IN THE MATTER OF
LOCAL AUTHORITIES' CO-ORDINATING
BODY ON FOOD & TRADING STANDARDS

THE WEIGHTS AND MEASURES ACT 1985

AND

UK IMPLEMENTATION OF THE UNITS OF
MEASUREMENT (METRICATION)
DIRECTIVES

OPINION

Local Government Association
Local Government House
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Ref. Alison Sutherland

OPINION

1. I am asked to advise the Local Authorities' Co-ordinating Body on Food & Trading Standards ("LACOTS") on a number of issues that arise in relation to the adverse reaction by some traders to the recent changes concerning the law of metrication which came into force on 1st January 2000. In particular, my advice is sought on the following points:

   a. Does the <u>Weights and Measures Act 1985</u> ("the 1985 Act") imply a repeal of either or both the earlier amending Regulations introducing metric units and /or of the <u>European Communities Act 1972</u> ("ECA 1972")?

   b. Are any of the relevant amending Regulations *ultra vires* for want of being made under the ECA 1972?

   c. (On the assumption that the relevant Community obligations have *not* been properly implemented into domestic law), do the EC Directives themselves have direct effect and are national courts required to have regard to them?

   d. May a local weights and measures authority exercise discretion in relation to enforcing the metrication laws; if so, what factors may it properly take into account in determining a general policy on enforcement and what factors should govern the decision to take formal or informal action in a particular case?

   e. What is the relevance of the provisions relating to harassment and unlawful intimidation contained, respectively, in the <u>Protection from Harassment Act 1997</u> and in s. 241 of the <u>Trade Union and Labour Relations (Consolidation) Act 1992</u> ("TULRCA 1992")?

2. In summary, my advice is that:

a. The 1985 Act did not, either expressly or impliedly, repeal the earlier amending Regulations introducing metric units; still less did it have that effect upon the ECA 1972; accordingly, the earlier Regulations, the 1985 Act itself and the two sets of Regulations introduced in 1994[1] which broadly[2] had the effect of requiring that metric (S.I.) units be used from 1 January 2000 are to be viewed in the light of the obligations accepted by the UK as arising under (superior) EC law;

b. Examination of the various Statutory Instruments to which my attention has been drawn - in particular the **Weights and Measures Act 1985 (Metrication)(Amendment) Order 1994** (SI 1994 No. 2866) and the **Units of Measurement Regulations 1994** (SI 1994 No. 2867) (collectively, "the 1994 metrication Regulations") - does not reveal any factor which, in my view, would be likely to lead a court to conclude that they were enacted *ultra vires*;

c. Because what is here at issue is the possibility of *criminal* prosecutions of traders who do not comply with the metrication requirements, the ordinary principles of "vertical direct effect" and consistent interpretation give way to the fundamental principle of legal certainty under EC law; accordingly, if and to the extent that the national implementing legislation does *not* correctly implement the Directives, an "emanation of the State" (such as a local authority) may not invoke the Directives themselves to sustain a criminal prosecution;

d. A local weights and measures authority may not decline to perform its statutory duties under the 1985 Act; thus, whilst it enjoys a discretion whether

[1] The **Weights and Measures Act 1985 (Metrication)(Amendment) Order 1994** (SI 1994 No. 2866) and the **Units of Measurement Regulations 1994** (SI 1994 No. 2867).

[2] As those instructing me well know, the savings in the domestic legislation for the use of imperial units beyond 31st December 1999 (e.g., the pint for draught beer and the mile for distances) reflect the continuing derogations permitted to the UK under Directive 89/617/EEC (see below).

or not to prosecute in an individual case, that discretion may not be used to justify a general policy of non-prosecution and must be exercised reasonably;

e. The issues under the Protection from Harassment Act 1997 and under s.241 of the Trades Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992") are inextricably bound up with, and represent a different way of approaching, the question of whether enforcement of the metrication provisions is, or is not, lawful: if lawful, no issue arises under either provision; if not, the Trading Standards officers are still unlikely to be held to be committing a criminal offence if they are acting under an honestly-held but mistaken view of the validity of the law that they are seeking to enforce.

Background: the EC Directives and the various domestic measures taken to introduce, and to move across to, the metric system

3. Enclosure 8 to my instructions contained a succinct but very helpful analysis of the sequence of changes brought about by the various "units of measurement directives" and their implementation into domestic law. The key points are the following.

EC legislation

4. The first units of measurement directive (Directive 71/354/EEC[3]) established the principle that the SI (i.e., metric) units of measurement listed in Chapter I of the Annex to the Directive were to be used for:

- measuring instruments used,
- measurements made and
- indications of quantity expressed in units of measurement

for economic, public health, public safety or administrative purposes. SI units were authorised for use definitively. Non-SI units were divided into two categories: those

[3] OJ 1971 L 243, p.29; OJ (English Special Edition) 1971 (III) p.878.

which were to disappear from use by 31 December 1977 at the latest[4]; and those whose use was to be reviewed by that date[5].

5. The UK's accession to the European Communities on 1 January 1973 necessitated the amendment of Directive 71/354/EEC[6]. Forty five imperial units of measurement were defined and authorised for temporary use[7], with a requirement that a decision should be taken before 31 August 1976 into which of the three original chapters of Directive 71/354/EEC those imperial units should be classified. Any imperial units not so classified were to disappear on 31 December 1979 at the latest.

6. Directive 76/770/EEC[8] provided for further phasing-out of certain imperial units in two groups, by 31 December 1977 and by 31 December 1979. Directive 80/181/EEC[9] (which repealed and replaced Directive 71/354/EEC) authorised (*inter alia*) the UK to continue to use, on a temporary basis, the seventeen imperial units listed in Chapter III of the Annex to that Directive.

7. Directive 89/617/EEC[10] was the final measure in the series It set 31 December 1994 as the date after which Member States could no longer authorise the general use of the imperial units listed in Chapter III of the Annex to Directive 71/354/EEC (the original directive). By way of derogation, Member States were permitted to authorise the use of –

- seven listed imperial units in specific fields of application until 31 December 1999; and
- seven other listed imperial units until a date to be set by the Member States.

[4] Units listed in Chapter III.
[5] Units listed in Chapter II.
[6] By Article 29 of, and Annex I to, the Act of Accession.
[7] Annex II, added to Directive 71/354/EEC.
[8] OJ 1976 L 262, p.204.
[9] OJ 1980 L 39, p.40.
[10] OJ 1989 L 357, p.28.

