ACAS in the negotiations.

38. If a union applies to the CAC under paragraph 11 or 12, the CAC must be satisfied, before the application may proceed, that it is valid and admissible.

39. *Paragraph 14* applies if two or more applications are received by the CAC, and the bargaining units proposed or agreed in respect of the applications overlap, ie at least one worker is a member of all the bargaining units. In this case, each application is the subject of a "ten percent" test to see whether at least 10% of the bargaining unit are union members. If only one application passes the test, it may proceed; if both pass or neither passes, neither application will be accepted.

40. *Paragraph 15* requires any application under paragraph 11 or 12 to be valid in terms of paragraphs 5-9 and admissible in terms of paragraphs 33-42. The CAC has 10 working days (or longer, if it notifies the union and employer of its reason for extending the period) in which to decide whether the application is valid and admissible. In order to proceed, an application must therefore:

- be received by the employer (paragraph 5);
- be made by an independent union (paragraph 6);
- apply to an employer with 21 or more workers (paragraph 7);
- be made in the proper form (paragraphs 8, 9 and 33);
- be copied to the employer, along with any supporting documents (paragraph 34);
- not cover any workers in respect of whom a union is already recognised, unless:
  - — the applicant union is the one which is already recognised, and the existing recognition agreement does not cover pay, hours or holidays (paragraph 35(2)); or
  - — the recognised union has no certificate of independence, was previously recognised in respect of the same (or substantially the same) bargaining unit, and ceased to be recognised within the three years prior to the application (paragraph 35(4));
- satisfy the CAC that at least 10% of the proposed bargaining unit are members of the union and a majority of the workers in the proposed bargaining unit would be likely to favour recognition (paragraph 36);

- (if the application is made by more than one union) show that the unions will co-operate effectively in collective bargaining and, if the employer wishes, conduct single-table bargaining (paragraph 37);
- not cover any workers in respect of whom the CAC has already accepted an application under paragraph 15 or proceeded with an application under paragraph 20, ie the bargaining unit must not overlap with another unit in respect of which the CAC has accepted an application (paragraph 38);
- not be substantially the same as an application which the CAC accepted within the previous 3 years (paragraph 39);
- not be made within 3 years of a declaration by the CAC that the union (or the same group of unions) were not entitled to be recognised in respect of the same (or substantially the same) bargaining unit as in the current application (paragraph 40); and
- not be made within 3 years of the union (or the same group of unions) being derecognised in respect of the same (or substantially the same) bargaining unit as in the current application (paragraph 41).

41. If the employer and union have agreed the bargaining unit, then the application under paragraph 12(4) leads directly to a determination of support. Otherwise, for applications under paragraphs 11(2) or 12(2), the CAC must decide the appropriate bargaining unit before moving on to the question of whether the union has sufficient support for recognition.

42. *Paragraph 16* allows a union to withdraw its application under paragraph 11 or 12 at any time before the CAC awards automatic recognition under paragraph 22(2) or gives notice of its intention to hold a ballot. If the CAC intends to hold a ballot, *paragraph 24* gives the union 10 working days in which to decide whether to cancel it. For example, it may become apparent to the union that its proposed unit is not appropriate. It may wish to withdraw its application and reformulate it, possibly in conjunction with another union. If the union withdraws its application after it has been accepted by the CAC under paragraph 15 or cancels a ballot, *paragraph 39* has the effect of barring it from reapplying for recognition in respect of the same or a substantially similar bargaining unit for 3 years.

43. *Paragraph 17* allows the union and employer to notify the CAC that they wish it to cease work on an application at any time before recognition is granted automatically on the basis of over 50% union membership or a ballot is arranged. Notification of the CAC under this paragraph is necessary if the parties want to make an agreement for recognition (ie to qualify for semi-voluntary recognition under Part II of the schedule) and an application to the CAC under Part I has been made.

44. *Paragraph 18* provides that, where the CAC has been asked to decide on the appropriate bargaining unit, it has 20 working days to help the union and employer to agree an appropriate bargaining unit. The CAC may choose to extend this period. *Paragraph 19* provides that if no agreement on the bargaining unit is reached, the CAC must determine the appropriate bargaining unit within ten working days, taking account of the need for the bargaining unit to be compatible with effective management and, so far as is consistent with this need, the factors listed in sub-paragraph (4). This period can be extended provided the CAC notifies the parties with its reasons for the extension, but in practice the CAC may have gathered enough information in the course of trying to help the parties to reach agreement to be able to decide quickly.

45. *Paragraph 20* requires the CAC to apply several tests if the bargaining unit determined in paragraphs 18 and 19 is different from the union's proposed bargaining unit. These tests are equivalent to those applied by paragraph 15. If all the tests are passed, or if the

bargaining unit has not changed, *paragraph 21* requires the CAC to proceed with the application. The tests are that an application must:

- not cover any workers in respect of whom a union is already recognised, unless:
  - — the applicant union is the one which is already recognised, and the existing recognition agreement does not cover pay, hours or holidays (paragraph 44(2)); or
  - — the recognised union has no certificate of independence, was previously recognised in respect of the same (or substantially the same) bargaining unit, and ceased to be recognised within the three years prior to the application (paragraph 44(4));
- satisfy the CAC that at least 10% of the proposed bargaining unit are members of the union and a majority of the workers in the proposed bargaining unit would be likely to favour recognition (paragraph 45);
- (if the application is made by more than one union) show that the unions will co-operate effectively in collective bargaining and, if the employer wishes, conduct single-table bargaining (paragraph 46);
- not cover any workers in respect of whom the CAC has already accepted an application under paragraph 15 or proceeded with an application under paragraph 20, ie the bargaining unit must not overlap with another unit in respect of which the CAC has accepted an application (paragraph 47);
- not be substantially the same as an application which the CAC accepted within the previous 3 years (paragraph 48);
- not be made within 3 years of a declaration by the CAC that the union (or the same group of unions) were not entitled to be recognised in respect of the same (or substantially the same) bargaining unit as in the current application (paragraph 49); and
- not be made within 3 years of the union (or the same group of unions) being derecognised in respect of the same (or substantially the same) bargaining unit as in the current application (paragraph 50)

46. If the CAC is satisfied that a majority of the workers in the bargaining unit are members of the union making the application, *paragraph 22* provides that the CAC shall issue a declaration of recognition without a ballot, unless one of the conditions in sub-paragraph (4) is met, in which case the CAC must give notice that it intends to hold a secret ballot of members in the bargaining unit. Under *paragraph 23*, the CAC must also give notice that it intends to hold a secret ballot where the union does not show majority membership in the bargaining unit. If the CAC gives notice of a ballot, paragraph 23 gives the union 10 working days in which to request that the ballot should not be held. If it does so, the CAC will take no further action and the union will not be recognised.

47. *Paragraph 166* provides that, where the CAC represents to the Secretary of State that paragraph 22 has an unsatisfactory effect and should be amended, the Secretary of State has power to make amendments by order subject to the affirmative resolution procedure. *Paragraph 167* provides that the Secretary of State may issue guidance to the CAC on the exercise of its functions under paragraph 22. This guidance must be laid before Parliament and published.

48. *Paragraph 25* makes provision for the conduct of recognition ballots. They must be conducted by a qualified independent person appointed by the CAC. Sub-paragraphs (7) and (8) set out the conditions to be met by a qualified independent person, which include meeting criteria specified in – or being himself specified in – an order made by the Secretary of State subject to negative resolution procedure. (This is essentially the same arrangement as for independent scrutineers for trade union elections and industrial

action ballots, where solicitors and accountants and certain bodies such as the Electoral Reform Society are designated as qualified to act as scrutineers.) The ballot is to be conducted within 20 working days of the appointment of the independent person unless the CAC decides to extend the period. This is intended to ensure that the ballot takes place without undue delay, while recognising that organising a large, complex ballot may take longer than 20 working days.

49. Sub-paragraph (4) provides that the ballot may be held at the workplace, by post or, if special factors make it appropriate, by a combination of the two methods, at the CAC's discretion. Sub-paragraph (5) requires the CAC to consider the risk of interference in a workplace ballot, costs and practicality, and any other matters it considers relevant. Sub-paragraph (6) lists 'special factors' which might make a combined postal and workplace ballot appropriate. Sub-paragraph (9) requires the CAC to inform the employer and union of the arrangements for the ballot as soon as reasonably practicable.

