**Collective Redundancies following insolvency – Enhanced Protections and Greater Transparency for Employees**

## 1. Programme for Government Commitment

Further to the commitment contained in the Programme for Government to "*review whether the legal provisions surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers*"[1], it has been decided:-

(i) To introduce amendments to a range of legislation in areas of employment law and company law dealing with matters relating to collective redundancies following company insolvency, and

(ii) To develop a Guidance Document which will provide clear and accessible information in relation to the rights and remedies available to employees facing a collective redundancy situation following a company insolvency,

and separately

(iii) In the area of employment law more broadly, to proceed to establish on a statutory footing an expert Employment Law Review Group analogous to the Company Law Review Group (see Section 4.3 for greater detail).

## 2. Context - Backdrop to the actions set out under

This Department has examined the area of the legal protection afforded to workers in a collective redundancy situation, with particular regard to company insolvency.

As the context here is the intersection between insolvency and redundancy/employment rights legislation, on the one hand, and company law, on

[1] Programme for Government Our Shared Future, p. 22, paragraph "National Economic Plan – Regulation and Costs"

the other, this area has presented certain complexities in terms of developing further safeguards.

The objective is to find ways to further enhance the protection of employees in a way that does not unduly impede enterprises in the conduct of their business. Having regard to concerns expressed following previous liquidations, a particular focus was placed on identifying ways to ensure that incorporation/limited liability cannot be used as a pretext to avoid a company's legal obligations to its employees. This policy initiative is not in response to any one previous company insolvency resulting in collective redundancies. Rather, it addresses the issues arising across the generality of such situations and seeks to further supplement the already robust legislative protections and safeguards afforded to the employees involved.

The Department's policy response has been informed by a number of initiatives[2] and combines legislative proposals in the areas of employment law governing insolvency and redundancy as well as legislative proposals in the area of company law that are material to the protection of workers as creditors. In addition, the Department will develop clear and accessible enhanced information in relation to those remedies designed to secure the protection of employees that are already a feature of the existing legal landscape.

Separately, in recognition of the changing nature of the employment landscape and the vast and complex body of law that exists in this area, it is further proposed to move to establish an independent forum that will consider employment law issues into the future. Membership of this forum will include stakeholders such as employee and employer representatives, as well as employment law and other legal experts. This forum's remit will go well beyond addressing redundancy and insolvency matters (see Section 4.3).

[2] Cahill Duffy Report of April 2016 (*Expert Examination and Review of Laws on the Protection of Employee Interests when Assets are separated from the operation Entity)*, CLRG 2017 Report (*Report on the Protections for Employees and Unsecured Creditor) and* CLRG Report of March 2021 (*Review of existing legislative provisions regarding the provision of information to creditors generally and, in particular, to employees).*

The measures, outlined in further detail below, are a combination of short, medium and longer-term initiatives. The intention is that this complementary range of measures will promote the provision of quality information, enhance participation and transparency and provide for continued development of employment law with particular regard to employee rights

Amendments to redundancy and insolvency legislation are outlined at Section 4.1. Legal advice to proof each of these proposals has been obtained in advance.[3] Amendments to company law are outlined in Section 4.2.

## 3. Short-term Action

Employee Rights (Collective Redundancies) Guidance Document

It has been decided that an Employee Rights (Collective Redundancies) Guidance Document will be developed by this Department to increase awareness of the legal rights of employees facing redundancy, with particular emphasis on the rights of those employees facing a collective redundancy or insolvency situation. It is intended that the scope of this Guidance Document would extend to a practical explanation of relevant employment rights contained in redundancy and insolvency legislation in addition to available company law interventions and remedies.

The legal framework in this area is not straightforward. It is proposed that a Guidance Document containing clear and comprehensive information would assist employees and their representatives in navigating the various options available to them and availing more effectively of existing legal remedies.