Domestic legislation

The situation before 1985

8. Before the UK joined the European Communities, definitions of units of measurement were contained in the Weights and Measures Act 1963. Section 10 of that Act made it an offence to "use for trade" units not listed in Schedule 1 to the Act[11]. Following accession, Community legislation relating to units of measurement was duly implemented in the UK. As a first step, the **Units of Measurement Regulations 1976** (SI 1976 No. 1674)[12] authorised the use of certain metric units[13] in the "specified circumstances"[14]. As a result, it became permissible for the first time to sell a kilogram of apples as an *alternative* to selling the same quantity as "a little over 2 pounds"[15]. Subsequent SIs - also made under powers conferred by section 2(2) of the ECA 1972 - further implemented Directive 71/354/EEC[16] and Directive 80/181/EEC[17].

9. I observe in passing that, as various imperial units were phased out and SI units brought in, provision was made for "supplementary indications" to be used for trade or in the specified circumstances. In case of any conflict, the authorised unit was to prevail; and the supplementary indication might not be in larger characters than the

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[11] I note that, even at this stage, section 1 of the Act defined the yard and the pound by reference, respectively, to the metre and the kilogram.

[12] Made under s.2(2) of the ECA 1972, the Secretary of State being the appropriate "designated Minister" under the European Communities (Designation) Order 1976 (SI 1976 No. 897). Further amendments were introduced by way of primary legislation, namely the Weights and Measures (etc) Act 1976.

[13] Those specified in Schedule 1.

[14] The "specified circumstances" are expressly defined by reference to Articles 2 and 3 of Directive 71/354/EEC.

[15] This authorisation did *not* affect the (imperial) units which continued to be authorised as lawful for trade by virtue of the Weights and Measures Act 1963 (see regulation 7(1)).

[16] **The Units of Measurement Regulations 1978** (SI 1978 No. 484) withdrew from use in the circumstances specified in Article 2 of Directive 71/354/EEC the units listed in Schedule 1 to the Regulations (regulation 3). The units thus withdrawn included the chain and the nautical mile, the rood, the bushel, the dram and the knot.

[17] **The Units of Measurement Regulations 1980** (SI 1980 No. 1070) authorised the use of the SI units listed in Schedule 1 to the Regulations (regulation 3). Regulation 8 withdrew from authorised use the units specified in Schedule 3 to the Regulations (as from 1 September 1980 in relation to units listed in Part I of that Schedule and as from 1 January 1986 in relation to units listed in Part II thereof). Accordingly, units such as the hand, the cubic foot, the stone and horsepower were withdrawn. These Regulations replaced the Units of Measurement Regulations 1976. The **Units of Measurement (No. 2) Regulations 1980** (SI 1980 No. 1742) made additional amendments, clarifications and corrections of errors. Following the amendment of Directive 80/181/EEC by Directive 85/1/EEC (OJ 1985 L 2, p.11), the **Units of Measurement Regulations 1985** (SI 1985 No. 777) made yet further corrections.

authorised unit[18]. It therefore remained possible for indications to be given in imperial units which had been phased out as authorised units (in order, for example, to help consumers to familiarise themselves with the new metric units).

The 1985 Act

10. Given the complexity of the legislative position by this stage, it is unsurprising that consolidation was felt to be desirable. Accordingly, the Weights and Measures Act 1963, as amended by the Units of Measurement Regulations 1976-1985 was consolidated with the Weights and Measures (etc) Act 1976 and the Weights and Measures Act 1979 as the Weights and Measures Act 1985, i.e., the 1985 Act.

11. Section 1(2) of the 1985 Act explains the function of Schedule 1 to the Act: that Schedule "shall have effect for defining for the purposes of measurements falling to be made in the United Kingdom the units of measurement set out in that Schedule". Section 1(3) expressly authorises the Secretary of State by order to "amend Schedule 1 to this Act by adding to or removing from Parts I to VI of that Schedule any unit of measurement of length, of area, of volume, of capacity, of mass or weight, as the case may be"[19]. It therefore gives the Secretary of State domestic law *vires* to prescribe what may, and may not, be used as a unit of measurement within the UK.

12. The offence of "using for trade" units not listed as authorised units in Schedule 1 of the 1963 Act became the equivalent offence, under section 8(1)(a) of the 1985 Act, in respect of the use for trade of any unit of measurement not included in Parts I to V of Schedule 1 to the Act. Parts I to V of Schedule 1 define both the imperial units and the metric units that were authorised for use in the specified circumstances at that time for measurement of length (Part I), area (Part II), volume (Part III), capacity (Part IV) and mass or weight (Part V). Section 8(1)(b) provides that a person may not

[18] See, e.g., Regulation 9 of the **Units of Measurement Regulations 1980**.
[19] Section 1(4) safeguards (without prejudice to s.8(2)(6)) the mile, the foot, the inch, the gallon and the pint from being moved from one Part of Schedule 1 to another by order in this way.

> "use for trade, or have in his possession for use for trade, any linear, square, cubic or capacity measure which is not included in Schedule 3 to this Act, or any weight which is not so included".

Schedule 3 to the Act, entitled "Measures and weights lawful for trade", duly listed both imperial and metric measures. Section 8(6) of the Act expressly gave the Secretary of State *vires*, under domestic law, by order to

> "(a) amend Schedule 3 to this Act to or removing from it any linear, square, cubic or capacity measure, or any weight;"

13. Precisely *because* the intention of Parliament in enacting the 1985 Act was *not* to reverse the phasing-out of imperial units that had already taken place, but merely to consolidate the existing law, Part VI of Schedule 1 ("Definitions of certain units which may not be used for trade") includes units such as the rood and the bushel which had already been withdrawn by earlier SI (see above) That lends weight to the argument that the 1985 Act was exactly what it was stated to be: a consolidation Act (see further below).

Further developments following the 1985 Act

14. Shortly afterwards, the **Units of Measurement Regulations 1986** [20] consolidated the **Units of Measurement Regulations 1978** and the **Units of Measurement Regulations 1980** as amended. The 1986 Regulations continued to define and authorise the use, in the specified circumstances, of metric units (regulation 3) and maintained the possibility of using supplementary indications (regulation 7). The 1986 Regulations specifically preserve and confirm the earlier regulations[21] withdrawing certain imperial units from authorised use (regulation 8).

