Law Commission
Reforming the law

Consumer sales contracts: transfer of ownership

Responses to consultation

Contents

Association of Business Recovery Professionals

8th Floor
120 Aldersgate Street
London
EC1A 4JQ

T: 020 7566 4200
F: 020 7566 4224

E: association@r3.org.uk
www.r3.org.uk

Transfer of ownership project
Commercial and Common Law Team, Law Commission
1st Floor, Tower, 52 Queen Anne's Gate
London
SW1H 9AG

Email only – Ownership@lawcommission.gov.uk

30 October 2020

Dear Sir / Madame

LAW COMMISSION - CONSUMER SALES CONTRACTS: TRANSFER OF OWNERSHIP CONSULTATION CONSULTATION RESPONSE

1. INTRODUCTION

1.1 R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from the global legal and accountancy firms through to smaller, local practices.

1.2 The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lend by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps indebted individuals get back on their feet. Our members have direct experience of insolvencies and their impact on the UK economy and insolvent companies' stakeholders.

1.3 This response has been prepared by R3 in collaboration with members of its General Technical Committee and we thank them for their input. The committee deals with issues of general importance and significance to the profession in the United Kingdom, keeping under review all UK and EU legislation, prospective and other matters relating to insolvency law and. The Committee is multi-disciplinary and has a good spread of representation, including practising insolvency practitioners, lawyers, solicitors, academics and others working within the insolvency profession.

1.4 If you would like to virtually meet or if you have any other queries, please contact [redacted] at [redacted] or on [redacted]

2. GENERAL OBSERVATIONS

2.1 In September 2015, R3 provided comments in response to the consultation paper issued by the Law Commission in June 2015 titled 'Consumer prepayments on retail insolvency'. In our response we advised that we saw some merit in providing an enhanced degree of protection for consumers in the event of insolvency, but not at the cost of further complicating statutory insolvency procedures or burdening other creditors of the insolvent estate with the costs of administering those protections. Most consumer claims were seen to be for comparatively small amounts, and the priority of such creditors will be to receive some repayment as quickly as possible, with minimal formality and complexity. It was considered that some enhancement of redress procedures outside formal insolvency was most likely to achieve this, and we suggested that proposals for reform should be focused on this area, together with initiatives to improve consumers' awareness of the remedies available to them. Adding complexity to existing insolvency processes would merely add cost and delays, and in most cases be unlikely to result in an increase in funds available for consumer creditors.

2.2 Following the report being published on the 2015 consultation in 2016, the Insolvency Service worked with R3, the Insolvency Lawyers Association, ICAEW, UKCA, card schemes (Mastercard and Visa), the Law Commission and consumer

groups to develop the guidance on the information which should be made available to consumers when seeking a chargeback where there has been a retail insolvency. The main element of the guidance is that a standard notice should be published by the office-holder on the insolvent retailer's website. This clearly shows the profession did support the voluntary measure of improving education of consumers on their rights.

2.3 Despite our comments in 2015, a considerable time ago, this consultation paper and accompanying draft legislation does not appear to address our primary concerns outlined in 2015. Whilst we appreciate the modernisation and clarification of the language used in part, our concerns around additional costs remain. The proposed changes may have limited benefits to consumers in a retail insolvency scenario but would increase the costs of administering an insolvency appointment and so reduce the amounts available to creditors as a whole, which include HMRC, Redundancy Payments Service, small suppliers and finance providers.

2.4 The consultation anticipates *"that firms providing insolvency services may incur familiarisation costs if the proposed rules in the draft Bill are introduced into law. In particular, insolvency practitioners and insolvency lawyers would need to receive training on the new rules".* However, to think these costs would be minimal is misleading. Creating and delivering training to deal with the proposed legislative changes is going to involve considerable time and resources. This is not a *"relatively small change to the existing law"*. Furthermore, Insolvency Practitioners ('IPs') often (available funds permitted) retain retail staff to assist with appointments and so retail staff would also need to be trained on the changes. In addition to the costs of training, IPs and their staff are likely to need to spend time adapting their work practices and processes to accommodate the change in approach to dealing with consumers and assessing the nature of their claim in an insolvency situation.

2.5 Familiarisation costs are one aspect of additional costs, another is in relation to consumers seeking to exercise their new rights, whether directly or through consumer groups. IPs are likely to face considerably more queries or claims from consumers, all of which will take time to deal with. For a solvent business, this is all part of the commercial equation, but creditors of an insolvent business may not welcome the diversion of resources that would be involved. There is also a risk that consumers will not understand the possible practical shortcomings of the legal rights they have been given, with potential for misunderstandings, disputes and damage to perception of the insolvency regime.

2.6 Additional costs to an insolvency estate will arise when upon appointment the company has no money to continue to trade or keep staff on the payroll and therefore need to close down operations immediately. When a situation like this occurs, under these new proposals, the consumers will own goods made to order when they are manufactured or otherwise when the rules provide (e.g. they have been labelled, sent for dispatch or otherwise identified). These goods could be anywhere in the country or even abroad, which places a huge burden on the IP as costs will need to be incurred to (1) locate the items (2) determine ownership (3) make contact with the owner (4) arrange delivery or wait for the consumer to collect, whilst incurring storage costs on an item the company or its creditors would not receive any benefit for.

2.7 It is difficult to see why an IP would incur costs to do so. Similarly, absent some mandatory requirement, it is not apparent why an IP would facilitate arrangements for a consumer to collect goods from premises of the insolvent business (even if it is in a position to do so) or how long such obligations would last. The proposals raise the prospect of goods being stuck at the insolvent business (or its suppliers) for an indefinite time and it is unclear what duties an IP would have to safeguard or dispose of the goods. In principle, you would expect uncollected goods to be disposed of or it will be impossible to completely wind-down an estate.

2.8 The retailer may have rights to claim against the consumer, but the expense of pursuing small claims will often be prohibitive. In the ordinary course, retailers might just regard defaulting consumers as a cost of business and pass the costs onto other consumers. In the case of insolvency, the costs of trying to recover consumer debts would be borne by creditors and IPs may well conclude in many cases that it would be counterproductive to pursue individual consumers. Those consumers then get something for nothing while others lose out.

3. CONSULTATION QUESTIONS

3.1 Please find attached responses to the questions raised in the consultation.

4. CONCLUSION

4.1 The proposed new rules are likely to present practical difficulties for IPs in all insolvency scenarios when trying to establish where ownership of remaining property lies.

4.2 We suggest the proposals and accompanying draft legislation are reviewed and further consideration of the additional costs incurred in applying this legislation, as against the benefits to be gained for a small minority of creditors, are reviewed. The additional costs would ultimately be to the detriment of creditors as a whole.

Yours faithfully

[redacted]
[redacted]
Association of Business Recovery Professionals

[redacted] [redacted]

R3, Association of Business Recovery Professionals
Law Commission - Consumer sales contracts: transfer of ownership consultation
Consultation response, 30 October 2020

Law Commission - Consumer sales contracts: transfer of ownership consultation			
No.	**QUESTION**	**DOC. PARA**	**COMMENTS**
1	Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly?		No. The proposed new terminology is clumsy (e.g. "goods not identified and agreed on") and could lead to misunderstanding. If an online consumer has chosen to purchase a specific item, they have already identified the item that they want to purchase. Some of the proposals are vague and open to ambiguity (e.g. how will you be able to establish that the trade intended labelling or setting aside of goods is to be permanent?)
2	Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns.		Yes. We believe that there may be confusion as to when ownership is supposed to transfer as the proposals: ● involve a subjective element (e.g. the trader intending something to be permanent- how will that be established?) ● contain vague terminology (e.g. when is something "delivered") ● how will the consumer prove that he/she has been told of a unique identifier
3	Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer?		It would be helpful if matters could be clarified and simplified as to when ownership of prepaid goods passes (e.g. ownership passes on the total payment being received by the seller / trader).
4	Is it common for goods to be held as part of a bulk until delivery or shortly before delivery in the consumer context? If possible please provide:		(1) Unknown (2) Member experience - Several suppliers of the same titled CDs claimed RoT. However, none of the suppliers had unique identification to evidence

	(1) details about the circumstances in which goods are held as part of a bulk until delivery or shortly before delivery (for example, types of retailer/goods); and (2) details of your own experiences.		which CDs had been delivered (and was still owned) by which supplier. The suppliers were forced to accept that they were co-owners of the bulk of same titled CDs but this wasn't sufficient to validate the RoT rights
5	Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?		No. The suggested amendments seem rather impractical if not prejudicial to the retailer / seller. 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 retailer's ability to deal with that bulk. It also seems unlikely that retailers will identify / label a particular bulk or portion thereof in a sales contract.
6	Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns.		Yes. It seems impractical to have a "two-stage" transfer of ownership process whereby the consumer will: ● become an owner in common of a bulk; and then ● become an owner of a specific quantity of the bulk when that quantity is identified Why not simplify the process and have ownership of the quantity transfer when that portion is identified? What is the benefit of the interim stage?
7	Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract?		See comments to Question 3 above.
8	Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?		No. The proposals undermine freedom of contract principles. It makes commercial sense why a retailer would want the terms to delay transfer of ownership in goods until the retailer has received payment in full. To provide otherwise prejudices the retailer at the expense of the consumer.

			It doesn't seem fair that the consumer can own goods which it has only partly paid for; leaving the retailer to expend time and resources receiving the balance of the payment. If the proposals deem it acceptable for a retailer to make the sale of age-restricted products conditional on the consumer proving their age, it should be permissible to make the sale of other goods conditional (e.g. on the price being paid in full).
9	Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements?		Yes.
10	Do you have experience of contracts for the transfer of goods or are you aware of them having been used? If so: (1) what was the purpose of the contract? (2) what transfer of ownership provisions (if any) did the contract contain?		No comment
11	Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?		No.
12	On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?		Yes. The consumer could have a claim for misrepresentation even where ownership has transferred to them.
13	If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that: (1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75? (2) these fees could not be claimed under chargeback rules?		(1) Possibly if these costs are recoverable as part of a qualifying damages claim under s.75 CCA74 (2) Unsure - this will depend upon the terms of the chargeback

14	Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?		More often than not, RoT clauses give rise to disputes as to the validity or otherwise thereof. If the clause is invalid, then the purported onsale by the retailer to the consumer could be the subject of challenge by the supplier. If the on-sale to the consumer is deemed valid and ownership in the goods is transferred, this will have an adverse impact on a creditor's security.
15	Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?		No. The analysis that the consumer is bound by such a lien "in most cases" is premised on the lien being in existence before ownership is transferred. That presupposes that the warehouse or deliverer has not been paid prior to ownership transferring to the consumer - why?
16	Do consultees agree that the draft Bill should come into force two months after it is passed into law?		No. A longer lead-in time would be preferable. The proposals represent a marked shift to the existing law which take time for stakeholders to familiarise themselves with and adapt their working practices.
17	How common it is for retailers to use terms and conditions which delay the formation of the sales contract? In particular: (1) Are they more common among online retailers? (2) Are they used when goods are ordered in-store for later pick-up or delivery? (3) Are they more common among retailers who sell certain types of goods?		Unknown
18	Where terms and conditions delay the formation of the sales contract until dispatch, is "dispatch" intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider?		In most circumstances, they refer to dispatch to the consumer.
19	We welcome consultees' views on the reasons why retailers use terms and conditions which delay formation		● avoid a breach of contract ● sourcing of stock to satisfy orders

	of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative).		● cater for pricing errors
20	We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts?		It's possible that conditional contracts could address certain elements of risk for retailers but we would question the suitability of conditional contracts in most retail transactions, especially on-line purchases.
21	Is it common for retailers to take steps to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract?		Unknown
22	Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?		No comment
23	Are you aware of situations where retailers have relied on terms delaying formation of the sales contract to justify delivery times outside the scope of section 28 of the Consumer Rights Act 2015?		No comment
24	Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the Consumer Credit Act 1974? Are card issuers likely to take this point in future?		No. Member experience - card issuers have been quite accommodating in accepting customer claims.
25	Are you aware of any other detriment caused to consumers as a result of terms delaying formation of the sales contract?		No comment
26	Do you agree that firms providing insolvency services would incur only minimal familiarisation costs as a result of the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible.		No. See comments to Question 16 above. Creating and delivering training to deal with the proposed legislative changes is going to involve considerable time and resources. This is not a "relatively small change to the existing law". Furthermore, insolvency

			practitioners (IPs) often retain retail staff to assist with appointments and so retail staff would also need to be trained on the changes. In addition to the costs of training, IPs and their staff are likely to need to spend time adapting their work practices and processes to accommodate the change in approach to dealing with consumers and assessing the nature of their claim in an insolvency situation.
27	Do you agree that retailers would incur, at most, only a small one-off increase in legal costs as a result of the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible		Unknown. We disagree that the proposed rules in the draft Bill are not extensive. They involve a marked shift from existing law and would presumably impact a retailers business regardless of insolvency. 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.
28	In addition to familiarisation costs and legal advice, are there any other transitional costs that would arise from the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible.		Our primary concern is the overall cost impact that the proposals will have on: ● insolvency appointments - allowing consumers to acquire ownership of assets will diminish those available for realisations for the benefit of the general body of creditors. This will be exacerbated where the goods have only been partly prepaid. Debt collection is particularly challenging in an insolvency situation. ● on the finance sector - diminishing the pool of assets will adversely affect lenders security, which is already being further eroded by both the increase to the prescribed part and the imminent introduction of the secondary preferential status of HMRC. These latter two changes have already dealt a substantial blow to the finance sector and the proposed changes to the benefit of consumers is not going to sit well with lenders

			● creditors (other than consumers) - a reduced pool of realisations which will be further eroded by HMRC's secondary preferential status, will result in a further dilution of the dividend paid to creditors. This will be particularly detrimental to trade creditors, most of whom have already suffered significantly as a result of the Coronavirus pandemic.
29	We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree? Please provide qualitative and quantitative evidence where possible.		No comment
30	What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently? Please provide qualitative and quantitative evidence where possible.		See comments to Question 28 above. Most likely negative but will presumably depend upon the circumstances of each retailer.
31	What financial impact (if any) would the proposed rules in the draft Bill have upon suppliers, logistics companies and secured creditors? Please provide qualitative and quantitative evidence where possible.		See comments to Question 28 above.
32	We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree? Please provide qualitative and quantitative evidence where possible.		No. See the comments to Question 26 above. Any ownership dispute (e.g. RoT) warrants investigation which can be time-consuming. There will be paperwork to consider, which of itself is seldom substantive proof of the allegations made. Determining rights of ownership is already complicated and the proposals compound matters further by introducing several new criteria and /or options that will need to be considered. Furthermore, some of the proposed changes (e.g. goods being labelled / set aside / altered / identified by the retailer) is likely to necessitate more site visits which in themselves are time-consuming and costly, not to mention challenging during COVID-19.

33	In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible.		Transferring ownership to the consumer will leave IPs with an unenviable choice of either: ● incurring costs to deliver the goods to the consumer; or ● failing to deliver the goods and presumably a claim for breach of contract and/or other damages claim both of which options will have an adverse impact on the insolvent estate and ultimately the return to the remaining creditors
34	Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill? Please provide qualitative and quantitative evidence where possible		No. You have identified the following benefits for consumers: ● they would spend less time investigating ownership and ● a greater chance of recovering items resulting in less frustration and personal time spent It's likely that very few (if any) consumers read a retailer's terms and conditions (so as to understand their position and possible risks involved in the sale transaction). Similarly, it's rather unlikely any of the same consumers will be reading the CRA15; so modernising and/or attempting to clarify the existing language is unlikely to be of much benefit to them. In our experience, it's the IP (and their staff) who would investigate any claims of ownership of assets and not the consumer. So the proposed changes are not going to change the status quo to the benefit of the consumer. Presumably the ease of recovering goods will ease their frustration, but most creditors experience frustration in dealing with an insolvent debtor. The proposed changes simply mean that a "small consumer group" will benefit from a fundamental change to the pari passu principle that underpins insolvency law, to the detriment of the remaining body of creditors.

35	Do consultees agree that the proposed rules in the draft Bill would increase consumer confidence in online sales? Please provide qualitative and quantitative evidence where possible.		The consultation has identified that the changes are "targeted at a small consumer group" and "would not protect all prepaying consumers on retailer insolvency". Hence we would question the true impact of the proposals in the greater scheme of online sales. There could be a myriad of reasons for the increase in online retail sales that have nothing to do with consumer confidence (e.g. convenience, change in consumer habits, competitive pricing and more recently the Coronavirus pandemic).

Law Commission Consultation

Consumer Sales Contracts: Transfer of Ownership

Response from the BRC
October 2020

[redacted]

[redacted]

The BRC

- The BRC represents the majority of British retail. Our membership comprises over 170 major retailers - whether operating physical stores, multichannel or pureplay online - plus thousands of smaller, independent retailers through a number of niche retail Trade Associations that are themselves members of BRC. Our members deliver an estimated £180bn of retail sales and employ over 1.5 million people.

- Retail is an exciting, dynamic and diverse industry. It is a driving force in our economy, a hotbed of innovation and the UK's largest private sector employer. Retailers touch the lives of millions of people every day, supporting the vibrancy of the communities they operate in. However, the industry is going through a period of profound change, with technology transforming how people shop, costs increasing, and growth in consumer spending slowing.

- Retailing will continue to evolve and advance. Online retail – and its associated data - will continue to grow as retailers invest in new emerging technologies; there will be fewer stores and those stores remaining will offer new experiences.

Overview of proposal

- BRC members welcomed the opportunity to discuss the proposal with the Law Commission and have now considered the paper further.

- After careful consideration, the BRC does not support the proposed change. While we note that the consultation is about the detail rather than the policy direction, we do not believe that in this case the two can be divorced.

- The question is whether there is evidence of need for a change because if there is insufficient evidence of such a need the proposal will inevitably have unnecessary and potentially adverse consequences.

- As we understand it, the proposal has arisen from a belief that it is necessary to change the law on insolvencies because some consumers were disadvantaged in the early 2000s as a result of the failure of Farepak and Land of Leather – and in changing the law it is necessary to amend not only the priority given to consumers in any insolvency (which could have been achieved by other means) but also to go well beyond that and fundamentally alter the basis on which retailers, especially those online, trade day to day.

- The BRC does not believe that promoting a fundamental change in retailers contracts without evidence of need or evidence on the cost and consequences of the proposal can be justified when as far as we are aware there has been no incident leading to consumer detriment as a consequence of this type of issue since the mid 2000, even though – as the paper points out – there has been a rise in insolvencies since. In any event, it is unlikely that this legislation will proceed swiftly so given the situation in retail currently it could be revisited if the situation arises over the next few months.

- 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 s75 protections and the debit cards voluntary agreement, consumers are well protected. While there are limits on the range of charges for s75 – 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.

- Even if that were not the case, there are some flaws in the proposal. It indicates that contracts with conditions would still be permissible. Thus there could be a term in the T and Cs to the effect that the contract is not formed until the product has a permanent address label and not until dispatch. In which case what would have been achieved?

- There are also practical issues. If and when there is a product in the warehouse which is labelled it is then owned by the customer. In the case of an insolvency, 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? In practice, while the consumer has the right to the goods, it is a right that could well cost more to exercise than opting for the s75 or debit card rights – yet if the goods are clearly owned by the customer, then he may even forfeit his s75 and chargeback rights.

- Moreover, in many warehouses in which items are picked and then dispatched within 30 minutes, there will only be a few items that have been labelled – which would not provide a great consumer benefit as opposed to consumer frustration. Essentially the process is streamlined in many cases – the order is sent to the warehouse; the goods are picked though the picker does not know who for; the goods are packed and then labelled and sent out.

- Some contracts for furniture, for example, are contracted out – resulting in a need to unravel contracts with furniture manufacturers that have not been paid and so they do not want to part with the goods regardless. Some large businesses would be able to say they own all that has been ordered but smaller businesses would not have the firepower to insist.

- While a customer might understand the outcome and might welcome it in principle, it would in reality not help due to the number of ways that a business could, often out of necessity for its business model, and other legal obligations, circumvent the key basis of the proposal. For example, it would disrupt online businesses and their need to observe the Distance Selling Regulations and/or the Off Premises Selling obligations. There would likely be a large cost for business at a difficult time for many – potentially in the millions of pounds – if they had to change their business model.

- One interpretation of the proposed change is that a business selling food online would no longer be able to form the contract on the doorstep as now (Off Premises selling which is provided for under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013) One of the reasons for using this type of contract is because a business is required to state before the contract is formed where produce comes from. If ownership were transferred and a contract formed at the time of picking the goods and labelling them, this would be against the Regulations requiring advice to be given prior to the contract being formed. If this advice were not able to be given

at the doorstep it would likely result in core produce simply not being made available online. Several supermarkets using online operations (which has been so useful for so many customers during the Covid lockdown) base their model on an Off Premises type of distance selling. This type of sale is permitted by the Consumer Contracts regs and allows for a contract to be concluded in the physical presence of the trader and the customer at a place which is not the place of business of the trader. This type of contract does not seem to have been considered in the Law Commission proposal.

- In detail the problem is that of concluding the contract too early. For fresh food, for example strawberries (although the same principle applies to many foodstuffs) a supermarket will follow the seasons around the world. They sell British strawberries wherever possible but where necessary they will import such goods and sell them via their stores and online.

- An online grocery business concluded on the doorstep of the customer benefits both parties. The customer can choose to accept or refuse any item (including any substitutions) on delivery. It facilitates an offer of substitutions (where goods are out of stock) and enables compliance with requirements under the Food Information Regulations.

- The Food Information Regulations is based on an EU Regulation. The UK version does not go into any detail but simply seeks to make the EU version directly applicable. (EU 1169/2011). The EU regs are very complex but the point here is that certain types of information is viewed as mandatory information and must be provided **before the purchase is concluded**. This begs the question, is the purchase concluded at delivery or elsewhere, for example, where the offer to purchase is accepted?

- One of the pieces of mandatory information is country of origin. Businesses are regularly inspected by DEFRA officials and it is an offence to fail to provide this information. Currently this is provided at the time of delivery (all the required information is printed on the packaging) but it would be very expensive indeed to add this information to a website, particularly as information may be different in different parts of the UK.

- Any requirement to amend a business model would be very expensive indeed and would take a significant time to introduce.

- Insurance for goods presents another problem and customers would be left more exposed as they would already own the goods and would need to arrange their own insurance rather than rely on that of the business or courier.

- Click and collect has not been considered and this model seemingly sits outside the requirements of the Consumer Contract regulations. 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.

- Overall the wording in the draft Bill does not clearly identify what is required. The definition of specified goods requires attention. It is ambiguous.

- The Law Commission has acknowledged there is an anomaly in that most online retailers say the contract is formed on dispatch but it has then failed to address the anomaly. It is not enough to say that the T and C's should be changed to deal with this.

- Two parties are entitled to decide to form a contract when there is an offer and acceptance. Retailers operate on the basis of an offer to treat with acceptance being determined at the checkout. The anomaly is that an online business usually takes the money in advance – mainly because if it does not, it fears it will not be paid. If the Law Commission is saying a business should just change its T and C's and go on as now then there will be a big change in that when the label is put on it will not be a permanent label. It will go on as now but the contract will be accepted when a permanent label is placed at the point of dispatch – though in many cases pick/label/dispatch is so fast there is little gap in the process. At the end of the day it will lead to more confusion by tweaking T and C's and more antipathy between retailers and consumers.

The specific questions

Consultation Question 1. 6.1 Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly? Paragraph 3.39

- *No*

Consultation Question 2. 6.2 Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns. Paragraph 3.40

- *Yes. In retail terms and conditions the contract is often formed on dispatch.*

Consultation Question 3. 6.3 Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer? Paragraph 3.41

- *Potential Issues arise from a delivery company going into administration so goods should not be transferred until delivered or the delivery company not being paid so retaining the goods.*

Consultation Question 4. 6.4 Is it common for goods to be held as part of a bulk until delivery or shortly before delivery in the consumer context? If possible please provide: (1) details about the circumstances in which goods are held as part of a bulk until delivery or shortly before delivery (for example, types of retailer/goods); and (2) details of your own experiences. Paragraph 3.53 62

N/A

Consultation Question 5. 6.5 Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above? Paragraph 3.54

- *No*

Consultation Question 6. 6.6 Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns. Paragraph 3.55

Consultation Question 7. 6.7 Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract? Paragraph 3.56

Consultation Question 8. 6.8 Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers? Paragraph 3.61

- *There are issues over the definition of when the contract is made. It will not work if there is ambiguity*

Consultation Question 9. 6.9 Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements? Paragraph 3.75

- *Yes*

Consultation Question 10. 6.10 Do you have experience of contracts for the transfer of goods or are you aware of them having been used? If so: (1) what was the purpose of the contract? (2) what transfer of ownership provisions (if any) did the contract contain? Paragraph 3.83

Consultation Question 11. 6.11 Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods? Paragraph 3.84

Consultation Question 12. 6.12 On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them? Paragraph 3.109

- *Most consumers would probably rather get their money back than have to go to collect their goods or arrange for their collection from a warehouse many miles away. They could opt to withdraw from the contract if bought online but in a shop they would not have that option. If they own the goods the option of a refund may not be there for in store purchases.*

Consultation Question 13. 6.13 If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that: (1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75? (2) these fees could not be claimed under chargeback rules? Paragraph 3.110 64

- *We would not envisage consumers would normally want to take delivery*

Consultation Question 14. 6.14 Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill? Paragraph 3.122

- *It would depend on the size of the retailer. The big retailers could push back on retention if they had title - but goods in the warehouse would still be in the possession of the manufacturer and*

Consultation Question 15. 6.15 Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill? Paragraph 3.127

Consultation Question 16. 6.16 Do consultees agree that the draft Bill should come into force two months after it is passed into law? Paragraph 3.130 Consultation

- *No. If a business had to change its whole model as would be the case for some supermarkets selling food online it would require much longer to make the changes.*

Question 17. 6.17 How common it is for retailers to use terms and conditions which delay the formation of the sales contract? In particular: (1) Are they more common among online retailers? (2) Are they used when goods are ordered in-store for later pick-up or delivery? (3) Are they more common among retailers who sell certain types of goods? Paragraph 4.31 65

- *They are bound to be used more for online than in store because more often than not in store the customer takes the items straight home. In store, they would more often be used for sellers of larger items. Click and collect is an anomaly when they are ordered online for in store purchase where the transaction may be concluded in the physical presence of the retailer or following the distance selling model, on dispatch. The message is – the rules have to work in all circumstances and these delays are used for a number of reasons outlined in the preliminary comments.*

Consultation Question 18. 6.18 Where terms and conditions delay the formation of the sales contract until dispatch, is "dispatch" intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider?
Paragraph 4.32

- *Either. The logistics provider may sometimes be an owned van or it could be the Post Office, for example. Retailers will generally accept risk in the goods until delivery.*

Consultation Question 19. 6.19 We welcome consultees' views on the reasons why retailers use terms and conditions which delay formation of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative). Paragraph 4.35

- *They could, but it would be more confusing for the consumer to understand a price mistake. In any case the outcome would need to be similar or the same thereby substantially removing the reason for the change.*

Consultation Question 20. 6.20 We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts? Paragraph 4.39

- *As per Q19 above and only if the customer understands that the use of the term 'acceptance' is for insolvency purposes only*

Consultation Question 21. 6.21 Is it common for retailers to take steps to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract? Paragraph 4.42

- *Yes. Customers' attention is generally drawn to the T and C's when sending an acknowledgement. The customer is told that this is acknowledgement of an order not acceptance of the contract which will be on dispatch or similar wording.*

Consultation Question 22. 6.22 Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract? Paragraph 4.43 66

- *We note that the Law Commission, beyond its remit, makes considerable play of its view that these could be unfair terms – though these have not been challenged by the CMA as the enforcer. Efforts are made to bring this to their attention but whether they are interested or not cannot be known. We strongly believe that these are not unfair terms and fully comply with the requirements on Terms and Conditions. It is well established that in general consumers probably do not read every single term and condition every time they purchase a product or, in store, consider the implied terms and conditions. The requirement, as we understand it, is that an unusual term or condition should be explicitly brought o the consumer's attention if there is an intention to rely upon it later. Not only do we regard these terms as not being unusual but they are brought to the customer's attention and they are not intended to be relied upon in a way that could impinge on the customer other than in exceptional circumstances. One other advantage for retailers is card fraud is a significant cost and risk to retailers and that taking advance payment ensures availability of funds before the goods are dispatched.*

Consultation Question 23. 6.23 Are you aware of situations where retailers have relied on terms delaying formation of the sales contract to justify delivery times outside the scope of section 28 of the Consumer Rights Act 2015? Paragraph 4.46

- *No*

Consultation Question 24. 6.24 Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the Consumer Credit Act 1974? Are card issuers likely to take this point in future? Paragraph 4.47

- *No awareness of such action*

Consultation Question 25. 6.25 Are you aware of any other detriment caused to consumers as a result of terms delaying formation of the sales contract? Paragraph 4.48

- *No, unless a corrected pricing error is seen as detriment*

Consultation Question 26. 6.26 Do you agree that firms providing insolvency services would incur only minimal familiarisation costs as a result of the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible. Paragraph 5.9 67

Consultation Question 27. 6.27 Do you agree that retailers would incur, at most, only a small one-off increase in legal costs as a result of the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible. Paragraph 5.11

- *In legal costs agree. It is possible that consumer confusion could result in additional cost to retailer carelines.*

Consultation Question 28. 6.28 In addition to familiarisation costs and legal advice, are there any other transitional costs that would arise from the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible. Paragraph 5.12

- *Yes if a business model has to be changed as would be the case for the online sale of food in many cases the cost would be substantial, likely tens of millions of pounds, and take a considerable time*

Consultation Question 29. 6.29 We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree? Please provide qualitative and quantitative evidence where possible. Paragraph 5.24

- *Yes – it would only affect those labelled and where there was a lack of speedy delivery following labelling*

Consultation Question 30. 6.30 What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently? Please provide qualitative and quantitative evidence where possible. Paragraph 5.25 68

- *If the answer above is correct, then perhaps it is unlikely to do so as it is largely irrelevant*

Consultation Question 31. 6.31 What financial impact (if any) would the proposed rules in the draft Bill have upon suppliers, logistics companies and secured creditors? Please provide qualitative and quantitative evidence where possible. Paragraph 5.26

Consultation Question 32. 6.32 We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree? Please provide qualitative and quantitative evidence where possible. Paragraph 5.30

- *No. Much depends on the proportion of goods labelled and where they are located and whether the customer needs to go to identify and collect his goods – and whether he wants to take the risk of doing all that not knowing whether his goods have been labelled or not. 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.*

Consultation Question 33. 6.33 In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible. Paragraph 5.31

- *Costs to customers of delivery etc and costs of changing the business model*

Consultation Question 34 6 .34 Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill? Please provide qualitative and quantitative evidence where possible. Paragraph 5.39

- *These are over-estimates. Goods bought online and sent for return on withdrawal would not have anywhere to go and no money would be available to pay out. So a consumer is stuck with them anyway. As the consultation admits, in practice few goods are affected. Moreover there is no evidence presented of any difficulties from recent insolvencies which makes this look like an answer in search of a problem.*

Consultation Question 35. 6.35 Do consultees agree that the proposed rules in the draft Bill would increase consumer confidence in online sales? Please provide qualitative and quantitative evidence where possible. Paragraph

- *No. People are unlikely to notice of the change or understand the rules – and anyway they would only be of relevance to a few people. Online sales have additional protections that make the insolvency rules less relevant. There is no evidence of a problem with consumer confidence in online sales springing from the insolvencies that the Law Commission has noted have increased. Indeed there has been a boom in online sales reaching 60% of sales and more in some non food cases and up from 9% to around 15% for food. Given this has continued beyond the lockdown itself, it seems likely that consumers have full confidence and measures such as this are not necessary to boost it further.*

4 College Hill
London EC4R 2RB
Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2
mail@citysolicitors.org.uk
www.citysolicitors.org.uk

1 INTRODUCTION

1.1 This document is a response to Law Commission Consultation Paper 246, "*Consumer Sales Contracts - Transfer of Ownership*", which was issued on 27th July 2020 (the "**Consultation**") and the draft *Consumer Rights (Transfer of Ownership under Sale Contracts) Bill* (the "**Bill**"). Terms defined in the Consultation have the same meaning in this response.

1.2 The CLLS represents approximately 17,000 City lawyers, through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. The CLLS Insolvency Law Committee, made up of solicitors who are expert in the field, has prepared the comments below in response to the Consultation. Individuals and firms represented on this Committee are set out in the Appendix.

1.3 It is noted that the Law Commission is not asking questions on the underlying policy set out in its 2016 Report, as this has already been the subject of consultation. We have therefore limited our response to a number of practical points concerning the impact of what is proposed in the Consultation on both insolvency officeholders and consumers whose claims have to be dealt with by those insolvency officeholders.

1.4 While we are not commenting on policy issues, it should be noted that the exercise of considering the impact of the proposals did repeatedly raise the question of whether their potential benefits (having regard to the limited number of creditors whose position may be improved and the expectation that they would not lead to a "significant reduction in the overall level of consumer detriment")[1] may be outweighed by potential disadvantages. This would particularly be the case if the title transfer provisions set out in the Bill created potential uncertainty in relation to the circumstances in which a creditor could make a claim under Section 75 of the Consumer Credit Act 1974 or request a Chargeback.

1.5 We have kept our comments at a high level but would be happy to discuss or expand on any of the comments made in this response, if requested.

2 How problematic is the current position for both insolvency officeholders and the consumers that they deal with?

2.1 In order to put our subsequent points into context, it may be useful to summarise how insolvency officeholders would, under the current legislation, typically deal with ownership

[1] Paragraph 5.38

issues in a retail insolvency, as there is a risk that what is proposed in the Consultation and the Bill could introduce uncertainty to an area of law and practice that is relatively well settled.

2.2 The process for resolving ownership issues is, under the current legislative regime, relatively straight-forward:-

Ascertained Goods

(a) Where there is an unconditional contract for the sale of specific goods, and nothing further needs to be done to those goods, the consumer will obtain possession of those goods by virtue of Rule 1 in Section 18 of the SGA 1979;

(b) In relation to other contracts for the sale of specific goods, the remaining Rules in Section 18 require the insolvency officeholder to check whether the consumer had received notice or had taken some other specific action (in the case of goods delivered on approval).

(c) If there is no evidence that the consumer had received such notice, or taken such action, with the result that title to the goods did not pass, the insolvency officeholder will normally remind customers that they are entitled, depending on whether they paid by credit or debit card, to make a Section 75 claim or to request a Chargeback from their card issuer. In either case, the customer normally accepts their position, having been given a clear route to obtaining repayment.

