*These notes relate to the Lords Amendments to the to the Enterprise and Regulatory Reform Bill, as brought from the House of Lords on 21 March 2013 [Bill 152]*

# ENTERPRISE AND REGULATORY REFORM BILL

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## EXPLANATORY NOTES ON LORDS AMENDMENTS

### INTRODUCTION

1. These Explanatory Notes relate to the Lords amendments to the Enterprise and Regulatory Reform Bill, as brought from the House of Lords on 21 March 2013. The Notes have been prepared by the Department for Business, Innovation and Skills in order to assist the reader of the Bill and the Lords amendments, and to help inform debate on the Lords amendments. They do not form part of the Bill and have not been endorsed by Parliament.

2. These Notes, like the Lords amendments themselves, refer to HL Bill 45, the Bill as first printed for the Lords.

3. These Notes need to be read in conjunction with the Lords amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the effect of the Lords amendments.

4. Lords Amendments 1 to 34, 39 and 41 to 120 (with the exception of 71 and 112) were tabled in the name of the Minister. Lords Amendments 71 and 112 were supported by the Government. Lords Amendments 35 to 38 and 40 were opposed by the Government.

5. In the following Commentary, an asterisk appears in the heading of each of the paragraphs dealing with amendments opposed by the Government.

### COMMENTARY ON LORDS AMENDMENTS

***Lords Amendments 1 to 8***

6. Lords Amendment 1 would ensure that references to greenhouse gases in Part 1 of the Bill are given the same definition as in section 92(1) of the Climate Change Act 2008.

7. Lords Amendment 3 would create a new statutory requirement in respect of the UK Green Investment Bank's contribution to the reduction of greenhouse gas emissions. The amendment would require the Secretary of State, before designating the Bank for the purposes of clause 3 to 6, to be satisfied that, acting consistently with its objects, the Bank's investment activities would (taken as a whole) be such as the Bank considers likely to contribute to a reduction of global greenhouse gas emissions.

8. Lords Amendment 7 would ensure that the Bank's objects may not be altered in a way that is inconsistent with the statutory requirement created by Lords Amendment 3.

9. Lords Amendment 8 would create a statutory reporting requirement on the Bank, requiring the Bank's directors to include each year in their directors' report an explanation of the steps that the Bank took in that year to ensure that its investment activities would (taken as a whole) be likely to contribute to a reduction of global greenhouse gas emissions, as well as a statement of the directors' views on the likely effect of those activities on global greenhouse gas emissions.

10. Lords Amendments 2, 4, 5 and 6 would make necessary consequential amendments.

***Lords Amendment 9***

11. Lords Amendment 9 would insert a provision into the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) prohibiting ACAS, or those appointed by ACAS, from releasing information relating to a worker, employer of a worker or a trade union, that they hold in the course of performing their functions. The clause specifies the circumstances in which the prohibition would not apply, for example if the disclosure is made for the purposes of a criminal investigation, or the disclosure is made in a way that means that no-one to whom the information relates can be identified. A breach of the prohibition would be a criminal offence, punishable by a fine but any such proceedings could only be instituted with the consent of the Director of Public Prosecutions.

***Lords Amendments 10 to 12***

12. Lords Amendments 10 to 12 would amend clause 11 to the effect that, wherever an Appeal Tribunal consists of a judge sitting with two or four lay members (whether by reason of a judge's direction or in accordance with an order made by the Lord Chancellor), there must be an equal number of "employer-representatives" and "worker-representatives" (these terms are defined in section 28(8) of the ETA 1996).

***Lords Amendment 13***

13. Lords Amendment 13 would insert a new subsection into section 108 of the ERA 1996. The effect of the new subsection would be that the two year qualification period for employment would not apply where the reason (or principal reason) for dismissal is the employee's political opinions or affiliation. Dismissal for political opinions or affiliation would not, however, be an automatically unfair dismissal; where such proceedings are lodged with the Employment Tribunal, the tribunal would still need to go on to consider reasonableness (section 98(4) of the ERA 1996).

***Lords Amendments 14 to 18***

14. Lords Amendment 14 would add a new subsection to the section 12A inserted into the ETA 1996 by clause 14. The new subsection would require the tribunal to have regard to the employer's ability to pay when deciding whether to impose a penalty, and in deciding the amount of the penalty; those companies in insolvency, and indeed those who may be on the brink, would be able to present evidence to the tribunal regarding the ability to pay, including the consequences of any decision to impose the fine. Lords Amendments 15 to 18, as well as being inserted to clarify the drafting, would remove the £100 per claimant floor in multiple cases, allowing the tribunal to have discretion as to the amount of the penalty, subject to a total minimum payment of £100 and upper limit of £5,000 per claimant.