50. *Paragraphs 26(1)-(4)* deal with the duties of the employer to cooperate with the ballot, to provide necessary information and to allow the union reasonable access to the workers to campaign for recognition. *Sub-paragraphs (6) and (7)* provide a mechanism for the union to send information to workers via the person conducting the ballot, at the union's expense, without the workers' names and addresses being disclosed to the union. *Sub-paragraph (8)* gives a power for the Secretary of State or ACAS to draw up a statutory code of practice to give practical guidance on 'reasonable access'. Such guidance will need to take account of the different circumstances of different employers' premises and businesses.

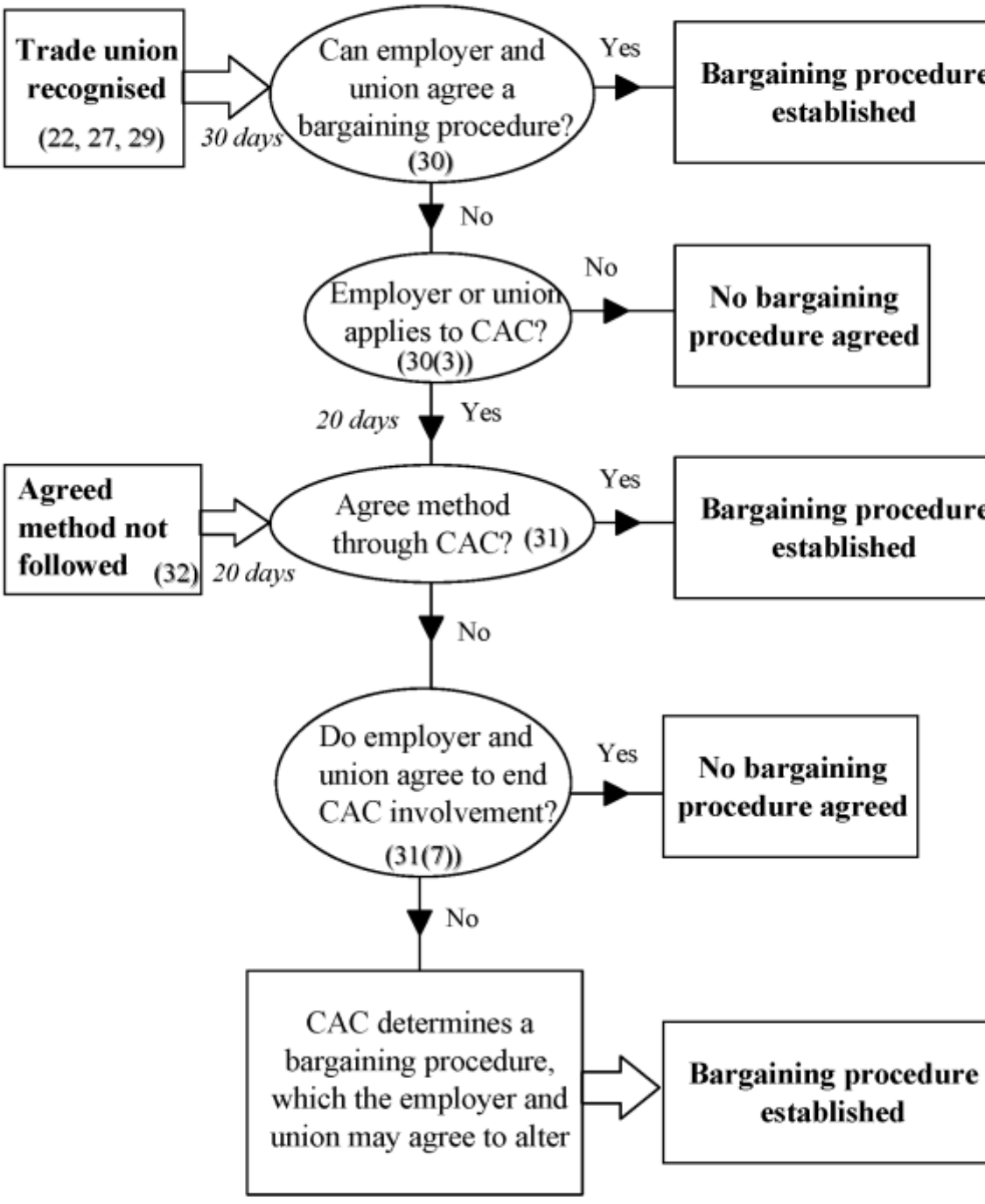
51. *Paragraph 27* makes provision for action by the CAC in the event that the employer does not fulfil his duties under paragraph 26. The CAC may order the employer to take specific steps to remedy his failure to cooperate. If the employer does not comply, the CAC may declare the union recognised and cancel the ballot.

52. *Paragraph 28* provides for half the costs of recognition ballots to be borne by the employer and half by the union or unions making the application. These costs include:

- the full cost of running the ballot incurred by the scrutineer (including any fee the scrutineer may charge for his services); and
- any other costs which the employer and union agree should be shared

Costs which are not shared include the cost of providing information to workers incurred by a union or the employer.

53. *Paragraph 29* requires the CAC to inform the employer and union of the result as soon as possible after the ballot. If recognition is supported by a majority of those who vote and at least 40% of the workers constituting the bargaining unit, the CAC must declare the union to be recognised; otherwise, it must declare that the union is not recognised. The conditions for recognition under this paragraph may be altered by the Secretary of State by order subject to affirmative resolution procedure.



54. *Paragraph 30* provides that, if a union is recognised by means of a declaration of the CAC and the employer and unions cannot agree a method for conducting collective bargaining, either party can ask the CAC for assistance. This process is illustrated in Figure 2. As elsewhere, the Act provides for a period of negotiation, in this instance

of 30 working days, for the employer and union to try to reach a voluntary agreement before the CAC intervenes.

55. *Paragraph 31* provides that, if the employer and union are still unable after the 30 working day negotiation period to agree on the method for conducting collective bargaining, the CAC will actively try to help them reach an agreement. The period allowed for this stage is 20 working days, or longer if all involved agree. If that attempt is unsuccessful, then the CAC must specify the method for collective bargaining unless the parties jointly request it not to do so. The imposed method will have effect as if it were a legally binding contract between the employer and union. If one party believes the other is failing to respect the method, the first party may apply to the court for an order for specific performance, ordering the other party to comply with the method. Failure to comply with such an order could constitute contempt of court. Sub-paragraph (5) has the effect that, once the CAC has imposed a method, the parties can vary it, including the fact that it is legally binding, by agreement provided that they do so in writing.

56. *Paragraph 32* allows the employer or union to apply to the CAC if an agreed method has not been followed. The CAC will help to broker another agreement or, if the parties cannot agree, will impose a bargaining procedure.

57. Under *paragraph 168*, the Secretary of State may, after consulting ACAS and by order subject to the negative resolution procedure, specify a model method for collective bargaining which the CAC must take into account but may vary if necessary in particular circumstances.

58. *Paragraph 37* provides that if two or more unions apply jointly under paragraph 10 or 11 the CAC must be satisfied they will be able to cooperate effectively on collective bargaining in order to proceed with the application.

59. The purpose of *paragraphs 39*, *40*, *41 and 42* is to give effect to the principle that once an application for recognition has been decided that decision should not be re-opened for at least three years.

60. *Paragraph 51* applies if, once an application is accepted, another application is made for recognition in a bargaining unit which includes at least one worker in the original application's bargaining unit. *Paragraph 38* provides that the new application will always be rejected and paragraph 51 provides that, if the union making the new application has at least 10% membership in the relevant bargaining unit and no bargaining unit has been decided for the original application, the CAC must cease work on the original application and treat it as if it had never been admissible.

Part II: Voluntary Recognition

61. Part II deals with recognition agreements made in consequence of an application under Part I without there being any formal CAC declaration that the union is recognised ("agreements for recognition"). An employer is required to maintain an agreement for recognition for three years. If either party does not follow an agreed bargaining method, the union or the employer may apply to the CAC to impose a bargaining method, as in paragraph 31. Entirely voluntary agreements are not affected by Part II.