Unascertained and future goods

(a) It is suggested in Paragraph 2.32 of the Consultation that "*uncertainty surrounding the meaning of "unconditional appropriation" … makes the law difficult for.…insolvency practitioners to apply*." We are, however, not convinced that this is the case, in practice, as there seems to be a general acceptance that unascertained goods are not irrevocably committed to the contract until they are in the process of being delivered.[2]

(b) This point is important, because an insolvency officeholder will rarely be in a position, on appointment, to stop either deliveries which are already under way or deliveries which have already been arranged. They will have other immediate priorities and, in any event, they would have no reason to stop the delivery of goods which were no longer owned by the company.

(c) The current default position is therefore that those consumers who have obtained title to goods on the basis that those goods have been irrevocably committed to the contract will, in practice, normally receive those goods without any further consideration or action being required on the part of the insolvency officeholder.

While the procedure for dealing with ownership issues has the benefit of being relatively quick and transparent, we are aware of cases where the current legislative regime has resulted in very unfortunate outcomes, particularly where customers have paid in advance for big ticket items using cash or a cheque.

Our experience is, however, that such outcomes were much more common a decade ago, when the administrators of retailers such as Focus DIY had to deal with customers who had paid by cheque for new kitchens and bathrooms. There are far fewer cases of this type today,

[2] As noted in Para 3.36 of the Consultation - "*Under the existing law, ownership is unlikely to transfer until the goods have been dispatched*"

as the vast majority of creditors 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 and Chargeback.

We strongly suspect, although we do not have firm evidence to support this, that the trend towards using credit and debit cards in a retail environment will be accelerated by the current pandemic, as more businesses become "cashless", and that the issue which has been identified in relation to payments in cash or by cheque will therefore become increasingly less relevant over time.

As a final point of clarification, when looking at the existing position, it is suggested that "*as insolvency practitioners owe duties to all creditors they may be inclined to err on the side of caution and instruct shop or warehouse staff not to release such property to prepaying consumers.*"[3] It is true that an administrator or liquidator may ask for further evidence before releasing goods to a customer, but they would be very aware that, as officers of the court, they must act fairly and cannot disregard the statutory framework. They would also be aware of the risk of incurring personal liability if they prevented consumers from obtaining goods which belonged to them. Erring on the side of caution could therefore result in goods being released to prepaying customers, where there was genuine doubt as to the legal position.

3 The risk of the proposals resulting in significant additional insolvency costs

3.1 Consultation Question 32 states that "*we estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency*."

3.2 The Consultation then goes on to assume that the assessment of whether ownership has transferred would "*likely involve a desk-based exercise, including a review of the retailer's records and discussions with employees in the retailer's shops and warehouses as to the status of goods they are holding*."[4]

3.3 We do not think that this correctly reflects the position, at least in larger retail insolvencies, as:-

(a) A significant number of stores may be closed immediately, if they were not trading profitably;

(b) Employees may not be kept on, either because the store in which they worked is being closed or because the administrator does not want to "adopt" their contract of employment;

(c) Key staff may decide to leave, realising that they will only continue to be employed for a limited period of time;

(d) Stock may have to be moved rapidly out of any stores and warehouses that the administrator or liquidator is not planning to use, a process which could result in labels and other means of identification being lost in transit;

[3] Paragraph 2.18

[4] Paragraph 5.28

(e) There is often a lack of accurate records, either as a result of staffing cuts to reduce overheads, operational restructurings aimed at reducing costs or just corners being cut immediately pre-insolvency; and

(f) The goods in question may have disappeared. Employees and customers may exercise "self-help" remedies, when told that the retailer has gone into an insolvency procedure and will not pay them or otherwise meet its obligations, taking the view that they will help themselves to goods of equivalent value to the amount owed to them.

3.4 Difficulties with obtaining accurate information could be exacerbated by a complex fact pattern. This can be illustrated by the example of buying a sofa from a retailer, where a sofa of the relevant type was identified at the warehouse and then labelled and set aside to be delivered to the relevant customer. The delivery schedules might then change, as the original customer could not take delivery when planned, with the result that the sofa was sent to someone else instead. Analysing the legal position under the proposed new legislation could be problematic, even if the contractual position was clear, as an administrator or liquidator would need to establish whether making such swaps was sufficiently common practice to rebut the argument that the labelling was intended to be permanent. Reaching a conclusion on this point may not be straight-forward if the relevant staff were no longer employed by the company.

3.5 It would also be necessary to deal with individual consumers one by one. In some cases, the additional time required to administer large quantities of consumer title claims might slow down the insolvency proceedings considerably, for example requiring warehouses to be maintained and staff employed for longer than is currently the case, adding significantly to the cost of the process.

3.6 The position when investigating whether title to goods, and particularly unascertained goods, had transferred under the proposed new legislation would, we believe, be analogous to the existing process followed by insolvency officeholders when dealing with retention of title claims, as this also requires a mixture of factual and contractual analysis. Our experience is that dealing with ROT claims is often a time consuming and expensive process which requires the attention of a significant number of the insolvency officeholder's staff, as well as the provision of external legal advice.

3.7 While a similar approach may be taken, there is a risk that the process for investigating whether title to goods had transferred could prove more expensive than the current process for dealing with ROT claims, as it is normally possible to do a deal with ROT creditors, thereby avoiding spending too much time in reaching a final conclusion. This would not be the case with transfer of title claims, as the position would normally be a binary one – either the customer gets their goods or they don't.

3.8 We would therefore, for the reasons outlined above, disagree with the conclusion that it would not take significantly longer for insolvency practitioners to assess ownership of goods under the proposed new legislation than it does under the existing rules in the Sale of Goods Act 1979.[5]

[5] Paragraph 5.29

4 Potential impact of the Bill on Section 75 and Chargeback claims

4.1 As noted above, and as recognised in the Consultation, the ability to make a Section 75 claim or to request a Chargeback is extremely important to consumers in a retail insolvency context.

4.2 There would be very significant concerns if what is proposed could result in consumers being worse off, either losing the ability to recover the purchase price from a card provider or finding it much more difficult to make such a claim. The rights of consumers as a whole (most of whom pay by debit or credit card) should not be prejudiced in order to protect an increasingly small minority who prepay using cash or a cheque.

4.3 In this context, the Consultation rightly asks:-

(a) How customers would be treated if they would prefer to receive a refund of prepayments rather than the goods themselves, even where ownership of goods had already transferred to them? This could be a particularly important consideration where the customer would be better off making a claim for repayment under their credit card than having to arrange to pick up kitchen units from a warehouse 150 miles away; and

(b) Whether the Section 75 and Chargeback regimes would reimburse the costs of paying outstanding storage costs, or the costs of arranging for goods to be collected from a warehouse.

4.4 We would raise the following additional points:-

(a) **Evidential requirements**: Would the consumer be required to establish the legal position as to title to the goods before making a Section 75 or Chargeback claim?

(b) **Insurance:** The Consultation provides that, as is currently the case under the CRA 2015, goods would remain at the company'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.[6] This raises the question of what would happen if the business in question failed to maintain adequate insurance cover, with the result that goods owned by the consumer were destroyed in a fire or stolen. The consumer would clearly have a (potentially worthless) claim against the company in such circumstances, but it would be essential to ensure that a Section 75 or Chargeback claims could be pursued in such circumstances.

(c) **Warehouse liens**: It is assumed that the consumer would be bound by warehouse liens in most cases, as the lien will almost always be in existence before the transfer of ownership occurs.[7] In such cases, it seems that the consumer could potentially be in a significantly worse position under the proposed new legislation, if the retailer owed a large amount to the warehouse, unless the consumer was definitely entitled to make a Section 75/Chargeback claim in such circumstances.

4.5 It is important, from the point of view of all stakeholders, that there is clarity on these points and that there is no risk that transferring title to goods at an earlier stage in the process could result in consumers having a lower level of protection under the Section 75 and Chargeback regimes than is currently the case.

---

[6] Paragraph 3.9

[7] Paragraph 3.126

4.6 It is not the role of this Committee to provide legal advice in relation to the interpretation of existing legislation, particularly where there may be a range of views, but we do note that the Consultation appears to accept that the position may not be entirely certain on a number of points:-

(a) "*Where the consumer has chosen to treat the sales contract as at an end under the CRA 2015 because of the retailer's refusal to deliver the goods, and the consumer then claims reimbursement, there is a strong argument that the claim for reimbursement is "in respect of a breach of contract… A section 75 claim should therefore be possible in this situation*."[8] [our emphasis]]

(b) *"If the consumer decides they want the goods and arranges for pick up or delivery of them, we think that the consumer could recover these costs (where they are reasonable costs) under section 75*."[9] [our emphasis]]

This uncertainty appears to be reflected in Consultation questions 12 and 13

4.7 In order to reduce the risk of their being any uncertainty in this area, we would strongly suggest that the industry code of best practice produced by the UK Cards Association, and any relevant equivalents, should make it clear that such costs should be covered by a Section 75 or Chargeback claim and that the introduction of the changes set out in the Bill should have no impact on a consumer's ability to make a claim for goods that they do not receive.

5 Potential problems which insolvency officeholders may face when dealing with consumers

It is important, in order to minimise the time spent explaining the situation to individual creditors, and thus to avoid any unnecessary resulting costs, that the rules as to ownership should be clear, consistent, fair and logical. There is a risk that certain aspects of what is proposed may appear inconsistent or unfair. Specifically:-

(a) **Apparent randomness**: As noted in the Consultation, "*It may be a source of frustration for consumers that the transfer of ownership depends on events and circumstances entirely within the retailer's control, such as labelling*".[10] This frustration may be increased by the fact that consumers, and the insolvency officeholder's staff dealing with them, may not have access to the information required to work out the consumer's legal position; and

(b) **Differences in recovery position between in person purchases and on-line purchases.** The proposals in the Consultation may not apply to on-line purchases as (i) the proposed rules will, as noted in the Consultation, apply only to contracts governed by English law[11] and (ii) even in those cases where English law does apply, many internet retailers provide in their standard terms that a contract will only be entered into once the goods in question are ready for delivery.

This may create a two tier system, particularly where a retailer has both physical stores and an on-line offering, as the creditor's position may depend on which

[8] Paragraph 3.96

[9] Paragraph 3.100

[10] Paragraph 5.37

[11] Paragraph 3.8

method they used to purchase a specific product. Creditors may not understand why this should be the case.

6 Impact on security arrangements

6.1 It is noted in the Consultation that "*the proposed rules in the draft Bill may reduce the effectiveness of the security held by the retailers' other creditors*".[12] The prejudiced parties include (i) secured lenders with a floating charge or stock financing security and (ii) suppliers relying on ROT provisions.

6.2 While it is true that, in many cases, the reallocation of risk envisaged by the Consultation will not, in itself, be sufficient to cause suppliers to change their terms of business, or to alter the terms on which banks provide new funding, it is important to consider what is being proposed in its wider commercial context.

6.3 In this respect, 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 1st 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.

6.4 Similarly, the draft Bill will have a detrimental impact on the effectiveness of ROT clauses, by reducing the time during which they would have effect. The impact of this will vary, depending on the exact fact pattern, but, once again, this impact needs to be viewed in its wider commercial context, as 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.

POINT OF CONTACT

Should you have any queries or require any clarifications in respect of our response or any aspect of this letter, please feel free to contact me.

[redacted]
[redacted]City of London Law Society Insolvency Law Committee

Other members of the Insolvency Law Committee are listed here:

https://www.citysolicitors.org.uk/clls/committees/insolvency-law/insolvency-law-committee-members/

[12] Paragraph 5.17

Law Commission - Consultation questions		CMA Response
Modernising language and clarifying/simplifying transfer of ownership rules		
Q 1.	**Do you think that the events and circumstances in proposed subsections 18 B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly?**	Q 1 – The events and circumstances as proposed in new sections 18B(3) and (4) of the Consumer Rights Act 2015 are drafted sufficiently clearly. The CMA supports the proposed changes to the rules for transfer of ownership in sales contracts as outlined in the consultation paper and draft Bill. These changes will modernise, simplify and clarify the position as to when ownership of goods is transferred from a trader to a consumer under a sales contract.
Q 2.	**Do you think that the events and circumstances in proposed subsections 18B (3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns.**	Q2 – 18B (3) is a sensible construction for goods made to order by the consumer. Clarity might be required as to what constitutes the position where 'manufacture is completed'. The proposed new rules will remove the current requirements for 'specific goods' to be in a 'deliverable state'. A 'deliverable state' has proven to be an unclear concept that left consumers at risk of not receiving ownership when the trader becomes insolvent. (As acknowledged in the consultation.) Might the condition under proposed 18(B)(3), that 'manufacture is completed' also be subject to challenges denying transfer of ownership to consumers? Perhaps an addition such that manufacture has been *'substantially'* or '*for the most part completed'* might provide more certainty - giving the consumer the option to take ownership of the goods where only relatively minor aspects of the manufacturing process have yet to be finished.
Q 3.	**Do you think that there any other events or circumstances which should result in ownership of the goods**	Q3 – The hierarchy of events by which transfer of ownership occurs is extensive and clear.

	transferring to the consumer?	In cases of insolvency the trader may have records (digital or otherwise) showing goods have been allocated specifically for certain consumers, even although the goods are not physically labelled with the consumer's name, or physically 'set aside' from other goods. Consideration should be given to adding to the list of occurrences under 18(4)(b) to reflect this? Perhaps by adding *"or the trader's records show that the goods are set aside for the consumer".*
Goods forming part of a bulk		
Q.4	**Is it common for goods to be held as part of a bulk until delivery or shortly before delivery in the consumer context? If possible please provide: (1) details about the circumstances in which goods are held as part of a bulk until delivery or shortly before delivery (for example, types of retailer/goods); and (2) details of your own experiences.**	Q.4 - The CMA offers no comment on this question.
Q. 5	**Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?**	Q.5 - The CMA offers no comment on this question
Q6.	**Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns.**	Q.6 - The CMA offers no comment on this question
Q7.	**Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract?**	Q.7 - The CMA offers no comment on this question
Q8.	**Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?**	Q8. - The CMA considers that the proposed rules in subsections 18A (4) and 18B (5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers.

		The new rules on transfer of ownership of goods to consumers will give valuable protections. It is important that these are not then capable of being excluded or varied through contractual terms imposed by the trader.
Exclusion of Conditional sale/Hire purchase/and transfer of goods, (i.e. not 'Sale of Goods' contracts)		
Q9.	**Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements?**	Q.9 - The CMA offers no comment on this question.
Q10.	**Do you have experience of contracts for the transfer of goods or are you aware of them having been used? If so: (1) what was the purpose of the contract? (2) what transfer of ownership provisions (if any) did the contract contain?**	Q.10 - The CMA offers no comment on this question.
Q 11.	**Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?**	Q. 11 - The CMA offers no comment on this question.
Interaction with Section 75 CCA and Chargeback		
Q12.	**On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?**	Q.12 - The CMA offers no comment on this question.
Q 13.	**If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that: (1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under**	Q.13 - The CMA offers no comment on this question.

	section 75? (2) these fees could not be claimed under chargeback rules?	
Retention of Title Clauses		
Q14.	**Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?**	Q 14 - The CMA offers no comment on this question.
Warehouse and Deliverers Liens		
Q15.	**Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?**	Q.15 - The CMA offers no comment on this question.
Commencement of changes		
Q16	**Do consultees agree that the draft Bill should come into force two months after it is passed into law?**	Q.16 - The CMA offers no comment on this question.
Terms delaying the formation of the contract		
Q. 17	How common it is for retailers to use terms and conditions which delay the formation of the sales contract? In particular: (1) Are they more common among online retailers? (2) Are they used when goods are ordered in-store for later pick-up or delivery? (3) Are they more common among retailers who sell certain types of goods?	Qs. 17- 25. The consultation questions numbered 17-25 relate to terms which seek to delay the formation of the contract until the goods are dispatched. In consideration of these questions the CMA would respond as follows – The CMA is aware of such terms, used in particular by online retailers, but has no evidence of how prevalent they are across online markets. • 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.
Q 18	Where terms and conditions delay the formation of the sales contract until dispatch, is "dispatch" intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider?	
Q 19	We welcome consultees' views on the reasons why retailers use terms and	

	conditions which delay formation of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative).	• 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: o claims under section 75 of the Consumer Credit Act 1974, or o 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 • It is also unlikely that terms delaying formation of the contract are sufficiently brought to consumers' attention by retailers. It is likely that consumers, having placed an order and paid - or provided payment details - would reasonably expect that they have entered into an agreement with the retailer yet under such a term the trader is left with no obligation to form the contract or deliver the goods. Even if consumers are aware of the term, it is very doubtful that they will appreciate the full significance of such a term in the absence of very clear and specific language. It is also unclear what benefits such a term provides for consumers and why a consumer could reasonably be expected to sign up to such a term even if they fully understood the consequences of doing so. • As such it is questionable whether such terms meet the principle of good faith requiring fair and open dealing with consumers or the more general principles of transparency and prominence for terms that are unfavourable to consumers. **Conditional contracts – an alternative approach** While the CMA recognises that the proposed alternative approach from the Law Commission is
Q 20	We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts?	
Q 21	Is it common for retailers to take steps to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract?	
Q 22	Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?	
Q 23	Are you aware of situations where retailers have relied on terms delaying formation of the sales contract to justify delivery times outside the scope of section 28 of the Consumer Rights Act 2015?	
Q 24	Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the Consumer Credit Act 1974? Are card issuers likely to take this point in future?	
Q 25	Are you aware of any other detriment caused to consumers as a result of terms delaying formation of the sales contract?	

		narrower in effect than terms that delay the formation of the contract, the CMA notes: (i) That such terms would still need to be fair in accordance with the provisions of Part 2 CRA 2015; and, (ii) Such terms still risk removing valuable consumer protections. It is also not entirely clear to the CMA why such terms are needed in any event. As the Law Commission notes, where there is a clear pricing error, it is likely that the law of mistake will come to the aid of the trader, while it would seem there are good arguments to suggest that the risks of insufficient stock can be manged in ways that do not see consumers bearing the whole risk given the technology available today. We also note that drafting such terms in a fair manner (if indeed this is feasible at all) will not be straightforward given, for example, we are likely to be concerned if the term gives a trader wider scope to alter the price than would be available under the applicable general legal principles absent the term; and consumers will need to understand the potential economic consequences (e.g. in terms of the protections lost or affected) for them which derive from the term. Consequently, endorsing the use of such terms (even if needed) carries a number of risks, including: o Providing false comfort to traders regarding the likely fairness of terms within this category; o Encouraging some traders to take advantage of the uncertainty and/or lack of knowledge on the part of consumers when drafting their terms. **Conditional contracts – other issues** Caution must also be taken in any suggestion that the solution lies in approval for practices that may be based on conditional terms in sales contracts where they allow retailers to knowingly –

		○ accept orders (and payments) for goods with no obligation to supply the goods at the advertised price, or ○ to only supply the goods if or when they have available stock. The Consumer Protection from Unfair Trading Regulations 2008 (CPRs) prohibits unfair commercial practices. These include – ○ misleading by action or omission in relation to the material information the average consumer needs to make an informed transactional decision. The price and availability of the product would constitute material information. ○ Schedule 1 of the CPRs also sets out commercial practices which are in all circumstances considered unfair - regardless of the effect on the consumer's transactional decision. These include 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 (known as bait advertising), or, ○ Making an invitation to purchase products at a specified price yet refusing to deliver them within a reasonable time with the intention or promoting a different product (known as bait and switch). ○ We are happy to discuss this further with the Law Commission.
Q 26	Do you agree that firms providing insolvency services would incur only minimal familiarisation costs as a result of the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible.	Q.26 - The CMA offers no comment on this question.
Q 27	Do you agree that retailers would incur, at most, only a small one-off increase in legal costs as a result of the introduction of proposed rules by the draft Bill?	Q.27 - The CMA offers no comment on this question.

	Please provide qualitative and quantitative evidence where possible.	
Q 28	In addition to familiarisation costs and legal advice, are there any other transitional costs that would arise from the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible.	Q.28 - The CMA offers no comment on this question.
Q 29	We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree? Please provide qualitative and quantitative evidence where possible.	Q.29 - The CMA offers no comment on this question.
Q 30	What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently? Please provide qualitative and quantitative evidence where possible.	Q.30 - The CMA offers no comment on this question.
Q 31	What financial impact (if any) would the proposed rules in the draft Bill have upon suppliers, logistics companies and secured creditors? Please provide qualitative and quantitative evidence where possible	Q.31 - The CMA offers no comment on this question.
Q 32	We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree?	Q.32 - The CMA offers no comment on this question.

	Please provide qualitative and quantitative evidence where possible.	
Q 33	In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill? Please provide qualitative and quantitative evidence where possible.	Q.33 - The CMA offers no comment on this question.
Benefits to Consumers		
Q 34	Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill? Please provide qualitative and quantitative evidence where possible.	Qs. 34 and 35. The CMA agrees with the Law Commission's view that the proposed new rules on transfer of ownership will offer benefits to consumers through clearer and fairer rules that are more in keeping with modern consumer transactions.
Q 35	Do consultees agree that the proposed rules in the draft Bill would increase consumer confidence in online sales? Please provide qualitative and quantitative evidence where possible.	

Consumer Sales Contracts: Transfer of Ownership

Law Commission – Consultation Paper 246

This response has been written by Dr Alisdair MacPherson, Donna McKenzie Skene and Dr Euan West, acting as a working group of the Centre for Scots Law at the University of Aberdeen.

General

We note that the intention of the Consultation Paper is to test whether the draft Bill successfully implements the recommendations you made in your 2016 Report and whether they are accessible and appropriately structured. We also note that the Consultation Paper does not ask questions on the underlying policy in your 2016 Report. Nevertheless, there are some policy issues which we think are worthwhile raising here and which should be given further consideration (in the context of this project and future projects relating to consumer protection).

Of course, recent decades have witnessed the development and expansion of consumer law. In many instances, consumers are treated differently in comparison to other parties. There is some merit in this, particularly in the context of scenarios involving a consumer and a business, as the former is ordinarily at an appreciable power, knowledge and economic disadvantage compared to the latter. Where, however, additional parties are involved, the position is more complicated and the extent to which consumers should be given special treatment is more questionable. This is especially true in the context of insolvency, where the interests of a range of different parties need to be balanced. The proposed changes effectively give priority status to consumers in the insolvency of a retailer by bringing forward the point at which ownership of goods transfers to consumers, in comparison to other creditors. This is a special form of priority, which means the property does not fall into the insolvent estate at all and is stronger protection than a consumer being merely a preferred creditor in an insolvency process. (We note that the earlier proposal to give consumers the status of preferred creditors in insolvency is not mentioned in the Consultation Paper. We would generally be unsupportive of making consumers preferred creditors as it would further complicate insolvency processes and disadvantage other creditors who may be considered as equally deserving.)

By allowing consumers to obtain ownership of goods earlier, this removes assets from the insolvent estate and means that other parties, such as floating charge holders and unsecured creditors including trade creditors and tort/delict claimants may suffer as a result. The approach taken is a functional means of giving preference to consumers ahead of other voluntary creditors and involuntary creditors. Some of these other creditors may be less able to bear losses than consumers, who may have often purchased items using excess income and who also have other mechanisms to recover losses (including using s 75 of the Consumer Credit Act 1974). The suggested changes will give rise to a more fragmented regime of law in this area, as consumer law will differ more markedly from non-consumer law.

On the other hand, we do appreciate that there is political motivation for wishing to protect consumers and the proposed reforms will do that to some extent. Bringing forward the transfer of ownership in the limited way sought is a relatively simple means of protecting consumers. In addition, consumers purchasing goods can be distinguished from other creditors, including other consumers, by virtue of the fact that they are in the process of obtaining ownership and the reforms merely help facilitate this. Giving priority to creditors who are not due to receive ownership of a particular item of property, such as tort claimants or trade creditors, is far more difficult to achieve (and would require the giving of preferential treatment in insolvency). Nevertheless, the changes proposed would generally have not protected consumers in cases such as Farepak (which we understand were a motivating factor for the Law Commission examining this area of law). This is because in such cases particular goods would not have been allocated to specific consumers until a relatively late stage and some time after most pre-payments were made. As such, this

supports the view that the proposed changes will not be considerable and suggests that not all of the issues affecting consumers in the insolvency of retailers will be addressed by the reforms, despite the possible expectations of some parties.

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.

The Consultation Paper states that the Law Commission can only make recommendations for England and Wales (para 1.16). However, it is also noted that the Consumer Rights Act 2015 applies to the whole of the UK, that consumer law is a reserved matter and that there is a hope that the UK Government will consider implementing the proposed rules throughout the UK, after engagement with devolved administrations. While we agree that the law in this area should be applied UK-wide as far as possible, it would have been advisable and preferable to have engaged with the Scottish Law Commission and the Northern Ireland Law Commission prior to producing this Consultation Paper. There are specific issues with respect to Scots law in particular that should be considered before enacting reforms in this area. This raises questions as to whether there ought to be more formal mechanisms for engagement across the law commissions if proposed reforms are likely to be introduced on a UK-wide basis.

Finally, we spotted a typographical error in s 18B(1)(b) of the draft Bill. The reference to "the contre act" should be a reference to "the contract".

Consultation Question 1.

Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly?

We generally support the different events and circumstances specified and it is useful to have a "mop-up" provision to cover scenarios that are not currently foreseen.

We do, however, have some issues with the terminology "intended by the trader to be permanent" and similar wording (see s 18B(4)(a), (b) and (h)). There are likely to be evidential difficulties in proving the intention of a retailer and there may be problems for insolvency practitioners and consumers, on whom the onus of proof would generally lie, seeking to identify and show what the trader's intention was. There could also be issues if a retailer initially has an intention to permanently allocate an item to a particular consumer contract and then, for whatever reason, this item is de-allocated and is or is not replaced with another item. This is perhaps not uncommon in business practice, if an item intended for one consumer (consumer 1) is instead re-directed to another consumer (consumer 2) who requires, or is to otherwise receive, quicker delivery. In such circumstances, the property will already be owned by consumer 1 when it is delivered to consumer 2 and could lead to problems if the retailer (or consumer 1) subsequently enters insolvency (albeit that the "seller in possession" provision in s 24 of the Sale of Goods Act 1979 could resolve some of the difficulties in this type of scenario). The other side of this particular coin is that if the retailer regards the allocation of an item to a particular consumer as subject to reversal in certain circumstances, then it would be at least arguable that the intention would not be for the allocation to be "permanent".

The relevant wording in the provisions is especially important as these rules are mandatory and will apply in lots of cases. Attention should therefore be given as to whether the term "intended" should be removed (so that there is perhaps just a reference to "permanent allocation"). It is also worthwhile to consider whether the term "permanent" should be replaced with another term, e.g. the allocation of a good to a particular contract is to be "unequivocal" or some other suitable term (rather than permanent).

With all of this in mind, attention needs to be paid as to how the proposed wording will accommodate a range of business practices, in relation to how goods are allocated to particular contracts.

Consultation Question 2.

Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns.

See our answer to question 1 above.

Consultation Question 3.

Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer?

We have not been able to identify any. The "mop-up" provision will cover particular events and circumstances not currently foreseen.

Consultation Question 4.

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

If possible please provide:

(1) details about the circumstances in which goods are held as part of a bulk until delivery or shortly before delivery (for example, types of retailer/goods);

and

(2) details of your own experiences.

As academic lawyers, we do not have particular knowledge of this.

Consultation Question 5.

Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?

It is unclear how many cases there are likely to be involving this. As such, it may be questioned whether it is worth changing the law on this point. We do not, however, have any strong views on the point and we can see some value in providing more clarity in the consumer context. Nevertheless, it may be questioned why consumers should be treated differently regarding the owning of a bulk in common.

Consultation Question 6.

Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when coownership of a bulk transfers in a consumer context? If so, please explain your concerns.

This is unknown to us. But we note at para 3.50(2)(d) the use of the terminology "intended by the trader to be permanent" – for this, please see the points we made above regarding such terminology.

Consultation Question 7.

Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract?

No and there is a mop-up provision in any event.

Consultation Question 8.

Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?

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. However, a result of the change is that there will be less freedom among the contracting parties regarding when ownership should transfer.

There are certain issues with removing the possibility of retention of title arrangements where there is e.g. non-payment by a consumer. Retailers will have to be particularly careful about delivering goods to consumers where full payment has not been made, as their lien right is lost upon the loss of possession and consumers will have ownership of the property. As such, if the consumer became insolvent the retailer would only have an unsecured claim. More broadly, it is unclear to what extent the change will affect the practices and procedures of retailers.

Consultation Question 9.

Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements?

We agree that the rules are not appropriate for such agreements. The nature of those transactions means that the property is not to transfer until later (if at all).

Consultation Question 10.

Do you have experience of contracts for the transfer of goods or are you aware of them having been used?

If so:

(1) what was the purpose of the contract?

(2) what transfer of ownership provisions (if any) did the contract contain?

No.

Consultation Question 11.

Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?

It would be useful to have clarity as to whether the provisions would apply (there is a lack of clarity under the current law regarding the application of the rules to such transactions). If the rules are considered to apply in the same way to transfer of goods contracts already, then perhaps this should continue to be the case. An alternative approach would be to consider that these contracts are less commonplace and parties should have more freedom to enter into the form of contract that they wish.

Consultation Question 12.

On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?

Clarity is necessary regarding the status of the ownership of the property. If there is a chargeback refund does ownership of the property revert to the retailer and, if so, when? If it does not, there could be problems if, for example, the consumer became insolvent. The retailer may have a lien right (if they have retained possession) but the position is messy (especially if another party has obtained possession) and ownership should be dealt with directly.

Consultation Question 13.

If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that:

(1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75?

(2) these fees could not be claimed under chargeback rules?

Insolvency is about allocating losses and risks. It could be argued that consumers should not be protected from all risks that may arise. Protecting consumers leads to other parties having to bear more loss and risk.

Consultation Question 14.

Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?

In the Consultation Paper there is a lot of focus on suppliers providing goods on retention of title allowing for transfer in the ordinary course of business. Some attention should also be given to situations in which there are restrictions on such transfers. In light of the proposed changes, suppliers may make retention of title arrangements more stringent or could impose other contractual conditions. Suppliers could change practices by, for example, not supplying goods until payment is made due to retention of title being compromised. The changes may therefore affect retailers' supply chains, leading to possible knock-on implications regarding the provision of goods to consumers and cashflow for retailers.

Consumers can obtain ownership if the retailer is in possession, but if the supplier or another party is in possession, then the position could be different. The proposed change simply involves a shifting of the time when ownership transfers but the consequences of that are a matter for debate and are not wholly certain.

Consultation Question 15.

Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?

Yes. The same general approach applies in Scotland regarding how liens would operate in relation to consumers. For the Scots law position, see A J M Steven, *Pledge and Lien* (2008), especially paras 13-35ff.

We note that the Consultation Paper does not specifically pick up on the landlord's hypothec in Scotland (a tacit security interest that a landlord has in the tenant's moveable property held on the landlord's premises). This is understandable as the Law Commission is making recommendations for England and Wales. However, if changes will be UK-wide, then this needs to be considered as it will have an impact in Scotland. If consumers acquire ownership before the landlord's hypothec arises then the hypothec will not affect the consumers or their property. If consumers acquire ownership after the landlord's hypothec arises, then they are also unlikely to be affected as they will be protected as good faith acquirers: the property "ceases to be subject to the hypothec upon acquisition" by the acquirers (Bankruptcy and Diligence etc (Scotland) Act 2007, s 208(5)). Yet if we take a broader view, it is possible that the changes will have an impact on the conditions that landlords seek to impose upon their tenants regarding business practices (due to the diminishing of the protection provided by the landlord's hypothec).

Consultation Question 16.

Do consultees agree that the draft Bill should come into force two months after it is passed into law?

Two months is very quick, especially in the current circumstances. In addition, 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.

A period of at least six months would be preferable.

Consultation Question 17.

How common it is for retailers to use terms and conditions which delay the formation of the sales contract?

In particular:

(1) Are they more common among online retailers?

(2) Are they used when goods are ordered in-store for later pick-up or delivery?

(3) Are they more common among retailers who sell certain types of goods?

We do not know.

Consultation Question 18.

Where terms and conditions delay the formation of the sales contract until dispatch, is "dispatch" intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider?

We do not know.

Consultation Question 19.

We welcome consultees' views on the reasons why retailers use terms and conditions which delay formation of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative).

We do not have practical knowledge of this.

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).

Consultation Question 20.

We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts?

According to what has been set out in the Consultation Paper, it seems so. Compelling parties to use e.g. conditional contracts instead may be questionable and a step too far. It would be better to just make clear that doing this is possible.

Consultation Question 21.

Is it common for retailers to take steps to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract?

We do not know. From personal experience, we do not recall ever having a term brought to our attention. However, it is unclear whether such terms and conditions were present or whether they were absent.

Consultation Question 22.

Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?

No, we very much doubt it. And see our previous answer above.

Consultation Question 23.

Are you aware of situations where retailers have relied on terms delaying formation of the sales contract to justify delivery times outside the scope of section 28 of the Consumer Rights Act 2015?

No.

Consultation Question 24.

Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the Consumer Credit Act 1974? Are card issuers likely to take this point in future?

We do not know on either count.

Consultation Question 25.

Are you aware of any other detriment caused to consumers as a result of terms delaying formation of the sales contract?

No. But it may become a more common practice due to the changes proposed. This may, in fact, harm the interests of consumers.

Consultation Question 26.

Do you agree that firms providing insolvency services would incur only minimal familiarisation costs as a result of the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

It is perhaps overly optimistic to consider that familiarisation costs will be minimal. There are various costs involved such as training of staff, changes to systems and documents and the costs related to working out the interaction of the new rules with e.g. retention of title and the landlord's hypothec.

There is value in the legal clarity that the change will bring. However, the novel, different rules for consumers will potentially cause some consternation for insolvency practitioners in the insolvency process, who will usually be seeking to reach a pragmatic outcome. In addition, removing goods from the insolvent estate or potentially extending the time involved in determining the exact composition of the insolvent estate (as to which see the comments in our answer to question 32 below) makes achieving the objectives of the "rescue culture" inherent in UK insolvency law more difficult.

Consultation Question 27.