***Lords Amendments 19 to 21***

15. Lords Amendments 19 to 21 would amend Part 4A of the ERA 1996 which deals with public interest disclosures.

16. Lords Amendment 19 would remove the requirement in sections 43C, 43E, 43F, 43G and 43H that a disclosure be made in good faith in order to be a protected disclosure and benefit from whistleblowing protections. On the other hand, the clause would amend the ERA 1996 to provide employment tribunals with the power to reduce an award of compensation by up to 25%, where a protected disclosure has not been made in good faith. Currently, the requirement for a disclosure to be made in good faith can affect the success of the claim. If an employment tribunal finds that a disclosure was not made in good faith and instead there was an ulterior motive which was the predominant reason for the disclosure, the claim will fail. The amendment would alter the effect of the good faith test; the issue of good faith would be considered by a tribunal in relation to remedy, rather than liability, so a claim would not fail as a result of an absence of good faith.

17. Lords Amendment 20 would insert new subsections into section 47B of the ERA 1996, in order to introduce the principle of vicarious liability into the "whistle-blowing" provisions of that Act. The effect would be that where a worker is subjected to a detriment by a co-worker done on the ground that the worker made a protected disclosure, and this detriment is done in the course of the co-worker's employment with the employer, that detriment would be a legal wrong and would be actionable against both the employer and the co-worker. The employer would only be liable for

a detriment where it is done by a worker in the course of employment or by an agent of the employer with the employer's authority. In this context, the term "agent" refers to someone who is appointed by the employer to perform duties on their behalf (such as a contractor). Employers would be able to rely on the defence at inserted subsection (1D) if they had taken all reasonable steps to prevent the co-worker or agent from subjecting the whistleblower to a detriment. If the defence applies the employer would not be liable for the actions of the co-worker or agent.

18. Lords Amendment 21 would widen the definition of "worker" in section 43K. At present, the NHS has certain contractual arrangements in place for workers in health services in England, Scotland and Wales which are not afforded whistleblowing protection because they fall outside the definition. This amendment would ensure that section 43K would apply to these workers. In addition, this amendment includes a power so that the definition of "worker" in section 43K could more readily be amended so as to keep it up to date. The power could be used to increase the scope of protection. It could, however, only be used to remove categories of individuals where, in the opinion of the Secretary of State, no such individuals exist (i.e. the category has become obsolete).

***Lords Amendments 22 to 25***

19. These Lords amendments would insert the necessary transitional provisions for new clauses into clause 19, and would delete a nugatory transitional provision in respect of clause 17.

***Lords Amendment 26***

20. Lords Amendment 26 relates to provisions of the Bill, and provisions added to other legislation by the Bill, which provide for the CMA to consult other persons when it prepares particular rules, statements of policy, guidance or general advice and information. For example, new section 94B of the EA 2002 (inserted by clause 25) requires the CMA to publish a statement of policy on the use of powers to enforce interim measures in merger cases and requires the CMA to consult the Secretary of State and such other persons as it considers appropriate when preparing such a statement. Amendment 26 would add a new clause allowing the OFT or the CC (or both jointly) to carry out any such consultation before the provision in question comes into force and, once the provision has come into force, allowing the CMA to treat the consultation as having been carried out by the CMA. This would enable consultations to take place on behalf of the CMA on such matters as CMA guidance before the CMA becomes fully operational. Subsection (4) of the new clause would also enable the Secretary of State to direct the CC or the OFT (or both jointly) to carry out such consultations.

***Lords Amendment 27 to 28***

21. Lords Amendment 27 would introduce a reserve power for the Secretary of State to remove concurrent powers from sector regulators in future.

22. Subsection (1) of the new clause to be inserted by Lords Amendment 27

would provide that the Secretary of State may by order made by statutory instrument amend any enactment to remove from a sectoral regulator either its functions under Part 1 of the CA 1998 Act or its functions under Part 4 of the EA 2002, or both (a "sectoral regulator order"). The Secretary of State would have the power to make a sectoral regulator order where he considers that it is appropriate to do so for the purpose of promoting competition, within any market or markets in the United Kingdom, for the benefit of consumers. Subsection (3) would provide that a sectoral regulator order may also amend any enactment the Secretary of State considers appropriate as a consequence of the removal of the specified functions (for example, removing a regulator's duty to consider Competition Act enforcement.) Subsection (6) would provide that the statutory instrument containing a sectoral regulator order would be subject to the affirmative resolution procedure in Parliament.

23. Lords Amendment 28 would introduce a further new clause setting out the procedural requirements in relation to a sectoral regulator order. Where the Secretary of State proposes to make a sectoral regulator order, he would be required under subsection (1) of the new clause to consult the regulator whose functions would be removed by the order, the CMA (or the OFT, before the CMA's duty and powers are commenced), and devolved administrations where they have a role in relation to an affected regulator. Where, following this first stage consultation, the Secretary of State still proposes to make a sectoral regulator order, the Secretary of State would be required under subsection (3) to consult: the bodies consulted in the first stage consultation; consumer and business groups who represent those whose interests are affected; and other such persons he considers appropriate. The Secretary of State would be required to explain to the persons consulted which powers of the regulator are subject to the proposed order and the reasons for removing them.

24. The following are the sector regulators with concurrent competition powers under Part 1 of the CA 1998 and Part 4 of the EA 2002 that may be affected by a sectoral regulator order:

a) the Office of Communications;
b) the Gas and Electricity Markets Authority;
c) the Water Services Regulation Authority;
d) the Office of Rail Regulation;
e) the Northern Ireland Authority for Utility Regulation;
f) the Civil Aviation Authority.