62. *Paragraph 52* provides that an agreement is an agreement for recognition if:

- the agreement was made in consequence of an application for recognition under paragraph 4 that is valid in terms of paragraphs 5-9;
- the agreement is an agreement to recognise the union to conduct collective bargaining on behalf of a particular bargaining unit;
- the union's application under paragraph 4 and any subsequent application to the CAC under paragraph 11 or 12 have not been withdrawn, rejected or cancelled; and

- if the union applied to the CAC under paragraph 11 or 12:
  - — the parties have given notice to the CAC under paragraph 17 to cease consideration of the application; and
  - — the CAC has not declared automatic recognition under paragraph 22 nor been required to arrange for a ballot under paragraph 24.

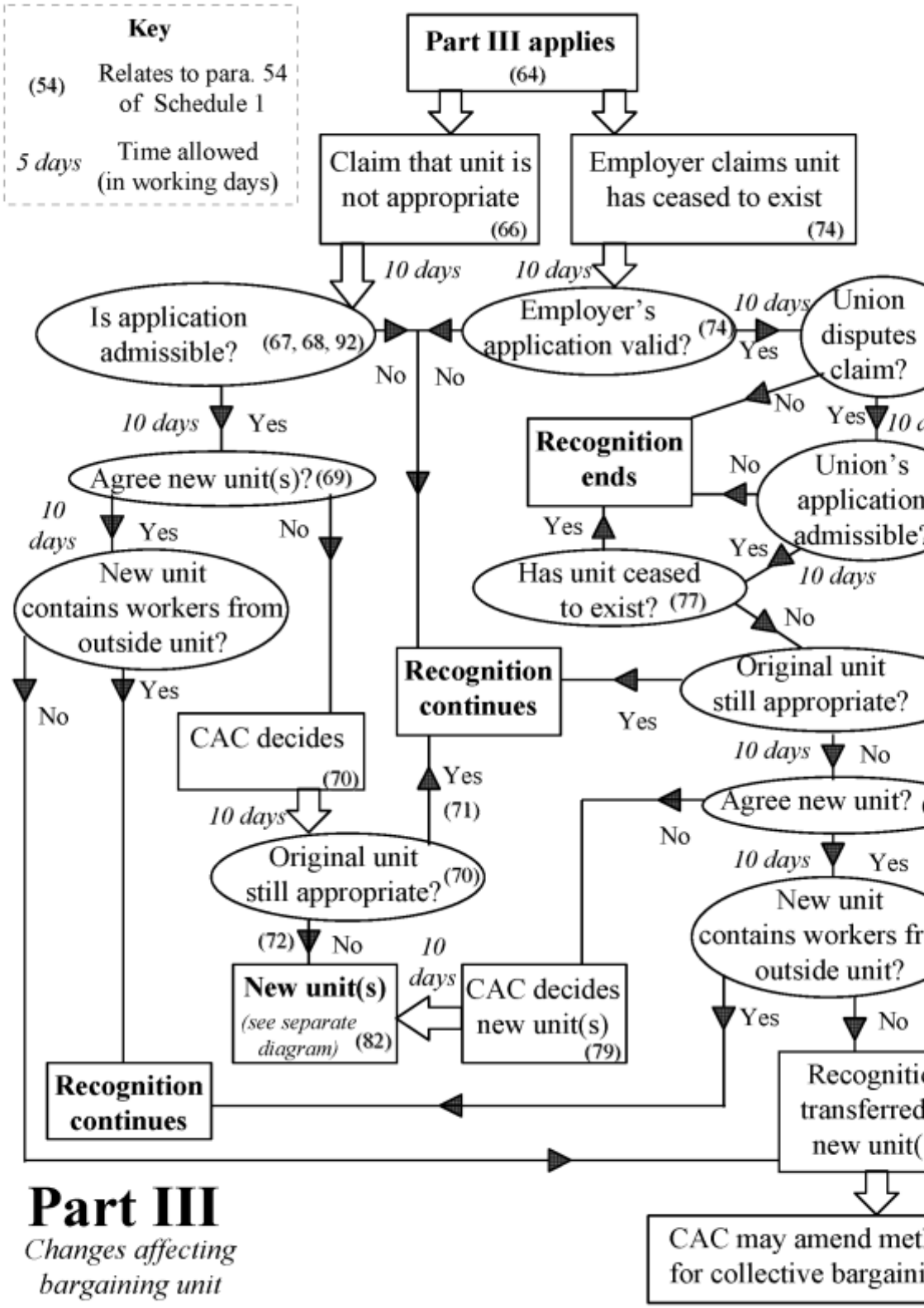
63. *Paragraphs 53 and 54* contain definitions, including a definition of collective bargaining as negotiations on matters the parties agree to bargain about, except for the purposes of a bargaining method imposed by the CAC. As in Part I, an imposed bargaining method will cover pay, hours and holidays.

64. *Paragraph 55* allows a party to apply to the CAC for a decision on whether an agreement is an agreement for recognition. *Paragraph 56* bars an employer from ending an agreement for recognition within 3 years of it being made; a union may end the agreement at any time, subject to the terms of the agreement. *Paragraph 57* provides that if the agreement for recognition is terminated, the bargaining method, whether imposed or not, also ceases to have effect.

65. *Paragraph 58* provides that, if the union and employer make an agreement for recognition, they have 30 working days in which to negotiate with a view to agreeing a bargaining method. If the employer and union do not agree a method for collective bargaining or an agreed method is not followed, either may apply to the CAC for assistance under paragraph 58 or *59*. *Paragraph 60* ensures the employer has at least 21 workers and *paragraph 61* gives other requirements for the application. If the CAC decides under *paragraph 62* to accept the application, *paragraph 63* gives it 20 working days in which it must help the union and employer try to agree a bargaining method. If no agreement is reached, the CAC must specify the method for collective bargaining unless the parties jointly request otherwise. This is the same procedure as that under paragraph 31 in respect of collective bargaining following an award of recognition under the statutory procedure and - as with the paragraph 31 procedure - the Secretary of State may specify a model collective bargaining method under paragraph 168.

Part III: Changes affecting bargaining unit

66. If an employer's business changes in structure or scope, or if it changes significantly in size, it may be appropriate for collective bargaining arrangements to alter to reflect the change in the business. In the case of voluntary agreements, including agreements for recognition, this is a matter for negotiation between parties. Where recognition has been imposed by the procedure in Part I, Part III provides a procedure for altering the recognition arrangements. Figure 3 illustrates the application procedure. In this Part of the Schedule, it is possible for the original unit to split into one or more new units. References in these notes on Part III to the new unit should generally be taken to mean the new unit or units, except where noted. In some places, it is necessary for the Schedule to distinguish between the cases of one new unit and more than one new unit; these notes make it clear where this happens.



67. *Paragraph 66* allows the employer or the union to apply to the CAC for a decision as to whether the original bargaining unit is no longer appropriate. For the CAC to accept the application, *paragraph 67* means there must be evidence to that effect because the

organisation, structure, nature or size of the business has changed. Sub-paragraph (2) defines the matters which may lead to the bargaining unit being declared inappropriate.

68. *Paragraph 68* provides that the CAC must reject an application unless:

- there is evidence that the original unit is no longer appropriate (paragraph 67);
- it is made in the proper form (*paragraph 92(1)*); and
- a copy of the application, with its supporting documents, is given to the union if an employer applies or to the employer if a union applies (*paragraphs 92(2) and 92(3)*)

69. *Paragraph 69* gives 10 working days in which the employer and union may attempt to agree a new bargaining unit or units. If they do so, the CAC must decide whether the new unit contains (or any of the new units contain) workers covered by a collective agreement with another union. If so, the CAC will take no further action on the application. If not, the CAC must declare the union recognised for the new unit, and the method of collective bargaining for the original unit will apply to the new unit, with any modifications the CAC thinks necessary to take account of the change of unit. If the union and employer do not agree, *paragraphs 70(2) and 70(7)* give the CAC 10 working days in which to decide:

- whether the original unit remains appropriate, using the same criteria as in paragraph 67; and
- if the original unit is not appropriate, what other unit is appropriate.

