



**Law  
Commission**  
Reforming the law

# **Consumer sales contracts: transfer of ownership**

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by the House of Commons to be printed on 22 April 2021



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ISBN 978-1-5286-2531-9

CCS 0421369540 04/21

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

# The Law Commission

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are:

The Right Honourable Lord Nicholas Green, Chairman

Professor Sarah Green

Professor Nick Hopkins

Professor Penney Lewis

Nicholas Paines QC

The Chief Executive of the Law Commission is Phil Golding.

The Law Commission is located at 1st Floor, Tower, 52 Queen Anne's Gate, London SW1H 9AG.

The terms of this report were agreed on 24 February 2021.

The text of this report is available on the Law Commission's website at <http://www.lawcom.gov.uk>.



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# Glossary

**1993 Report:** Sale of goods forming part of a bulk (1993) Law Com No 215, Scot Law Com No 145, <https://www.lawcom.gov.uk/project/sale-of-goods-forming-part-of-a-bulk/>.

**2015 Consultation:** Consumer Prepayments on Retailer Insolvency – a consultation paper (2015) CP No 221, <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

**2016 Recommendations:** The recommendations on transfer of ownership made by the Law Commission in the 2016 Report.

**2016 Report:** Consumer Prepayments on Retailer Insolvency (2016) Law Com No 368, <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

**Administration:** A rescue mechanism for insolvent companies, which allows them to continue their business temporarily.

**Card issuer:** An entity which issues credit or debit cards, such as a high street bank.

**Card scheme:** Payment networks, such as Visa and MasterCard, which facilitate card payment transactions.

**Chargeback:** The reversal of a card transaction which the consumer may ask their card issuer to request.

**Consumer:** An individual acting for purposes that are wholly or mainly outside their trade, business, craft or profession, as defined in section 2(3) of the Consumer Rights Act 2015.

**Consultation paper:** Consumer sales contracts: transfer of ownership (2020) Law Commission Consultation Paper No 246, <https://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/>.

**Creditor:** An entity to which a person or company owes money or its equivalent.

**Draft Bill:** The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill included in the consultation paper.

**Final draft Bill:** The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill included in this report.

**Fixed charge:** A mortgage or a security over a specific asset to secure the repayment of a loan.

**Floating charge:** A security over a class of a company's assets or, more usually, over all of a company's assets, both present and future (for example, stock and money in bank accounts). On insolvency, the floating charge "crystallises" over the assets a company owns at that moment.

**Future goods:** Goods which have not yet been made at the time a contract for the sale of goods is made.

**Insolvency practitioner:** A third party who steps in to see if an insolvent company can be saved, or at least sold as a going concern, rather than simply wound up. On an insolvency, the insolvency practitioner will assess the assets of the insolvent company.

**Insolvency:** The status of a company when the value of its assets is less than the amount of its debts ("balance sheet insolvency") or it cannot pay its debts as they fall due ("cash flow insolvency").

**Lien:** A right to hold property belonging to another until a debt owed by them is paid.

**Liquidation:** A process through which a company is brought to an end. Its assets are sold and the proceeds distributed to the various creditors in accordance with the hierarchy set out in legislation.

**Merchant acquirer:** The party in the card cycle that contracts with the retailer (or "merchant") to process payments for credit and debit card transactions. Sometimes called "merchant services providers", they used to be associated with the major banks. However, as the market has become more competitive, they have become increasingly independent. Merchant acquirers in the United Kingdom include WorldPay, Barclaycard Merchant Services, Elavon, and Lloyds Bank Cardnet.

**Prepayment:** Money, or goods for money's worth, provided to a person or company in advance of receiving goods or services. A prepayment could be for the entire balance, or just a proportion of the total price.

**Proposed rules:** The proposed rules on transfer of ownership of goods in the draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the "final draft Bill").

**Section 75 claim:** A claim by a consumer under section 75 of the Consumer Credit Act 1974 in relation to a breach of contract or misrepresentation. The credit card company is jointly and severally liable for any breach of contract or misrepresentation by the retailer.

**Secured creditor:** A creditor with a security interest, such as a fixed charge or floating charge, over all or some of the assets of the person or entity that owes money to the creditor.

**Specific goods:** Goods identified and agreed upon by the retailer and consumer at the time a contract for the sale of goods is made.

**Unascertained goods:** Goods which have not been identified and agreed upon by the retailer and consumer at the time a contract for the sale of goods is made. For example, where a consumer buys goods online, the retailer has the freedom to select which item from its general stock will be used to fulfil the contract.

**Unsecured creditor:** A creditor which is owed money but does not have the benefit of a security interest in the assets of the person or entity which owes it, or any degree of preference among fellow creditors.



# List of abbreviations

**CCA 1974:** Consumer Credit Act 1974.

**CCRs 2013:** Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134.

**CRA 2015:** Consumer Rights Act 2015.

**SGA 1979:** Sale of Goods Act 1979.

## WEBSITES

All websites referenced in this document were last visited on 15 April 2021.



# Consumer sales contracts: transfer of ownership

*To the Right Honourable Robert Buckland QC MP, Lord Chancellor and Secretary of State for Justice*

## Chapter 1: Introduction

- 1.1 Consumers often pay for goods in advance of receiving them. This happens whenever consumers buy goods online. It can also happen when consumers pay for goods in a physical shop, but the goods have to be made to the consumer's order, are not available to be taken away there and then or are left with the retailer to be altered. There are many circumstances then in which a consumer may have paid for goods, in full or part, but does not yet have them in their possession. In this situation, who owns the goods? The question is particularly important in the event of the retailer's insolvency, which increases significantly the risk that the goods will never be delivered to the consumer.
- 1.2 The ownership of goods is determined by complex and technical rules which have remained largely unchanged since the late 19th century. Some of the terminology is old-fashioned and unclear and these transfer of ownership rules were not designed with consumer transactions in mind, let alone internet shopping. As a result, the rules can be a source of confusion for consumers. On retailer insolvency, consumers can have difficulty understanding why they cannot claim goods they have paid for.
- 1.3 In July 2016, the Law Commission made recommendations aimed at improving the situation for consumers in the event of a retailer's insolvency. One of a number of measures that we recommended was an update of the transfer of ownership rules as they apply to consumers. This report is the result of a request from government to do further work on the practicalities and wider impacts of updating the rules.
- 1.4 Internet sales have grown steadily over the last few years, with a sharp increase in recent months amid the closure of non-essential retail outlets in response to the COVID-19 emergency. In the last year, internet sales as a proportion of all retail sales jumped from 19.1% in February 2020 to 34.5% in February 2021.<sup>1</sup> The result of this upward trend in online shopping is that more and more consumers are paying for goods before receiving them. The number of retailer insolvencies has also been

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<sup>1</sup> Office for National Statistics, 'Internet sales as a percentage of total retail sales' (March 2021), <https://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsi>.

increasing. 2019 saw the highest number of retailer insolvencies in five years<sup>2</sup> and, according to Deloitte, retailer insolvencies in the first half of 2021 could be 80-100% higher than the average for the last few years.<sup>3</sup> Perhaps more than ever before, there is a need for balance between consumer protection, retailer flexibility and the importance of resolving issues on insolvency as quickly and inexpensively as possible.

- 1.5 In this report we set out how our 2016 recommendations could be implemented, and include draft legislation which would achieve this. We also consider the potential impact of the new rules on a range of parties, particularly in the event of a retailer insolvency. We look at other aspects of law and practice which could affect the impact of the draft legislation, including a widespread practice among internet retailers of delaying the formation of the consumer sales contract until the goods are dispatched to the consumer. These issues would need to form part of any decision on implementation of new transfer of ownership rules.

## BACKGROUND TO THE PROJECT

- 1.6 In July 2016, the Law Commission published its report *Consumer Prepayments on Retailer Insolvency*.<sup>4</sup> This looked at the existing protections given to prepaying consumers on a retailer's insolvency and considered whether such protections should be strengthened. We made a range of recommendations designed to improve the position of consumers in different circumstances, including regulating industries which pose particular harm to vulnerable consumers and improving consumer awareness of the protections available through credit and debit card providers.<sup>5</sup>
- 1.7 As part of this work, we looked at the existing law on transfer of ownership of goods. The current rules are contained in the Sale of Goods Act 1979 and apply to all contracts for the sale of goods, regardless of whether the purchaser is a consumer or a business. We recommended that the rules for consumer contracts should be updated and moved into the Consumer Rights Act 2015 (CRA 2015). Our recommended rules would apply to contracts for the sale of goods under consumer contracts generally, and not just in the event of retailer insolvency.
- 1.8 In 2018, the government said that it agreed in principle with our recommendations but that further work would be required.<sup>6</sup>

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<sup>2</sup> Insolvency Service, 'Company Insolvency Statistics July to September 2019' (October 2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/856060/Company\\_Insolvencies\\_-\\_Commentary\\_-\\_Q3\\_2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/856060/Company_Insolvencies_-_Commentary_-_Q3_2019.pdf).

<sup>3</sup> Deloitte, 'Another storm on the horizon?', <https://www2.deloitte.com/uk/en/pages/financial-advisory/articles/another-storm-on-the-horizon-the-outlook-for-insolvencies-in-2021.html>.

<sup>4</sup> Consumer Prepayments on Retailer Insolvency (2016) Law Com No 368 (the 2016 Report), <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

<sup>5</sup> We made five recommendations in total: see 2016 Report, ch 10.

<sup>6</sup> Department for Business, Energy & Industrial Strategy, 'Law Commission report on consumer prepayments on retailer insolvency: Government response' (December 2018), <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/law-commission-report-government-response.pdf>.

The government agrees with the Law Commission that the law on transfer of ownership is not as clear and understandable as it could be. However, due to the technical nature of this area of law, we have concerns about the practicalities and wider impacts of amending legislation at present, particularly in relation to drawing up an agreed list of events that would be sufficient to identify the goods for the contract, and what other impacts there might be.

### Terms of reference

1.9 In September 2019, the Department for Business, Energy & Industrial Strategy (BEIS) asked the Law Commission to undertake this further work and to prepare draft legislation to implement its 2016 recommendations on transfer of ownership.

1.10 Our terms of reference are as follows:

The Law Commission has agreed with the Department for Business, Energy & Industrial Strategy to prepare, with Parliamentary Counsel, draft legislation to implement the Commission's recommendations on transfer of ownership contained in its report Consumer Prepayments on Retailer Insolvency, Law Com No 368 (July 2016).

In particular, the Law Commission will:

- Consult stakeholders with a view to understanding their concerns about the recommended changes.
- Produce and consult on draft legislation.
- Work with economists within the Department and the Insolvency Service to prepare an impact assessment to accompany the draft legislation.
- Publish draft legislation with explanatory notes.

### THE CONSULTATION EXERCISE

1.11 In July 2020 we published a draft Bill (the draft Bill)<sup>7</sup> which would implement changes to the rules on transfer of ownership of goods under consumer sales contracts. We also published an accompanying consultation paper (the consultation paper).<sup>8</sup> This report sets out an updated version of the draft Bill (the final draft Bill) with commentary, and an analysis of responses to the consultation.

1.12 In the consultation paper we asked consultees for their views about whether the draft Bill would successfully implement the recommendations we made in our 2016 Report, and whether it was accessible and appropriately structured. We also asked consultees for their views on the potential impact of the draft Bill. Finally, the consultation discussed the practice among retailers of seeking to delay the formation of a

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<sup>7</sup> Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the draft Bill), <https://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/>.

<sup>8</sup> Consumer sales contracts: transfer of ownership (2020) Law Commission Consultation Paper No 246 (the consultation paper), <https://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/>.

consumer sales contract until goods are dispatched, or in some cases delivered, to the consumer. We noted the impact of this practice on the proposed rules on transfer of ownership and asked consultees about its effect on consumers more generally.

- 1.13 We received 19 responses to the consultation. We have read and analysed these responses carefully and they have influenced the final draft Bill and this report. We provide an analysis of the results of the consultation exercise in this report; we are separately publishing the full responses received (with personal information redacted as appropriate).

## **TERRITORIAL EXTENT**

- 1.14 As the Law Commission for England and Wales, we cannot make recommendations for Scotland or Northern Ireland. However, the CRA 2015, which our final draft Bill seeks to amend, applies to the whole of the UK. Consumer law is reserved: it is a matter on which only the United Kingdom Parliament can legislate. If the government makes changes to the rules on transfer of ownership under consumer sales contracts, we hope that it will consider implementing such changes throughout the UK, after appropriate engagement with the devolved administrations. Large retailers operating in England and Wales tend to have shops in Scotland and Northern Ireland, and we think that consumers would expect their rights to be consistent across the UK. It would therefore be preferable to have the same level of protection in each jurisdiction.

## **IMPLEMENTATION OF THE FINAL DRAFT BILL**

- 1.15 In the 2016 Report, we said that the impact of the transfer of ownership recommendations would be relatively limited and that they would not be the main source of protection for consumers in the event of a retailer insolvency. However, we did say that improving the accessibility of the law in this area could be reason enough for reform.<sup>9</sup>
- 1.16 As a result of further engagement with stakeholders, we are still of the opinion that the final draft Bill has the potential to meet these aims. However, we have reached the conclusion that there may not be sufficient justification for implementation of the final draft Bill as a standalone measure at the present time. We have reached this conclusion based on evidence that the proposed reforms would have only a limited benefit for consumers while resulting in potentially substantial costs; costs which, in the event of retailer insolvency, would reduce the estate to the detriment of all creditors.
- 1.17 The responses to our consultation in 2015 revealed support from consumer groups and academics for the proposals to change the rules on transfer of ownership. Other consultees, in particular insolvency practitioners, were less supportive. They were concerned that the proposals would affect retailers' ability to access finance, and that they would complicate the insolvency process. In response to our consultation paper published alongside the draft Bill in 2020, retailers and insolvency practitioners further elaborated on these concerns and suggested that the costs associated with the draft Bill would not be proportionate compared to the limited benefits. Some consultees

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<sup>9</sup> 2016 Report, paras 9.51 to 9.52.

also suggested that the rules would not necessarily give consumers more clarity about their rights.<sup>10</sup> In response to the consultation paper we did not get significant engagement from stakeholders representing the voice of consumers. As a result, the evidence we have been presented with about the potential benefits of the draft Bill for consumers is less detailed than the impact on other interested parties. Nevertheless, this has not prevented us from considering the position of consumers and we have met with additional stakeholders since the close of the consultation in order to gain further insight into consumers' experiences on insolvency.

1.18 Certain issues have also come to light during our work on drafting the Bill, particularly the practice by retailers of delaying the point at which the sales contract is formed.<sup>11</sup> In brief, at the point when a consumer orders goods (for example, on the internet), many retailers' terms and conditions state that the contract of sale will not form until the goods are dispatched to the consumer. This common practice limits the potential benefits that our recommended rules could have for consumers, as the rules rely on a contract being in place. While we have asked questions about the practice, it is beyond the scope of our work to make recommendations to prohibit or regulate it through the provisions in the final draft Bill. In any case, the evidence we have received about the practice does not suggest significant consumer detriment or a need for urgent law reform in this area. We do, however, consider that our work has been beneficial in raising awareness of this practice. We suggest that its impact on consumers is kept under review so that the Competition and Markets Authority or government (as appropriate) can take action in future if necessary.<sup>12</sup>

1.19 In Chapter 2 of this report we suggest that any decision as to whether to implement the final draft Bill would need to balance a number of relevant considerations. Namely, the impact on the proposed rules of the practice of delaying contract formation, the potential impact of the final draft Bill on interested parties and the availability of other options for protecting consumers in the event of a retailer insolvency.<sup>13</sup> We do not rule out the possibility that our proposed reforms might be more effective in future should conditions change. For example, the argument for reform may strengthen if contract formation is not routinely delayed either as a result of retailers changing their practices or of direct action by the Competition and Markets Authority or government. The potential impact on consumers could also increase if there is an increase in the number of consumer transactions which fall outside the protections currently afforded by section 75 and chargeback.<sup>14</sup> Finally, evidence may emerge in the future suggesting that consumers would benefit from the proposals in a way not identified as part of the consultation. This may also swing the balance towards implementation of the final draft Bill.

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<sup>10</sup> We discuss consultees' comments from para 4.57.

<sup>11</sup> We explain this practice in detail in Chapter 5.

<sup>12</sup> See from para 5.77.

<sup>13</sup> We briefly consider other options for protecting consumers from para 2.29.

<sup>14</sup> When a consumer pays with their credit or debit card for goods, they may be able to claim a refund from their card issuer under section 75 of the Consumer Credit Act 1974 or their card issuer's chargeback rules if those goods are not delivered or if the consumer is otherwise left out of pocket. We discuss consumers' rights under section 75 and chargeback from para 4.2 and the potential impact of the practice of delaying contract formation on section 75 rights from para 5.59.

## **THE STRUCTURE OF THIS REPORT**

- 1.20 Chapter 2 looks at the considerations to be balanced when looking towards implementation of the final draft Bill. In particular, it considers the motivation behind our 2016 recommendations and the potential impact of the proposed rules.
- 1.21 Chapter 3 explains how the proposed rules would operate in practice, with reference to the final draft Bill. It also highlights comments from consultees which dealt specifically with the drafting of the draft Bill.
- 1.22 Chapter 4 looks at the proposed rules in context, including how the final draft Bill would operate alongside the protections for consumers who have paid for goods by credit or debit card, and the interaction of the proposed rules with retention of title clauses and liens.
- 1.23 Chapter 5 looks in more detail at consultees' views on the practice of retailers delaying the formation of the consumer sales contract until dispatch of the goods.
- 1.24 Chapter 6 considers issues not covered by the final draft Bill, including comments from consultees in relation to transfer of ownership and sale of goods arrangements which are outside the scope of this project.
- 1.25 Additional detail is included in the appendices:
- (1) Appendix 1 contains a list of those stakeholders who responded to the consultation or whom we have met or corresponded with.
  - (2) Appendix 2 contains the final draft Bill.
  - (3) Appendix 3 contains the explanatory notes on the final draft Bill.

## **TERMINOLOGY**

- 1.26 The language used to describe the parties involved in a sales transaction varies according to whether a consumer is involved, and has also developed over time. We generally refer to the "consumer", although sometimes we use "buyer" if we are talking about sales or contract law more generally. We think that "retailer" is more accessible than "trader", although we use the latter term in our final draft Bill to reflect the language of the Consumer Rights Act 2015 which our draft Bill would amend. Where we are talking about legislation, we have sought to use the language of the relevant enactment.

## **ACKNOWLEDGEMENTS AND THANKS**

- 1.27 We are grateful to all those individuals and organisations who have met or corresponded with us or responded to our consultation. These individuals and organisations are listed in Appendix 1.
- 1.28 We are also grateful to the Scottish Law Commission for their input, including arranging a workshop on consumer contracts in Scotland, and to the speakers who contributed to that event.



## **THE TEAM WORKING ON THE PROJECT**

- 1.29 The following members of the Commercial and Common Law team have contributed to this project: Laura Burgoyne (team manager), Teresa Trepak (team lawyer) and Matthew Barry (research assistant).

## Chapter 2: Balancing the considerations

- 2.1 In this chapter we look at the considerations to be balanced when looking towards implementation of the final draft Bill.
- 2.2 We discuss what consultees told us about the potential impact of the proposed rules. We also explain that many retailers seek to delay the point at which the consumer sales contract is formed until dispatch of the goods, and acknowledge that this practice might further dilute the effectiveness of the final draft Bill. We note therefore that the costs and benefits are finely balanced.<sup>15</sup>
- 2.3 Some consultees suggested alternative approaches to protecting consumers in the event of retailer insolvency. We discuss these briefly along with suggestions we made in our 2016 Report.<sup>16</sup> We do not make recommendations about alternative approaches; to do so would be beyond the scope of our current work.

### THE AIMS OF OUR 2016 RECOMMENDATIONS

- 2.4 Our recommendations in this area were intentionally limited. We recognised in the 2016 Report that they would not usually be the primary protection for consumers when a retailer becomes insolvent.<sup>17</sup> We were mindful of the comments from the City of London Law Society (CLLS), received in response to our 2015 consultation, that the transfer of ownership proposals may have too minor an effect to justify legislative reform.
- 2.5 On the other hand, the Law Commission has long argued that the law on consumer sales should be rewritten in plain language and brought together in one place, so that it is readily accessible to both consumers and retailers.<sup>18</sup> In 2016, we noted:<sup>19</sup>

The Consumer Rights Act 2015 has gone a long way to achieve this objective, but it does not include updated rules on when ownership is transferred. Instead, section 4 of the [Consumer Rights Act 2015] imports the rules from the [Sale of Goods Act 1979], which were written in nineteenth century language for commercial contracts.

- 2.6 The case histories we received from Citizens Advice showed that issues of ownership are sometimes a real concern to consumers who struggle to understand why the goods they have chosen and paid for are being sold to others. We argued that consumers deserve a clear and accessible statement of the law about when they do (or do not) own goods left with an insolvent retailer. We said that clearer, updated

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<sup>15</sup> We discuss consultees' views on these issues in more detail in chs 4 and 5.

<sup>16</sup> Consumer Prepayments on Retailer Insolvency (2016), Law Com No 368 (the 2016 Report), <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

<sup>17</sup> 2016 Report, para 9.51.

<sup>18</sup> Law Commission, Simplifying Consumer Law: A response from the Law Commission to the DTI's Consultative Document on Consumer Strategy, October 2004.

<sup>19</sup> 2016 Report, para 9.52.

statutory rules would also benefit administrators and shop staff who have to apply them.

2.7 Our recommendations were therefore intended to:

- (1) simplify and modernise the language so it is more suitable for the consumer context and more readily comprehensible to consumers, retailers and insolvency practitioners;
- (2) bring the transfer of ownership provisions, insofar as they relate to consumers, into the Consumer Rights Act 2015 (CRA 2015) so that related rules are kept together; and
- (3) in limited cases, bring forward the point at which the consumer acquires ownership of the goods.

2.8 The rules would apply generally and not only on insolvency.

2.9 The responses to our original consultation revealed support from consumer groups and academics. Other consultees, and in particular insolvency practitioners, were less supportive. They were concerned that it would both affect retailers' ability to access finance and complicate the insolvency process.

2.10 Part of the remit of our current work was therefore to consult stakeholders with a view to understanding their concerns about the recommended changes. We asked a number of questions in the 2020 consultation about the potential impact of the proposals.

2.11 In considering how implementation of these recommendations could work, we have heard more about issues which could reduce both the beneficial effects of our proposed new rules, and their desirability. We discuss these below, and highlight the need to balance practical considerations against the need to protect vulnerable consumers in the event of retailer insolvency.

## **IMPACT OF THE PROPOSED NEW RULES**

2.12 Our initial assessment of the impact of the proposed new rules was that the main benefit would be clarity of the law: putting the rules into clearer language and bringing them into the CRA 2015.

2.13 In monetary terms, the rules are primarily intended to benefit consumers in the event of a retailer's insolvency, where the consumer does not receive goods they have paid for. The proposed rules may mean that they could claim ownership over the goods. Consumers who have paid by credit or debit card are generally able to get a refund from their card issuer in this situation, but consumers who have paid with cash, cheque or by bank transfer do not have this option. The proposed new rules could potentially better protect some of these more vulnerable consumers who have no

other protections, and who would otherwise simply rank as unsecured creditors, effectively losing all the money they had paid.<sup>20</sup>

- 2.14 In our initial assessment of the impact of the proposed rules we also acknowledged that there may be increased costs for insolvency practitioners (which would reduce the insolvent estate to the detriment of all creditors) and retailers. These could include transition costs, such as familiarisation costs and one-off legal costs, as well as ongoing costs, such as reduced access to/increased cost of finance and the increased cost of determining ownership of goods on insolvency.
- 2.15 In the consultation we asked consultees about these potential costs as well as any benefits which may arise as a result of the proposed rules being implemented. We discuss their answers in more detail in Chapter 4.
- 2.16 The responses we have received suggest that the proposed rules might impose substantial costs on insolvency practitioners, retailers and creditors without delivering corresponding benefits to consumers. Insolvency practitioners and retailers told us that changing the law in this area is likely to result in additional complications and costs. While these responses were not unexpected, they are particularly important in light of the fact that the responses received from a number of different types of consultee suggested that the benefit of the draft Bill for consumers is unlikely to be as significant as originally envisaged. Without such benefit to consumers, the justification for the costs is called into question.
- 2.17 Some consultees expressed doubt that the proposed new rules would provide additional clarity for consumers or reduce frustration in the event of retailer insolvency. They cited the complexity involved in proving the “events and circumstances” upon which ownership of goods would transfer. The practice of delaying contract formation, discussed in more detail below, also weakens the monetary and non-monetary impact of the proposed new rules.
- 2.18 In response to the consultation, we did not get significant engagement from stakeholders representing the voice of consumers, despite our additional efforts to engage. As a result, the evidence we have been presented with about the potential benefits of the draft Bill for consumers is less detailed than the impact on other interested parties, although we have kept consumer protection issues central to our considerations.

### **Timing of contract formation**

- 2.19 The law relating to the sale of goods is, for the most part, predicated on a contract being in place between the buyer and seller. The existing rules on passing of property in goods operate where there is a contract for the sale of goods<sup>21</sup> and a consumer’s rights as to satisfactory quality and fitness for purpose of goods are implied into a sales contract.<sup>22</sup>

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<sup>20</sup> We discuss the impact on consumers of using different payment methods further from para 4.94.

<sup>21</sup> Sale of Goods Act 1979, ss 16–20B.

<sup>22</sup> Consumer Rights Act 2015, ss 9–10.

- 2.20 The recommendations we made in our 2016 Report about transfer of ownership followed this convention, as does the final draft Bill which seeks to implement those recommendations. The final draft Bill sets out when ownership of goods transfers under a sales contract other than a conditional sales contract (both as defined in the CRA 2015).<sup>23</sup> The current and proposed rules require a sales contract to be in place and, if there is no such contract, ownership will not transfer under the rules.
- 2.21 Most of the available commentary appears to assume that a contract between a retailer and a consumer is formed at an early stage, such as when the retailer takes payment. However, we have become aware that, at least in the case of online sales, it is a common practice among retailers to seek to delay the formation of the sales contract until the “dispatch” of the goods to the consumer. Some retailers do this even where payment is taken immediately upon the consumer placing their order.
- 2.22 Terms and conditions delaying formation of the sales contract have implications for the effectiveness of the proposed transfer of ownership rules. Under the proposed rules, ownership could transfer under a sales contract on the occurrence of certain events which occur prior to dispatch of goods. These include labelling of goods or the setting aside of goods by a retailer. However, if the contract does not come into existence until dispatch, there can be no transfer of ownership until dispatch, regardless of whether these events have occurred. In other words, such transfer cannot occur in the absence of a contract.
- 2.23 Terms and conditions delaying contract formation could also have an impact upon the effectiveness of certain existing consumer protections, such as the obligation on a retailer to deliver goods within 30 days of the contract being entered into.<sup>24</sup> They could potentially affect the ability of consumers to claim a refund under section 75 of the Consumer Credit Act 1974 if they have paid for goods but not received them.<sup>25</sup>
- 2.24 In the consultation paper we asked consultees about the practice of delaying contract formation. We sought to gather further information about the use of these terms and the impact they have on consumers. We include an overview below, and more detail in Chapter 5.
- 2.25 Over half of consultees commented on this topic but their experiences of the practice varied, as did their awareness of it prior to the publication of the consultation paper. Consultees observed that the practice appears to be widespread amongst online retailers and acknowledged that most consumers were probably unaware that they do not have a contract with the retailer even when they have paid for goods in full in advance.
- 2.26 A few consultees noted that, in principle, consumers are at risk of suffering a detriment as a result of the use of these terms and conditions. However, consultation responses did not identify any specific consumer detriment, although some observed that such detriment may arise if the proposed new rules were introduced, given that

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<sup>23</sup> See discussion in ch 3.

<sup>24</sup> Consumer Rights Act 2015, s 28. The consumer and trader may agree an alternative time or period for delivery.

<sup>25</sup> We discuss the potential impact of this practice on consumer rights and protections in more detail in ch 5.

this practice would effectively prevent earlier transfer of ownership of goods. Some consultees suggested that the use of these terms and conditions could increase as a result of the proposed new rules as a way for traders to delay transfer of ownership.