Do you agree that retailers would incur, at most, only a small one-off increase in legal costs as a result of the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

This may be true initially but if there are disputes and debates later there may be more costs. With any new law there is likely to be some litigation to resolve disputed meaning with respect to the wording of provisions. To suggest that there will only be a small one-off increase in legal costs is perhaps over-optimistic in the short-to-medium term. However, the clarity may be beneficial in the longer term.

Consultation Question 28.

In addition to familiarisation costs and legal advice, are there any other transitional costs that would arise from the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

Various parties, such as landlords, suppliers and other creditors may make changes to practices, processes, systems and agreements etc. There are (unknown) costs involved in such steps.

Consultation Question 29.

We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree?

Please provide qualitative and quantitative evidence where possible.

We do not know the answer to this.

Consultation Question 30.

What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently?

Please provide qualitative and quantitative evidence where possible.

Floating charge holders are most obviously affected here. It is their security that will usually cover the goods that the consumer is acquiring. (However, it should be noted that, at least in some circumstances, a floating charge would encompass the retailer's lien right over goods that have been sold.) There are also other recent and upcoming changes negatively affecting floating charge holders, namely the increase in the maximum limit of the prescribed part from £600,000 to £800,000 (since 6 April 2020) and the partial reintroduction of Crown preference (from 1 December 2020). These changes (especially cumulatively) may impact upon the willingness of lenders to provide finance and may affect the terms upon which they are willing to provide it e.g. it may cause them to include more stringent terms and conditions relating to the provision of finance (relating to, for example, monitoring, covenants and/or business practices, which will push up the borrowing costs to be borne by the retailer). This is especially true where changes will have a significant effect for a particular retailer or industry (e.g. see para 5.22). As such, different types of retailers are likely to be affected in different ways.

Under Scots law, it is generally not possible to create non-possessory fixed security. In order for a secured creditor of the retailer to have priority over a consumer acquiring goods, there would need to be a pre-existing fixed security over the property (in English law, if this was an equitable security, the consumer would only have priority if they were a good faith acquirer for value). However, such security will usually not be available to a creditor in Scots law. This is true not only for the goods being transferred (for which it may be unusual but not unheard of to be covered by fixed security in English law) but also for alternative items of property over which the retailer may grant fixed security. Consequently, retailers in Scotland may suffer from the changes more than retailers in England with respect to the raising of finance. This further incentivises the need for the Scottish Government to press forward as soon as possible with reforms to the law of moveable transactions to, inter alia, enable non-possessory fixed security.

Consultation Question 31.

What financial impact (if any) would the proposed rules in the draft Bill have upon suppliers, logistics companies and secured creditors?

Please provide qualitative and quantitative evidence where possible.

See our answers to the points above. Attention should also be given to unsecured creditors in Scotland who seek to do diligence (this is the equivalent of execution and distress in England). By carrying out diligence, the relevant creditor obtains an interest in property. The diligence to be used for goods would be attachment or arrestment, depending upon who holds the property at the relevant time. If, however, the consumer owns the property, the retailer's creditors will be unable to successfully do diligence. If the consumer only acquires ownership after the diligence is done, then the consumer will be subject to this security interest. Consideration will need to be given as to whether this is the intended approach. Diligence creditors can often be vulnerable creditors and may deserve protection as much as consumers. Furthermore, creditors who might seek to do diligence (e.g. trade creditors) may wish to review their practices as well, which could lead to increased transaction costs (at least for a time).

Consultation Question 32.

We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree?

Please provide qualitative and quantitative evidence where possible.

The greater clarity could save some time; however, given the responses to the original consultation from e.g. R3 and PWC, and as a result of the points we note above, there are likely to be some negative time implications too. There will be more need to consider individual goods, in comparison to the current position, where property will generally be part of the insolvent estate and can be dealt with in a more collective way. To some extent, the consequences will depend on the type of business involved.

Consultation Question 33.

In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

The only ongoing costs we can think of are those we have already referred to, such as costs for dealing with disputes and litigation etc.

Consultation Question 34.

Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill?

Please provide qualitative and quantitative evidence where possible.

We cannot think of any others. If there is increased clarity, not only will consumers benefit but a range of other parties will too.

Consultation Question 35.

Do consultees agree that the proposed rules in the draft Bill would increase consumer confidence in online sales?

Please provide qualitative and quantitative evidence where possible.

We are unsure of what the effect will be. In many instances it will have no impact unless and until something goes wrong.

This is a response to the Law Commission's Consultation Paper on 'Consumer Sales Contracts: Transfer of Ownership' (Consultation Paper 246, referred to below as 'CP 246' or 'the Law Commission's consultation paper').

It has been written by Dr Magda Raczynska and final year LLB students at UCL Laws: Thomas Bains, Lili Feher, Julia Juchno, Chak Lau, Moh Moh, Haeon Oh, Yanusika Srithar, Radu Suciu, Ming Hao Tay, Adam Westlake, Alanna Yung.

The work was split between different members of the team, and the authorship of the answers to the questions is indicated below. Apart from the answers authored solely by Magda, the answers were provided by individuals named next to each question number, under Magda's guidance, which is indicated by 'MR' after the name of the author.

Introductory Comment (Magda Raczynska (MR))

The draft Bill included in CP 246 is set out to replace the rules in the Sale of Goods Act 1979 that govern when property passes (ownership is transferred) to the buyer. The Bill does so by providing mandatory (as opposed to default) rules when ownership passes to the buyer. This means that Consumer Rights Act 2015 would provide a new principle that in consumer contracts ownership passes at a time identified in the statute, and not in contract.[1] This would be a substantial departure from the position under the general law, whereby parties to a contract of sale are free to decide when ownership passes to the buyer (except that no ownership can pass until goods are ascertained). In the consumer context, such a departure is justified in many cases because in reality consumers and retailers do not generally need to adjust the time at which property is to pass in the same way as commercial parties might (one exception is a contract of sale with a retention of title clause, as discussed below).

The clarification of the law on passing of property for consumers would be welcome, and there is some logic to include it in one statute (Consumer Rights Act 2015). But, as can be seen below, there are some reservations as to the shape of the rules as to when property is to pass.

The main concern about the Bill is whether it addresses the consumer detriment, namely whether it offers desired protections in situations where a consumer prepays for goods they do not under the current law come to own and the trader goes into insolvency. It is suggested that fixing the time of transfer of ownership to the consumer earlier than under the current law does not solve the issue. Alternative solutions are suggested and their pros and cons briefly considered.

The Bill and CP 246 use the language of 'transfer of ownership' but in this response 'passing of property' and 'transfer of ownership' are used interchangeably.

In this response, references are also made to Law Commission's Consultation Paper on 'Consumer Sales Contracts: Transfer of Ownership' (Consultation Paper 221) referred to as

[1] The mandatory rules would be introduced by way of an implied term – under the proposed s 18A(3) of the Bill – but since this term cannot be departed from by the parties its effect is equivalent to a mandatory rule in law.

'CP 221') and Law Commission's Report 'Consumer Prepayments on Retailer Insolvency' (2016) Law Com No 368, referred to as 'report No 368'.

Other abbreviations used in this response are:

CCA - Consumer Credit Act 1974
CCRs – Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013
CRA - Consumer Rights Act 2015
SGA - Sale of Goods Act 1979

Question 1 (Yanusika Srithar, MR)

Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly?

Generally, the provisions in the draft Bill make it clearer to the reader when ownership is transferred, and are helpful for consumers, but there is also some scope for refining the language further.

The issue with the current law, we suggest, is not with its lack of clarity (we think the law is clear) but rather with the complex language and the flexibility it captures. If this flexibility is not needed in the consumer context (and we think it is not), it is possible and desirable to simplify the language.

The terms "unascertained goods" and "ascertainment" in the Sale of Goods Act 1979 (SGA) are not used in common parlance. By replacing them with "goods not agreed upon or identified at the time when contract is made", the language has become more accessible to laypersons such as consumers. Nonetheless, this process of "ascertainment" has been provided with satisfactory judicial interpretation, dealing with essentially the same idea as the proposed wording.

The SGA's current use of the phrases "unconditional appropriation" and "deliverable state" in section 18 rule 5, which the Law Commission intends to replace, although again not common in everyday speech, have proven to be useful indicators in determining the moment of ascertainment in commercial contracts. It is clearly understood that goods are in a deliverable state when they are in such a state that the buyer would under the contract be bound to take delivery of them and these goods must also be unconditionally appropriated to the contract. According to Pearson J in *Carlos Federspiel & Co v Twigg* [1957] 1 Ll R 240, 255 "the parties must have had, or be reasonably supposed to have had an intention to attach the contract irrevocably to those goods so that those goods and no others are the subject of the sale and the property of the buyer". The case law has made it clear that this is "the last act" the seller must do before surrendering control over the goods. The Law Commission's concern is that there is no clarity as to when this "last act" occurs, making it difficult for consumers to understand and for insolvency practitioners to apply. However, this is an inevitable result of commercial reality, where each contract is different and

therefore this "last act" would naturally vary on a case-by-case basis, whether it may be packing, labelling, or loading goods.

The Law Commission (at paras 2.28-2.31 CP 221) contrasts the cases of *Carlos Federspiel* with *Aldridge v Johnson* (1857) 7 El & Bl 885 to demonstrate how the case law's interpretation of "unconditional appropriation" is hard to reconcile; while the "last act" in the former case had to be actual delivery, in the latter case, constructive delivery (filling the sacks) was accepted as unconditional appropriation. However, this juxtaposition is not a convincing illustration of lack of clarity of law since in *Carlos Federspiel* the FOB terms of the contract highlighted that the seller had to actually deliver onto the named ship and therefore it was fair enough that the court interpreted that the parties intended for property to pass upon shipment. Ultimately, the question of ascertainment hinges on the court's construction of the particular contract.

The issue for consumers, we think, is not that the law is unclear but that the language under SGA 1979 offers flexibility that is simply not needed, and therefore could be simplified. A list of examples of common practices of ascertainment does to some extent offer simplification and transparency for the traders, consumers or advisers. However, some of the circumstances can also be clarified further.

18B(3):

This event covers retailers who make to order, where products are not manufactured until a confirmed order and "specification" for products is received and this specification is "agreed between trader and consumer". We see this practice in the home improvement sector where the retailer would produce a unique item of furniture (that is out of the retailer's general stock) in accordance with the customer's specifications. This may be a sofa of a specific style and fabric or a made-to-measure window fitting. The question here is whether this "specification" agreed between the trader and customer requires a degree of particularity and uniqueness of the resulting (manufactured) goods? The specification should ideally comprise particular details given by the consumer so that the goods manufactured are "those goods and no others are the subject of the sale"; this is a satisfactory identification and ascertainment. This means that a consumer ordering a sofa from a retailer with a particular type of fabric chosen from a catalogue would not be giving specifications sufficient to identify goods to the contract once they are produced, and so this would not be 'manufacture… to a specification agreed…' for the purposes of s 18B(3) of the Bill. If we take the case of a bespoke furniture retailer accepting a specification which is as simple as a "red polka dot" sofa, using the example from the 2016 report (para 9.68 of the report No 368), it may be that other customers order the same design. What if more than one of these identical sofas were delivered together? Would it therefore make sense that ownership is passed on the moment that manufacture is completed? This is perhaps why the "specification" agreed between the trade and consumer should demand a measure of particularity and detail to make the item truly unique.

It should also be added that the contract and terms and conditions of the retailer can also undermine this provision. These make-to-order retailers tend to deal with expensive products such as unique furniture or customised computer servers. As already mentioned by the Law Commission (at para 4.9 CP 221), it is common practice for such retailers to rely

on consumer deposits as a source of working capital to fund the resources and manufacturing process and also to include in their terms and conditions that no contract is formed until the goods made have been dispatched. Therefore, it seems this provision is not very helpful to consumers and unlikely to apply in practice.

Sometimes the line between manufacture-according-to-specifications (proposed s 18B(3)) and an alteration (s18B(4)(c)) might be hard to draw. Alteration covers situations where goods already exist in the retailer's stock, but the retailer has agreed to do something further to that standard good. It could also include cases of accession of a new thing to another (the principal thing). Examples of this include curtains that are to be shortened or the completion of an inscription on a ring which then becomes an intricate part of the ring (at para 3.28 CP 221). In some cases, the difficulty of identifying what constitutes alteration will not matter because whether the process is one of alteration or making-to-specification, the completion of that process will result in transfer of ownership, and the structure of the provisions suggest that alteration of goods is seen as the broader process (words at the start of subsection (4) '[i]n any other case'). In other cases, however, more clarification on what exactly constitutes "alteration" is needed. Taking the example of bespoke window fitting, the trader checks that the consumer has standard window openings and simply assembles parts that have been manufactured before? Even though specific measurements may be taken from the consumer, the trader may supply or compile a best or nearest fit product from stock parts or complete parts. It may be hard to determine whether the retailer is truly manufacturing or merely "altering" and compiling existing goods. The moment of manufacture could be seen as completion of the process of putting the parts together but 'alteration' could mean completion of additional work needed, eg, sanding corners off in order to fit the frame in.

S18B(4):

Sections 18B(4)(a) and 18B(4)(b) both include practices of labelling and setting aside the customer's goods in "a way that is intended by the trader to be permanent". Therefore, the principle of "unconditional appropriation" is still underlying these circumstances and deals with concerns that labelling may be temporary and changed by the trader. However, the difference with the operation of the current s18 rule 5(1) SGA is that while under SGA, unconditional appropriation by the seller (or buyer) must receive assent from the buyer (or the seller), under the proposed draft wording of s 18B(4), the identification of the goods is a matter of the seller's unilateral intention. In practice, in commercial cases, unconditional appropriation is often done by the seller (or the seller's agent) and the buyer's assent is implied from the contract, so it is in fact the seller's act that identifies the moment when property (ownership) passes to the buyer and establishing whether the intention is unconditional is a matter of parties' common intention. The proposed new s18B(4) could make clearer how the intention is to be established and when the trader's intention is thought to be permanent. What exactly is meant by "permanent" is unclear. On one hand, it does not seem to establish anything different to "unconditional". On the other hand, "permanent" does not provide the reference point to help establish whether intention is "final" – by contrast to "unconditional appropriation" where the contract between the parties serves this function. The consultation paper does not provide much guidance on this; it does say that this permanent intention depends on the retailer's practice (at para 3.26 CP 246). Therefore, it is presumably only the trader's objectively manifested intention

that counts but it would be useful to identify means by which it is to be established, for example by referencing 'retailer's practice' in the Bill, but also considering other factors (eg industry practice if retailer's practice not established).

18B(4)(d):

The event deals with situations where consumers are "told by the trader that goods bearing a unique identifier will be used to fulfil the contract". The Law Commission provides the example of the retailer emailing the consumer with the IMEI number before the smartphone they have contracted for is dispatched (at 3.29 CP 246). However, this invites clarification on the issue of the moment of communication and the exact moment when property is passed. Is it the moment the email or message is sent by the trader or, as the provision states, the time the consumer is actually "told" and made aware? This needs to be made clear.

18B(4)(e):

In terms of 18B(4)(e), does the examination of the goods by the consumer have to be physical or can it be an online examination, for example with the help of detailed images, videos or a written description of the retailer's product on eBay for example? Although this is not explained in the 2020 Consultation paper, seeing that "physically" was removed from the original draft provision in the July 2016 report (at 9.65 report No 368) which demanded actual physical examination and acceptance of the goods, it seems that the modified subsection in the Bill intends to cover virtual examination. In its explanation of this provision (at 3.30 CP No 221) in the consultation paper, the Law Commission highlights that s9 of CRA continues to apply, so if the consumer examined the goods before making the contract then a defect which would have been revealed by the examination will not be grounds for finding the goods to be unsatisfactory. In view of that, it makes more sense that there is a distinction made between a physical examination and virtual examination; a defect can much more easily be expected to be found in the former case.

18B(4)(f):

What if the goods are delivered to the carrier mixed with other goods? It should be made clearer that the goods are delivered on their own to the carrier in order to be ascertained and property to pass.

18B(4)(h):

Despite covering analogous situations, this sweep-up limb essentially means that the courts will still have to interpret appropriation from the circumstances of individual cases. The process of ascertainment appears to be still the same as it is currently under the SGA. The question of ascertainment is still subject to the court's construction, presumably of the relevant contract. This is problematic, especially, as the identification is to be permanent, and how this is to be established is unclear for reasons explained earlier,

An additional issue with this subsection is that it could potentially be used as the basis for transfer of ownership before the events specified in (a)-(g) occur, eg before a label with consumer's name is attached. If such an open-ended subsection is to remain, it should be

made clearer that it is to apply only if the other subsections do not apply, and not in competition with them.

In conclusion, although this list of provisions indeed does provide examples of common retailer practices , some of the phrasing in the provisions may cause confusion in practice, especially with the points on the seller's intention and what is meant by "permanent".

Question 2: (Thomas Bains, MR)

Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns.

We dealt with the question of unintended consequences arising from the wording of ss 18B(3) and (4) in response to Question 1. The points below relate to the general impact on the retailer of ownership passing sooner in consumer cases than under the current law.

The first point concerns the passing of risk. The consumer buyer is not worse off if ownership in the goods passes sooner rather than later (or at least sooner than in commercial cases). In commercial cases the passing of property could matter to the buyer because risk passes when property passes, unless the parties agree otherwise (s 20(1) SGA). However, in the consumer context, passing of risk is not dependent on transfer of ownership (s 29 of CRA provides that risk will not pass to a consumer purchaser until the goods are in the physical possession of the consumer). This means that if goods become damaged after they were, eg, labelled with customer's name by the retailer with intention permanently to label (which under the draft s 18B(4)(a) would pass ownership to the buyer), the seller is still liable to deliver non-defective goods to the buyer. In practice, this means that the retailer bears the loss suffered. To recover this loss, they may wish to sue the tortfeasor. However, if the seller does not have a proprietary or possessory interest in the goods at the time the tort was committed, they cannot make a claim for loss or damage to property in tort of negligence (*Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL)). This issue is not likely to arise often as the seller in possession of the goods will likely become a bailee of the goods and will have an independent action to sue the tortfeasor (*The Winkfield* [1902] P 42).

Another possible issue that the retailer will need to consider is the risk of conversion of the goods once ownership in them passes to the buyer. Given that ownership might pass earlier than under existing law, the retailer might wish to adjust their practices.

Question 3 (Thomas Bains, Yanusika Srithar, MR)

Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer?

One point that should be included in s18B(4) of the Bill relates to bulk (exhaustion of bulk), as discussed below[2], if provisions on sales out of bulk are to continue to apply in consumer context.[3]

Besides this, we think there are two points that should be included in the CRA 2015 if it is to be a comprehensive consumer protection regime includes ownership issues. They are not strictly on the topic of *transfer* of ownership but they relate to proprietary protection of the consumer. The first relates to situations where consumer supplies part of the goods for manufacture into or attachment to a different think. The second relates to an associated problem of location of ownership in the case of returned goods, which we think the CRA 2015 should also deal with. We expand on each below.

Products out of consumer's goods

Sometimes, the customer might want the trader to manufacture goods to specification using consumer's goods, eg by affixing customer's own rims onto the body of a car that the trader sells, or by providing own upholstery fabric for a sofa they wish to buy so that the trader is yet to manufacture. In both examples, consumer's goods become combined with other goods (car and sofa, respectively). When the joinder takes place, consumer's goods become part of other (dominant) goods under the doctrine of accession (*Appleby v Myers* (1867) LR 2 CP 651, where bricks built into the wall were held to become part of the wall), or part of a new thing, a product, in the process of manufacture (*Clough Mill Ltd v Martin* [1976] 1 WLR 676). In both situations, consumer loses their ownership of the component parts (rims, fabric) at the moment that incorporation (accession, manufacture) occurs. Magda Raczynska in *The Law of Tracing in Commercial Transactions* (OUP 2018) explains this as follows, at [2.07]:

> 'In some situations, the law looks at things as if they no longer exist even though they are not actually destroyed. Deemed destruction of an asset results from deemed destruction of proprietary interest, by virtue of application of various legal doctrines… [which include] … accession to the dominant asset [and] the process of manufacture [footnote omitted].'

The doctrines of accession and manufacture pose a risk for the consumer if the trader goes into insolvency before the consumer acquires ownership in the new goods (car, sofa). The concern is not only that the consumer might lose their pre-payment but also lose ownership in their own goods that went into the new goods. This is because there is likely to be a gap between the point in time when goods are deemed to be destroyed and completion of manufacture-to-specification or alteration for the purposes of ss18B(3) or 18B(4)(c) of the draft Bill, respectively (eg because the completion of the processes of manufacture-to-specification or alteration is likely to be a matter of internal production policies).

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

[2] See the answer to Question 7.
[3] See the answer to Question 6.

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.

Returned goods

The consultation paper does not address the cases when the consumer decides to return the goods, whether by exercising the right to return under the Consumer Protection (Distance Selling) Regulations 2000/2334 ('Distance Selling Regulation') or under the terms of the contract with the trader. 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.[4]

Moreover, the timing of the passing of ownership in the case of return can cause issues. For example, online fashion-retailers, in accordance with the Distance Selling Regulation, accept returns within 14 days of the goods being received by the purchaser and sometimes their return policy does not require the buyer to even inform the retailer of an intention to return. All that is needed is for the customers to print a returns label at home and send the item back. So, at what point does ownership transfer back to the retailer? It would be useful to identify the moment when ownership passes to the retailer, and we think it should be easily identifiable, eg when the goods are dropped off at a courier's collection point at or collected by a courier.

NB

There is a typo in the last line of section 18B(1)(b): it should refer to 'contract' rather than 'contre act'.

Question 5 (Chak Lau, Moh Moh, MR)

Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?

We do not think that s20A(1) should be included in SGA 1979 for a range of reasons. First, the inclusion of a provision concerning consumer contracts in the statute that would otherwise govern commercial parties would compromise the Law Commission's own project to try to contain all ownership provisions relating to the consumers in one statute.

[4] See the answer to Question 33.

Second, we are not sure whether the practice of traders selling to consumers is to keep goods in bulk. Based on our anecdotal understanding of how supply chains work, it seems to us that traders selling to consumers tend to keep a circulating stock of goods.

Third, we are concerned about the complexity of law that inclusion of provisions about sales ex-bulk would bring in the consumer context for no good reason. Bulk provisions were introduced to SGA to help deal with situations where goods are transported, typically shipped, or where they are stored in a warehouse and out of that quantity sold to the buyer. We do not think that it is the practice in relation to consumers, and the introduction of s 20A(1) could additionally complicate the law governing consumer sale of goods rather than simplify and clarify it for consumers.

Fourth, the operation of ss20A and 20B yield odd results in practice. If 5 people have ordered 5 similar ('interchangeable': s 61(1) SGA) items out of, say, a delivery van ('a defined space or area') such that this would constitute bulk, and each person agreed to buy out of this bulk, but the liquidator only finds 4 of those items, each individual is only entitled to ⅕ of the bulk. It is reasonable to imagine that consumers are interested in obtaining the item they ordered or the original price they paid, rather than a fraction of the sum they paid for it. The same is true if the sale is of eg 0.5 tonnes of gravel out of 2 tonnes of gravel held on a truck: if the quantity of the gravel is reduced to, say 1 tonne, the consumer is unlikely to be satisfied with 0.25 tonnes of gravel, which would be the result at least in some cases. It seems much easier to protect consumers using the existing protections (s 75 CCA and chargeback) and where these are not available to give the consumer a preferential claim for the prepayment made.[5]

The following are our thoughts on each of the subsections under the proposed provision.

2(c) [listed in para 3.50 in the Law Commission's consultation paper]:

First, there are many different ways that goods can be earmarked, and out of all these ways it seems arbitrary to define ownership via the physical space goods are in. A spatial requirement is not specific enough. It also seems to produce odd results when it is taken into account that "bulk" is defined (s61(1) SGA) as "a mass or collection of goods… contained in a defined space or area". The proposed section 2(c) would seem to produce a result whereby the seller would identify the bulk as eg gold stored in a vault, but there would be no agreement between the trader and consumer that the goods (the gold) are to come from *that* bulk *from* which the buyer agrees to buy the goods. Therefore, the seller would not breach its duty to deliver gold of the description corresponding to contract if it supplied the goods from a different vault.

Second, and linked with first, this provision is also circular: it says that the "bulk is identified" if "the trader [...] identifies [...] the defined space or area [ie what is needed for there to be any bulk in the first place]".

[5] See the answer to Question 34.

Third, whilst this provision needs to be read in conjunction with s20B, another difficulty is that it is undefined is how long the goods need to be kept in the space identified in the contract, before it can be deemed to be identified. What if the item is moved out of that defined space or area?

Question 6 (Chak Lau, Moh Moh, MR)

Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns?

2(c) may be problematic with large retailers who maintain a changing stock of items ordered in bulk. Where the bulk has been defined by the trader and then moved to accommodate another, more urgent consumer, the passing of property had already taken place according to 2(c). The issue stems from the bulk in a particular space being a description of position, which requires a temporal element to its definition which is temporary. Goods that form part of a bulk are of a fungible nature ('interchangeable': s 61(1) SGA), and as such are replaceable for and between consumers.

2(e) may be problematic with traders or retailers. The consumers agreement that the goods of the contract form part of the bulk should not automatically convey rights to the bulk. Traders and retailers may, in practice, deliver goods not currently part of fungible bulks. This creates a disconnect between what is believed to be the goods forming the part of the bulk and what does become the goods forming part of the bulk. The bulk itself may fluctuate.

2(e) may also be problematic for display bulks. For example, the ordering of sand for a sand pit. The consumer may examine a bulk of sand and agree that the goods form part of the sand. However, it does not match commercial reality that the trader must then take the goods from only that bulk of sand. A bulk is, often, by its nature homogenous or fungible. This characteristic of a bulk is commercially beneficial to both the buyer and the seller, for it allows a great deal of flexibility as to the sourcing and replacement of the goods that form part of the bulk. 2(e) removes that freedom and will be unduly inconvenient on both parties.

Question 7 (Chak Lau, Moh Moh, MR)

Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract?

If s 20A(1) is to be added to SGA despite our recommendation that it should not be, it is necessary to add codification of exhaustion, per *Karlshamns v Eastport* as it would be beneficial to buyers, particularly where goods are transferred, moved or delivered in bulks which contain more than the consumers' goods. The current s18 r5(3) SGA (the benefit of which would not be available to consumers under the draft Bill) achieves much the same effect, however, it seems more appropriate to be mentioned in the methods of ascertainment as 2(g) or added to the proposed s18B(4) of the Bill. This is because exhaustion applies most commonly in bulks, and is a method of identification of the goods specifically.

Question 8 (Julia Juchno, Radu Suciu, Ming Hao Tay, Adam Westlake, MR)

Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?

We have chosen to interpret this question broadly as a question whether the means of protection of consumers through reform of passing of property (transfer of ownership) rules is satisfactory or whether pre-paying consumers

The issue of passing of property is raised in this consultation in connection with protecting pre-paying consumers and on the backdrop of increasing internet sales where the gap between payment and passing of property is commonplace. If the trader becomes insolvent in this gap the consumer will have already paid for goods but will not have gained any property interest in them thereby becoming an unsecured creditor with decreased chances of recovery.

Criteria for an efficient consumer protection mechanism

Whatever mechanism (or set of mechanisms) for the protection of pre-paying consumers from a trader's insolvency is adopted it must not be too onerous for the consumer to utilise it and ought not further burden the insolvent's estate disproportionately to the value of the consumer's purchase.

Passing of property – unsatisfactory as the sole means of consumer protection

Protection solely in the form of more consumer-favourable passing of property rules does not necessarily satisfy these criteria. It is possible that consumers will find the protection given to them as too complicated to make use of, and it will carry disproportionate costs on the insolvent's estate (e.g. by increasing the costs of administration or liquidation[6]), thereby limiting the recovery for other creditors.

The average sale price of items in e-commerce purchases is under £45 and with rising internet sales the average value of individual purchases can be expected to decrease.[7]

Considering this, it is quite possible, that the majority of consumers will not find bringing up their claim with the insolvency officer and further having to deal with them worth their while for a relatively low value purchase and will rather be content with internalising the costs of the trader's insolvency.

The costs to the insolvent's estate or the consumer associated with utilising the consumer's right flowing from the passing of property are also likely to be disproportionately high to the value of most online purchases. The purchased property is likely to be difficult to access by the purchaser (it will be stored in remote warehouse or abroad) and costly to ship

[6] See answers to Questions 32 and 33.

[7] https://www.irpcommerce.com/en/gb/ecommercemarketdata.aspx – the average value of an e-commerce order is under £90 with the average sale price per item being under £45

(international shipping, not being able to utilise bulk shipping savings because the insolvent no longer has any bulk to ship…). This is also likely to discourage consumers from asserting their right in the property in the first place.

The protection passing of property offers to consumers can therefore turn out to be severely limited in practice and its utilisation generally economically inexpedient.

Bearing these drawbacks of passing of property as a method of consumer protection in mind, other (complimentary) forms of consumer protection from a retailer's insolvency already in existence should remain available to ensure consumers are protected in a way which they can easily utilise and which is not disproportionately financially burdensome on the consumer or the insolvent's estate.

Chargeback and claims under s75 CCA 1974

When available, Chargeback or claims under s75 CCA 1974 can provide some consumers with an accessible alternative mechanism of protection. The protection they offer is much easier for the consumer to make use of (dealing with a bank or payment card issuer with whom I likely have a relatively long pre-existing relationship and who can be reached via local bank branches), thereby increasing the odds that the consumer chooses to do so over internalising the costs of purchasing from a retailer who then became insolvent.

Moreover, particularly the availability of claims using s75 CCA 1974 is likely to increase if major technological companies and internet trading platforms push their users towards setting up credit cards with them and using them for online purchases (as Amazon and Apple are currently doing).

However, the utility of s75 CCA 1974 also remains severely limited by the requirement of the minimum item sale price value being £100 when, as noted herein above, the average for e-commerce purchases is under £45, thereby leaving a large gap in the protection afforded to pre-paying consumers.

Right to reimbursement with preferential status

If this gap is to be filled, an additional (new) mechanism of consumer protection needs to be adopted. It is suggested that one such mechanism could be that where the consumer prepaid but did not receive the goods, the consumer could be given a right to reimbursement of money paid that would have a preferential status in the trader's insolvency. This could fill in the gap in consumer protection left by s75 CCA 1974 and chargeback rules.

However, with reference to the requirement that the consumer protection mechanisms of choice are not disproportionately financially burdensome on the insolvent's estate (and therefore the chances of recovery for other creditors) this right would have to be limited. A limitation which would nonetheless provide consumers with reasonable protection could be restricting the prioritised right of reimbursement to recovery of pre-paid sums and excluding damages for consequential losses.

Justification for introducing additional consumer protection mechanisms

An introduction of new mechanisms of consumer protection (such as a right to reimbursement with preferential status[8]) will necessarily occur at the cost of other creditors in the insolvency. It is submitted however, that there are economic and general policy grounds which justify such a change.

There are valid economic reasons for increasing consumer protection (and the consumers' faith that they are protected). To consumers, form is just as important as substance and greater protection measures can be expected to increase a consumer's propensity to make online purchases. As the world moves toward greater reliance on e-commerce as a more efficient mode of trade, implementing measures which ensure consumers can be confident this is not simultaneously increasing their exposure to trading risks (i.e. trader's insolvency) can be expected to have a positive macroeconomic effect.

The positive effect consumer confidence has on expanding trade has already been recognised by e-commerce platforms. Indeed, Shopee – the largest e-commerce platform in SE Asia – successfully differentiated itself from its competition by providing their own guarantees, under which if a buyer fails to receive his goods, he is entitled to a full refund from the platform.[9]

In terms of more general public policy, consumers who have become unsecured creditors due to a trader's insolvency occurring before property in pre-paid goods passed to them can be considered "non-consensual" creditors. They are "non-consensual" in the sense that when making their purchase they could have hardly imagined they would become the trader's creditors in insolvency and did not ask to be placed in such a situation. It is arguable that such "non-consensual" unsecured creditors are deserving of additional protection in an insolvency, where current protection is available narrowly, when alternative means of protection failed. Granting consumers priority over all secured creditors is justifiable because secured creditors are generally financial institutions and as such possess greater capacity to shoulder a reduction in the value of their investments than consumers.

However, we realise that giving the consumers priority over all classes of secured creditors would require an overhaul of insolvency law and this may not be a realistic goal to achieve by means of consumer legislation. At present, no preferential creditor takes priority over a creditor secured by way of a fixed security interest, only over the floating charge. We think, therefore, that consumers should have a preferential status in relation to their prepayments in a way comparable to other preferential creditors under the current law, ie by taking priority over the holder of the floating charge. If a wider insolvency reform is contemplated in the future, we think the arguments made here support giving consumers priority over all secured

[8] For detail see the answer to Question 34.
[9] See https://www.techinasia.com/shopee-p2p-marketplace-southeast-asia; https://shopee.ph/docs/111

creditors, but for now we recommend giving consumers preferential status and priority over the holders of the floating charge.

A limited right to reimbursement with a preferential status in the insolvency would rectify the arguably unduly harsh position in which consumers find themselves as non-consensual unsecured creditors described in the previous paragraph and additionally have a generally positive economic effect on stimulating trade.

Conclusion

In conclusion, it is submitted that consumer protection solely through passing of property is inefficient and unsatisfactory. Other methods already exist (chargeback, s75 CCA 1974) and since their operation is more efficient and accessible they should be retained and promoted. However, even with these complementary consumer protection mechanisms, severe gaps in consumers' protection remain. It is proposed that these can be overcome by the introduction of an additional consumer protection mechanism – a limited right to re-imbursement which is prioritised in insolvency.

Enhanced consumer protection is likely to have positive economic effects, stimulating trade as well as rectifying the unduly harsh position in which prepaying consumers find themselves in when traders become insolvent before passing property in the prepaid goods to the consumer. Indeed, that greater consumer protection is desirable has already been recognised in the private sector with large e-commerce platforms introducing their own internal mechanisms of protecting consumers from events such as trader's insolvency which may in the future constitute an important method of consumer protection complementary to statutory mechanisms.

Question 9 (MR)

Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements?

I agree that the proposed rules on transfer of ownership should not apply to conditional sale contracts. Nor should they apply to hire purchase agreements, as set out below.