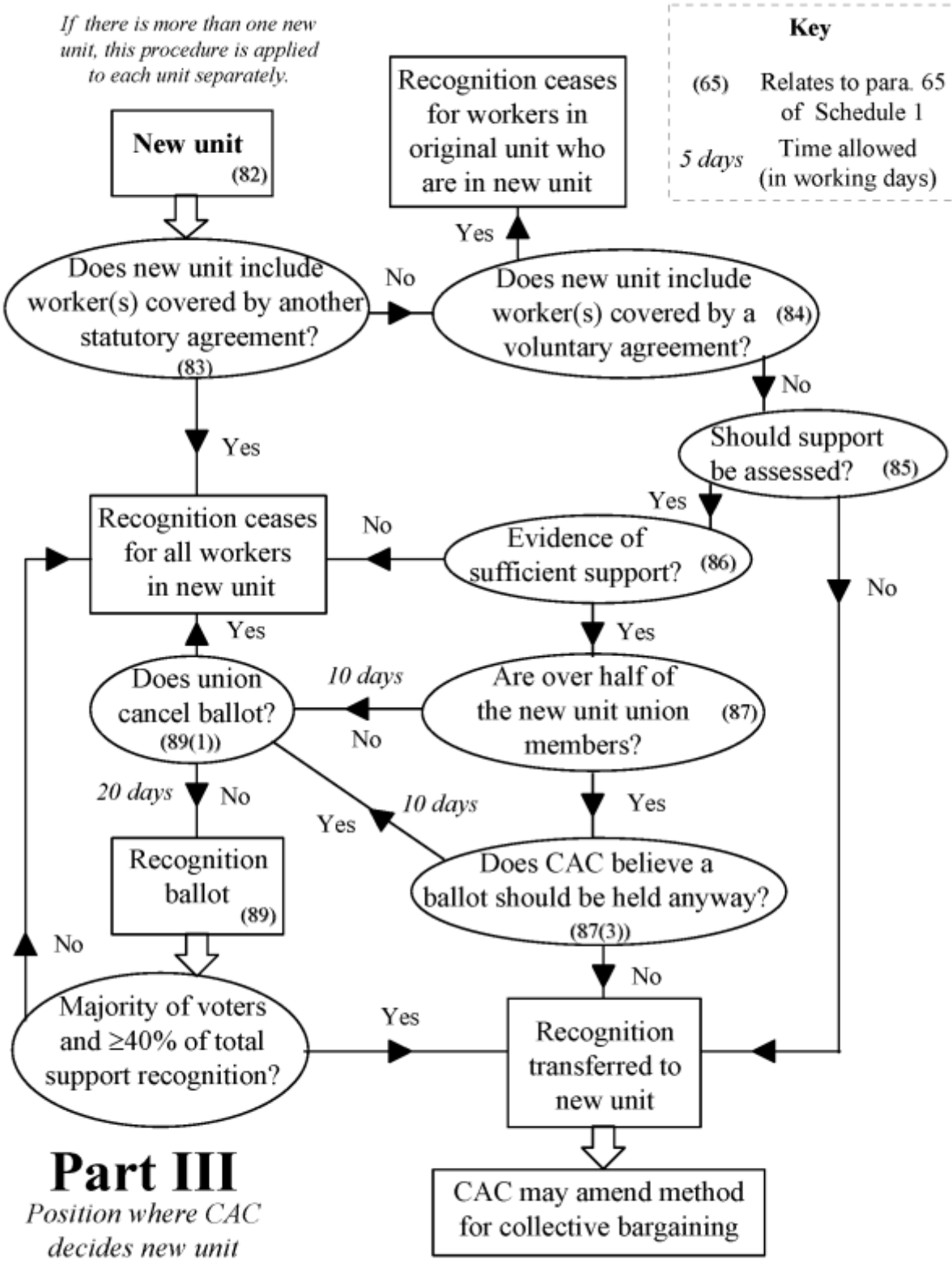
70. If the CAC decides that the original unit remains appropriate, it will take no further action. If the CAC decides that the original unit is not appropriate, it will decide the appropriate unit, taking into account the factors in *paragraphs 70(4), (5) and (6)*. These are the same criteria used for applications under Part I, plus a requirement that if there is more than one new unit then the new units must not overlap. Once the appropriate unit is determined, the CAC must decide under paragraphs 82-89 whether the union should be recognised for that unit. If there are any workers in the original unit who do not fall into a new unit, *paragraph 73* provides that the union will cease to be recognised to represent them in collective bargaining.

71. The employer may also seek to end recognition if he believes the bargaining unit for which the union is recognised has ceased to exist. *Paragraph 74* gives details of how the employer must notify the union of such a claim. The CAC must decide whether the notice is valid. *Paragraph 75* allows the union 10 working days from the receipt of a valid application to apply to the CAC to decide whether the original unit has ceased to exist or is no longer appropriate. If the union does not apply to the CAC, recognition will end. *Paragraph 76* requires the CAC to check that the union's application is admissible, in terms of paragraph 92. If it is not, the CAC must reject it.

72. If the CAC accepts an application, *paragraph 77* requires it to give both parties an opportunity to give evidence. If the CAC decides the original unit remains appropriate, the employer's notice has no effect. If there is evidence that the original bargaining unit is no longer appropriate, the CAC must give notice to that effect. In that event, *paragraph 78* applies and the parties have 10 working days to agree a new bargaining unit. If they do so, the CAC must declare the union recognised for the new unit, and the method of collective bargaining for the original unit shall apply to the new unit, as in paragraph 69. If the union and employer do not agree, *paragraph 79* gives the CAC has 10 working days in which to decide:

- whether the original unit is appropriate, using the same criteria as in paragraph 67; and
- if the original unit is not appropriate, what other unit is appropriate.

73. The procedure the CAC follows is similar to the one in paragraphs 70-73: the CAC will decide the appropriate unit, taking into account the factors in *paragraphs 79(3), 79(4) and 79(5)*, and must then decide under paragraph 82 whether the union should be recognised for that unit.



74. *Paragraph 82* applies if the CAC decides one or more new bargaining units under paragraph 70 or 79. The procedure is illustrated in Figure 4. If there is more than one new unit, the procedure in paragraphs 83-89 is applied separately to each of them. *Paragraph 83* deals with a new unit which overlaps with a statutory outside bargaining unit (ie contains at least one worker who is part of another bargaining unit for which a union is recognised under Part I or Part III following a declaration by the CAC). In this case, the collective bargaining arrangements shall cease in respect of workers in the new unit who were in the original unit or were in a statutory outside unit. The CAC will take no further action, but it would be possible for a union (or unions) to request recognition under Part I of the Schedule for the new unit.

75. *Paragraph 84* deals with a new unit which overlaps with a voluntary outside bargaining unit (ie contains at least one worker who was part of another bargaining unit for which a union was recognised voluntarily, including by an agreement for recognition under Part II) but not with any statutory bargaining unit. In this case, the collective bargaining arrangements must cease in respect of workers in the new unit who were in the original unit. Those in the outside unit will not be affected. The CAC will take no further action.

76. If the new unit contains no workers covered by other collective agreements, *paragraph 85* requires the CAC to decide whether the difference between the new unit and the original unit is such that support for recognition needs to be reassessed. If support does not need to be assessed (ie the changes to the bargaining unit are sufficiently minor), the CAC must declare the union recognised for the new unit, and the original method for collective bargaining will apply, with any modifications the CAC decides are necessary as a result of the change in bargaining unit. If support does need to be assessed, then the tests parallel those in Part I: *paragraph 86* requires the CAC to decide whether the union has 10% membership in the new unit, and recognition is likely to have majority support. If the test is failed, then the union ceases to be recognised. If not, then automatic recognition may be granted to unions with over 50% membership of the bargaining unit under *paragraph 87*, or a ballot will be held under *paragraph 88*.

77. *Paragraph 89* allows the union and employer to agree to cancel the ballot. If they do not, the ballot will be run in the same way as in Part I, paragraphs 25-29. If the ballot is not in favour of recognition, then the union is derecognised. *Paragraph 90* means the union ceases to be recognised in respect of any workers in the original unit who fall outside the new unit (or all of the new units). *Paragraph 91* removes workers who are in the new unit from any statutory outside bargaining unit, and allows the CAC, where a statutory method of collective bargaining applies to that unit, to modify it to take account of the change of unit.