## **Conclusion on impact and implementation**

2.27 Although terms and conditions delaying formation of the sales contract until dispatch of goods do not appear to be causing significant consumer detriment at the moment, they could dilute the effectiveness of the rules in the final draft Bill. This is because the practice would effectively delay the transfer of ownership of goods until dispatch, regardless of whether any of the events or circumstances set out in the proposed rules had occurred. It seems therefore that the benefit to consumers may not be sufficiently significant as to justify the potential costs.

2.28 Any decision as to whether to implement the final draft Bill would need to balance a number of relevant considerations. Namely, the impact on the proposed rules of the practice of delaying contract formation, the potential impact of the final draft Bill on interested parties and the availability of other options for protecting consumers in the event of a retailer insolvency.<sup>26</sup> While we do not consider that there is a strong case for reform at the present time, we do not rule out the possibility that our proposed reforms might be more effective in future should conditions change. For example, the argument for reform may strengthen if contract formation is not routinely delayed either as a result of retailers changing their practices or of direct action by the Competition and Markets Authority or government. The potential impact on consumers could also increase if there is an increase in the number of consumer transactions which fall outside the protections currently afforded by section 75 and chargeback.<sup>27</sup>

## **OTHER OPTIONS FOR PROTECTING CONSUMERS**

2.29 The need to protect consumers on retailer insolvency has arguably increased since our original work in 2015 and 2016, particularly given that the COVID-19 pandemic has caused an increase in both online shopping and retailer insolvency.<sup>28</sup> Consumers who pay by cash, bank transfer or cheque are likely to be more vulnerable than users of debit and credit cards. There is therefore a socio-economic issue here affecting some parts of society more than others. Nevertheless, the factors discussed above raise questions as to whether the transfer of ownership provisions are the best vehicle for this protection, given that they would assist only those consumers for whom goods have already been “selected” in some way. They would not, for example, assist those for whom the item has not been picked from the shelf, or where larger items being made or sourced for the consumer are not yet complete or otherwise available.

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<sup>26</sup> We briefly consider other options for protecting consumers from para 2.29.

<sup>27</sup> When a consumer pays with their credit or debit card for goods, they may be able to claim a refund from their card issuer under section 75 of the Consumer Credit Act 1974 or their card’s chargeback rules if those goods are not delivered or if they are otherwise left out of pocket. This is a major source of protection for prepaying consumers. We discuss consumers’ rights under section 75 and chargeback from para 4.2 and the potential impact of the practice of delaying contract formation on section 75 rights from para 5.59.

<sup>28</sup> According to data from the Office of National Statistics (ONS), internet sales as a percentage of total retail sales increased from 2.7% in January 2007 to 19.9% in January 2020. ONS data shows that, in November 2020, the share of online sales in total sales jumped to 36.2%:  
<https://www.ons.gov.uk/businessindustryandtrade/retailindustry/timeseries/j4mc/drsi>.

2.30 In the 2016 Report, we made a separate, targeted recommendation aimed at protecting consumers who have no other protections. We said the government should consider giving preferential status to consumers who had made a prepayment of £250 or more in the six months preceding the insolvency, and had no other protections (such as chargeback/section 75 or insurance or trust arrangements).

2.31 In the government's response to the 2016 Report, it said that it had decided not to pursue this measure. It said:

The government recognises the concerns when individual consumers may lose money in an insolvency situation. However, in its view this recommendation could increase the cost of capital, harm enterprise and lead to calls for preferential status for other groups of creditors which would adversely affect the amount available to other unsecured creditors, which would lead to far greater losses to the wider economy. The Law Commission suggest that there are value judgments to be made when considering the insolvency hierarchy and set the measure out as an option should the government feel the need to act. The government has decided not to pursue this measure.

2.32 We acknowledge the government's reservations but suggest that there is still a case for seeking alternative means of protection for these consumers.

### **Consultees' views**

2.33 Although we did not specifically ask consultees for suggestions for alternative options for protecting consumers, we did receive a number of comments on this topic.

2.34 The Institute of Chartered Accountants in England and Wales (ICAEW) noted that the recommendations in the 2016 Report were targeted at protecting consumers who prepay for goods in cash. They observed that the proposed rules on transfer of ownership are less focused on this group and therefore have a potentially wider impact, including an increase in both costs on insolvencies and impact on other creditors. They suggested that alternative action could be taken to protect vulnerable consumers:

One step government could take to alleviate the concern (to a small degree) would be to reverse the provisions in the Finance Act that will reintroduce preference for HMRC tax debts. This reduces the amount available to consumers and other unsecured creditors (as well as inhibiting finance that might help businesses avoid insolvency altogether).

Alternatively, it might ringfence the amount it raises from that measure to form a compensation fund for relevant consumers who are otherwise unprotected.

2.35 Similarly, Dr Magda Raczynska considered options for introducing special protections for prepaying consumers on the insolvency of a retailer. She noted that imposing a duty on retailers to hold prepayments on a statutory trust for the consumer "would be hard to justify" given that it seems to impose relatively heavy burdens on retailers and would only address a problem that currently arises in a small number of cases. In line with our 2016 recommendation discussed above, Dr Raczynska and final year LLB

students at University College London Faculty of Laws<sup>29</sup> noted that another option would be to make consumers preferential creditors in relation to their prepayment claims where section 75 and chargeback are not available. Dr Raczynska noted, however, that such claims would not take absolute priority, as ownership claims or claims secured by fixed security rights would rank above them. She suggested that floating charge holders would be impacted by this option, but:

the conferral of a preferential status, as suggested here, would impact floating chargees less than the solution contemplated in the Bill for the simple reason that it would not inflate the costs of insolvency proceedings. The consumer would simply be entitled to the return of an amount equal to what they paid; protection of consumers would not be contingent on third party's (insolvency officer's) work and time.

2.36 KPMG suggested steps which could be taken which do not involve legislative changes. They suggested that “retailer T&Cs, particularly regarding title, should be brought to consumers’ attention in a much clearer way” and “education for consumers on their rights regarding section 75 and chargeback claims would help.”

## **Conclusion**

2.37 There are two overarching aims of the proposed new rules on transfer of ownership:

- (1) to make the law clearer and therefore easier for consumers to understand and insolvency practitioners to apply; and
- (2) to improve the situation for (some) consumers in an insolvency situation, by bringing the transfer of ownership of goods forward to an earlier point.

2.38 As such, the rules are not specifically targeted at helping the most vulnerable prepaying consumers and we recognise that there will be some consumers who still lose out in the event of a retailer insolvency. Even if the proposed rules are implemented, the government may wish to give further consideration to how vulnerable consumers can be protected.

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<sup>29</sup> Julia Juchno, Radu Suci, Ming Hao Tay and Adam Westlake.



## Chapter 3: The proposed rules in practice

- 3.1 In this chapter we explain our recommended new rules on transfer of ownership of goods under consumer sales contracts, and the provisions of the final draft Bill which would implement them. The final draft Bill is set out in full at Appendix 2.
- 3.2 We note where the proposed rules or the drafting have been updated in light of comments received from consultees in response to our July 2020 consultation paper<sup>30</sup> and accompanying draft Bill.<sup>31</sup>

### SCOPE OF THE PROPOSED RULES

#### Changes to the Consumer Rights Act 2015

- 3.3 The final draft Bill seeks to introduce new rules into the Consumer Rights Act 2015 (CRA 2015) about the transfer of ownership under contracts for the sale of goods between a “trader”<sup>32</sup> and a “consumer”.<sup>33</sup>
- 3.4 Under the current law, the same rules on transfer of ownership apply to sales contracts, regardless of whether one of the parties is a consumer. The CRA 2015 does not contain rules on transfer of ownership. Instead, section 4(2) cross-refers to the transfer of ownership provisions in the Sale of Goods Act 1979 (SGA 1979).
- 3.5 The final draft Bill substitutes section 4(2) of the CRA 2015 so that it signposts the reader to the new sections of the CRA 2015 which would contain the new rules. The substituted section 4(2) also retains cross-references to relevant existing provisions in the SGA 1979.
- 3.6 The final draft Bill provides for the new rules to be inserted into sections 18A and 18B of the CRA 2015. They apply to sales contracts (excluding conditional sales contracts).<sup>34</sup> As updated, section 4(2) makes it clear that, where section 18A or 18B applies, the timing of the transfer of ownership under the sales contract is determined by those sections. Relevant provisions in the SGA 1979 will not apply to these contracts and consequential amendments are made to that Act to make this clear.<sup>35</sup>

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<sup>30</sup> Consumer sales contracts: transfer of ownership (2020) Law Commission Consultation Paper No 246 (the consultation paper), <https://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/>.

<sup>31</sup> Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the draft Bill), published as part of the consultation paper.

<sup>32</sup> “Trader” means a person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf: Consumer Rights Act 2015, s 2(2).

<sup>33</sup> “Consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession: Consumer Rights Act 2015, s 2(3).

<sup>34</sup> This is discussed further from para 3.8.

<sup>35</sup> Final draft Bill, s 2.

Where a sales contract does not fall within the scope of sections 18A or 18B, transfer of ownership will continue to be determined by the provisions of the SGA 1979.<sup>36</sup>

- 3.7 Professor Christian Twigg-Flesner and Professor Hugh Beale (joint response) questioned the rationale for continuing to include references to the SGA 1979 in section 4(2) of the CRA 2015. For completeness, the final draft Bill retains cross-references to the SGA 1979 because some consumer contracts, such as conditional sales contracts and contracts where goods form part of a bulk, will still be subject to the rules in that Act. We discuss these contracts below.

### **Rules apply to “sales contracts” except “conditional sales contracts”**

- 3.8 A sales contract is a contract under which a trader agrees to transfer ownership of goods<sup>37</sup> to a consumer in exchange for the price.<sup>38</sup> A sales contract may be entered into between one part owner and another and can provide for the transfer of an undivided share in goods.<sup>39</sup> Sales contracts can be absolute or conditional.<sup>40</sup>
- 3.9 In the consultation paper we asked consultees whether they agreed that the proposed rules should apply to transfer of ownership of goods under sales contracts but not conditional sales contracts, hire-purchase agreements and contracts for the transfer of goods.

### Conditional sales contracts and hire-purchase agreements

- 3.10 “Conditional sales contracts” are sales contracts under which the price for the goods, or part of it, is payable by instalments and the trader retains ownership of the goods until the conditions specified in the contract (for the payment of instalments or otherwise) are met.<sup>41</sup> Ownership of goods under these contracts will generally transfer in accordance with the SGA 1979, so that property passes when the parties intend it to pass.<sup>42</sup> In the case of a conditional sales contract, this will be when “such conditions as to the payment of instalments or otherwise as may be specified in the agreement” are fulfilled. We think the continued application of the rules in the SGA 1979 to these contracts is appropriate given the varied arrangements which may be agreed for conditional sales contracts. Other legislation may also be relevant, depending on the

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<sup>36</sup> Final draft Bill, s 1(2) which contains proposed s 4(2)(b) of the Consumer Rights Act 2015. Where a sales contract is for goods that are contained in a bulk, rules in the Consumer Rights Act 2015 and Sale of Goods Act 1979 apply to transfer ownership. This is provided for in proposed 4(3) of the Consumer Rights Act 2015.

<sup>37</sup> These could be either existing goods or goods yet to be manufactured or produced.

<sup>38</sup> Consumer Rights Act 2015, s 5(1)–(2).

<sup>39</sup> Consumer Rights Act 2015, s 3(5)(a)–(b).

<sup>40</sup> Consumer Rights Act 2015, s 3(5)(c).

<sup>41</sup> Consumer Rights Act 2015, s 5(3).

<sup>42</sup> Sale of Goods Act 1979, s 17.

goods themselves. For example, rules in the Consumer Credit Act 1974<sup>43</sup> or the Hire-Purchase Act 1964<sup>44</sup> may apply.

- 3.11 Hire-purchase agreements are defined in section 7 of the CRA 2015.<sup>45</sup> Under a hire-purchase agreement, possession of goods is transferred to the consumer in return for periodical payments. Ownership only transfers to the consumer if the consumer exercises an option to buy the goods (usually only after full payment has been made). The transfer of ownership rules in the SGA 1979 do not apply to hire-purchase agreements but certain provisions in the Consumer Credit Act 1974 and the Hire-Purchase Act 1964 will apply.

#### Consultees' views

- 3.12 In the consultation paper we explained that we do not think that the proposed rules are appropriate for the transfer of ownership of goods under conditional sales contracts and hire-purchase agreements. The timing of transfer of ownership is the very thing that characterises these agreements and it would therefore not be appropriate to apply rules whereby ownership transfers at the point of contract formation or at the point that the goods are identified for fulfilment of the contract.
- 3.13 We asked consultees if they agreed.<sup>46</sup>
- 3.14 We received twelve responses to this question. Eleven agreed that the draft Bill should not apply to conditional sales contracts and hire-purchase agreements. One consultee responded "other".
- 3.15 Two consultees noted potential drawbacks of excluding conditional sales contracts. Dr Magda Raczynska observed that excluding conditional sales contracts from the rules would mean that it would be possible for a trader to retain ownership if the price were paid in instalments but not if it were paid by deposit and then final payment. Professor Duncan Sheehan ultimately agreed that the proposed new rules should not apply to conditional sales contracts. However, he noted that it may be difficult in practice to distinguish a conditional sales contract, in which the price is payable by "instalments", from a sales contract under which a consumer pays a deposit or part payment.
- 3.16 All other consultees commented that it would not be appropriate to apply the draft Bill to conditional sales contracts and hire-purchase agreements. Consultees emphasised that these contracts differ in nature from sales contracts, the primary difference being that the consumer takes possession of the goods before payment. Delaying the transfer of ownership until the consumer pays all instalments, or exercises the option to purchase, protects the trader against the risk of the consumer's bankruptcy. While there may be an issue in some circumstances distinguishing conditional contracts

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<sup>43</sup> Including s 66A(11) whereby if the debtor withdraws from the agreement after the credit has been provided but the debtor pays for the goods in full, title to the goods passes on the same terms as if the debtor had not withdrawn from the agreement.

<sup>44</sup> Part III of the Hire-Purchase Act 1964 makes an exception to the principle "*nemo dat quod non habet*" (one cannot pass a better title than one has) in favour of a private purchaser of a motor vehicle.

<sup>45</sup> Consumer Rights Act 2015, s 7(3).

<sup>46</sup> Consultation question 9.

from those payable by instalments, we do not think that this will be a difficult issue so frequently as to override the other policy concerns.

- 3.17 Given the overwhelming response from consultees, the final draft Bill does not extend to conditional sales contracts and hire-purchase agreements.

#### Contracts for the transfer of goods

- 3.18 Section 8 of the CRA 2015 defines contracts for the transfer of goods. Broadly, these are contracts under which a party transfers or agrees to transfer ownership of goods in exchange for consideration other than payment of money. A contract may also be a contract for the transfer of goods if it is otherwise not a contract of sale or a hire-purchase agreement.
- 3.19 An example of the first type of contract is an exchange arrangement for goods. Where goods are supplied in exchange for something other than a price (for example, in exchange for other goods, for work done, or for board and lodging) this is a barter or exchange. A part-exchange arrangement where goods are supplied in exchange for goods plus an amount of money could, on the facts of the case, be interpreted as a contract for the transfer of goods rather than a sale of goods.<sup>47</sup>
- 3.20 An example of the second type of contract is a contract for work and materials, where there is a contract for the performance of work or services to which the supply of goods is incidental. The characterisation of a contract in this way, rather than as a sale of goods, will turn on the substance of the contract. The courts have been asked to consider the classification, for example, of contracts for the printing of a book, painting of a portrait and the supply and laying of a fitted carpet.<sup>48</sup>
- 3.21 The statutory rights in sections 9 to 18 of the CRA 2015 (including those relating to the quality and fitness of goods) are the same for sales contracts and contracts for transfer of goods, although the remedies available to consumers are slightly different for contracts for transfer of goods. Although not set out in the CRA 2015, the law treats the two types of contracts differently for the purposes of transfer of ownership. The current rules on transfer of ownership in the SGA 1979 apply to contracts of sale of goods, which are defined as “a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price”.<sup>49</sup> The SGA 1979 therefore does not apply to contracts for the transfer of goods.

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<sup>47</sup> Implied Terms in Contracts for the Supply of Goods (1979) Law Com No 95, para 48; M Bridge (ed), *Benjamin's Sale of Goods* (10th ed 2019) para 1-039. Examples where courts have considered such arrangements include: *Clarke v Reilly & Sons* [1962] 96 ILTR 96 (where the agreement appears to have been to exchange a new car for a new car plus £192, neither vehicle being valued); *Flynn v Mackin and Mahon* [1974] IR 10 (where the Supreme Court of Ireland held that the case before it was a barter); and *Hearns v Rizzolo* [2012] NSSC 256 (where an exchange of vehicles with no reference to monetary value was held to be a barter).

<sup>48</sup> M Bridge, L Gullifer, K Low and G McMeel (eds), *The Law of Personal Property* (2nd ed 2018) para 18-033.

<sup>49</sup> Sale of Goods Act 1979, s 2(1).

However, there is authority to suggest that the rules in the SGA 1979 may apply to these contracts by analogy where property in goods passes for good consideration.<sup>50</sup>

#### Consultees' views

- 3.22 In the consultation paper we observed that there is a rationale for clarifying the law around transfer of ownership under these contracts. However, we noted that our 2016 recommendations were not written with these contracts in mind. The definition of these contracts and the freedom available to the parties to agree when ownership transfers mean that there may be a multitude of different arrangements which fall into this category.
- 3.23 Through the consultation exercise we sought better to understand how common these types of contract are and what the transfer of ownership arrangements are under them. We asked consultees if they had experience of contracts for the transfer of goods or were aware of them having been used. We also asked whether they thought it would be appropriate for the rules in the draft Bill to apply to them.<sup>51</sup>
- 3.24 We did not receive any detailed information about how contracts for the transfer of goods are used in practice or the transfer of ownership provisions (if any) they contain. Only one consultee, the Institute of Consumer Affairs, reported experience with these contracts. It said:
- We interpret some 'supply and fit' contracts falling into this category where consumers may have already made payments and their goods are in the trader's store.
- 3.25 Consultees were divided about whether the rules in the draft Bill should apply to contracts for the transfer of goods.<sup>52</sup> Some consultees argued that these contracts should not be treated differently merely because the goods are exchanged for non-money consideration. Other consultees suggested that applying the proposed new rules to these contracts could give rise to difficulties in practice: for example, the consumer simultaneously being the owner of the goods to be supplied and received. One consultee said that the Bill should provide clarity about whether it applies to contracts for the transfer of goods.
- 3.26 There was clearly some support for applying the draft Bill to contracts for the transfer of goods. However, only one consultee reported practical experience with these contracts. In the absence of more information about how these contracts are used and

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<sup>50</sup> Michael Bridge et al suggest that "it would seem sensible that similar rules apply to other contracts where property in goods passes for good consideration, such as contracts of barter and exchange": M Bridge, L Gullifer, K Low and G McMeel (eds), *The Law of Personal Property* (2nd ed 2018) para 18-032. There is some support for this in the case law: see *Koppel v Koppel* [1966] 1 WLR 802 (where the Court of Appeal appeared to assume that property under a contract of barter passed under s 18 of the Sale of Goods Act 1893) and *Aldridge v Johnson* (1957) 119 ER 1476 (QB) (where the court appeared to proceed on the basis that the passing of property under a contract for the exchange of barley for bullocks was to be determined by reference to the rules that applied to a sale of goods).

<sup>51</sup> Consultation questions 10 and 11.

<sup>52</sup> Of the eight consultees who answered this question, three consultees thought the rules should cover contracts for the transfer of goods, three did not, and two answered "other".

how frequently they are used, we have not identified a compelling reason for applying the proposed new rules to these contracts.<sup>53</sup>

### **Passing of risk**

- 3.27 Under the CRA 2015, the goods remain at the trader’s risk until they come into the physical possession of the consumer or a person identified by the consumer to take possession of the goods.<sup>54</sup> The final draft Bill does not change this existing rule.

## **TRANSFER OF OWNERSHIP UNDER THE PROPOSED RULES**

### **Modernised language**

- 3.28 The current provisions on transfer of ownership of goods, contained in the SGA 1979, are substantially the same as those in the original Sale of Goods Act 1893. As a result, some of the terminology is old fashioned and unclear.
- 3.29 The proposed rules in the final draft Bill use the more modern, consumer-focused language of the CRA 2015. For example, they refer to “trader” and “consumer” (rather than “buyer” and “seller”) and “transfer of ownership” (rather than “passing of property”). The terms “deliverable state”, “ascertainment” and “unconditional appropriation”, which are open to interpretation under the current law, do not feature in the proposed rules.
- 3.30 The current rules in the SGA 1979 distinguish between contracts for “specific goods” and contracts for “unascertained and future goods”. Specific goods are goods “identified and agreed upon at the time a contract of sale is made”.<sup>55</sup> That is, goods are “specific” when the exact item or items being purchased have been identified. A consumer who goes into a retailer’s physical shop and selects a red wool jumper and takes it to the till to pay is buying specific goods. A consumer who goes onto the website of that same retailer and selects the same jumper in the same size is not buying specific goods. This is because the retailer is free to provide the consumer with any one of the jumpers from its stock which matches the description of the jumper the consumer has ordered. It is possible to purchase specific goods online, particularly where an item is a “one off” such as an antique.
- 3.31 In the draft Bill we maintained this distinction, but we used different language. The draft Bill distinguished between contracts for “goods that are identified and agreed on when the contract is made” and contracts for “goods not identified and agreed on when the contract is made”. A number of consultees were concerned that the distinction between the two types of contracts was still not clear on the face of the draft Bill.
- 3.32 We have therefore updated the drafting to address this and the final draft Bill now distinguishes between:

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<sup>53</sup> The position on transfer of ownership in relation to these contracts will therefore remained unchanged by the final draft Bill. The transfer of ownership rules in the SGA 1979 may apply to these contracts by analogy where property in goods passes for good consideration; see footnote 50 above.

<sup>54</sup> Consumer Rights Act 2015, s 29.

<sup>55</sup> Sale of Goods Act 1979, s 61(1).

- (1) contracts for goods where the actual goods that are to be used to fulfil the contract have been selected when the contract is made; and
- (2) contracts for goods where the actual goods that are to be used to fulfil the contract have not been selected when the contract is made.

3.33 The final draft Bill sets out separate transfer of ownership rules for each type of goods.

**Contracts for goods where the actual goods that are to be used to fulfil the contract have been selected when the contract is made**

3.34 The final draft Bill provides for new rules to be inserted in section 18A of the CRA 2015, setting out when ownership transfers where the actual goods that are to be used to fulfil the contract have been selected when the contract is made. The proposed rules would apply where a sales contract is for such goods or an undivided share of such goods, specified as a fraction or percentage.<sup>56</sup> The proposed rules effectively cover consumer sales contracts (other than conditional sales contracts) which would otherwise fall within the existing rules on transfer of ownership of specific goods in sections 17 and 18 (Rules 1 to 4) of the SGA 1979.<sup>57</sup>

3.35 These provisions will most often apply to contracts concluded in a trader's physical shop, where a consumer or trader has selected the item from the shelves and the contract is subsequently concluded, most often at the checkout. They could also apply to contracts for goods which are purchased at a distance (for example, online) if the actual goods subject to the contract have been selected when the contract is made; for example, a "one-off" such as an antique.

3.36 Under the proposed rules, transfer of ownership of the goods occurs when the contract is entered into. It is not a requirement (in contrast to the current rules) that the goods must be in a "deliverable state" for ownership to transfer. The result is that ownership transfers on conclusion of the contract, even where the seller has agreed to do something further to the goods (for example, to adapt the goods to the consumer's specifications or dismantle a display item ahead of delivery).<sup>58</sup>

3.37 Take the example of a diamond ring which is selected by the consumer in a physical shop but left with the trader to be inscribed. Under the existing rules, the requirement for goods to be in a "deliverable state" means that it may not always be clear on an insolvency whether ownership of the ring has transferred to the buyer if the inscription has not been completed. Under the proposed rules, if the trader becomes insolvent between the contract forming and the inscription being completed, the ring will be owned by the consumer. The insolvency practitioner will then have to make the ring available to the

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<sup>56</sup> Final draft Bill, proposed s 18A(1) of the Consumer Rights Act 2015. The final draft Bill updates the language in the draft Bill to make it clear that a "share" refers to a share "of the goods". This is to avoid any misunderstanding for consumers who may think of a share as being shares in a company. We discuss undivided shares of goods further in para 3.76.

<sup>57</sup> Final draft Bill, cl 1(2), 1(3), 2(4) and 2(5).

<sup>58</sup> These rules apply to goods which already exist, but to which the trader has agreed to do something further. The rules do not apply where a consumer is purchasing goods which are yet to be made or generic goods from a trader's general stock which are then to be altered. In that case, the rules in proposed s 18B of the Consumer Rights Act 2015 will apply. These are discussed from para 3.41 and from para 3.57.

consumer. The trader will still be bound under the contract to complete the inscription; however, if the trader is insolvent this is unlikely to happen and the consumer may have a claim for breach of contract against the trader. If they paid using a credit or debit card they may be able to recoup some money from their card issuer under section 75 of the Consumer Credit Act 1974 or the card issuer's chargeback rules.<sup>59</sup>

**Contracts for goods where the actual goods that are to be used to fulfil the contract have not been selected when the contract is made**

- 3.38 The final draft Bill also proposes new rules on transfer of ownership to be inserted in section 18B of the CRA 2015. These rules apply to sales contracts (except conditional sales contracts) which do not fall within the scope of section 18A of the CRA 2015. The proposed rules would apply where a sales contract is for such goods or an undivided share of such goods, specified as a fraction or percentage.<sup>60</sup> New section 18B would effectively cover all other consumer sales contracts (except conditional sales contracts) which would fall within the existing rules on transfer of ownership of unascertained and future goods in sections 16, 17 and 18 (Rule 5) of the SGA 1979.<sup>61</sup>
- 3.39 Some consultees queried whether it would be clearer to provide a descriptive definition of the contracts which would fall within section 18B. Essentially, those consultees wished to see an updated definition to replace contracts for “unascertained” and “future” goods (in the language of the SGA 1979). Although we can see that providing such a definition could seemingly make the rules easier for a consumer to read and understand, there would also be a risk that some sales contracts would be found to fall outside both sections 18A and 18B. This would be undesirable; the rules in the SGA 1979 would continue to apply in those circumstances. Defining the scope of section 18B in contradistinction to section 18A ensures that no sales contracts would fall “through the gaps”.
- 3.40 The rules in section 18B are most likely to apply where a consumer places an order for goods out of a trader's general stock. This would be the case, for example, where a consumer has ordered goods online or where the consumer has made a purchase in a physical shop but the actual item they are buying has not been selected. This could happen where the consumer has inspected a display item of furniture but the actual item that they will receive under the sales contract will be selected from the trader's general stock before being delivered to the consumer. Section 18B would also apply where a consumer orders an item which is to be manufactured or produced to a specification agreed between the trader and the consumer.

**Transfer of ownership when manufacture or production completed**

- 3.41 Proposed section 18B(2) of the CRA 2015 deals with sales contracts for goods which are to be manufactured or produced for a consumer to a specification agreed between

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<sup>59</sup> We discuss s 75 of the Consumer Credit Act 1974 and chargeback in Chapter 4.

<sup>60</sup> Final draft Bill, proposed s 18B(1) of the Consumer Rights Act 2015. The final draft Bill updates the language in the draft Bill to make it clear that this rule applies to a contract for an undivided share of goods specified as a fraction or percentage, rather than an undivided share specified in any other way. We think that it is very unlikely that a contract would describe an undivided share in any other way and, if it were to, the rules in the SGA 1979 would apply. We discuss undivided shares of goods further in para 3.76.

<sup>61</sup> Final draft Bill cl 1(2), 1(3), 2(3), 2(4) and 2(5).



the consumer and the trader.<sup>62</sup> Ownership of the goods would only transfer to the consumer when the manufacture or production is completed.