15. The obligations under Directive 89/617/EEC necessitated further measures in 1994. The **Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994**[22]

[20] SI 1986 No. 1082, again made under s.2(2) of the ECA 1972.
[21] I.e., regulation 3 of the 1978 Regulations and regulation 8 of the 1980 Regulations.
[22] SI 1994 No. 2866.

amended section 8 of the 1985 Act so as to make unlawful from 1 October 1985 the use for trade of the pint, fluid ounce, pound or ounce except

- as supplementary indications of quantity *or*
- where a derogation (reflected in section 8(2)) permitted their use as primary units[23].

Regulation 4 provided for the further changes, from 1 January 2000, which have given rise to the present difficulties - namely, the withdrawal of the pound for the sale of goods loose from bulk[24].

16. *Unlike* all the other SIs discussed above, and unlike the **Units of Measurement Regulations 1994**, the **Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994** was made by the Secretary of State "in exercise of the powers conferred upon him by sections 8(6), 22(1) and (2) of [the 1985 Act] and of all other powers enabling him in that behalf". The "other powers" include the Secretary of State's general powers under section 1(3) of the Act, described above.

17. The **Units of Measurement Regulations 1994** [25], once again made under section 2(2) of the ECA 1972, contain the detailed provisions necessary to give effect to the changeover from using imperial measures to using metric measures in the specified circumstances. They ended the authorised use, in the specified circumstances, of the imperial units of measurement most commonly used to describe length, area, volume and mass (such as the yard, pint and pound). Specifically, they render those imperial measures unlawful for use for trade by placing them in Part VI of Schedule I to the Act (although they may continue to be used as supplementary indications). The Regulations also take advantage of the derogations for the use of certain imperial units in certain circumstances provided for in Directive 89/617/EEC. Amendments to Schedule 3 to the 1985 Act, and the introduction of new schedules (Schedule 3A and Schedule 3B) reflect those derogations.

[23] For example, the use of the pound as a primary indication for the sale of goods loose from bulk continued to be permitted until 31 December 1999.
[24] Also, indeed, the withdrawal of the pint save for sales of draught beer or cider.
[25] SI 1994 No. 2867.

18. Finally, the **Units of Measurement Regulations 1995**[26] make the corresponding changeover from imperial measures to metric measures in respect of those uses of the imperial system for which no implementing legislation to date had made specific provision.

The legal advice giving rise to the present challenges to the recent changes concerning the law of metrication

19. The United Kingdom Independence Party ("UKIP") has sought and obtained the advice of Counsel (Mr Shrimpton). That advice, dated 22nd December 1999, was placed by UKIP on its website. In response to a number of queries raised, Mr Shrimpton provided a further Note dated 23rd January 2000

20. In essence, Mr Shrimpton's propositions are the following:

   a. The 1985 Act was a consolidation act, and is therefore presumed not to alter the law (para. 7);

   b. Because imperial measures appear in Schedule 3 to the 1985 Act, "the use of Imperial weights and measures for all purposes has been expressly authorised by the Imperial Parliament at Westminster" (para. 8);

   c. Section 2 of the ECA 1972 is "a nonsense and a constitutional impossibility, because as is well-known our Sovereign Parliament cannot bind its successors and in the event of conflict the later Act takes precedence" (para. 13);

   d. The doctrine of implied repeal rests upon the express will of Parliament; applying the 1985 Act requires no more than giving effect to its clear and express words; the Parliament of 1985 was no less sovereign than the Parliament of 1972 and it could and what is more did over-ride the European

[26] SI 1995 No. 1804.

Communities Act and Council Directive 80/181/EEC at will (para. 19 with para. 21)[27];

e. The provisions of the 1985 Act which expressly authorise the use of Imperial weights and measures "cannot be reconciled with community law, which seeks to outlaw those self-same weights and measures and force the European system of measurement upon us by means of criminal sanctions, indeed force a change to our way of life, so central are our much-loved and familiar weights and measures to the British way of life" (para. 23); the test of repugnancy which has to be satisfied for the doctrine of implied repeal to apply[28] is therefore satisfied (para. 23);

f. The "Factortame litigation" is not pertinent, because "the case was not fully contested by the Law Officers, who chose not to argue the obvious defence (with respect) of implied repeal" (para. 25); since the decision of the House of Lords in <u>Factortame</u> was a "decision without argument" it is not binding (para. 26);

g. To say that the courts would refuse to apply the 1985 Act (i.e., implicitly, that they would be prepared to enforce the 1994 metrication Regulations) "involves saying that after having had the benefit of full argument on the law of the constitution (...) the judges would wilfully and deliberately defy Parliament (...) [which] is unthinkable" (para. 28);

h. Because of the implied repeal of the ECA 1972, the Weights and Measures (Units of Measurement) Regulations 1994 (i.e., the **Units of Measurement Regulations 1994**) are "*ultra vires*, null and void and of no legal effect whatsoever" (para. 33);

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27 Mr Shrimpton continues, at para. 22, "the proposition that anything done in 1972 could have a bearing on an Act of Parliament passed more than a decade later is unarguable and contrary to the Law of the Constitution. I would not expect any Member of the Bar of England and Wales to put it forward." At the risk of disappointing Mr Shrimpton, I have to say that both I and a number of other members of the Bar would unhesitatingly advance that proposition in any case falling within the scope of EC law that involved the interpretation of domestic legislation in the light of the UK's obligations under Community law as a Member State.

i. The **Weights and Measurements Act (Metrication) (Amendment) Order 1994** is also *ultra vires*, being a misuse of the "Henry VIII" clauses in the 1985 Act, and /or in any event those Regulations are so bound up with the **Units of Measurement Regulations 1994** that "it is strongly arguable that they fall *a priori*", and/or any local authority which engaged in a prosecution under them would be in an impossible position and would be "engaged in an unconstitutional defiance of Parliament" (paras. 33-34).

Mr Shrimpton concludes that,

> "No prosecution should be commenced and if one were it would be as misconceived, unconstitutional and improper as any prosecution ever brought (...) I cannot speak for the courts, but I cannot conceive that they would be willing to defy Parliament in the way that the minister suggests that they should. If the Minister wishes to make it an offence to sell a pound of apples he should first go to Parliament and get an Act which says so. This one does not and the futile attempt to amend it by reference to an earlier Act is of no legal consequence. I advise accordingly" (para. 36)

21. I agree with Mr Shrimpton's first proposition, but part company with him thereafter.

22. In the remainder of this opinion, I examine first whether the 1985 Act was, or was not, a pure consolidation Act (because Mr Shrimpton's argument turns, at least in part, upon the true status of that Act). I then examine the specific points raised in my instructions, relating them in turn to Mr Shrimpton's remaining propositions.