***Lords Amendment 29***

25. Lords Amendment 29 would narrow the scope of the power in new section 26B(2)(g) of the P(LBCA) Act 1990, which is inserted by clause 52 of the Bill. This power enables the Secretary of State to modify any provision of the 1990 Act as it applies in relation to heritage partnership agreements. Amendment 29 would limit the scope of this power to specified provisions of the Act. Heritage partnership agreements are voluntary agreements between owners and local planning authorities designed to help them manage listed buildings more effectively and reduce the need

for individual consent applications for minor or repetitive works.

***Lords Amendments 30 to 34***

26. Lords Amendments 30 and 31 would modify the operation of certificates of lawfulness of proposed works to listed buildings. These certificates will be used by local planning authorities to confirm that listed building consent is not required in cases where proposed works would have no impact on the building's special interest. As clause 53 is currently drafted, certificates could potentially last forever, but the works are only conditionally presumed to be lawful. Amendment 31 would provide that certificates last for a period of 10 years, during which time the lawfulness of any works for which a certificate is in force would be conclusively presumed unless the certificate was revoked under new section 26I. It would be possible to apply for a new certificate at the end of the 10 year period if required. Amendment 30 would be a consequential drafting change to new section 26H(4).

27. Lords Amendments 32 to 34 would correct an anomaly in the current drafting by providing that the Secretary of State's powers to prescribe the procedure for appeals in connection with certificates of lawfulness are exercisable by regulations rather than order.

****Lords Amendments 35 and 36***

28. Lords Amendments 35 and 36 would remove the repeal of section 3 of the Equality Act 2006, the general duty of the Equality and Human Rights Commission, together with a consequential amendment.

****Lords Amendment 37***

29. Lords Amendment 37 would amend the Equality Act 2010 so as to add "caste" to the current definition of "race". The term "caste" can be defined as a hereditary, endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora.

****Lords Amendment 38***

30. Lords Amendment 38 would remove subsection (3) of clause 61 which amends section 47(2) of the HSWA 1974. Clause 61(3) was first amended in Grand Committee in the Lords, as a result of an amendment tabled by the Government, to remove the new section 47(2B) inserted by the clause and to make consequential amendments. The remaining provisions of clause 61(3) were removed at Report stage in the Lords as a result of an amendment which the Government opposed.

31. The main effect of the amendment would be to retain the current position in relation to the right to sue for breach of a statutory duty contained in regulations made under the 1974 Act. In addition, the amendment would remove new sections 47(2A) and 47(2B) of the 1974 Act which are also inserted by clause 61(3). Section

47(2A) prevents a claim for breach of statutory duty in relation to certain health and safety legislation that existed before the 1974 Act. Section 47(2B) enables the Secretary of State to make regulations setting out the extent to which a breach of "other health and safety legislation" is actionable. Other health and safety legislation is legislation other than regulations, made under section 15 of the 1974 Act and health and safety legislation that existed before the 1974 Act that relates to the general purposes of Part 1 of the 1974 Act. The amendment would also remove the power to include in regulations a defence to an action for breach of a statutory duty in a health and safety regulation. It would also remove the power to include a provision in regulations that would make any term in an agreement void if it purported to exclude or restrict liability for breach of statutory duty.

***Lords Amendments 39***

32. Lords Amendment 39 was part of a package of amendments tabled by the Government at Grand Committee. The main aspect of the package was to remove the new section 47(2B) of the HSWA 1974 (inserted by clause 61(3)). Amendment 39 would make consequential changes to remove procedural requirements relevant only to new section 47(2B).

****Lords Amendments 40***

33. Lords Amendment 40 would extend the definition of "estate agency work" in the Estate Agents Act 1979 which would mean that the provisions of that Act would apply to persons carrying out the activities described in the revised definition, as well as to the services that estate agents provide in relation to the disposal or acquisition of land. Those activities described in the amendment are: acting on clients' instructions in relation to the letting of an interest in land, managing lettings and block management arrangements (such as in the residential leasehold sector) and any management activities undertaken by any person in the course of a business in connection with land or interests in land.

***Lords Amendments 41, 76, 78 and 110***

34. Lords Amendments 41, 76, 78 and 110 would insert a new clause after clause 63 and a new Schedule after Schedule 19 to abolish the Agricultural Wages Board for England and Wales and related English bodies.

35. The Agricultural Wages Act 1948 ("the AWA 1948") established the Agricultural Wages Board ("AWB") for England and Wales as an independent body with a statutory duty to set a minimum wage rate for agricultural workers and with discretion to set other minimum terms and conditions. The AWA 1948 provides that the AWB's functions exist in relation to each of the counties and combinations of counties for which Agricultural Wages Committees ("AWCs") have been established. There are 15 AWCs in England and 1 AWC for the whole of Wales.

36. Agricultural Dwelling House Advisory Committees ("ADHACs") were established under the Rent (Agriculture) Act 1976. They provide advice upon request on the urgency and agricultural need of an application by a landlord for re-housing a

tenant in tied accommodation in order to provide accommodation for an incoming agricultural worker. There are 16 ADHACs in England and 1 ADHAC for the whole of Wales. Members of ADHACs are appointed by the Chair of the local AWC as necessary.