The draft Bill sets out to replace the rules in the Sale of Goods Act 1979 that govern when property (ownership) is transferred. The Bill does so by providing mandatory (as opposed to default) rules when ownership passes to the buyer, ie in consumer sale contracts ownership would pass at a time identified in the statute, and not the contract. Conditional consumer sale agreements would be an exception from this. One of the two elements of a conditional sale agreement is that the trader retains ownership of the goods until the conditions specified in the contract (eg payment of instalments) are met (CRA 2015, s 5(3)).[10] The proposed ss18A(2) and 18B(2) of the Bill are therefore necessary to accommodate conditional sale agreements in law: without ss18A(2) and 18B(2), the trader would not be

[10] Similar definitions of consumer sale agreement are found in Consumer Credit Act 1974, s 189 and Sale of Goods Act 1979, s 25(2)(b).

able to retain ownership of the goods because ownership would pass under the mandatory rules set out in proposed ss18A and 18B.

There is a question whether, as a matter of policy, conditional sale agreements ought to remain be possible in law. It is suggested that they should. They create a valuable way in which traders can take, in effect, security against the risk that the price will not be paid in full or in part (conditional sale contracts are, by definition, contracts under which the price for the goods or part of it is payable by instalments: CRA 2015, s 5(3)) and they can do so by taking simple steps (a contractual clause in the contract of sale, as opposed to creation of a security right over the consumer's assets). At the moment, this matters in particular in contracts where the consumer takes possession of the goods before full price is paid. Retention of ownership provides the trader with protection in, for example, the consumer's bankruptcy, and in cases of unauthorised sub-sales of the supplied goods by the buyer (the third party buyer cannot, for example, raise the 'buyer-in-possession' defence under SGA 1979, s 25(2)).

There is one additional point, and possibly an unintended consequence of the proposed rules: under the proposed rules, a trader cannot retain ownership until a condition is fulfilled, eg, the price is paid. It seems odd that under the proposed rules it would be possible for the trader to retain ownership when price is to be paid in instalments (in part or in full) but it would not be possible to retain ownership when the payment of the entire price is deferred until a future date (or the occurrence of a future uncertain event, although that is far less common). The trader in both situations runs a similar risk of non-payment (there is, possibly, an even greater risk of non-payment when none of the price is paid), and it would seem very odd that the power to retain ownership depends on how the price is to be paid. One way to solve this would be to include an exception to the proposed ss 18A and 18B that the provisions do not apply also in cases where the trader retains ownership until the price is to be paid. Another would be to expand the definition of conditional contracts of sale in the CRA. Either way, this would not undermine the objective of the Bill, namely the protection of pre-paying consumers, for the simple reason that the scenario contemplated is where the consumer has not yet paid.

It is neither necessary nor desirable to apply the transfer of ownership rules set out in the Bill to hire-purchase agreements. Transfer of ownership is not part of such agreements. Hire-purchase agreements contain an option to purchase, which is different from an agreement to buy in a contract of sale (*Helby v Matthews* [1895] AC 471).

Question 11 (MR)

Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?

It is sensible to include all ownership issues (including those relating to contracts for the transfer of goods) in CRA 2015 if the idea is to work towards a comprehensive consumer protection regime, and ss 18A and 18 B seem appropriate for contracts for transfer of goods as the issue of when property passes should not depend on the nature of consideration (whether money or not). I have no experience of these contracts, however, and have only

given this question a brief thought. If these contracts are included in the scope of ss 18A and B, it would be good if the drafting style could recognise that these are nowhere near as commonly used as contracts for sale of goods, and the drafting would be clearer if the provisions refer to contracts of sale only, as they do at the moment, rather than clutter ss 18A and 18B by adding 'and contracts for the transfer…' each time contract of sale is mentioned.

Question 12 (Julia Juchno, Radu Suciu, Ming Hao Tay, Adam Westlake, MR)

On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?

In general, yes. We note, however, that there exist certain limitations of s 75 CCA claims and under the claims under chargeback rules. These limitations are important when we come to look at what the position of consumers ought to be where these claims are not available. [11]

In terms of s 75 CCA 1974:

Regardless of whether ownership has transferred, a consumer may have a claim under s75 if they have prepaid for goods and they have a claim in respect of breach of contract or misrepresentation. The limitations that apply are accurately described in the consultation paper. However, several situations are worth highlighting as they illustrate how consumers can easily fall out of scope of s 75 CCA 1974 and thus not be able to utilise the protection it offers.

The refund under s.75 is possible only in cases of credit card transactions (it is therefore not possible when the payment was made through, for example, bank transfer or debit card) where the price of the goods is between £100 and £30,000. The refund is possible on retailer's "refusal" to deliver goods to the consumer.

"Refusal" for the purpose of s75 can have a broad meaning and is open to interpretation. If the retailer requires the consumer to pay additional storage and/or delivery costs, it can be considered a retailer's refusal to deliver goods and therefore enable a claim under s75. However, this option may be limited in practice if the trader includes a clause in the contract stating that additional costs of delivery may apply. Since requiring additional storage and/or delivery costs would be in line with the agreed terms of sale, the grounds for a claim under s75 would not arise.

Another significant point to make is that in reality, the consumer is unlikely to recover any money from the insolvent retailer. Therefore, a claim against a card issuer could be much more useful in many situations. However, such a claim is available only when the consumer has a claim against the retailer "in respect of a misrepresentation or breach of contract" (s 75 CCA). The claim for reimbursement is in respect of a breach of contract when, for example,

[11] See the answer to Question 33.

the retailer refuses to deliver goods – in this case the refusal is treated as breach of terms of the contract between the retailer and the consumer. Are there any scenarios in which there will be no breach of contract and no misrepresentation by the trader?

Even if the ownership of goods had already been transferred, the consumer can cancel a distance or off-premises contract in accordance with their rights under the CCRs 2013. The regulations provide that the contract is to be treated as including the statutory provisions as to reimbursement on cancellation.[12] We agree that the consumer could cancel the contract and seek reimbursement from the retailer and if the retailer refuses, the refusal would be treated as a breach of contract, which provides the customer with a potential claim against their card issuer.

However, the right to cancel under the CCRs 2013 provides ground for a claim under s75 only if the contract was formed – even though the consumer has a statutory right to reimbursement where a distance or off-premises contract has not yet formed (under regulation 34), entitlement to reimbursement on withdrawal of an offer cannot be said to be in respect of breach of contract, because the contract has not yet been made. What is more, the consumer may also have a claim in damages for consequential loss, which is not explored in detail in the paper.

In terms of chargeback rules:

It is subject to a time limit: the consumer has 120 days from the latest expected delivery date of the goods or services to request their card issuer to raise a chargeback and also subject to the card scheme rules, to which the consumer is not party.[13] The circumstances of the transaction must fall within a "chargeback reason code". [14]

Consumers to whom the ownership has transferred but they do not wish to take possession of the goods can rely on the provision of "goods and services not provided" when they cancelled their order and they did not receive "credit" from the retailer. There are exceptions to this rule: for example, if the merchant delivered the merchandise and the cardholder refused to accept delivery or the cardholder signed a waiver absolving the merchant from responsibility when the merchandise is not received. What follows from this is that, for example, if the cardholder signs a waiver absolving the merchandiser of liability for goods that the cardholder did not receive, the cardholder has himself declined insurance.

There might be some cases in which the contract provides that cancellation of an order is subject to certain rules; e.g. the retailer may claim the right to refund only a part of the price paid – therefore, even in the rare situations when the consumer is able to recover money from insolvent retailer, it may be more useful to have a claim against a card issuer.

[12] CCRs 2013, SI 2013/3134, reg.34(13)
[13] MasterCard Chargeback Guide (December 2018) https://www.mastercard.us/content/dam/mccom/global/documents/chargeback-guide.pdf – pp. 62, Law Commission Consultation Paper No 246, pp. 39.
[14] Ibid, pp. 39

However, there is a provision in chargeback guide stating that if partial travel services have already been provided, the chargeback amount should be prorated to reflect only the travel services not provided. If the cardholder (or traveller) has received partial reimbursement from a bonding authority or similar scheme, the chargeback should also be prorated to reflect the reimbursement. What the paper does not elaborate on is that this can be particularly problematic, as travel services provided partially may burden the customer with additional unplanned costs which cannot be claimed back. Also, if the consumer decides to pay additional charges, for example for delivery, the claim for a chargeback under card scheme rules is not possible. In the context of sale of goods, the following example illustrates this well: if the consumer *(e.g. a musician drummer)* only receives a partial delivery of goods he ordered *(2 out of a set of 6 drums)* but needs to have all the goods to make use of those already delivered *(needs a whole drum set to play)* he may want to return the delivered ones and use chargeback to get his money back. He won't however be able to use chargeback to cover the costs he will incur for the return shipping of the part of the goods that has already been delivered *(the return shipping of the 2 drums already received).*

Question 13 (Julia Juchno, Radu Suciu, Ming Hao Tay, Adam Westlake, MR)

If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that:

(1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75?

(2) these fees could not be claimed under chargeback rules?

Storage charges under s 75

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. If the consumer made a claim against the retailer for loss suffered, this loss would not be too remote it would satisfy the test of remoteness, whether we think it is about losses that are reasonably foreseeable, or losses for which the contract breaker assumed responsibility) and so the retailer would be liable. As s75 makes the card issuer jointly and severally liable for the retailer's breach of contract, the consumer would be able to claim storage charges.

Delivery charges under s 75

Yes, Art. 18 Consumer Rights Directive defines delivery as being based on the transfer of "physical possession" (as opposed to eg delivery of constructive possession). The CRA 2015 is based on the Consumer Rights Directive which means that the term delivery is interpreted in light of the directive. However, with the UK being in the transition period, courts are likely to no longer be bound to interpret the term "delivery" in the CRA in light of the CRD. Courts might interpret delivery in the CRA on its own. If that were to happen, it is likely that the court would not find the transfer of physical possession to be required for delivery to occur, as the

definition of "delivery" in the CRA does not mention physical possession. Nevertheless, if "delivery" either under the CRD definition or under a potential future CRA definition has not happened, because it is part of the retailer's obligations under the typical contract, the contract is breached when the retailer refuses to pay for delivery fees, so consumers would be able to claim the delivery charges under s75.

Is it the case that these fees could not be claimed under chargeback rules?

Delivery and holding fees cannot be claimed in the circumstances explored in the consultation paper (para 3.105 of CP 246). However, it seems to us that another reason code under which consumers can claim a chargeback under the Mastercard Chargeback Guide could be used to claim delivery and holding fees where these could class as services which were to be provided but were not (although we do not have direct knowledge of how this applies in practice). This reason code is as follows:

Goods or Services Not Provided[15]	
The issuer may use reason code 79 when the cardholder claims goods or services were not received.	
Chargeback Condition:	The cardholder contacted the issuer alleging the cardholder's account has been debited for goods or services that were to be shipped, delivered or otherwise provided and were not received by the expected delivery date.
Time Frame:	Between 5 and 120 calendar days from the transaction settlement date or the date the goods or services were to be provided. One of the following conditions must be met before processing the chargeback: • When the date the goods or services were to be provided as agreed upon by the merchant and the cardholder has passed. • When a specific delivery date is not provided, the issuer must wait 30 calendar days from the transaction settlement date. […]

Reason code 79 provides that one of the conditions in which a chargeback can be issued is simply when the date for receiving the goods has passed (or 30 days from the settlement of the transaction if no date has been agreed). In the case of insolvency of the retailer it is likely for this condition to be met, thus enabling the consumer to claim the shipping and storage fees under the chargeback rules.

Question 14 (MR)

[15] https://www.mastercard.us/content/dam/mccom/global/documents/chargeback-guide.pdf – pp. 357

Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?

I agree that under the Bill, in some circumstances, ownership will be transferred sooner than under the current law, and so the suppliers of goods under contracts with retention of title (RoT) clauses will lose the ability to rely on RoT sooner than it would otherwise be the case. This does not change the position of the RoT suppliers substantively (only speeds up the point in time when the trader will be seen as having exercised the power to sell the goods free of the supplier's RoT interest in the goods – under the RoT sale between the trader and the supplier). The concern that, as a matter of practice, this change might discourage suppliers from suppling goods on credit to traders (which is, I think, what underpins the concern identified by R3 and quoted at para 3.121 of CP 246) is, to my mind, unfounded. The fact that suppliers take RoT in proceeds of sale and products into which the goods became incorporated suggests that suppliers do not rely on RoT in supplied goods for protection. That RoT in proceeds and products do not generally work as they are recharacterized as creating security interests over proceeds and products (and are void in insolvency of corporate traders) is another matter. In any case, the suppliers are free to take security over proceeds and/or products, although they do not tend to do so in practice.

Question 15 (MR)

Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?

I agree that where goods are in a warehouse or held by a delivery company, who holds a lien over the goods, the consumer's ownership is subject to a lien. This is so where the lien arises before the ownership is transferred to the consumer, and in practice is also likely to be the case where lien arises after ownership is transferred: 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.

One point which could be added is that while warehouse liens will often arise under a contract between the trader and the warehouse company, it is also possible for them to arise under operation of law. Liens arising by contract take effect in accordance with the contract terms, so the consumer's position will depend on them. For example, it is possible (in theory) for the contract to provide that the lien is waived or disclaimed where ownership in the goods passes to the consumer (there is less flexibility with liens arising by operation of law); and it is also possible for the lien to secure payment of storage (or delivery) charges not only for the goods the consumer buys but also all charges and any money owed to the lien-holder.

Question 17 (Alanna Yung, MR)

How common is it for retailers to use terms and conditions which delay the formation of the sales contract?

In particular:

1. Are they more common among online retailers?

Terms and conditions which delay the formation of the sale contract appear to be reasonably prevalent among a number of major online retailers and well-known British companies which sell their products online. This includes both retailers with a physical presence, as well as those who offer their services exclusively online. It is most common for these retailers to delay the formation of the sale contract until the goods are dispatched.

It should be noted that not all retailers specifically address formation of sales contracts or the method/time of acceptance in their terms and conditions. For instance, the terms and conditions of the online stores of Alex Monroe and Daisy London, both independent jewellery brands/retailers based in the UK, are silent as to when a sales contract is deemed to have been formed.

If the terms and conditions of sale displayed specifically address the issue of the sales contract, this is commonly achieved through a section devoted to 'acceptance' or some sort of statement to the effect that a confirmation of the contents of the order is not to constitute acceptance by the seller.

Please refer to Table 1 below for specific examples from some retailers in the UK.

2. Are they used when goods are ordered in-store for later pick-up or delivery?

It is common for retailers who have both an online and a physical presence to only accept orders for products through their websites, in which case the terms delaying contract formation would apply. This is the case for supermarkets in particular: the way in which grocery orders are fulfilled means that the policy for both in-store pick up (commonly termed 'click and collect') and home delivery is the same for any orders placed online. However, in the case of supermarkets, payment is sometimes taken only shortly before the scheduled delivery or pick-up, following confirmation of what items would be delivered/allocated to the customer.
Hence, the terms which delay the formation of the sales contract would apply in the same manner for orders in-store and orders made online.

The case may be different for retailers of custom-made goods. Retailers offering goods made to the customer's order, such as tailored suits, have been observed to stipulate that orders from customers constitute offers to purchase, and that acceptance occurs only through some sort of written confirmation from the seller. This is the case for Moss Bros, a well-known retailer of mens' formal wear, and this stipulation applies to all of their sales made via order, including those of ready-made items and custom-tailored items, whether or not the order is made online or in-store. Alternatively, customers who make orders for custom goods in-store will often receive an electronic receipt sent to them via e-mail, and in many cases, this may well constitute the written 'acceptance' from the seller.

Please refer to Table 1 for for specific examples from some retailers in the UK.

3. Are they more common among retailers who sell certain types of goods?

Terms providing for delayed formation are not necessarily more common for certain types of retailers than others. Among the sample of retailers whose terms and conditions we examined in Table 2 below, we observed provisions for delayed contract formation from supermarkets as well as retailers who carry a range of different types of goods. The price range of the products also did not appear to be an influencing factor among those retailers.

Please refer to Table 1 for a list of examples of provisions for delayed contract formation from different retailers.

Table 1: Examples of delayed formation from British retailers

Name of retailer	Provision for delayed contract formation
Waitrose (electronic contracts)	Order acceptance and the formation of the contract between you and us will take place on the dispatch to you of the products ordered unless we have notified you that we do not accept your order or you have cancelled it in accordance with the instructions below.
Sainsbury's (Food to Order)	8.3 When you complete an order in store or on the Sainsbury's Food to order website we will acknowledge your order. The Order Acknowledgement and order number is not an order acceptance from us. Acceptance of your order and the completion of the contract between you and us will, unless we have notified you that we do not accept your order or you have cancelled it in accordance with these terms and conditions, take place when your order is available for collection on your nominated collection day. If you ordered online, please bring your Order Acknowledgement email and order number with you when you collect your order. If you ordered in-store, please bring your receipt, or, if you have given us your email address, your order acknowledgement with you when you collect your order.
Marks & Spencer	Please note that completion of the online checkout process does not constitute our acceptance of your offer to purchase products or services from us. We will notify you by email as soon as possible to acknowledge that we have received and are processing your order. Our acceptance of your order will take place only when we despatch the product(s) or on commencement of the services that you ordered from us. This will be no later than 1 week after we have received payment from you. Prior to despatch of the product(s), M&S has the right to decline an order for any reason, including legal and regulatory reasons. The duration of our contract with you will start from when you receive the order despatch email and last until the last day of your right to return the products.
Argos (online contracts)	2.3 Acceptance of your order and the completion of the contract between you and us will take place on despatch to you of the products ordered unless we have notified you that we do not accept

	your order or you have cancelled it (please refer to Returns and refunds). For FastTrack and Tu clothing orders, completion of the contract between you and us will take place when the products ordered have been collected from the store. 3.3 Risk of loss and damage of products passes to you on the date when the products are delivered to you or are left with a person or place nominated by you. Our delivery driver may take a photograph of your address if you are not home to receive a delivery.
Net-a-Porter	Once you have made your choice and your order has been placed, you will receive an email acknowledging the details of your order. This email is NOT an acceptance of your order, just a confirmation that we have received it. Unless you cancel your order, acceptance of your order and completion of the contract between you and NET-A-PORTER will be completed when we email you to confirm the goods have been dispatched.
Selfridges	6.2 (b) We will send you an email confirming your Order which will detail the Product(s) (including their Product Descriptions) that you have ordered. This email does not constitute an acceptance of your Order by us and a contract does not exist between us at this point. 6.5 Non-acceptance of your Order (or parts of your Order) may be due to any one or more of the following non-exhaustive reasons: a) A Product you ordered is out of stock; b) We are unable to obtain authorisation for your payment; c) We have identified an error with a Product Description, including but not limited to a pricing error; d) You do not meet the eligibility requirements as specified in these Terms and Conditions; e) There is a system or procurement failure; f) You fail our customer validation checks; g) There are restrictions (legal or otherwise) or practices in relation to a Product which prevent us from being able to sell or deliver it to you; or h) We believe you are generating orders for commercial gain and not personal use.
Astley Clarke	Our acceptance of your order takes place on the dispatch to you of the products ordered unless we notify you that we do not accept your order, or you have cancelled your order in accordance with the clause 'Right for you to cancel your contract' below. Our acceptance of your order brings into existence a legally binding contract between us.

Missoma	Payment in whole, by credit card or debit card, is required before dispatch of goods. Once payment has been received by us, we will confirm that your order has been accepted by sending a confirmation email to you at the email address you provide in your online order form. Goods supplied by Missoma to customers remain the property of the company, until paid for in full by the customer.

Question 18 (Haeon Oh, MR)

Where terms and conditions delay the formation of the sales contract until dispatch, is "dispatch" intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider?

Where a retailer's terms and conditions purport to 'accept' the buyer's offer upon 'dispatch' by notifying the buyer via a 'Dispatch Confirmation', we believe the meaning of 'dispatch' is dependent on the circumstances of the retailer, specifically, on their capacity to handle deliveries. Through our study of the fifty largest online retailers in the UK (Source: https://www.myukmailbox.com/blog/the-top-50-online-shops-in-the-uk), those not reliant on third-party logistics providers, form the contract where the goods are 'dispatched from [their] warehouse to be delivered [to the consumer]' (Debenhams Terms and Conditions s.2.5). Retailers that rely on third-party logistics providers or couriers to deliver their goods, such as Hermes, Royal Mail, DHL ecommerce solutions, or UPS, tend to form the contract when the goods are dispatched to their respective third-party carriers.

This is to be expected. In practice, 'dispatch' cannot mean something other than that the seller has passed the goods to the carrier, to be delivered to the customer, even if the seller has to employ a third-party logistics provider to fill the gap in their logistics chain.

Table 2: Examples of 'dispatch' from British Retailers

Name of Retailer	Provision for acceptance of the buyer's offer
Tesco	At all times our acceptance of an order takes place on despatch of the order, at which point the purchase contract will be made and you will be charged for your order
Argos	Acceptance of your order and the completion of the contract between you and us will take place on despatch to you of the products ordered unless we have notified you that we do not accept your order, or you have cancelled it
Marks & Spencer	Our acceptance of your order will take place only when we despatch the product(s) or on commencement of the services that you ordered from us.

Net-a-Porter	Acceptance of your order and completion of the contract between you and NET-A-PORTER will be completed when we email you to confirm the goods have been dispatched
Next	Your order for goods is accepted and a contract is formed between Next and you when we despatch the goods you have ordered and not before. A contract is not formed at the point in time that payment has been taken from you by Next, nor at the point in time that you receive an email from Next acknowledging receipt of your order.
Matalan	Our acceptance of your order will take place when we e-mail you with confirmation that the Products have been dispatched (Dispatch Confirmation). The Contract between us will only be formed when we send you the Dispatch Confirmation. Delivery of an order shall be completed when we deliver the Products to the address you gave us or you or a carrier organised by you collects from us.
Astley Clarke	Our acceptance of your order takes place on the dispatch to you of the products ordered unless we notify you that we do not accept your order, or you have cancelled your order in accordance with the 'Right for you to cancel your contract' below.
John Lewis	Order acceptance and the completion of the contract between you and us will take place on the despatch to you of the Products ordered.
Debenhams	Order acceptance and the creation of the contract between you and us will take place at the point the products you have ordered are dispatched from our warehouse to be delivered to the address you have given us. The contract will be formed at the place of dispatch of the products.
River Island	All Orders are subject to acceptance by Us and We will confirm such acceptance by sending You an email that confirms that the Product has been dispatched. The Contract between Us will only be formed when We send You the Despatch Notice.
Harrods	We will send you a confirmation email to confirm that your order has been dispatched for delivery. This is confirmation and acceptance of your order
Cult Beauty	Your Order constitutes an offer to Cult Beauty to buy a Product via the Site (and Cult Beauty reserves the right to refuse orders for Products). No contract will exist in relation to the Products until we have confirmed to you by email that the Product has been dispatched (Dispatch Confirmation). Our acceptance to your offer will be deemed complete and the contract between us shall be formed when we send you the Dispatch Confirmation email.

Space NK	We will confirm acceptance of your order by sending you an e-mail that confirms that the Products have been dispatched ("Dispatch Confirmation"). A legally binding contract between us will be formed when we send you the Dispatch Confirmation (or, in the unlikely event that a Dispatch Confirmation is not sent due to a processing error, when we dispatch the Products to you) ("Contract")

Question 19 Lili Feher, MR)

We welcome consultees' views on the reasons why retailers use terms and conditions which delay formation of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative).

We agree with the Law Commission's view on the reasons why retailers delay formation of contract. These reasons are i) to protect against the requirement to dispatch goods within 30 days of contract formation, ii) to protect retailers from errors on their website (which includes pricing errors and product errors), and iii) protects against lack of stock, which may lead to the retailer's failure to deliver within 30 days.

We believe that one possible alternative to the delay of the sales contract would be if parties choose to contract out of the '30-day rule.' However, we note that parties do not seem to be free to contract out of any terms they want, but rather, only if they agree on a different 'time or period' (section 28(3)(b) CRA 2015), which, as an alternative, does not address the issue of lack of stock. Perhaps parties could agree that the 'period' would be a 'period it takes for S to obtain goods from suppliers' or in a similar vein, rather than stating a period in days.

As a side note, we add that in the United States, Article 2 of the Uniform Commercial Code (UCC) sets out certain rules regarding when a sales contract is deemed to have been formed in the absence of any offer/acceptance that would be recognised under the traditional common law rules on contract formation. See §2-206(b).

The Law Commission has raised the point of whether a conditional contract is a viable alternative to the delay of sales contract formation. We agree that the uses of conditional contracts set out in 4.37 of the Consultation Paper would mitigate many of the risks faced by both online consumers and retailers. We are also of the view that there are drawbacks to the use of conditional contracts. Conditional contracts come with various risks and possible uncertainty as to when the contract formation occurs. A buyer holding the incorrect assumption that a contract has formed may find herself in a difficult position, especially considering that they may not be aware of the condition (See our responses to questions 21 and 22).

Question 20

We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts?

This is set out in our response to Consultation Question 19.

Question 21 (Haeon Oh, MR)

Is it common for retailers to take steps to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract?

There are a number of ways in which a retailer may attempt to bring the terms and conditions to the consumer's attention. However, these methods are not specifically targeted towards informing the consumer of the delay in formation of the sales contract. Common practice among online e-retailers involves requiring the consumer to click on a 'check box', which confirms that the consumer has read the terms and conditions and has accepted them. These retailers allow consumers to submit their final order, only if they have clicked on the 'check box.'

Another method involves retailers notifying the consumer that "by clicking accept, you agree to the terms and conditions," or less frequently, stating that "by completing and submitting the following electronic order form you are making an offer to purchase goods which, if accepted by us, will result in a binding contract." These notifications are commonly placed next to the 'checkout', 'confirm' or 'accept' button, and include a link to the retailer's terms and conditions.

These methods are likely the best for online retailers, yet they are not the most consumer-friendly model. An alternative to the 'check box' model involves taking the consumer to the terms and conditions page prior to checkout, where they are required to scroll to the bottom to find the 'check box'. This model has not been widely implemented by retailers.

It is important to note that most consumers are not interested in reading these terms and conditions in full or are generally unaware of their implications as to what obligations the seller owes to them after payment is made. It appears that retailers are aware of this, and therefore do not actively attempt to draw the consumer's attention towards the terms and conditions.

Question 22 (Alanna Yung, MR)

Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?

While it may be simplistic to assume that all consumers think that a sale contract would generally be formed upon payment to the vendor, it is also true that checking for terms which provide for delayed formation would not necessarily be the first port of call for

consumers, even those who regularly make purchases online or those who work in legal profession.

It may be more obvious that a sale contract has not been formed when the seller does not collect payment for orders until, for instance, the items have been packed for delivery, or until the items have been dispatched, or until the day that the delivery is expected to arrive. But in the majority of cases, consumers cannot be expected to be cognizant of the fact that while they have paid and their orders have been confirmed, that whatever confirmation they receive in return for the completed order form and/or payment given does not constitute an acceptance from the seller -- and that there is supposedly no sales contract as a matter of the seller's terms and conditions. It is logical to expect that some kind of obligation would arise on the part of the vendor when all payment for the products ordered is made in advance, whatever this obligation may be.

In most cases, this does not create issues, because consumers have the right to demand the return of their payment when orders cannot be fulfilled, and vendors are obligated to deliver the goods within a reasonable amount of time. The Law Commission contemplates issues in situations where traders become insolvent, and it would indeed be problematic for consumers if they have made payment to a trade who is now insolvent before a sales contract has even been formed. However, the solution may not necessarily lie in a statutory provision which transfers ownership to customers at the time when, for instance, payment is made. There are practical reasons behind traders' provisions for delay and difficulties may arise for custom goods that have yet to be made or for items that have yet to be restocked.

It may be preferable to instead consider alternative means to protect consumers who make payment for goods in advance. This is discussed in our response to Question 34.

Question 29 (MR)

We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree?

Please provide qualitative and quantitative evidence where possible.

Does this question relate to situations where the retailer is in insolvency? If so, I agree that that the proposed rules in the draft Bill are likely to affect only a small proportion of goods.

Read more broadly, the answer is that the draft Bill would affect every contract of sale of goods (but I do not think this is what is being asked).

Question 30 (MR)

What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently?

Please provide qualitative and quantitative evidence where possible.

On the one hand, the retailer's ability to borrow against their assets is not going to be affected. Stock-in-trade is only ever used to raise finance by way of a floating charge, so the value of individual assets (and whether or not ownership of the assets passed to the buyer) is not relevant. The whole point of taking a debenture that includes a floating charge is that the chargor (the trader) can continue trading.

One the other hand, however, as I've set out in the answer to Questions 32 and 33, the draft Bill is likely to increase the costs of insolvency (by increasing the cost of expenses of liquidation and administration), which – coupled with other recent developments relating to the floating charge – suggests that debenture holders may recover less than previously from their security. This is not necessarily always a problem – the floating charge is a form of security right that is taken 'for control' (holders of certain forms of floating charges can appoint administrators, which gives them some level of control over the course of events, although not where the new moratorium under the Corporate Insolvency and Governance Act 2020 applies) rather than for 'security' in the sense of discharge of secured loans by exercising powers of enforcement against some assets. However, if the banks generally start perceiving the floating charge as a weaker security due to the ever-growing list of costs and claims that take priority over them, this is likely to have an impact on the terms on which banks lend: it is anecdotally known among banking lawyers that weaker the security means that the bank will either charge higher the interest rate on the loan or – in the case of smaller and medium sized companies might decide not to lend at all.[16]

I am not aware of any particular types of sectors where lending would not be against a floating charge where the chargor operates a business selling goods (ie I think the problem is similar across the board). One very small exception could be sole traders and unincorporated businesses which cannot raise finance against a floating charge (as a result of Bills of Sale Acts 1878 and 1882) –for them raising finance can be difficult for different reasons. It (anecdotally) involves more extensive use of personal guarantees and land charges granted by individuals to secure their business operations. I do not think transfer of ownership rules relating to stock-in-trade is likely to make their position any worse.

Question 31 (MR)

Please see my answer to Question 30, which focuses on access to secured finance.

Question 32 (MR)

We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree?

[16] Valuable empirical study on this issue showing that this correlation exists was conducted by J Franks and O Sussman on behalf of the Association of Business Recovery Professionals, *The Cycle of Corporate Distress, Rescue and Dissolution. Study of Small and Medium Size UK Companies* (IFA Working Paper 306, 2000).

Please provide qualitative and quantitative evidence where possible

I am concerned about the impact of the proposed draft Bill on the costs of liquidation and administration. I am not convinced that the increase of these costs would be merely 'minimal' (para 5.27 of CP 246). The consultation paper identifies the cost of the time that insolvency practitioners will spend on assessing and validating claims to ownership. Discussions with employees and individuals in warehouses are likely to be time consuming – certainly more time consuming than looking at records, eg dispatch notes or confirmation emails identifying the goods (eg by their unique number).

It is notoriously difficult to get data on how much liquidations and administrations actually cost (and what proportion of these costs is taken by the insolvency officers' fees). But anecdotal evidence suggests that the insolvency officer's fees take a considerable proportion of expenses of insolvency, so any increase in these costs would have to very carefully weighed against the benefits, and compared to (possibly cheaper) alternatives (eg granting a proprietary right for the return of the price paid for goods not delivered).

Even if the cost increase is 'minimal' (para 5.27 of CP 246), I am concerned that a small increase of insolvency expenses may have significant consequences on insolvency for holders of the floating charge as expenses of insolvency take priority over claims secured by the floating charge (Insolvency Act 1986, s 176ZA (in liquidation), Sch B1 para 70 (in administration)). This should be seen alongside other developments, notably the re-introduction of the status of the Crown (as of 1 December 2020) as a preferential creditor in relation to certain taxes[17], which is likely to diminish the attractiveness of the floating charge and may well lead to poorer access to finance for companies (traders).

Question 33 (MR)

In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence

The insolvency costs might increase as a result of possible litigation costs which the insolvency officer is to engage in, which do not seem to have been factored into the cost calculus. Litigation costs can be expenses of administration, and in some circumstances also liquidation.[18] In the draft Bill, a number of the proposed rules (s 18B(4)(a), (b), (h) of the draft Bill) refer to the need to establish that the trader's intention is permanent. This is likely to become a contentious issue, and might lead to litigation, and so greater costs of insolvency.

Question 34 (MR)

[17] Insolvency Act 1986, ss 175 and 386(1).
[18] Insolvency (England and Wales) Rules 2016/1024, rr 6.44 and 7.112. See too *Lightman & Moss on The Law of Administrators and Receivers of Companies* (6th edn) [4-011].

Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill?

Please provide qualitative and quantitative evidence where possible.

The draft Bill goes some way to achieve the consumer benefits but it does not eliminate the consumer detriment. The benefit will be achieved where the consumer can show that ownership in the goods has been transferred to the consumer earlier than could be the case under the current law. However, there will still be some situations where the consumer pre-pays but no ownership in the goods can be transferred to the consumer. This could be, for example, because the goods are not yet manufactured, or the manufacture or alteration process is incomplete, or goods are not yet labelled, set aside or otherwise identified, or – even if they are identified in a way set out in the draft Bill – the trader's intention is not permanent. In those situations, the consumer will be left with the general claims (under s 75CCA and chargeback) but when these are unavailable, the consumer will be left to prove on the retailer's insolvency as an ordinary (unsecured) creditor.[19]

A better solution than a chance to own goods earlier would be to enhance the consumer's position with respect to getting their money back. There seems no evidence to suggest that consumers generally want the goods more than their money back. In particular, the 2016 Consumer Detriment Report (cited at para 5.34 of the CP 246) refers to consumer's frustration when unable to recover prepayment or the goods from the insolvent retailer but it does not suggest that consumers generally prefer ownership of the goods more than their money back.

S 75 CCA and chargeback go a long way to protect consumers (by, in effect, providing a third party who undertakes liability to pay the money back to the consumer) and they should continue to be available.

Where s 75 CCA and chargeback are not available[20], the pre-paying consumer should be given a right against the retailer for the repayment of price, which would be more than an ordinary unsecured claim on the retailer's insolvency. This could be achieved in various ways but the best option would offer consumer protection whilst working with the existing measures (s 75 CCA and chargeback).

One option is to impose a duty on retailers to hold the prepayments on a (statutory) trust for the consumer. This would, in practice, mean that retailers would be under a (statutory) duty to hold prepayments in a separate account. This option seems to impose relatively heavy burdens on retailers (who would become trustees in relation to the money, and would therefore owe a range of trustee duties to the consumers) in all circumstances only to address a problem that currently arises in a small number of cases. The continued existence of s 75 CCA and chargeback would be hard to justify if a statutory trust were to be imposed. This option is not to be recommended.

[19] For more detailed appraisal of the reform of transfer of ownership rules and
[20] Please see our analysis in answers to Question 12.