- 3.42 This rule would apply where the specification of the goods is agreed between the consumer and the trader and the goods are made specifically for the consumer. At one end of the spectrum, this could involve the manufacture of a very bespoke item such as a pair of curtains where the consumer has selected the fabric and curtain style and provided the trader with measurements. At the other end of the spectrum, a consumer buying a sofa may select just the style of sofa and a fabric from a limited range of options.
- 3.43 This rule is not intended to apply:
- (1) where goods of the same description are already part of the trader's stock and can be used to fulfil the contract; or
  - (2) where the trader or a supplier has to make a new item in order to satisfy the consumer's order, but where making the item is not part of the agreement.
- 3.44 In these scenarios ownership would transfer under section 18B(3), discussed below.
- 3.45 Some consultees queried whether the draft Bill was entirely clear on this point. One consultee also asked what the situation would be if the trader was manufacturing a number of identical items at the same time. This could happen, for example, where a trader manufactures sofas but only offers them in a limited number of styles and fabrics. In this situation it is possible that they may be in the process of manufacturing a number of identical items, albeit that they are destined to fulfil existing consumer orders rather than form part of the trader's general stock. The final draft Bill has been updated to make clear that ownership of goods will only transfer under this rule when the manufacture or production of those goods for the consumer is completed.<sup>63</sup>
- 3.46 If manufacture or production of the goods has not been completed on the insolvency of a trader, the consumer will not obtain ownership of the component parts of their goods (for example, in the case of a sofa: cloth, foam and wood). Some consultees thought that ownership should transfer when manufacture is "substantially" or "for the most part completed". In most cases, we do not think a customer would want ownership over component parts and introducing the concept of "substantially manufactured" could lead to increased uncertainty for traders, consumers and insolvency practitioners applying the rules. We accept that there may be situations where the component parts are inherently valuable and a consumer would prefer to have ownership over a substantially manufactured item. However, on balance, we do not think that providing for this scenario can justify this approach given the risk of increased uncertainty.

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<sup>62</sup> The final draft Bill has been updated and the language "or produced" has been added. This is for consistency with section 5(2)(a) of the Consumer Rights Act 2015 which defines a sales contract.

<sup>63</sup> If the goods are not manufactured or produced specifically for the consumer, the rules in section 18B(3) would apply to transfer ownership of the goods.

Transfer of ownership on the occurrence of particular events or circumstances

3.47 Proposed section 18B(3) provides that, in any other case, ownership of goods transfers when the first of the following events or circumstances occurs:

- (a) the goods are physically labelled with the consumer's name in a way that is intended by the trader to be permanent;
- (b) the goods are physically set aside for the consumer in a way that is intended by the trader to be permanent;
- (c) the alteration of the goods to a specification agreed between the trader and the consumer is completed;
- (d) the consumer is told by the trader that goods bearing a unique identifier will be used to fulfil the contract;
- (e) on examining the goods the consumer agrees that they are to be used to fulfil the contract;
- (f) the goods, identified as being those for delivery to the consumer, are delivered to a carrier;
- (g) the goods are delivered to the consumer;
- (h) the goods that are to be used to fulfil the contract are selected by the trader in some other way, and the trader intends the selection to be permanent.

3.48 We make additional points in relation to each of these below.

*(a) Goods are physically labelled in a way intended by the trader to be permanent*

3.49 For the benefit of clarity, we have limited this provision in the final draft Bill to physical labelling. If the trader does employ some kind of non-physical labelling, then this would be caught by section 18B(3)(h) (discussed from paragraph 3.70).

3.50 We have been told by stakeholders that the process of labelling goods may not always be intended by the trader to be permanent. For example, a trader (or their third-party warehouse contractor) may label items with a consumer's name and address in anticipation of delivery but find that the consumer is unavailable on the proposed delivery date. The label may then be removed and a new label with a different consumer's details attached to that item.

3.51 This practice may occur in the interests of efficiency for the trader's business where there is a high turnover of goods. In an insolvency situation, the trader's practices in relation to labelling will be relevant when considering whether goods have been labelled in a way that is intended to be permanent.

3.52 A number of consultees raised concerns about how insolvency practitioners and consumers would know whether a trader intended labelling of any particular goods to be permanent. The final draft Bill now includes a presumption that the trader had an intention to label the goods permanently. New section 18B(4) provides that:

If the trader acts as mentioned in subsection (3)(a), (b) or (h), the action is to be taken to have been intended by the trader to be permanent unless the contrary is proved.

- 3.53 In an insolvency situation, this presumption would allow insolvency practitioners confidently to proceed on the basis that ownership has transferred unless there is clear evidence to the contrary.

*(b) Goods are physically set aside for the consumer in a way intended by the trader to be permanent*

- 3.54 This means that goods have been selected and physically set aside by the trader to fulfil the contract with the consumer.

- 3.55 Some consultees queried whether the language in this paragraph would be sufficient to catch non-physical setting aside such as a trader recording on their system that certain goods are to be used to fulfil the contract with the consumer. In the consultation paper we suggested that this could be the case, but we agree that this is not explicit in the language of this subsection. For the benefit of clarity, we have limited the provision in the final draft Bill to physical setting aside. Non-physical setting aside would be caught by section 18B(3)(h) (discussed from paragraph 3.70).

- 3.56 The final draft Bill includes a presumption that the trader intended such physical setting aside to be permanent.<sup>64</sup>

*(c) Alteration of goods to an agreed specification*

- 3.57 Where a consumer has contracted to buy an item from the trader's general stock which is to be altered to a specification agreed between the consumer and the trader, ownership will transfer under this rule when that alteration is complete. For example, where the consumer has bought a diamond ring online with a bespoke inscription, ownership of the ring will transfer to the consumer when the inscription is complete.

- 3.58 Two consultees queried the benefits of this limb. One response suggested that the criterion should be that ownership transfers when the process of alteration is commenced. Another noted that a consumer who buys goods for alteration in a physical store will be in a better position on an insolvency under section 18A than a consumer who buys online if ownership transfers only when alteration of goods is complete.

- 3.59 We acknowledge the narrow focus of this limb. However, completion of the alterations is only one event upon which ownership would transfer under section 18B. We expect that ownership may well transfer where an item has been selected by the trader to be altered for the consumer because one of the other events / circumstances will already have occurred.

*(d) Consumer is told that goods bearing a unique identifier will fulfil the contract*

- 3.60 We do not think that this situation will arise regularly in a consumer context, but we include it because where it does happen it might relate to high-value goods where the

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<sup>64</sup> Final draft Bill, proposed s 18B(4) of the Consumer Rights Act 2015. This is discussed from para 3.50.

consumer may have a particular interest in obtaining ownership. For example, this limb would apply where a consumer has entered into a contract for the sale of a new smartphone from a trader's general stock and the trader emails the consumer with the International Mobile Equipment Identity (IMEI) number before the smartphone is dispatched.

- 3.61 In response to the consultation, R3 queried how a consumer would prove that they had been told a unique identifier. This scenario could arise in the event of a trader's insolvency where a consumer is seeking to show an insolvency practitioner that they have ownership of particular goods. We accept that there may be an evidential challenge for consumers if they have, for example, been given this information over the telephone rather than in writing. However, we do not think that this would justify limiting this limb to information provided in writing as we would expect that an insolvency practitioner could corroborate any claims by referring to a trader's records.

*(e) Consumer examines and agrees goods to be used to fulfil the contract*

- 3.62 This provision is not intended to impact upon the requirement under section 9 of the CRA 2015 that goods be of satisfactory quality, or a consumer's right to reject goods under sections 20 to 24. Those provisions will continue to apply. For example, if it emerges that the goods do not conform to the contract only after the consumer has taken delivery of the goods, the consumer will still have 30 days to return them if they turn out to be faulty. Under section 9, if the consumer examined the goods before making the contract then a defect which should have been revealed by the examination will not be grounds for finding the goods to be unsatisfactory.

- 3.63 "Examination" in this paragraph is to be understood in the same way as under section 9. The term is not defined in the CRA 2015 so appears to be broad enough to cover non-physical examination, for example video call, or photographs on a website. The CRA 2015 already contemplates the examination of "digital content" by the consumer<sup>65</sup> (for example, section 34(4)(b)), suggesting that "examination" is not an inherently physical concept.

- 3.64 Indeed, in the much older case *Thornett and Fehr v Beers & Son*,<sup>66</sup> the court held that the buyer of a quantity of vegetable glue had "examined" the glue even though the glue was stored in barrels and the buyer had not taken the opportunity to open the barrels and examine the glue (instead merely looking at the barrels from the outside). This might also be taken to suggest that physical examination of the goods (in this case, opening the barrels and actually looking at the glue) is not necessary for an "examination".

*(f) Goods, identified as being those for delivery to the consumer, are delivered to a carrier*

- 3.65 The draft Bill provided that ownership would transfer where "the goods are delivered to a carrier for delivery to the consumer". The language in the final draft Bill has been updated to make it clear that ownership will only transfer under this limb where goods which have been identified for delivery to the particular consumer are delivered to a

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<sup>65</sup> For example, Consumer Rights Act 2015, s 34(4)(b).

<sup>66</sup> [1919] 1 KB 486.

carrier.<sup>67</sup> We have made this change to clarify the situation, raised by consultees, where goods may be delivered to a carrier mixed with other identical goods. An example of this would be where identical fruit and vegetable boxes are delivered to a logistics company for distribution to customers but none of the boxes has been specifically identified for any particular customer. The carrier will go to each delivery address they have been given and simply unload one of the boxes in their van and give that to the customer.

- 3.66 Under this limb, ownership of an item will only transfer if it is clear what the actual item is because it has been identified for delivery to the consumer, such as by labelling. Identification under this limb does not include a requirement that such identification is intended by the trader to be permanent. The act of identification is important to identify the goods but it does not in and of itself transfer ownership.
- 3.67 We have been told by a stakeholder that goods may be released by a trader to a carrier in anticipation of delivery to the consumer but on the instruction that they should not be delivered until further notice. This could occur where a consumer has paid a deposit on goods and the trader does not intend to deliver the goods until full payment has been received. We think that in this situation, ownership of the goods will transfer on delivery to the carrier, albeit that the exact timing of delivery to the consumer has not yet been confirmed. The consumer may be required to pay the outstanding balance before the goods will be released to them.<sup>68</sup>
- 3.68 It should be noted that ownership may already have transferred under another limb of the non-exhaustive list prior to release by the trader to the carrier. However, as we discuss in more detail in Chapter 5, it appears that, at least in the context of online sales, the point of dispatch may be the point at which the contract is formed. If this is the case, this is the earliest point at which ownership could transfer.

*(g) Goods are delivered to the consumer*

- 3.69 If goods are delivered to the consumer,<sup>69</sup> we consider that ownership should transfer even if the consumer has not paid any or all of the purchase price. The trader (or the insolvency practitioner) would then have a debt claim against the consumer for payment.

*(h) Goods that are to be used to fulfil the contract are selected by the trader in some other way and the trader intends the selection to be permanent*

- 3.70 The list is non-exhaustive and events (a) to (g) attempt to reflect common practices whereby traders select goods to fulfil consumer orders. Event (h) is a sweep-up limb which seeks to capture analogous events and circumstances and is intended to ensure that ownership will not transfer only on the occurrence of one of the other events explicitly mentioned in section 18B(2) and (3).

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<sup>67</sup> Consumer Rights Act 2015, s 59(1): "Delivery" defined as "voluntary transfer of possession from one person to another".

<sup>68</sup> Sale of Goods Act 1979, s 39. An unpaid seller's rights are discussed in further detail from para 3.123.

<sup>69</sup> Consumer Rights Act 2015, s 59(1): "Delivery" defined as "voluntary transfer of possession from one person to another".

3.71 The final draft Bill includes a presumption that the trader intended such selection to be permanent.<sup>70</sup>

#### Operation of the proposed rules

3.72 The list is easier to understand than the existing rules in the SGA 1979 which require goods to be “ascertained” and also “unconditionally appropriated” before ownership can transfer. There is also no requirement under the proposed rules for goods to be in a “deliverable state”.<sup>71</sup>

3.73 Although the rules would apply in any circumstances where there is a consumer sales contract, we envisage that they are most likely to be relevant in the event of a trader’s insolvency. The operation of the proposed rules on an insolvency strikes a balance between prepaying consumers and other creditors. Under the existing law, ownership is unlikely to transfer until the goods have been dispatched, regardless of the fact that the trader may have earmarked those goods for a consumer before that point. The proposed rules formalise this “earmarking” process so that transfer of ownership is linked to the selection of goods that are to be used to fulfil the contract (provided that a contract is in place). This is less obviously unfair to consumers on an insolvency than the position under existing law. Ownership of goods may also transfer earlier in some situations than under existing law, so a greater number of consumers will have the protection of ownership rights if a trader becomes insolvent before they receive their goods.

3.74 However, the impact of the proposed rules should not be overstated and it should be noted that they will not apply where a consumer has made payment (in full or in part) but the goods to fulfil the order have not yet been selected. Whether a trader will be holding substantial numbers of goods which have been selected to fulfil particular contracts but which have not yet been dispatched will depend on the trader’s operational model and the type of goods that they sell.

3.75 If the trader is holding a number of identical items of the type ordered by the consumer, but those items are still on the warehouse shelves, the consumer will not have a claim to one of those items. In the 2016 Report we considered and rejected a more radical proposal which would give consumers an ownership right in such “unascertained goods” (goods which would fall within the rules in section 18B of the final draft Bill) as soon as the contract was made.<sup>72</sup> We concluded that a wider rule may be difficult to apply in practice and might still lead to perceived unfairness in a different way, such as if more orders had been received for a particular product than the trader had in stock. Furthermore, it could result in a large proportion of the trader’s stock belonging to consumers, significantly diminishing the assets available to other creditors.

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<sup>70</sup> Final draft Bill, proposed s 18B(4) of the Consumer Rights Act 2015. This is discussed from para 3.50.

<sup>71</sup> We discuss the meaning of these terms in the consultation paper in Chapter 2.

<sup>72</sup> 2016 Report, paras 9.76 to 9.79.

## **Contracts for goods or for an undivided share of goods specified as a fraction or percentage**

- 3.76 The proposed rules in sections 18A or 18B would apply where a sales contract is for goods or for an undivided share of goods (specified as a fraction or a percentage).<sup>73</sup> The CRA 2015 already provides that sales contracts can be entered into between one part owner and another<sup>74</sup> and for the transfer of an undivided share in goods.<sup>75</sup> However, for the avoidance of doubt we have provided in draft sections 18A(1) and 18B(1) that the rules apply when the sales contract is for an undivided share of goods specified as a fraction or percentage.
- 3.77 An example of such a contract could be for the sale of a 50% share of a car. Under section 18A, if the actual car to be used to fulfil the contract has been selected when the contract is made, then ownership of the 50% share would transfer when the contract is made. If the actual car has not been selected then ownership of the 50% share would transfer when one of the events or circumstances in section 18B(2) or 18B(3) occurs. This could be when the goods (in this case the car in which the consumer will own a share) are physically labelled for the consumer in a way that is intended by the trader to be permanent.
- 3.78 Sections 18A and 18B do not apply to contracts where a consumer is buying an undivided share of goods specified otherwise than as a fraction or percentage.<sup>76</sup> It is possible that a sales contract could be framed in this way, for example as a contract for the purchase of an undivided share of goods specified by weight or volume. We do not think that this kind of contract will arise very often. However, if it does, we think it is best dealt with by the existing rules in the SGA 1979 given the possible complexities of having multiple owners with claims to specific amounts of a single item/mass of goods. Depending on whether the contract satisfies certain requirements, section 20A or the rules in sections 16 to 18 of the SGA 1979 will apply.<sup>77</sup> The rules in section 20A crucially provide a mechanism for calculating a buyer's share where the aggregate of all undivided shares is greater than the total amount of the goods (described as a "bulk" in that Act).<sup>78</sup> Sections 16 to 18 allow the parties to set out their own arrangements for how ownership of the goods will transfer.

## **Contracts for goods forming part of a bulk**

- 3.79 Where a consumer enters into a sales contract to buy a specific quantity of goods out of a bulk (for example, 500kg of gravel from a larger mass of gravel), there are special

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<sup>73</sup> Final draft Bill, proposed ss 18A(1) and 18B(1) of the Consumer Rights Act 2015. The final draft Bill makes it clear that a "share" refers to a share "of the goods". This is to avoid any misunderstanding for consumers who may think of a share as being shares in a company.

<sup>74</sup> Consumer Rights Act 2015, s 3(5)(a).

<sup>75</sup> Consumer Rights Act 2015, s 3(5)(b).

<sup>76</sup> The draft Bill provided that section 18B applied to any contract for an undivided share of goods. The final draft Bill updates the language in the draft Bill to make it clear that 18B only applies where the contract is for an undivided share of goods where that undivided share is specified as a fraction or percentage.

<sup>77</sup> We discuss the rules in section 20A of the Sale of Goods Act 1979 in more detail from para 3.79. We discuss the rules in sections 16 to 18 of the Sale of Goods Act 1979 in the consultation paper from para 2.35.

<sup>78</sup> Sale of Goods Act 1979, 20A(4).

rules in section 20A and 20B of the SGA 1979 which may apply to transfer an undivided share of that bulk to the consumer.

- 3.80 These rules were introduced as a result of recommendations made in 1993 by the Law Commission and the Scottish Law Commission. They sought to address a perceived unfairness in the operation of the SGA 1979 which arose in relation to commodity trading where it is commonplace for sale of goods contracts to relate to quantities out of a bulk.<sup>79</sup> In commodity trading the goods being purchased would be identified as a fraction or percentage of a bulk (for example, 20% of the grain on a particular ship) or a specified quantity of a bulk (for example, 20 tonnes of grain on a particular ship). The bulk itself would be identified either in the contract or by subsequent agreement between the parties.
- 3.81 The rules in the SGA 1979 provide for a buyer to become a co-owner of a bulk when certain conditions are met: if the contract of sale is for a specific quantity of goods in the bulk, the bulk is identified in the contract or by subsequent agreement, and the buyer has pre-paid for some or all of the goods.<sup>80</sup> An undivided share in the bulk transfers to the buyer and they become an owner in common of the bulk. This stage is an interim stage of ownership in common with any other owners of the bulk.
- 3.82 The second stage is where the buyer becomes the owner of the specific quantity of goods which they have contracted to buy. They become, for example, the owner of 500kg of gravel rather than the owner of just an undivided share in a bulk of gravel. Transfer of ownership of the specific quantity of goods occurs in accordance with the rules for transfer of ownership in sections 16, 17 and 18 of the SGA 1979.
- 3.83 Our 2016 recommendations did not propose any changes to the rules around co-ownership of bulk goods as we were not convinced that they have particular relevance to consumers. When we consulted on the draft Bill, we asked consultees if the rules should be amended better to accommodate the reality of consumer sales contracts involving bulk goods.<sup>81</sup>

Is it common for consumers' goods to be held as part of a bulk until delivery or shortly before delivery in the consumer context?

- 3.84 We asked consultees for their views about whether it is common for goods to be held as part of a bulk until delivery or shortly before delivery in the consumer context and whether the existing rules should be updated for consumer contracts.
- 3.85 We received five substantive responses to this question.<sup>82</sup> Consultees gave examples of consumer contracts where goods are held as part of a bulk in this way, but were generally unable to say how common such arrangements are.

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<sup>79</sup> Sale of goods forming part of a bulk (1993) Law Com No 215; Scot Law Com No 145 (1993 Report), para 3.2, <https://www.lawcom.gov.uk/project/sale-of-goods-forming-part-of-a-bulk/>.

<sup>80</sup> Sale of Goods Act 1979, s 20A(1); Sale of Goods Act 1979, s 61(1): "Bulk" means a mass or collection of goods which are interchangeable with each other and contained in a defined space or area.

<sup>81</sup> We discuss the existing rules on goods forming part of a bulk in the consultation paper from para 2.35.

<sup>82</sup> In response to consultation question 4.



3.86 Examples given included contracts with building merchants, beer/wine merchants and creameries, solar panels for a consumer-household collective and contracts for goods stored in bins (screws, nails, lengths of chain or rope, food and household materials) where quantities are drawn down for dispatch to consumers.

3.87 ICAS observed that, while consumer bulk goods contracts may not be common, they are also not such a rare occurrence as to be trivialised. They also noted that:

With increasing amounts of retail being carried out via internet sales it is conceivable that such storage and dispatch solutions will become more prominent as part of consumer transactions.

3.88 Professor Twigg-Flesner and Professor Hugh Beale (joint response) and KPMG noted that even where consumers' goods are held as part of a bulk, it is unlikely that the contract will be caught by the rules in sections 20A and 20B of the SGA 1979. This is because the bulk is not usually contained in a defined space or area and/or is not identified in the contract or by subsequent agreement between the parties.<sup>83</sup>

Should the rules on bulk goods be amended for consumer contracts?

3.89 In the consultation we set out proposals for how the conditions in section 20A(1) of the SGA 1979 could be amended for consumer contracts. We asked consultees if they thought these amendments should be implemented.<sup>84</sup>

3.90 We suggested amendments to the conditions in section 20A(1) of the SGA 1979 which must be met for co-ownership to arise.<sup>85</sup> We set out a list of events on which a consumer could become an owner in common of a bulk.<sup>86</sup> These included when the bulk is identified in the contract, labelled with the consumer's name or otherwise allocated to them, or where the consumer examines the bulk and agrees that their goods form part of it.

3.91 The consumer's co-ownership of the bulk would be an interim stage. Ownership of the specific quantity of goods being purchased would only transfer to the consumer when the goods are identified for fulfilment of the contract under the rules in proposed section 18B of the CRA 2015 which apply to goods not identified and agreed on at the time the contract is made.

3.92 We received eleven responses to this question, including nine substantive responses. Five consultees answered "yes", four answered "no" and the remaining three answered "other".

3.93 Those who thought that the rules should be amended for consumer contracts generally took the view that while this was a good idea, there was not necessarily a pressing need for the proposed changes. Lorna Richardson thought that, in the context of making other changes to transfer of ownership rules, it seemed sensible to

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<sup>83</sup> Sale of Goods Act 1979, s 20A(1) and definition of "bulk" in s 61(1).

<sup>84</sup> Consultation question 5.

<sup>85</sup> Consultation paper, from para 3.50.

<sup>86</sup> The definition of "bulk" in s 61(1) of the Sale of Goods Act 1979 could be retained: "Bulk" means a mass or collection of goods which are interchangeable with each other and contained in a defined space or area.

deal with the realities of consumer contracts. Similarly, the ICA suggested that the changes could provide an important future-proof mechanism and should be made, but only as part of a “belt and braces” approach.

- 3.94 The Bar Council agreed with the proposed changes in principle but raised concerns about goods from a bulk being assigned by a trader to one consumer (for example, by labelling or setting aside) but then re-assigned to another consumer. They noted that “for traders, the logistics of fulfilling a variety of orders from different bulks could see frequent but unanticipated re-assigning” and that:

If ownership has transferred, this simple action would potentially amount to conversion of the original customer’s goods, creating an actionable wrong in circumstances where (absent an insolvency situation) it would not seem to be warranted.

- 3.95 Professor Twigg-Flesner and Professor Beale (joint response) agreed that in principle they would welcome a more consumer-tailored version of the provisions on sales from bulk, but they queried whether there is a case for extending the notion of a “bulk” to cover the supplier’s stock. In the 2016 Report we considered and rejected this more radical proposal which would give consumers an ownership right in “unascertained goods” (goods which would fall within the rules in section 18B of the final draft Bill) as soon as the contract was made.<sup>87</sup>

- 3.96 Five consultees did not think that the rules should be amended. ICAS noted that:

This seems to be an attempt to come up with a solution to a problem that doesn’t exist on any scale and will only serve to muddy the waters even further for an appointed IP attempting to resolve a company’s estate.

- 3.97 R3 raised concerns about the practicalities of the proposals and also the potential negative impact on traders/sellers. In particular, they suggested that:

It would be unfair to allow a consumer who has only prepaid part of the sale price to be afforded ownership rights to a bulk of goods, thereby interfering with the trader’s ability to deal with that bulk. It also seems unlikely that traders will identify / label a particular bulk or portion thereof in a sales contract.

- 3.98 KPMG suggested that there should be a focus on consumer education and awareness of the risks of prepayments rather than changing the rules on transfer of ownership in the way suggested. They suggested that the proposed changes would be difficult to implement in practice and offered little protection for consumers. For example, because consumers are unlikely to examine a bulk if they place an order online or because the rules rely on the traders’ actions (including labelling or providing details of the bulk) to protect the consumer.

- 3.99 ICA and Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West of the University of Aberdeen (joint response) and Dr Magda Raczynska and final year LLB

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<sup>87</sup> 2016 Report, paras 9.76 to 9.79.

students at University College London Faculty of Laws<sup>88</sup> all queried how often the proposed rules would actually apply.

Would there be unexpected consequences to our proposals?

3.100 We asked consultees if the suggested rules on bulk goods for consumers could have unexpected consequences for when co-ownership of a bulk transfers in a consumer context.<sup>89</sup>

3.101 We received six responses to this question. Four consultees thought there would be unforeseen consequences if the rules on bulk goods were expanded in the way set out in the consultation.

3.102 The Bar Council noted that the rules could result in a trader's normal business practices (for example, labelling a bulk as containing goods for one customer and then re-labelling the bulk for another customer or customers) amounting to an actionable conversion.

3.103 Professor Duncan Sheehan observed that providing for ownership to transfer when "the bulk is identified in some other way" was ambiguous enough that it could result in transfer of ownership of age restricted products prior to a trader being able to satisfy themselves of a consumer's age. KPMG noted that the proposed rules could make dealing with retention of title claims over goods held in a bulk more complex and time consuming to deal with.

Should there be any additional events and circumstances to transfer ownership of a bulk?

3.104 We asked consultees if there were any additional events and circumstances which should be added to the list in the possible amendments (described in paragraph 3.90).

3.105 Five consultees commented on this but did not think that additional provisions would need to be added. A couple commented that any action not already contemplated would likely be caught by the final limb: "the bulk is identified for the purposes of the contract in some other way".

3.106 Dr Magda Raczynska and final year LLB students at University College London Faculty of Laws<sup>90</sup> suggested that exhaustion of the bulk (when the bulk is reduced to the amount of goods subject to the contract) should be added to the list of events and circumstances in section 18B of the proposed rules.

Conclusion

3.107 While a number of consultees observed that there are situations in which goods are held in bulk until delivery or shortly before delivery in a consumer context, there was no consensus as to whether this was a common occurrence. While some consultees thought that amending the bulk goods rules for consumer sales contracts had the

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<sup>88</sup> Chak Lau and Moh.

<sup>89</sup> Consultation question 6.

<sup>90</sup> Chak Lau and Moh.

potential to help consumers, there was no strong support for amending them either generally or in the way suggested in the consultation.

3.108 In light of responses we received, the final draft Bill does not seek to make special rules for consumer sales contracts for a specific quantity of goods which form part of a bulk.<sup>91</sup>

3.109 Sections 20A and 20B of the SGA 1979 will therefore continue to apply to sales contracts between a trader and consumer.<sup>92</sup> If the relevant conditions in section 20A(1) are met, the consumer will become a co-owner of the bulk of goods.<sup>93</sup> All co-owners of the bulk (be they consumer or non-consumer owners) will be deemed to have consented to any dealings in the bulk goods, allowing for delivery of the specific quantity of goods which the consumer has contracted to buy.<sup>94</sup> The rules inserted into proposed section 18B of the CRA 2015 by the final draft Bill will then apply to transfer ownership of the specific quantity of goods which the consumer has contracted to buy.

3.110 The events listed in proposed sections 18B(2) and (3) upon which ownership of goods will transfer relate to the “goods” which are the subject of the sales contract, not the bulk of which those goods may form a part. Therefore, for example, in relation to the physical labelling of goods under section 18B(3)(a), ownership will transfer only when the specific quantity of goods which are the subject of the contract is labelled, not when the bulk is labelled. The effect of this is that the goods will need to be separated from the bulk before ownership can transfer under proposed section 18B. Separation of the specific quantity of goods from the bulk could itself transfer ownership if such an action were intended by the trader to be permanent.<sup>95</sup>

## **RULES TO BE MANDATORY**

3.111 Under the SGA 1979, ownership of goods transfers when the parties to a contract for sale intend it to transfer. The current rules relating to the passing of property in the SGA 1979 are presumptions which impute an intention to the parties where they have not otherwise evidenced one. These presumptions therefore do not apply where parties have made their intention obvious or explicit. However, in a consumer context, rules such as those governing the transfer of risk in the CRA 2015 are mandatory, meaning that they cannot be varied by contract.<sup>96</sup> This prevents retailers including more retailer-friendly terms in their standard terms and conditions, which consumers have no opportunity to negotiate.

3.112 The current rules on transfer of ownership in the SGA 1979 do not require goods to be paid for before ownership is transferred. However, as ownership of goods transfers under section 17 when the parties to a contract for sale intend it to, a seller can contract to retain property rights until the full price of goods has been paid. In

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<sup>91</sup> We summarise consultation responses on this topic from para 3.84.