37. The new clause would provide for the abolition of the AWB in England and Wales and the 15 AWCs and 16 ADHACs in England. The AWC and ADHAC for Wales would not be abolished.

38. The clause also introduces a new Schedule after Schedule 19, which would make consequential provision in respect of relevant primary and secondary legislation. In particular, the Schedule would amend the Rent (Agriculture) Act 1976 to remove the ability to apply for the advice of an ADHAC in England, repeal the main provisions of the AWA 1948 and amend the National Minimum Wage Act 1998 to bring agricultural workers in England and Wales within the scope of that Act.

***Lords Amendment 42***

39. Clause 66 is currently framed as a power to amend (add or remove) copyright exceptions, limited to provision that could be made under the existing powers conferred by section 2(2) of the European Communities Act 1972 ("ECA 1972") but without the concomitant limit on criminal penalties. That limit can lead to a reduction in criminal penalties when changes to copyright exceptions are made using those existing powers. This amendment would provide for a more limited clause, which does not contain any standalone parallel power to amend copyright legislation. It would continue to ensure that, when existing powers under the ECA 1972 are used to amend copyright exceptions or exceptions relating to performances, the limitation on criminal penalties will not apply.

***Lords Amendments 43 to 46***

40. Lords Amendment 43 would remove unpublished films and unpublished photographs from the scope of the power conferred by clause 67 to amend Schedule 1 to the Copyright, Designs and Patents Act 1988 so as to reduce the duration of copyright. This would mean that certain unpublished films and photographs that are currently protected by copyright until 2039, at the earliest, would remain protected until then. The effect of this would be that such works may enjoy copyright protection for a longer period than the current standard terms.

41. Lords Amendments 44 and 45 would limit the powers under these provisions to unpublished works (apart from unpublished films and unpublished photographs), and would require that no work would receive a shorter term of copyright than is set out in the EU Term Directive 2006. These amendments are in response to recommendations in the Delegated Powers and Regulatory Reform Committee's tenth report of this Parliamentary session.

42. Lords Amendment 46 would ensure that regulations amending Schedule 1 to the 1988 Act could make different provision for different types of work and work

of different ages. This would mean that recent literary works, for example, could be treated differently from literary works which are centuries old.

***Lords Amendments 47, 48, 116, 117, 118, 119***

43. These amendments would ensure that the first exercise of the powers under these provisions, and any subsequent exercise, was subject to the affirmative procedure. The existing drafting makes provision for a negative procedure. All of these amendments are in response to recommendations in the Delegated Powers and Regulatory Reform Committee's tenth report of this Parliamentary session.

***Lords Amendments 49 to 51 and 60***

44. Lords Amendments 49 to 51 would clarify how and when clauses 70 to 73 affect companies that become quoted companies after these provisions come into force. Lords Amendment 60 would amend clause 73 to deal with companies that are quoted companies on commencement.

***Lords Amendments 52 to 54***

45. Lords Amendments 52 to 54 would clarify that section 226E(3) and (4) of clause 71 apply rather than section 226E(2) where relevant.

***Lords Amendment 55***

46. Lords Amendment 55 would amend the new section 226E of the Companies Act 2006 which would be inserted by clause 71. Section 226E imposes a potential liability on directors who authorise an unapproved remuneration or loss of office payment. This amendment would ensure that, as is consistent with other provisions in the Companies Act 2006, a director who acts honestly and reasonably may be relieved of this liability if a court - taking into account all the circumstances - decides it is appropriate to do so.

***Lords Amendments 56 and 61 to 63***

47. Lords Amendments 56 and 61 to 63 would move some of the provisions in clause 73 into the other clauses so that they appear alongside the sections to which they apply and so that clause 73 becomes solely about transitional arrangements.

***Lords Amendments 57 to 59***

48. Lords Amendments 57 to 59 relate to the information that a company must publish about a person's exit package when they cease to be a director.

49. As a result of the complexity of directors' pay, some payments made after loss of office will technically be classed as remuneration payments and not loss of office payments. These amendments would bring within scope, "the particulars of any remuneration payment made or to be made to the person after ceasing to be a director, including its amount and how it was calculated" so that a company must disclose the full range of payments made.

***Lords Amendment 64 to 66***

50. Lords Amendment 64 would insert a new clause after clause 73. Subsection (1) contains the substantive power of the Secretary of State to make regulations. It would enable provisions to be made compelling a "regulated person" (as defined in subsection (2)) to provide "customer data" (as defined in subsection (3)) to a customer at their request or to a person authorised by the customer to receive it ("the customer data regulations").

51. Subsection (2) identifies four types of supplier who would be required to supply data (energy suppliers, mobile phone network providers, and financial services providers offering current accounts or credit cards). Subsection (2)(d*)* would provide the power to designate other regulated persons although before doing so the Secretary of State would have to have regard to a number of factors set out in subsection (7).

52. Subsection (3) defines "customer data" as information held electronically by or on behalf of the regulated person and that relates to transactions between the regulated person and the customer. For example, this could be a customer's purchasing history represented by a quarterly energy statement. It does not extend to data not already held in electronic form.