Another option would be to confer a preferential status on consumers' claims for the repayment of pre-payments on retailer's insolvency in circumstances where s 75 CCA and chargeback are not available (but not where they are no longer available). Consumers would become preferential creditors in relation to their pre-payment claims, alongside e.g. employees' claims for remuneration, occupational pension scheme contribution, or (as of 1 December 2020) certain HMRC taxes (Insolvency Act 1986, ss 175 and 386).

The advantage of this solution is that it would work well with the existing measures, as a 'fall-back' solution. To ensure that the current measures are not weakened, this solution should not be available where the existing measures are no longer (as opposed to not) available. It would give consumers a degree of protection on insolvency because the consumer would no longer need to share *pari passu* with unsecured creditors.

There are two possible downsides. One is that preferential claims do not take absolute priority (as ownership claims or claims secured by fixed security rights do) but instead take priority over other creditors, including over claims secured by a floating charge (see e.g. Lord Neuberger in *Re Nortel Companies; Bloom v Pensions Regulator* [2013] UKSC 52, at [39]-[40]). It is, therefore, possible that the consumer would not get their money back if the insolvent's estate is not sufficient to pay preferential creditors (I expect this to be rare). Another downside is that this solution weakens the position of the holders of the floating charge, and risks undermining access to finance. A similar criticism is levied against the proposed Bill's impact on expenses of insolvency.[21] However, 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.

Questions 35

Insights into the question about the extent to which consumers' confidence in online shopping can be enhanced through the proposed reform are included above: please see the answer to Question 8.

[21] See the answer to Question 33.

Consumer Sales Contracts: Transfer of Ownership

Law Commission Consultation

Response from the Finance & Leasing Association

About the FLA

The Finance & Leasing Association (FLA) is the leading trade association for the UK consumer credit, motor finance and asset finance sectors. FLA member companies include banks, the finance subsidiaries of major manufacturers and independent finance firms. They offer credit services to customers from all social groups, via credit and store cards, personal loans, point of sale finance, motor finance, mortgages and a number of other consumer credit products, as well as a wide range of leasing and hire purchase services to businesses of all sizes.

We welcome the opportunity to comment on the Law Commission's latest Consultation Paper (CP) *Consumer Sales Contracts: Transfer of Ownership*. FLA members include not only lenders offering credit cards and personal loans for retail purchases, but also some of the major online retailers who are also providing finance. We have therefore considered the response from both a finance and retail perspective. In this response we have not provided feedback on all the questions but have instead set out our members' views on the proposed approach to reform in this area.

Executive Summary

- We strongly agree that the current legislative framework under the *Sale of Goods Act 1979* is highly complex and in need of reform. And we fully support moving to a much simpler approach, which can be readily understood by consumers, retailers, lenders and insolvency practitioners.

- 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. A more detailed *Cost Benefit Analysis* should ideally be undertaken together with updated consumer research, to ensure the changes remain pertinent and appropriately targeted.

- How consumers purchase goods has changed significantly since the *Transfer of Ownership Projec*t was first initiated in 2014, as well as more recently in response to the pandemic. Online shopping and the use of consumer credit are increasingly used, as customers seek options which deliver greater convenience and consumer protection. Paying for goods by cash has also reduced considerably. Further insight could usefully be gathered on the extent to which the consumer harms identified at the outset of the Project remain prevalent.

- The overriding objective should be delivering clarity and we can see the pros and cons of a contract being formed at different points in time, depending on

the circumstances. What lenders want to avoid is the need for detailed considerations of when a contract was formed, when dealing with section 75 and chargeback claims. The reforms need to be very clear, so complex claims of this type do not arise.

- The way in which the Bill has been drafted could also lead extensive work being required by Insolvency Practitioners - again in determining whether transfer of ownership has occurred. This could in turn lead to additional costs and delays.

- We agree that the terminology adopted in the SGA is complicated and we welcome the simpler language proposed in the draft Bill. However, further clarification would be useful on some of the key definitions, such as '*goods that are identified and agreed on when the contract is made'.*

- We support hire purchase and conditional sale products being excluded from the proposals, due to the way in which the transfer of title already operates in these products.

Scope of the project

We very much support changes to legislation where it is no longer fit for purpose and there is strong evidence that a new approach is needed to properly protect consumers. For example, we are currently pressing for changes to the Consumer Credit Act (CCA) 1974 which is in desperate need of updating considering how customers now want to apply for and manage their credit. The Sale of Goods Act 1979 (SGA) is another good example of a highly complex piece of legislation and we agree it needs updating to make it clearer for consumers, retailers, lenders and insolvency practitioners.

To ensure that any changes are properly targeted, the Law Commission could usefully undertake further research to inform the next stage of its work and the scope of any changes in the draft Bill. While the project was initially aimed at protecting customers who pay for goods in advance where the retailer then becomes insolvent, recent developments in how consumers shop and pay for goods may have reduced the overall potential for consumer harm and it would be good to get a clearer understanding of this.

For example:

- The CP notes that the proposed changes would only affect *a small group of consumers* and in practice most of these customers would have been paying for goods in cash. With the growth of consumers paying for goods via debit card or consumer credit and the reduction in the use of cash since the project was launched in 2014, it would be helpful for research to explore the extent of potential consumer detriment which remains. Many customers will now be able to rely on the protections under Section 75 of the CCA or the Chargeback Rules if they have prepaid for goods and the retailer then goes out of business.

- The CP refers to consumer feedback via the Citizens' Advice Service dated 2015. Five years on, more up-to-date feedback on customer experiences could provide helpful input on the extent of any remaining detriment and where it is focused.

We continue to support the need for change to the SGA and some up-to-date research might help in shaping the content of the Bill.

Contract Formation

As noted in the CP, in online transactions a sales contract would usually form on dispatch of the goods. This approach provides a clear point in time for the customer and provides retailers with flexibility should there be insufficient stock to fulfil the orders or there have been pricing errors which need to be recertified. The CP notes that if there are long delays between order and the dispatch of the goods then customers will not be covered by usual protections (eg under Section 75), as there will be no sales contract in place. In practice such delays 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.

The CP suggests that retailers could instead make use of conditional contracts, setting out the retailer's obligation to deliver the goods based on a specified event occurring. As the aim of this project is to deliver greater certainty for consumers, the use of conditional contracts could be unduly complex.

While we welcome the intention behind the draft Bill, the eight scenarios determining when a contract would form under Clause 18B (4) could be confusing and create additional complications for lenders and insolvency practitioners. For example, how would a lender know if the goods already had a label on them with the customer's name (a trigger for a sales contract forming) when ascertaining if Section 75 rights were in place at a particular point in time? Similar challenges would also arise for insolvency practitioners when trying to determine if, and when, any of the scenarios in Clause 18B were relevant. This would require significant additional time and resource before the practitioner had even commenced work aimed at assisting the creditors.

We appreciate that this is not a straightforward issue and that there will be advantages and disadvantages in contracts forming at different stages depending on the different circumstances which arise. As noted above, the need for clarity is paramount, which might point towards the potential for some rationalisation of the scenarios proposed.

Section 75

Section 75 and the Chargeback rules provide significant protections for customers not only when retailers have become insolvent but also where customers are subsequently dissatisfied with the goods or services purchased. However, there will be situations where these protections should not be the automatic first port of call. For example, where a customer has bought goods from a shop and the retailer becomes insolvent, the onus should be on the customer to collect those goods where this option

is available. There may be scope in these cases for the customer to claim back any collection costs under Section 75, where the retailer would have been responsible for delivery.

Conditional Sale and Hire Purchase

We agree that conditional sales contracts and hire purchase agreements be excluded from the Law Commission's proposals, taking into account the way in which title to goods currently operates with these products.

Next Steps

We would be happy to discuss the points raised in this response. We remain supportive of changes to the Sale of Goods Act 1979 to provide a clearer framework for all parties, and recognise the challenges in achieving this reform against a backdrop of major changes to the way in which customers now buy and pay for goods and services.

Finance & Leasing Association
30 October 2020

Furniture & Home Improvement Ombudsman

Law Commission Consumer Sales Contracts: Transfer of Ownership Consultation response

Please see below our comments to the above consultation.

Background Information

By way of background, the Furniture & Home Improvement Ombudsman (FHIO) (formerly Qualitas and The Furniture Ombudsman) has provided Alternative Dispute Resolution Services to consumers purchasing with member retailers in the furniture and home improvement sectors since 1992. At the request of several of our members following the enactment of The Alternative Dispute Resolution for Consumer Disputes (Amendment) Regulations 2015 (the ADR Regulations) in 2015, we broadened the reach of our ADR services with the more generic Dispute Resolution Ombudsman (DRO) scheme.

A full list of our members can be found here: https://www.fhio.org/members; https://www.disputeresolutionombudsman.org/members.

By way of additional information and of relevance to the discussion in terms of a consumer protection mechanism that can be used in the event of insolvency of one of our former members where a consumer has an active claim, the Furniture and Home Improvement Ombudsman also operates a Payment Protection Scheme which is a mechanism that has been devised to protect consumers who have paid 100% in advance of a home improvement installation (the supply and fit of a fitted kitchen, fitted bathroom, fitted bedroom, fitted home office or other installation including conservatories). FHIO holds an amount of money in a Protected Account which can be drawn upon, if needed, to pay an award of compensation to a consumer following a legitimate complaint being upheld in their favour.

The rules of our scheme are included here for your ease of reference: https://www.fhio.org/publications/payment-protection

The Payment Protection Scheme was originally set up at the behest of the OFT following their investigations in the late 1990s and subsequent 2005 document "Guidance on Unfair Terms in Home Improvement Contracts". The OFT had considered applying for an injunction to prevent a number of home improvement retailers from charging consumers 100% in advance of an installation. Before formal enforcement action commenced, discussions took place between the OFT, FHIO and the retailers concerned during which a proposal was made to establish a Payment Protection Scheme. This was approved at the time and has also been subsequently reviewed. The Payment Protection Scheme has operated successfully since then, offering consumers additional protection and being equally well received by our members.

By way of further background, in the previous 2 years (i.e. 2018 and 2019), on average, 7 retailers have ceased their membership per year with both schemes due to administration, affecting on average an estimated 0.6 cases per retailer.

Furniture & Home Improvement Ombudsman

So far in 2020, 9 members have notified us of administration events (and are therefore no longer members), affecting on average an estimated 11 open cases per retailer (two larger retailers with open cases of 83 and 11 respectively at the time of their administration have provided a higher average per retailer and this data is indicative only). This does however highlight that the issue is more prevalent in 2020 than it has been in previous years.

Consultation Response

Our response below will provide general feedback on each chapter of the consultation document, answering points where it is relevant and appropriate for us to do so.

Chapter 2

We agree to the general premise that clearer rules written in Plain English are required both to assist consumers understand their rights and traders to understand their obligations. The proposed rules, using modernised language will benefit all stakeholders.

Chapter 3

The proposed rules are specifically clear to meet the purpose set out. In our experience, when such changes take place, clear information outlining the obligations are crucial to successful implementation. We, therefore, propose that the spirit and the wording of the new rules is made clear. So, for example, whilst we agree that specific examples in 18B (3) and (4) provide helpful context, outlining the expectations, in conjunction with information about the interplay with the Consumer Protection from Unfair Trading Regulations 2008, would help traders understand and implement the changes required to their process and manage these across the supply chain. It is also crucial that the information is disseminated widely throughout the supply chain, including manufacturers, and consideration is given to how this applies in an overseas context, particularly post the UK withdrawal from the EU.

We note the comments on the effect of the changes on claims made under s75 of the Consumer Credit Act 1974, with regard to this, we can supply the following data:

There were a total of **16,943** cases raised since the beginning of 2018 in which the payment method was specified by the consumer within their Application Form (i.e. credit card/finance/cash/debit card etc). Of these **4,087** (**24%**) consumers confirmed that they had made the payment at least in part on credit card and 'contract price' was in excess of £100.

With regards to the timing of the changes, with support and clear information regarding the implications of the supply chain, in the ordinary course, we agree that this should be achievable within the 2-month period specified. However, the impact of the current pandemic on the retail sector should be borne in mind in terms of setting a timeframe given potential backlogs and availability of staff to make the changes. In light of its remit to raise standards (as referenced below), the Ombudsman would be instrumental in ensuring our members were briefed as to the changes, providing advice as to amendments required to their terms and conditions and processes (both

Furniture & Home Improvement Ombudsman

internal and with regards to the external supply chain). We suggest a longer timeframe at this time and on this basis.

Chapter 4

As an Ombudsman we have a specific remit to raise standards within the sectors over which we have jurisdiction. Membership of an Ombudsman in these sectors is currently voluntary and a value-add in terms of those traders who join our schemes is access to training and advice regarding their obligations. This includes:

- City & Guilds accredited training on consumer law and customer service;
- Review of terms & conditions, with specific advice as to how to ensure these are accessible to and can be easily read by all consumers;
- Ad hoc advice on consumer law issues.

Whilst we have no direct experience of retailers drawing consumers' awareness to terms and conditions seeking to delay formation of sales contracts, we do appreciate the issue more generally in making consumers aware of terms and conditions.

Further, with regard to the time specified for delivery in the Consumer Rights Act 2015, in the furniture industry lead times generally are longer than 30 days and we have provided training and consultancy on the need for clear and timely information to consumers to ensure that they understand this and that it is provided for in the terms of the contract.

Chapter 5

In terms of costs to traders incurred in the implementation of the changes, whilst we have no direct data, we believe that these costs could be mitigated by providing clear briefing documents and advice to best amend internal process and deal with challenges from the supply chain. The BEIS Green Paper (Modernising Consumer Markets), consulted on making ADR mandatory in certain sectors where consumer detriment was a risk, including the home improvement industry. By following this through to completion, businesses could benefit from the Ombudsman's remit to raise standards with the provision of advice and training, as referenced above, and consumer confidence would be increased accordingly.

Conclusion

The Furniture & Home Improvement Ombudsman and Dispute Resolution Ombudsman welcome the opportunity to add our voice to this important new consumer protection measure and acknowledge the clarity that it brings for consumers and traders alike. We will await the outcome with interest, prepared to engage with our membership to ensure they are appraised of the changes when they are finalised.

Please do not hesitate to contact us if you require amplification on any of the above points.

Furniture & Home Improvement Ombudsman

Dispute Resolution Ombudsman Limited

(incorporating Furniture & Home Improvement Ombudsman and Dispute Resolution Ombudsman)

ICAEW
REPRESENTATION 95/20

LAW COMMISSION CONSULTATION ON CONSUMER SALES CONTRACTS: TRANSFER OF OWNERSHIP

Issued 28 October 2020

ICAEW welcomes the opportunity to comment on the consultation *Consumer Sales Contracts: Transfer of Ownership* published by the Law Commission on 27 July 2020 a copy of which is available from this link.

We support the aim of protecting consumers who pay upfront in cash and lose substantial amounts of money when sellers become insolvent. But we believe the proposed reforms are more extensive than required to address this concern, are unlikely to provide a complete solution in practice, and would have adverse consequences. We do not believe that the other reasons given for the proposal are sufficiently compelling to justify this.

This response is made by the Business Law Department of ICAEW and reflects views of its Insolvency Committee, which is comprised of office taking insolvency practitioners licensed by ICAEW.

ICAEW is the largest single insolvency regulator in the UK. We license approximately 800 of some 1,550 UK insolvency practitioners as a recognised professional body.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 186,500 chartered accountant members and students around the world. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

ICAEW Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
T +44 (0)20 7920 8100 **icaew.com**

KEY POINTS

1. We are not convinced that the problems identified in the consultation or the injustices arising in respect of cash pre-payments are of such significance that the proposed legislation is required. If legislation is pursued, we doubt that it will provide a complete solution as regards pre-paying consumers. We have specific concerns that proposals intended to compensate a small (albeit important) minority of consumers will push this cost elsewhere and that the consequences have not been fully assessed.
2. The proposal follows from the consultation on protecting consumers who prepay for goods in cash, and so are not otherwise protected on insolvency of the retailer (eg, through credit and debit card refund regimes). We would support focused and proportionate measures to address this concern, but the current proposal impacts all consumer sales of goods contracts and does not appear to take account of all the potential costs and other possible adverse impacts, so we are not convinced that it is proportionate. We consider alternative approaches at the end of this response
3. As regards consumers who pre-pay in cash, the evidence we provide on insolvency suggests that the proposed changes would not be a complete solution but would increase costs of insolvency and so reduce amounts available to other creditors. These other creditors include the taxpayer (ie, all consumers), small suppliers (who may be individuals) and finance providers who help businesses function (to the benefit of consumers and wider society). Government will need to consider whether this price is worth paying (we do not think it is).
4. Apart from seeking to protect these consumers, the proposals appear to be motivated by an over-riding desire to clarify and modernise the law driven in large part by the move to online retail. We do not believe this is sufficient reason to pursue proposals that could have adverse consequences in practice. The concrete examples given of lost cash pre-payments largely involve physical, rather than on-line, transactions and should be given limited weight in assessing changes in law applying to on on-line transactions.
5. The proposals only apply to contracts governed by the laws of England and Wales [*3.8 of the consultation*]. We query whether it is choice of law and/or location of the seller that is most pertinent. For instance, would it not be problematic where a consumer becomes the owner (under English law) of goods in possession of an insolvent seller in, say, China?
6. In assessing whether to pursue this proposal, Government should consider the relative quantity of goods subject to foreign law contracts, relevant trends (eg increasing on-line sales by companies such as Amazon) and whether the proposal would result in English law being a less attractive choice for parties (in those cases where there is free choice under other legislation impacting contract law).
7. If the proposed changes in law make it more difficult for suppliers to protect themselves through right of retention provisions or the like, demands for up-front payment from retailers may well increase and credit availability may be reduced. Government has already increased credit risk of suppliers by giving HMRC preference over floating charge holders and should consider the cumulative impact of changes law on enterprise.
8. Where we mention likely views of consumers, we are reflecting the views of those involved in preparing this response as consumers rather than providing ‘expert evidence’ of ICAEW.
9. In view of the above comments, we are not responding to many of the specific questions raised which assume the proposed legislation will be adopted but have commented on the key issues that we think need further consideration.

ISSUES ARISING

Clarity of law

10. IPs support law being clear so that they can carry out their functions in the most efficient way and provide maximum returns to creditors. If the law is unclear IPs may need to seek legal

advice and the risk of legal disputes may increase, which can add significantly to costs and reduce and/or delay returns to creditors.

11. Complex issues can arise under current law but, in the ordinary course, we do not believe that interpretation of the law on transfer of title in consumer transactions is a major concern for IPs.

12. Much of the paper focuses on the complexity and uncertainties of the Sales of Goods Act 1979 (SGA). But SGA only applies to transfer of title where the contract does not cover the point.

13. We are not providing formal evidence on contract provisions used in the market, but we have looked at a few from leading retailers and they all provide either that a contract is not formed until dispatch (or delivery) or that title passes on delivery (or dispatch). We would not be surprised if this were to be representative of general market practice; it seems a natural result. Indeed, the paper notes that ownership is 'unlikely to transfer until the goods have been dispatched' [*3.36*].

14. The paper suggests that lack of clarity in the law leaves room for interpretation, particularly for Insolvency Practitioners (**IPs**).

> While the courts might construe the law to benefit a consumer, in practice it is usually the insolvency practitioner who is interpreting the rules. As insolvency practitioners owe duties to all creditors they may be inclined to err on the side of caution and instruct shop or warehouse staff not to release such property to prepaying consumers (p/8)

IPs do owe duties to all creditors and we would not consider them to be 'erring' when they perform their statutory duties. An IP might err if they include in the insolvent estate goods that belong to a third party (eg, a consumer) (*as noted in 2.47 of the consultation*). To do so could expose the IP/estate to potential claims and additional costs. In difficult cases, IPs would typically seek legal advice.

15. In practice, we do not believe that it is generally difficult for IPs to establish who owns the relevant goods Naturally, there will be exceptions and even occasional mistakes. There is insufficient information given about the case cited above (of a ring awaiting inscription) for us to comment on that, and we would, in any case, be wary of reaching general conclusions on the basis of isolated examples. Indeed, we think that the weight attributed to the few concrete examples cited in the proposal needs to be better evaluated in general.

16. The paper suggests that the new regime might lead to minor familiarisation and training costs for IPs [*5.7*]. Familiarisation costs for IPs might not be high because IPs need to be familiar with a very wide range of laws and regulations, whether or not they are clear or simple.

17. Training costs, however, are more difficult to assess. The proposal is likely to lead to checks being required that are not needed currently (eg, where title passes on delivery). IPs can have personal liability and will take very seriously the prospect of dealing in goods that do not belong to the insolvent estate.

18. Additional costs will inevitably arise where consumers seek to exercise their new rights, whether directly or through consumer groups. IPs are likely to face considerably more queries or claims from consumers which will take time to deal with. For a solvent business, this is part of the commercial equation, but creditors of an insolvent business may not welcome the diversion of resources that would be involved. There is also a risk that consumers will not understand the possible practical shortcomings of the legal rights they have been given, with potential for misunderstanding, dispute and damage to perception of the insolvency regime.

19. We do not believe that consumers generally read primary law to understand their rights. They will generally rely on others to explain in simple terms and seek legal advice in high value cases or where there is a dispute.

20. Any legislation on consumer contracts will eventually need to be interpreted and developed by the courts and will itself become more complex in that sense. The summary of the Sales

of Goods Act (**SGA)** in the consultation is very readable and could perhaps be adapted to form an explanation of the principles of current law for those who need it.

21. 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' (which has a somewhat convoluted and far from plain English definition in CRA).
22. We do not think 'modernisation' justifies making substantive changes in law in this context. So, for example, we do not find the terms 'seller' and 'buyer' in SGA problematic or believe that 'trader' is more user friendly than 'seller' (indeed The Law Commission frequently refers to 'retailer' rather than 'trader' in the consultation document, as do we here).
23. The paper suggests that simplification will help retail staff understand the position, but, in para 5.8 states that 'we do not consider that retail staff would be required to understand or be trained on the changes'. We agree that staff will not typically be expected to explain the legal position to consumers.

Issues arising from ownership without possession

24. The consultation refers to reasonable expectations of consumers who have paid for goods *[2.50]*, but we doubt consumers will typically think through the implications of owning goods before they possess them. Consumers typically buy goods to use or consume and it is somewhat difficult to see why they would want title in other circumstances (unless they want to resell, ie, for speculative purposes). Rather we think that consumers expect to have some recourse when a seller does not perform its obligations.
25. As noted earlier, we see nothing unusual or unnatural in parties agreeing that title to goods transfers on delivery or dispatch and doubt that this would surprise many consumers, even if they haven't read or understood the terms applying to their transactions. Although the outcomes under current law in insolvency will be, or at least seem, 'unfair' to those adversely impacted, insolvency nearly always produces results that seem unfair to some. We do not think the Commission has made a cogent case that its proposal is 'less obviously unfair to consumers on an insolvency than the position under current law', at least in terms of likely practical outcomes of the law.[*3.36*]
26. It is proposed that the law on risk in the Consumer Rights Act (**CRA**) (by which risk generally passes on delivery) will be unchanged *[3.9]*. While it appears that retailers are currently bearing the risk of goods until delivery irrespective of when title passes, the proposal means that title will transfer earlier in more cases so that the implications of a gap between transfer of title and risk becomes more significant, so the implications for businesses might require further consideration (eg, insurance).
27. As the proposal notes, giving consumers title to goods does not solve all the problems identified.
28. If the retailer becomes insolvent, the specific ring sent by the retailer for inscription may remain uninscribed (*3.17*) or curtain unadjusted. The consumer may be better off having the goods as they are, but in some low value cases might not (it could just give rise to a problem of disposal).
29. The proposal means that consumers will own goods made to order when the rules provide (eg, they have been labelled, sent for dispatch or otherwise identified). So, they could own goods located anywhere in the country (or, indeed, the world, so long as English law applies to the contract). The proposal highlights some of the implications of this, but we do not think these issues can be left open. Legislation may be needed to clarify (so further complicating the law).
30. This is a crucial issue in the insolvency context, because the seller may no longer be functioning as a business, for instance, it may have lost all of its staff, any right to occupy or

grant access to premises, may have no money, or access to money or, therefore, ability to pay suppliers.

31. Even if it could deliver goods to consumers having title to them, any costs involved would reduce money available to pay other creditors (including consumers not having title to goods).

32. In para 3.117 of the consultation, the Law Commission says that it does not think that the proposal 'will materially increase the cost and complexity of administration' and implies that this is because the rules will be 'clear and simple'. Current law may be complex in some circumstances, but it has not generally been problematic for IPs in this context. By contrast, the proposals can be expected to increase complexity. We believe the expert comments made to the Law Commission by R3 Scottish Technical Committee *(3.115*) and others should be heeded in this respect.

33. The Law Commission focuses on the complexity of SGA, but it is unclear what proportion of consumer transactions are, in fact, potentially exposed to these complexities. The Commission acknowledges that, where contracts are not formed until delivery, the proposal will have no impact at all *[5.15].* If the contracts provide for title to transfer on delivery, the IP then knows that all goods in its warehouses or shops belong to the estate. It is not difficult. By contrast, under the Law Commission's proposal, the position would depend on how goods have been marked or set aside etc., so making it necessary for the IP to consider both the factual circumstances relating to the goods and the law (which is along the lines of SGA, even if simplified to some degree, and therefore, according to the Law Commission itself, not particularly straightforward).

34. Unless insolvency law is changed so that an IP would be required to deliver goods to a consumer holding title to the goods, it is difficult to see why an IP would incur costs to do so in many cases. Similarly, absent some mandatory requirement, it is not apparent why an IP would facilitate arrangements for a consumer to collect goods from premises of the insolvent business (even if it is in a position to do so) or how long such obligations would last.

35. The proposal raises the prospect of goods being stuck at the insolvent business (or its suppliers) for an indefinite time and it is unclear what duties an IP would have to safeguard or dispose of the goods. In principle, you would expect uncollected goods to be disposed of or it will be impossible to completely wind-down an estate.

36. The Commission's paper (*5.28*) says:

> an IP would have to determine whether a contract is in place (as is the case under the current law) and, if so, whether goods have been identified for fulfilment of the consumer's contract. We anticipate that the assessment of whether ownership has transferred would likely involve a desk-based exercise, including a review of the retailer's records and discussions with employees in the retailer's shops and warehouses as to the status of goods they are holding. For example, whether any goods have been labelled with a consumer's name and address and whether that labelling was intended to be permanent. The list of events and circumstances upon which ownership of goods transfers in the draft Bill are intended to be clearer and easier to understand than the current law.

As noted above, we do not believe that clarity in the law is an issue for IPs at present. Where the position is determined by labelling of goods or their physical positioning (for instance, ready for dispatch to an identified consumer), we do not see how that could be a desk-based exercise (absent remote cameras). It might be an exercise that an IP would rely upon shop staff to conduct, but an IP is ultimately responsible for these issues and that would be a question of judgment in the circumstances. Also, there may be no staff left.

37. In some (perhaps few) cases, the increased costs, or uncertainties involved, might deter IPs from taking appointments, so that the Official Receiver would need to be appointed.

Whether or not goods have been paid for

38. The proposal applies to all consumer sales, regardless of whether the goods have been paid for in cash (or otherwise), so going beyond the genesis of the proposal which was concerned with protecting cash deposits etc.

39. Where consumers have not paid in advance, we do not understand what harm the Commission believes is being addressed. The result of the proposal is that consumers will own goods they have not paid for and do not possess, regardless of whether the consumer or trader want this position.

40. The proposal refers to rights of retention and lien for amounts unpaid [*3.64*]. A right to retain will be of limited value unless coupled with power of sale, and we are not clear whether retailers are intended to have this right where title has already transferred to the consumer. The paper considers the position higher up the chain where the supplier has a retention of title right against the retailer [*3.120*] but refers to contract terms commonly used in practice today which enable a retailer to deal with the goods free of retention of title rights. Practices may change if this proposal is taken forward and clarity will be required as to whether a consumer acquires absolute title to goods by virtue of the legislation irrespective of possible third party rights (referring to current law under SGA is not particularly helpful in this context).

41. In practice, we agree that retailers will seek to reduce any credit exposure they may have to consumers, so that one effect of the proposal may be that retailers will insist on payment in full at an earlier date than might currently be the case. We are not sure that this is in the interests of consumers. If it were to result in more cash advance payments, that would probably be counterproductive because consumers might still not, ultimately, receive the goods they paid for.

42. While the retailer may have the right to claim unpaid purchase price from the consumer, the expense of pursuing small claims will often be prohibitive. In the ordinary course, retailers might just regard defaulting consumers as a cost of business and pass the costs onto other consumers. In the case of insolvency, the costs of trying to recover consumer debts would be borne by creditors and IPs may well conclude in many cases that it would be counterproductive to pursue individual consumers. Those consumers then get something for nothing while others lose out.

43. Where the consumer has paid in full for goods not received and the seller is solvent, the consumer would have the usual remedies (eg, to require delivery or sue for damages for breach) and we are not clear that transferring title to the consumer would assist much or what the point would be.

44. As regards cases where the goods have been paid for and the seller is insolvent, we refer to practicalities concerning possession above, and refund mechanisms and possible alternatives below.

Whether refund is adequate remedy for failure to deliver

45. The Commission suggests that trends of on-line shopping and retailer insolvency make it 'important that the transfer of ownership rules are clear and provide appropriate protection to the prepaying consumer'.*[5.5]* But the concrete examples it gives of harm (eg, rings sent for engraving, sofas, display kitchens) largely arise out of physical store transactions and the most poignant cases involve cash pre-payments (which are declining, as physical retailer insolvencies increase).

46. Where consumers do not receive goods paid for, we believe that they would generally be satisfied with refund of money paid in compensation (albeit that might not compensate for speculative losses or sentimental value attached to some goods).

47. It appears from the Commission's analysis that where goods have been purchased using credit card or debit card, consumers will generally benefit from s75 or charge back protection, including where failure to deliver arises from insolvency of the seller. We therefore query whether the risk of harm justifies the proposal in this context.

48. The main risk of harm arises where consumers pay deposits (or the full price) for goods and are not protected by s75, chargeback or other mechanisms (eg, sector insurance) and, again, we think that alternative approaches should be considered in that respect.

Profiting from insolvency

49. While Government should consider how best to allocate losses in the cases of insolvency (and, therefore, whether and how to protect consumers who pre-pay in cash), we do not believe that a class of 'winners' in insolvency should be created.
50. We suggest that further consideration is required as to whether this proposal might unjustly enrich consumers in certain circumstances.
51. We have noted one potential windfall situation above - that a consumer may receive goods and title to them without having paid the full purchase price and may not be pursued for the unpaid price. Government may wish to consider whether there are other ways in which consumers might unfairly benefit from the proposals. For instance, would it be possible for consumers to resell goods to which they have title (but not possession) and also claim the goods in possession of the IP? Could an administrator release goods to a consumer without knowing whether the consumer has already made a charge-back or similar claim (that goods have not been delivered)?
52. If there is potential for some consumers to profit from the regime, social media means that any opportunity can rapidly become common knowledge and increase the costs of doing business or insolvency costs).

Formation of contracts

53. We do not know what motivates those retailers who provide that a contract of sale arises only when the goods are dispatched (or delivered). It may (or may not) be that they are seeking to mitigate/avoid the impact of some provisions of CRA. While Government should naturally consider this possibility it is unclear why it would legislate for change unless material harm results.
54. It is important that legislation enables legitimate transactions to take place in efficient ways that meet the needs of both consumers and business and allows for innovation. We do not know if CRA currently achieves this, but we are concerned that mandating transfer of title before delivery will reduce flexibility and might not be what either the consumer or business would want in every case.
55. Some of the standard contracts we looked at contained provisions on transfer of title but were not governed by English law. It may be that they are intended to work under a variety of laws. Government should consider whether the proposal might lead practice in the UK to diverge from that of other jurisdictions. Of course, much UK consumer law derives from EU law so that this issue is particularly pertinent now we have left the EU.

Alternative ways to protect consumers

56. The Law Commission originally consulted on consumer pre-payments in the wake of catalogue and Christmas Club insolvencies where trading bodies were effectively operating as unregulated banks and we naturally supported (and continue to support) measures to prevent this happening again. However, this proposal does not concern those cases.
57. As noted in the paper, various options were considered to protect other consumers who prepay for goods in cash, including giving consumer cash deposits (or full payments) priority on insolvency or requiring them to be held on trust. Both these alternatives would have had the relative merit of addressing the identified harm in a targeted way and could have been expected to meet the objective.
58. We understand that government has decided not to pursue these options and we have our own reservations about them. However, that does not mean that this proposal should be pursued. Indeed, it may be that the problem is insoluble in a cost-efficient way.
59. 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).

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

61. Some of the alternatives might have been applied proportionately, ie, to higher value transactions only, so reducing the practical impact of the increased costs on insolvencies and impact on other creditors. It does not seem that the impact of the current proposal could easily be mitigated in this way.

RESPONSE TO CONSULTATION ON

CONSUMER SALES CONTRACTS: TRANSFER OF OWNERSHIP

LAW COMMISSION

Introduction

1 The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 23,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.

2 ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires ICAS to represent its members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.

3 ICAS is pleased to have the opportunity to submit its views in response to the Law Commission's consultation on the draft Bill to reform the rules on the transfer of ownership of goods as they apply to consumers. We shall be pleased to discuss in further detail with the Law Commission any of the matters raised within this response.

Our approach to the consultation

4 While we are responding to the individual questions posed (Appendix 1), we also include an executive summary below to highlight our key comments.

Executive summary

5 ICAS agrees that the rules for consumer contracts should be updated and moved into the Consumer Rights Act 2015 (CRA 2015). This will undoubtedly be useful and provide clarity in some circumstances.

6 However, whether the legislation arising from the draft Bill will provide sufficient clarity that consumers, administrators, shop staff and IPs would all be happy to apply the rules it sets out is less certain.

7 It is noted that the Law Commission can only make recommendations for England and Wales. However, consumer law is reserved and CRA 2015, which the draft Bill seeks to amend, applies to the whole of the UK. We would call for further consultation with devolved administrations at an early stage to identify any concerns or further development or amendments required to the draft Bill prior to the draft Bill being introduced to Parliament.

8 It is vital that any changes made apply UK-wide to avoid any confusion for stakeholders and to guard against any increase in the complexity of cross-jurisdiction insolvencies. It is further vital that full consideration is given to any unintended consequences resulting from the Bill's interaction with Scots Law which may have not been fully explored as part of the process. This is a matter for legal professionals however, as an example, the term '*deliver*' is not defined and is understood to mean different things across the jurisdictions. Scotland-specific issues such as the interaction with landlord's hypothec may also not have been given full consideration.