## 4. Short/Medium-term Actions involving legislative changes

### 4.1 Redundancy & Insolvency Legislation

It has been decided to introduce legislative reforms (detailed below) in the medium term to enhance the rights of employees in the context of collective redundancies following insolvency. These measures will necessitate the enactment of amending

[3] Appendix I provides a summary of Cahill Duffy proposals.

primary legislation and while work will begin in the short-term, amending legislation, by its nature, will take some time. The changes agreed are as follows:

- As matters stand, collective redundancies cannot take effect until after a statutory 30-day period of notification to employees. By virtue of an exemption contained in section 14(3) of the Protection of Employment Act 1977, this provision does not apply to collective redundancies precipitated by insolvency. It has been decided that this exemption will be removed to ensure that all collective redundancies will be subject to the 30-day notification period. This will require an amendment to section 14 of the Protection of Employment Act 1977 with a view to providing greater clarification to employees and resulting in enhanced transparency.
- Where a redundancy arises due to company insolvency, it has been decided that an employee may be placed on temporary lay-off by the liquidator for the duration of the 30-day notification period (with the employment termination date to coincide with the expiry of the statutory 30-day period). An employee in these circumstances would be eligible to "sign on" and claim a Jobseeker's Payment during this period in the usual way as a consequence of being placed on temporary lay-off.
- In order to promote compliance, it has been decided that the redress mechanism framed by section 41 of the Workplace Relations Commission Act 2015 will apply to a contravention of section 14 of the Protection of Employment Act 1977 (which provides for the statutory 30-day period of notification to employees). This would extend the remit of the Workplace Relations Commission to this type of dispute. Furthermore, an appeal would lie to the Circuit Court. This proposal requires an amendment to the Act of 2015.

## 4.2 Company Law Initiatives

### 4.2.1 Provision of information to employees as creditors

The Department has considered the Company Law Review Group's (CLRG) report *Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees.* While the CLRG sought to arrive

at a consensus in this report, ICTU dissented to varying degrees and submitted a minority report.[4]

The Department recommends nine actions to improve the quality and circulation of information to employees as creditors. It should be noted that the Department also considered the arguments presented in ICTU's minority report. Three of the nine actions are in response to the minority report.

(I) Recommendations for short to medium term action:

The following require amending the Companies Act – subject to approval as miscellaneous provisions in the Companies (Small Companies Administrative Rescue Process and Miscellaneous Provisions) Bill 2021 which is targeted for enactment in the summer legislative programme:

- Clarify the liquidator has power to bring/defend proceedings before the WRC and Labour Court.
- Oblige the liquidator/director to ensure creditors are made aware they have the right to form and participate in a Committee of Inspection[5].
- Provide that where a Committee of Inspection is appointed it shall include at least one employee creditor member (ICTU minority report).

The following can be implemented within the current legislative framework:

- Amend by Regulations, the ODCE's liquidator's form to include consideration given to employees by the director in the period leading up to liquidation.
- Engage with Courts Service to allow for a petition notice in a court liquidation to be published on corporate websites (Superior Court Rules amendment).
- Establish a working group of stakeholders to examine the format of the Statement of Affairs[6] and liquidation-related CRO forms.

[4] Appendix 2 lists all recommendations made in the CLRG report and the ICTU minority report and the Department's consideration of them. It also sets out the status of CLRG recommendations from its 2017 report on protections for employees and unsecured creditors.

[5] A Committee of Inspection represents the interests of all creditors of a company going into liquidation. It has two main roles: (a) to oversee the activities of the liquidator; and (b) to protect the rights of the creditors. The creditors can appoint up to five people to the committee and the company can appoint up to three. It cannot have more than eight members or less than two.

[6] This statement reflects the financial position of the company at the date of preparation.

(II) Recommendations for medium term action:

Implementing the following will require further development to amend the Companies Act[7]:

- Oblige directors to notify employees of the petition filed at court; the court could then have regard to whether the company has met this obligation. (ICTU minority report)
- Enable the court to direct the provisional liquidator to inform employee representatives of his/her appointment, to explain the process and to invite them to provide information on the company's affairs. (ICTU minority report)
- Oblige directors to furnish creditors with the Statement of Affairs within 24 hours of it being presented to court and amend ODCE's liquidator's form (by regulations) to include a question on whether this obligation has been fulfilled.

