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From the Minister for the Arts

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AF 7/5

The Rt Hon Patrick Jenkin MP
Secretary of State for the Environment
2 Marsham Street
London SW1P 3EB

1 May 1985

Dear Patrick,

in A16.

EC ACQUIRED RIGHTS DIRECTIVE AND THE SOUTH BANK

I am writing further to our consideration in September 1983 of a paper (MISC 95(83)8) which dealt with the applicability of the EC Acquired Rights Directive (77/187/EEC) to staff transfers in the UK.

It will be recalled that the background to this was that in the course of agreeing policy issues posed by the abolition legislation, the question was raised as to whether the Directive would apply to groups of staff transferred as a consequence of abolition.

Previous UK experience of this Directive arose in the context of transfers of Civil or Crown servants to the private sector. In this case the Directive, which applies "to the transfer of an undertaking, business or part of a business to another employer as a result of a legal transfer or merger", was accepted as applying. "Undertaking" is not defined in the Directive although lawyers have advised that there are defensible grounds for maintaining that it applies to activities of an economic character only. In the Transfer of Undertakings (Protection of Employment) Regulations 1981, however, it is defined as including any trade or business, but not including any undertaking or part of an undertaking which is not in the nature of a commercial venture.

The Law Officers were asked to consider the precise point at issue in the abolition exercise since there was no clear limitation on the scope of the Directive, and it was uncertain how far limitation was intended. There was a general feeling that the Directive was conceived in the

context of the takeover of businesses, and local government reorganisation is far from this, whatever might be the position as regards transfer to the private sector.

Following our discussions at MISC 95, it was agreed in correspondence that the Transfer of Undertakings Regulations did not apply to abolition as their scope is limited to "commercial" undertakings, that the Directive applied more widely to "economic" undertakings, that only the South Bank Concert Halls (which are my concern in this context) and municipal airports were likely to be affected and that Ministers would take their own legal advice case by case.

This I have now done. As regards the South Bank Michael Havers has indicated that, in the light of documentary material supplied by my Office, he has doubts whether a "commercial venture" is carried out by the GLC in providing these facilities and, therefore, whether the Regulations apply. He nevertheless felt that the GLC is engaged in an "economic" activity in relation to the South Bank Concert Halls. Recently, however, an argument has been aired in cases before the European Court (principally Abels' Case, No 135/83) that the Directive is not concerned with transfers which are not based on agreement, and although the Court preferred to base its decision on other grounds, the argument would still be available in the context of statutory transfers following abolition. Furthermore, it could be maintained that there are many other local government services which could equally well be described as economic activities, such as the provision of housing, recreation facilities or fire services, either because a contribution towards costs is made by the consumer or because the activity itself contributes to the economic life of the authority. If challenged, I do not see in consequence that we would be accepting any greater risk with South Bank staff than with various other groups.

The purpose of this letter is, therefore, to let colleagues know that I consider that there are respectable grounds for treating the South Bank employees like any other staff of the GLC. This is the approach that both I and the Arts Council of Great Britain, which will assume responsibility for the complex after abolition, wish to adopt. The Arts Council has been quite rightly concerned that the Concert Halls are regarded as being overstaffed at present by some 30% and the staff paid some 20% more than others in comparable positions. The Council would, in any event, want to be able to correct that situation, but in particular anticipate serious dissatisfaction among their existing staff if they are inhibited from doing so. The Council might decide also that work at present done by GLC employees, such as cleaning, should be contracted out.

As I understand it, this approach would have no effect on the existing provisions of the Local Government Bill. I shall

assume colleagues are content with my decision, unless I hear to the contrary.

I am sending copies of this to all members of MISC 95 and to Sir Robert Armstrong.

Yours,

GOWRIE