<u>Was the 1985 Act anything more than a consolidation Act?</u>

23. A different Parliamentary procedure is used for consolidation Bills from that applicable to ordinary public bills. Thus, consolidation Bills are usually introduced into the House of Lords and after their formal first reading are sent to a Joint

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[2A] Per A.L. Smith J. in West Ham Church Wardens and Overseers v. Fourth City Mutual Building Society [1892] 1 QB 654 at 658.

Committee of both Houses, which examines them[29] and reports its conclusions to each House. In the Commons, the second reading stage is taken without debate and, provided no amendments have been tabled, a motion is put that the Bill should *not* be committed to a standing committee (i.e., the usual "committee stage" is not taken). The third reading is then taken without debate[30].

24. I have examined carefully the Hansard records of the stages through which the Weights and Measures Bill passed, as a consolidation bill, before becoming law. It is clear from the report of the Joint Committee on Consolidation Bills[31] that, when examining witnesses, the Joint Committee was fully alive to the necessity of *not* introducing any change into a pure consolidated Bill[32]. The introduction of a new Schedule I into the Weights and Measures Act 1963 by statutory instrument made under s.2(2) of the ECA 1972 was meticulously checked[33]. The Joint Committee was told that, whereas the Bill reproduced the Weights and Measures Acts, as amended by the 1980 and 1985 Regulations, the 1980 Regulations had a much wider scope than the Weights and Measures Bill and would remain in force as they stood, not only for the Weights and Measures Consolidation Bill or Act, but also for other Acts as well[34]. Further evidence that the Joint Committee was careful to ensure that the Bill was purely a consolidation measure appears from the discussion of timber fire wood[35] and from the direct question put to Assistant Parliamentary Counsel, Miss C.E. Johnston[36]. The Joint Committee duly reported that the Bill (as amended) was pure

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29 The purpose of the examination is, precisely, to ensure that the Bill is indeed a pure consolidation Bill - i.e., that the measures are strictly consolidating, that any repeals are only of redundant legislation and that any amendments made to the existing law fall within the strict limits permitted for a consolidation Bill.

30 I am indebted to those instructing me for this clear exposition of the consolidated Bill procedure, which is more lucid and comprehensible than the equivalent explanations in J.A.G. Griffith, Michael Ryle and M.A.J. Wheeler-Booth, *Parliament: Functions, Practice and Procedure* (London, Sweet & Maxwell, 1989) at pp.312-313 or in *Erskine May*.

31 Session 1984-85 5th Report, published as HC 501.

32 See the discussion of whether the scope of the vending machine provision in clause 22 should be extended to include the name and address of the manufacturer and the safe consumption date of the goods (paras. 2-4 of the minutes of evidence, pp.2-3 of the Report). The Joint Committee initially considered raising the point with the Law Commission. After further discussion, it was left to the Department to consider in conjunction with MAFF as a separate amendment to the legislation.

33 The **Units of Measurement Regulations 1980** (SI 1980 No. 1070): see para. 10 of the minutes of evidence, p.5 of the Report.

34 See paras. 14-15 of the minutes of evidence, p.6 of the Report.

35 Discussion of Schedules 8-11, paras. 15-17, pp.6-7 of the Report.

36 Chairman, para. 21: "Miss Johnston, are you satisfied that the Bill does not alter the existing law?" Miss Johnston: "Yes, my Lord, I am." (p.8 of the Report).

consolidation and that there was no point to which the attention of Parliament should be drawn[37].

25. Such a report could not, of course, have been made if the Bill had impliedly repealed any of the earlier Regulations which it purported to consolidate. Still less could it have been made if there had been any question of Parliament, by the 1985 Act, impliedly taking the fundamental constitutional step of repealing the ECA 1972.

26. The reports in Hansard relating to the remainder of the Bill's passage into law add little; but what they do add again points to the 1985 Act being a pure consolidation act. The second reading in the Commons was taken without debate on 21 October 1985[38]. When the remaining stages were taken in the Commons on 24 October 1985[39], an amendment was put in order to correct a mistake; and again the issue whether the Bill was genuine consolidation was expressly ventilated before the House, prior to the third reading. The Bill then went back to the Lords[40], which endorsed the Commons amendment; and the Bill received the Royal Assent on the same day.

27. Applying the rule in Pepper v. Hart [1993] A.C. 593, the Parliamentary material may be used to assist in the interpretation of the 1985 Act, to the extent that the legislation is ambiguous or obscure. On the basis of the evidence available from the Joint Committee and from Hansard, and on the text of the Act itself, I conclude that the 1985 Act was indeed a pure consolidation act. It did not change the pre-existing law, but merely consolidated it in more convenient form.

28. If the 1985 Act was a consolidation act - and it seems clear that it was - such an act is presumed *not* to change the law (see the passage from Bennion, *Statutory Interpretation* cited by Mr Shrimpton at para. 7 of his opinion). "Not changing the law" means what it says. The law of the UK as enacted by Parliament includes the

[37] Minutes of proceedings, p. v of the Report.
[38] Hansard col. 116.
[39] Hansard col. 562.
[40] Hansard 30th October 1985, col.1569-1570.

ECA 1972. "Not changing" that law includes "not changing" (i.e., *not* impliedly repealing) the ECA 1972.

29. I also make the obvious, but nevertheless important, point that *in 1985* it was perfectly lawful, under EC law, for the UK to continue to use imperial measures in parallel with SI units. *There was therefore, when Parliament legislated, no conflict between (superior) EC law and the domestic law provisions of the 1985 Act.* Consequently there cannot in my view be any real pre-supposition that Parliament "must" have intended to repeal the amending Regulations and/or the ECA 1972 when it passed the 1985 Act; or, indeed that the 1985 Act could impliedly have that effect. Parliament was not enacting legislation "contrary" to the law of the European Communities[41]; but merely permitting the parallel use of imperial and metric units, as was *at that time* permitted under EC law. The issue of repeal (express or implied) of the earlier amending Regulations and / or of the ECA 1972 therefore simply does not arise.

a. **<u>Does the 1985 Act imply a repeal of the earlier amending Regulations and/or of the ECA 1972?</u>**

Authorities

30. Were the issue one purely of internal, domestic English law, Mr Shrimpton's theoretical propositions in respect of express and implied repeal would be relatively uncontentious. As I have just indicated, however, they are in the present case unsupported by any evidence that the 1985 Act *changed* the pre-existing law; and it is only if the pre-existing position was *changed* by the 1985 Act that questions of express or implied repeal arise. Thus, on the basis purely of English law, I conclude that in the present case - which involves a pure consolidation Act - there was no express or implied repeal of earlier legislation.