<sup>92</sup> Final draft Bill, clause 1(2).

<sup>93</sup> Sale of Goods Act 1979, s 20A(2).

<sup>94</sup> Sale of Goods Act 1979, s 20B.

<sup>95</sup> By operation of the final draft Bill, proposed section 18B(3)(a) or (h) of the Consumer Rights Act 2015.

<sup>96</sup> Consumer Rights Act 2015, s 29.

particular, section 19 permits a seller to delay transfer of ownership of goods to a buyer until certain conditions are fulfilled, even if the goods have been delivered to a buyer or a carrier, bailee or custodian for onward delivery to the buyer.<sup>97</sup> Section 19 can be used to delay transfer of ownership until full payment is received by the seller.

3.113 Prior to the consultation exercise, some stakeholders raised concerns that mandatory transfer of ownership rules could cause problems for retailers who sell age-restricted products. We think that the proposed rules will continue to allow retailers to prevent the transfer of ownership of products to consumers who do not meet relevant age requirements. For example, where a consumer buys a bottle of alcohol in a physical shop, it will continue to be for the retailer to satisfy themselves as to the consumer's age before selling them that item. Where a consumer seeks to buy a bottle of alcohol in other circumstances, such as online, ownership will transfer when the retailer selects the actual bottle of alcohol that will be used to fulfil the contract "in a way that is intended to be permanent". The events and circumstances in proposed section 18B(3) of the CRA 2015 will apply. Part of a retailer's process for satisfying an order may be that goods are not permanently selected for fulfilment of a contract until the retailer is satisfied that the consumer is the requisite age.

#### Consultees' views

3.114 In the 2016 Report we recommended, following consultation, that the proposed rules on transfer of ownership should be mandatory.<sup>98</sup> When we consulted in 2015<sup>99</sup> we received 13 substantive responses on this point: 11 said that the rules should be mandatory and only two thought that the parties should be able to agree alternative terms. Respondents representing consumer interests said mandatory rules would provide clarity. The Competition and Markets Authority (CMA) expressed concern that allowing parties to agree alternatives could lead to unfair terms being imposed on consumers.

3.115 The draft Bill provided that the sales contract is to be treated as including a term that ownership of goods transfers when one of the events or circumstances in section 18B(3) or 18B(4) occurs. Section 18B(5) then sought to implement our recommendation that the rules be mandatory by providing that:

Any term of the contract that purports to provide for ownership of the goods to transfer to the consumer at a time later than that provided by virtue of this section is to that extent of no effect.

3.116 We asked consultees if the drafting of these provisions would sufficiently protect the interests of both consumers and traders.<sup>100</sup> Ten consultees provided substantive responses to this question.

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<sup>97</sup> Sale of Goods Act 1979, s 19.

<sup>98</sup> 2016 Report, Recommendation 5c.

<sup>99</sup> Consumer Prepayments on Retailer Insolvency A Consultation Paper (2015) Law Commission Consultation Paper No 221: <https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>.

<sup>100</sup> Consultation question 8.

3.117 Two consultees said that the mandatory rules would ensure that consumers are adequately protected and may also provide enhanced certainty for consumers, traders and insolvency practitioners. The ICA said:

It is essential that these rules are mandatory and cannot be varied under contract. It is likely that consumers will not understand what these rules are and therefore may be caught by any variation. This would also provide certainty from a business perspective.

3.118 Similarly, the Centre for Scots Law said:

Making the rules mandatory shifts the balance in favour of consumers, which is obviously intentional. Mandatory rules are more straightforward for a retailer, the consumer and insolvency practitioners.

3.119 Some consultees commented on the underlying policy decision that the rules should be mandatory. They observed that, under the proposed new rules, it is possible for ownership of goods to transfer to the consumer even if the consumer has not paid for the goods. The mandatory rules would prevent traders requiring full payment before transfer of ownership occurs and from relying on retention of title clauses to protect themselves in this situation.<sup>101</sup> If the trader is still in possession of the goods, they may exercise a lien over the goods until the consumer pays for the goods. If the consumer is in possession, then the trader's only recourse will be to sue the consumer for the balance of the purchase price, and the trader may incur additional costs in doing so. If the consumer goes insolvent, the trader will be an unsecured creditor and may not recover any of the purchase price. The consultees who raised this point questioned the fairness of this approach.

3.120 Dr Magda Raczynska observed that under the proposed rules, it would be possible for the trader to retain ownership when the price is paid in instalments (this would be a conditional sales contract which falls outside the rules in the final draft Bill) but not when the payment of the entire price is deferred until a future date.

3.121 Several consultees said that the mandatory nature of the rules may lead to more widespread use of terms and conditions delaying formation of the sales contract.<sup>102</sup> As traders cannot use retention of title clauses to protect themselves against the risk of non-payment by the consumer, they may instead employ terms delaying formation of the sales contract. These terms could stipulate that the sales contract does not form until the consumer pays for the goods. Accordingly, the mandatory nature of the rules could easily be circumvented by traders.

## Conclusion

3.122 We continue to think that the rules should be mandatory. Sections 18B(5) of the proposed rules therefore states that contract terms which provide for ownership to transfer at a later time than under the rules are of no effect. This reflects the recommendation we made in the 2016 Report that any term in the contract which would put the consumer in a worse

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<sup>101</sup> Retention of title clauses typically provide that ownership does not transfer to the consumer until the consumer pays for the goods in full. We discuss retention of title further from para 4.41.

<sup>102</sup> We discuss the practice of delaying contract formation from in detail in ch 5.

position should be of no effect. The proposed rules also disapply section 19 of the SGA 1979 in relation to contracts to which the proposed rules apply.<sup>103</sup> As a result it will not be possible to delay transfer of ownership until the full price of goods has been paid.

3.123 An unpaid trader will continue to have rights under section 39 of the SGA 1979. This provides that a seller has a lien or right to retain goods until the whole of the price has been paid. A trader or insolvency practitioner is therefore not obliged to release the goods until the consumer has paid for them in full. The lien in favour of an unpaid seller that arises by operation of law under section 39 of the SGA 1979 is a possessory lien. It operates only while the seller “is in possession of” the goods.<sup>104</sup> Accordingly, once the seller parts with the possession of the goods, they lose the lien. Under section 43 of the SGA 1979, a seller loses the lien if the seller delivers the goods to the buyer, or if the seller delivers the goods to a carrier for onward delivery to the buyer without delaying transfer of ownership using its right in section 19. As the proposed rules disapply section 19, the final draft Bill amends section 43 in its application to consumer sales contracts so that the trader will lose their lien not only upon delivery to the consumer, but also upon delivery of the goods to a carrier.<sup>105</sup> The seller may also be entitled to assert a lien under the terms of the sales contract with the buyer. As with liens arising by operation of law, the holder of a contractual lien must have possession of the assets over which the lien is asserted.<sup>106</sup>

3.124 If a trader loses its lien or right of retention by delivering the goods before payment either to the consumer or a carrier, other bailee or custodian for the purpose of transmission to the consumer, it will retain its contractual right to payment and will have a debt claim. It can also structure its ordering process so that any offer a consumer makes to purchase goods will not be accepted unless full payment is tendered. This is already the case for the majority of purchases made online.

## COMMENCEMENT

3.125 The final draft Bill provides that the proposed rules will come into force two months after the Bill is passed into law.<sup>107</sup> The proposed rules will not apply to contracts made before the Act comes into force.<sup>108</sup>

## Consultees’ views

3.126 We asked consultees if they agreed that the new rules should come into force two months after they were passed into law.<sup>109</sup> In the consultation we said that we did not expect that the majority of traders or other businesses would need to change the way they operate as a result of the rules coming into force. While insolvency practitioners

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<sup>103</sup> Final draft Bill, cl 2(6).

<sup>104</sup> Sale of Goods Act 1979, s 41(1).

<sup>105</sup> Final draft Bill, cl 2(7).

<sup>106</sup> M Bridge, L Gullifer, K Low and G McMeel (eds), *Law of Personal Property* (2nd ed 2018) para 15-042.

<sup>107</sup> Final draft Bill, cl 3(2).

<sup>108</sup> Final draft Bill, cl 3(3).

<sup>109</sup> Consultation question 16.

would need to familiarise themselves with the new rules, we suggested that this could be achieved within the proposed two-month timescale.

3.127 Eight consultees responded to this question. Two said that two months was a realistic timeframe, while five consultees suggested that this would not give insolvency practitioners and other affected parties enough time to prepare for the rule change. The Furniture and Home Improvement Ombudsman suggested that a two-month period may be realistic for traders and suppliers to understand the rules if appropriate support and information were provided. However, they cautioned that a longer timeframe would be appropriate at the moment due to the pressures on the retail sector and its staff as a result of the COVID-19 emergency.

3.128 ICAS suggested a six-month lead in period to allow insolvency practitioners to familiarise themselves with the new rules. They said this was “of particular importance in the current environment with IPs anticipated to be very busy dealing with the impact of the coronavirus pandemic as well as Brexit.”

3.129 The Centre for Scots Law also favoured a six-month time frame, noting that “although the proposed change may appear small it will probably require various parties to review and change their practices and procedures, as well as forms and template contracts.” The British Retail Consortium (BRC) suggested that some traders would have to make radical changes to their business models (including supermarkets selling food online) and would therefore need longer than two months to put these changes in place.

## **Conclusion**

3.130 We did not receive sufficient responses to the consultation confidently to propose an alternative time frame for commencement of the final draft Bill. However, the responses we did receive suggest that some consultees are concerned that a short commencement period may pose challenges for affected parties. We suggest that this is something for government to consider further as part of any implementation of the final draft Bill.



## Chapter 4: The proposed rules in context

4.1 In this chapter we consider the proposed rules in context. We examine how they would operate alongside the existing protections for consumers who have paid for goods by credit or debit card, their interaction with the law on retention of title clauses and liens, and their overall impact on businesses, consumers and insolvency practitioners. We set out in detail what consultees said about these issues in response to the questions in the consultation paper. We then set out our conclusions on these issues. In this chapter, we do not address the practice of delaying contract formation, nor its impact on the proposed new rules. This is discussed in the next chapter.

### SECTION 75 AND CHARGEBACK

#### Summary of section 75 and chargeback

- 4.2 When a consumer pays with their credit or debit card for goods, they may claim a refund from their card issuer if those goods are not delivered or if they are otherwise left out of pocket.<sup>110</sup> This is a major source of protection for prepaying consumers.
- 4.3 The consumer may obtain a refund in two ways:
- (1) For credit card transactions where the goods cost between £100 and £30,000, section 75 of the Consumer Credit Act 1974 (CCA 1974) makes the card issuer jointly and severally liable for the retailer's breach of contract or misrepresentation. Under section 75, the consumer can recover up to the total value of their loss, irrespective of how much was paid by credit card.
  - (2) For all card transactions (debit or credit cards), card schemes provide a system of "chargeback", which allows the consumer to claim the amount they paid on their card. Unlike the section 75 protection for credit card transactions, it is not restricted to payments over £100, but only the amount paid by card is recoverable. It is not a statutory right for consumers, but contained in the card scheme rules issued by Visa and MasterCard, to which the consumer is not party.
- 4.4 Table 1 on the next page summarises the key features of section 75 and chargeback.

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<sup>110</sup> In Chapter 5 we consider the potential impact upon section 75 claims in the event that a sales contract has not formed.

Table 1: Summary of section 75 and chargeback

	<b>Section 75 of the CCA 1974</b>	<b>Chargeback</b>
Nature of protection	Statutory right.	Contained in card scheme rules issued by Visa and MasterCard, to which the consumer is not party. As such, it is a right pursuant to a contract rather than a right protected by statute.
Type of card	Credit cards only.	Credit and debit cards.
Basis of claim	A consumer who has a “misrepresentation or breach of contract” claim against a retailer can bring a like claim against their credit card issuer depending on the value of the goods or services (see below).	Chargeback allows card transactions to be reversed under specified circumstances set out in the card scheme rules.  For example, the MasterCard Chargeback Guide provides that the card issuer may initiate a chargeback on the basis that “goods or services were not provided”. <sup>111</sup>
Value of prepayment	Cash price of goods or services must be over £100 and less than £30,000, though the amount paid on card may be less.	No minimum or maximum limits.
Amount which can be recovered	Total value of prepayment, irrespective of how much was paid by credit card. Any consequential loss may also be claimed as damages.	Amount paid by card.
Claim to be made to	Card issuer.	Card issuer.
Time limit for making a claim	Statutory limitation rules apply. Six years from the non-delivery of goods or service (five years in Scotland).	The time limits are set out in the scheme rules. Generally the card issuer must raise a claim within 120 days of the date on which delivery of the goods or services was expected.
Where retailer is insolvent, who bears the loss	Card issuer (unless offset by chargeback claim against merchant acquirer).	Merchant acquirer.

<sup>111</sup> *MasterCard Chargeback Guide* (February 2021) p 232, <https://www.mastercard.us/content/dam/mccom/global/documents/chargeback-guide.pdf>.

- 4.5 In the consultation paper, we set out an analysis of how we thought the proposed rules would operate alongside these protections and asked consultees if they agreed.<sup>112</sup>

### **Outside retailer insolvency**

- 4.6 Outside insolvency, a consumer may wish to rely on their section 75 rights or a chargeback claim in certain circumstances. If the retailer fails to deliver goods which have been ordered, or delivers incorrect or defective goods, the consumer's first avenue of recourse is likely to be with the retailer themselves, who will provide replacement goods or a refund. If the consumer does not get the appropriate remedy from the retailer, they may then seek to make a section 75 or chargeback claim. We said we did not think that the draft Bill would have any impact on section 75 or chargeback claims in a non-insolvency situation. No consultees commented on this analysis and we do not discuss it further.

### **On retailer insolvency: section 75**

- 4.7 In the event of retailer insolvency, it is possible that the consumer will not receive goods which they have paid for but not received. For example, the insolvency practitioner might not make the goods available to the consumer at all, or the insolvency practitioner might make them available but not arrange for delivery.<sup>113</sup> In the consultation paper we said that a section 75 claim would be available if goods are not delivered to the consumer as agreed either within the time period for delivery agreed between the consumer and retailer in the contract, or in line with the statutorily implied timeframe. We said that simply making the goods available to the consumer (rather than delivering them) was not likely to satisfy the delivery requirement in section 28 of the Consumer Rights Act 2015 (CRA 2015). We said that such a claim would be available to the consumer regardless of whether ownership of the goods has transferred to them.
- 4.8 We also considered the availability of a section 75 claim in the situation where ownership of goods have transferred to a consumer but they wish to cancel the contract rather than take the goods from the insolvent retailer. Consumers have various rights to cancel a sales contract:
- (1) A right under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs 2013) to cancel a distance or off-premises contract from the date of entry into the contract to 14 days after receiving the goods.<sup>114</sup>

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<sup>112</sup> Consultation paper, from para 3.89.

<sup>113</sup> This depends on a number of factors and administrator decisions. See consultation paper from para 3.90, and 2016 Report from para 2.12.

<sup>114</sup> Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 SI 2013 No 3134, regs 29(1)–(2) and 30(3). If a sales contract is a distance or off-premises contract, these provisions give consumers a statutory right to cancel the contract. The consumer does not have to give a reason for the cancellation.

- (2) A right under the CRA 2015 to treat a sales contract as at an end for on the grounds of the retailer's refusal to deliver the goods.<sup>115</sup>
- 4.9 A consumer who exercises either of these rights has a reimbursement claim against the retailer for payments made under the contract.<sup>116</sup> As the consumer is unlikely to be reimbursed by the insolvent retailer, can the consumer seek recourse from their credit card issuer under section 75?
- 4.10 We concluded that a section 75 claim could be available if a consumer exercised their statutory cancellation rights under the CCRs 2013 but did not receive a refund from the insolvent retailer. This is because the CCRs provide that the contract is to be treated as including the statutory provisions as to reimbursement on cancellation.<sup>117</sup> Therefore, the retailer's failure to provide the reimbursement would be a breach of contract, for which the card issuer is also liable under section 75.
- 4.11 The right to reimbursement under the CRA 2015 is a statutory right<sup>118</sup> but is not implied into the sales contract by statute. However, we suggested that there was still a strong argument that a section 75 claim could be available to a consumer who exercised the CRA 2015 right and was not reimbursed by the insolvent retailer. We argued that the claim for reimbursement could be seen to be "in respect of a breach of contract", as required by section 75. This is because the consumer's right to terminate and seek reimbursement under the CRA 2015 is premised on the retailer being in breach of the statutory implied terms (or the parties' agreed terms) regarding delivery.
- 4.12 Finally, we said that, if a consumer agreed to pay additional storage, pick-up or delivery costs in order to take possession of their goods, these would be recoverable under section 75. This is because these costs would be necessary to put the consumer in the position they would have been in had the retailer delivered the goods and are therefore recoverable as damages for the retailer's breach of contract.

#### Consultees' views

- 4.13 We asked consultees whether they agreed with our analyses of these situations. The majority of consultees either agreed with our analysis or did not provide any views.
- 4.14 In relation to a failure to reimburse the consumer after exercising a statutory right to cancel a sales contract or treat it as at an end,<sup>119</sup> the Bar Council said that failure to reimburse under the CCRs 2013 would itself be a breach of contract by the retailer. They agreed that this would be actionable against the card issuer under section 75 of

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<sup>115</sup> Consumer Rights Act 2015, s 28(8). This gives a consumer the right to treat a sales contract as at an end on the grounds of the retailer's refusal to deliver the goods, and the retailer must then reimburse the consumer under section 28(9). If a retailer (or insolvency practitioner) tells the consumer that it will not deliver the goods unless the consumer pays additional storage and/or delivery costs, it is arguable that the retailer has "refused" to deliver the goods to the consumer for the purposes of the CRA 2015.

<sup>116</sup> Consumer Rights Act 2015, s 28(9); Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134, reg 34(1).

<sup>117</sup> SI 2013 No 3134, reg 34(13).

<sup>118</sup> Consumer Rights Act 2015, s 28(9).

<sup>119</sup> Consultation question 12. Eleven consultees responded to this question. Of these, six consultees agreed with our analysis, and five consultees responded "other".

the CCA 1974. UK Finance also commented that the proposed rules would not alter the consumer's rights under section 75 in relation to online contracts because the CCRs 2013 "provide cancellation rights to consumers who have contracted with a retailer on a distance selling basis".

- 4.15 A majority of consultees agreed that if a consumer were required by an insolvency practitioner to pay storage or delivery fees in order to obtain the goods, those additional charges would be recoverable under section 75.<sup>120</sup> Dr Magda Raczynska said:

In the typical scenario, the consumer is forced to pay a charge in order to get to the position he would have been in without paying the charge, if the retailer would have fulfilled his obligations under the contract. There is thus a causal chain between the breach of contract (retailer not fulfilling his obligation to deliver) and the consumer having to pay the charge.

- 4.16 Similarly, R3 said that the additional charges would be recoverable if they formed part of the consumer's "damages claim" for the retailer's breach of contract. UK Finance also said that storage and delivery charges would be recoverable under section 75 as consequential losses flowing from the retailer's breach of contract. KPMG said that if the consumer were required to incur additional costs in order to collect their goods, those costs would be recoverable under section 75.

- 4.17 Four consultees did disagree or otherwise comment on our analysis.

- 4.18 Lorna Richardson noted that physical delivery of the goods to the consumer is not necessary under section 28 of the CRA 2015 unless the contract provides for this.<sup>121</sup> We agree that there will be situations in which a consumer will have agreed that, for example, they will collect the goods rather than the trader delivering them. However, there is an argument that the default position where the contract is silent on this is that the trader will deliver the goods. This is because the CRA 2015 implements article 18 of the Consumer Rights Directive which requires that the trader "shall deliver the goods by transferring the physical possession or control of the goods". This suggests that making the goods available for collection by the consumer will not satisfy the requirement for "delivery".<sup>122</sup>

- 4.19 The Bar Council commented on our conclusion about the availability of a section 75 claim in the event that a consumer does not obtain reimbursement after they have exercised a statutory right under the CRA 2015 to treat a sales contract as at an end.<sup>123</sup> They thought it was arguable that a trader's reimbursement obligation under section 28(9) of the CRA 2015 is a statutory remedy which is distinct from any contractual claim and therefore falls outside the ambit of section 75. They suggested that section 28(9) should be amended to make it clear that breach of the

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<sup>120</sup> Consultation question 13. Seven consultees responded to this question. Of these, three agreed with our analysis, one disagreed, and two responded "other".

<sup>121</sup> We discuss this at para 4.7.

<sup>122</sup> Michael Bridge (ed), *Benjamin's Sale of Goods* (10th ed 2019) para 14-113.

<sup>123</sup> We discuss this from para 4.8. The right to reimbursement under section 28(9) of the Consumer Rights Act 2015 is a statutory right.

reimbursement obligation is actionable as a breach of the contract. We agree that it is arguable that a section 75 claim may not be available where a retailer fails to reimburse a consumer under section 28(9) of the CRA 2015. However, this has not been tested. It is beyond the scope of our current work to suggest changes to section 28(9), but government may wish to consider this as part of its more general work on consumer rights.

- 4.20 The Financing & Leasing Association said that when goods are purchased in a physical shop, section 75 should not be “the automatic first port of call”. The onus should instead be on the consumer to collect the goods where that option is available.
- 4.21 UK Finance thought that transfer of ownership could have an impact on whether a consumer is entitled to a full refund of their prepayment or just reimbursement for additional costs (if any) incurred in order to take possession of the goods. They said that in the absence of a contractual or statutory right to cancel a sales contract and obtain reimbursement of their prepayment, a consumer may not be able to recover their prepayment under section 75. Instead, they may only be entitled to claim the consequential losses for non-delivery of the goods:

We think card issuers would be able to defend wholly or partially section 75 claims on the basis of the consumer’s duty to mitigate a loss under the consumer’s contract with the merchant and/or on the basis, the consumer has title to goods and has received what they bargained for. Mitigating a loss would involve having to accept title to the goods save where there was a statutory protection or contractual cancellation right. In these circumstances, the credit card issuer would be able to recognise title transfer and then pay consequential losses such as delivery charges.

- 4.22 We expect that most consumers will have a contractual or statutory right to return their goods and obtain a refund. However, there are situations where a consumer’s rights will be more limited, for example, where a consumer has ordered bespoke or personalised goods. The cancellation right under the CCRs will not apply in this situation<sup>124</sup> and retailers do not usually provide consumers with a contractual right to return such goods simply because they have changed their mind. Another example is where a consumer enters into a sales contract in a retailer’s physical store. In this situation the consumer will not have the benefit of the statutory right to cancel the sales contract under the CCRs. However, given that many retailers provide a contractual right allowing consumers to return goods for a refund where they have changed their mind, this potential discrepancy should not prove too problematic in practice.

*Mechanism for consumers to accept or reject goods*

- 4.23 UK Finance expressed concern that ownership of goods transferring to the consumer at an earlier point could complicate the process of claiming and processing section 75 claims and also cause problems for insolvency practitioners. They were concerned that insolvency practitioners may find that they are holding goods which they cannot dispose of. This could arise where the goods belong to a consumer and the consumer no longer wants them but has no way to reject them and transfer ownership back to the insolvent retailer. As discussed above, consumers who purchase goods online

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<sup>124</sup> SI 2013 No 3134, reg 28(1)(b).

have a statutory right under the CCRs 2013 to cancel the sales contract without giving reason.<sup>125</sup> UK Finance describe this as an ability to “reject” the goods. In contrast, consumers who purchase goods in store for delivery later do not have this same statutory right to cancel a contract,<sup>126</sup> although they may have a contractual right to reject.

- 4.24 UK Finance suggested that the position of the insolvency practitioner could be complicated further if the consumer is not inclined to resolve the question of ownership of the goods. This could arise where the consumer has made a section 75 claim and obtained reimbursement of their prepayment from their card issuer. In that situation the consumer will have their money back and therefore have no interest in the goods themselves. In this situation, the insolvency practitioner may struggle to know what to do with the goods. It should be noted that card issuers have some control over this and may not make a section 75 payment until they have evidence of the insolvency and are satisfied that the retailer is not going to deliver the goods to the consumer. As we noted in our 2016 Report, card issuers may need to ask the consumer for further information which is specific to the particular case, but this should be easily identifiable and reasonably easy for a consumer to obtain.<sup>127</sup>
- 4.25 UK Finance were also concerned that the lack of a mechanism to accept or reject goods could cause problems for consumers and card issuers. They were concerned that “consumers could be ‘bounced’ between the card issuer and the administrator if the acceptance and rejection processes are not clearly laid out.” If a consumer wishes to claim under section 75 or chargeback because goods they have ordered have not been delivered, a card issuer may not want to reimburse the consumer if there is a risk that the consumer is the owner of the goods. In this situation, a card issuer may argue that the consumer should instead arrange for delivery, claiming back just the delivery costs from their card issuer. UK Finance suggest that the process of finding out if a consumer has ownership and then finding out if they can get reimbursed by their card issuer will be an administrative burden for insolvency practitioners, card issuers and consumers.
- 4.26 UK Finance suggested that a solution may be to align the rejection requirements for distance selling and non-distance selling contracts. They explained the evidential benefits of the rejection process under the CCRs 2013:

At present, distance selling contracts under the Consumer Contract Regulations 2013 require a rejection notice where rejection occurs during the “cooling-off” period. In this way, the card providers and merchant acquirers could require a copy of the rejection notice as evidence the consumer has rejected the goods and further the administrator will know that he/she can deal with the goods free of any consumer claim. This may also reduce the opportunity for fraud.

- 4.27 To a certain extent, the scenarios described above can already arise because it is possible that insolvency practitioners will find that they are holding goods which are

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<sup>125</sup> SI 2013 No 3134, regs 29(1)–(2) and 30(3).

<sup>126</sup> We discuss consumers’ more limited rights to reject goods or treat the sales contract as at an end under the Consumer Rights Act 2015 from para 4.8 above.

<sup>127</sup> 2016 Report, para 7.92.

owned by consumers. However, a potential effect of the final draft Bill would be to increase the incidence of situations in which goods in an insolvency practitioner's possession will be owned by consumers (because ownership may transfer earlier than under the existing rules). While more goods may fall into this category were the proposed rules to be implemented, we expect that the majority of consumers will have a statutory right to cancel their sales contract under the CCRs 2013 (and thereby "reject" the goods) because they have ordered them online. The final draft Bill does not change consumers' rights to cancel a sales contract and reject goods. We therefore think that the scenario described by UK Finance is only likely to arise in relation to a small minority of goods held by an insolvency practitioner – where the right to reject has not been exercised, or where there is no such right.

4.28 We can see that there is a rationale to give consumers the right to reject ownership of goods in the event of a retailer insolvency where it would speed up a section 75 or chargeback claim. It would also lessen the impact on insolvency practitioners and card issuers as described above. We note, however, that there is a risk that consumers would exercise such a right without fully understanding the implications and may end up with no ownership rights and as an unsecured creditor of an insolvent trader (if their section 75 or chargeback claim is rejected). While this suggestion is out of scope for our project, which is focused solely on transfer of ownership, it may warrant further consideration as part of a project looking at the practicalities of the insolvency process more generally.

#### **On retailer insolvency: chargeback**

4.29 In our consultation paper we noted that chargeback allows card transactions to be reversed under specified circumstances set out in the card scheme rules. Unlike section 75, it is not a statutory right for consumers. According to the MasterCard Chargeback Guide, the card issuer may initiate a chargeback when the circumstances of the transaction fall within a "chargeback reason code".

4.30 The MasterCard Chargeback Guide states that a chargeback can be claimed for "goods or services not provided" in various circumstances, including:

- (1) when the determination has been made that the merchant will not provide the goods or services because, for example, the merchant is no longer in business;
- (2) when the cardholder cancelled the order for goods or services, the goods or services were not provided, and the cardholder did not receive a credit.<sup>128</sup>

4.31 We concluded that chargeback would be available for consumers to whom ownership has transferred but who do not wish to take possession of the goods. However, we thought that if a consumer takes possession of goods and pays any additional delivery or storage charges then it seems unlikely that they can claim a chargeback for these additional costs.

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<sup>128</sup> *MasterCard Chargeback Guide* (February 2021) p 232, <https://www.mastercard.us/content/dam/mccom/global/documents/chargeback-guide.pdf>.