78. *Paragraph 93* ensures that applications to the CAC cannot be withdrawn after the CAC makes a decision or declaration that recognition should continue or should cease, or after a recognition ballot is cancelled by the union under paragraph 89(1). *Paragraph 94* defines collective bargaining for the purpose of Part III and provides that the union and employer can agree to alter the scope of collective bargaining. *Paragraph 95* allows the union and employer to vary a statutory bargaining method by agreement.

Part IV: Derecognition: General

79. The statutory derecognition process set out in Part IV applies only where a declaration of recognition has been made by the CAC under Part I or III. Applications for derecognition may only be accepted three or more years after the CAC's original decision. In other circumstances, Part IV does not apply, but if a voluntarily-recognised union is derecognised it may then apply for recognition under Part I.

80. *Paragraph 96* provides that the derecognition procedure applies to a union recognised through a CAC declaration. *Paragraph 97* provides that derecognition may not take place until three or more years after a CAC declaration was made.

81. The statutory recognition procedure in Part I does not apply to an employer with fewer than 21 workers. If, at least three years after a CAC decision, an employer has fewer than 21 workers, it can notify the union that it will therefore be derecognised. The union may appeal to the CAC under *paragraph 101* if it believes the request is unfounded.

82. *Paragraph 99* provides that if the employer employs an average of fewer than 21 workers (using the same definition as in paragraph 7) over a period of thirteen weeks, he may at the end of that period give notice to the union of the fact and state that the existing bargaining arrangements will not apply from a given date, which must be at least 35 working days after the union is notified.

83. *Paragraph 100* gives the CAC 10 working days from the date it receives an application from an employer under paragraph 99 in which to decide on its validity. If it finds that the employer's notification was not valid, the collective bargaining arrangements will remain in place; otherwise the CAC must notify the union and employer that the notification is valid and, under *paragraph 101*, the union then has 10 working days in which to make an application to the CAC disputing the employer's claim. If the notice is not challenged, or if the challenge is unsuccessful, the notice will take effect and the collective bargaining arrangements will end on the date specified in the notice. If the CAC rules under *paragraph 102* that the employer's application is not correct, recognition continues.

84. Paragraphs 104-111 apply if the employer requests the union to end the bargaining arrangements. (These paragraphs are broadly similar to paragraphs 10-12 and 15, which deal with a request for recognition.) If the union was recognised voluntarily, and the CAC did not impose a method for collective bargaining, then this procedure does not apply and the employer may derecognise at any time without going through the statutory procedure in this Part.

85. *Paragraph 104* has the effect that a request to end the bargaining arrangements may be made under this Part only once three or more years have passed since the union was recognised.

86. *Paragraph 105* provides that the derecognition procedure is to end if the parties agree to end the bargaining arrangements within ten working days of the request. If the union agrees to negotiate, then the parties have 20 working days, plus whatever remains of the initial ten working day period, to reach agreement. They can extend the period for negotiation by mutual consent. If the parties agree that the union should remain recognised, it is sufficient for them to take no further action. The CAC would not be asked to make a decision under paragraphs 106 or 107, and the bargaining arrangements would remain in force. Paragraph 105(5) is for the avoidance of doubt; there is no requirement to involve ACAS.

87. *Paragraph 106* provides that if the union either does not respond to or rejects the request before the end of the first (ten working day) period, the employer may apply to the CAC to hold a secret ballot to decide whether a majority of workers support derecognition.

88. *Paragraph 107* provides that if the employer and union fail to reach agreement by the end of the second period, the employer may apply to the CAC to hold a secret ballot to decide whether a majority of workers support derecognition. *Paragraph 108* contains general procedural requirements for applications to the CAC. *Paragraph 109* means the application must be rejected if the CAC accepted another application for derecognition under Part IV or V in the previous 3 years.

89. *Paragraph 110* provides that, if the CAC is to decide whether a union should be derecognised, it must first be satisfied that derecognition is likely to have sufficient support in the bargaining unit to make proceeding with the application worthwhile. The test for this is that at least 10% of the bargaining unit favour an end to the collective bargaining arrangements and a majority of the workers in the bargaining unit would be

likely to do so. This is essentially the same test as in paragraph 20 or 36 for recognition applications.

90. Paragraphs 112-116 apply to applications for derecognition by workers. The provisions apply equally if one or many workers in the bargaining unit formally request an end to collective bargaining arrangements. For simplicity these notes refer to applications by a single worker but such references should be read as covering applications by a group of workers as well.

91. *Paragraph 112* provides that three or more years after recognition, a worker may apply to the CAC to end the collective bargaining arrangements. *Paragraph 113* means the application must be rejected if the CAC accepted another application for derecognition under Part IV or V in the previous 3 years. *Paragraph 114* provides that the CAC may not proceed with an application unless at least 10% of the bargaining unit favour an end to the collective bargaining arrangements and a majority of the bargaining unit are likely to do so. (This is essentially the same test as in paragraph 110).

92. *Paragraph 116* requires the CAC to help the employer, union and worker with a view either to the employer's and union's agreeing to end the bargaining arrangements or the worker's withdrawing the application in the 20 working days after the application is accepted. If an agreement is reached or the application is withdrawn, the CAC will take no further action. Otherwise, it must hold a ballot under the provisions of paragraphs 117-121.

93. *Paragraphs 117-121* make provision for the holding of ballots on applications for derecognition, mirroring the procedures for recognition ballots under paragraphs 25-29. Paragraph 121 provides that if the ending of bargaining arrangements is supported by a majority of those who vote and at least 40% of the workers constituting the bargaining unit, the CAC must declare that the bargaining arrangements will cease to have effect from a specified date; otherwise, the application must be refused and the union will remain recognised. The degree of support needed for derecognition may, like that needed for recognition, be altered by the Secretary of State by order subject to the affirmative resolution procedure.

Part V: Derecognition where recognition automatic

94. Part V provides for a different derecognition process to apply in cases where unions have been 'automatically' recognised on the grounds of having greater than 50% membership of the bargaining unit (*i.e.* without a ballot). Applications for derecognition of an automatically-recognised union may be accepted only three or more years after recognition.

95. *Paragraphs 122-124* provide that the derecognition procedure applies to unions recognised as the result of a CAC declaration under paragraph 22 or 87 whether the method for collective bargaining is voluntarily agreed, imposed by the CAC or agreed as a variation on a CAC imposed method.

96. *Paragraph 125* provides that derecognition may not take place until three or more years after a CAC declaration of recognition was made.

97. Paragraphs 127-133 provide for an employer to request a union to end bargaining arrangements on the grounds that fewer than half of the workers constituting the bargaining unit are members of the union. (These paragraphs are similar to paragraphs 104-111, which deal with a standard request for derecognition.)

98. *Paragraphs 127 and 129* contain general procedural requirements for applications to the CAC under this Part.

99. *Paragraph 128* provides that the derecognition procedure is to end if the parties agree to end the bargaining arrangements within ten working days of the request. If the union agrees to negotiate, then the parties can extend the ten working day negotiation period

by mutual consent. If the parties agree that the union should remain recognised, it is sufficient for them to take no further action. The CAC would not be asked to hold a ballot under paragraph 106 or 107 (which are applied by reference), and the bargaining arrangements would remain in force. If the union either does not respond to or rejects the request before the end of the negotiation period, the employer may apply to the CAC to hold a secret ballot to decide whether the union should be derecognised.

100. *Paragraphs 130 and 131* provide that, if the CAC is to hold a ballot to decide whether a union should be derecognised, it must first be satisfied that a majority of the workers who make up the bargaining unit are not members of the recognised union, and that it had accepted no application for derecognition under Part IV or V in the previous 3 years. If a majority of the workers are union members, the automatic recognition will remain in force and the CAC will take no further action. The CAC has 10 working days in which to decide.

101. *Paragraph 133* provides that if a ballot is to be held on derecognition the same derecognition ballot procedure as in Part IV should be followed.

Part VI: Derecognition where union not independent

102. Part VI provides that workers will be able to apply to the CAC for the derecognition of a union which does not have a certificate of independence and which has been (voluntarily) recognised by an employer.

103. These provisions apply equally if one or many workers in the bargaining unit request an end to collective bargaining arrangements.

104. *Paragraphs 134 and 138* restrict the scope of this Part to unions which do not have a certificate of independence.