4.2.2 Corporate restructuring

The CLRG has commenced its work on corporate restructuring, revisiting the 2017 report[8] in the light of the Government's ambitions that employees as creditors exercise their rights and have the means to exercise those rights. One workstream involves a consideration of employees as corporate stakeholders, in particular in the context of alleged restructuring and splitting of corporate operations from asset holding entities. A further workstream will address the legal provisions that pertain to any sale to a connected party following insolvency and transactions around insolvency which remove assets from the reach of creditors and, in particular involve the transfer of assets to connected parties. This work reflects complex policy issues and the CLRG has indicated that it expects to report back in September. On receipt of the report, the Department will review recommendations made and will provide for any necessary legislation as soon as is practicable.

[7] These proposals could be provided for in a legislative vehicle following the Department's consideration of the CLRG's report on corporate restructurings in Q4.

[8] CLRG Report on the Protections for Employees and Unsecured Creditors

## 5. Longer-term Initiative - Establishment of an Employment Law Review Group

Having developed over many decades, the area of employment law has become complex to navigate comprising a statutory framework of multiple pieces of primary and secondary legislation, for example, the Redundancy Payments Acts 1967 to 2012, the Minimum Notice and Terms of Employment Acts 1973 to 2005, the Protection of Employees (Employer's Insolvency) Acts 1984 – 2004). Furthermore, the world of work continues to evolve as new ways of working and new occupation models are developed that do not always fit with more traditional definitions of what was meant by employment. It is acknowledged that much of our employment law framework currently derives from EU legislation which, in turn, arises from a continuous process of dynamic review and progressive reform.

Adopting the model of the CLRG, it is planned to set up on a statutory basis an expert Employment Law Review Group to act independently, with the Chair appointed by the Minister. It is anticipated that this Group will consist of members who have expertise and an interest in the development of employment law, including legal practitioners, users (business and unions), implementation and enforcement bodies (WRC, Labour Court) and representatives from government departments including this Department, the Department of Social Protection, the Department of Children, Equality, Disability, Integration and Youth as well as the Revenue Commissioners and the Office of the Attorney General.

The Terms of Reference and annual work programme will be agreed with the Minister, who will also have the power to refer additional matters to the Group for deliberation, with a view to reporting back to him/her.

The forum will act as an independent advisory expert group to help shape the formulation of policy and legislation in this area.

It is anticipated that, once the Employment Law Working Group has been established by statute and becomes operational, it will offer a forum for a structured conversation in relation to the balancing of competing rights in this area with a view to identifying difficulties or gaps and devising legislative or other non-statutory solutions. This Expert Group will provide a valuable resource to conduct an ongoing assessment of employment law to ensure that it is fit for purpose. Emerging trends

will be examined to ensure that our employment law framework adapts to changes in the evolving contemporary workplace.

It is proposed that the assessment of innovations in other Member States (or other jurisdictions) would form part of this Group's work programme in order to enhance responsiveness in terms of the modernisation of regulation within our own workplace.

Department of Enterprise, Trade & Employment

10 May 2021

## *APPENDIX I*

Various practical measures outlined in Section 4.1 are recommendations adopted from the Cahill Duffy Report, which had six key proposals, as set out below.

Where it was not considered workable to adopt certain other recommendations, the reason is set out in Column 3:-

| Proposal | Content | Rationale |
|---|---|---|
| Proposal No. 1 | Deletion of exemption contained in section 14(3) of Protection of Employment Act 1977 | Proposal adopted – see Section 4.1 |
| Proposal No. 2 | Amendment of the Protection of Employment Act 1977 to prohibit another corporate entity intending to refuse a lease or to sell the property in which the employer's business is transacted without requiring a statutory period of consultation with employees. | The Companies Act 2014 already provides at least two mechanisms for a creditor or the liquidator to take action where the deeds of a related company or entity contributed to the insolvency (s. 599 & s.608).<br><br>CLRG currently reviewing again as part of their work regarding corporate restructuring. |
| Proposal No. 3 | Sanction in respect of contravention of section 14(1) of the Protection of Employment Act 1977 | Proportionate sanction to be introduced.<br>Modified proposal adopted – see Section 4.1 |
| Proposal No. 4 | To provide for recovery of asset where the transfer of the asset in question had been improper | Already provided for under section 608 of the Companies Act 2014.<br>CLRG currently reviewing again as part of their work regarding corporate restructuring. |
| Proposal No. 5 | To introduce a statutory injunction to allow employees to prevent the reduction of their employer's assets below the level necessary to discharge accrued liabilities to employees. | The *Mareva* injunction is the standard equitable remedy available in these circumstances. |
| Proposal No. 6 | To introduce enhanced redundancy payments where there is a contravention by the employer of the Protection of Employment Act. | This could create two classes of redundant employees and undermine the purpose of collective redundancies in the context of corporate restructuring. Accordingly, this approach is not recommended. |