53. Subsection (9) describes what is meant by a customer for the purpose of this clause. It covers persons who have at any time purchased goods or services from the regulated person or received them free of charge from them. The intention is that this would generally apply to consumers (subsection (9)(b)(i)) but subparagraph (ii) allows this to be extended to specified forms of business. This would most likely be used to treat micro businesses (who, like consumers, may suffer difficulties in identifying their consumption behaviour) as customers for these purposes.

54. Subsections (4) and (5) make further provision about the scope of the power, including allowing the regulations to specify the format and timeframe in which the data is to be delivered and to permit the regulated person to charge for the supply of data (though any such charge could not exceed the cost borne by the supplier in providing the data).

55. Subsection (8) would give the Secretary of State the flexibility to apply the regulations in different ways depending on the types of regulated person, customer or customer data, but also depending on where in the UK those persons are located. It would also enable regulations to provide for exceptions from any requirement imposed by them, including if the cost of compliance proves to be prohibitive (subsection (8)(d)).

56. Lords Amendment 65 would empower the Secretary of State to make provision for the enforcement of the customer data regulations. It provides for a model of civil enforcement as opposed to criminal penalties (subsection (2)) and enables regulations to be made allowing customers to bring their own actions for breach of the regulations before a court or tribunal (subsection (5)). By virtue of

subsections (6) and (8) some of the provisions of the new clause introduced by Lords Amendment 64 would apply to this clause.

57. Subsection (1) identifies the Information Commissioner as a potential enforcer but empowers the Secretary of State to designate other persons to act as enforcers. The regulations may also designate more than one enforcer and provide for their functions to be exercisable concurrently or jointly (see further the explanation of subsection (4) below).

58. Subsection (2)(a) and (b) would set out the enforcement options referred to above. The regulations will be able to provide for enforcers to apply to a court (or tribunal) for an order that a regulated person comply with the regulations. Alternatively an enforcer may be allowed to serve an enforcement notice on a regulated person without a court order. In both cases breach of the order/notice could amount to a contempt of court.

59. Subsection (3*)* provides that regulations may confer on enforcers investigatory powers to enable them to fulfil their functions. The regulations may also set out sanctions for non-compliance with requirements made by an enforcer when exercising its investigatory powers (for example, if a regulated person fails to provide information on request). The words in parenthesis in subsection (3)(b) make clear that the enforcement provisions could be comparable to those for breach of the customer data regulations (namely civil enforcement not criminal penalties).

60. As explained above, under subsection (4)(b) provision can be made for functions to be exercisable by more than one enforcer, whether concurrently or jointly. Where functions are exercised concurrently, subsection (4)(c) would allow the regulations to make provision for a lead enforcer to take on a co-ordination role, which could include giving directions as to which enforcer can act in a particular case. To assist with that role, that subsection would also allow the regulations to require the other enforcers to consult with the lead enforcer before exercising enforcement functions.

61. Subsection (4)(a) would enable regulations to be made requiring an enforcer (if not the Information Commissioner) to inform the Commissioner if they intend to exercise functions under the regulations. The intention is to make the Commissioner aware of potential breaches of the customer data regulations in case they raise wider subject access issues.

62. Lords Amendment 66 inserts a new clause which would provide for supplemental matters including the power to make consequential amendments to legislation and to enable a person to exercise discretion (subsection (1)). It also describes the Parliamentary procedure for the regulations; those made under the new clause introduced by Lords Amendment 64 would be subject to the negative resolution procedure, except where regulations are applied to persons by virtue of subsection (2)(d) of Lords Amendment 64 in which case the affirmative resolution

procedure is to be used. Regulations made under the new clause introduced by Lords Amendment 65 would also be subject to the affirmative resolution procedure as are any instruments that make regulations under the clause introduced by Lords Amendment 65 or subsection (2)(d) of the clause introduced by Lords Amendment 64 together with any other provision under the clause introduced by Lords Amendment 64.

***Lords Amendments 67 to 70***

63. Lords Amendment 67 would give the Secretary of State a power to make an order amending sections 233 and 372 of the Insolvency Act 1986. These sections currently allow for certain providers of gas, electricity, water and communications services ("utility supplies") to seek a personal guarantee from an insolvency practitioner before continuing to supply an insolvent business and prevent such suppliers from demanding that pre-insolvency arrears are cleared as a condition of continuing supply.

64. Subsections (1) and (2) provide a power to enable IT suppliers to be added to the present list of utility supplies to which sections 233 and 372 apply. This reflects the increasing importance of IT supplies to the functioning of modern businesses since these two sections were enacted.

65. Subsections (1) and (2) also enable the Secretary of State to widen the application of these provisions to providers of utility services who are not presently covered by sections 233 and 372. The Government considers this is necessary in order to be able to reflect the way the utility and telecoms markets have evolved and deregulated since these statutory provisions were enacted.