31. It is (surely) clear that repealing the ECA 1972 would be a step of immense constitutional importance. Unless and until the UK leaves the European Union, the UK is bound to respect the obligations it has accepted under the various Community

treaties as clarified and expanded by the case law of the ECJ, and to ensure that principles of EC law such as primacy, supremacy and direct effect are capable of being invoked directly before domestic courts. The ECA 1972 is the linchpin of the UK's implementation of those Treaty obligations.

32. Therefore, the only basis and justification for repealing the ECA 1972 which would not instantly place the UK in grave breach of a number of clear obligations under EC law would be a decision, duly notified to the UK's partners within the EU, that the UK was withdrawing from the European Union. One would expect to see such a step preceded by widespread debate both inside and outside the House as to the desirability, practicability and logistics of a UK withdrawal from the European Union; and there would naturally be a full debate in the House on any Bill brought to repeal the ECA 1972. I would not expect any superior court to be disposed to accept the proposition - central to Mr Shrimpton's case and expressed in his propositions (d) and (e) - that by passing a pure consolidation act which did *not* change the law, Parliament had nevertheless impliedly taken such a fundamental step.

33. It is, moreover, significant that the cases and legal writers on which Mr Shrimpton relies in his extended and interesting historical exegesis involve consideration of national law in isolation. It is, however, the authorities relating to the interaction between national law and EC law that are pertinent to the present issue. Those authorities are squarely against Mr Shrimpton.

34. The difficulties with the position espoused by Mr Shrimpton do not stem from R. v. Secretary of State for Transport, ex parte Factortame and others [1991] 1 A.C. 603 (H.L.) ("Factortame I"), which he seeks to distinguish on the grounds that this fundamental and obvious constitutional argument was, inexplicably, not taken by the Respondent Secretary of State acting by experienced counsel[42]. In reality, there is

[41] Cf. para. 14 of Mr Shrimpton's supplementary Note.
[42] Before the House of Lords prior to the making of the reference to the ECJ the respondent Secretary of State was represented by Sir Nicholas Lyell Q.C., the then Solicitor- General, John Laws (then the Treasury Junior, now Lord Justice Laws) and Christopher Vajda (now Christopher Vajda Q.C.), a recognised specialist in EC law. Before the ECJ, the UK was represented by the Solicitor-General, Christopher Bellamy Q.C. (later the British Judge at the Court of First Instance of the European Communities) and Christopher Vajda. When the case returned before the House of Lords, the Respondent Secretary of State appeared by the Solicitor-General,

much earlier authority which makes his position untenable. The cases in question are the earliest building blocks of EC law.

35. The two most obvious authorities are Case 26/62 Van Gend en Loos v. Netherlands Customs Administration [1963] ECR 1 and Case 6/64 Costa v. ENEL [1964] ECR 1141. In Van Gend, the ECJ held that the Netherlands could not, by a national law, increase the rate of import duty payable on ureaformaldehyde originating in Germany, because Article 12 of the EEC Treaty (a "standstill clause" prohibiting any increase in such duties) had direct effect within the national legal order and took precedence over the (posterior) rule of national law. In a much-quoted passage, the ECJ explained that "the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals [who could therefore rely directly upon the clear, precise and unconditional standstill clause in the Treaty]". In Costa v. ENEL, the ECJ explained that,

> "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.
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> "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights and have created a body of law which binds both their nationals and themselves.
>
> "The integration into the laws of each Member State of provisions which derive from the Community and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overriden by domestic legal provisions, however framed, without being

John Laws, Stephen Richards (a subsequent Treasury Junior, now Stephen Richards J.) and Andrew Macob (a shipping specialist). Having myself been instructed during the later stages of the "Factortame litigation", know the level of meticulous care and scrutiny which has characterised it. I would, frankly, be amazed if the decision not to take the "obvious" English constitutional law point that the Merchant Shipping Act 1988 impliedly repealed the ECA 1972 had been taken other than after careful consideration.

deprived of its character as Community law and without the legal basis of the Community itself being called into question.

"The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights."

36. When Parliament endorsed the UK's accession to the EC and enacted the ECA 1972, it *accepted* the system of EC law as laid down in the various Treaties, together with its jurisprudential underpinnings (including Van Gend and Costa v. ENEL). Subsequent Parliaments have continued to accept that system, endorsing major Treaty modifications such as the Single European Act, the Treaty of Maastricht and the Treaty of Amsterdam but never calling into question the basic tenets of the obligations willingly accepted in 1972. Amongst academic commentators on the constitutional issues arising from the UK's membership of the EU and the limitations on Parliamentary sovereignty that such membership entails, the generally held view is that, whilst Parliament could legislate expressly to repeal the ECA 1972[43], unless and until it does so the limitations on Parliamentary sovereignty inherent in the system of EC law continue to apply[44].

37. In the meantime the case law of the ECJ (applicable and binding by virtue of section 3(1) of the ECA 1972) has continued to reinforce the concepts of primacy and supremacy of EC law over anterior *and* posterior national law. Two further, classic, examples suffice. In Case 107/77 Amministrazione delle Finanze dello Stato v. Simmenthal [1978] ECR 629, the precursor to Factortame, the ECJ held that *any* national court (and not merely a constitutional supreme court) was under a duty to disapply a rule of national law that conflicted with directly effective rights under EC law. In Case C-106/89 Marleasing [1990] ECR I-4135, the ECJ held (in a civil law context) that, in applying national law, whether the national provisions in question were adopted *before or after the directive*, the national court was required to interpret

[43] Presumably, unless the ECA 1972 were merely being replaced by another measure, this would only be done as part of withdrawing from the EU.

[44] See, e.g., Neil MacCormick, *Questioning Sovereignty: Law, State and Practical Reason* (Oxford, OUP, 1999), chapter 6 (*passim*) and Colin R. Munro, *Studies in Constitutional Law* (2nd edition, London, Butterworths, 1999), Chapter 6 ("The European Union and the British Constitution"), especially pp. 201-20[illegible] ("EC law and Parliamentary Sovereignty") and pp. 209-214 ("Scrutiny at Westminster").

the national law, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the directive.