## Consultees' views

- 4.32 We asked consultees whether they agreed with that analysis. The majority of consultees either agreed with our analysis or did not provide any views.
- 4.33 A majority of consultees agreed that additional charges would not be recoverable under the chargeback rules. Dr Magda Raczynska commented that where the consumer has paid in advance for delivery services using their debit card, these could be the subject of a chargeback claim if those services were not provided. However, additional delivery charges levied by the administrator would not be recoverable under the chargeback rules. Similarly, UK Finance said:

Where the consumer's purchase included "free" delivery, any such charge would not be eligible for a chargeback claim but could be eligible for a section 75 claim (as a consequential loss). Where the purchase amount includes a charge for delivery, we think a chargeback claim could be made for the paid for delivery charge, but not any additional charge the administrator would levy.

- 4.34 UK Finance did note that, if ownership has transferred to a consumer, a merchant acquirer<sup>129</sup> may voluntarily pay the additional costs of storage or delivery rather than refunding the full prepayment. This would mitigate the cost of a chargeback claim for the merchant acquirer and result in the consumer receiving the goods they had ordered without them having to pay additional costs.
- 4.35 KPMG said that delivery or storage costs levied by the insolvency practitioner would not be recoverable in a chargeback claim.

## Section 75 and chargeback: conclusion

- 4.36 The consultation responses indicate that the operation of section 75 and chargeback will not be significantly affected by the proposed rules, even if ownership has transferred at an earlier point. If the consumer takes delivery of the goods but has extra fees or charges to pay, they are likely to be recoverable under section 75 but not under chargeback. If they simply cancel the contract under the CCRs 2013, it is likely that a refund would be available through the card issuer.
- 4.37 Where on the other hand a consumer treats the contract as at an end and claims reimbursement under section 28(9) of the CRA 2015, a transfer of ownership to the consumer may mean that the consumer is confined in their section 75 claim to recovering the costs of having the goods delivered rather than a full refund. This is because it is arguable (as the Bar Council observes) that the retailer's obligation to reimburse the consumer under section 28(9) is not a contractual obligation, but a statutory obligation, breach of which is not actionable against the card issuer under section 75. However, it appears that the consumer would be able to raise a

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<sup>129</sup> The merchant acquirer is the party in the card cycle that contracts with the retailer (or "merchant") to process payments for credit and debit card transactions. Sometimes called "merchant services providers", they used to be associated with the major banks. However, as the market has become more competitive, they have become increasingly independent. Merchant acquirers in the United Kingdom include WorldPay, Barclaycard Merchant Services, Elavon, and Lloyds Bank Cardnet.

chargeback in this situation as such a claim does not specifically require a breach of contract.

## **RETENTION OF TITLE CLAUSES AND LIENS**

- 4.38 In the consultation paper, we explained that, upon their appointment, the insolvency practitioner will assess the assets of the insolvent retailer. On a liquidation, the insolvency practitioner will look to sell the retailer's assets in order to obtain a return for the retailer's creditors. On an administration, the assets may be sold for the purposes of trying to save the retailer, or for achieving a sale of the retailer as a going concern. In both cases, the insolvency practitioner will need to know which goods still belong to the retailer and which belong to consumers.
- 4.39 In a retailer insolvency, multiple creditors may claim an interest in the goods held by the retailer. Part of the insolvency practitioner's task will be to assess these competing claims and determine who is entitled to the goods. These competing claims may include claims by suppliers under retention of title clauses, claims by warehouses and delivery companies that may have a lien over the goods, and claims by consumers that they are the owners of the goods.
- 4.40 In the consultation paper, we set out an analysis of how the proposed rules would interact with the interests of other creditors, including suppliers, warehouses and delivery companies. We concluded that the proposed rules would not complicate the law in this area or give rise to novel legal issues. We asked consultees if they agreed with our analysis.

### **Retention of title clauses**

- 4.41 A retention of title clause prevents ownership from transferring to the buyer until certain conditions imposed by the seller are fulfilled. Typically, the retention of title clause will state that ownership will not transfer until the buyer pays for the goods in full. In retail supply chains, retention of title clauses provide security to suppliers who deliver goods to retailers without taking payment. If the retailer enters insolvency before paying for the goods, the supplier will be able to claim those goods in the retailer's insolvency.
- 4.42 In the consultation paper, we said that the proposed rules on transfer of ownership would not complicate the law on retention of title clauses found in contracts of sale between suppliers and retailers. Under the current law, if a retailer sells goods subject to retention of title, the consumer will generally take free of the supplier's title to the goods. This is because, typically, retention of title clauses enable the retailer to on-sell the goods in the ordinary course of business. The proposed rules would only change the time at which the transfer of ownership from the retailer to the consumer could occur. The legal consequences for retention of title arrangements would remain the same as under the current law. We asked consultees if they agreed with this analysis.
- 4.43 Consultees generally agreed, although several added caveats to their answers or made further comments.<sup>130</sup>

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<sup>130</sup> Eight consultees responded to this question. Three agreed with our analysis and five responded "other".

4.44 Lorna Richardson said that the proposed rules would simply “bring forward the point at which ownership is transferred to the consumer purchaser”. The Bar Council and Dr Magda Raczynska also agreed with our analysis.

4.45 Professor Christian Twigg-Flesner and Professor Hugh Beale (joint response) considered the situation where the retailer does not have a power of resale under the retention of title clause. They said:

Even if the ROT in a sales contract does not contain an express or implied term authorising resale, in principle, a retention of title clause would be defeated by a sub-sale where this satisfies the requirements of section 25 of the Sale of Goods Act 1979, which protects a buyer who takes in good faith and without notice. However, that section only applies once there has been delivery of the goods to that buyer. So in the consumer context, goods subject to a retention of title clause would still be within the reach of that clause until section 25 is fully engaged.

4.46 Professor Andreas Rahmatian and Lorna Richardson also commented that a supplier’s retention of title can be defeated by the operation of section 25 of the SGA 1979. That section provides for the situation in which a buyer is in possession of goods which are subject to a lien or other right in favour of the seller of those goods. Where the buyer sells the goods and delivers or transfers them to a third party, that third party will take them free of the lien or other right if they receive them in good faith and without notice of the lien or other right.<sup>131</sup> We agree that, in rare cases where a retention of title clause contains no express or implied power of resale, a supplier’s retention of title would persist unless the requirements in section 25 are satisfied.

4.47 The ICA suggested that the new rules should outlaw the use of retention of title clauses in consumer contracts. They said:

Dealing with insolvency practitioners’ comments, the purpose of these rules is to offer enhanced consumer protection and, as stated at the outset, shifting greater risk to the parties in the supply chain who have better knowledge and wherewithal to protect their interests.

4.48 As discussed from paragraph 3.111 above, the transfer of ownership rules in the final draft Bill are mandatory. This means that a retention of title clause in a sales contract between a trader and a consumer will be of no effect to the extent that it would result in ownership transferring to the consumer at a later time than under the final draft Bill. However, goods purchased by a consumer may still be subject to a retention of title claim by a supplier as a result of a retention of title clause in a sales contract between that supplier and the retailer. The final draft Bill does not prohibit the use of retention of title clauses in contracts between suppliers and retailers. However, the rules provide that, in certain circumstances, ownership will transfer to the consumer at an earlier point in time than under the current rules. In effect this has the potential to diminish the security afforded to suppliers by retention of title clauses.

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<sup>131</sup> Sale of Goods Act 1979, s 25(1).

4.49 Although consultees agreed with our legal analysis, some consultees commented on the impact which the proposed rules would have on suppliers. We discuss these comments in more detail at para 4.70 below.

## Liens

4.50 In the consultation paper, we said that third party warehouses and delivery companies will often assert a lien over goods in their possession as security for their unpaid fees. The lien arises from the contract between the retailer and the warehouse or delivery company. The clause creating the lien is typically drafted broadly so that the lien applies to all the goods in the possession of the warehouse or delivery company.

4.51 We said that where there is a transfer of ownership of goods to the consumer under the proposed rules, the consumer would in most cases be bound by the lien. This is because in most cases the lien will be in existence before transfer of ownership occurs. In some cases, the lien may arise after ownership is transferred, in which case the consumer would be bound only if they expressly or impliedly consented to the lien. We asked consultees if they agreed with this analysis.

4.52 A majority of consultees agreed with our analysis of the interaction between the proposed rules and warehouse and deliverers' liens.<sup>132</sup> They agreed that, where the lien arises before ownership is transferred, the consumer would be bound by the lien because the retailer cannot transfer a better title than it has (the "*nemo dat*" principle).<sup>133</sup>

4.53 Consultees also agreed that, where the lien arises after the transfer of ownership, the consumer would be bound if they gave express or implied consent to the lien. Some consultees said that, in most cases, the consumer would be found to have consented to the creation of the lien. Dr Magda Raczynska said:

The consumer's consent to the creation of the lien is likely to be implied as an incident of the contract of storage between the consumer and the warehouse company or the delivery company, eg where the consumer agrees to goods being stored while the rest of the order is being put together.

4.54 Similarly, Professor Duncan Sheehan said that "the consumer will in almost all cases be deemed to have consented or given authority for the lien".

4.55 The Centre for Scots Law agreed with our analysis and commented that "the same general approach applies in Scotland regarding how liens would operate in relation to consumers".

## Conclusion

4.56 The responses from consultees indicate that the interaction of the proposed rules with retention of title clauses and liens is unlikely to give rise to novel legal issues. Where ownership of goods has transferred to the consumer, the consequences of that

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<sup>132</sup> Question 15: Six consultees responded to this question. Four consultees agreed with our analysis, one consultee disagreed, and one consultee responded "other".

<sup>133</sup> A seller cannot pass a better title to goods than the seller possesses. This rule is captured by the Latin maxim "*nemo dat quod non habet*".

transfer of ownership for retention of title holders and lienholders can be determined by applying established legal principles. However, as a practical matter, we recognise that determining whether ownership has transferred to the consumer under the proposed rules, and the consequences of that transfer for other creditors, could have an impact on the insolvency process and the work of the insolvency practitioner. We discuss these potential impacts below.

## IMPACT OF THE PROPOSED RULES

4.57 In the consultation paper we identified potential costs to business which could result from the introduction of the proposed rules. These included transition costs (such as familiarisation and one-off legal costs) and ongoing costs (such as the impact upon security interests and the process of determining ownership of goods on insolvency). We also identified potential benefits which could result from the introduction of the proposed rules. These included reduced consumer detriment and increased consumer confidence in retail markets. We asked consultees if they agreed with our assessment of these impacts and to provide qualitative and quantitative evidence of the impact of the proposed rules, where possible.

### Costs of the proposed rules

#### Familiarisation costs and legal costs

4.58 In the consultation paper we asked consultees whether they agreed that firms providing insolvency services would incur only minimal familiarisation costs as a result of the implementation of the draft Bill. We also asked consultees whether they agreed that retailers would incur only a small one-off increase in legal costs as a result of the implementation of the draft Bill.

4.59 Consultees commented that it might be overly optimistic to assume that familiarisation costs would be minimal.<sup>134</sup> Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West of the University of Aberdeen (joint response) said that insolvency firms would have to spend time training their staff, adapting their systems and documents and working out how the rules in the draft Bill interacted with the claims of other creditors. R3 said that the cost of training staff in particular would require “considerable time and resources”.

4.60 Consultees also highlighted the potential for ongoing, as opposed to one-off, legal costs for retailers as a result of the implementation of the draft Bill.<sup>135</sup> R3 said:

Retailers will probably require ongoing legal advice, not only to gain an understanding of the changes and what this means for their business, but also for a review of their business documentation and also assistance in the event of any future disputes as to ownership under the revised law.

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<sup>134</sup> Question 26: Four consultees responded to this question. Two consultees disagreed with our analysis and two consultees responded “other”.

<sup>135</sup> Question 27: Five consultees responded to this question. Three consultees agreed with our analysis and two consultees disagreed.

- 4.61 Lorna Richardson said that retailers may initially seek legal advice on a “one-off” basis, but may incur additional legal costs if they decide to make changes to their business operations as a result of that legal advice.
- 4.62 We also asked consultees whether there were any other transitional costs that would arise from the implementation of the draft Bill. The British Retail Consortium (BRC) and Lorna Richardson commented that retailers may incur transitional costs by having to amend their business models to accommodate the proposed rules. ICAS and Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West of the University of Aberdeen (joint response) pointed to transitional costs for other parties: suppliers, landlords and floating charge holders may incur additional legal costs as they review the terms on which they supply, lease and lend to retailers.

#### Impact on security arrangements

- 4.63 In the consultation we asked consultees if they agreed that, in most cases, the proposed rules in the draft Bill would affect only a small proportion of goods in the retailer’s possession. We then asked what impact the proposed rules in the draft Bill would have on retailers’ ability to borrow against the value of their stock and what impact the proposed rules would have on other creditors, including suppliers, logistics companies and secured creditors.
- 4.64 Consultees agreed that the proposed rules in the draft Bill would affect only a small proportion of goods in the retailer’s possession.<sup>136</sup> UK Finance said that in most retailer insolvencies, much of the stock will not have been “identified” for a particular consumer contract and so ownership will not have transferred. Professor Duncan Sheehan and Dr Magda Raczynska commented that only a small proportion of goods would be affected by the proposed rules. ICAS also made this point and added that the number of goods affected would “diminish further over time as retailers make changes to their terms and conditions”.
- 4.65 Consultees nevertheless said that the proposed rules could have a negative impact on retailers’ ability to borrow. Six consultees commented that the proposed rules in the draft Bill may reduce the effectiveness of floating charge security and therefore impede the ability of retailers to obtain finance from lenders. The City of London Law Society (CLLS) said:

It should be borne in mind that there have been an increasing number of statutory amendments which dilute the effectiveness of floating charges, most recently the reintroduction of Crown preference, with HMRC becoming a secondary preferential creditor with effect from 1 December. When introducing any measure that further erodes the benefit of taking a floating charge, it is necessary to consider the cumulative effect of all such erosions, as these may, eventually, have an impact on the price of lending.

- 4.66 Similarly, ICAS said that the proposed rules in the draft Bill could be perceived as the “latest attack” on floating charge security. It concluded: “taken in the round there certainly appears to be the possibility of lending not being provided, or happening on less favourable terms”. Similarly, Dr Alisdair MacPherson, Donna McKenzie Skene

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<sup>136</sup> Question 29: Six consultees responded to this question. All agreed with our analysis.

and Dr Euan West of the University of Aberdeen (joint response) said that the proposed rules, in combination with other legislative developments, may “impact upon the willingness of lenders to provide finance and may affect the terms upon which they are willing to provide it”.

- 4.67 Dr Magda Raczynska commented that the rules in the draft Bill may increase insolvency expenses, which take priority over the claims of floating charge holders. This, combined with other legislative developments, would be likely to “diminish the attractiveness of the floating charge and may well lead to poorer access to finance for companies”. KPMG said that the proposed rules may diminish the value of the assets subject to the floating charge, resulting in retailers being required by lenders to hold higher cash reserves against their stock. This would in turn reduce retailers’ working capital.
- 4.68 A minority of consultees said that retailers’ ability to borrow against their stock would not be adversely affected by the proposed rules. BRC and Professor Duncan Sheehan commented that only a small proportion of retailers’ stock would be affected by the proposed rules and therefore the proposed rules were likely to have little impact on the value of floating charge security. Dr Magda Raczynska and Professor Duncan Sheehan noted that sole traders and unincorporated businesses are precluded from granting floating charges over their assets, and so these retailers would not be affected by the proposed rules.
- 4.69 Five consultees commented that the proposed rules would have a negative impact on suppliers because they would reduce the effectiveness of retention of title clauses. This could in turn have a negative impact on retailers and consumers. The CLLS said:
- Suppliers are currently adjusting to restrictions implemented in the Corporate Insolvency and Governance Act which prevent them from being able to rely on insolvency related termination rights. If their ability to rely on ROT clauses is also limited, there may eventually be pricing consequences that feed through to consumers, to reflect the increased insolvency-related risks that suppliers are being asked to take.
- 4.70 The Institute of Chartered Accountants in England and Wales (ICAEW) and KPMG thought that suppliers may increasingly demand upfront payment from retailers as a result of the proposed rules. ICAS thought that suppliers may insist on retailers changing their terms and conditions to delay contract formation with the consumer, which would result in “less protection for consumers than is now the case”.
- 4.71 Lorna Richardson commented that the proposed rules could have an impact on Scottish landlords, who have a right of “hypothec” over goods on the premises leased by a retailer. The landlord can seize and sell the goods subject to the hypothec in the event of the retailer’s insolvency. Lorna Richardson commented that the proposed rules may diminish the landlord’s security because “there will be fewer goods to which the landlord’s hypothec can attach”.

#### Impact on the work of the insolvency practitioner

- 4.72 In the consultation paper we suggested that the proposed rules in the draft Bill would result in only a minimal increase in the time spent by insolvency practitioners

determining whether ownership had transferred to a consumer. We said that determining whether ownership had transferred was likely to be a desk-based exercise and would not necessitate an increase in site visits. We asked consultees whether they agreed with our assessment.

4.73 All consultees who responded to this question disagreed with our assessment and said that the proposed rules in the draft Bill would substantially increase the time spent by insolvency practitioners determining ownership of goods in a retailer insolvency.<sup>137</sup>

4.74 KPMG said:

IPs will be required to review all finished goods to assess the status of title considering each event or circumstance listed in proposed Section 18B(4). Due to the subjective nature of the circumstances under which title could pass, this initial analysis is likely to be difficult and time consuming to undertake. It could also result in high levels of correspondence with consumers trying to prove their title, where they do not accept rejection of a claim (in a similar way to that currently experienced with ROT claimants).

4.75 Similarly, BRC said:

There will be thousands of goods in the warehouse, most without a label. Who will go through all the goods, check if there is a label, allocate those with a label to the consumer, ask the consumer if he wishes to withdraw or if he wishes to collect the goods which are potentially hundreds of miles away in a warehouse and for which he will have to pay for storage until they are collected? ... The effort needed to identify the goods and link them to a specific customer and then find out if the customer wants them has been underestimated.

4.76 ICAS said that the proposed rules would require insolvency practitioners to undertake extensive investigations into the trading practices of the retailer in order to determine whether ownership had transferred to the consumer. Similarly, R3 said that the proposed rules may “necessitate more site visits” by insolvency practitioners to determine whether ownership of goods has transferred, which would be time-consuming and costly.

4.77 The CLLS said that, as a result of the proposed rules, warehouses would have to be maintained and staff employed for longer than is currently the case, which would add significantly to the cost of the insolvency process. The proposed rules would also increase the number of consumer claims, which would “slow down the insolvency proceedings considerably”.

4.78 Consultees also commented that insolvency practitioners may incur additional legal costs as a result of the proposed rules. ICAS said that insolvency practitioners would be likely to seek legal advice before determining whether ownership has transferred to a consumer under the proposed rules. Similarly, the CLLS said that insolvency practitioners may need to seek legal advice to resolve consumer claims, as they do when resolving claims made by suppliers under retention of title clauses. KPMG and

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<sup>137</sup> Question 32: Eleven consultees responded to this question.



Dr Magda Raczynska commented that the “subjectivity” of some of the events and circumstances in section 18B of the draft Bill may increase the risk of disputes as to ownership of the goods and therefore lead to additional legal costs.

#### Other ongoing costs

- 4.79 In the consultation we asked consultees whether there were any other ongoing costs that would arise from the introduction of the proposed rules.
- 4.80 Consultees identified the cost of arranging delivery or collection of goods as a potential ongoing cost for insolvency practitioners. KPMG said that insolvency practitioners would have to attend physical shop and warehouse locations to oversee collections “whilst incurring holding costs, such as rent, rates and utility costs that are unlikely to be transferrable to the consumers as a condition of repatriation”. Similarly, R3 said that insolvency practitioners would have to incur storage costs while waiting for consumers to collect their goods.

#### Benefits of the proposed rules

- 4.81 The responses to our consultation in 2015 revealed support from consumer groups and academics for the proposals to change the rules on transfer of ownership. Other consultees, in particular insolvency practitioners, were less supportive. They were concerned that it would affect retailers’ ability to access finance, and complicate the insolvency process.
- 4.82 Our initial assessment of the impact of the proposed new rules was that the main benefit would be clarity of the law: putting the rules into clearer language and bringing them into the CRA 2015. In monetary terms, the rules are primarily intended to benefit consumers in the event of a retailer’s insolvency, where the consumer does not receive goods they have paid for. The proposed rules may mean that they could claim ownership over the goods. Consumers who have paid by credit or debit card are generally able to get a refund from their card issuer in this situation but consumers who have paid with cash, cheque or by bank transfer do not have this option. The proposed new rules could potentially better protect some of these more vulnerable consumers who have no other protections, and who would otherwise simply rank as unsecured creditors, effectively losing all the money they had paid.
- 4.83 In the consultation paper we suggested that the proposed rules could have benefits for consumers: a reduced risk of consumer detriment and increased consumer confidence. In response to the consultation paper and despite additional efforts to engage, we did not get significant engagement from stakeholders representing the voice of consumers. As a result, the evidence we have been presented with about the potential benefits of the draft Bill for consumers is less detailed than the impact on other interested parties.

#### Reduced risk of consumer detriment

- 4.84 In the consultation paper we said that the proposed rules would benefit consumers because the rules are drafted in simple and clear language which consumers can readily understand. We said that consumers would have a greater chance of recovering goods they have paid for in a retailer insolvency and would therefore experience less frustration dealing with the problem.

4.85 We asked consultees whether they agreed with that assessment and whether there were any other benefits to consumers which could result from the proposed rules.

4.86 The ICA did not indicate whether they agreed or disagreed with our assessment but did draw attention to statistics from Citizens Advice:

denoting that there have been 3383 cases noted from 01/01/2020 to 23/09/2020 that have been signposted to the insolvency service, where the client appears to have lost out on goods or a service they have paid for as the trader has gone out of business.

4.87 Citizens Advice have also told us that, amongst consumers who contacted their Consumer Service in 2020, there continued to be high levels of confusion about ownership of goods on retailer insolvency. It observed that consumers felt that they were entitled to the goods they had paid for before the retailer became insolvent.

4.88 A number of consultees agreed that the proposed rules would reduce the risk of consumer detriment on retailer insolvency.<sup>138</sup> The Competition and Markets Authority (CMA) said that the proposed rules “will offer benefits to consumers through clearer and fairer rules that are more in keeping with modern consumer transactions”. Similarly, the Bar Council said that some consumers would benefit significantly from the new rules. Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West of the University of Aberdeen (joint response) observed that “if there is increased clarity, not only will consumers benefit but a range of other parties will too”.

4.89 UK Finance suggested that:<sup>139</sup>

We think the proposals will reduce consumers’ sense of unfairness, particularly where consumers have chosen specific items or have been informed of an impending delivery, that never happens.

4.90 However, the majority of consultees questioned whether the proposed rules in the draft Bill would deliver discernible benefits to consumers. Several consultees disagreed that the proposed rules were capable of being readily understood by consumers. The ICAEW said:

We do not believe that the proposed legislation is self-explanatory. The Commission’s consultation document provides additional commentary and without further explanation it seems unlikely that consumers would, for instance, know what constitutes a ‘unique identifier’, how to agree that goods are to be used to ‘fulfil the contract’ or whether they have a ‘conditional sales contract’.

4.91 ICAS said that consumers are unlikely to be capable of navigating the proposed rules and applying them to their own circumstances. The Bar Council said that the ability of

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<sup>138</sup> Question 34: Thirteen consultees responded to this question. Four agreed with our assessment of consumer benefits while nine disagreed, suggested that the impact on consumers would be mixed or that the benefits for consumers would be minimal.

<sup>139</sup> UK Finance did, however, raise concerns that the proposed rules could also complicate the situation for consumers on insolvency who wish to claim reimbursement from their card issuer. We discuss this further from para 4.23.

the average consumer readily to understand the proposed rules will “largely depend on the guidance provided” to explain the proposed rules.

- 4.92 Six consultees said that the benefits of the proposed rules would be minimal, because consumers are already sufficiently protected by section 75 of the CCA 1974 and the chargeback rules. BRC said:

One key reason that consumers have not suffered is the move from cash to cards and to online transactions – now running at over half for non-food. Given the section 75 protections and the debit cards voluntary agreement, consumers are well protected. While there are limits on the range of charges for section 75 – and potential issues with sales on online marketplaces by third parties – refunds have not been challenged on these bases by the card issuers and banks. ... Online sales have additional protections that make the insolvency rules less relevant.

- 4.93 The CLLS said that the problem of consumers being unable to recover the goods they paid for or their prepayments on retailer insolvency was “much more common a decade ago”, when consumers more often paid for items using cheque or cash. They suggested that the problem arises far less frequently today, because “the vast majority of consumers pay for big ticket items using credit or debit cards, encouraged to do so by publicity highlighting the protection offered to them by section 75 of the CCA 1974 and chargeback”. Similarly, the Financing & Leasing Association commented that how consumers purchase goods has changed significantly even since the Law Commission recommended reform of the transfer of ownership rules in its 2016 Report. They noted that consumers are increasingly shopping online and using their credit and debit cards, instead of paying with cash, and this trend has only accelerated during the COVID-19 emergency. These consumers are already protected on retailer insolvency by section 75 of the CCA 1974 and the chargeback rules.

- 4.94 Although the use of debit and credit cards has increased over the last few years, other payment methods are still regularly used.<sup>140</sup> UK Finance found that during 2019 there were 2.1 million consumers who mainly used cash, choosing this payment method when doing their day-to-day shopping.<sup>141</sup> Responses to the Financial Conduct Authority’s Financial Lives 2020 survey showed that in February 2020, 5.4 million adults (10%) paid for everything or most things using cash<sup>142</sup> and 1.2 million adults (2.3%) were ‘unbanked’ in February 2020.<sup>143</sup> Citizens Advice has also told us that, among consumers who complained to their Consumer Service in 2020 in relation to an insolvency, bank transfers were the second most common payment method used (for goods and services), after payment by debit card. Payment by credit card was the third most common method, followed by cash. There are also instances where card

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<sup>140</sup> UK Finance, “UK Payment Markets Summary 2020” (June 2020), p 1.

<sup>141</sup> UK Finance, “UK Payment Markets Summary 2020” (June 2020), p 3.

<sup>142</sup> Financial Conduct Authority, “Financial Lives 2020 survey: the impact of coronavirus” (11 February 2021), p 117, <https://www.fca.org.uk/publication/research/financial-lives-survey-2020.pdf>.

<sup>143</sup> “Unbanked” means those without a current account or an alternative e-money account. Financial Conduct Authority, “Financial Lives 2020 survey: the impact of coronavirus” (11 February 2021), p 118.

payments are not accepted by retailers and where consumers have no choice but to pay by cash, bank transfer or other payment method. Citizens Advice have provided us with case studies highlighting this issue in relation to higher value items such as boilers and used vehicles. The growing trend for selling goods via social media platforms also often requires consumers to pay for goods via bank transfer.<sup>144</sup>

4.95 For transactions which do not use card payments, consumers do not have the benefit of protections under section 75 or chargeback. These consumers are particularly vulnerable in an insolvency situation as they are likely to find that, under the current rules, they do not own the goods they have ordered and are just unsecured creditors of the insolvent retailer. The draft Bill has the potential to provide protection for at least some of these consumers by bringing forward in time the point at which ownership transfers to a consumer, making it more likely that a consumer will be able to claim the goods they have ordered.<sup>145</sup> Three consultees said that the proposed rules may have minimal benefits for consumers because of the use by retailers of terms and conditions delaying contract formation, which we discuss in more detail in the next chapter. ICAS said that, given the practice of delaying contract formation, the proposed rules will have a negligible impact on consumer protection. Significantly, it went on to say that the introduction of such rules “may lead to that practice becoming more widespread, resulting in less protection to consumers than is currently the case”. Similarly, Lorna Richardson and BRC both made the point that more retailers may seek to delay contract formation so as to avoid the impact of the proposed rules.

4.96 Finally, several consultees made the general observation that the consumer benefits delivered by the proposed rules would come at a disproportionate cost for retailers, insolvency practitioners and creditors. The Financing & Leasing Association said:

Any reform in this area needs to be proportionate, reflecting both market practice and the outcomes customers want to see. The transfer of ownership proposals will have major implications for retailers and insolvency practitioners; however, their overall benefit will be minimal as they are targeted at a very small group of consumers.