## APPENDIX 2

| 1. Recommendations of the Company Law Review Group – Stream 1 Report - Employees' rights as creditors | | | |
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| | CLRG Report Recommendation | ICTU Minority Report | Department response |
| **1.1** *S571, 572 - Provisions as to applications for winding up, powers of court on hearing petition* | The CLRG does not support an amendment to s571 or s572 that would restrict the court's ability to proceed to hear a winding up petition where employees have not been put on notice. | ICTU recommends that the court only appoint a liquidator (including provisional) in circumstances whereby employees have been notified and full details of the employees' entitlements have been supplied to the court. | The Department has considered ICTU's minority report and considers it appropriate to provide for an amendment to the Companies Act to oblige directors to notify employees of the petition at the time of presenting it to court.<br>Consequently, the court could have regard to whether the company has met its legal obligations to inform employees of the petition. |
| **1.2** *Notice of appointment of liquidator* | The CLRG recommends that information requirements be explored which rely on dissemination on various website platforms in addition to the current formal requirements in national newspapers and Iris Oifigiúil. | | The Department supports this recommendation.<br>The Rules of the Superior Court provide for the procedures for court wind up including methods by which the notice of filing of a petition and impending hearing are advertised.<br>The Department will engage with the Courts Service on amendments to the rules to provide that such notices be also publicised on corporate websites. |
| **1.3** *Section 573 - Appointment of a provisional liquidator* | The Review Group is not in favour of restricting the court's ability to hear an application for the appointment of a provisional liquidator under s573. | See **1.1** above | The Department supports the ICTU recommendation in principle.<br>Provisional liquidators are typically appointed in emergency situations to protect the assets of the company. Given the time sensitive nature of such appointments it would not be possible for employees to be put on notice in advance of his/her appointment. |

| 1. Recommendations of the Company Law Review Group – Stream 1 Report - Employees' rights as creditors | | | |
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| | CLRG Report Recommendation | ICTU Minority Report | Department response |
| | | | However, having considered ICTU's minority report, it is the Department's view that employees of the debtor company should be made fully aware of what is happening at the earliest opportunity. Thus, the Department recommends amending the Companies Act to provide that the court direct the appointed provisional liquidator to inform employee representatives of the appointment, to explain the process and to invite them to provide information they deem he/she should have to provide a complete overview of the company's affairs. |
| **1.4** *Section 621 – preferential payments in winding up* | The Review Group is not in favour of amending s621 to give preference to awards made by the Labour Court under the Industrial Relations Acts whether explicit or implied by collective agreement**.**<br>It notes that this is a complex matter and a decision cannot be made without reference to the employment law framework. | ICTU recommends that awards made by the Labour Court under the Industrial Relations Acts, whether explicit or implied by collective agreement, be given preferential status in a winding up. | This CLRG recommendation has been submitted to WREM Division for its consideration.<br>While the Companies Act provides for the ranking of creditors in the Act, it is not a company law issue and is based on policy consideration of other areas, such as employment and tax law. |
| **1.5** *Section 627 Liquidator's powers* | The Review Group recommends that further clarification be added to the wording of s627 regarding the locus standi of a liquidator to bring or defend actions under the Industrial Relations Acts | | The Department supports this recommendation.<br>Subject to the Tánaiste's and Minister's approval this amendment will be progressed as part of miscellaneous provisions in the Companies (Small Company Administrative Rescue Process) Bill 2021. |