38. In short, the legal system created by the EC Treaty, as clarified and explained by the rulings of the ECJ, is one that does not admit of Mr Shrimpton's arguments.

39. In that respect, the speech of Lord Bridge of Harwich in Factortame I is both helpful and instructive. In a classic passage explaining the impact of EC law on Parliamentary sovereignty, he said this:

> "Some public comments on the decision of the European Court of Justice, affirming the jurisdiction of the courts of member states to override national legislation if necessary to enable interim relief to be granted in protection of rights under Community law, have suggested that this was a novel and dangerous invasion by a Community institution of the sovereignty of the United Kingdom Parliament. But such comments are based upon a misconception. If the supremacy within the European Community of Community law over the national law of member states was not always inherent in the E.E.C. Treaty (Cmnd. 5179-II) it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law. Similarly, when decisions of the European Court of Justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments Thus there is nothing in any way novel in according supremacy to rules of Community law in those areas to which they apply and to insist that in the protection of rights under Community law, national courts must not be inhibited by rules of national law from granting interim relief in appropriate cases is no more than a logical recognition of that supremacy."[45]

40. I conclude that the 1985 Act cannot be said impliedly to have repealed the ECA 1972, whether as a matter of domestic law or in the light of the interaction between EC law and domestic law (cf. Mr Shrimpton's propositions (c), (d) and (e)). Parliament's

authorisation of imperial measures in the 1985 Act in parallel with metric measures when that Act was enacted has since legitimately been superseded by the metrication regime introduced by the 1994 metrication Regulations (cf. Mr Shrimpton's proposition (b)). The decision of the House of Lords in Factortame I accords both with accepted British constitutional theory and with the ECJ's jurisprudence; and I would expect lower courts to follow and apply it (cf Mr Shrimpton's proposition (f)).

Legitimacy of courts questioning validity of Acts of Parliament

41. In deference to Mr Shrimpton's eloquent opinion, I should deal briefly with judicial review of Parliamentary acts where EC law is involved. Under the system of law put into place by the EC Treaty, accepted by the UK upon accession and incorporated into national law by the ECA 1972, both national courts and the ECJ *can and do* "enquire into the validity of an Act of Parliament"[46] when it is asserted that such an Act is in conflict with (superior) EC law. In so doing, they apply the principles laid down in cases such as Van Gend, Costa v. ENEL and Simmenthal (cited above).

42. National courts make such enquiry, and apply those cases, in obedience to section 2(1) and section 3(1) of the ECA 1972. If necessary, they make a reference for a preliminary ruling to the ECJ as to the proper meaning of an EC provision under Article 234 EC (formerly Article 177), before determining whether the Act of Parliament must be disapplied[47].

43. The ECJ makes such enquiry in two ways. If the Commission has brought an action against the Member State concerned under the procedure laid down in Article 226 EC (formerly Article 169) - as would almost certainly happen sooner or later if the UK Government did *not* legislate for, and enforce the changeover to, the metric system - the ECJ examines whether the Commission's claim that the Member State is in breach of EC law is well-founded. If the ECJ concludes that it is, it makes a declaration that,

[45] At 658G-659C.
[46] Cf. para. 17 of Mr Shrimpton's supplementary Note.
[47] This was, indeed, the procedure followed in Factortame I. The ECJ's ruling is expressed generically in terms of what is the proper interpretation of EC law (e.g, that Article X of the EC Treaty (or of a secondary provision) permits, or precludes, a national measure which has the effect of doing Y). It is then for the national court to give effect to that judgment when the matter returns from the ECJ.

by failing to take appropriate action and/or by maintaining an incompatible national measure in force, the Member State concerned has failed to fulfil its obligations under the EC Treaty. Parliament then legislates to remedy the breach of EC law and, in the meantime, an incompatible measure (even an Act of Parliament) cannot be enforced. Alternatively, the ECJ may make a ruling within the context of Article 234 EC, as described above.

b. <u>Are any of the relevant amending Regulations *ultra vires* for want of being made under the ECA 1972?</u>

44. In implementing an EC Directive, the obligation which the Member State must discharge is to ensure that the Directive is, within the timescale laid down for implementation, transposed fully and effectively into national law. There is, however, no requirement under EC law that national legislation implementing an EC Directive should be made in a particular way, using a particular procedure. There are at least as many valid methods of implementation as there are Member States. How, technically, the Member State sets about implementation is purely a matter for national law. National law may provide (as happens in the UK) for different techniques for implementation in different areas of law, or for alternative techniques even within the same area of law.

45. In the present case, two different types of *vires* were used. The **Weights and Measures Act (Metrication) (Amendment) Order 1994** was made under powers conferred upon the Secretary of State under the 1985 Act itself. The **Units of Measurement Regulations 1994** were made under powers contained in s.2(2) of the ECA 1972.

46. The Secretary of State's use of his powers under the 1985 Act to make the **Weights and Measures Act (Metrication) (Amendment) Order 1994** appears to me to fall within the wording of the powers invoked in that Order; and the procedure followed appears to have been that prescribed by section 86 of the Act. As a matter of EC law, it was open to the Secretary of State to make use of *vires* conferred by national legislation *other* than the ECA 1972; and I am aware of other instances where that has

been done notwithstanding that the purpose of the amendment was in fact to discharge some Community obligation. Provided that the making of the Order was *intra vires* the powers conferred under national law (and it seems to me that it was), it is unexceptionable.

47. For the reasons which I have given above, I do not consider that the ECA 1972 can be said impliedly to have been repealed by the 1985 Act. The *vires* contained in s.2(2) may therefore be used -

> "(a) for the purpose of implementing any Community obligation of the United Kingdom, or of enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
>
> (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;"[48]

The words "related to" have been interpreted broadly in R. v. Secretary of State for Trade and Industry, ex p. Unison, GMB and NATSUWT [1996] ICR 1003; and I do not consider that there is any real doubt as to the capability of section 2(2) of the ECA 1972 (whether under limb (a) or limb (b)) to confer the necessary *vires* upon the Secretary of State to make the **Units of Measurement Regulations 1994** in order to discharge the UK's obligations under the metrication directives.