4.97 ICAS questioned the “overall value of the proposed changes when weighed against the potential negative impacts”, given that only a small proportion of goods will be affected by the proposed rules. Similarly, the ICAEW said it was not convinced the proposed rules were proportionate, given the “potential costs and adverse impacts” and the fact that the proposed rules will benefit only a small group of consumers.

#### Consumer confidence

4.98 In the consultation we said that the proposed rules would benefit retail markets by increasing consumer confidence and providing greater certainty to consumers and businesses about ownership of goods on insolvency. We asked consultees whether they agreed with that assessment.

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<sup>144</sup> BBC, Money Box: Shopping with Covid (17 March 2021), <https://www.bbc.co.uk/sounds/play/m000t4l3>.

<sup>145</sup> We discuss the impact of the practice of delaying contract formation on our proposed rules from para 2.19 and the practice more generally in in Chapter 5.

4.99 The ICA thought that the new rules would offer an improved level of protection for consumers and impact upon consumer confidence generally and not only in relation to online sales. However, the majority of consultees disagreed that the proposed rules would increase consumer confidence in online sales.<sup>146</sup> BRC said that the proposed rules are unlikely to have any impact on consumer confidence in online sales. They said that the protections already afforded to consumers when they shop online mean that consumer confidence in online sales is already high. ICAS and R3 said that the proposed rules are targeted at a small consumer group and are therefore unlikely to have a significant impact on consumer confidence in the retail market.

## Conclusion

4.100 The responses from consultees indicate that the proposed rules may impose substantial costs on retailers, insolvency practitioners and creditors. The responses also suggested that these costs may not be proportionate to the corresponding benefit that they might provide to consumers. This is due to the protections already in place for consumers paying by card (although many consumers still pay by other methods), and the small proportion of a retailer's stock likely to have been "selected" for fulfilment of the contract without having been dispatched.

4.101 The benefits of the proposed rules appear to be further diminished to a significant extent by the practice among retailers of delaying the formation of the contract until the point at which the goods are dispatched to the consumer, which we discuss in the next chapter. The impact of this practice was not reflected in the responses of those consultees who said that the costs and disadvantages would be substantial – although the argument is ultimately moot. While delaying contract formation may in fact mean that the impact on businesses is more hypothetical than real, it also means that the benefits to consumers will be similarly weakened.

4.102 On the information available to us, it is clear that the balance of benefits to consumers against costs to businesses requires careful consideration.

## SALES CONTRACTS GOVERNED BY THE LAW OF ANOTHER JURISDICTION

4.103 In the consultation paper, we said.<sup>147</sup>

The proposed rules will apply only to contracts governed by the law in England and Wales. There may be situations where consumers in the UK enter into a sales contract to buy goods from retailers which is governed by the law of another jurisdiction. This may occur, for example, with online purchases. In those situations, the proposed rules will not apply.

4.104 Two consultees commented on this paragraph. They said that, under the Rome I Regulation,<sup>148</sup> the provisions of the draft Bill may apply even where the parties have

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<sup>146</sup> Question 35: Eight consultees responded to this question. Three agreed with our analysis and five disagreed.

<sup>147</sup> Consultation paper, para 3.8.

<sup>148</sup> Regulation on the law applicable to contractual obligations (EU) No 593/2008 Official Journal L 177 of 04.07.2008 p 6 (Rome I Regulation). The Rome I Regulation's continued effect is provided for in art 66 of

chosen the law of another jurisdiction to govern the sales contract. Having considered these responses and undertaken further research, it does appear that the rules in the draft Bill could apply to a sales contract which is governed by the law of another jurisdiction. The Rome I Regulation provides that mandatory laws of England and Wales may in certain circumstances be applicable to a sales contract under article 6<sup>149</sup> and/or article 9,<sup>150</sup> despite the parties' choice of law to the contrary. However, Rome I does not concern itself with proprietary issues, which are determined according to the law of the place where the goods are located (*lex situs*).<sup>151</sup> The answer as to which rules will apply will lie in whether the rules in the draft Bill are best characterised as contract law or property law and whether there is a public policy exception to applying the *lex situs* rule.

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the Withdrawal Agreement and in the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc) (EU Exit) Regulations 2019, SI 2019 No 834.

<sup>149</sup> Article 6 of the Rome I Regulation provides that a consumer contract is governed by the law of the country where the consumer is habitually resident, provided that the trader pursues its business activities in or directs its business activities to that country. Where this rule applies, the parties remain free to choose a different law to govern the contract, but that choice cannot deprive the consumer of the protection afforded to them by the mandatory provisions of the law of the country of their habitual residence.

<sup>150</sup> Article 9 of the Rome I Regulation provides that a court in England and Wales is entitled to apply "overriding mandatory provisions" of the law of England and Wales to a contract – despite the parties' choice of law to the contrary and regardless of whether the contract has any connection with England and Wales.

<sup>151</sup> M Bridge, *International Sale of Goods* (3rd ed 2013) para 7.35.

## Chapter 5: The timing of contract formation

- 5.1 The law surrounding the sale of goods is, for the most part, predicated on a contract being in place between the buyer and seller. The characteristic feature of a sale of goods contract is the transfer of property in the goods in exchange for money. Most of the available commentary appears to assume that the contract is formed at an early stage, such as when the retailer takes payment. However, during our investigation into the transfer of ownership provisions, we found that it is a common practice among retailers to seek to delay the formation of the sales contract until the “dispatch” of the goods to the consumer, at least in the case of online sales.
- 5.2 In the consultation paper we noted that this practice may have significant implications for the transfer of ownership (in particular under our proposed new rules) and potentially consumer rights more generally. We asked consultees about their knowledge of or experience with this practice, and its impact.
- 5.3 In this chapter, we set out our understanding of the law and of this practice and summarise consultees’ views on these issues.

### HOW DOES A SALES CONTRACT FORM?

- 5.4 The formation of a sales contract, like any other contract, requires an agreement comprising an offer and acceptance. Offer and acceptance is a question of the parties’ intentions, objectively ascertained.
- 5.5 English courts have held that the display of goods in a shop is not intended as an offer, but as an “invitation to treat”; that is, an invitation to consumers to make an offer.<sup>152</sup> When the consumer selects an item from the shelf and presents the item to the shopkeeper, the consumer makes an offer to purchase the goods. The retailer accepts the offer, and the contract forms, when the retailer takes payment from the consumer.<sup>153</sup>
- 5.6 Although the position has not been tested in court and it is open to argument, we think that a similar analysis applies when goods are purchased online, in terms of the “invitation to treat” and offer analysis.<sup>154</sup> We proceed on this assumption for the purposes of this report. The key question for our purposes is then: when is the offer accepted?

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<sup>152</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795 at 802; *Esso Petroleum v Customs & Excise* [1976] 1 WLR 1 at 11.

<sup>153</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795 at 802. The position is not wholly clear in Scots law: see *Chisholm v Robertson* (1883) 10 R 760. The views of Lord President Inglis and Lord Deas are mirrored in *Chapelton v Barry UDC* [1940] 1 KB 532 at 536 and 537 (Slessor LJ) and *Thornton v Shoe Lane Parking* [1971] 2 QB 162 at 179 (Lord Denning MR).

<sup>154</sup> This also appears to be the view of the authors of *Benjamin’s Sale of Goods* (10th ed 2019) para 2-002. There is an argument that the display of goods on a website accompanied by the seller’s detailed terms and conditions is an offer rather than invitation to treat. However, we think the better argument is that it is an invitation to treat.

## WHEN WOULD THE CONTRACT FORM WITHOUT THE TERMS AND CONDITIONS PURPORTING TO DELAY FORMATION?

- 5.7 Without these terms and conditions, we think that the sales contract would form, at the latest, when the retailer takes payment from the consumer. The taking of payment by the retailer would amount to an acceptance by the retailer of the consumer's offer to purchase the goods.<sup>155</sup>
- 5.8 As we said above, we think that a similar analysis applies when goods are purchased online as when they are purchased in store. The display of goods on the retailer's website is not an offer but an invitation to treat. When a consumer adds an item to their "basket" and clicks on the button to place their order, the consumer makes an offer to the retailer to buy the goods. We think that if the retailer charges the consumer's card, that would amount to an acceptance of the consumer's offer. We see no reason why the taking of payment would amount to an acceptance when goods are purchased in a physical shop, but not when goods are purchased online.
- 5.9 Accordingly, absent terms and conditions delaying formation, we think that the contract would form on payment by the consumer. This would precede dispatch in all cases where the retailer takes payment from the consumer at an earlier point.

## HOW DO TERMS AND CONDITIONS PURPORT TO DELAY FORMATION?

- 5.10 In an online sales transaction, the retailer typically asks the consumer to agree to a set of terms and conditions before the consumer places their order. The consumer might be asked to tick a box to indicate their agreement to the terms and conditions. Alternatively, a statement such as the following may appear next to the "place order" button: "By placing your order you agree to our terms and conditions of sale". The words "terms and conditions" will typically be hyperlinked to a separate webpage containing the full text of the terms and conditions.
- 5.11 The terms and conditions often contain statements regarding the formation of the sales contract. These statements purport to prescribe the time at which the retailer will accept the consumer's offer. We have found that, typically, the terms and conditions state that the consumer's offer is not accepted by the retailer until the goods are dispatched.<sup>156</sup> For example, one major retailer's terms and conditions state:
- We only accept your offer, and conclude the contract of sale for a product ordered by you, when we dispatch the product to you and send e-mail confirmation to you that we've dispatched the product to you.
- 5.12 If these terms and conditions delaying formation are legally effective, the contract will not form between the consumer and the retailer until dispatch of the goods, even if the consumer has paid for the goods. Although in some cases payment is not taken until dispatch, we are aware of at least one major retailer whose practice is to charge the consumer's card immediately when the consumer places their order, but whose terms and conditions state that no contract forms until dispatch of the goods. It may be the

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<sup>155</sup> *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795 at 802.

<sup>156</sup> We consider what "dispatch" means from para 5.14.



case that this is common practice among retailers who manufacture or procure goods to order, as is often the case for furniture, for example. The payment will provide working capital to fund the manufacture or purchase.

- 5.13 If there is a long lead time between order and dispatch, the contract will form weeks or potentially months after the consumer has paid for the goods. During that period, the consumer will not have the benefit of certain consumer rights or protections which depend on there being a contract in place. We discuss these potential detriments to the consumer in more detail below.

#### **What does “dispatch” mean?**

- 5.14 In the consultation paper we used the term “dispatch” to mean the point where the goods are handed to a carrier for delivery to the consumer.
- 5.15 Six consultees commented on the likely meaning of “dispatch”.<sup>157</sup> Suggestions included that it could mean dispatch to a logistics provider or dispatch to a consumer (either by the retailer themselves or by a logistics provider). The Institute of Chartered Accountants of Scotland (ICAS) observed that “a review of the terms and conditions imposed by some major high-street retailers indicated that the term “dispatch” is largely undefined”.
- 5.16 It therefore appears that there is no single definition of dispatch used in the retail industry and consumers should not assume that all retailers apply the same definition.

#### **On what basis is the retailer holding a consumer’s money?**

- 5.17 If terms and conditions delaying formation are legally effective, a retailer could be holding a consumer’s money without a sales contract being in place. Below we consider the basis upon which the retailer holds this money.

Is the consumer’s money held in trust?

- 5.18 If a payment is made by a consumer to the retailer before the sales contract is formed, it does not follow that the retailer holds the money on trust for the consumer. The courts will not imprint the money with a trust unless it can be shown that the parties intended to create a trust.<sup>158</sup>
- 5.19 Courts may impress money with a trust if the money is advanced on the understanding that the recipient is not to have free disposal of it and is to apply it only for a specified purpose. This is known as a “*Quistclose* trust”.<sup>159</sup> In *Twinsectra v Yardley*,<sup>160</sup> Lord Millett explained that the key factor in the creation of these trusts is the inability of the recipient freely to dispose of the money:

A *Quistclose* trust does not necessarily arise merely because money is paid for a particular purpose. A lender [...] may be said to lend the money for the purpose in question, but this is not enough to create a trust [...]. Similarly payments in advance

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<sup>157</sup> In response to consultation question 18.

<sup>158</sup> J McGhee and S Elliott (eds), *Snell’s Equity* (34th ed 2020) para 22-015.

<sup>159</sup> *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

<sup>160</sup> *Twinsectra Ltd v Yardley* [2002] UKHL 12; [2002] AC 164 at [73]–[74].

for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cashflow. Commercial life would be impossible if this were not the case. The question in every case is whether the parties intended the money to be at the free disposal of the recipient.

- 5.20 Accordingly, the fact that the consumer paid money to the retailer for the purpose of the retailer entering into a contract with the consumer is not, of itself, sufficient to give rise to a trust. It must be intended that the retailer is not to have free disposal of the money advanced by the consumer. A retailer may demonstrate an intention to create a trust by setting aside the money and not using it for other purposes, or by having a trust deed drawn up by a lawyer.<sup>161</sup> However, most retailers do not take these steps and so a trust over the money will not arise.<sup>162</sup>
- 5.21 Finally, the authorities make clear that English courts do not have a discretion to impose a trust in order to provide the claimant with a remedy (the so-called “remedial constructive trust”).<sup>163</sup>

On what basis is the retailer entitled to retain the consumer’s money in the absence of a contract or a trust?

- 5.22 We frequently make payments to others without that payment resulting in a contract or the creation of trust. An example is a payment made in the course of negotiations which are “subject to contract”. After the payment is made, there is no contract and, unless one is created, there is no trust. What is the nature of these payments and how does the law deal with them?
- 5.23 As Birks has written, we often make payments to others for a particular purpose or to achieve a certain outcome.<sup>164</sup> He called these “voluntary participatory enrichments”: “voluntary” because they are not made out of legal obligation, and “participatory” because they are made with the consent of the payer. When we make these payments, we do so subject to conditions: we do not generally pay money to others for no reason. The law of unjust enrichment says that if a condition to which a payment is subject fails, then the recipient of the payment must give the money back: they must make restitution.<sup>165</sup> The recipient’s entitlement to retain a voluntary participatory enrichment is therefore conditional.

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<sup>161</sup> Consumer Prepayments on Retailer Insolvency (2015) Law Commission Consultation Paper No 221, paras 2.63–2.64 (2015 Consultation Paper), at [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/06/cp221\\_consumer\\_prepayments.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/06/cp221_consumer_prepayments.pdf). See also *Re Kayford* [1975] 1 WLR 279.

<sup>162</sup> 2015 Consultation Paper, para 2.73 (noting that a trust may be created by a retailer in the situation where the use of trusts is a permanent feature of the retailer’s business model, or if the retailer’s insolvency is imminent).

<sup>163</sup> See *Re Polly Peck International Plc (In Administration) (No 5)* [1998] 3 All ER 812; *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55 at [37]. The same applies in Scots law where a constructive trust arises only on breach of a preceding fiduciary duty. Otherwise an express declaration of trust is required.

<sup>164</sup> See P Birks, *The Law of Unjust Enrichment* (2nd ed 2005) pp 140–148.

<sup>165</sup> The right to restitution is subject to various bars (such as the recipient being legally entitled to retain the payment) and defences (such as change of position).

5.24 The consumer's payment to the retailer in circumstances of delayed contract formation can be understood as a voluntary participatory enrichment. It is a payment made by the consumer to the retailer on conditions. The question of what these conditions are depends on an objective interpretation of the transaction. However, it can be supposed that in almost all consumer sales transactions, the consumer's payment will be subject to the following conditions:

- (1) a legally binding sales contract will come into existence between the parties; and
- (2) the retailer will deliver the goods to the consumer.

5.25 If, after the consumer's payment, the retailer becomes insolvent, the result may be that the contract does not form and the goods are not dispatched, so both conditions fail.<sup>166</sup> The condition on which the consumer paid the money having failed, the law of unjust enrichment will impose an obligation on the retailer to return the money .

5.26 Support for this analysis can be found in cases where a person makes a payment in anticipation of a contract, but the contract does not materialise.<sup>167</sup> In *Valencia v Llupar*,<sup>168</sup> the claimant made payments to the defendant in the course of negotiations for a partnership agreement that were expressed to be "subject to contract". A formal partnership agreement never materialised, and the claimant sought to recover the money paid to the defendant. The Court of Appeal held that the claimant was entitled to restitution on the ground of failure of condition because the formation of the partnership agreement was a condition of the payment. The court observed:<sup>169</sup>

A claimant who pays money to the defendant on a 'subject to contract' basis and who then decides that he does not wish to go through with the purchase is entitled to recover from the defendant the sum so paid.

5.27 The same reasoning would apply where a consumer pays money to a retailer in anticipation that the retailer will enter into a sales contract with the consumer. If, by reason of the retailer's insolvency, the contract does not form, the condition of the consumer's payment fails and the consumer is entitled to recover the money paid.

5.28 The restitutionary remedy that arises upon failure of condition is a personal remedy. Accordingly, if a consumer has a restitutionary claim against an insolvent retailer for failure of condition, the consumer will be an unsecured creditor in the retailer's insolvency. The courts have refused to impose a trust over an insolvent company's assets to reverse unjust enrichment.<sup>170</sup> There is arguably no good reason why unjust

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<sup>166</sup> This is not necessarily the case on retailer insolvency eg if the business continues to trade in administration or the insolvency practitioner otherwise decides to honour orders.

<sup>167</sup> See *Goff & Jones: The Law of Unjust Enrichment* (9th ed 2016) ch 16. The same will apply in Scots law: *Shilladay v Smith* 1998 SC 725; *Parvaiz v Thresher Wines Acquisitions Ltd* 2009 SC 151.

<sup>168</sup> [2012] EWCA Civ 396.

<sup>169</sup> *Valencia v Llupar* [2012] EWCA Civ 396 at [47], citing *Halsbury's Laws* (4th ed resissue 2007) vol 40(1) para 88.

<sup>170</sup> See *Bailey & v Angove's Pty Ltd* [2016] UKSC 47; [2016] 1 WLR 3179 at [30] by Lord Sumption; *Re Goldcorp Exchange Ltd* [1995] 1 AC 74.

enrichment claimants should be treated differently to the company's unsecured creditors.<sup>171</sup> In an insolvency context, therefore, contractual and unjust enrichment claims rank *pari passu*; that is, neither takes preference over the other.

## **HOW COMMON IS THE USE OF TERMS AND CONDITIONS PURPORTING TO DELAY CONTRACT FORMATION?**

- 5.29 During our initial research, we reviewed the terms and conditions of a sample of online retailers and found that all those we looked at contained some form of words purporting to delay contract formation until dispatch of the goods. However, very few of the stakeholders we spoke to were aware of these clauses being used as standard. We asked in the consultation paper about their ubiquity. We were interested to know whether the use of these terms is a general practice among retailers, or confined to a particular group of retailers, for example retailers who sell certain types of goods. We were also interested to find out more about whether such terms are used only in online sales, or whether they are also used in shop-based transactions in which the goods are not conveyed to the consumer immediately (such as where furniture is ordered and paid for in store but will not be available for pick up or delivery for several weeks).
- 5.30 Only four consultees commented on this.<sup>172</sup> The British Retail Consortium (BRC) and the Competition and Markets Authority (CMA) stated that they were aware of the use of these terms and conditions and noted that they were used in particular for online sales.
- 5.31 ICAS reviewed the terms and conditions of some major high-street retailers and found that the majority delay contract formation until goods are dispatched. Similarly, Dr Magda Raczynska and final year LLB students at University College London Faculty of Laws<sup>173</sup> reviewed the terms and conditions of a number of British retailers and identified fifteen well-known retailers that purported to delay contract formation until dispatch or confirmation of dispatch of goods. They noted that it appeared from that research that the practice of delaying contract formation is not necessarily more common for certain types of retailers than others or for goods of a particular value.

### **Consumer awareness of these terms and conditions**

- 5.32 Eleven consultees commented on whether it is common for retailers to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract and whether consumers are generally aware of such terms.<sup>174</sup> Consultees generally acknowledged that most consumers were probably unaware of the practice of delaying contract formation.
- 5.33 There was a general consensus amongst consultees that most consumers do not read the retailers' terms and conditions and would therefore be unaware of terms delaying contract formation. For example, ICA said that consumers are not aware of

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<sup>171</sup> See *Goff & Jones: The Law of Unjust Enrichment* (2016 9th ed) para 38-40.

<sup>172</sup> In response to consultation question 17.

<sup>173</sup> Alanna Yung.

<sup>174</sup> In response to consultation questions 21 and 22.

these terms and conditions and referred to research in the BEIS Consumer Green Paper that “less than 1% of consumers open the terms and conditions when making an online purchase”.<sup>175</sup> The CMA suggested that, even if consumers are aware of such terms “it is very doubtful that they will appreciate the full significance of such a term in the absence of very clear and specific language”. KPMG and Dr Magda Raczynska and final year LLB students at University College London Faculty of Laws<sup>176</sup> said that requiring consumers to tick a box indicating their assent to the retailer’s terms and conditions is not sufficient to make consumers aware of this specific term.

- 5.34 BRC said that consumers “probably do not read every single term and condition every time they purchase a product”. However, they noted that terms and conditions delaying contract formation are generally drawn to the consumers’ attention in the email acknowledging the consumer’s order. The email acknowledging the consumer’s order typically states that the email “is not acceptance of the contract” and that the contract will form on “dispatch”.

## Conclusion

- 5.35 On the evidence we have reviewed, it appears that the use of terms and conditions delaying contract formation is widespread for online sales. This practice does not appear to be restricted to particular retail sectors and is employed by well-known retailers, suggesting that a large number of consumers will find their orders are subject to these arrangements. Although we did not receive any confirmation from consultees as to the position of in-store terms and conditions, our review of those we could access online suggests that they contain similar provisions. Anecdotal evidence suggests that consumers are not generally aware of these terms and conditions or their practical implications.<sup>177</sup>

## WHY DO RETAILERS USE THESE TERMS AND CONDITIONS AND COULD CONDITIONAL CONTRACTS BE AN ALTERNATIVE?

### The rationale for terms delaying formation

- 5.36 When the sales contract forms, the trader comes under an obligation to deliver the goods to the consumer.<sup>178</sup> Under section 28 of the Consumer Rights Act 2015 (CRA 2015), the trader must deliver the goods without “undue delay” and in any event not more than 30 days after the day the sales contract is entered into.<sup>179</sup>
- 5.37 In pre-consultation discussions with stakeholders we were told that retailers would face practical problems if the sales contract formed (and the obligation to deliver arose) prior to dispatch of the goods. It was suggested that these problems would include the following:

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<sup>175</sup> See BEIS, *Consumer green paper: modernising consumer markets* (2018), para 128, <https://www.gov.uk/government/consultations/consumer-green-paper-modernising-consumer-markets>.

<sup>176</sup> Haeon Oh.

<sup>177</sup> We discuss how consumers may be affected by a delay to contract formation from para 5.52.

<sup>178</sup> Consumer Rights Act 2015, s 28(2).

<sup>179</sup> Consumer Rights Act 2015, s 28(3).

- (1) *insufficient stock*: the retailer may not be able to guarantee that they have the goods in stock at the point when the consumer makes the order. If the contract forms prior to dispatch, the retailer may be obliged to deliver goods which it does not have in stock. If it cannot do so and is in breach of contract, the retailer may be liable not just to return the money paid but also to pay damages to compensate for any losses suffered by the consumer as a result of the breach.<sup>180</sup>
- (2) *pricing errors*: goods on a retailer's website may be mispriced. For example, a fridge may be mistakenly priced at £2.99, instead of £299, due to human error when entering the price. If the contract forms before the pricing error is discovered, the retailer may be obliged to deliver the goods at the mistaken price, causing loss to the retailer. The retailer may have an argument under the law of mistake that no binding contract forms in these circumstances, because the retailer did not intend to contract at the advertised price and the consumer knew this. However, this argument would only succeed if the retailer could prove that the consumer knew of its mistake.<sup>181</sup>

5.38 We were told that retailers delay contract formation until dispatch as a means to avoid these problems.

#### Consultees' views

- 5.39 In the consultation paper we asked consultees for their views as to why retailers seek to delay contract formation.
- 5.40 Seven consultees commented on the reasons why retailers use these terms and conditions.<sup>182</sup> Most agreed that they were probably used to prevent the retailer from being under an obligation to deliver the goods where the goods are not in stock or where the retailer has mispriced the goods.
- 5.41 BRC added that they were used by retailers selling food online in order to offer substitutions (where goods are out of stock) and to comply with EU law which requires that certain information must be provided before a purchase is concluded.<sup>183</sup> ICAEW and Dr Magda Raczynska and final year LLB students at University College London Faculty of Laws<sup>184</sup> suggested that the terms and conditions may be used by retailers

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<sup>180</sup> Although these would be subject to the (now fairly strict) remoteness rules in contract, which means that consequential losses will not be recoverable unless they are within the reasonable contemplation of the parties, and the seller had special knowledge of the particular loss in question that might result from a failure to deliver. Such losses will also be subject to mitigation.

<sup>181</sup> *Hartog v Colin & Shields* [1939] 3 All ER 566 at 568; see also *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502.

<sup>182</sup> In response to consultation question 19.

<sup>183</sup> Regulation on the provision of food information to consumers (EU) No 1169/2011, Official Journal L304 of 22.11.2011 p 18. Under article 14 of this Regulation, retailers selling food online must provide "mandatory food information" to the consumer "before the purchase is concluded". This includes "the country of origin or place of provenance".

<sup>184</sup> Lili Feher.

seeking to mitigate/avoid the impact of some provisions of the CRA 2015, for example, delivery within 30 days.

- 5.42 Professor Christian Twigg-Flesner and Professor Hugh Beale (joint response), Professor Duncan Sheehan, the CMA and ICA suggested that the use of such terms and conditions may not be necessary. They observed that the risks of insufficient stock could be mitigated through the use of existing technological solutions. While we agree that technological solutions could assist, these technologies may be costly and therefore out of reach for some retailers. The CMA noted that the law of mistake would come to the aid of a retailer in the event of a pricing error. Similarly, Lorna Richardson suggested that the law of mistake could be used by retailers to deal with pricing errors and insufficient stock. Again, while we agree that this is possible, we note that such action may be expensive and time-consuming.
- 5.43 Professor Duncan Sheehan suggested that, by accepting payment from a consumer, the retailer is impliedly promising delivery. He suggested that stock issues could be dealt with by a retailer ensuring that their website reflects the number of items in stock, so that a consumer is aware if they are ordering items which are out of stock. Professor Sheehan further noted that a retailer would be under an obligation to procure more stock in this situation but would not automatically be in breach of the contract of sale. Finally, he said that mispricing of goods could be dealt with using a term in the contract that the retailer is not obliged to deliver at a “misprice” and must notify the consumer who is not obliged to accept the “correct price”.
- 5.44 While not raised in the context of this question, BRC referenced click and collect arrangements whereby the consumer orders goods online for collection from the trader’s physical shop. A review of a selection of retailers’ terms and conditions for click and collect suggests that most include a clause similarly delaying formation of the contract, in this case until the point at which the goods are collected by the consumer. This may be partly to avoid the risk that the consumer never collects the goods and the retailer is contractually obliged to hold them for the consumer indefinitely. Retailers often make specific provision to allow them to cancel the order if the consumer does not collect the goods within a specified period of time.

#### **Alternatives to terms and conditions delaying formation**

- 5.45 We understand retailers’ concerns about being bound to supply goods which they do not have in stock or which have been mispriced, and we agree that they should not be bound in this way. However, we consider that retailers might be able to achieve their objectives other than by using terms and conditions which delay the formation of the sales contract.
- 5.46 In the consultation paper we suggested that an alternative approach could be for the sales contract to be a conditional contract. The contract could say that the retailer’s obligation to deliver the goods is conditional on a specified event occurring. The event could be a “condition precedent”, so that the obligation to deliver does not become binding until the event occurs; or a “condition subsequent”, so that the obligation ceases to be binding when the event occurs. In relation to the problem of insufficient stock, for example, the contract could provide that the retailer is not obliged to deliver the goods unless the goods are in stock (a condition precedent), or that it is entitled to terminate the contract if the goods are not in stock (a condition subsequent). We suggested that conditions precedent and subsequent could also be used to deal with the problem of

pricing errors. The contract could provide that the goods must have been correctly priced otherwise the trader is not obliged to deliver them (a condition precedent), or that it is entitled to terminate the contract if the goods have been mispriced (a condition subsequent).