9 ICAS has overarching concerns about how many individuals will be tangibly assisted by the reforms and the benefit they will bring when weighed against their potential unintended consequences.

10 The Bill will essentially bring forward the point at which ownership transfers to the consumer in certain circumstances. In essence this creates a '*super-priority'* for consumers in insolvency situations. Insolvency requires the balancing of interests for the benefits of creditors as a whole and it is unclear, at a very fundamental level, why consumers should be prioritised over other creditors (for example small trade creditors or employees).

11 It could be argued that the actual harm to consumers at present is minimal, with most pre-paid consumer purchases protected by the 'chargeback 'scheme. Further, the consumers left out of pocket in respect of pre-payments in most of the high-profile cases in recent years, such as *Farepak*, would be no better protected under the proposed reforms. A cursory review of the terms and conditions of some major high-street retailers also shows that the majority already delay formation of a contract until goods are dispatched. Therefore, without some form of legislative amendment, or authoritative case law clarifying that those terms are unfair, the change will have a negligible effect and actually may lead to that practice becoming more widespread, resulting in less protections for consumers than is currently the case.

12 Ultimately, if the changes achieve their intention, then there are likely to be fewer assets falling into the estate of insolvent retailers, which in turns means less money to meet expenses and distribute to creditors. It is also clear that, no matter the intention of the changes proposed by

the Bill, IPs will need to do more than they do at the moment to identify who owns what in an insolvent situation. That could impact timescales for IPs seeking to dispose of businesses rapidly as a going concern, and serve to increase legal costs, as well as the costs of the IP, all of which would negatively impact the UK's rescue culture.

13 There may be further unintended consequences in terms of floating charge lending, with more assets escaping the charge, as well as to the behaviour of landlords in relation to the terms of commercial leases, supplier and finance terms and conditions etc.

14 A number of the questions surround points of legal principle where it is not appropriate for ICAS to express a view.

30 October 2020

Direct contact for further information:

[redacted]

Consultation Questions

Consultation Question 1

6.1 Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly?

Response

Not in relation to subsections 18B(4)(a) and (b). The drafting as these subsections will provide no clarity of comfort to IPs or any other parties assessing whether good have been set aside or labelled in a way intended to be permanent in many instances.

Whether or not the labelling or setting aside of goods has been done in a way intended to be permanent can only be determined by looking at the trader's previous practices and, even then, this may not be clear (as alluded to in the consultation document).

Insolvency appointments are personal to the practitioner and IP's are unlikely to risk making a determination, bearing in mind the conflicting interests of the various stakeholders, without legal input unless it is absolutely clear that goods have been so labelled or set aside. Therefore, if the intention is to have IPs, consumers and other stakeholders to be able to 'self-service' by reference to the amended CRA 2015 then that intention will not be achieved.

Consultation Question 2

6.2 Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns.

Response

No unexpected consequences identified. However, this will undoubtedly add a further layer of complexity for IPs assessing the competing claims of stakeholders in relation to the same goods.

Consultation Question 3

6.3 Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer?

Response

No.

Consultation Question 4

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

If possible, please provide:

(1) details about the circumstances in which goods are held as part of a bulk until delivery or shortly before delivery (for example, types of retailer/goods); and
(2) details of your own experiences.

Response

While this situation may not be common in a consumer context, it is also not such a rare occurrence as to be trivialised. Examples of where this may occur would include situations where goods are stored in bins (screws, nails, lengths of chain or rope, food and household materials) with quantities being drawn down for dispatch.

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.

Consultation Question 5

6.5 Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?

Response

No. 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.

Consultation Question 6

6.6 Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns.

Response

No unexpected consequences identified.

Consultation Question 7

6.7 Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract?

Response

No.

Consultation Question 8

6.8 Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?

Response

No, as this simply relates to competing terms of contracts entered into. A cursory review of the terms and conditions of some major high-street retailers shows that the majority already delay formation of a contract until goods are dispatched. Therefore, in a similar fashion to the now ubiquitous retention of title clause, this practice is likely to become increasingly widespread, resulting in less protections for consumers than is currently the case.

Consultation Question 9

6.9 Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements?

Response

Yes.

Consultation Question 10

6.10 Do you have experience of contracts for the transfer of goods or are you aware of them having been used?

If so:

1) what was the purpose of the contract?
2) what transfer of ownership provisions (if any) did the contract contain?

Response

No – limited experience.

Consultation Question 11

6.11 Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?

Response

It would not be appropriate without full consideration of potential unintended consequences. Again, were the rules to apply to contracts for the transfer of goods it would add significantly to the complexity for IPs appointed to cases where such contracts exist.

Consultation Question 12

6.12 On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?

Response

We agree that this should be the position for the reasons set out in the paper (e.g. concerns about guarantees, aftercare and delivery arrangements) but whether this is achieved is a legal point in respect of which no opinion is offered.

Consultation Question 13

6.13 If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that:

(1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75?
(2) these fees could not be claimed under chargeback rules?

Response

These are legal points in respect of which no opinion is offered.

Consultation Question 14

6.14 Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?

Response

We offer no opinion on the interaction of retention of title clauses with the rules in the draft Bill, however it is vitally important that there is complete clarity for IPs as to when ownership transfers.

While the proposals may not complicate the law on retention of title clauses, they certainly serve to further complicate the position for appointed IPs attempting to determine ownership of a company's assets and deal with competing stakeholders.

There may be a considerable number of situations where goods have not been paid for in full, but ownership has transferred under the proposed rules. Where there has been partial payment for goods and title has transferred to some, but not all, consumers due to the way goods have been set aside or labelled, there is the potential for myriad issues for an IP to deal with on appointment in trying to determine the rights of the various stakeholders.

As pointed out in the paper, the changes have the potential to diminish the value of the retention of title clause which may just push more suppliers to insist on companies tailoring their terms and conditions to delay the formation of a contract to protect their position, resulting in less protection for consumers than is now the case.

Consultation Question 15

6.15 Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?

Response

We offer no opinion on the interaction of warehouse and deliverer's liens with the rules in the draft Bill, however it is again vitally important that there is complete clarity as to when ownership transfers.

Consultation Question 16

6.16 Do consultees agree that the draft Bill should come into force two months after it is passed into law?

Response

We would suggest a longer lead-in period (6 months) to allow IPs to familiarise themselves with the changes. This is 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.

Consultation Question 17

6.17 How common it is for retailers to use terms and conditions which delay the formation of the sales contract?

In particular:

(1) Are they more common among online retailers?
(2) Are they used when goods are ordered in-store for later pick-up or delivery?
(3) Are they more common among retailers who sell certain types of goods?

Response

A cursory review of the terms and conditions imposed by some major high-street retailers shows that the majority delay formation of a contract until goods are dispatched. Without some form of legislative amendment, or authoritative case law to define these terms as unfair, the changes will have a negligible effect and actually may lead to that practice becoming more widespread, resulting in less protections for consumers than is currently the case.

We have no evidence of whether these terms are more common in the scenarios listed above.

Consultation Question 18

6.18 Where terms and conditions delay the formation of the sales contract until dispatch, is "dispatch" intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider?

Response

A review of the terms and conditions imposed by some major high-street retailers indicates that the term 'dispatch' is largely undefined, and we offer no opinion on the meaning intended by this term.

Consultation Question 19

6.19 We welcome consultees' views on the reasons why retailers use terms and conditions which delay formation of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative).

Response

The consultation paper sets out reasons why retailers use terms and conditions which delay formation of the sales contract and we are unaware of other reasons. We offer no opinion on whether these reasons could be addressed by alternative means but would query why retailers would wish to deviate from the terms and conditions they currently employ.

Consultation Question 20

6.20 We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts?

Response

We offer no opinion on this matter.

Consultation Question 21

6.21 Is it common for retailers to take steps to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract?

Response

We have no evidence that terms and conditions delaying formation of the sales contract are often specifically drawn to a consumer's attention. Generally, most websites will contain a tick box which confirms that a consumer agrees to a retailer's terms and conditions in their entirety (with a hyperlink to the terms and conditions themselves).

Consultation Question 22

6.22 Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?

Response

Again, we have no evidence on this point. However, it seems highly unlikely that most consumers will be interested in considering the timing of the formation of a sales contract, or the implications of that, when making a purchase. More pertinently, there is no evidence that drawing those terms to the attention of consumers, even if they read and fully understood them, would have any impact whatsoever on the decision to purchase.

Consultation Question 23

6.23 Are you aware of situations where retailers have relied on terms delaying formation of the sales contract to justify delivery times outside the scope of section 28 of the Consumer Rights Act 2015?

Response

We are not aware of any such situations.

Consultation Question 24

6.24 Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the Consumer Credit Act 1974? Are card issuers likely to take this point in future?

Response

We are not aware of any such situations.

Consultation Question 25

6.25 Are you aware of any other detriment caused to consumers as a result of terms delaying formation of the sales contract?

Response

No.

Consultation Question 26

6.26 Do you agree that firms providing insolvency services would incur only minimal familiarisation costs as a result of the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

Response

While we agree that familiarisation costs should be relatively minimal, that will of course be dependent on the level of clarity able to be given to IPs on the interaction between the new rules and retention of title, hypothec, liens etc. It is also dependent on the rules applying UK-wide and there being no differences across the jurisdictions.

The real cost implication is likely to be during the insolvency process itself, when, regardless of familiarisation and training in respect of the new rules, IPs are going to be less likely than ever to make decisions on ownership rights without recourse to legal input. Whatever the intention of the Bill, it is clear that IPs will face more possible scenarios with regards to ownership of goods held on insolvency, and will need to do more than they do at the moment to identify who owns what.

Consultation Question 27

6.27 Do you agree that retailers would incur, at most, only a small one-off increase in legal costs as a result of the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

Response

We offer no opinion on this matter.

Consultation Question 28

6.28 In addition to familiarisation costs and legal advice, are there any other transitional costs that would arise from the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

Response

There are clearly going to be additional legal costs for suppliers, landlords and floating charge holders for example who may need to consider the terms under which they supply and lend. They may consider that they need to impose conditions on the retailer to protect their security (retention of title, hypothec and floating charge) in the event of the retailer's insolvency. This may result in them insisting that the retailer delays formation of contracts until goods have been dispatched.

Consultation Question 29

6.29 We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree?

Please provide qualitative and quantitative evidence where possible.

Response

For the various reasons already set out, we would agree that the number of good affected would be minimal under the proposed rules. We consider that the number of goods impacted would also diminish further over time as retailers make changes to their terms and conditions.

This again calls into question the overall value of the proposed changes when weighed against the potential negative impacts discussed.

Consultation Question 30

6.30 What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently?

Please provide qualitative and quantitative evidence where possible.

Response

From a floating charge holder's perspective, this could be perceived as the latest attack on that form of security as the changes would potentially diminish the assets captured by the charge and create a form of '*super-priority*' for consumers in certain situations.

This follows on from a recent increase in the 'prescribed part' level (the amount potentially ringfenced for ordinary creditors from floating charge assets) to £800,000 and the pending reintroduction of crown preference from 1 December. The recent introduction of a corporate moratorium can also prevent enforcement of the charge for an extended period.

Taken in the round there certainly appears to be the possibility of lending not being provided, or happening on less favourable terms, with conditions imposed around how retailers engage with consumers i.e. by insisting on delayed formation of contract.

Consultation Question 31

6.31 What financial impact (if any) would the proposed rules in the draft Bill have upon suppliers, logistics companies and secured creditors?

Please provide qualitative and quantitative evidence where possible.

Response

We offer no opinion on this matter.

Consultation Question 32

6.32 We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree?

Please provide qualitative and quantitative evidence where possible.

Response

We strongly disagree. This is already an area that is difficult to navigate with the various competing stakeholders and we consider that the proposed rule changes will serve to further muddy the waters for IPs by increasing the number of scenarios they may encounter in a retail insolvency situation.

Using an example from the consultation paper it states:

"Where a consumer has contracted to buy an item from the retailer's general stock which is to be altered to a specification agreed between the consumer and the trader, ownership will not transfer under this rule until that alteration is complete. For example, where the consumer has bought a diamond ring online with a bespoke inscription, ownership of the ring will not transfer to the consumer under this rule until the inscription is complete. However, ownership might have passed under another rule in proposed section 18B(4), for example if the goods have been set aside or labelled for the consumer in a way that was intended by the trader to be permanent".

So, IPs would have to look at how the goods have been set aside and labelled, about which the consultation paper goes on to say:

"This does not necessarily mean that the goods which are to be used to fulfil the contract are physically set aside in a warehouse and left untouched until delivery to a consumer. It could include situations where it is clear that an item is intended for a specific consumer, for example because the retailer has ordered it from a supplier specifically to satisfy that consumer's order".

"In an insolvency situation, the retailer'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".

Using this example, the prospect of the insolvency of a jeweller engaged in online sales appears to be extremely complex. Far from providing clarity the new rules appear to require the IP to take quite extensive action to interrogate the trading practice of the retailer and then make essentially subjective decisions about whether goods have been set aside and labelled as permanent.

We would anticipate that increased time and resources will be incurred by insolvency practitioners considering and identifying ownership of goods and that there is a significant risk of increased dispute with consumers again resulting in additional time and costs, including legal costs, being incurred in dealing with consumer communications.

Consultation Question 33

6.33 In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill?

Please provide qualitative and quantitative evidence where possible.

Response

We are not aware of further costs beyond those mentioned in this response.

Consultation Question 34

6.34 Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill?

Please provide qualitative and quantitative evidence where possible.

Response

We do not agree with the assessment of consumer benefits for reasons set out earlier in this response, specifically in relation to the delay to the formation of a contract until goods are dispatched. Without some form of legislative amendment, or legal challenge, to define these terms as unfair, the changes will have a negligible effect and actually may lead to that practice becoming more widespread, resulting in less protections for consumers than is currently the case.

As the consultation paper recognises, the changes are not anticipated to result in a significant reduction in the overall level of consumer detriment.

We agree that it makes sense for the rules for consumer contracts to be updated and moved into CRA 2015 and that this should provide clarity in some circumstances. However, we anticipate it remains unlikely that consumers themselves will readily reference and be able to navigate the rules within CRA 2015 and apply them to their own set of circumstances.

Consultation Question 35

6.35 Do consultees agree that the proposed rules in the draft Bill would increase consumer confidence in online sales?

Please provide qualitative and quantitative evidence where possible.

Response

No, again we do not see any significant shift in consumer confidence as a result of the proposed rules. As the consultation paper recognises, the changes are not anticipated to result in a significant reduction in the overall level of consumer detriment. It is consequently difficult to envisage any reason why there would be an overall shift in consumer confidence when the impact for consumers is predicted to apply to such a narrow range of circumstances, not even allowing for the potential unintended consequences.

Transfer of Ownership Consultation Response: Institute of Consumer Affairs

The Institute of Consumer Affairs (ICA) comprises members working in trading standards services, public and private sector ombudsmen services, consumer policy, Citizens Advice and other interest parties. For more information, please see our website https://www.icanet.org.uk/

Below, the ICA has outlined its response to the Law Commission Consumer Sales Contracts: transfer of ownership consultation paper.

In addition to answering the consultation questions, the ICA has considered the impact on consumers of the proposed changes. The ICA supports the improvements for consumers in the draft Bill which come from shifting some of the risk of insolvency onto the business supply chain where businesses have much better knowledge and the wherewithal to find out the viability of other businesses and protect themselves accordingly.

However, the ICA appreciates that the proposed reform overlaps with other broad areas of law such as contract and unfair terms, and would urge the Law Commission to acknowledge any impact and relevance of these areas for consumers. In particular the effect on retention of title clauses frequently used by businesses to protect themselves.

The ICA has also identified associated areas to consider in making the changes beneficial for consumers. Using the consumer principles (access, information, choice, fairness, redress, representation and safety) adopted internationally by consumer organisations, we would highlight the following:

- Information – consumers need to know when they own goods and this should be relayed at key points: e.g. when paying for goods and when an insolvency practitioner is appointed. There should be a duty incorporated into guidance and protocols governing the work of insolvency practitioners for example, to not only take full account of the change in law when administering a liquidation, but to do so transparently and with a duty to notify consumer creditors of their rights.
- Redress – it seems to us that the point at which consumers would benefit from improved rights is in an insolvency. If a consumer's rights are not observed by an

insolvency practitioner, there is no easy remedy[1] unlike other areas of public or commercial law where ADR schemes or Ombudsmen are expected.

Consultation Question 1. *6.1 Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly?*

Yes – however this may still prove hard for a consumer to grasp if they stick to the logic "I have paid for them so they are mine", particularly where there is sufficient stock to otherwise fulfil the consumer's order which has not been set aside to fulfil the contract.

With regards to 18B (3), consideration needs to be given to when manufacture is completed to safeguard the situation where all but minor amendments are required. Is this envisaged to mirror the provisions of 18B(4) i.e. for example a sofa is manufactured to the consumer's specification and then labelled, set aside, identified as being the consumer's in the warehouse, or could this be interpreted as "substantially manufactured" to guard against last minute additions being omitted to prevent the operation of the amendment. A principled approach to consumer protection legislation has been applied to previous regulations and this could be considered here as a "catch-all" to the current list.

Consultation Question 2*. 6.2 Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns.*

---

[1] Extracts from the government document, "Insolvency practitioners: Guidance for those who want to complain":

Insolvency practitioners, by the very nature of the work they undertake, deal with a number of conflicting interests and the authorising bodies cannot intervene in or adjudicate upon disputes of a commercial or legal nature. Ultimately, it is for the Courts to adjudicate upon commercial disputes and disagreements about the application of insolvency law and making a complaint should not be seen as a substitute to the remedies available to individuals through the Courts.

We would recommend that you consider seeking independent professional advice before exercising any recourse to the Court or before bringing a negligence claim against an insolvency practitioner. We are unable to provide you with advice in this regard.

The role of the authorising body will be to investigate any complaints referred to them by the Gateway and issue sanctions against insolvency practitioners where appropriate. The complaints process however does not provide any mechanism of redress for the complainant.

It should be borne in mind that the existence of these rules may have an impact on business practices for dispatch of goods. See response to question 1.

Consultation Question 3. *6.3 Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer?*

No, although the impact of the example in question 1 should be given due consideration.

Consultation Question 4. *6.4 Is it common for goods to be held as part of a bulk until delivery or shortly before delivery in the consumer context?*

If possible please provide:

(1) details about the circumstances in which goods are held as part of a bulk until delivery or shortly before delivery (for example, types of retailer/goods); and

(2) details of your own experiences.

In our opinion this should be included as a consideration, as this may be an important future-proof mechanism. Recent examples of bulk-ordering of solar panels for a consumer-householder collective have the potential to be construed in this manner.

However it is difficult to provide current examples in a consumer context as even gravel, in a depot, could be treated like any other stock. In general consumer contract for goods and not for part of a bulk.

Consultation Question 5. *6.5 Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?*

Yes, but as per above, only as a "belt and braces" approach.

Consultation Question 6. *6.6 Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns.*

We believe it is unlikely to be used.

Consultation Question 7. *6.7 Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract?*

Please see above; no other specific response.

Consultation Question 8. *6.8 Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?*

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.

Consultation Question 9. *6.9 Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements?*

Agreed, as otherwise both parties would lose the benefit of these agreements, including additional protections under consumer finance provisions.

Consultation Question 10. *6.10 Do you have experience of contracts for the transfer of goods or are you aware of them having been used?*

If so:

(1) what was the purpose of the contract?

(2) what transfer of ownership provisions (if any) did the contract contain?

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.

Consultation Question 11. *6.11 Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?*

As per above, for consistency, the rules should apply in such circumstances and may also need to relate to part payments. There is already a fundamental misunderstanding of deposits, for example, particularly in sectors such as motor – it is crucial that transfer of ownership is defined in these scenarios so that consumers understand the implications of their agreements and businesses can protect themselves from losses.

Consultation Question 12. *6.12 On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?*

Agreed as otherwise they are likely to be in breach of contract

Consultation Question 13. *6.13 If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that:*

(1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75?

(2) these fees could not be claimed under chargeback rules?

Yes as per the charge-back rules quoted but these are not a statutory protection.

Consultation Question 14. *6.14 Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?*

We have experience of businesses using retention of title clauses, for example in the home improvement sector, and would call for these proposals to outlaw their use, in consumer contracts. 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.

Consultation Question 15. *6.15 Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?*

No specific response

Consultation Question 16. *6.16 Do consultees agree that the draft Bill should come into force two months after it is passed into law?*

Agreed as it does not require a significant change or cost to business.

Consultation Question 17. *6.17 How common it is for retailers to use terms and conditions which delay the formation of the sales contract?*

In particular:

(1) Are they more common among online retailers?

It is believed terms to this effect are used by online retailers.

(2) Are they used when goods are ordered in-store for later pick-up or delivery?

No specific awareness

(3) Are they more common among retailers who sell certain types of goods?

No specific awareness

Consultation Question 18. *6.18 Where terms and conditions delay the formation of the sales contract until dispatch, is "dispatch" intended to mean dispatch to the consumer or dispatch by the retailer to a third party such as a logistics provider?*

When they leave the retailer's control i.e. to a carrier.

Consultation Question 19. *6.19 We welcome consultees' views on the reasons why retailers use terms and conditions which delay formation of the sales contract and whether these reasons could be addressed by alternative means (such as conditional contracts or some other alternative).*

We concur with the reasons identified in the report. Technological developments should enable stock levels to be checked and pricing errors to be identified before taking payment. Some retailers take the payment upon dispatch which renders the argument that a contract is not in existence even though payment has been taken, redundant.

Consultation Question 20. *6.20 We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts?*

We appreciate these arguments, however, see 19 above which must also be balanced against the requirements of the Consumer Protection from Unfair Trading Regulations 2008.

Consultation Question 21. *6.21 Is it common for retailers to take steps to draw the consumer's attention specifically to terms and conditions delaying formation of the sales contract?*

Despite efforts made by retailers, research quoted by BEIS in their Consumer Green Paper suggests that less than 1% of consumers open the terms and conditions when making an online purchase.

Consultation Question 22. *6.22 Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?*

No.

Consultation Question 23. *6.23 Are you aware of situations where retailers have relied on terms delaying formation of the sales contract to justify delivery times outside the scope of section 28 of the Consumer Rights Act 2015?*

No and in our experience, because there is an option to "agree otherwise", this tends not to be an issue where, for example lead times are longer than 30 days.

Consultation Question 24. *6.24 Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the Consumer Credit Act 1974? Are card issuers likely to take this point in future?*

No specific response

Consultation Question 25. *6.25 Are you aware of any other detriment caused to consumers as a result of terms delaying formation of the sales contract?*

We believe that there is the potential for greater detriment caused by late or no deliveries.

Consultation Question 26*. 6.26 Do you agree that firms providing insolvency services would incur only minimal familiarisation costs as a result of the introduction of proposed rules by the draft Bill?*

Please provide qualitative and quantitative evidence where possible.

No specific response

Consultation Question 27. *6.27 Do you agree that retailers would incur, at most, only a small one-off increase in legal costs as a result of the introduction of proposed rules by the draft Bill?*

Please provide qualitative and quantitative evidence where possible.

There may be a cost to reviewing terms & conditions and ensuring processes are geared to meet the new rules. We envisage this to be a one-off cost.

Consultation Question 28. *6.28 In addition to familiarisation costs and legal advice, are there any other transitional costs that would arise from the introduction of proposed rules by the draft Bill?*

Please provide qualitative and quantitative evidence where possible.

No specific response

Consultation Question 29. *6.29 We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree?*

Please provide qualitative and quantitative evidence where possible.

No specific response

Consultation Question 30. *6.30 What impact (if any) would the proposed rules in the draft Bill have upon a retailer's ability to borrow money against the value of their stock? Could different types of retailers be affected differently?*

Please provide qualitative and quantitative evidence where possible.

No specific response

Consultation Question 31. *6.31 What financial impact (if any) would the proposed rules in the draft Bill have upon suppliers, logistics companies and secured creditors?*

Please provide qualitative and quantitative evidence where possible.

No specific response

Consultation Question 32. *6.32 We estimate that the proposed rules in the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of insolvency. Do you agree?*

Please provide qualitative and quantitative evidence where possible.

No specific response

Consultation Question 33. *6.33 In addition to the impact upon security interests, access to/cost of finance and costs of determining ownership of goods on insolvency, are there any other ongoing costs that would arise from the introduction of proposed rules by the draft Bill?*

Please provide qualitative and quantitative evidence where possible.

No specific response

Consultation Question 34. *6.34 Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill?*

Please provide qualitative and quantitative evidence where possible.

We are aware of 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.

Consultation Question 35. *6.35 Do consultees agree that the proposed rules in the draft Bill would increase consumer confidence in online sales?*

Please provide qualitative and quantitative evidence where possible.

The increase of online sales due to the recent pandemic, to which consumers have turned whilst the High Street has been closed , highlights that the reach of the new rules is about consumer confidence beyond online sales as it offers an improved level of protection for consumers in the event of insolvency. The insolvency of retailers such as Harveys during the pandemic has led to the closure of physical stores and a high potential for consumer detriment notwithstanding the sales channel itself.

KPMG LLP
Restructuring
15 Canada Square
London E14 5GL
United Kingdom

Tel +44 (0) 20 7311 1000
Fax +44 (0) 141 204 1584

Ownership@lawcommission.gov.uk

Contact [redacted]

BY EMAIL

30 October 2020

Dear Sir/Madam

Consumer Sales Contracts: Transfer of Ownership Consultation

Please find below KPMG Restructuring's response to the Law Commission's request for comments on the Consumer Rights (Transfer of Ownership under Sales Contracts) draft bill ('the Bill'), dated 27 July 2020.

Who we are?

This response is prepared on behalf of the KPMG Restructuring practice, which is made up of 32 formal appointment takers and approximately 534 staff. We are a national practice with 13 of our offices within England, Wales and Scotland undertaking Restructuring work.

We have a strong presence on several of the Technical and Regulatory committees in existence for the insolvency profession including the R3 General Technical Committee, the R3 Training Committee, the ICAEW Technical Committee and the IPA Disciplinary and Appeals Board. We also previously provided the ICAEW representative on the Joint Insolvency Committee ('JIC'). This demonstrates the commitment we have made and continue to make to the insolvency profession.

Major issues and areas of concern

We have provided comments on what we consider to be the main areas of concern, in particular for consumers, retailers and insolvency practitioners ('IPs') and the general body of creditors. For this reason, we have chosen not to respond to the specific questions raised by the Law Commission as part of the consultation.

We welcome steps to provide better general protection for consumers and recognise the need for changes to wider legislation to achieve this, other than legislation directly relating to insolvency. Any changes in primary or secondary legislation must be carefully considered to ensure that they are compatible with one another.

We agree with the need to introduce modernised language, as the Sale of Goods Act 1979 remains largely unchanged from its original drafting in 1893. The move from terminology such as 'property passing' to 'ownership transferring' brings the proposed rules in line with modern and evolving sales contracts, increases transparency and accessibility However, there are a number of areas where further clarification would be helpful.

There appear to remain exemptions for retailers, which could minimise the Bill's effectiveness. Paragraphs 3.58 and 3.59 of the consultation paper advise that proposed Sections 18A and 18Bprevent a retailer from amending their terms and conditions ('T&Cs') to delay transfer of ownership and also disapply Section 19 of the Sale of Goods Act 1979 ('SGA') which allows a seller to do the same, as this would put the consumer in a worse position that set out in the Bill. However, it is not clear whether retailers may be able to override this position by altering their T&Cs to delay the formation of a contract rather than delaying transfer of ownership. Similarly, could retailers seek to implement conditional contracts to circumvent the Bill's provisions?

Where the Bill is effective, the impact on the retailer could be significant. Have the Law Commission considered whether secured inventory funding will be adversely impacted, with additional reserves likely to be required, reducing borrowing available? Furthermore, could credit, currently extended by suppliers with either rights of lien of retention of title ('ROT') rights, be reduced considering the impact the Bill may have on the effectiveness of ROT clauses and warehouse or haulier's liens?

The very nature of insolvency means that there are insufficient funds available to repay all creditors in full. Should ownership transfer to consumers at an earlier stage, there will be a commensurate reduction in the level of assets available for all creditors on insolvency. Why should one type of unsecured creditor receive goods in full whilst other unsecured creditors receive potentially no distribution whatsoever? Is this the correct policy approach to strike a balance for all creditors? In an insolvency scenario, significant additional costs in the logistics of repatriating goods to consumers are likely to be incurred. Additional time will be incurred in reviewing the validity of the claims to ownership, for both suppliers and consumers, and then attending various 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. In the early stages post introduction of the new legislation, additional costs may be incurred as court direction may be required in some cases. The increase in costs will reduce net realisations available for creditors, including consumers.

It could equally increase the complexity and cost of trading during administration to the extent that trading-on may no longer be commercially viable following the Bill's implementation as drafted.

It would be interesting to understand what proportion of consumers are currently affected by the existing legislation in relation to the point at which ownership passes, particularly in light of Section 75 and charge back provisions being widely available and most internet purchases being made by either credit or debit card.

We recognise the desire to better protect consumers in and before an insolvency and believe that this protection should be provided via pre-appointment measures; educating consumers on their rights on insolvency and putting the onus on the directors to manage their business responsibly in a way that protects consumers, i.e. via visibility and understanding of T&Cs.

The proposed rules

Goods identified and agreed on

The Bill does simplify the position in respect of goods which are identified and agreed on, by confirming that the transfer of ownership occurs at the time the contract is made, without the requirement for the goods to be in a deliverable state. However, this equally creates some additional issues on insolvency.

Impact on consumers

As the consultation paper confirms, the removal of the requirement for goods to be in a deliverable state puts the consumer at risk of having title to goods which may not be acceptable to them, for example where a warranty is no longer capable of being honoured should the retailer enter an insolvency process. However, it appears likely that the consumer would be able to make a claim under Section 75 of the Consumer Credit Act 1974 ('Section 75') or chargeback rules in this circumstance. (We consider Section 75 and chargeback rules later in our response).

Impact on retailers

The Bill operates in a way that transfer of ownership for goods ascertained and agreed on occurs, effectively, on payment for goods identified and agreed upon.

A retailer's working capital could be adversely affected by this change. Many retailers utilise asset-based lending facilities secured against inventory. The proposed change to the point at which title passes is likely to result in lenders requiring higher reserves against stock, thus reducing the availability of cash for a retailer to draw down.

Impact on the general body of creditors

Whilst the Bill may allow an IP to release stock to prepaying, identifiable consumers, this will incur additional time and resource to facilitate. The additional time costs will have a direct impact on funds available to the general body of creditors. Furthermore, the ability to identify and repatriate goods also relies upon the retailer having adequate practices in place to sufficiently identify goods.

It could equally mean that additional holding costs are incurred by the company acting by the IP, whilst the repatriation process is undertaken (for example, rent, rates, utilities, insurance and security). Again, this could have an adverse impact on the funds available to creditors as a whole, as such general overhead costs are unlikely to be capable of being passed to any one consumer as a condition of repatriation.

Goods not identified or agreed on

We agree that consumers ought to be afforded confidence when purchasing goods from a retailer's general stock online. However, without any further clarity, the Bill as drafted in relation to goods not identified or agreed may not provide consumers with this confidence and could also create relatively inequitable issues for the retailer and their general body of creditors should it enter an insolvency process.

The Bill suggests that the goods must be appropriated in a way the trader intends to be permanent, such as by labelling, segregation, identification or alteration. However, it will be difficult to establish the retailer's intention of permanency until such goods are delivered to the consumer, which is the last circumstance under which title passes under proposed Section 18B(4).

Equally, many retailers' T&Cs often operate to delay the formation of a contract until goods have been delivered or passed to a carrier. In this case, will the retailer's terms prevail? If so, the Bill as drafted will not assist consumers in obtaining title to goods at an earlier stage.

Impact on consumers

The Bill may result in consumers potentially being considered to have title to goods in many different circumstances, prior to delivery. However, the list of events and circumstances are subjective and open to interpretation. Clarity is required here to provide the consumer with both the protection intended and an understanding of their position.

Are retailers able to circumvent the changes in the Bill by altering their T&Cs to delay formation of the contract until such time as they consider title to pass, for example, upon delivery or dispatch of goods?

If so, this will not clarify the position for consumers, whom will continue to be bound by an individual retailer's T&Cs.

Paragraph 5.37 of the consultation document states that "*more prepaying consumers would be able to recover their goods under the proposed rules in the draft Bill, resulting in less frustration and personal time being spent dealing with the problem*". However, in light of the above queries, the Bill could achieve the opposite due to the complex legal position that will need to be confirmed prior to the consumer receiving goods (which ultimately may also not happen).

Consideration could be given to how a retailer may better bring their T&Cs, particularly in relation to title, to consumers' attention. We agree that this is usually done by providing a link, often in small font where the consumer is required to tick a box to confirm that they have read before completing the purchase. In many cases this is unlikely to be done and the consumer just ticks the box without reading a large, often complicated document. Perhaps if a statement in relation to the retailer's terms regarding title passing was given on the face of the page, rather than by link to a much bigger document, this may bring this issue to consumers' attention and better educate them.

Clarity is also required for consumers on when risk in the goods passes to them, as it may, for example, give them cause for additional concern if they consider that they are responsible for damage caused in transit if title to the goods passes to them prior to delivery.

Impact on retailers

The same impact on a retailer's working capital, as previously mentioned in relation to the proposed rules regarding ascertained goods, could also apply here.

However, many retailers' T&Cs often operate to delay the formation of a contract until goods have been delivered or passed to a courier. These terms are used by retailers to address practical issues, such as pricing errors or stock levels. Should the Bill remain as drafted, it is likely that retailers will address their T&Cs to ensure that they have such a clause.

This may mitigate the impact on availability of inventory funding, although is unlikely to address the likelihood of retailers' suppliers reviewing their credit terms where they feel that their ROT or lien clauses will be adversely impacted by the Bill.

Impact on the general body of creditors

The assets available to the general body of creditors will reduce as a result of the events and circumstances listed bringing forward the point at which transfer of ownership to the consumer occurs.

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 to a claim (in a similar way to that currently experienced with ROT claimants). Furthermore, it is likely that additional legal fees will be incurred by the IP to obtain advice on how best to resolve these issues.

Paragraph 5.24 of the consultation paper states that, when considering goods in a retailer's possession, "*ownership in the vast majority of those goods would not have transferred to consumers*". Even in this situation, the initial detailed analysis will need to be undertaken, at a cost to the creditors of the insolvent estate.