48. I observe, moreover, that - in accordance with Standing Order No. 124 - a joint committee of both Houses (the "scrutiny committee") considers *every* statutory instrument of general applicability required to be laid before both Houses, with a view to determining whether the special attention of the House should be drawn to it on any of a number of grounds. Those grounds include, *inter alia*, where there appears to be a doubt as to whether the instrument is *intra vires* or where the instrument appears to make some unusual or unexpected use of the powers under which it was made[49]. The

[48] Section 2(1) requires effect to be given to enforceable Community rights; section 2(2) is commonly used for the discharge of Community obligations.
[49] See Griffith, Ryle and Wheeler-Booth, *op. cit.*, at pp. 244-247 and pp. 444-445.

1994 metrication Regulations passed that scrutiny, as I woulc have expected them to do.

49. I therefore conclude that the 1994 metrication Regulations ar : not "*ultra vires*, null and void and of no legal effect" but that, on the contrary, they have the effect of amending the 1985 Act in the way that they purport to do (cf Mr Shrimpton's propositions (g), (h) and (i)).

c. **(On the assumption that the relevant Co mmunity obligations have *not* been properly implemented into dom estic law), do the EC Directives themselves have direct effect and are national courts required to have regard to them?**

50. Behind this question lies the EC law doctrine of "vertical dir ct effect". Succinctly stated, that doctrine means that, where particular provisions of a directive are clear, precise and unconditional and the date for implementation o the directive has passed, an individual may rely upon those provisions of the directive against the State[50] or an "emanation of the State"[51].

51. However, because what is here at issue is the possibility of *criminal* prosecutions of traders who do not comply with the metrication requirements, the ordinary principles of "vertical direct effect" and consistent interpretation give way to the fundamental principle of legal certainty under EC law. The pertinent EC authority is Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, which concerned a prosecution brought by the Dutch authorities against an undertaking running a café for stocking for sale and delivery a beverage which it called "mineral water", but wh ch consisted of tap water and carbon dioxide. Council Directive 80/777/EEC[52] (the mineral water directive") required Member States to take the necessary measures to ensure that such beverage could not be marketed as "mineral water". The directive sh ould have been

[50] See Case 152/84 Marshall v. Southampton and South West Hampshire H alth Authority [1986] ECR 72 , following Case 8/81 Becker [1982] ECR 53. Conversely, no "horizontal direct effect" is given to similar term s of a directive, after the latter's "sell-by date", in an action between private p rties: Case C-91/92 Faccini Dori [1994] ECR I-3325.

[51] Case C-188/89 Foster v. British Gas [1990] ECR I-3313 provides a definitic n of what this means.

[52] OJ 1980 L 229, p.1.

implemented by 17 July 1984. The Netherlands legislation was amended only with effect from 8 August 1985. The events giving rise to the charges occurred on 7 August 1984.

52. The ECJ held that a national authority may *not* rely, as against an individual, upon a provision of a directive whose necessary implementation into national law has not yet taken place[53]. The obligation on the national court to refer to the content of the directive when interpreting its national rules is limited by the general principles of law which form part of Community law and, in particular, the principles of legal certainty and non-retroactivity. Accordingly a directive cannot, of itself and independently of a law adopted for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of that Directive[54].

53. It follows that, if and to the extent that the national implementing legislation does *not* correctly implement the metrication Directives, an "emanation of the State" (such as a local authority) may not invoke the Directives themselves to sustain a criminal prosecution.

d. **May a local weights and measures authority exercise discretion in relation to enforcing the metrication laws; if so, what factors may it properly take into account in determining a general policy on enforcement, and what factors should govern the decision to take formal or informal action in a particular case?**

54. Section 70 of the 1985 Act states that the Authorities[55] "shall" report to the Secretary of State on "the arrangements made to give effect in that Authority's area (...) to the purposes of this Act". That wording can only be interpreted as pre-supposing that there is a duty on the Authorities to implement the purposes of the Act (which, as amended, includes the changeover to metrication). It is unlawful for a public authority to decline to implement or otherwise to frustrate the policy of an Act of Parliament: see R. v. Boteler (1864) 4 B&S 959 (old poor law: justices acted

[53] Para. 10 of the judgment.
[54] At paras. 13-14of the judgment, applying Case 14/86 Pretore di Salo v. X [1987] ECR 2545.

unlawfully in refusing to make order for contributions against one parish because they thought it unfair that, having no paupers, it should have to contribute) and Taylor v. Munrow [1960] 1 WLR 151 (hostility of St Pancras Borough council to the Rent Act 1957, and hence refusal to raise rents, condemned); see also Arden, *Local Government Constitutional and Administrative Law* (1999) para. 2.3.15 and Wade, *Administrative Law* (7th edition, 1994) at pp. 411-414. It follows that it would be unlawful for an Authority to adopt a *general* policy not to enforce metrication in its area.

55. So far as the decision to prosecute in an individual case is concerned, the wording of section 83 of the 1985 Act is not such as to make prosecution for an offence under the Act mandatory. That section merely provides that proceedings shall only be instituted by either the Authority or the chief of police, and that certain procedures must be followed. The 1985 Act also appears to grant a discretion at various stages of any enforcement of its provisions (see, e.g., the wording of section 79: an inspector "may" inspect or test weighting and measuring equipment; and he "may" seize any article which he has reasonable cause to believe is liable to be forfeited under the Act). There is therefore, in my view, a discretion whether or not to prosecute in any individual case[56].

56. To say that there is not a duty to prosecute in an individual case, however, does not mean that a refusal to prosecute would automatically escape scrutiny by the courts. In R. v. Metropolitan Commissioner of Police, ex p. Blackburn [1968] 2 QB 118, the Court of Appeal held that, whilst the courts could not direct a chief constable to prosecute or not to prosecute a particular person, a policy decision which represented a failure of the chief constable's duty to obey the law *was* reviewable by the courts: see per Lord Denning MR at 136A-G, per Salmon LJ at 138G and per Edmund Davies LJ at 148C-149B. Although an order of mandamus would be unlikely to be granted, R. v. DPP ex p. Manning and another (Divisional Court, unreported, 17th

[55] Designated by section 69.

[56] Cf. the statement of principle articulated by Lord Shawcross when Attorney General in 1951: "It has never been the rule in this country - I hope it never will be - that suspected criminal offences must automatically be the subject of prosecution" (HC Deb 483, col. 681, 29th January 1951). The Crown Prosecution Service's Annual Report 1998-99 describes that as, "the classic statement on public interest, which has been supported by Attorneys General ever since".