| 1. Recommendations of the Company Law Review Group – Stream 1 Report - Employees' rights as creditors | | | |
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| | CLRG Report Recommendation | ICTU Minority Report | Department response |
| **1.6** *Sections 666 – 668 Committee of inspection* | The Review Group recommends that consideration be given to providing for a general obligation to be imposed on liquidators and directors to ensure that creditors are made aware that they have the right to form and participate on a Committee of Inspection. | ICTU recommends that the Committee of Inspection consist of at least one employee representative where they employees decide to elect one. | The Department supports the CLRG's recommendation subject to an additional amendment to address ICTU's concerns.<br>It thus recommends amending the Companies Act to:<br>○ Provide that where a Committee of Inspection is appointed it shall include not less than one employee creditor member to represent employee creditors, should they so elect.<br>○ Oblige the liquidator and director to ensure creditors are made aware they have the right to form and participate in a Committee of Inspection.<br>Subject to the Tánaiste's and Minister's approval this amendment will be progressed as part of miscellaneous provisions in the Companies (Small Company Administrative Rescue Process) Bill 2021. |
| **1.7** *Section 682 – Liquidator to report on conduct of director* | The CLRG supports an outstanding recommendation from the 2017 CLRG *Report on the Protections for Employees and Unsecured Creditors* which recommended a new question on the liquidator's report to address the treatment of employees immediately prior to liquidation. | | The Department supports this recommendation.<br>Implementation requires regulations to amend the liquidator's form. The Department will action this during Q2 2021. |

| 1. Recommendations of the Company Law Review Group – Stream 1 Report - Employees' rights as creditors | | | |
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| | CLRG Report Recommendation | ICTU Minority Report | Department response |
| **1.8** *Section 819 – Declaration by court restricting director of insolvent company in being appointed or acting as director etc.* | The Review Group does not recommend an amendment to s819 to provide for a judicial discretion to increase or otherwise alter the mandatory period of restriction. | ICTU recommends amending the section to give the court the power to impose any further period of restriction it considers appropriate and that the court shall have regard to the director's compliance with employees' rights under their contract and the employment law framework. | The Department supports the CLRG's recommendation.<br>The CLRG examined the same proposal in 2017 and considered the section was fit for purpose. A restriction order has serious implications for a director and any company with which they are involved, including a negative commercial reputation. The Department defers to the CLRG's opinion in 2017 and 2021 that the section is fit for purpose. |
| **1.9** *S819 – Declaration by court restricting director of insolvent company in being appointed or acting as director etc.* | The Review Group is not in favour of including specific reference to the treatment of employees and compliance with employment law in s819. It notes that company directors have a general obligation to comply with the Companies Act and this includes s224 which references the director's duty to have regard to the interest of employees. | See **1.8** above | The Department supports the CLRG's recommendation.<br>Consideration of directors' duties towards employees already forms part of the review conducted into director behaviour by the ODCE. The specific inclusion of the duty to employees in the liquidator's form will also address this point (see **1.7** above). |
| **1.10** *Administrative efficiency - Statement of affairs* | The CLRG recommends that the Statement of Affairs for both court and creditors' voluntary liquidations be standardised.<br>The Review Group also recommends that the affirmation of the contents of the Statement of Affairs should take the form of a declaration in s202(1)(b) Companies Act and that directors should be placed | | The Department supports this recommendation.<br>The Department considers there is merit in standardising the Statement of Affairs. It plans to establish a working group of stakeholders which will consider the Statement and CRO forms (see **1.11** below) in the context of the overarching principles outlined in the CLRG report. |