105. *Paragraph 137* provides that at any time after a non-independent union is recognised, a worker (or workers) may apply to the CAC to end the collective bargaining arrangements. *Paragraph 139* provides that an application is not admissible unless at least 10% of the bargaining unit favour an end to the collective bargaining arrangements and a majority of the bargaining unit are likely to do so. (This is essentially the same test as in paragraph 110). *Paragraphs 135 and 136* provide definitions for this Part of the Schedule.

106. *Paragraph 140* makes an application for derecognition under Part VI inadmissible if the union has applied for a certificate of independence under section 6 of the 1992 Act. *Paragraph 141* requires the CAC to decide whether an application is admissible in terms of paragraphs 137-140, taking evidence from the employer, union and workers.

107. *Paragraph 142(1)* mirrors paragraph 116(1), and requires the CAC, during a 20 working day negotiation period, to help the employer, union and workers negotiate with the aim that either they agree to end the bargaining arrangements or the worker withdraws the application. If an agreement is reached or the application is withdrawn, the CAC will take no further action. Otherwise, it must hold a ballot under paragraph 147.

108. If during the negotiation period in paragraph 142 the CAC becomes aware that the union applied for a certificate of independence before the application for derecognition was made, *paragraph 143* requires it to suspend work on the workers' application for derecognition. If the Certification Officer (CO) decides that the union is independent, *paragraph 144* has the effect of ending the application, and the union remains recognised. If the CO decides that the union is not independent, the application resumes, and a new 20 working day negotiation period begins. If the employer and union agree to end recognition or if the workers withdraw their application, the CAC will take no further action. If they cannot agree, it must hold a ballot under *paragraph 147*. If at any time before the CAC is informed of a ballot result under Part VI the union is awarded a certificate of independence – for example, as a result of an appeal against the CO – then

paragraph 146 requires the CAC to ignore the workers' application for derecognition and the union remains recognised.

109. *Paragraph 148* deals with the situation where an application for derecognition under this Part has been successful but the employer has re-recognised the non-independent union for substantially the same bargaining unit. In this case, paragraph 35 allows an independent union to apply for statutory recognition under Part I within 3 years of the derecognition. If the independent union is declared to be recognised by the CAC then paragraph 148 provides that the non-independent union shall be derecognised. In this case statutory recognition under Part I replaces the voluntary recognition of the recently-derecognised non-independent union.

Part VII: Loss of independence

110. The provisions for statutory recognition in Part I apply only to unions with a certificate of independence. Part VII of the schedule deals with the possibility that an independent union recognised under Part I might lose its certificate of independence. If this were to happen, the union would be treated as voluntarily recognised by the employer, but the statutory support for the bargaining arrangements would cease. Part VII also deals with unions which have made an agreement for recognition and for which a bargaining method is imposed via Part II; again, if such a union were to lose its certificate of independence the statutory support for the bargaining arrangements would cease.

111. *Paragraphs 149 and 150* provide that Part VII applies to unions recognised by a declaration of the CAC (under Part I or Part III) or which obtain a legally-binding bargaining procedure under Part II. *Paragraph 152* means that the bargaining arrangements cease if the Certification Officer withdraws a certificate of independence from the union or, if more than one union is jointly recognised, from all the unions. *Paragraph 153* provides for the bargaining arrangements to be restored if a union successfully appeals against the Certification Officer's decision to withdraw the certificate of independence.

112. *Paragraph 154* means that if the bargaining arrangements cease to have effect under this Part, then the employer can derecognise the union without having to go through the procedure in Part IV or Part V, or negotiate to change the bargaining unit without following the procedure in Part III. If the union appeals successfully against the loss of certificate, the original arrangements will come into force again.

113. *Paragraph 155* concerns the requirement to consult on training (section 5 of the Act). If the requirement lapses because a union loses its certificate of independence, but then resumes because the union appeals successfully, the first consultation meeting must be held within 6 months of the day on which the bargaining arrangements take effect again.

Part VIII: Detriment

114. Detriment is action short of dismissal taken by an employer which is damaging to the worker. *Paragraphs 156-160* set out provisions prohibiting such detriment in respect of a worker on the grounds relating to recognition or derecognition of a union listed in paragraph 156(2). Under section 146 of the 1992 Act, an employee currently has the right not to suffer detriment on grounds of membership, non-membership or taking part in the activities of a trade union. The Act extends this right so as to prohibit detriment in respect of the paragraph 156(2) grounds and gives employees the right to complain in respect of such detriment to an employment tribunal. Paragraphs 157-160 make provision for time limits and other procedural matters and in relation to the calculation of awards.

115. *Paragraph 161* provides that an employee's dismissal is unfair if it is on the grounds related to recognition or derecognition listed in paragraph 161(2); these are the same grounds as in paragraph 156(2). *Paragraph 162* makes similar provision in respect of selection for redundancy. *Paragraph 163* has the effect that dismissal which would be

unfair under paragraphs 161 or 162 will still be unfair even if the dismissal consists of the expiry of a fixed term contract and the employee has waived the right to claim unfair dismissal on that expiry as permitted by section 197(1) of the 1996 Act. This provision is transitional in nature since such waivers will be prohibited by section 18 of the Act when it is brought into force.

116. *Paragraph 164* has the effect that dismissal on the grounds listed in paragraph 161(2) is unfair even if the employee has not completed the qualifying period normally required for claiming unfair dismissal or has passed the upper age limit normally required for making a claim.

- The *qualifying period for unfair dismissal* is currently one year, as set out in section 108 of the 1996 Act (as amended by SI 1436/1999).
- The *upper age limit* is dealt with in section 109 of the 1996 Act.

Part IX: General

117. *Paragraph 166* provides that if the CAC represents to the Secretary of State that the automatic recognition procedure in paragraphs 22 or 87 has an unsatisfactory effect, the Secretary of State may amend it. The amendment need not be one proposed by the CAC, and must be made by statutory instrument subject to the affirmative resolution procedure. *Paragraph 167* allows the Secretary of State to issue guidance to the CAC on how to exercise its functions under paragraphs 22 and 87, ie how to decide the three qualifying questions in paragraphs 22(4) and 87(4). The guidance is required to be laid before both Houses of Parliament and published

118. *Paragraph 168* provides that the Secretary of State may by order specify a method for conducting collective bargaining to be taken into account by the CAC when imposing a collective bargaining method under paragraphs 31(3) and 63(2). The Secretary of State must consult ACAS before providing the guidance, which is made by order subject to negative resolution procedure. The CAC must take the specified method into account in imposing a bargaining method, but may depart from it as circumstances require.

119. *Paragraph 169* allows the Secretary of State to make rules for how the CAC should treat competing applications for derecognition.

Section 2 and Schedule 2: Detriment related to trade union membership

120. Existing law protects employees against positive acts to prevent or deter trade union membership, non-membership or activities but not against omissions on the same grounds. In other words, if an employer takes action which gives a benefit to non union members but omits to confer the same benefit to union members, the omission does not constitute action short of dismissal on grounds related to trade union membership under section 146 of the 1992 Act. This aspect of the law was brought to light in the cases *Associated Newspapers v Wilson* and *Associated British Ports v Palmer [HL 1995] ICR 406***,** where the House of Lords held that the word "action" in section 146 did not extend to omissions to act.

121. *Section 2* gives effect to Schedule 2, which amends section 146 so as to prohibit this form of detriment by omission and makes consequential amendments to other related sections of the 1992 Act; section 147 on the time limit for applications to be made to employment tribunals; section 148 on the consideration of a complaint by tribunals; section 149 on the remedies which tribunals can award; and section 150 on awards against third parties.

122. *Paragraph 2* of Schedule 2 replaces references in sections 146(1), (3) and (4) of the 1992 Act to action short of dismissal on grounds related to trade union membership, non-membership or activities with references to a right not to be subjected to any detriment as an individual by an act or deliberate failure to act on the part of the employer for one of the prohibited purposes. Section 146(5), which sets out the

ground on which an employee may present a complaint to an employment tribunal as action taken against him, is amended accordingly. Similarly, *paragraphs 3 to 6* make consequential amendments to sections 147, 148, 149 and 150 of the 1992 Act, which deal respectively with the time limits for bringing complaints before an employment tribunal, the criteria to be applied by the tribunal in determining the purpose of an employer's action, the remedies available in the event that the tribunal find a complaint is well-founded and proceedings against third parties.

