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Bill Digest

Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill

Bill No. 76 of 2023

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Abstract

The Bill provides for amendments to certain provisions of the *Protection of Employment Act 1977*, as amended, and certain provisions of the *Companies Act 2014*, as amended, with a view to enhancing the protection of employees in a collective redundancy situation in a way that does not unduly impede enterprises in the conduct of their business. It also provides for the establishment of an Employment Law Review Group and other related matters.

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Summary

The Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill (the "Bill") was published on 27 October 2023 along with an Explanatory Memorandum.[1] Second stage debate is scheduled for Wednesday, 15 November 2023.

The Bill has four Parts, which together comprise 27 sections:

- Part One (sections 1-2): Preliminary and General;
- Part Two (sections 3-12): Amendments to *Protection of Employment Act 1977*;
- Part Three (sections 13-18): Establishment of Employment Law Review Group; and
- Part Four (sections 19-27): Amendments to *Companies Act 2014*.

The primary aims of the Bill, as set out in its Long Title, are to:

- amend certain provisions of the *Protection of Employment Act 1977*;
- provide for the establishment of an Employment Law Review Group to monitor, review and advise the Minister for Enterprise, Trade and Employment on matters relating to employment law;
- amend certain provisions of the *Companies Act 2014*; and
- provide for related matters.

The Bill proposes to combine legislative proposals in the area of employment law governing insolvency and redundancy, and legislative proposals in the area of company law, which are central to the protection of workers as creditors.[2] On the publication of the Bill, the Department of Enterprise, Trade and Employment (DETE/the "Department") noted that this Bill "will further enhance the protection of employees in a collective redundancy in a way that does not unduly impede enterprises in the conduct of their business".[3]

This Bill Digest contains:

- a discussion of the background to the Bill;
- an examination of the Principal Provisions of the Bill; and
- an analysis of the extent to which the Bill's provisions incorporate the recommendations arising from the Joint Committee on Enterprise, Trade and Employment's Pre-legislative Scrutiny of the General Scheme of the Bill.

[1] DETE, *Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023* (October 2023).
[2] DETE, 'Regulatory Impact Analysis on General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill, 2023' (March 2023), available here [hereinafter "RIA Report"].
[3] DETE, *Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023* (October 2023).

Key Messages

- The Bill contains four Parts and 27 sections.
- The Bill provides for amendments to the *Protection of Employment Act 1977* (the "1977 Act") and the *Companies Act 2014* (the "2014 Act") with a view to enhancing the protection of employees in a collective redundancy situation in a way that does not unduly impede enterprises in the conduct of their business.
- The Bill seeks to implement commitments in this regard included in both the Government's Plan of Action concerning Collective Redundancies following Insolvency and the Programme for Government.
- The Bill proposes to amend sections 9, 10 and 12 of the 1977 Act to require a liquidator, provisional liquidator, receiver manager or any other court-appointed person made responsible for managing the affairs of an insolvent company, to:
    - initiate consultations with employees' representatives regarding any proposed collective redundancies at least 30 days before the first notice of dismissal is provided;
    - provide all relevant information to employees' representatives and provide certain information in writing to the Minister for Enterprise, Trade and Employment (the "Minister") regarding any proposed collective redundancies; and
    - notify the Minister in writing of the proposed collective redundancies at least 30 days before the first dismissal takes effect.
- The Bill proposes to amend sections 11 and 13 of the 1977 Act to provide that any liquidator, provisional liquidator, receiver manager or other court-appointed person made responsible for managing the affairs of an insolvent company who fails to discharge their obligations under sections 9, 10 and 12 of the Act shall be guilty of an offence punishable on summary conviction by a class A fine (a fine of up to €5,000). The Bill provides for a defence where it can be shown that, having exercised all reasonable professional care and skill, the responsible person had reasonable grounds for believing that the employer had complied with the obligations imposed on the employer under sections 9, 10 or 12, as the case may be.
- The Bill proposes to amend section 11A of the 1977 Act to permit employees to submit complaints to the Workplace Relations Commission in relation to an employer's alleged contravention of their obligation under section 14 (1) not to give effect to collective redundancies within 30 days of notifying the Minister that they are considering collective redundancies.
- The Bill proposes to amend section 14 of the 1977 Act to prohibit a liquidator, provisional liquidator, receiver manager or any other court-appointed person made responsible for managing the affairs of an insolvent company from giving effect to collective redundancies within 30 days of the Minister being notified that collective redundancies are under consideration.
- The Bill proposes to establish an Employment Law Review Group on a statutory footing. It is proposed that this new Review Group will adopt the same "model" as the Company Law Review Group.[4] In this regard, it is proposed that the Review Group will advise the Minister