66. Lords Amendment 68 would give the Secretary of State a power to make an order that renders void certain contractual terms in contracts for the supply of essential goods or services where a company goes into administration or a voluntary arrangement takes effect if certain conditions are met. The supplies that may be protected are those to which section 233 applies, i.e. supplies of gas, electricity, water, communications and IT supplies if added through exercise of the power in Lords Amendment 67.

67. Subsection (2) requires the provision of express safeguards that must be included in an order made under this power. Those safeguards include granting the right to a supplier to terminate a contract of supply where any charges for post-insolvency supply remain unpaid after 28 days beginning with the day on which payment is due regardless of the terms of the contract. A supplier may also terminate the contract if given permission by the insolvency office-holder or by the court.

68. Subsection (3) requires a further safeguard to be provided for affected suppliers by giving such suppliers a right to request a personal guarantee for payment from the insolvency office-holder as a condition of continuing the supply. Subsection

(4) provides scope for the Secretary of State to provide exceptions to this right.

69. Subsection (5) gives the Secretary of State the power to add any other safeguards that might be felt necessary, in order to protect suppliers who may be affected.

70. Subsection (7) defines which contractual terms may be rendered void by the order for the purposes of this power. These are those contractual terms that would allow providers of essential IT or utility supplies to alter the terms of a contract or withdraw the supply from an insolvent company on account of the insolvency. It also includes those that allow a supplier to terminate the contract on account of a termination event that occurred before the insolvency but which had not been exercised by the time of insolvency.

71. Lords Amendment 69 would make comparable provision to Lords Amendment 68 for cases where an individual becomes subject to an individual voluntary arrangement. Subsection (2) provides that this power is restricted to supplies made to individuals subject to an individual voluntary arrangement for the purpose of carrying on a business.

72. Lords Amendment 70 would give the Secretary of State the power in an order under Lords Amendments 68 or 69 to make different provision for different cases, to provide for persons to exercise discretion and to make incidental, supplementary, consequential and transitional or saving provision in relation to the exercise of the powers. It also restricts the powers so that they may not be exercised retrospectively in a way which would affect contracts of supply which pre-date the introduction of any order made and ensures that any order made is subject to the affirmative resolution procedure.

***Lords Amendment 71***

73. On 29th November 2012 the Report of An Inquiry into the Culture, Practices and Ethics of the Press was presented to Parliament (HC 780) ("the Leveson Report"). In the report, the Rt. Hon. Lord Justice Leveson makes a range of recommendations to reform the regulatory framework for the press, creating a new system for press regulation, with the principle of industry self-regulation at its heart. One of the recommendations of the Leveson Report was that a body should be given responsibility for recognising whether any independent self-regulator established by the press met certain criteria (principally set out in recommendations 1 to 24 of the Leveson Report).

74. The new clause that would be inserted by Lords Amendment 71 would apply to a body established by a Royal Charter after 1st March 2013 where the Charter contains a requirement that Parliament must approve amendments to the Charter or the dissolution of the body the Charter establishes. It would provide that such a requirement contained in the Charter on the date it is granted must be satisfied before steps can be taken to recommend, via the Privy Council, dissolution or amendment to

Her Majesty in Council.

***Lords Amendment 72 to 74***

75. Lords Amendment 72 to 74 respond to recommendations made by the Delegated Powers and Regulatory Reform Committee by providing further detail about the exercise of the power to make regulations requiring employment tribunals to order employers to undertake equal pay audits where the employer had been found to have broken equal pay law. Amendment 72 would specify that regulations made under this clause may provide that an employment tribunal may order an employer to pay a penalty not exceeding £5000 for failure to comply with an equal pay audit order and that such a penalty may be repeated until the employer complies with the order. Amendment 73 would provide that the first regulations made under this power must include an exemption for new and very small businesses as defined and Amendment 74 provides that regulations under this clause may only be made following consultation with the Minister responsible for employment tribunals.

***Lords Amendments 75 to 81***

76. Lords Amendments 75 to 77 (so far as relating to bankruptcy) would ensure that the amendments made by Schedule 19 to the Bill have the same extent as the provisions of the Insolvency Act 1986 which they amend. Schedule 19 makes no changes to bankruptcy law in Scotland, which is a devolved matter.

77. Lords Amendments 76 and 78 would limit the extent of provisions relating to the abolition of the Agricultural Wages Board and related English bodies to England and Wales only. Lords Amendments 79 and 80 would limit the extent of provisions relating to the protection of supplies in cases of corporate insolvency to England and Wales and Scotland and the extent of provisions relating to the protection of such supplies in cases of individual insolvency to England and Wales.

78. Lords Amendment 81 would limit the extent of provisions inserted by Lords Amendment 71 (relating to *Royal Charters; requirements for Parliamentary approval*) to England and Wales only.

***Lords Amendments 82 to 87***

79. Lords Amendments 82 to 87 would amend the commencement provisions. Amendments 82 and 83 would add to the list of provisions which will come into force automatically on Royal Assent and ensure that all powers in the Bill to make subordinate legislation by statutory instrument would come into force on Royal Assent. These powers would then be available to be exercised at an appropriate later date. Some of the powers in the Bill are reserve powers, for example as set out in Amendments 27 and 28, and their commencement does not imply that they would necessarily be exercised. Amendment 85 adds to the list of provisions (clause 79(2)) which will come into force automatically two months after Royal Assent.