Section 3 : *Blacklists*

123. Under sections 137 and 138 of the 1992 Act, refusal of employment or (in the case of employment agencies) refusal of service on grounds of trade union membership is unlawful. In the past, organisations have compiled and disseminated blacklists of supposed trade union activists. People on such lists could have difficulty finding work. Inclusion could be defamatory and unjustified but it was often impossible in practice to obtain a remedy. Although there is no evidence that blacklisting is widespread, the practice of blacklisting in the UK has been repeatedly criticised by the International Labour Organisation and in *Fairness at Work* the Government proposed to prohibit blacklisting of trade union members.

124. *Section 3(1)* gives the Secretary of State the power to make regulations, subject to affirmative resolution (under section 42), to prohibit the compilation of lists containing information about individuals' trade union membership or activities with a view to their being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers already employed. *Subsection (2)* provides that the prohibition may extend to the use, sale or supply of such lists. *Subsection (3)* sets out particular provisions which may be included in Regulations made under subsection (1). They include provision:

- conferring jurisdiction on employment tribunals and the Employment Appeal Tribunal;
- empowering the courts and tribunals to grant and enforce specified remedies;
- for awarding compensation to individuals included on blacklists;
- relating to cases where an employee is dismissed or selected for dismissal because he is included on a blacklist;
- permitting trade unions to bring proceedings on behalf of their members;
- creating criminal offences, which may in specific circumstances extend to another person, for example to an accomplice or agent of the person who commits the offence, or to their employee or employer; and
- specifying obligations or offences which will not apply in specified circumstances.

The regulations may also include supplemental, incidental, consequential and transitional provisions, including provision amending Acts of Parliament, and may make different provisions in differing cases and circumstances. The Government intends to consult on draft regulations before they are made.

125. *Subsection (4)* limits the penalties for criminal offences which might be created by regulations made under subsection 3. Subsection (4)(a) provides that offences may not be punishable by imprisonment. Subsections (4)(b)and (c) set out the maximum fines that can be imposed by the courts. Such fines may not exceed level 5 on the standard scale (£5,000) for an offence that is triable only summarily, or the statutory maximum for a summary conviction for a case triable either way. The penalties are based on analogous criminal sanctions in the Data Protection Act 1998.

126. *Subsection (5)* is interpretative. It provides a wide definition for the type of list which can be prohibited by regulation. In particular, it is designed to cover information that

may be stored and circulated electronically, and to cope with the future development of information technologies. It also provides that the term "worker" (which appears in subsection (1)(b)) has the wide definition given in section 13 of the Act, and so includes agency workers, homeworkers, persons in Crown employment and Parliamentary staff as well as those included in the definition of "worker" in section 230(3) of the 1996 Act.

127. *Subsection (6)* provides that expressions used in section 3 (except for "worker" and "list") have the same meanings as in the 1992 Act.

Section 4 and Schedule 3: Ballots and Notices

128. Sections 226 to 235 of the 1992 Act specify the law relating to industrial action ballots and notices. These provisions are complex. The Government invited suggestions in *Fairness at Work* to clarify and simplify the law in this area. A large number of responses to this invitation were received, especially from trade unions and legal bodies. *Section 4* gives effect to Schedule 3, which draws on some of these suggestions and amends the law in the following areas.

Informing employers of the ballot result

129. Section 231A of the 1992 Act requires unions to inform employers about the result of an industrial action ballot which involves their employees. In cases where a union ballots its members employed by different employers, the union must supply the information to each of the employers concerned. Under existing law, a failure to inform some, but not all, of the employers can make it unlawful for the union to induce any of its balloted members to take action. *Paragraph 2(3)* of Schedule 3 makes it lawful in these circumstances for a union to call on its members to take action where they are employed by an employer who was informed of the result. It will remain unlawful, however, for a union to induce its members to take action if their employer was not informed of the result.

Notices to employers of industrial action ballots and the taking of industrial action

130. If a trade union decides to call on its members to take or continue industrial action, it has no immunity from legal liability unless it holds a properly conducted secret ballot in advance of the proposed action. Unions are required under the 1992 Act to give to the employers concerned advance notice in writing both of the ballot and of any official industrial action which may result. The ballot notice must describe, so that their employer can readily ascertain them, the employees who it is reasonable for the union to believe will be entitled to vote. Likewise, the notice of official industrial action must describe, so that their employer can readily ascertain them, the employees the union intends should take part in the action. The current law has been interpreted by the courts (most notably, in the case *Blackpool and the Fylde College v National Association of Teachers in Further and Higher Education [1994] ICR, 648 Court of Appeal and 982 House of Lords*) as requiring the union in certain circumstances to give to the employer the names of those employees which it is balloting or calling upon to take industrial action.

131. *Paragraph 3* amends the provisions of the 1992 Act which provide for a notice to be issued in advance of the ballot. It amends section 226A(2) to redefine the purpose for which the notice is required as being to enable the employer to make plans to deal with the consequences of any industrial action and to provide information to those employees who are being balloted. Sub-paragraph (3) inserts a new section 226A(3A) which sets out the type of information which is to be included in the notice in order to satisfy the new section 226A(2). It has the effect that a union is required to provide only information in its possession and that it is not required to name the employees concerned.

132. *Paragraphs 11(1) to 11(3)* amend section 234A of the 1992 Act, which provides for a notice to be issued in advance of official industrial action, in similar terms.

Requirement to send sample voting papers to employers

133. Section 226A(1) of the 1992 Act provides that a union proposing to conduct an industrial action ballot must ensure that a sample voting paper is received by every person who it is reasonable for the union to believe will be the employer of a person or persons who will be entitled to vote in the ballot. The sample voting paper must be received not later than the third day before the opening of the ballot. Section 226A(3) has the effect that where more than one employer is involved and different forms of voting paper are used, samples of all the different forms of the voting paper must be sent to every employer.

134. *Paragraph 3(3)* inserts a new section 226A(3B) amending the requirement on unions so that they must ensure only that each employer receives the sample voting paper (or papers, where more than one form exists) which are to be sent to persons employed by that employer. In other words, unions are no longer required to ensure that an employer receives sample forms which are to be sent only to the employees of other employers.

Inducing members to take industrial action

135. Section 227(1) of the 1992 Act provides that entitlement to vote in an industrial action ballot must be accorded equally to all union members who it is reasonable at the time of the ballot for the union to believe will be induced to take part in the industrial action. No other members are entitled to vote. Section 227(2) provides that these requirements are not satisfied if "any person" who was a member at the time of the ballot and who was denied an entitlement to vote is subsequently induced by the union to take part in the action.

136. The effect of these provisions is that unions are free to induce new members who joined the union after the ballot to take industrial action. However, they cannot induce any members to take action if they were members at the time of the ballot but were denied an entitlement to vote. This includes cases where members changed their job after the ballot and became employed within the group of workers which the union is proposing should take industrial action.

137. *Paragraph 4* repeals section 227(2). *Paragraph 8* inserts a new section 232A into the 1992 Act which defines circumstances where a union which induces a member to take industrial action who was denied an entitlement to vote in the ballot loses its protection from liability in tort. The effect of the new section is to maintain that protection for unions which induce members to take action where they were not balloted, unless it was reasonable at the time of the ballot for the union to believe that those members would be induced to take part. This will enable unions to induce members who changed job after the ballot to take action. *Paragraph 2(2)* makes a consequential change to section 226 of the 1992 Act, which defines the circumstances where industrial action can be regarded as having the support of a ballot.

Separate Workplace Ballots

138. Section 228 of the 1992 Act defines the circumstances where unions can hold an aggregate ballot across two or more separate workplaces. *Paragraph 5* replaces this section with new sections 228 and 228A.