| 1. Recommendations of the Company Law Review Group – Stream 1 Report - Employees' rights as creditors | | | |
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| | under an obligation of utmost good faith in relation to the preparation of the Statement. | | The Department also notes that while the Statement of Affairs is critical in the provision of information to creditors there is a difference in the way in which the statement is provided: in a creditor's voluntary liquidation, creditors who attend the meeting receive a copy; in a court liquidation, creditors apply to the court for a copy and pay a prescribed fee.<br>Thus, the Department also recommends that the Companies Act be amended obliging company directors in a court liquidation to provide all creditors with a copy of the Statement within 24 hours of it being presented to the court. The liquidator should then consider whether a director has met this obligation in the liquidator's report to the ODCE – this would necessitate the inclusion of a further question in the ODCE's liquidator's form. |
| **1.11** *Administrative efficiency - forms* | The CLRG recommends that the Department consider the reporting requirements under s680 and s681 together with the structure of the related CRO Forms E3 (Liquidator's account of acts & dealings & conduct of the winding up) and E4 (Liquidator's statement of proceeding & position of winding up) with a view to consolidation and streamlining. | | As with **1.10** above the Department considers there is merit in consolidating CRO reporting requirements. |

| 2. Outstanding Recommendations of the CLRG 2017 Report on the Protection of Employees and Unsecured Creditors | | |
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| | Recommendation | Department response |
| **2.1** | Recommends that a provisional liquidator must specifically seek the power to terminate employee contracts from the court. | A provisional liquidator will seek a range of powers from the court, including the power to terminate employment contracts. Where a company is to be wound up it is essential that the provisional liquidator has this power so that employees can be made redundant, in accordance with employment rights legislation, and can access their statutory entitlements.<br><br>While unclear, it appears the CLRG's 2017 recommendation was intended to require a liquidator to seek further approval from the court in order to *exercise* the power to terminate employment contracts granted to him/her on appointment and thus put employees on *notice*. However, it is important to note that employees have rights under employment law in respect of collective redundancies and consultation (Protection of Employment Acts 1977 – 2014, Employees (Provision of Information and Consultation) Act 2006).<br><br>The Department does not consider it necessary to amend the Companies Act to provide that the provisional liquidator seek permission to exercise the power granted to terminate employment contracts given existing rights under employment rights law and that an additional application to court would increase costs and reduce funds which would otherwise be available for creditors. |
| **2.2** | Provide new ground for High Court restriction order in respect of director of an insolvent company who has failed to:<br><br>• convene a general meeting of shareholders for the purpose of nominating a named liquidator<br>• table a notice to nominate such liquidator at such a general meeting | The Department supported this recommendation and it is now being progressed as part of the General Scheme of the Companies (Corporate Enforcement Authority) Bill. |
| **2.3** | Imposition of statutory obligation on directors to consider interests of creditors where it | The Department is not opposed to this recommendation. It was previously included in the General Scheme of the Companies (Miscellaneous Provisions) (Covid-19) Amendment Act but |

| 2. Outstanding Recommendations of the CLRG 2017 Report on the Protection of Employees and Unsecured Creditors | | |
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| | Recommendation | Department response |
| | appears a company is/likely to be unable to pay its debts as they fall due | removed following concerns raised by Advisory Counsel which could not be resolved within the compressed timeframe available for delivery of the legislation.<br><br>Striking the right balance is very difficult when moving from common law duty to statutory duty. The legal concerns raised by AC will be considered further by the CLRG as part of Workstream 2. |
| **2.4** | Consideration of a scheme to help directors of insolvent companies who want to wind up their company but cannot afford to pay a liquidator to do so | The Department supports this recommendation in principle and the CLRG will examine the issue of self-administered liquidation as part of its work programme for 2020 – 2022. |
| **2.5** | Legislative change to allow for access to the Social Insurance Fund for employees whose employer has not entered into formal insolvency | This recommendation does not fall within the policy remit of company law.<br><br>Responsibility for this issue transferred to the Department from the Department of Social Protection. The Protection of Employees (Employers' Insolvency) Act 1984 does not provide for situations where an employer ceases to trade without engaging in any formal wind-up process. In such cases, referred to as 'informal insolvency', former employees may have monies owed to them without having a legal mechanism to claim same from the Social Insurance Fund.<br><br>In December 2018, the Supreme Court found that Ireland must provide a mechanism through which a competent authority can determine that a state of insolvency arises, without requiring a formal wind-up process, and that monies due to the employee can be claimed by them from the Social Insurance Fund.<br><br>The judgment and its ramifications are complex. Officials in WREM are working with legal counsel and the Attorney General's Office to identify potential solutions and address the issues involved. |

**ENDS.**