May 2000, New Law Online) indicates that the court will, in appropriate circumstances, be prepared to quash a decision not to prosecute.

57. So far as the proper exercise of the discretion whether or not to prosecute is concerned, useful guidance may be derived from the Code for Crown Prosecutors[57]. The most recent Code applies a two stage test:

- first stage (evidential): is there enough admissible and reliable evidence to provide a "realistic prospect of conviction"?[58] and

- second stage (public interest): in cases of any seriousness, a prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour.

58. Crown Prosecutors "must not be affected by improper or undue pressure from any source"[59] and are required by the Code to balance public interest factors for and against prosecution. Amongst the factors tending *towards* prosecution (para. 6.4) are where: "(e) the evidence shows that the defendant was a ringleader or an organiser of the offence"; "(f) there is evidence that the offence was premeditated"; "(g) there is evidence that the offence was carried out by a group"; "(k) the defendant's previous convictions or cautions are relevant to the present offence"; "(m) there are grounds for believing that the offence is likely to be continued or repeated" and "(n) the offence, although not serious in itself, is widespread in the area where it was committed".

e. **What is the relevance of the provisions relating to harassment and unlawful intimidation contained, respectively, in the Protection from Harassment Act 1997 and in s. 241 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA 1992")?**

[57] The Authorities share the right to prosecute offences under the 1985 Act with the chief officer of police for the relevant area (section 83(1)); and the CPS Code provides a structured and rational basis for prosecution decisions.

[58] "If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be" (para. 4.1).

[59] Para. 2.3. An exercise of the discretion not to prosecute principally in order to avoid potential political difficulties might well amount to "improper" or "undue" pressure within the meaning of the Code.

59. I understand that these points are raised because the UKIP has indicated that it may consider forcing local authorities' hands by bringing cases *against* trading standards officers and/or individual councillors based upon these provisions.

The Protection from Harassment Act 1997

60. Section 1(1) of the Protection from Harassment Act 1997 provides that,

> "A person must not pursue a course of action -
>
> (a) which amounts to harassment of another, and
> (b) which he knows or ought to know amounts to harassment of the other."

Section 1(2) explains that,

> "For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other."

Section 1(3) affords a defence to section 1(1) if the person pursuing a course of conduct shows -

> "(a) that it was pursued for the purpose of preventing or detecting crime,
>
> (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
>
> (c) that in the particular circumstances the pursuit of the course of conduct was reasonable."[60]

61. The Act goes on both to create an offence of harassment (section 2) and to provide civil remedies for the victim of such harassment (section 3).

60 Similar, but not identical, provisions apply where what is at issue is conduct which puts another person in fear of violence (section 4).

62. The essence of harassment is the unjustifiability of the conduc impugned. Applying that touchstone:

a. If, as I have concluded above, the metrication legislation is valid and thus enforcement of that legislation is not only lawful but an obligation imposed on local authorities by statute, no councillor and no trading standards officer would fall foul of this Act, because he could avail himself of the defence contained in section 1(3)(a) and/or section 1(3)(b)[61]

b. If (contrary to my view) a court concluded that the metrication provisions were *ultra vires* and could not, therefore, lawfully be enforced, I advise that a councillor or trading standards officer would probably still be able to rely upon the defence contained in section 1(3)(c) - namely, that in the particular circumstances the pursuit of the course of conduct was reasonable[62]. Unless and until a court declares the metrication provisions to be unlawful, the presumption is that they *are* lawful; and councillors and officers would merely be acting upon that (legitimate) presumption.

The Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992")

63. S.241 of TULRCA 1992 contains provisions formerly to be found in the Conspiracy and protection of Property Act 1875, s.7, as amended by the Public Order Act 1986, s.40(2), Sch. 2, para.1. Section 241 of TULRCA 1992 provides that,

"(1) A person commits an offence when, with a view to compelling another person to abstain from doing or to do any act which that person has a legal right to do or abstain from doing, wrongfully and without legal authority -

(a) uses violence to or intimidates that person or his wife or c children, or injures his property,

[61] Or, if the charge were one of putting another person in fear of violence, of the equivalent defences contained in section 4(3)(a) and/or section 4(3)(b).
[62] It should be noted that section 4(3)(c) does *not* provide an analogous defence against a charge of putting another person in fear of violence. Section 4(3)(c) only assists where the pursuit of the course of action was "reasonable for the protection of himself or another person or for the protection of his or another's property". Trading standards officers should bear this in mind. I am sure that they would, in any event, do their best to avoid enforcing the metrication measures in a way that laid them open to such a charge.

(b) persistently follows that person about from place to place;

(c) hides any tools, clothes or other property owned or used by that person, or deprives him or hinders him in the use thereof,

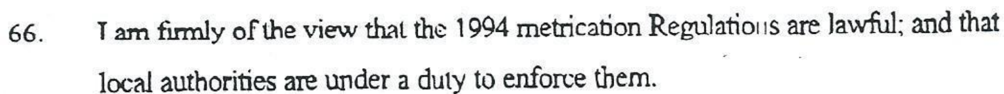
(d) watches or besets the house or other place where that person resides, works, carries on business or happens to be, or the approach to any such house or place, or

(e) follows that person with two or more other persons in a disorderly manner in or through any street or road."

64. As with the <u>Protection from Harassment Act 1997</u>, no case will lie against trading standards officers or councillors if the metrication provisions are lawful, because the "compulsion" being applied would not cut across what the person being compelled had a legal right to do or to abstain from doing. It will be seen, however, that - *if* the metrication provisions were unlawful - an argument could be put together that trading standards officers who seek to enforce those provisions are committing acts which are capable of coming within (at the least) sub-paragraphs (a), (c) and (d) above.

65. The wording of the Act is such that, to commit an offence, the compellor must be acting "wrongfully and without legal authority". It seems to me at least reasonably well arguable that an officer acting in the honest but (on this hypothesis) misguided belief that the metrication provisions were lawful would be acting "without legal authority" but would not *necessarily* be acting "wrongfully". The term "wrongfully" must add something, beyond "without legal authority", to the classification of the conduct (otherwise it, and the conjunction "and", are meaningless). That said, I can well imagine that local authorities would not wish to see trading standards officers made the object of speculative prosecutions under this Act as a mechanism for determining the lawfulness or otherwise of the metrication provisions.

<u>Conclusion</u>



66. I am firmly of the view that the 1994 metrication Regulations are lawful; and that local authorities are under a duty to enforce them.

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15th August 2000