It would be helpful if clarity was provided on where the burden of proof falls in an insolvency situation. For example, it is for the ROT claimant to prove title, rather than the company or the IP on insolvency.

An IP is also likely to incur more time in dealing with ROT and lien claims as the proposed rules provide an extra layer of complexity to their claims, via another claim on title being introduced for the same goods. This will also adversely impact the funds available for the general body of creditors. For example, when assessing a warehouse or haulier's lien, it will be necessary to firstly prove when title to the goods in question transfer to the consumer. How will the Bill affect goods on the water where there are letters of credit in place? If title passed before the goods were moved to the warehouse or passed to the haulier, then the lien claim is unlikely to be valid, but due to the subjectivity of circumstances pre-delivery where title is considered to have passed, this will be difficult to prove and will therefore create further protracted correspondence, and potential legal costs.

Under the proposed rules, ownership of goods may transfer before full payment is made in order to protect consumers on the insolvency of a retailer who have paid substantial deposits. Whilst we appreciate this provides protection for the consumer, it could adversely impact available funds for creditors if an insolvent retailer has no title to the goods, but instead has several, individually low value, debts. These could prove difficult to collect, particularly if goods no longer have valid warranties as a result of the insolvency and in many cases, the costs to pursue the debt would outweigh the value outstanding. It is noted, however, that an IP would be able to exert their right to retain goods that had not been delivered to a carrier, until full payment is received.

We note that at Paragraph 5.30 of the consultation document it is stated that "*the draft Bill would result in only a minimal increase in time spent by insolvency practitioners in determining whether ownership of goods has transferred to a consumer in the event of an insolvency*". Have the Law Commission gathered any evidence to support this?

Goods forming part of a bulk

We agree that consumers do sometimes enter into contracts for goods that form part of a bulk and that goods could remain part of that bulk until shortly before delivery. Examples of such retailers are building merchants, beer/wine merchants or creameries, although recognise that the latter are more likely to be sold on a wholesale basis. It is unlikely that, in these examples, the bulk would be identified in the contract and that the consumer would know what bulk their goods formed part of.

The Bill confirms that goods will need to be separated from the bulk before ownership of the specific quantity of goods can transfer, but the measures suggested to identify the point at which co-ownership arises will be difficult to implement in practice. It is reliant upon retailers labelling bulks with co - owners' names or committing to providing details of the bulk either in the contract or post contractually. Similarly, it is unlikely that a consumer would examine the bulk, particularly if the order was placed online.

Impact on consumers

The Bill affords little protection to consumers who purchase a specified quantity of goods from a bulk, where this has not been identified. The proposed rules rely on the retailers' actions to protect the consumer.

We echo that education and awareness of consumers is key and they should be made aware of prepayment risks, rather than seeking to transfer ownership at an earlier stage, when practically it is unlikely to happen.

Impact on retailers

Again, retailers will be able to easily circumvent the changes in the Bill by not labelling the bulk, not providing details of such or not allowing consumers to examine goods prior to dispatch. Furthermore, T&Cs that delay the formation of a contract until delivery will also serve to protect the retailer and evade the proposed rules.

Impact on the general body of creditors

The Bill as drafted, could make dealing with ROT claims over bulk stored goods more complex and time consuming to deal with due to the additional layers of claims on title.

Conditional sale contracts & HP

We agree that the proposed changes introduced by the Bill should not apply, nor are appropriate, to conditional sales or hire-purchase agreements until full payment is made or other steps are completed, or conditions met.

Section 75 claims and chargebacks

We agree that Section 75 and chargeback arrangements are a key method of protection for consumers and should be both more transparent and widely understood. However, increases to these claims will not be without detriment to the card issuer and merchant acquirers. Has it been considered whether making the card issuers' and acquirers' business harder, may also be detrimental to both consumers and retailers? If the number of acquirers fall as profits become squeezed, or terms are introduced to protect the acquirers, this may impact on cost terms being passed to consumer and additional cash collateral requirements being passed to the retailer and adversely impact on their cashflow.

We appreciate that, if consumers are better protected by the proposed rules, Section 75 and chargeback claims should theoretically decrease. However, claims for the costs of collection or for refunds where goods are offered without warranty, for example, will serve to inflate claims and where a retailer successfully manages to circumvent the proposed rules by introducing T&Cs that delay contract formation until delivery, Section 75 and chargeback claims will remain the main source of protection for a consumer.

Impact on consumer

We agree that an established industry code of best practice will act to increase access to these and aid consumer education.

Section 75 claims can only be made where there is a breach of contract and so if there has been a breach, for example the insolvent retailer refusing to deliver the goods and instead requesting the consumer collect them. Therefore, the accelerated passing of title proposed under the Bill will not change the consumers' current position in relation to Section 75. However, it is likely that the proposed changes will mean that the consumer could make a claim under Section 75 for any additional costs incurred to obtain the goods to which they hold title.

We agree, however, that it is unlikely that a consumer would be able to claim under the chargeback rules for any additional costs incurred to store or deliver the goods required by an IP as a condition of repatriation.

Impact on retailer

KPMG

As discussed above, any increase to the level of Section 75 claims to a merchant acquirer could ultimately result in the merchant acquirers requiring higher levels of cash collateral, which could adversely impact the retailers' cashflow.

Impact on the general body of creditors

An increased awareness of Section 75 claims and chargebacks for consumers pre-appointment will be of benefit as it will reduce the time incurred by IPs addressing individual consumer queries and rights.

Conclusion

In summary we believe that:

- Clarity is required for consumers to make the point of transfer of title less subjective;
- Retailer T&Cs, particularly regarding title, should be bought to consumers' attention in a much clearer way;
- Education for consumers on their rights regarding Section 75 and chargeback claims would help, although query who will provide this (potentially the card companies);
- Any change must provide a fair balance in terms of impact on the consumer, the retailer and the retailer's wider body of creditors on insolvency;
- Changes should be mirrored to other sectors outside of retail where consumers pay large deposits for goods.

Whilst we understand the importance of protecting the interests of consumers in retail insolvencies, we also believe it important to protect the interests of the creditors as a whole and maximise funds available to all creditors in an insolvency scenario.

We trust these comments are of assistance to you. However, if you have any further questions, please do not hesitate to contact me or [redacted].

Yours faithfully

[redacted]

[redacted]

KPMG LLP

Response ID ANON-CMMJ-UD1N-Y

Submitted to **Law Commission consultation on consumer sales contracts: transfer of ownership**
Submitted on **2020-08-03 11:11:28**

About you

What is your name?

Name:
Lorna Richardson

What is the name of your organisation?

Enter the name of your organisation:

University of Edinburgh

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state: :

What is your email address?

Email:
[redacted]

What is your telephone number?

Telephone number :
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

The new rules in practice

Consultation Question 1

Other

Please share your views below::

In the main yes. Subs(4)(b) could be altered to make clearer what is meant by setting aside.

I have a general comment on the phrase "ownership of goods or share". A consumer may think of a share as being shares in a company. I would suggest adding "or share in the goods".

Consultation Question 2

Other

Please share your views below::

I note that a consumer in the diamond ring to be inscribed example used in the DP is in a better position if she purchases in a store rather than online given she will not become the owner in the latter case until the inscription is complete. There would be greater parity if ownership transferred when the alteration started. In that situation it seems to me that the trader has at that stage identified the goods to be used to fulfil the contract.

I don't think this is an unintended consequence but it appears that retention of title clauses will no longer be effective in consumer sales contracts which are not conditional sales contracts. For instance, a trader gives a 14 / 30 day period after which the full sum due for the goods is payable. In that situation the consumer would become the owner of the goods without any payment having been made. The insolvency practitioner would have a claim against the consumer for the price but given the concern is protecting consumers who have paid for goods but not received them by the time the trader becomes insolvent I don't think RoT clauses should necessarily be excluded. It may however be the case that RoT until full payment after a period, rather than by instalments, is very rare and, as such, is unlikely to cause problems. It may however result in traders being unwilling to provide these grace periods to consumers, to the disadvantage of consumers.

Consultation Question 3

No

Please share your views below: :

Consultation Question 4

Not Answered

Please share your views below: :

Consultation Question 5

Yes

Please share your views below::

Given the changes proposed to transfer of ownership in s18A and 18B it seems sensible to make these changes to deal with the realities of consumer contracts.

In 2(g) might it be sensible to add that the bulk is identified in some other way that is intended to be permanent?

Consultation Question 6

No

Please share your views below::

Consultation Question 7

No

Please share your views below::

Consultation Question 8

No

Please share your views below::

See response to Q2.

Consultation Question 9

Yes

Please share your views below::

Consultation Question 10

No

Please share your views below::

Consultation Question 11

No

Please share your views below::

In contracts for the supply of goods and services it may be that the consumer does not want the goods unless she also receives the associated service. It may be that it is difficult or more costly to obtain the service from another supplier without also obtaining the goods from that supplier. Given the rules proposed in the Bill do not tie the transfer of ownership to payment this would mean that the consumer would be liable to pay for the goods once the contract was formed / they had been identified. This would happen before the service was to be performed and trader insolvency could intervene.

In contracts of exchange I think rules that deal specifically with these types of contract would be better than those set out in the draft Bill. On insolvency it may be that the trader stops trading or trade is significantly reduced. Unlike in a contract for the sale of goods where the sums paid or due by the consumer will be wanted, other goods or work may not be wanted by the insolvency practitioner in terms of running the business or winding up operations. The rules as currently drafted could operate to the prejudice of the trader's general body of creditors where the consumer obtains ownership in the goods before anything of value, eg work done by the consumer is provided. The rules could also operate to the consumer's detriment eg if the consumer offers up goods in exchange for board and lodging ownership in the goods would pass to the trader at contract formation, the trader may become insolvent and it may be impossible for the insolvent company to provide the board and lodging agreed upon.

Consultation Question 12

No

Please share your views below::

I am not convinced that a trader needs to physically deliver the goods to a consumer in terms of ss28 and 59 CRA. As such if the insolvent trader does not physically deliver the goods to the consumer I don't think that this would be a breach of the contract of sale, unless, of course, the contract provided for physical delivery of the goods to the consumer. If I am correct then there is no breach of contract by the trader entitling the consumer to reject the goods and claim a refund. The matter is different where additional charges have to be paid by the consumer before the trader / someone in possession of the goods on the trader's behalf releases the goods to the consumer.

Consultation Question 13

Other

Please share your views below::

Yes but only where those charges are additional charges. Please see the response to Q12. Any delivery charges where the goods were made available to the consumer would not be incurred due to a breach by the trader and as such would not be recoverable. This would be different if the contact provided for physical delivery to the consumer as then there would be a breach of contract.

Consultation Question 14

Other

Please share your views below::

The analysis provided in the consultation paper does not mention the fact that suppliers' retention of title clauses are often defeated by s25 SOGA. That however does not affect the analysis offered and I agree that the changes proposed may simply bring forward the point at which ownership is transferred to a consumer purchaser.

On retention of title as between retailer and consumer see response to Q2.

Consultation Question 15

Not Answered

Please share your views below::

Consultation Question 16

No

Please share your views below::

Work will need to be done to publicise the bill and when the law is going to come into effect. Retailers will need to know about it and what it means for them and potentially their relationships with suppliers (in terms RoT provisions). It may be that retailers want to operate slightly differently to take account of the changes. More significantly, retailers of all sizes are struggling given lockdown measures to deal with COVID-19. It may be best to provide a bit of breathing space while retailers deal with these effects before introducing further changes. Equally, given the changes will protect consumers on retailer insolvency, and with many of those predicted, there is a need to put the measures in place. I would suggest a 3 month lead in time, with publicity around the changes.

The timing of contract formation

Consultation Question 17

Please share your views below::

Consultation Question 18

Please share your views below::

Consultation Question 19

Please share your views below::

Consultation Question 20

Yes

Please share your views below::

Yes. Conditional sales contracts or the law of mistake could be utilised by retailers. It may noted that Art II-4:201 DCFR places a condition on offers made to the public to provide goods or a specific service at a stated price (although that deals with the issue of adverts or displays of goods being considered offers rather than invitations to treat).

Consultation Question 21

No

Please share your views below::

As a consumer who shops online regularly I am aware of only one platform (notonthehighstreet) that makes clear that the contract will not be concluded until a confirmation email has been received. This seems to be because notonthehighstreet acts as a platform by which many independent retailers sell goods. The retailer itself has to be contacted by notonthehighstreet to check there are goods to fulfil the order.

Consultation Question 22

Please share your views below::

I don't think they are.

Consultation Question 23

Not Answered

Please share your views below::

Consultation Question 24

Not Answered

Please share your views below::

Consultation Question 25

Yes

Please share your views below::

As you highlighted earlier in the DP, without a contract there can be no claim for consequential losses. 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.

Assessing the impact

Consultation Question 26

Not Answered

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 27

Yes

Please share your views below (supported by qualitative and quantitative evidence where possible)::

In the main this is likely to be a one off main cost as retailers obtain advice about how the rules will affect them. There may however be some follow up queries especially if the retailer decides to make changes to their operations as a result.

Consultation Question 28

Yes

Please share your views below (supported by qualitative and quantitative evidence where possible)::

There may be some costs to businesses should retailers make changes to their modes of working to take account of the changes. Such costs would be one off.

Consultation Question 29

Not Answered

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 30

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 31

Please share your views below (supported by qualitative and quantitative evidence where possible)::

In Scotland a landlord has a right of hypothec against items in the leased premises owned by the tenant debtor for sums due under the lease. This has not been considered in the DP. The utility of the landlord's right of hypothec has been significantly reduced since the main mechanism to enforce it (sequestration for rent) was abolished. However it is in the context of insolvency that a landlord can seek to utilise his hypothec, as secured creditor of the items in the leased premises owned by the tenant. The effect on landlords may therefore be similar to floating chargeholders, in that with ownership of goods passing to consumers earlier there will be fewer goods to which the landlord's hypothec can attach.

Consultation Question 32

Not Answered

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 33

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 34

Please share your views below (supported by qualitative and quantitative evidence where possible)::

I agree with the assessment on consumer benefits.

Consultation Question 35

Yes

Please share your views below::

However, this would be to a limited extent. As noted in the DP the changes to the rules will not benefit all prepaying consumers. Consumers may also be anxious about entering into discussions with insolvency practitioners about ownership of goods. In addition, if retailers delay contract formation until dispatch the rule changes will bring no benefit to consumers. An unintended consequence of the proposed changes may be that more retailers seek to delay contract formation.

Response ID ANON-CMMJ-UD14-5

Submitted to **Law Commission consultation on consumer sales contracts: transfer of ownership**
Submitted on **2020-07-29 13:08:37**

About you

What is your name?

Name:
Matthew Hoyle

What is the name of your organisation?

Enter the name of your organisation:

One Essex Court

Are you responding to this consultation in a personal capacity or on behalf of your organisation?

Personal response

If other, please state: :

What is your email address?

Email:
[redacted]

What is your telephone number?

Telephone number :
[redacted]

If you want the information that you provide in response to this consultation to be treated as confidential, please explain to us why you regard the information as confidential. As explained in our privacy notice, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

Please explain to us why you regard the information as confidential:

The new rules in practice

Consultation Question 1

Not Answered

Please share your views below::

Consultation Question 2

Not Answered

Please share your views below::

Consultation Question 3

Not Answered

Please share your views below: :

Consultation Question 4

Not Answered

Please share your views below: :

Consultation Question 5

Not Answered

Please share your views below::

Consultation Question 6

Not Answered

Please share your views below::

Consultation Question 7

Not Answered

Please share your views below::

Consultation Question 8

No

Please share your views below::

As a lawyer who deals very commonly with conflict of laws issues, I am concerned about the ambiguity in the consultation paper as to the nature of clauses 18A(4) and 18B(5). Paragraph 3.8 of the consultation suggests that:

'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.'

Under Rome I (in its current and retained-EU law versions) Article 6 governs consumer contracts, applying English law to English-resident consumers if sales are 'directed' here or the trader operates here. However, parties are free to choose another law (Article 6.2) subject to a restriction against derogating from mandatory provisions of the otherwise applicable law. Therefore, it would seem that clauses 18A and 18B, being expressed in mandatory terms, will normally apply to English consumers despite any choice of law to the contrary.

In situations where the trader does not operate in or direct sales to England, the sale will be governed by the law of his habitual residence, subject to 'overriding mandatory provisions' under Article 9.1- 2. There is nothing in the new bill which would suggest these provisions fall within Article 9, but equally, these appear to be provisions which apply irrespective of the law of the goods contract, for the purposes of consumer protection. The limitation of the bill in clause 3(1) to 'England and Wales' does not seem to meet the point (and indeed arguably adds more confusion) given that the bill is concerned with the enforceability and effect of the terms of contracts before the English courts and not with conduct of the parties.

A judge would likely be comfortable in finding these are mandatory provisions which apply to any sales contract made with an English resident consumer. There will have to be costly litigation to determine whether these provisions are indeed overriding mandatory provisions, and this will not be assisted by the language of para 3.8 of the consultation document or the bill itself.

Consultation Question 9

Not Answered

Please share your views below::

Consultation Question 10

Not Answered

Please share your views below::

Consultation Question 11

Not Answered

Please share your views below::

Consultation Question 12

Not Answered

Please share your views below::

Consultation Question 13

Not Answered

Please share your views below::

Consultation Question 14

Not Answered

Please share your views below::

Consultation Question 15

Not Answered

Please share your views below::

Consultation Question 16

Not Answered

Please share your views below::

The timing of contract formation

Consultation Question 17

Please share your views below::

Consultation Question 18

Please share your views below::

Consultation Question 19

Please share your views below::

Consultation Question 20

Not Answered

Please share your views below::

Consultation Question 21

Not Answered

Please share your views below::

Consultation Question 22

Please share your views below::

Consultation Question 23

Not Answered

Please share your views below::

Consultation Question 24

Not Answered

Please share your views below::

Consultation Question 25

Not Answered

Please share your views below::

Assessing the impact

Consultation Question 26

Not Answered

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 27

Not Answered

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 28

Not Answered

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 29

Not Answered

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 30

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 31

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 32

Not Answered

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 33

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 34

Please share your views below (supported by qualitative and quantitative evidence where possible)::

Consultation Question 35

Not Answered

Please share your views below::

CONSULTATION RESPONSE

The Consumer Rights Act 2015 (CRA) was supposed to provide a "code" in which consumers could ascertain comprehensively their rights in relation to traders (s. 2 CRA). It is therefore consequent to include the rules on transfer of ownership – hitherto only regulated in s. 4 by reference to the Sale of Goods Act 1979 (SGA) – in the CRA as well. Unusually, but helpfully, the Law Commission included a Draft Bill already at the consultation stage. The following are some observations (by no means exhaustive), occasionally with reference to the similar Scots law.

1.

As a preliminary point, the intention of being a comprehensive text that can be consulted by lay persons ("We think that consumers deserve a clear, modern statement of the law about when they will own goods, including in an insolvency situation.", Law Commission Consultation Paper summary), cannot be taken to have been achieved by the Draft Bill. The text is not even very accessible to specialists. For example, the principal change is that the CRA- equivalent to s. 18, rule 1, SGA, in the Draft, s. 18A (3) and (4), mandatorily requires that ownership passes when the contract is made; a contrary agreement by the parties is not permissible (unlike in ss. 17, 18 r. 1 SGA). The Draft speaks of transfer of ownership, not passing of property, as the Sale of Goods Act, and therefore comes closer to Scottish terminology which is more precise in this particular context (interestingly, the amendment shall apply to England and Wales only at the moment, see Draft s. 3 (1)). But it does not say, for example: "In relation to goods that are identified and agreed on when the contract is made, the mandatory implied term applies that ownership in the goods transfers to the consumer when the contract is made.", but proposes the complex wording across three subsections ((1), (3), (4)) in s. 18A which cannot possibly contribute to further clarity for consumers. There are several other examples, so a redraft in relation to language and style may be advantageous. The duplication of a number of rules of the SGA in the CRA also forces a quite long-winded restatement of definitions that the SGA already provides (e.g. specific and (un)ascertained goods and what is considered as ascertainment, divided and undivided shares in goods etc.) which are not consumer-specific issues, and their duplication in the CRA does not add anything new except for leading to more cumbersome rules in the CRA (e. g. s. 18A (1), s. 18B (1) and (4)).

2.

On a more substantive point, the change that ownership must pass when the contract is made, as a compulsory rule, might be the result of a slightly insufficient appreciation of the notional separation of contract (a contract directing at transfer of ownership, law of obligations) from conveyance (the actual ownership transfer, law of property). It is true, the same rule applies in France in relation to moveable property (art. 1138 (1) Code Civil: "L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes."), but in France the idea of contract and conveyance is clearly observed. In the present Bill, this is not so clear. The compulsory rule that conveyance must happen with the formation of the contract, makes it appear that the conveyance is the contract, and not merely effected by the contract as the basis of the conveyance. The latter would normally be the case in a causal system of conveyance which effectively applies here: a causal system of conveyance requires a valid contract as a the basis for the transfer of ownership, such as in Austria, Switzerland, effectively also in England, while an abstract system of conveyance requires consent between owner-transferor and transferee that ownership shall pass, irrespective of whether the underlying contract is valid, such as in Germany (there are exceptions). Some Scottish legal academics assume that Scots law also has an abstract conveyance (which ss. 17, 18 r. 1 of the SGA supposedly contradict): while this is correct for land/immoveable property (heritable property), this view is rather doubtful with regard to moveable property. However, if the proposed amendment were to be extended to Scotland concerns may be raised by some in this regard.

A typical delivery scenario in business, that transfer or delivery of goods (which could be transfer of ownership, as could be agreed under ss. 17, 18, r. 1 SGA) happens sometime after the contract has been concluded, would not be possible under the CRA. This can lead to two problems:

(a)

Retention of title (s. 19 SGA) is apparently no longer possible (Draft s. 2 (6)). That is unlikely to be acceptable to traders who sell goods to consumers on credit, repayable over a period of time in instalments (typically, as consumer credit agreements, regulated by the Consumer Credit Act 1974). Retention of title (ownership) is attractive to traders because it will rarely be affected by a resale because the sale was to a consumer as a final user, contrary to a sale by the manufacturer to a wholesaler, where s. 25 SGA usually applies and the proceeds of sale instead of the goods sold to a sub-buyer will only go to the original seller if held in trust by the first buyer separately from the first buyer's assets. Such problems would not often arise in case of a consumer sale because the consumer would not be expected (or allowed) to sell on: he uses the goods for himself as an end-user, in which case a retention of title would work for the seller (and is attractive in case of the

buyer's insolvency). But it seems that this option would no longer be open to traders according to the Draft.

(b)

Since contract (sale) and conveyance (ownership transfer) are mandatorily intertwined according to the Draft, sellers (traders) may seek to delay the formation point of the contract to prevent the transfer of ownership. While in the Draft the process of the conveyance is mandatory, the process of contract formation is not (and that would otherwise be a deep incision into contract law): so traders can, and will, stipulate in their contract terms various conditions that have to be fulfilled before the contract is concluded (and with it, ownership then necessarily passes). Litigation over perceived unreasonable terms and possible chicanery is likely: the courts may be invited to rule that under certain circumstances, a contract is taken to have been concluded. Pre-payment by customers to traders is probably not (or can be stipulated as not) bringing about the formation of the contract. This is not a malicious interpretation in favour of traders, but can be result of the following simple example: consumer B sends £ 170 as pre-payment to trader A, but A only wants to sell for £ 190 – *dissensus* as to price, no contract of sale. If the trader becomes subsequently insolvent, B is not owner of the goods and only has an unsecured claim for £ 170 in unjustified enrichment (if we stay in Scots law) or an action for money had and received against B's insolvent estate, which is commercially worthless. If, furthermore, A has sent the goods to B, not realising that he has only received £ 170, B additionally has to return the goods to A or his liquidator because there is no contract and no basis for a transfer of ownership, and only the latter would save the goods from the grip of A's liquidator. It is therefore hard to see where the advantage for consumers lies which the proposed change in the Draft seems to envisage.

The further scenarios of manufacturing. labelling etc. (s. 18B (3) and (4)), are only different conditions, but in relation to the discussed issues of ownership transfer not substantively different to the problems already dealt with.

Another problem is the consumer protection provision of s. 75 of the Consumer Credit Act 1974: Credit card companies may insist that there is no transaction or a contract (s. 75: "in relation to a transaction financed by the agreement") has not been concluded (because the trader wanted to delay compulsory transfer of ownership with the delay of the formation of the contract), so that the connected lender liability in s. 75 does not apply, which would weaken consumer protection considerably.

3.

A further point is the relationship between CRA and SGA with regard to ownership transfer. Does the CRA rule out the application of the SGA as a *lex specialis*? Or does the SGA apply as a set of subsidiary rules if the CRA is silent? S. 18 rule 3 and rule 4 have no equivalent in the proposed Draft. Does the SGA apply in consumer contracts in these cases? S. 2 (2), (4) and (5) make clear that all cases of the SGA which the CRA in its amended form takes account of obviously fall under the CRA only. But for the other cases that should be clarified.

Professor Andreas Rahmatian

Professor of Commercial Law

University of Glasgow

Consumer Sales Contracts – Transfer of Ownership

Consultation Response

Professor Christian Twigg-Flesner and Professor Hugh Beale, University of Warwick

We welcome the opportunity to be able to comment on the draft bill, and on some of the additional questions raised in this consultation paper (particularly in chapter 4).

Chapter 3: The proposed rules in practice/Draft Bill

Para 3.5: We assume the continued cross-references to the Sale of Goods Act 1979 under the revised s.4(2) CRA are necessary because of the fact that the proposed amendments are limited to England and Wales only. Like the Law Commission, we hope that this could be extended to Scotland. The difficulty with bolting-on provisions on existing legislation in this way is that it makes the amended legislation less easy to follow (which, in the case of the Sale of Goods Act 1979, is a significant issue: the Act looks rather messy already, and the additional provisos which would be required are not going to improve this).

The location of the new provisions in ss.18A and 18B also seems strange. In the Consumer Rights Act, s.4 has had the dual function of both referring to the rules applicable to the transfer of ownership and a "placeholder" for consumer-specific provisions, once they were ready to be introduced. With ss.9-18 of the Consumer Rights Act focusing on the various aspects of quality and fitness for purpose, followed by ss 19-24 providing remedies for breach of the requirements, rules on the transfer of ownership do not seem to fit here. Instead, a better location within the Act would be either as new sections 4A and 4B or (since it might better to deal with the issue of passing of ownership in sales after the explanation of the various kinds of contract in ss 5-8) as a new section 28A (or perhaps 29A), along with delivery and risk. We think either would help consumers and consumer advisors to navigate the provisions of the Consumer Rights Act more easily.

We also question whether the legal technique used for the various rules on the transfer of ownership are appropriate. The Draft Bill uses the language of "terms treated as included in the contract", the rather awkward phrase used in the Consumer Right Act 2015 to avoid the notion of the implied term. However, it might be unnecessarily complicating matters by making the rules on the transfer of ownership terms of the contract. In fact, the Sale of Goods Act 1979 is not expressed in such terms: whilst s.17 SoGA priorities the parties' agreement as to

the time when property is to pass, and s.18 is expressed in terms of "rules of presumed intention", this is, presumably influenced by the fact that in many commercial contracts, there may be express terms dealing with the passing of property. The rules proposed for the Consumer Rights Act 2015 are (rightly) intended to be mandatory, so it might be more straightforward to phrase these provisions as clear statutory rules.

We would therefore encourage you to consider whether it would be better to (i) insert the new provisions into the Consumer Rights Act immediately either after s.4 or after s 28 or s 29, and (ii) to avoid the "terms treated as included in a contract" technique for these provisions.

Specific comments on the draft legislation (Consultation Qs 1-3)

In addition to my more general comments above, we have some specific observations on the individual provisions:

Section 18A: The core provision, s.18A(3) is a clear and easy rule to apply in consumer contracts. As indicated earlier, we are not hugely impressed with the drafting of this section, though we can see that it follows the rather cumbersome drafting style of the Consumer Rights Act generally.[1]

Section 18B:

S.18B (1): We wonder if simply using the definition of "specific goods" from s.61(1) SoGA without using the term itself does enough to make the distinction between the situations covered in s.18A and s.18B sufficiently clear. Applying the notion of goods which are "identified and agreed on" is notoriously difficult for a layperson, something which we see every year when Commercial Law students first meet the concept. Part of the problem is that to "identify" is often used to mean "specify" in the sense of stating precisely what is wanted. Removing the label but keeping the substance might not make this distinction any clearer. Clearer language might be to say "the individual item or items to be sold have been selected when the contract is made" in s.18A and "the individual item or items to be sold *had not* been selected when the contract is made" in s. 18B.

[1] Both Professor Andrew Burrows JSC and Joshua Rozenberg have commented on the CRA's drafting style elsewhere.

S.18B(3): at first sight, this provision seems sensible and correct, but on reflection it raises some difficult issues.

The first is the meaning of "are to be manufactured for the consumer". We assume that this means that it is expressly agreed that the supplier will make a new item for the consumer and cannot supply an item from existing stock even if it meets all the specifications; and conversely, means that it is not enough that the supplier has to make a new item in order to satisfy the consumer's order but making the item is not part of the agreement.

Secondly, we are not convinced that even when the supplier has expressly agreed that the item for the consumer is to be manufactured, that will be sufficient in the one case where it really matters - where the supplier has become insolvent before the goods have been delivered. It will be clear enough when the goods will be wholly unique (e.g. a five-legged stool) or each consumer has such differing requirements that no two orders are alike, but with new goods the consumer may be presented with a limited number of options. Take your example in para 3.21 but suppose the only option is as to the fabric of the sofa that is to be made for the consumer. The facts that the consumer has ordered a sofa in, say, black leather, and that a black leather sofa has been manufactured since the consumer's order was placed, may not be sufficient to link the sofa to the contract because there may have been several orders for a black leather sofa and several have been made.

Also, s.18B(3) seems to leave room for dispute as to when "manufacture is completed". For instance, when is manufacture of the sofa in your example at para 3.21 completed? Does it have to be physically complete, should all the necessary labels be attached, or should it be wrapped and ready for delivery? If it is the latter, how is this different from s.18B(4)(b)? We are not sure that s.18B(3) actually adds anything to the criteria in s.18B(4). There may be cases in which the goods can be identified because they are custom made yet they do not meet any of the s.18B(4) criteria – but this could be resolved by adding "manufactured" to sub-paragraph (c). Also, the reason why the process of manufacture or alteration needs to be complete is not clear at all.

One possible way round this problem might be to say that what matters is the state of affairs at the moment of insolvency; and so the property in the sofa should pass if at that moment there was only one order for the manufacture of goods of the relevant specification. But that would involve a radical change of approach, from providing rules that speak of the transfer of

ownership irrespective of the supplier's insolvency to determining what should happen if and when insolvency occurs, and allocating the property accordingly. And this might open up the argument that even where the sofa was not to be made to order and could be supplied from stock or elsewhere, if only one consumer has ordered a sofa and there is only one in stock, the sofa should be treated as the consumer's property. That would of course be consistent with your aim of protecting pre-paying consumers, though it might not go down well with the supplier's potential other creditors.

s.18B(4)(a) labelling in a way intended to be permanent: what is the yardstick by which the trader's intentions would be established? Your example at 3.25 is quite a particular situation, but about a situation where this is not regular practice, but, just before the appointment of the insolvency practitioner, a label has been removed because, in that particular case, the trader had intended to supply the item intended for one consumer to another? We wonder if this criterion actually does little to advance on the situation as it already seemed to be under s.18 rule 5 of the Sale of Goods Act 1979.

s.18B(4)(b): Again, this raises the same question about the manner in which the trader's intentions as to permanence should be established.

s.18B(4)(c): We imagine that it would be easier to establish a link goods between a particular consumer's order and the goods that are being altered than in the case of manufacture discussed earlier; alterations will normally be pretty individual. But if that's so, we think there is a mismatch between the objective of improving the position of pre-paying buyers and the rule as it is proposed. Would it not make more sense for the criterion to be that, at the time when the business becomes insolvent, the trader had commenced the process of alteration?

s.18B(4)(d): This seems a useful criterion (even if the instances when this will be the case might not be that common except with new cars, when the buyer may well be told the VIN number and registration number before delivery).

s.18B(4)(e): Here, we wonder why there is any need for limiting this to a situation where the consumer has "examined" the goods? Again we think there is potential for confusion; the consumer might examine a model in order to check that it what is wanted without expecting to be supplied with the item actually examined. Would a simpler approach not be to say that "trader and consumer have agreed the individual item or items to be sold"?

s.18B(4)(f) and (g): These both seem fine.

s.18B(4)(h): a useful fall-back provision but, once again, it leaves open the question of how the trader's intentions would be determined.

Sales from bulk (Consultation Qs 4-7)

In principle, we would welcome a more consumer-tailored version of the provisions on sales from bulk in ss.20A and 20B of the Sale of Goods Act 1979. However, in our view, the cross-feeding between SoGA and the Consumer Rights Act suggested in the consultation paper should be avoided. Instead, provisions on bulk-sales should be reproduced in full in the CRA.

We suspect that with the possible exception of sales of wine that is kept in warehouses (as in *Re London Wine*, though there in that case was no agreed bulk), it will be pretty rare for consumer goods to be kept in 'bulk' in the SGA s 61 sense of being kept in a defined space or area. However, it seems quite possible that sellers will agree to sell consumers items that they have in stock, and the consumer may well get the impression that the contract is for one of the stock items. We wonder if there is a case for extending the notion of a 'bulk' to cover the supplier's stock?

It is true that there may be difficulty in working out exactly what stock the seller holds, especially if it is spread over several storage sites; but you evidently do not think that this problem is insurmountable, as it would also apply to your later recommendation that sellers who are unsure whether they will be able to supply the consumer's order should make the contract conditional on the seller having sufficient stock.

Otherwise, in substance, the criteria for identification of the bulk are broadly fine, although the comments we made with regard to determining a trader's intentions as to the permanence of an identification would apply here, too.

Mandatory Nature (CQ 8)

Both s.18A(4) and s.18B(5) seem to do the job they're intended for. Again, would a simpler wording be better? For instance, "The effect of this section cannot be modified by a term in the contract"? (We note in relation to CP para 3.8 that this will mean that English consumers will be protected in many cases even when the contract is not governed by English law. If the

trader has done business with the consumer in England or has directed its activity to England (as opposed to the consumer making the purchase while abroad or actively seeking out the trader e.g by searching foreign-language websites), this rule will protect the consumer because of Article 6 of the Rome I Regulation, which remains applicable by virtue of the EU Withdrawal Act 2018 and secondary legislation)

Other contracts (CQ 9)

Yes, we agree that it would not be appropriate to apply the proposed rules to conditional sale/hire-purchase contracts. In most of these instances, the goods will be contractually supplied by a finance company rather than the trader, so the consumer would have a contract with a regulated financial services firm. In any case, the main reason for such arrangements is that the consumer will take possession of goods before payment, and so the problem that may arise is a different one.