***Lords Amendments 88***

80. Lords Amendment 88 would be a technical amendment to Schedule 2 to correct an error which purported to suspend the limitation period in respect of a claim for which conciliation is not available. As claims under section 188A are not subject to conciliation, the extension to the limitation period in section 189 made by Schedule 2 should not apply to section 188A claims, and the amendment addresses this point.

***Lords Amendments 89***

81. Lords Amendment 89 would amend the definition of the expression "the commencement date" as it applies for the purposes of Schedule 4. It currently means the date on which clause 20 (the Competition and Markets Authority) comes into force. As amended, "the commencement date" would mean the date on which subsection (3) of that clause (the CMA's general duty to seek to promote competition) comes into force. The amendment would make clear that, if subsection (3) were to be commenced after the date on which the other provisions of clause 20 are commenced, references in Schedule 4 to "the commencement date" would be to the later date. Under paragraph 64 of Schedule 4, the CMA's first financial year begins on "the commencement date"; and under paragraph 65 the CMA's first annual plan must be published within the period of three months beginning with "the commencement date". Under paragraphs 14 and 15, the CMA must prepare a performance report and a concurrency report as soon as practicable after the end of each of its financial years. If the CMA's general duty under clause 20(3) were to be commenced later than the other provisions of that clause, Amendment 89 would make clear that the CMA would not have to prepare a concurrency report or a performance report, or publish an annual plan, for a period before it acquired that general duty.

***Lords Amendment 90***

82. Lords Amendment 90 would deal with the permitted duration of appointments to the CMA panel in certain circumstances. Paragraphs 61 to 63 of Schedule 4 contain rules about the eligibility of CC panel members and former CC panel members to be appointed to the CMA panel. Among other things, paragraph 61 allows an existing CC panel member to be appointed to the CMA panel before the abolition of the CC if his or her term of office as a CC panel member is not due to expire before the abolition of the CC. However, the terms of the person's appointment to the CMA panel must not be such that his or her total period of service as a member of the CC and CMA panels exceeds eight years. Amendment 90 would make clear that, for this purpose, any period when the person holds office both as a CC panel member and as a CMA panel member would not be counted towards his period of service as a CC panel member.

***Lords Amendment 91***

83. Lords Amendment 91 would ensure that provision could be made for the appointment of CC panel members to the CMA in circumstances where they could not otherwise be appointed but the appointment is needed to ensure that they can complete an inquiry on which they began work as CC panel members.

***Lords Amendments 92 to 95***

84. Lords Amendments 92 to 95 would make minor changes to Schedule 5 and Schedule 6 to ensure that references to the CC in particular provisions of the EA 2002 and the Civil Aviation Act 2012 are replaced by references to the Competition and Markets Authority or "CMA".

***Lords Amendment 96***

85. Lords Amendment 96 would repeal section 100(1)(b) of the EA 2002. This relatively minor change would ensure that the new mergers regime is internally consistent as regards investigations of anticipated and completed mergers.

86. Section 101(1)(b) of the EA 2002 provides that where an anticipated merger is notified by merger notice, the OFT can refer the merger to the Competition Commission for a more detailed Phase 2 investigation outside the usual timeframe for referral if the merger completes during the statutory period for consideration of the merger notice. Unlike for investigations of anticipated mergers, EA 2002 currently does not provide for a timeframe for referral of completed mergers to Phase 2.

87. Clause 26 and Schedule 8 to the Bill provide for a new timeframe for referral which will apply to both anticipated and completed mergers. In the light of that, section 101(1)(b) of EA 2002 is no longer necessary.

***Lords Amendments 97 and 98***

88. Lords Amendments 97 and 98 would amend Schedule 15. These minor and technical amendments would ensure that the Bill is internally consistent. Paragraph 18 of Schedule 15 to the Bill repeals section 32 of the EA 2002. Lords Amendments 97 and 98 would ensure that subsection (4) of that section is retained for purposes where it is still required. Section 32(4) of the EA 2002 relates to determining time periods for the purposes of sections 25(1) and 25(5)(b) of that Act and is still required for those purposes.

***Lords Amendments 99 to 101***

89. Lords Amendment 99 relates to the abolition of conservation area consent. The amendment would prevent a person claiming compensation arising out of the requirement to obtain planning permission for demolition in circumstances where the person would, previously, have been required to obtain conservation area consent.

90. Lords Amendment 100 would have the effect that all of the heritage provisions in the Bill would be capable of applying to the Isles of Scilly as if it were a separate county.

91. Lords Amendment 101 would change the procedure for making a national listed building consent order so that it was subject to the affirmative, rather than the negative, procedure. Listed building consent orders, if made, will grant listed building consent for certain categories of work or buildings - where the extent of the building's special interest is well understood - without any need to make an

application. The Secretary of State will have the power to make national listed building consent orders, applying to works of any description for the alteration or extension of listed buildings of any description in England.