- 5.47 We noted that imposing conditions on delivery is permitted by the CRA 2015. The obligation to deliver the goods in section 28 does not apply if the parties “have agreed otherwise”. Conditional contracts therefore have the potential to achieve the same objectives as terms delaying formation of the sales contract.

#### Consultees’ views

- 5.48 We asked consultees whether they considered that the concerns which lead retailers to delay formation of the contract could be addressed by alternative means (such as conditional contracts or some other alternative).
- 5.49 There were mixed views as to whether conditional contracts could be a suitable alternative to the use of these terms and conditions.<sup>185</sup> Two consultees agreed that conditional contracts could be effective while a further three consultees agreed with this in principle but subject to certain caveats. Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West of the University of Aberdeen (joint response) observed that compelling parties to use conditional contracts instead of these terms and conditions may be “a step too far”.
- 5.50 Four consultees were explicitly against the use of conditional contracts in these circumstances. BRC and the Finance and Leasing Association suggested that the use of such contracts would be unnecessarily complex, with BRC suggesting that they would be confusing for consumers to understand.
- 5.51 The Bar Council queried whether conditional contracts would be permitted as a result of section 31 of the CRA 2015<sup>186</sup> or Part 2 of the CRA 2015.<sup>187</sup> Similarly, the CMA had concerns about whether conditional contracts could be drafted in a fair manner (in accordance with Part 2 of the CRA 2015) if the terms gave the trader wider scope to alter the price than available under the applicable general legal principles absent the term. The CMA also queried whether consumers would understand the potential economic consequences for them, including the protection lost or affected. They noted the requirements of the Consumer Protection from Unfair Trading Regulations 2008<sup>188</sup> (CPRs) which prohibit unfair commercial practices, and pointed out that, in the context of a conditional contract, a retailer would have to be mindful to avoid the following commercial practices.

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<sup>185</sup> In response to consultation question 20.

<sup>186</sup> Section 31 of the Consumer Rights Act 2015 prevents traders from contracting out of the consumer’s statutory rights under sections 9 to 16, section 28 (on time of delivery) and section 29. It has the effect that a term in a contract is void if it seeks to prevent the consumer from having access to those rights and associated remedies.

<sup>187</sup> Part 2 of the Consumer Rights Act 2015 sets out the requirements for contract terms and notices to be fair and transparent.

<sup>188</sup> SI 2008 No 1277.



- (1) Misleading by action or omission about the price or availability of a product.
- (2) Invitations to purchase products at a specified price without disclosing reasonable grounds for believing that the trader will not be able to supply the products.
- (3) Invitations to purchase products at a specified price yet refusing to deliver them within a reasonable time with the intention or promoting a different product.

## **ARE CONSUMERS SUFFERING A DETRIMENT?**

5.52 In the consultation paper we identified some consumer rights and protections which could be impacted by a delay to contract formation. We also asked consultees if they were aware of consumers actually suffering a detriment in relation to these or any other rights and protections caused by a delay to contract formation.<sup>189</sup>

5.53 Consultees who provided comments on this topic were not aware of any situation in which consumers had suffered detriment as a result of the use of these terms. BRC and Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West of the University of Aberdeen (joint response) went further and said that these terms and conditions do not cause detriment to consumers in practice. However, other consultees observed that there is at least a potential for consumer detriment.

5.54 Below we consider relevant consumer rights and protections and note consultees' views on the risks of consumers suffering a detriment in practice.

### **Right to delivery of the goods**

5.55 As discussed above, under section 28 of the CRA 2015 it is an implied term of the contract that the retailer will deliver the goods to the consumer without undue delay, or within 30 days of the contract being formed unless the parties agree otherwise. However, if the contract does not form until dispatch, section 28 is of minimal value to the consumer. The retailer's obligation to deliver the goods will not arise until the retailer has, in effect, sent the goods out for delivery.

5.56 If the consumer pays for goods which are never delivered, the absence of the contract does not leave the consumer with no remedy. For online sales, the consumer can withdraw their offer to enter into the contract under regulation 32(1) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, in which case the trader must reimburse all payments received from the consumer.<sup>190</sup> In addition, the consumer may have a claim for restitution under the law of unjust enrichment. However, neither avenue would allow the consumer to recover consequential losses, whereas a contract claim may allow for this.<sup>191</sup>

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<sup>189</sup> Consultation question 25.

<sup>190</sup> Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134, reg 34(1).

<sup>191</sup> *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] 1 AC 275 at [45], [60].

- 5.57 Lorna Richardson said that in the absence of a contract, consumers may not be able to claim consequential losses resulting from the non-delivery of the goods by a retailer. The consumer will be confined to a claim to recover their prepayment:

For instance a consumer may carry out some preparatory work to their home or garden in anticipation of receiving the goods, which effort and expense will be wasted if the goods are not obtained. It may be possible to obtain the goods from another supplier but that might be much more expensive or take longer.

- 5.58 Similarly, the ICA said that consumers may potentially suffer “greater detriment” in cases of late or non-delivery if the contract only forms on dispatch of the goods.

#### **Section 75 of the Consumer Credit Act 1974**

- 5.59 A further potential detriment concerns the ability of consumers to make claims under section 75 of the Consumer Credit Act 1974 (CCA 1974). Under section 75, a consumer who has a “misrepresentation or breach of contract” claim against a retailer can bring a like claim against their credit card issuer, provided that the cash price of goods or services is over £100 and less than £30,000, though the amount paid on card may be less.

- 5.60 As we discussed in the 2016 Report, section 75 is an important source of protection for prepaying consumers. However, terms and conditions delaying formation mean that there may be no contract between the retailer and consumer where goods have not been delivered. We are not, however, aware of card issuers refusing claims on the basis that the contract of sale has not yet been entered into.

- 5.61 Professor Duncan Sheehan observed that if terms and conditions delaying contract formation are effective, then “a card issuer would have an arguable point that section 75 was inapplicable”. UK Finance said that while it might be possible for card issuers to reject section 75 claims if a contract had not formed, “we do not think this is a tactic routinely adopted by issuers or merchant acquirers”. R3 said that, in the experience of R3’s members, card issuers had been “quite accommodating” in accepting consumers’ section 75 claims. The Financial Ombudsman Service have also confirmed to us that, to date, they had not received many, if any, complaints about card issuers refusing claims on this basis.

- 5.62 The Finance and Leasing Association said that terms delaying contract formation mean that the consumer may not have the benefit of section 75 protection in the period between payment and dispatch. However:

In practice such delays [between payment and dispatch] are uncommon, as retailers strive to dispatch goods as quickly as possible. In a highly competitive retail market, providing a swift and efficient service has become the norm and customers expect this. We do not agree that this approach is unfair and that consumers are currently disadvantaged by it. This is also not an area where customers have expressed dissatisfaction or have complained.

## Transfer of ownership

- 5.63 Terms and conditions delaying formation of the sales contract have important implications for the transfer of ownership. This is because both the current transfer of ownership rules in the Sale of Goods Act 1979 and our proposed rules in the final draft Bill<sup>192</sup> are premised on the existence of a contract. If the contract does not come into existence until dispatch, then there can be no transfer of ownership until dispatch. We understand “dispatch” to be the point where the goods are dispatched to a logistics provider or dispatched to a consumer (either by the retailer themselves or by a logistics provider).<sup>193</sup> These terms and conditions potentially undermine our proposed rules, which seek to enable the transfer of ownership to occur at an earlier point in time.
- 5.64 Consider a scenario where a consumer places an order for goods and the retailer takes payment immediately, on terms and conditions which delay formation of the contract until dispatch. If the retailer goes insolvent before dispatch, the sales contract does not form. Without a sales contract, there can be no transfer of ownership to the consumer. Our proposed rules, which are triggered by events and circumstances occurring before dispatch, would be of no assistance to the prepaying consumer under these terms and conditions.
- 5.65 In contrast, without these terms and conditions, the sales contract would form before dispatch, at least in some cases. Our proposed rules would then apply, so that ownership would transfer to the consumer if the retailer identified goods for the fulfilment of that contract prior to insolvency. Terms and conditions delaying formation could therefore have a significant impact on the outcomes for consumers in an insolvency situation.
- 5.66 Dr Magda Raczynska and final year LLB students at University College London Faculty of Laws<sup>194</sup> noted that, although delaying contract formation does not create issues for consumers in most cases, the practice would be problematic for consumers who have pre-paid for goods not yet received prior to a retailer becoming insolvent.
- 5.67 Some consultees observed that the use of terms and conditions delaying contract formation would impact upon the effectiveness of the proposed transfer of ownership rules. Some consultees even suggested that the practice would become more widespread as a way for retailers to delay transfer of ownership.
- 5.68 For example, Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West of the University of Aberdeen (joint response) said that:

If the proposals in the Consultation Paper are brought into force, and delay of formation of contract is permissible, then one result may be that parties seek to delay the formation of contract to stop ownership transferring to the consumer at an early stage (either on retailers’ own initiative or due to pressure from others who may be affected).

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<sup>192</sup> The final draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (the “final draft Bill”) is at Appendix 2 to this paper.

<sup>193</sup> We discuss the meaning of “dispatch” from para 5.14.

<sup>194</sup> Alanna Yung.

## The fairness of terms and conditions delaying contract formation

5.69 There may be an argument that terms and conditions delaying formation are “unfair” contract terms or consumer notices<sup>195</sup> under Part 2 of the CRA 2015. A term or notice is “unfair” if, contrary to good faith, it causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer.<sup>196</sup>

5.70 We think terms and conditions delaying formation might meet this test. They potentially create an imbalance between retailer and consumer, as the consumer is obliged to pay money to the retailer without the retailer being under a contractual obligation to deliver the goods. This potentially causes detriment to the consumer insofar as the transfer of ownership rules do not apply and the consumer’s right to delivery under section 28 of the CRA 2015, and possibly their section 75 rights, are compromised. Further, as these terms and conditions do not appear to be brought specifically to consumers’ attention by retailers, we think that they may offend the principle of good faith, which requires disadvantageous terms to be given “appropriate prominence”.<sup>197</sup>

5.71 The CMA noted that terms and conditions delaying contract formation could be “unfair” under the CRA 2015 and that they could impact upon consumer protections currently in place. They said:

The CMA agrees with the Law Commission that terms that state that the contract is only formed when the goods are dispatched are of significant suspicion of failing the fairness test under Part 2 (section 62) of the Consumer Rights Act 2015. This is on the basis that they cause a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumers, contrary to the requirements of good faith.

Such terms, at least in some cases, appear to change the common law position or remove (or at best delay) valuable statutory or other consumer protections to the detriment of consumers. Such protections include:

- claims under section 75 of the Consumer Credit Act 1974, or
- the requirements under section 28 of the Consumer Rights Act 2015 (CRA) for (in the absence of a term agreeing a delivery period) goods to be delivered to the consumer without undue delay, and in any event not more than 30 days after the contract has been formed.

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<sup>195</sup> A notice “includes an announcement, whether or not in writing, and any other communication or purported communication”: Consumer Rights Act 2015, s 61(8).

<sup>196</sup> Consumer Rights Act 2015, s 62(4) and (6).

<sup>197</sup> *Director-General Fair Trading v First National Bank* [2001] UKHL 52; [2002] 1 AC 481 at [17] per Lord Bingham.

## IS ACTION NECESSARY TO ADDRESS THE USE OF TERMS AND CONDITIONS DELAYING CONTRACT FORMATION?

### Consultees' views

5.72 Because it is technically outside the scope of our current work, we did not ask a question about whether action should be taken to address the use of terms and conditions delaying contract formation. However, some consultees made relevant observations on this point.

5.73 Three consultees concluded that no action was necessary to address the use of terms and conditions delaying contract formation. ICAEW sounded a note of caution that:

While Government should naturally consider this possibility [that retailers are seeking to mitigate/avoid the impact of some provisions of the CRA] it is unclear why it would legislate for change unless material harm results.

5.74 The Bar Council noted:

Unless and until the Commission receives evidence of significant consumer detriment caused by terms delaying contract formation, we consider it may be better to retain the status quo, which permits terms delaying contract formation provided they satisfy the requirement of fairness in Part 2 of the Consumer Rights Act 2015.

5.75 UK Finance suggested that action would be necessary if the proposed rules on transfer of ownership come into force. They noted that “it is important that consumers are not prevented from enjoying the benefit of the Bill”. They also raised concerns that the cards claims system could end up being used as a forum to determine contract formation. They recommended that the timing of contract formation is dealt with in the draft Bill:

either by specifying clearly that contract formation on delivery is permitted or prohibited with exceptions (by and allowing for conditions to be met before the retailer is obliged to fulfil its contractual obligations). The card industry as [a] whole requires clarity one way or the other so that a simplification exercise does not lead to a rise in complex card claims.

5.76 Professor Christian Twigg-Flesner and Professor Hugh Beale (joint response) suggested that further steps could be taken to protect pre-paying consumers.

- (1) A targeted rule could be introduced whereby, once a trader takes payment, the contract is deemed to be concluded at the time payment is taken.
- (2) Legislation could render ineffective any term that seeks to delay the formation of a contract beyond the time when the consumer's order has been acknowledged and payment requested (similar to section 31 of the CRA 2015).<sup>198</sup>

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<sup>198</sup> Section 31 of the Consumer Rights Act 2015 prevents traders from contracting out of the consumer's statutory rights under sections 9 to 16, section 28 (on time of delivery) and section 29. It has the effect that a

- (3) The reach of section 75 of the CCA 1974 could be extended to cover claims in restitution and (particularly in light of COVID) under the Law Reform (Frustrated Contracts) Act 1943.

## Conclusion

- 5.77 The evidence and comments we have received do not suggest that the practice of delaying contract formation is causing significant consumer detriment at the moment. On the other hand, it suggests that retailers have legitimate reasons for delaying formation in this way, and that alternative means of achieving these aims may not be significantly better for consumers.
- 5.78 There does, however, remain a risk of consumer detriment and this risk would increase if the new rules on transfer of ownership were implemented.<sup>199</sup> We suggest that the impact on consumers of this practice is kept under review so that the CMA or government (as appropriate) can take action in future if necessary.

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term in a contract is void if it seeks to prevent the consumer from having access to those rights and associated remedies.

<sup>199</sup> We discuss the practice of delaying contract formation from para 2.19 and consultees' comments on this practice in Chapter 5.

## Chapter 6: Issues not covered by the final draft Bill

6.1 In this chapter, we discuss the following aspects of transfer of ownership which were raised by consultees but which we do not address in the final draft Bill:

- (1) transfer of ownership back to the retailer in certain circumstances; and
- (2) goods made using goods supplied by the consumer.

6.2 We also note other suggestions made by consultees for legislative reform which are out of scope of our current work:

- (1) reimbursement rights for consumers; and
- (2) modernisation of other sale of goods legislation.

### TRANSFER OF OWNERSHIP BACK TO TRADER

6.3 A few consultees expressed concern that our recommendations do not deal with the transfer of ownership of goods back to a retailer in certain circumstances, such as where a consumer rejects goods or cancels a distance contract and seeks a refund.

6.4 The Consumer Rights Act 2015 (CRA 2015) provides that a consumer can reject goods for specific reasons, for example if the goods are not as described.<sup>200</sup> It provides that the right to reject is exercised if the consumer indicates to the trader that the consumer is rejecting the goods and treating the contract as at an end. The indication may be something the consumer says or does, but it must be clear enough to be understood by the trader.<sup>201</sup> The CRA 2015 therefore goes some way towards addressing the question of when a consumer “rejects” goods. We think, however, that there may be situations in which the timing of rejection could be uncertain. An example could be where a consumer sends goods back to a retailer using a pre-paid returns label but does not inform the retailer that they are rejecting the item and returning it. Does the rejection occur at the point that the consumer indicates their intention by posting back the goods or only when the retailer receives notice of their intention when the parcel arrives?

6.5 When the consumer exercises a right to reject, the trader has a duty to give the consumer a refund.<sup>202</sup> It is already possible for a consumer to exercise a right to reject goods after they have been delivered and by which time, in most cases, ownership will have then transferred to them.<sup>203</sup> Existing legislation includes rules about return of the goods if they are in the consumer’s possession<sup>204</sup> but does not provide for when

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<sup>200</sup> Consumer Rights Act 2015, ss 11, 19(3) and 20.

<sup>201</sup> Consumer Rights Act 2015, s 20(5)–(6).

<sup>202</sup> Consumer Rights Act 2015, s 20(7).

<sup>203</sup> Consumer Rights Act 2015, s 22(3).

<sup>204</sup> Consumer Rights Act 2015 s 20(7)–(8).

ownership of goods will transfer back to the trader. Case law in the commercial sphere suggests that, where a buyer exercises a right of rejection of goods, the effect of a lawful rejection is that property reverts in the seller at the time of rejection.<sup>205</sup> It has been assumed that this conclusion would also be applied to the exercise of consumers' statutory rights to reject under consumer law.<sup>206</sup>

- 6.6 As discussed in Chapter 4, a consumer also has the right under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (CCRs 2013) to cancel a distance contract (such as a sales contract concluded when shopping online) without giving any reason.<sup>207</sup> The consumer can exercise this right before or after goods have been received (subject to certain time limits), simply by informing the trader.<sup>208</sup> The CCRs 2013 set out arrangements for the return of goods which are in the consumer's possession. However, they do not provide for when ownership of goods will transfer back to the trader. In the event that ownership of the goods had already passed to the consumer while still in the trader's possession, the case law in the commercial sphere (discussed in the previous paragraph) would suggest that ownership would revert in the trader when the consumer notifies the trader of the cancellation.
- 6.7 A consumer may exercise their right to reject goods or cancel a distance contract while a trader is solvent but may also do so where the trader has become insolvent and an insolvency practitioner has been appointed. Consultees who raised this issue observed that a lack of clarity as to the ownership of goods on an insolvency is undesirable for card issuers issuing refunds (through section 75 or chargeback), consumers seeking a refund from their card issuer, and insolvency practitioners who need to know whether they are free to sell or dispose of goods.
- 6.8 We can see that there is a case for including rules on revesting in legislation. For example, these rules could provide that ownership reverts in the trader when the trader is made aware of the consumer's intention to reject the goods, either by the consumer returning the goods to the trader or notifying the trader of its intention to return the goods. Rules on revesting of ownership may provide certainty for all parties, especially in an insolvency situation. However, reform in this area was not contemplated by our June 2015 consultation, our July 2016 recommendations, nor our latest consultation and draft Bill. It is also not an issue which is exacerbated by the proposed new rules. Accordingly, we do not feel that we can now recommend rules on the transfer of ownership back to the trader without fully considering and consulting on it.

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<sup>205</sup> *McDougall v Aeromarine of Emsworth Ltd* [1958] 1 WLR 1126 at 1134; *Tradax Export SA v European Grain and Shipping Ltd* [1983] 2 Lloyd's Rep 100 at 107–108.

<sup>206</sup> M Bridge, L Gullifer, K Low and G McMeel (eds), *The Law of Personal Property* (2nd ed 2018), paras 18-061 and 18-062.

<sup>207</sup> Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, SI 2013 No 3134, reg 29. A "distance contract" is "a contract concluded between a trader and a consumer under an organised distance sales or service-provision scheme without the simultaneous physical presence of the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded": SI 2013 No 2131, reg 5.

<sup>208</sup> SI 2013 No 2131, regs 29 to 32.



- 6.9 On a related point, R3 and ICAEW also raised concerns about goods whose ownership has transferred to a consumer but which are still in the possession of the insolvent trader because they have not been claimed by consumers (who are either unaware of their ownership or do not want the goods). They queried how long insolvency practitioners would have to hold a consumer's goods for collection. They noted that goods could be "stuck" at the insolvent business or its suppliers for an indefinite period of time, making it impossible completely to wind down an estate. We note that insolvency practitioners have a duty not to dispose of property owned by third parties. If they do dispose of third party property, they may be personally liable in conversion.<sup>209</sup>
- 6.10 It is possible that this situation may arise more often as a result of the proposed new rules on transfer of ownership as they could result in ownership of goods transferring before the goods leave the trader's possession. We do not think that it would be appropriate to address this issue in rules on transfer of ownership, for example, by providing that ownership can "run out" and revert to a trader after a certain time. However, we think that this is an area where insolvency practitioners may benefit from guidance (as to how their existing duties would apply in this situation) if the new transfer of ownership rules were implemented.
- 6.11 BRC raised similar concerns about how the proposed new rules would operate in relation to click and collect orders where a consumer does not collect their goods.<sup>210</sup> They said:
- [T]he rules have to work in all circumstances ... In click and collect, goods may be set aside for collection and labelled but if they are not picked up they go back into stock and the money, if already taken, is refunded. But there may be period of 7 days or more before the customer collects the item – which depending on the approach adopted may be his if it is already labelled.
- 6.12 We can see that if the consumer does not collect the goods, this may put a retailer in the position of having to hold the goods for the consumer indefinitely. This is because returning the goods to stock or otherwise disposing of the goods may technically be a conversion of the consumer's property. We think this risk is something which could be – and indeed, already is – addressed in the contract. A review of retailer terms and conditions on click and collect often provide for what is to happen if the consumer does not collect the goods. Typically these terms and conditions state that the retailer reserves the right to cancel the order and refund the consumer if the consumer does not collect the goods within a specified timeframe (such as "5 days" or "a reasonable time"). As we note in chapter 5, click and collect terms and conditions also frequently delay formation of the contract until the goods are collected.<sup>211</sup>

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<sup>209</sup> *Hchette UK Ltd v Borders* [2009] EWHC 3487 (Ch) at [3]; *Lightman & Moss on The Law of Administrators and Receivers of Companies* (6th ed 2017) para 12-051. Under the Insolvency Act 1986, an administrator has the power to dispose of third party property in the possession of the company under a hire-purchase, conditional sale, chattel-leasing or retention of title agreement, but only by order of the court: see Insolvency Act 1986, sch B1 para 72(2)(b).

<sup>210</sup> Click and collect allows for a consumer to order goods online and collect them from the trader's physical shop rather than having them delivered.

<sup>211</sup> At para 5.44.

## GOODS MADE USING GOODS SUPPLIED BY CONSUMER

- 6.13 Dr Magda Raczynska and final year LLB students at University College London Faculty of Laws<sup>212</sup> suggested that the opportunity should be taken to address the situation in which the consumer supplies goods to a retailer or manufacturer to be incorporated into another product, and risks losing ownership of those base goods. They gave the example of a contract in which the retailer manufactures a sofa for the consumer using upholstery provided to the trader by the consumer.
- 6.14 A consumer who provides goods to a retailer may lose ownership of those goods during the manufacturing process by reason of the principle of accession. Accession occurs where “a subordinate item is joined to a dominant thing, and its identity is submerged in the dominant”.<sup>213</sup> Whoever owns the dominant item “owns the whole” as a result.<sup>214</sup> The consumer will lose ownership of the goods if, by reason of the goods being joined to or mixed with other materials, they lose their identity in the manufacturing process. If the retailer goes insolvent after accession of the consumer’s goods, but before the manufacturing process is completed, then the consumer may not have a claim to ownership of any goods in the retailer’s possession. The consumer may be confined to an unsecured claim.
- 6.15 These consultees said that the consumer should have protection in this situation:
- We think that in cases where the consumer supplies own goods, the consumer should be protected by statute (CRA 2015) from the consequences of losing ownership of the supplied goods. The consumer should be granted a proprietary interest over the dominant thing or the new goods that would secure the performance of an obligation to pass ownership in the goods to the customer (a statutory lien or statutory security interest). Alternatively, the consumer should obtain a co-ownership share of the dominant thing or new thing until the ownership of the new thing is transferred to them. The share should be as the value of the supplied goods bears to the sum of all components of the new thing/dominant thing. The value should be looked at the time the agreement to incorporate customer’s thing into the dominant thing or new thing is made but need not be part of the contract to sell goods.
- 6.16 This goes beyond the scope of our current work, which does not cover concepts such as accession. We recognise, however, that there may be merit in this issue being looked into for the sake of consumers.
- 6.17 The new rules in our draft final Bill may at least operate to bring transfer of ownership of the manufactured goods to an earlier point than under the current law, provided the relevant contract is a “sales contract” for the purposes of the CRA 2015.

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<sup>212</sup> Thomas Bains and Yanusika Srithar.

<sup>213</sup> M Bridge, L Gullifer, K Low and G McMeel (eds), *The Law of Personal Property* (2nd ed 2018) para 16-032. See also *Appleby v Myers* (1867) LR 2 CP 651 at 659–660.

<sup>214</sup> M Bridge, L Gullifer, K Low and G McMeel (eds), *The Law of Personal Property* (2nd ed 2018) para 16-033.

6.18 We consider that a contract for the manufacture of goods using goods supplied by the consumer can be a “sales contract” under the CRA 2015.<sup>215</sup> Whether a particular contract of this nature is in fact a sales contract depends on whether the contract, on its proper construction, assigns a monetary value – a price – to the goods manufactured by the trader. It may be difficult to say that the contract assigns a monetary value to the goods in circumstances where the consumer provides money *and* goods to the trader. Depending on the terms of the contract, the contract may be interpreted as a contract for the transfer of goods, not a sales contract. As discussed elsewhere in this report, contracts for the transfer of goods are not covered by the final draft Bill.<sup>216</sup>

## **REIMBURSEMENT RIGHTS FOR CONSUMERS**

6.19 Two consultation responses suggested that there is a need to consider consumers’ existing reimbursement rights in the event of an insolvency. The points made are related, but not identical. Both of these points are beyond the scope of this current work but are relevant issues for consumer protection more generally, particularly in the event of retailer insolvency.

### **Availability of a section 75 claim for trader’s failure to reimburse**

6.20 In Chapter 4 we discuss a consumer’s right to reimbursement from a trader under section 28 of the CRA 2015 (for refusal to deliver) and regulations 33 and 34 of the CCRs 2013 (after cancellation of a contract by the consumer). The Bar Council noted that the legal basis of a consumer’s right to be reimbursed by a trader can affect their right to claim under section 75. A section 75 claim against the card issuer can only be made when the consumer has a claim against the trader “in respect of a misrepresentation or breach of contract”.

6.21 The Bar Council said:

We are not confident that the initial delivery breach is sufficient to enable a consumer to claim a reimbursement due under section 28(9) in a section 75 claim; it is at least arguable that the reimbursement is a statutory remedy which is distinct from any contractual claim and therefore falls outside the ambit of section 75. If the Commission’s intention is that consumers should be able to claim under section 75 if a trader fails to comply with its reimbursement obligation under section 28(9), we wonder whether section 28(9) ought to be amended to make it clear that breach of the reimbursement obligation is actionable as a breach of the contract.

6.22 We recognised the different rights and results for consumers in certain circumstances in Chapter 4. We noted that the framing of the relevant legislative provisions means that in some circumstances there is a contractual breach which could form the basis of a section 75 claim, while in others there is not. In some cases there may be a

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<sup>215</sup> Section 5(2) of the CRA 2015, which deals expressly with contracts for the manufacture of goods, does not require all the materials used in the manufacturing process to be owned by the trader. What is required is that the consumer agrees to pay “the price” and that the manufactured goods, on being supplied to the consumer, will be owned by the consumer.

<sup>216</sup> We discuss the scope of the rules from para 3.3, and contracts for the transfer of goods in particular from para 3.18.

chargeback claim even if not a section 75 one, since chargeback is not directly based on breach of contract, but in other cases there will be no recourse at all to card issuers.

- 6.23 It is important to remember that even though consumers who pay by card often have access to the important protection of section 75 and chargeback, this protection is not universal. In the 2016 Report, we noted that these procedures work relatively well. At least at that time, we thought the key issue was ensuring that consumers were made aware of these avenues rather than looking to bolster the schemes or to consider putting chargeback on a statutory footing.<sup>217</sup> Given the importance of such schemes to consumer protection, it is important that they are kept under review.

### **Priority for consumers on insolvency**

- 6.24 Dr Magda Raczynska and final year LLB students at University College London Faculty of Laws<sup>218</sup> thought that consumers should have a limited priority in the event of a retailer's insolvency that would ensure they received a refund if they returned goods:

If the trader goes into administration or liquidation, should the consumer be able to exercise the power to return the goods, and pass the ownership back to the seller in a way that would bind the administrator/liquidator? We think the consumer should be able to do so, even after the seller enters insolvency. We think that the consumer should then have the right for a return of payment for the goods returned and that in respect to this right the consumer should have protection in retailer's insolvency, if the existing protections under s 75 CCA and chargeback are not available.