Contracts for transfer of goods (CQ10)

It might be useful to know when such arrangements might give rise to difficulties in the case of trader insolvency to work out whether the proposed rules could simply be extended to these types of contract. For instance, are there instances involving part-exchange when the goods to be provided by the consumer become the trader's before the trader has delivered the goods to be supplied to the consumer? If so, then extending the rules to these types of contract should be considered. We also wonder about contracts for work and materials, e.g. if a repairer orders parts or a builder orders materials before starting the job and the consumer makes an advance payment to cover this.

General remarks on the passing of property project

The proposals now made still do not resolve one of the lingering shortcomings of the Consumer Rights Act 2015. Despite the ambition to achieve a high degree of consolidation, too many aspects of the law were left outside of the Act. Whilst the Draft Bill would introduce specific provisions on the transfer of ownership into the Consumer Rights Act 2015, it stops short of a complete set of rules dealing with all aspects of the transfer of ownership, with s.20A/s.20B continuing to have a role to play.

There are also the provisions dealing with the transfer of title by a non-owner in ss.21-25 which are long overdue for an overhaul, although we realise that this is outside the scope of the present project.

Equally we appreciate that reform of the rules on the passing of property, and the closely associated rules on the passing of risk and the action for the price, are also not part of the Law Commission's terms of reference. Nonetheless, we would like to put down a marker that these rules are due for a general overhaul, not one confined to consumer contracts. 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 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.

A particular concern is the C2C contract. Distance sales by one non-trader to another are now very common, e.g. over eBay and the like; and they will often involve specific goods - CP para 3.15 refers to antiques but used goods are a far more common example. What we do not know, however, is how often the case will fall outside s 18 rule 1, which of course will protect the buyer if it applies.

Chapter 4: The timing of contract formation

This chapter raises an important question. We agree with the basic analysis of contract formation in the context of online transactions in the Consultation Paper.

We am not entirely persuaded by the two reasons for delaying the formation of a contract stated in para 4.15. We would expect that most online traders are able to monitor their stock-levels digitally (indeed they often indicate how many are left in stock, and it would be pretty frustrating if the supplier than said it did not have them!) and should therefore either be able to avoid the situation in the first place, or indicate to the consumer at the time of ordering that the goods are either out-of-stock or not yet in stock, and indicate a likely delivery date. And you make sensible suggestions for how these situations could be managed without delaying

the formation of the contract itself and the difficulties that would result from this in paras 4.36-4.38.

Perhaps this issue needs a slightly different angle of attack. Starting from the objective of this project to deal with the position of pre-paying consumer buyers, the main reason why the delay to contract formation will be a practical issue is if payment is taken when the consumer places the order but none of the protections which are triggered by the conclusion apply yet. One solution would be to introduce a targeted rule for these instances, i.e., once a trader takes payment, the contract is deemed to be concluded at the time payment is taken. A different solution, building on your analysis of the potential unfairness in paras 4.25 – 4.27 would be to add a rule that a term that seeks to delay the formation of a contract beyond the time when the consumer's order has been acknowledged and payment requested would be ineffective (similarly to s.31 Consumer Rights Act 2015).

We think that a different approach might be fruitful: to extend the reach of s 75 of the Consumer Credit Act 1974 to cover not just claims for breach of contract or misrepresentation but also claims in restitution and (particularly in the light of COVID-19) under the Law Reform (Frustrated Contracts) Act.

Chapter 5

We have a comment on your analysis in para 5.18 regarding retention of title arrangements: even if the ROT in a sales contract does not contain an express or implied term authorising resale, in principle, a retention of title clauses would be defeated by a sub-sale where this satisfies the requirements of s.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 s.25 is fully engaged.

Unanswered question

A different issue is prompted by para 5.19, and also the earlier discussion in ch.4. This paragraph looks at the position of warehouse and logistics companies. There is, however, a hybrid business model which might not fit neatly into this: an online marketplace platform offering various types of fulfilment service for its marketplace sellers (the obvious example being "fulfilled by amazon", the operation of which was recently analysed in the US case of *Bolger v Amazon.com* (D075738, Court of Appeal, California)). This kind of arrangement

rather blurs the relationships between consumer, trader and logistics company (the platform), particularly where the platform offers more than just warehousing services to the marketplace seller in question. How would the proposed rules work in this context, and would your analysis in the various chapters of the consultation document still fit with this particular business model?

Law Commission Consultation Response: Consumer Sales and Transfer of Ownership

I reply to this consultation as an individual. I am Professor of Business Law at the University of Leeds and author of the second edition of *The Principles of Personal Property Law* (Hart Oxford 2017). Paragraph numbers refer to the paragraph of your consultation.

Passage of Title:

As I think I have indicated to you before, I do not think that these changes that you propose alter the law in practice much.

Section 18B(4) for example will remove the language of "unconditional appropriation" but I do not think there is anything here that would mean property passes when it would not have passed under the current law. There is one potential (apparent) oddity in that should the ring purchased be a specific ring, title passes immediately (para 3.17) even if the required inscription is not complete yet title does not pass if a ring is ordered from a generic stock with a requirement for an inscription until the inscription is complete. It looks odd, but in fact I do not think you need to provide for this scenario as in all cases the retailer will have permanently set the ring aside with a view to inscribing it prior to beginning the work. The removal of the "deliverable state" requirement is also welcome. The whole thing produces peculiar interpretive difficulties.[1] To quote from my book

> "Deliverable state is defined by section 61(5) of the Sale of Goods Act 1979 as being a state where the buyer is obliged to take delivery. This would lead to some… odd conclusions. The buyer is entitled to reject goods if they do not meet their description, or are not of satisfactory quality; it would be odd to say the least if that entailed property not passing."

I question the extent to which the bulk goods provisions will be needed because I suspect in most circumstances (gravel, heating oil etc) that the consumer orders a specific amount from the company's generic stocks without ever knowing whether the company has enough in at the moment or puts an order in itself to the wholesaler… That said, by all means leave the provisions in just in case. Again I do not see that the proposed amendments to section 20A(1) SoGA change the substance of the law much, except to make the scope for the creation of a tenancy in common slightly wider. I think that in most cases you mention a good argument could be made that there was agreement in the contract or thereafter. There are exceptions to this - the provisions regarding labelling (d) or delivery to a carrier (f). These though sit in line with the labelling provisions of new section 18B(4). I do not, however, understand in what circumstances para (g) would operate – the bulk is identified "in some other way". In what other way? If the labelling is intended as permanent it is covered elsewhere; if the labelling is intended as temporary or provisional property should not pass for reasons I have explained elsewhere, but basically because it overrides the party's intention. If there is agreement between the parties, it is covered elsewhere. Equally the scope of operation of para (c) is unclear. The information provided must identify the bulk as being intended, or agreed permanently, to be the bulk from which the consumer's goods will come. If not, the trader could change their mind and should be free to do so. But surely this counts as a type of labelling? I also share the concern

[1] In truth the logic is that the "deliverable state" requirement should be abolished for all contracts, but that might be beyond the scope of your report/project.

about age restricted products. The intention you describe in para 3.60 is that the retailer may satisfy himself of the customer's age prior to permanently identifying stock, but the ambiguity of when para (g) applies might lead to transfer of ownership prior to that point. It may be better to remove that paragraph.

Generally, I agree that the new rules should not apply to hire purchase. I worry that you might have got yourself into a mess with conditional sales contracts. You say that the seller will not be able to use section 19 SoGA to delay the time of transfer of title until the consumer has paid in full (para 3.59) and there are reasons to disallow this. The most important is that it protects a prepaying consumer. It disallows the seller from putting the risk of their own insolvency on the buyer, which is precisely the policy you cite in para 3.63. However, section 5 Consumer Rights Act 2015 defines a conditional sales contract as

> a sales contract under which— (a)the price for the goods or part of it is payable by instalments, and (b)the trader retains ownership of the goods until the conditions specified in the contract (for the payment of instalments or otherwise) are met;
>
> and it makes no difference whether or not the consumer possesses the goods.

Why does the policy not apply here? Why do we say that if the consumer pays substantial "deposits" he owns the goods, but not if he pays substantial "instalments"? What is the difference anyway? Why does the instalment payer not deserve to be protected from retailer insolvency? I would think that there will be significant definitional arguments as insolvency practitioners argue that the contract in question was a conditional sale not a "normal" sale and therefore the company retains ownership subject to a personal unsecured claim by the consumer. (Of course if the Govt takes up your original proposal of preferential position for the return of prepayments there is a balance of fairness here). If you think that the policy is a good one then you need to be clear that any attempt to impose a condition or retention of title clause is void, but that's not the position you have, I think. I agree that the rules should not touch conditional sales – there may be good commercial reasons for a RoT clause - but that means you need to be much clearer about what you are attempting to prevent in section 18B(5) so that some of the clauses you ant to keep are not knocked out by a side wind.

On chargeback I agree that the consumer should be able to recover prepayments even when title has transferred, but I would stress that it would be unfair to allow the consumer both the goods and a refund of the prepaid price. If there are consequential losses to which you allude (eg paras 3.99-3.100) they should be recoverable, but if the consumer has the goods in his hands, he should not also have a refund provided he is no worse off than he would have been had there been no breach of the (eg) requirement to deliver.

On liens (Consultation Q 15) I have not changed my mind. I think consumers are probably bound. I think the consumer will in almost all cases be deemed to have consented or given authority for the lien. Whether the lien binds the consumer depends (in general law) on the question whether the company has actual, implied or apparent authority to create the lien – eg *Albemarle Supply Company v Hind & Co* [1928] 1 KB 307 and *Tappenden v Artus* [1964] 2 QB 185. I think a retailer will be expected to have such authority and the consumer might be caught by this. You say probably not; I suppose it depends on the ts and cs that you have seen.

In terms of the impact on creditors, I agree that very little will change. Very few goods will change hands earlier or significantly earlier and so except in the case of small retailers there will be little effect on the value of stock available to be secured by eg a floating charge. It's possible that things might be different for small retailers who might use Amazon as an intermediary platform and you might think more about such retailers. Many of those might be sole traders, however, and it may be that any secured lending would be against the value of their homes for example in any case which would lessen the impact. They would not be able to grant floating charges either in any case.

Formation of Contracts:

Some of this I find bizarre. Your point in para 4.10 about the contract forming weeks or months after payment is incomprehensible. What am I paying for? As I said in my prior response to your informal approach

> The retailer must, by accepting the money/charging the card, be impliedly promising delivery. Otherwise they are saying – "We can charge you for goods that we may or may not choose to deliver and don't have to because there's no contract."

For the record (consultation Q 18) I think despatch must mean despatch to a carrier, but the delay to despatch must be ineffective or I really don't understand what I'm paying for. Even if that were not the case, and even if the terms were sufficiently brought to the consumer's attention (which I don't think they are; I don't read my emails from Amazon. I don't suppose many people do which tells you my response to Q22; consumer's won't be aware) etc, the thrust leaves the prepaying customer with an unsecured claim in unjust enrichment for failure of consideration against the retailer (or thus putting the risk of insolvency on the consumer in contradiction of the policy you want to pursue (para 3.63)). On the face of it there is no debtor-creditor-supplier relation such that the debtor has a claim for breach of contract to trigger section 75 CCA. The debtor's only hope is to claim a misrepresentation, but I'm not sure there is one if the supplier is explicitly saying there is an agreement until despatch. The consumer seems in a very precarious position. I'm not aware of any cases, but it seems that a card company would have an arguable point that section 75 was inapplicable.

It must also surely be possible to deal with issues of pricing errors and insufficient stock through other means. It must for example be possible for the website to be updated with the number of items in stock as orders are made so that consumers are aware that there is 1 (some websites do say things like "fewer than 10 left" or "out of stock"; alternatively a term stating that an order will be fulfilled as soon as practicable will presumably serve. If there are no items left the retailer is under an obligation to procure more to fulfil the order, but is not left in breach of contract automatically. Mispricing is more complex, but a term that the retailer is not obliged to deliver at a "misprice", must notify the customer who is not obliged to accept the "correct price" should serve to protect everyone.

Duncan Sheehan

Bar Council response to the Law Commission consultation paper on Consumer Sales Contracts: Transfer of Ownership

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation on Consumer Sales Contracts: Transfer of Ownership.[1]

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talent from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

4. We set out below our responses to the consultation questions on which the Bar Council is able to comment.

CHAPTER 3: THE PROPOSED RULES IN PRACTICE

Consultation Question 1 (Paragraphs 3.39): Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly?

5. We think that the drafting is clear, subject to the following observations:

[1] Consultation

a. We wonder whether consideration has been given to whether it is possible to align the language in the proposed section 18B(3) more closely with regulation 28(b) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. This subsection excludes the right of cancellation in relation to contracts for the supply of goods that are made to the consumer's specifications or are clearly personalised. Whilst we think it is likely that goods which are "clearly personalised" are covered by the proposed section 18B(4)(c), it might improve clarity if the same language could be adopted across these pieces of legislation.

b. The phrase "intended by the trader to be permanent", which appears in proposed sections 18B(4)(a), (b) and (h) makes the transfer of ownership dependent upon the trader's subjective intention. A consumer is unlikely to have sufficient knowledge of the supplier's practices to ascertain this intention (other than in simple cases) and the extent to which an insolvency practitioner will be in a better position may depend on the nature of the business and the extent to which its insolvency is orderly or chaotic. We recognise that this is a difficult issue and we address the point further in our response to Question 2 below.

c. It appears to be intended that section 18B(4)(b) will cover situations beyond the physical setting aside of goods (such as the example in paragraph 3.27 of the Consultation Paper). We wonder whether this should be made explicit, perhaps by the inclusion of a phrase such as "whether physically or otherwise".

Consultation Question 2 (Paragraphs 3.40): Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 could have unexpected consequences for when ownership transfers? If so, please explain your concerns.

6. We wonder whether further consideration should be given to sections 18B(4)(a), (b) and (h). A trader may intend labelling, setting aside or some other action to be permanent but, due to unforeseen circumstances (such as the example given in paragraph 3.25 of the Consultation Paper), may then need to reverse this action and use the goods for fulfilment of another customer's order.

7. 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.. On the other hand, if the drafting was changed such that the labelling, setting aside or other action must, in fact, be permanent *and irreversible*, it is unlikely to provide much additional consumer protection - the situation would be as set out in *Carlos Federspiel & Co v Charles Twigg & Co* [1957] Lloyd's Rep 240.

8. It is not easy to reconcile these issues and protect a trader's legitimate interest in flexibility whilst also protecting consumers upon insolvency. However, we wonder whether it is possible to consider a form of drafting which ties the transfer of ownership in the scenarios envisaged in sections 18B(4)(a), (b) and (h) to a trader's insolvency. If this could be achieved, it would allow traders to retain flexibility in practice but would transfer ownership of goods labelled or set aside for a specific consumer to that consumer should the trader become insolvent.

Consultation Question 3 (Paragraphs 3.41): Do you think that there any other events or circumstances which should result in ownership of the goods transferring to the consumer?

9. No. We consider the Commission has identified the appropriate events and circumstances and note that section 18B(4)(h) should cover unforeseen circumstances.

Consultation Question 5 (Paragraphs 3.54): Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?

10. We agree in principle with the proposals, subject to our responses to Question 2 above and Question 6 below.

Consultation Question 6 (Paragraphs 3.55): Could the amendments described above to the conditions in subsection 20A(1) of the Sale of Goods Act 1979 have unexpected consequences for when co-ownership of a bulk transfers in a consumer context? If so, please explain your concerns.

11. The proposed expansion of the situations which would vest co-ownership in a consumer could give rise to some interference with a trader's ability to assign and re-assign goods. Although, as the Report comments, this is not likely to be an area where consumers are substantially affected, we can envisage that, for traders, the logistics of fulfilling a variety of orders from different bulks could see frequent but unanticipated re-assigning. See further our answer to Question 2.

Consultation Question 7 (Paragraphs 3.56): Do you think that there are any other events or circumstances which should be listed in subsection 20A(1) in order to identify the bulk to a consumer contract?

12. No.

Consultation Question 8 (Paragraphs 3.61): Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?

13. Subject to the comments above, we consider the proposed rules strike a reasonable balance between the interests of the consumers and the retailers. However, the operation of the rules in practice may discriminate between consumers on the basis of factors which are outside their control and which might appear to them to have little logical rationale. It may be that explanation of the rules will alleviate any difficulties this will create.

Consultation Question 9 (Paragraphs 3.75): Do you agree that the rules on transfer of ownership in the draft Bill should not apply to conditional sales contracts and hire-purchase agreements?

14. Yes, for the reasons given by the Commission at paragraph 3.73 of the Consultation.

Consultation Question 11 (Paragraphs 3.84): Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?

15. We think there are important conceptual differences between contracts for sale and contracts for the transfer of goods. Once the Commission has considered the responses received to Question 10 above, important consideration will need to be given to the appropriateness of applying the rules in proposed sections 18A and 18B to the transfer of goods.

16. Our tentative, preliminary, view is that it would not be appropriate to apply the rules proposed in sections 18A and 18B to contracts for the transfer of goods. It seems to us that, without significant modification, the application of those rules could frequently result in the consumer simultaneously being the legal owner of both the goods they are due to provide and the legal owner of the goods they are due to receive; we do not believe this would accord with the intention or expectation of consumers or traders. Further, should the transfer contract not be completed, these rules could result in significant legal complexity.

Consultation Question 12 (Paragraphs 3.109): On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take

possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?

17. Yes, we agree for the reasons given by the Commission. The consumer's rights would be subject to the usual limitations on section 75 and chargeback claims. Further, in the case of section 75 claims, the consumer would usually need to formally reject the goods, cancel the contract or treat it as at an end in order to trigger an obligation for the trader to reimburse the prepayment; the breach of this reimbursement obligation *may* then be actionable in contract and under section 75, allowing the consumer to reclaim their prepayment from their credit provider

However, we note that section 28(9) of the Consumer Rights Act 2015 does not specifically make a trader's failure to honour its reimbursement obligations actionable as a breach of contract (c.f. regulation 34(13) of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013. Further, 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.

Consultation Question 13 (Paragraphs 3.110): If a consumer chooses to take possession of goods on a retailer's insolvency, do consultees agree that:

- **(1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75?**
- **(2) these fees could not be claimed under chargeback rules?**

18. Yes, we agree for the reasons given by the Commission.

Consultation Question 14 (Paragraphs 3.122): Do consultees agree with our analysis of how retention of title clauses will interact with the rules in the draft Bill?

19. Yes, we agree with the Commission's analysis. Further, if the concerns we raise in response to Questions 2 and 6 can be addressed, we think the concerns raised by previous consultees on the impact of these changes may be, at least partially, addressed.

Consultation Question 15 (Paragraphs 3.127): Do consultees agree with our analysis of how warehouse and deliverers' liens will interact with the rules in the draft Bill?

20. Yes, we agree with the Commission's analysis.

Consultation Question 20 (Paragraphs 4.39): We have been told by some retailers that terms and conditions delaying formation of the sales contract are used to mitigate certain risks, including the risk of insufficient stock and pricing errors. Do you consider that retailers can achieve the same objective through the use of conditional contracts?

21. We are not confident that conditional contracts could be successfully used as the Law Commission suggests. We are not convinced that section 28(2) of the Consumer Rights Act 2015 necessarily permits the imposition of conditions precedent or subsequent as envisaged in the consultation. In our view, it is at the very least arguable that section 28(2) enables the parties to agree, for example, that the consumer will collect the goods or for some other means of physical transport of the goods but does not permit the parties to agree that the trader may never have to provide the goods in certain circumstances.

22. It is arguable that the legislative structure permits the trader to use conditional contracts as suggested. However, this is far from certain and the trader would be exposed to a degree of legal uncertainty in not knowing whether any condition precedent or subsequent would be struck down by either section 31 or Part 2 of the Consumer Rights Act 2015.

23. 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.

Consultation Question 34 (Paragraphs 5.39): Do consultees agree with our assessment of consumer benefits and are there any other benefits which could result from the proposed rules in the draft Bill?
Please provide qualitative and quantitative evidence where possible.

24. We agree with the Commission's assessment. We agree that there will not be a significant impact in the overall level of consumer detriment if the proposed changes are introduced but some customers will benefit significantly.

25. We also agree that the proposed changes are more accessible and easier to understand than the current law. However, whether an average consumer will easily

understand the legal position will largely depend on the guidance provided to explain these changes and how these changes are publicised to consumers more widely.

Bar Council[2]
30 October 2020

For further information please contact

[redacted]

The General Council of the Bar of England and Wales
289-293 High Holborn, London WC1V 7HZ

[redacted]

[redacted]

[2] Prepared by the Law Reform Committee

UK FINANCE

Law Commission Consultation No 246
Consumer Sales Contracts:
Transfer of Ownership

Date: 30 October 2020

Sent to: Ownership@lawcommission.gov.uk

UK Finance is the collective voice for the banking and finance industry.

Representing more than 250 firms across the industry, we act to enhance competitiveness, support customers and facilitate innovation.

1. **Response**. Following engagement with our cards and payments industry stakeholders, we are pleased to respond to the Law Commission Consultation 246 – Consumer Sales Contracts: Transfer of Ownerships (the "**Consultation**").

2. **Key Response Points and Commentary**.

   (i) Simplification. We broadly support the Law Commission's recommendations set out in the Consultation. We support a simplification of the law by amending the Consumer Rights Act 2015 as proposed. The simplification will make it easier for consumers to understand their rights and is to be welcomed.

   (ii) Contract Formation. We support the proposals relating to the formation of the contract at an earlier stage in the buying process so that consumers will not be denied their contractual rights. However, whilst supporting consumer rights, we do not wish to drive card claims disputes into the system where consumers, seeking the remedy of transfer of title first need to establish when and if a contract was formed and use the cards claims system as the forum to determine contract formation (which would require detailed analysis of the Consumer Rights Act amongst other things). The Bill at present would seem to allow transfer of title to occur on delivery, which as the Law Commission points out, would prevent consumers obtaining the benefit of the protection. We recommend this issue is dealt with in the Bill itself 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 whole requires clarity one way or the other so that a simplification exercise does not lead to a rise in complex card claims. We note that consumer cancellation and refund remedies will not be altered for distance selling contracts as they are covered by The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013). We do not expect the Bill will make any change to chargeback or Section 75 remedies relating to cancellation and refund rights as against the card issuer.

(iii) Title and identification. Similarly, we support the proposals relating to transferring title to the consumer when the merchant has identified the goods to be delivered to the consumer. We view this as an appropriate and fair balance between the rights of the consumer to have ownership of goods identified as belonging to that consumer and the rights of lenders to have access to a more general pool of inventory under their floating charge security.

(iv) Direct remedies. We support direct remedies being made available to consumers so that they can deal directly with the company in administration (through its administrators or other insolvency practitioner) rather than having to make a claim to their card issuer. We believe this would be a better outcome for consumers and is welcomed.

(v) Fewer card claims. UK Finance agrees that the draft Bill, if enacted, would reduce the aggregate value and the aggregate number of claims made to debit card issuers and credit card issuers. This will reduce the value and volume of chargeback claims under debit and credit cards and Section 75 Consumer Credit Act 1974 ("**Section 75**") claims. This will in turn reduce the financial exposure that merchant acquirers carry when processing card payments on behalf of retailers. We note caution however on the contract formation point noted at (ii) above and the requirement for clarity on the acceptance and rejection process at (ix) below.

(vi) Delivery fees. We think it is reasonable that the administrator may levy an administrative delivery charge to the consumer. In our view, 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. In contrast, the Section 75 claim would be for the administrator's additional charge only.

(vii) Rejection rights – loss mitigation. We think the consumer's rejection rights need to be considered further, in the context of a card claim. We think a credit card holder would have to mitigate the loss and it seems to us that would involve having to accept title to the goods, save where there was a statutory protection (such as "cooling off" rights under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013). In these circumstances, the credit card issuer would be able to recognise title transfer and then pay consequential losses such as delivery charges. Industry views vary as to whether chargeback claims would be treated similarly. The process would be different as the chargeback risk, upon merchant insolvency, falls to the merchant's payment processor, known in the industry as the "merchant acquirer". The issuer receives the cardholder's chargeback claim and via the card scheme (Visa, MasterCard etc) sends it to the merchant acquirer. The merchant acquirer could seek to defend the claim on the basis that the consumer has title and has received what he/she bargained for. However, the view of the major card schemes is that where delivery is the responsibility of the merchant under the contract, whether free or paid for by the consumer, the consumer would have the right to raise a chargeback for the full card transaction value, where delivery did not occur as a result of insolvency. Where the consumer agreed with the merchant that the consumer would arrange delivery or collection, then the delivery service would not have been part of the card payment made to the merchant. This means that if title has passed to the consumer, there would not be a chargeback right upon insolvency.

(viii) Clarity of title – administrator's rights to deal with the goods. We also think the consumer's rejection rights need to be considered to ensure that goods do not end up in "no-man's land" where the administrator does not know if the consumer has accepted or rejected title. Consideration should be given to requiring an alignment of rejection requirements for distance selling and non distance selling contracts. 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.

(ix) Consumer clarity – This response is written during the Covid-19 pandemic. A key problem for consumers, particularly in the travel sector, is knowing how and where to make their claim when travel has been cancelled or their provider has become insolvent. Consumers report having been "bounced" between different protection providers. Indeed, the FCA and the CMA have intervened in 2020 with guidance and statements to mitigate some of these issues. Whilst we remain supportive of the Bill, we think there is a material risk that consumers could be "bounced" between the card issuer and the administrator if the acceptance and rejection processes are not clearly laid out. Furthermore, whilst beyond the scope of the Consultation, we think it is important that consumers should be made aware of their new rights and how they can be exercised or rejected prior to them automatically making claims to the card issuers by default. It should not be left to the card issuers to explain to the consumers that they may have the rights to take delivery of the goods and then receive adverse commentary of trying to avoid claims. A better outcome would be a clear mechanic the consumer would follow to accept the goods (and claim delivery charges under Section 75) or reject the goods and then claim for a chargeback/or Section 75 claim. Consumers, acquirers, card issuers and the insolvency practitioners all need clarity and certainty.

3. **Questionnaire Responses**. Please find attached in the Annex our detailed responses to those questions. Our response to all other questions is "*No Comment*". Please note that where we refer to Section 75, the responses assume that the underlying contract is one falling within the requisite eligibility requirements of Section 75 (such as transaction value limits, debtor-creditor-supplier relationships etc).

If you have any questions relating to this response, please contact [redacted] or [redacted]

Name
[redacted]

Q.	Paragraph	Question	UK Finance Response
1	3.39	Do you think that the events and circumstances in proposed subsections 18B(3) and (4) of the Consumer Rights Act 2015 signalling that goods have been "identified for fulfilment of the contract" are drafted sufficiently clearly?	Yes
5	3.54	Do you think that the conditions in subsection 20A(1) of the Sale of Goods Act 1979 should be amended for consumer contracts on the terms described above?	Yes
8	3.61	Do you think that the proposed rules in subsections 18A(4) and 18B(5) of the Consumer Rights Act 2015 will sufficiently protect the interests of both consumers and retailers?	Yes
11	3.84	Do you think it would be appropriate for the rules in proposed sections 18A and 18B of the Consumer Rights Act 2015 to apply to contracts for the transfer of goods?	Yes. Providing a clear right to ownership in the limited circumstances where the goods have been "identified", is a fair and reasonable outcome for consumers. The card industry is supportive of consumers and retailers resolving issues between them before making card based claims (chargebacks or Section 75). Ensuring that the consumer has a clear right against an insolvent company, will help to reduce consumer confusion and anxiety and remove the need for the

			consumer to have to approach its card issuer for a remedy. A statutory consumer rights remedy, where the consumer obtains *possession* of the item they purchased is likely to lead to a better, faster and more practical remedy than a card based claim where there is a process to follow and forms to fill, where the only remedy is financial recompense.
12	3.109	On the insolvency of a retailer, a consumer may prefer to receive a refund of their prepayment rather than take possession of goods they have prepaid for. Do consultees agree that the consumer may be entitled to a refund of their prepayment under section 75 or chargeback rules, even if ownership of the goods has transferred to them?	We think the law needs to be clear, in the interests of consumers, card issuers, merchant acquirers (and schemes who would arbitrate disputes), the administrators appointed over insolvent companies and the purchasers of assets from an insolvent company. The commentary below relates to **in store sales contracts only** because The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013) provides cancellation rights to consumers who have contracted with a retailer on a distance selling basis (and inability to reject because a retailer is closed would be deemed to be a breach by the merchant and thus allowing a chargeback or Section 75 claim). In Store Contracts (a) If the consumer has received full performance of the contract no claim should automatically arise simply because of insolvency. Claims under chargebacks and Section 75 only arise as a result of a merchant's breach. If the insolvency caused the merchant's breach, the insolvency is likely to result in the consumer being able to claim under Section 75 or under chargebacks. Nuances depending on the circumstances and the stated delivery date at the time the contract was entered into, and the inclusion of contractual cancellation rights may lead to valid claims e.g. where the consumer suffered a delay in delivery such that the goods were no longer needed (such as a gazebo for a one-off celebration garden party). If an administrator, at no additional cost to the consumer, performs the contract and delivers promptly, it is unlikely that any breach has occurred. We should add that rights to claim for defective goods would not normally be impacted by insolvency. Receipt of defective goods would remain a breach. **(b)** 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. Views differ as to whether chargeback claims would be treated similarly. The process would be different as the chargeback risk, upon merchant insolvency, falls to the merchant's payment processor, known in the industry as the "merchant acquirer". The issuer receives the cardholder's chargeback claim and via the card scheme (Visa, MasterCard etc) sends it to the merchant acquirer. The merchant acquirer could seek to defend the claim on the basis that the consumer has title and has received what he/she bargained for. However, having consulted with the major card schemes and their disputes teams (who ultimately arbitrate such disputes), chargebacks will be upheld where the merchant was responsible for delivery as part of the contract. If the consumer agreed on the contract to make the delivery arrangements or to collect, then the original card transaction for the purchase could not be chargebacked. Acquirers, who bear the financial risk of chargebacks, may decide to voluntarily fund the administrator's delivery costs to consumers as a means of mitigating the full chargeback claims and if this happened such that the merchant did not breach the contract, it is unlikely that a chargeback claim would succeed. (c) We also think the consumer's rejection rights need to be considered to ensure that goods do not end up in "*no-man's land*" and that administrations proceed smoothly and predictably: i. One concern could be that a consumer does not wish to collect the goods or have them

			delivered and does not have a statutory right to reject. That consumer might submit a card claim which is paid. The administrator is unable to sell the goods as he/she believes they belong to the consumer. The consumer may have no interest and neither confirms delivery nor rejects. How will title revert to the company in administration? How will the administrator know whether he/she can sell the goods lawfully? How will a purchaser, such a trade buyer of a bulk of inventory or upon an asset sale, know that they will have good title? What will happen when the administrator sells the goods that were mistakenly thought to have been rejected? ii. The interplay of rejection rights, card claims, knowing who has title and the requirement of certainty for the administrator, may require further consideration or even a requirement that consumers must take delivery within a certain time period or "accept or reject", else forfeit title and any right to a refund. iii. As many administrations are conducted on a "pre-pack" basis where a buyer is "lined up" prior to the commencement of the formal insolvency process, consideration should be given to ensuring the efficacy of any administration process and rescue of the business (albeit with a new owner) is not materially prejudiced by uncertainty relating to a small portion of the inventory.
13	3.110	If a consumer chooses to take possession of goods on a retailer's insolvency, do	(1) Yes, to the extent Section 75 applies, which will be determined by a number of factors outside the scope of this response, including transaction value and the existence of necessary relationships set out in the

		consultees agree that: (1) the consumer would be able to claim any additional charges they had to pay for storage or delivery under section 75? (2) these fees could not be claimed under chargeback rules?	Consumer Credit Act 1975 (debtor-creditor-supplier) . (2) Yes. We note that if there was a delivery charge as part of the contract, there would be a chargeback claim for the original delivery charge paid by the consumer, but not for any additional charges imposed by an administrator. We also think that where the delivery was "free" under the contract, there would not be a chargeback claim for any implied delivery charge in the contract.
16	3.130	Do consultees agree that the draft Bill should come into force two months after it is passed into law?	Yes
22	4.43	Do you consider that consumers are generally aware of terms and conditions delaying formation of the sales contract?	Whilst we have not collected empirical evidence, we do not believe that consumers check terms and conditions and are unaware of this contractual tactic. We note the commentary on delaying formation of the contract for legitimate reasons (such as price errors and unavailable inventory). We think there is a risk that retailers may adopt this technique more generally to avoid the impact of Bill. We do not think it will be helpful to rely on existing legislation to determine the fairness of the tactic as otherwise card issuers and acquirers could become involved in very technical disputes. We would support an approach that forms the contract at an earlier stage in the process with appropriate conditions precedent. We think it is important that consumers are not prevented from enjoying the benefit of the Bill. We also think it is very important that consumers are made aware of their rights to accept or reject delivery and do not fall-back on the cards system as a first port of call for a remedy or information. See our comments at Q12.(c)(ii) above. The cards industry does not wish consumers to feel "bounced" between issuers and administrators.
24	4.47	Are you aware of situations where card issuers have relied on terms delaying formation of the sales contract to reject claims made by consumers under section 75 of the	We do not think this is a tactic routinely adopted by issuers or merchant acquirers. If additional remedies apply under formed contracts, it is possible that issuers would reject Section 75 claims if a contract is not formed. However we think chargebacks would apply to the payment itself, such that whether or not there was a contract, if the merchant defaulted the cardholder would have a remedy – either for breach of contract or for return of a prepayment/deposit where the "goods were not

		Consumer Credit Act 1974? Are card issuers likely to take this point in future?	delivered" . We are concerned that the new title transfer remedy does not drive additional and unnecessary card claims where the card system becomes the forum to decide whether or not the contract was formed prior to insolvency.
29	5.24	We estimate that, in most cases, the proposed rules in the draft Bill would only affect a small proportion of goods in the retailer's possession and so ownership of the vast majority of those goods would not have transferred to consumers. Do you agree?	Yes. 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. The impact of the Bill however will be relatively small as in most cases inventory will not have been identified for a particular consumer and title will not pass.

End.