***Lords Amendments 102 to 109***

92. Lords Amendments 102, 103 and 105 to 109 would provide that certain documents relating to the appointment, removal and release of trustees in bankruptcy, currently filed with the court, must instead be filed with such persons as may be prescribed in rules, and would provide powers to make provision about the responsibility of specified persons to keep files and records relating to bankruptcy applications, and to allow for the inspection of such by prescribed persons. The purpose of these amendments is to enable the Government to modernise and make more efficient all of the filing and document inspection processes that govern bankruptcies.

93. Lords Amendment 104 amends Schedule 19 to provide for further amendment of section 415 of the Insolvency Act 1986. Amendment 104 would have the effect of enabling the Lord Chancellor, with the consent of the Treasury, to make provision by order about fees to be payable to an adjudicator in respect of the exercise of functions under Part 9 of that Act (as amended by Schedules 18 and 19 to the Bill). Whilst provision about fees relating to the determination by adjudicators of bankruptcy applications would be within the ambit of the existing power in section 415(1)(a) of that Act, this amendment will ensure that provision may be made about fees to be payable to adjudicators in respect of the exercise of other functions.

***Lords Amendments 111 to 114 and 115***

94. Lords Amendments 111 to 114 would ensure that the specified criteria for the statutory code of practice, the process for determining a breach of a code of practice, any sanction for a breach, and any subsequent appeals process, are specified in regulations. Amendment 115 would remove the ability to impose requirements on licensing bodies by reference to guidance that is not contained in regulations. All of these amendments are in response to recommendations in the Delegated Powers and Regulatory Reform Committee's tenth report of this Parliamentary session.

***Lords Amendment 120***

95. Lords Amendment 120 would insert additional wording in the long title to reflect Amendments 64 to 71.

## COMPATIBILITY WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS

***Abolition of the Agricultural Wages Board and related English Committees (Amendments 41, 76, 78 and 110)***

96. Lords Amendments 41, 76, 78 and 110 would bring agricultural workers within the same minimum statutory employment terms and conditions as workers in

all other sectors of the economy and abolish a number of public bodies whose functions are now limited or have fallen into disuse.

97. The terms of a worker's employment contract which exist at the time the Agricultural Wages Board is abolished would continue to apply until such time as the contract were varied by agreement between the employer and the worker, or until the contract came to an end. Moreover, agricultural workers would have the same levels of protection and employment rights as all other workers.

98. The abolition of Agricultural Dwelling House Advisory Committees does not affect the statutory protection afforded to tenants under the Rent (Agriculture) Act 1976 or other housing legislation.

99. The Government has considered the provisions carefully in the context of the ECHR, with particular reference to Article 1 of the First Protocol and Article 11 and has concluded that the provisions would not infringe either Article, or indeed any Article of the Convention. We are therefore satisfied that the amendments would be compatible with ECHR.

***Supply of customer data (Amendments 64 to 66)***

100. Lords Amendments 64 to 66 would confer a power on the Secretary of State to make regulations requiring certain suppliers of goods and services ("regulated persons") to provide customer data following a request from a customer. Such a right of access may be regarded as raising issues under Article 1, Protocol 1 in respect of the rights of owners of the customer data (or the potential intellectual property rights which vest in any database containing such data). The right will, however, only be to access raw data, not analytical data or database structures. Furthermore, the right is limited to being provided with a copy of the data only and it confers no restrictions on the use of data by the supplier. For these reasons it is considered that Article 1, Protocol 1 is not engaged.

101. The new clause would confer a power to make provision for enforcement. It envisages an enforcer being able to issue an enforcement notice or apply to the court for an enforcement order. Article 6 requires the state to provide access to an independent and impartial tribunal so that the civil rights and obligations of an individual can be determined at a fair and public hearing. Allowing enforcement notices to be issued without recourse to any judicial process could interfere with Article 6, however the person subject to the notice would have access to a court based appeal procedure should they wish to contest the notice, which would be compliant with Article 6. Application for enforcement orders would be subject to judicial oversight and through well established court procedures only, which would be compliant with Article 6.

**Glossary of abbreviations**

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| ACAS | Advisory, Conciliation and Arbitration Service |
| ADHACs | Agricultural Dwelling House Advisory Committees |
| AWA 1948 | Agricultural Wages Act 1948 |
| AWC | Agricultural Wages Committees |
| CA 1998 | Competition Act 1998 |
| CC | Competition Commission |
| CMA | Competition and Markets Authority |
| EA 2002 | Enterprise Act 2002 |
| ECA 1972 | European Communities Act 1972 |
| ERA 1996 | Employment Relations Act 1996 |
| ETA 1996 | Employment Tribunals Act 1996 |
| HSWA 1974 | Health and Safety at Work etc. Act 1974 |
| OFT | Office of Fair Trading |
| P(LBCA)A 1990 | Planning (Listed Buildings and Conservation Areas) Act 1990 |
| TULR(C)A 1992 | Trade Union and Labour Relations (Consolidation) Act 1992 |

# ENTERPRISE AND REGULATORY REFORM BILL

# EXPLANATORY NOTES ON LORDS AMENDMENTS

*These notes refer to the Lords Amendments to the Enterprise and Regulatory Reform Bill as brought from the House of Lords on 21 March 2013 [Bill 152]*

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