- 6.25 In our 2016 Report, we made a related recommendation.<sup>219</sup> We recommended that the government should consider giving preferential status to a limited number of consumer claims, which would rank below preferential claims from employees, but above those from floating charge holders. Rather than those who had returned goods and were due a refund, we focused on any consumer who had made a prepayment of £250 or more within six months of the insolvency, and who did not have any other avenue for recourse (such as through a card issuer or trust arrangements). The remit of our recommendation was narrow, and sought to focus on the most vulnerable consumers who may be left entirely exposed in the event of retailer insolvency. This is likely if they have not paid by credit or debit card, cannot claim ownership of the goods and if the insolvency practitioner does not consider they can release the goods to the consumer having considered the interests of the creditors as a whole.
- 6.26 In its response to our 2016 Report, the government said it had decided not to pursue this measure. Its view was that this recommendation could "increase the cost of capital, harm enterprise and lead to calls for preferential status for other groups of

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<sup>217</sup> 2016 Report, ch 7, and in particular para 7.38.

<sup>218</sup> Thomas Bains and Yanusika Srithar.

<sup>219</sup> 2016 Report, ch 8.

creditors which would adversely affect the amount available to other unsecured creditors, which would lead to far greater losses to the wider economy”.<sup>220</sup>

- 6.27 We also recognise that there are other interests to consider, including the interests of other secured and unsecured creditors. As we discuss in Chapter 2, we remain of the view that may be a case for protection of the most exposed consumers who have no other avenues for redress.<sup>221</sup>

## MODERNISATION OF OTHER SALE OF GOODS LEGISLATION

- 6.28 Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West of the University of Aberdeen (joint response) said there may be a case for modernising the language in the Sale of Goods Act 1979 (SGA 1979), rather than only in the consumer context:

We note the value of having relevant rules in one place for consumers, rather than being split across the Sale of Goods Act 1979 and the Consumer Rights Act 2015. And clarifying and modernising the law regarding the transfer of ownership of goods is desirable. However, this is also desirable in the non-consumer context, and the Law Commission may wish to also examine expanding some of the changes, including the modernisation of language, to other sale of goods transactions in future (albeit with such rules not being mandatory in non-consumer contexts, to facilitate retention of title and other commercial arrangements). One complication would be the fact that, unlike in a consumer context, changes to the rules regulating transfer of ownership of goods in business-to-business sales and sales between private persons would have a direct bearing on the transfer of risk from seller to buyer as per section 20 of the Sale of Goods Act 1979.

- 6.29 Professor Christian Twigg-Flesner and Professor Hugh Beale (joint response) also suggested that areas of the SGA 1979 would benefit from review. They pointed to the provisions dealing with the transfer of title by a non-owner in sections 21 to 25 which they noted “are long overdue for an overhaul”. They also suggested that the application of the SGA 1979 to peer-to-peer or C2C contracts should be considered, in particular how often distance sales by one non-trader to another using online sales platforms would fall outside section 18 Rule 1 of the SGA 1979. Finally, they said that the rules on the passing of risk and the action for the price stating are due for an overhaul, and not one confined to consumer contracts. They said:

In particular, the rule on the passing of risk in non-consumer contracts seems to us quite unrealistic now that most accidental loss or damage will be covered by insurance: the seller who still has possession is far more likely to be insured than is the buyer. Conversely, we see no reason to delay the passing of property in goods that are specific or identified just because they still have to be put into a deliverable state; that that rule may have been seen as desirable to prevent the risk passing to the buyer when the seller was still working on the goods, and could go if the risk rule were changed as we have suggested. Likewise, we suspect that the rule that

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<sup>220</sup> Department for Business, Energy & Industrial Strategy, ‘Law Commission report on consumer prepayments on retailer insolvency: Government response’ (December 2018), pp 15 to 16, <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/law-commission-report-government-response.pdf>.

<sup>221</sup> We discuss this from para 2.29.

property will not pass if the goods have to be weighed, measured etc in order to ascertain the price was seen as necessary in order to stop the seller having an action for the price under s 49(1), but there is no need to delay the passing of property in order to prevent the seller having an action, that could be done better by a specific rule.

- 6.30 A review of the SGA 1979 may well be an appropriate project for the Law Commission in the future. We are already aware, from other work we are doing, of issues which may be in need of updating, such as whether “goods” includes – or should be expanded to include – digital assets.

(signed) Sir Nicholas Green, Chair  
Professor Sarah Green  
Professor Nick Hopkins  
Professor Penney Lewis  
Nicholas Paines QC

Phil Golding, Chief Executive

24 February 2021

# Appendix 1: List of consultees

The following bodies and individuals responded to our consultation, which ran from July 2020 to October 2020.

## REPRESENTATIVE BODIES AND ASSOCIATIONS

British Retail Consortium

City of London Law Society

Finance & Leasing Association

Institute of Chartered Accountants in England and Wales

Institute of Chartered Accountants of Scotland

Institute of Consumer Affairs

Association of Business Recovery Professionals (R3)

The Bar Council

UK Finance

## INSOLVENCY PRACTITIONERS

KPMG

## GOVERNMENT AND PUBLIC BODIES

Competition and Markets Authority

## ACADEMICS

Professor Hugh Beale, University of Warwick

Dr Alisdair MacPherson, University of Aberdeen

Donna McKenzie Skene, University of Aberdeen

Dr Magda Raczynska, University College London

Professor Andreas Rahmatian, University of Glasgow

Lorna Richardson, University of Edinburgh

Professor Duncan Sheehan, University of Leeds

Professor Christian Twigg-Flesner, University of Warwick

Dr Euan West, University of Aberdeen

## **PRACTISING BARRISTERS**

Matthew Hoyle

## **OTHER**

Final year LLB students at University College London Faculty of Laws, under the guidance of Dr Magda Raczynska: Adam Westlake, Alanna Yung, Chak Lau, Haeon Oh, Julia Juchno, Lili Feher, Ming Hao Tay, Moh, Radu Suciu, Thomas Bains and Yanusika Srithar.

The Furniture and Home Improvement Ombudsman

Between September 2019 and March 2021, the Law Commission met or corresponded with the following individuals and organisations with respect to the project.

## **REPRESENTATIVE BODIES AND ASSOCIATIONS**

Association of Business Recovery Professionals (R3)<sup>222</sup>

British Retail Consortium<sup>223</sup>

Finance & Leasing Association

Insolvency Lawyers Association<sup>224</sup>

Institute of Chartered Accountants in England and Wales

UK Finance

UK Warehousing Association

## **INSOLVENCY PRACTITIONERS**

Deloitte

Ernst & Young

## **GOVERNMENT AND PUBLIC BODIES**

Competition and Markets Authority

Department for Business, Energy & Industrial Strategy

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<sup>222</sup> Including members from PwC, KPMG, Clifford Chance and Crowell & Moring.

<sup>223</sup> Including members from a number of retailers.

<sup>224</sup> Including members from Ashurst, Linklaters, Kirkland & Ellis, Freshfields Bruckhaus Deringer and Allen & Overy.



Financial Conduct Authority

The Financial Ombudsman Service

Insolvency Service

Scottish Law Commission

## **PRACTISING BARRISTERS**

Professor Jonathan Harris QC

## **ACADEMICS**

Professor Joshua Bamfield, Centre for Retail Research

Professor Michael Bridge, National University of Singapore, London School of Economics and Political Science (Emeritus)

Professor Andrew Dickinson, University of Oxford

Emeritus Professor Sir Roy Goode QC, University of Oxford

Professor Alex Mills, University College London

Professor Edwin Peel, University of Oxford

Professor Duncan Sheehan, University of Leeds

Professor Christian Twigg-Flesner, University of Warwick

## **OTHER**

Celtheath

Citizens Advice

Simon Edwards, Aaron & Partners

## **Appendix 2: Final Draft Bill**

# Consumer Rights (Transfer of Ownership under Sales Contracts) Bill

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## CONTENTS

- 1 Transfer of ownership under a sales contract
- 2 Consequential amendments of the Sale of Goods Act 1979
- 3 Extent, commencement and short title

A

**B I L L**

TO

Make provision about when ownership of goods is transferred to consumers under sales contracts

**B**E IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**1 Transfer of ownership under a sales contract**

- (1) The Consumer Rights Act 2015 is amended as follows.
- (2) In section 4 (ownership of goods), for subsection (2) substitute—
- “(2) For the time when ownership of goods is transferred—
- (a) under a sales contract to which section 18A or 18B applies, see those sections, and 5
- (b) in any other case, see in particular the following provisions of the Sale of Goods Act 1979 (which relate to contracts of sale)—

section 16:	goods must be ascertained	
section 17:	property passes when intended to pass	10
section 18:	rules for ascertaining intention	
section 19:	reservation of right of disposal	
section 20A:	undivided shares in goods forming part of a bulk	15
section 20B:	deemed consent by co-owner to dealings in bulk goods	

- (3) Where a sales contract to which section 18B applies is for goods that are contained in a bulk (within the meaning of the Sale of Goods Act 1979),

nothing in this Chapter prevents the consumer from becoming an owner in common of the bulk by virtue of section 20A of that Act.”

(3) After section 18 insert—

*“When is ownership transferred under a sales contract?”*

- |            |   |    |
|------------|---|----|
| <b>18A</b> | <b>Transfer of ownership: actual goods selected</b>   | 5  |
| (1)        | This section applies to a sales contract for goods, or for an undivided share of goods specified as a fraction or percentage, if—   |    |
|            | (a) the actual goods that are to be used to fulfil the contract have been selected when the contract is made, and   |    |
|            | (b) the contract is not a conditional sales contract.   | 10 |
| (2)        | The contract is to be treated as including a term that ownership of the goods, or the share of the goods, transfers to the consumer when the contract is made.  |    |
| (3)        | Any term of the contract that purports to provide for ownership to transfer to the consumer at a time later than that provided by virtue of this section is to that extent of no effect.  | 15 |
| <b>18B</b> | <b>Transfer of ownership: actual goods not selected</b>   |    |
| (1)        | This section applies to a sales contract for goods, or for an undivided share of goods specified as a fraction or percentage, if—   |    |
|            | (a) the actual goods that are to be used to fulfil the contract have not been selected when the contract is made, and   | 20 |
|            | (b) the contract is not a conditional sales contract.   |    |
| (2)        | If under the contract the goods are to be manufactured or produced to a specification agreed between the trader and the consumer, the contract is to be treated as including a term that ownership of the goods, or the share of the goods, transfers to the consumer when the manufacture or production for the consumer is completed. | 25 |
| (3)        | In any other case, the contract is to be treated as including a term that ownership of the goods, or the share of the goods, transfers to the consumer when the first of the following occurs—  | 30 |
|            | (a) the goods are physically labelled with the consumer’s name in a way that is intended by the trader to be permanent;   |    |
|            | (b) the goods are physically set aside for the consumer in a way that is intended by the trader to be permanent;  |    |
|            | (c) the alteration of the goods to a specification agreed between the trader and the consumer is completed;   | 35 |
|            | (d) the consumer is told by the trader that goods bearing a unique identifier will be used to fulfil the contract;  |    |
|            | (e) on examining the goods the consumer agrees that they are to be used to fulfil the contract;   | 40 |
|            | (f) the goods, identified as being those for delivery to the consumer, are delivered to a carrier;  |    |
|            | (g) the goods are delivered to the consumer;  |    |
|            | (h) the goods that are to be used to fulfil the contract are selected by the trader in some other way, and the trader intends the selection to be permanent.  | 45 |

- (4) If the trader acts as mentioned in subsection (3)(a), (b) or (h), the action is to be taken to have been intended by the trader to be permanent unless the contrary is proved.
- (5) Any term of the contract that purports to provide for ownership to transfer to the consumer at a time later than that provided by virtue of this section is to that extent of no effect.” 5

## 2 Consequential amendments of the Sale of Goods Act 1979

- (1) The Sale of Goods Act 1979 is amended as follows.
- (2) In section 1 (contracts to which Act applies), for subsection (5) substitute –
- “ (5) Certain provisions of this Act do not apply to – 10
- (a) a contract to which Chapter 2 of Part 1 of the Consumer Rights Act 2015 applies;
- (b) a contract to which section 18A or 18B of that Act applies.”
- (3) In section 16 (goods must be ascertained) –
- (a) at the beginning insert “(1)”, and 15
- (b) at the end insert –
- “ (2) This section does not apply to a contract to which section 18B of the Consumer Rights Act 2015 applies.”
- (4) In section 17 (property passes when intended to pass), at the end insert –
- “ (3) This section does not apply to a contract to which section 18A or 18B of the Consumer Rights Act 2015 applies.” 20
- (5) In section 18 (rules for ascertaining intention) –
- (a) at the beginning insert “(1)”, and
- (b) at the end insert –
- “ (2) This section does not apply to a contract to which section 18A or 18B of the Consumer Rights Act 2015 applies.” 25
- (6) In section 19 (reservation of right of disposal), at the end insert –
- “ (4) This section does not apply to a contract to which section 18A or 18B of the Consumer Rights Act 2015 applies.”
- (7) In section 43 (termination of lien), at the end insert – 30
- “ (3) In subsection (1)(a), the words “without reserving the right of disposal of the goods” do not apply to a contract to which section 18A or 18B of the Consumer Rights Act 2015 applies.”

## 3 Extent, commencement and short title

- (1) This Act extends to England and Wales only. 35
- (2) This Act comes into force at the end of the period of two months beginning with the day on which it is passed.
- (3) This Act does not apply to a contract made before the day on which this Act comes into force.

- (4) This Act may be cited as the Consumer Rights (Transfer of Ownership under Sales Contracts) Act 2021.

# Appendix 3: Explanatory Notes on the draft Bill

## WHAT THESE NOTES DO

These Explanatory Notes relate to the draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill.

The draft Bill gives effect to the recommendations made by the Law Commission in its report on Consumer Prepayments on Retailer Insolvency published in July 2016. These Explanatory Notes have been produced by the Law Commission in order to assist the reader of the draft Bill and to help inform debate on it.

These Explanatory Notes explain what each part of the draft Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the draft Bill will affect existing legislation in this area.

These Explanatory Notes are not, and are not intended to be, a comprehensive description of the draft Bill.

## OVERVIEW OF THE BILL

The draft Consumer Rights (Transfer of Ownership under Sales Contracts) Bill (“the Bill”) gives effect to the Law Commission’s recommendations to reform the rules on transfer of ownership of goods under certain consumer contracts. It does so primarily by amending the Consumer Rights Act 2015. It also amends the Sale of Goods Act 1979 which contains rules on transfer of ownership of goods.

If enacted, the Bill would provide new rules on transfer of ownership of goods under contracts for the sale of goods between a trader and a consumer. These would largely replace the rules in the Sale of Goods Act 1979 as they apply to certain consumer contracts. The rules in the Sale of Goods Act 1979 would continue to apply to other contracts.

## POLICY BACKGROUND

In July 2016, the Law Commission published its report on Consumer Prepayments on Retailer Insolvency. This considered, amongst other things, the rules on transfer of ownership of goods in the Sale of Goods Act 1979. The Law Commission noted that the rules were developed for commercial contracts and codified in statute in 1893. They were restated in 1979 but not changed in their substance. The Law Commission concluded that the rules were complex and technical and could cause confusion and operate harshly when applied to consumer sales. The report recommended that the rules be simplified so as to provide for ownership of goods to transfer to consumers where the goods had been identified for them. It also recommended that the rules be moved into the Consumer Rights Act 2015.

In September 2019, the government asked the Law Commission to undertake further work to prepare draft legislation to implement this recommendation. The Law Commission consulted



on a draft of the Bill in 2020<sup>1</sup> and then published the Bill in 2021 in its report Consumer sales contracts: transfer of ownership.<sup>2</sup>

Further information on the policy and background to the Law Commission's recommendations can be found in the following Law Commission publications.

(1) Consumer Prepayments on Retailer Insolvency (2016) Law Com No 368 HC 543 (<https://www.lawcom.gov.uk/project/consumer-prepayments-on-retailer-insolvency/>).

(2) Law Commission Report on consumer prepayments on retailer insolvency: government response (2018) (<https://www.gov.uk/government/publications/consumer-prepayments-on-retailer-insolvency-government-response-to-the-law-commission-report>)

(3) Consumer sales contracts: transfer of ownership (A consultation paper) (2020) Law Commission Consultation Paper No 246 (<https://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/>).

The Bill is explained in more detail in the following Law Commission publication:

(4) Consumer sales contracts: transfer of ownership (2021) Law Com No 398, HC 1365 (<https://www.lawcom.gov.uk/project/consumer-sales-contracts-transfer-of-ownership/>).

## LEGAL BACKGROUND

The relevant legal background is explained in the policy background section of these Notes.

The legislation impacted by the Bill is:

- (1) the Sale of Goods Act 1979; and
- (2) the Consumer Rights Act 2015.

## TERRITORIAL EXTENT AND APPLICATION

The draft Bill applies to England and Wales.

## COMMENTARY ON PROVISIONS OF THE BILL

### Clause 1 - Amendments to the Consumer Rights Act 2015

Clause 1 amends the Consumer Rights Act 2015 by:

- (1) substituting new subsections (2) and (3) for subsection (2) of section 4; and
- (2) inserting new sections 18A and 18B.

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<sup>1</sup> Consumer sales contracts: transfer of ownership (A consultation paper) (2020) Law Commission Consultation Paper No 246

<sup>2</sup> Consumer sales contracts: transfer of ownership (2021) Law Com 398.

Sections 4(2) and 4(3) - Which rules on transfer of ownership apply to sales contracts?

Sections 4(2) and 4(3) of the Consumer Rights Act 2015 signpost to the sections of that Act, and of the Sale of Goods Act 1979, where the rules on transfer of ownership of goods under a sales contract can be found.

Section 4(2) provides that where section 18A or 18B of the Consumer Rights Act 2015 apply to a sales contract, the rules in those sections will apply to transfer ownership of goods under those contracts. See the notes on sections 18A and 18B below. Where neither section 18A or 18B applies, the Sale of Goods Act 1979 will apply to determine when ownership of goods is transferred under a contract of sale (as defined in that Act).

Sections 4(2) and 4(3) of the Consumer Rights Act 2015 do not seek to provide a comprehensive list of provisions which concern the transfer ownership of goods to a consumer. The absence of a reference to any relevant legislation should not be read as disapplying that legislation.

Section 4(3) - Goods contained in a bulk

Section 4(3) makes it clear that, where a sales contract to which section 18B applies is for goods that are contained in a bulk (within the meaning of the Sale of Goods Act 1979), section 20A of the Sale of Goods Act 1979 may apply to that contract.

Section 20A of the Sale of Goods Act 1979 provides for a buyer to become a co-owner of a bulk when certain conditions are met. By operation of that section, an undivided share in the bulk transfers to the buyer and they become an owner in common of the bulk.

A consumer may therefore become an owner in common of the bulk of goods under section 20A of the Sale of Goods Act 1979. The rules in section 18B of the Bill will then apply to transfer ownership of the specific quantity of goods which the consumer has contracted to buy. The events listed in sections 18B(2) and (3) relate to the transfer of ownership in the goods which are the subject of the sales contract, not the bulk of which those goods may form a part. Therefore, for example, in relation to the physical labelling of goods under paragraph 18B(3)(a), ownership will transfer only when the specific quantity of goods which is the subject of the contract is labelled, not when the bulk is labelled.

Section 18A - Transfer of ownership where actual goods selected

*What contracts are covered?*

Section 18A applies to a sales contract for goods when the goods that are to be used to fulfil the contract are selected at or by the time the contract is made. Section 18A(2) inserts an implied term into a relevant sales contract, providing that ownership of such goods transfers to the consumer when the contract is made.

Section 18A applies to sales contracts other than conditional sales contracts (both as defined in section 5 of the Consumer Rights Act 2015). Section 18A does not apply to other contracts for a trader to supply goods to a consumer as further described in Chapter 2 of Part 1 of the Consumer Rights Act 2015: contracts for the hire of goods, hire-purchase agreements and contracts for transfer of goods.

Section 18A applies to sales contracts for goods or for an undivided share of goods specified as a fraction or percentage. An example of such a contract could be for the sale of a 50%

share of a car. If the actual car to be used to fulfil the contract has been selected when the contract is made, then under section 18A ownership of the 50% share would transfer when the contract is made.

Section 18A only applies if the actual goods that are to be used to fulfil the contract have been selected when the contract is made. Where the actual goods have not been selected in this way then section 18B will apply.

Section 18A will most often apply to contracts concluded in a trader's physical shop, where a consumer or trader has selected the item from the shelves and the contract is subsequently concluded, most often at the checkout. Section 18A could also apply to sales contracts for goods which are purchased at a distance (for example, online) if the actual goods subject to the contract have been selected when the contract is made: for example, a "one-off" such as an antique.

*When does ownership of goods transfer to the consumer under section 18A?*

Under section 18A(2), a sales contract to which section 18A applies is to be treated as containing a term that ownership of goods transfers to a consumer when that contract is made. For ownership to transfer under section 18A, it is therefore necessary for a valid, applicable sales contract to exist.

Ownership will transfer when the sales contract is made and it is not relevant that the consumer may leave the goods in the possession of the trader for any reason.

Section 18A(3) has the effect that the sales contract cannot provide for ownership to transfer at a later time.

Section 18B - Transfer of ownership where actual goods not selected

*What contracts are covered?*

Section 18B applies to a sales contract for goods when the goods that are to be used for the contract have not been selected at or by the time the contract is made. It includes a list of events which will or may occur after the contract is made, at which point ownership in the goods will transfer to the consumer.

Like section 18A, section 18B applies to sales contracts except conditional sales contracts (both as defined in section 5 of the Consumer Rights Act 2015). Section 18B does not apply to other contracts for a trader to supply goods to a consumer as further described in Chapter 2 of Part 1 of the Consumer Rights Act 2015: contracts for the hire of goods, hire-purchase agreements and contracts for transfer of goods.

Section 18B applies to sales contracts for goods or for an undivided share of goods specified as a fraction or percentage. An example of such a contract could be for the sale of a 50% share of a car. Under section 18B, ownership of the 50% share of a car would transfer when one of the events or circumstances in section 18B(2) or 18B(3) occurs. This could be when the goods (in this case the car in which the consumer will own a share) are physically labelled for the consumer in a way that is intended by the trader to be permanent.

Section 18B applies to sales contracts which do not fall within the scope of section 18A. That is, it applies where the actual goods that are to be used to fulfil the contract have not been selected by the time the contract is made.

Section 18B is most likely to apply where a consumer places an order for goods which will be taken out of a trader's general stock. This would usually be the case, for example, where a consumer has ordered goods online. It could also occur where the consumer has made a purchase in a physical shop but the actual item they are buying has not been selected. This could happen where the consumer has inspected a display item of furniture but the actual item that they will receive under the sales contract will be selected from the trader's general stock before being delivered to the consumer. Section 18B would also apply where a consumer orders an item which is to be manufactured or produced to a specification agreed between the trader and the consumer.

*When does ownership of goods transfer to the consumer under section 18B?*

Section 18B(2) provides specific rules for transfer of ownership of goods under a sales contract under which the goods are to be manufactured or produced to a specification agreed between the trader and the consumer. At one end of the spectrum, this could involve the manufacture of a very bespoke item such as a pair of curtains where the consumer has selected the fabric and curtain style and provided the trader with measurements. At the other end of the spectrum, a consumer buying a sofa may select just the style of sofa and a fabric from a limited range of options.

Under section 18B(2), such a contract is to be treated as containing a term that ownership of goods transfers to the consumer when the manufacture or production of the consumer is completed.

For ownership to transfer under section 18B, it is therefore necessary for a valid, applicable sales contract to exist.

Section 18B(5) has the effect that the sales contract cannot provide for ownership to transfer at a later time.

Section 18B(2) is not intended to apply:

- (1) where goods of the same description are already part of the trader's stock and can be used to fulfil the contract; or
- (2) where the trader or a supplier has to make a new item in order to satisfy the consumer's order, but where making the item is not part of the agreement.

In these scenarios ownership would transfer under section 18B(3).

Section 18B(3) provides that, in any other case, the sales contract is to be treated as containing a term that ownership of goods transfers under the sales contract when the first of the events or circumstances listed therein occurs. For ownership to transfer under section 18B, it is therefore necessary for a valid, applicable sales contract to exist.

The list of events and circumstances in section 18B(3) is non-exhaustive. The events or circumstances in sections 18B(3)(a) to (g) reflect common practices whereby traders select goods to fulfil consumer orders. Section 18B(3)(h) is a sweep-up limb which seeks to capture analogous events and circumstances.

The events and circumstances in section 18B(3) are as follows.

- Section 18B(3)(a) – the goods are physically labelled with the consumer’s name in a way that is intended by the trader to be permanent. If the trader does employ some kind of non-physical labelling, then this would be caught by section 18B(3)(h). Subsection 18B(4) includes a presumption that the trader intended such labelling to be permanent.
- Section 18B(3)(b) – the goods are physically set aside for the consumer in a way that is intended by the trader to be permanent. Non-physical setting aside would be caught by section 18B(3)(h). Subsection 18B(4) includes a presumption that the trader intended such setting aside to be permanent.
- Section 18B(3)(c) – the alteration of the goods to a specification agreed between the trader and the consumer is completed. Completion of the alteration of the goods is only one event upon which ownership would transfer under section 18B. Ownership may therefore transfer at an earlier point, where an item has been selected by the trader to be altered for the consumer because one of the other events or circumstances in section 18B will already have occurred.
- Section 18B(3)(d) – the consumer is told by the trader that goods bearing a unique identifier will be used to fulfil the contract. There is no requirement that the consumer receives this information in any particular format, for example in writing.
- Section 18B(3)(e) – on examining the goods the consumer agrees that they are to be used to fulfil the contract. This provision does not impact upon the requirement that goods be of satisfactory quality under section 9 of the Consumer Rights Act 2015, or a consumer’s right to reject goods under sections 20 to 24. Those provisions will continue to apply.
- Section 18B(3)(f) – the goods, identified as being those for delivery to the consumer, are delivered to a carrier. Ownership will not transfer under this section where goods are delivered to a carrier mixed with other identical goods. Ownership will only transfer under this section if it is clear which particular goods are for the consumer; that is, they have been identified for delivery to the consumer, for example by labelling. Identification in this way does not have to be intended by the trader to be permanent. The act of identification is important to identify the goods but it does not in and of itself transfer ownership.
- Section 18B(3)(g) – the goods are delivered to the consumer.
- Section 18B(3)(h) – the goods that are to be used to fulfil the contract are selected by the trader in some other way, and the trader intends the selection to be permanent. Subsection 18B(4) includes a presumption that the trader intended such selection to be permanent.

The presumption in section 18B(4) puts the onus on the trader (including an insolvency practitioner in charge of an insolvent trader’s estate) to show that the labelling or setting aside for the consumer was not intended to be permanent.

Section 18B(5) has the effect that the sales contract cannot provide for ownership to transfer at a later time than it would transfer under section 18B(3).

## **Clause 2 - Consequential amendments to the Sale of Goods Act 1979**

Clause 2 makes consequential amendments to the Sale of Goods Act 1979. It provides that the transfer of ownership rules in sections 16, 17, 18 and 19 of the 1979 Act do not apply to relevant sales contracts to which sections 18A and 18B of the Consumer Rights Act 2015 apply.

Clause 2(6) provides that section 19 (reservation of the right of disposal) of the Sale of Goods Act 1979 does not apply to sales contracts to which sections 18A and 18B of the Consumer Rights Act 2015 apply. The effect of this is that a trader cannot rely on section 19 of the Sale of Goods Act 1979 to require certain conditions to be fulfilled before ownership of goods will transfer to a consumer under a sales contract. Disapplication of section 19 of the Sale of Goods Act 1979 operates in tandem with sections 18A(3) and 18B(5)

Clause 2(7) amends section 43 (termination of lien) of the Sale of Goods Act 1979 to sales contracts to which sections 18A and 18B of the Consumer Rights Act 2015 apply. Section 41 of the Sale of Goods Act 1979 provides that an unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment of the price in certain circumstances. Section 43 of the Sale of Goods Act 1979 sets out the circumstances upon which the seller will lose their lien or right of retention. The effect of the amendment to section 43 is that a trader will lose their lien not only upon delivery of the goods to the consumer but also upon delivery of the goods to a carrier.

## **Clause 3 – Extent, commencement and short title**

This group of provisions is self-explanatory.

### **COMMENCEMENT**

Clause 3 makes provision about the coming into force of the Bill.

CCS0421369540

978-1-5286-2531-9