139. New section 228 requires a union, when balloting its members at two or more workplaces, to hold separate ballots at each workplace unless one or more of the following circumstances (listed in new section 228A) obtain, in which case the union may hold an aggregate ballot if it wishes:

- new section 228A(2) provides for an aggregate ballot to take place at those workplaces where at least one of a union's members is affected by the dispute. (New subsection (5) specifies which members of a union can be categorised as being "affected by a dispute" by reference to the definition of a "trade dispute" in section 244 of the 1992 Act.) ;

- new section 228A(3) provides for an aggregate ballot to take place where a union reasonably believes that it is balloting all its members in a particular occupational category (or categories) who are employed by one or more of the employers with whom the union is in dispute; and

- new section 228A(4) provides for an aggregate ballot to take place where a union reasonably believes that it is balloting all its members who are employed by one or more of the employers with whom the union is in dispute.

New section 228(4) provides the definition of a "workplace" for the purposes of these new provisions.

Overtime and call-out bans

140. Section 229(2) of the 1992 Act provides that the voting paper in an industrial action ballot must contain either or both of two questions asking whether the voter is prepared to take part in a "strike" or in "industrial action short of a strike". In some cases, it has been unclear whether overtime bans and call-out bans were strikes or industrial action short of a strike, and court action has ensued. Recent authority has concluded that an overtime ban is strike action. *Paragraph 6(2)* reverses this decision and clarifies the status of call-out bans by defining both these forms of industrial action as "industrial action short of a strike" for the purposes of section 229(2). *Paragraph 6(4)* ensures that the definition of a "strike" as "a concerted stoppage of work", which is given in section 246 of the 1992 Act, does not apply to overtime bans and call-out bans for the purposes of the law on voting papers.

The statement on voting papers

141. Section 229(4) of the 1992 Act requires the following statement to appear on all ballot voting papers: "If you take part in a strike or other industrial action, you may be in breach of your contract of employment". *Paragraph 6(3)* of the Schedule amends this statement by adding words which describe the main features of the new protections against the unfair dismissal of workers taking industrial action contained in Schedule 5 to the Act.

Conduct of Ballot : Merchant Seamen

142. Sections 230(2A) and 230(2B) of the 1992 Act provide for the situation where a union is conducting an industrial action ballot among its members who are merchant seamen. Merchant seamen are often away from home for long periods and it can be difficult for them to participate in a ballot if voting papers are sent to their home addresses. Sections 230(2A) and 230(2B) therefore require the union to ballot such members on board a ship, or at a port where the ship is, as long as the merchant seamen are at sea, or at a foreign port where their ship is, for the entire period of the ballot. *Paragraph 7* replaces these sections with new sections 230(2A) and 230(2B), which in effect extend these requirements to cater for the case where the merchant seamen are at sea or at a foreign port for just a part of the balloting period. These new provisions require a union, if it is reasonably practicable, to ballot a member on board ship, or at a port where the ship is, if:

- the member will be at sea, or at a foreign port where the ship is, for all or part of the balloting period ; and

- it will be convenient for the member to receive the ballot paper and to vote in this way.

Disregard of certain minor and accidental failures

143. The organisation of an industrial action ballot is often a complicated task and can sometimes involve many thousands of people spread around the country and, occasionally, abroad. However, a whole ballot can be invalidated if a union commits small errors in determining who is eligible to vote or if a union fails to a small extent to send ballot papers to all those entitled to vote and to nobody else. In order to provide greater scope for such errors to be disregarded, provided they are accidental and on a scale which is unlikely to affect the outcome of a ballot, *paragraph 9* introduces a new section 232B into the 1992 Act defining where failures to meet the requirements of section 227(1) (entitlement to vote in a ballot) and parts of section 230 (conduct of a ballot) can be disregarded.

Ballots for industrial action : period of effectiveness

144. Section 233 of the 1992 Act provides that industrial action does not have the support of a ballot unless it is called by a "specified person" and meets certain other conditions. One of these is that action to which the call relates must take place before the ballot ceases to be effective in accordance with section 234 of the 1992 Act. Section 234(1) provides that, in ordinary cases, ballots cease to be effective at the end of the period of four weeks beginning with the date of the ballot. Section 246 of the 1992 Act provides that where votes are cast on more than one day the "date of ballot" is the last of those days.

145. *Paragraph 10* provides for this period to be lengthened by up to a maximum of four more weeks if both the union and the employer agree to an extension. The purpose of the amendment is to avoid circumstances where a union feels obliged to organise industrial action within the four week period before a ballot becomes ineffective, even though the parties consider a settlement might be achieved by further negotiation.

146. Where the ballot has included the workers of two or more employers, the option of agreeing an extension is to operate separately in relation to each employer. So, if a ballot involves the workers of two employers (employer A and employer B) and employer A agrees an extension but employer B does not, the extension would apply only in respect of A's workers and not B's.

147. Subsections (2) to (6) of section 234, which deal with the particular case where a court has lifted an injunction prohibiting a union from calling industrial action, are unaffected.

Suspension of industrial action

148. Section 234A of the 1992 Act provides for a trade union to send a notice to a person's employer informing him that the union intends to call upon all or some of his employees to take industrial action. The notice must be received at least seven days in advance of the commencement of the action. The notice must specify if action is continuous or discontinuous.

149. Subsection 234A(7) deals with the position where continuous industrial action which has been authorised or endorsed by the union ceases to be so authorised or endorsed and is later authorised and endorsed again. It has the effect that the notice issued before the action ceased to be authorised or endorsed does not usually cover any action pursuant to the later authorisation or endorsement. This arrangement discourages unions from suspending industrial action to negotiate a settlement of the dispute because, if the negotiations fail, action cannot resume promptly because a fresh notice has to be issued at least seven days in advance.

150. *Paragraph 11(5)* inserts a new subsection (7A) into section 234A which defines the circumstances where, following a specified period in which the industrial action has been suspended by joint agreement between the union and the employer, the action can be resumed without the need to issue a fresh notice. The specified period of the suspension can be extended by joint agreement. It does not change the existing exemption whereby a union may resume industrial action which it suspended in order to comply with a court order or undertaking.

Section 5: Training

151. *Section 5* inserts new sections 70B and 70C into Chapter VA of Part I of the 1992 Act. (Chapter VA is itself inserted into the 1992 Act by section 1 of the Act.) Under new section 70B, if a union is recognised under the procedure set out in Part I of Schedule A1 to the 1992 Act as inserted by Schedule 1 to this Act and the CAC has specified a method for collective bargaining under paragraph 31(3) of Schedule A1 which the employer and union have not agreed should not be legally binding under paragraph 31(5) of the Schedule, the employer must invite representatives of the union to a meeting to:

- consult on the employer's policy on training;
- consult on the employer's plans for training in the next six months or, if the employer sets a date for the next meeting, in the period before the next meeting; and
- report on the training undertaken since the previous meeting.

152. This duty applies only in respect of workers within the bargaining unit. The first such meeting must be held within six months of the CAC imposing a method for collective bargaining, and further meetings must be held within six months of the previous meetings. The employer will be obliged to give to the union any information without which it would be impeded in participating in the meeting and which it is in line with good industrial relations practice to provide. This is subject to certain exceptions, such as information which would disclose the identity of individuals without their consent. The information must be provided at least two weeks before the meeting. After the meeting, the union has four weeks in which to make written representations (comments, suggestions or requests) on the training matters discussed at the meeting, which the employer must take into account.

153. New section 70C provides that a union may complain to an employment tribunal that an employer has failed to fulfil the obligations under new section 70B. This failure could, for example, consist of a failure to hold meetings or to provide sufficient information to the union in advance of a meeting. As is usual for employment tribunals, a complaint should be made within three months of the alleged failure. If the tribunal upholds the complaint, it may award compensation to each member of the bargaining unit, up to a maximum of two weeks' pay. This award is payable to the individual workers, and the union may not take legal action to enforce payment: a worker may take such legal action if necessary.

Section 6: Unfair dismissal connected with recognition: interim relief

154. This section allows an employee complaining of unfair dismissal under paragraph 161 of Schedule 1 to the Act (dismissal connected with union recognition or derecognition) to claim interim relief.

Interim relief is dealt with in sections 128-132 of the 1996 Act. It may be awarded by an employment tribunal if it is applied for within seven days of the employee being dismissed and the tribunal considers it is likely to find the dismissal unfair. The effect of interim relief is that the employer must re-employ the worker on terms at least as favourable as before the dismissal, and hence the employee will continue to be paid. The amount paid under interim relief is offset against the compensation finally awarded

by the tribunal. If the employer fails to re-employ the worker, the tribunal may order the employer to pay compensation.