[4] DETE, Plan of Action on Collective Redundancies following Insolvency (May 2021), p. 7.

on all aspects of employment and redundancy law and help to ensure that the relevant legislation remains fit for purpose and in line with international developments.[5]

- The Bill proposes a number of amendments to Part 11 of the *Companies Act 2014*, which relates to the winding up of companies. The amendments proposed by the Bill relate to:
    - the provision of information to employees as creditors (the Bill proposes to amend sections 571, 572, 573 and 594 of the 2014 Act);
    - the power of the court to order a related company to contribute to the debts of a company being wound up (the Bill proposes to amend section 599 of the 2014 Act);
    - the transfer of assets of a company being wound up (the Bill proposes to amend sections 604 and 608 of the 2014 Act); and
    - civil liability for fraudulent or reckless trading (the Bill proposes to amend section 610 of the 2014 Act).

Glossary and abbreviations

Table 1: Glossary and abbreviations

Term	Meaning
CLRG	Company Law Review Group
Committee	Joint Committee on Enterprise, Trade and Employment
Department	Department of Enterprise, Trade and Employment
DETE	Department of Enterprise, Trade and Employment
ELRG	Employment Law Review Group
Ibec	Irish Business and Employers Confederation
ICTU	Irish Congress of Trade Unions
Minister	Minister for Enterprise, Trade and Employment
Plan of Action	Plan of Action on Collective Redundancies (2021)
WRC	Workplace Relations Commission
1977 Act	*Protection of Employment Act 1977, as amended*
2001 Act	*Company Law Enforcement Act 2001*
2014 Act	*Companies Act 2014, as amended*

Table of provisions

A summary of the Bill's provisions is included in Table 2 below.

[5] RIA, p. 12.

Table 2: Table of provisions of the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill

Section	Title	Effect
Part 1: Preliminary and General		
1.	Short title, collective citation and commencement	This is a standard provision and provides that, if enacted, the Bill may be cited as the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Act 2023. It provides that the Bill will be commenced by Ministerial order(s) and that different provisions may be commenced at different times. This provision also provides that the Protection of Employment Acts 1977 to 2014 and Part 2 of the Bill may be cited together as the Protection of Employment Acts 1977 to 2023 and shall be construed together as one.
2.	Definition	Section 2 defines the term "Minister" for the purposes of the Bill to mean the Minister for Enterprise, Trade and Employment.
Part 2: Amendments to Protection of Employment Act 1977		
3.	Definition (Part 2)	Section 3 defines "Act of 1977" to mean the Protection of Employment Act 1977.
4.	Amendment of section 2 of Act of 1977	Section 4 provides for the amendment of section 2 of the 1977 Act to insert a definition of "responsible person". It provides that "responsible person", in circumstances where an employer's business is being terminated following the initiation of bankruptcy or winding up proceedings or as a result of a court decision, shall mean: the liquidator, the provisional liquidator, the receiver who has assumed full responsibility for the management of the business concerned, or any other court-appointed person who has assumed full responsibility for the management of the business concerned.
5.	Amendment of section 9 of Act of 1977	Section 5 provides for the amendment of section 9 of the 1977 Act to require the responsible person to initiate consultations with employees' representatives at least 30 days before the first notice of dismissal is provided in circumstances where the responsible person proposes to create collective redundancies. It also permits the responsible person to continue any consultations with employees initiated by an employer under section 9.
6.	Amendment of section 10 of Act of 1977	Section 6 provides for the amendment of section 10 (1) of the 1977 Act to impose a duty on the responsible person to supply employees' representatives with all relevant information in relation to the proposed redundancies for

Section	Title	Effect
		the purposes of consultations under section 9. Section 6 also provides for the amendment of section 10 (3) of the 1977 Act to require the "responsible person" to supply the Minister with copies of certain relevant information in writing, as specified in section 10 (2), as soon as possible.
7.	Amendment of section 11 of Act of 1977	Section 7 provides for the amendment of section 11 of the 1977 Act to provide that a responsible person who fails to initiate consultations with employees' representatives, as required under section 9, or who fails to provide the necessary information, as required under section 10, shall be guilty of an offence punishable on summary conviction by a class A fine (a fine of up to €5,000). Section 7 provides for a defence where it is shown that, having exercised all reasonable professional care and skill, the responsible person had reasonable grounds for believing that the employer had complied with the obligations imposed on the employer under sections 9 or 10.
8.	Amendment of section 11A of Act of 1977	Section 8 provides for the amendment of section 11A of the 1977 Act to permit employees to submit complaints to the Workplace Relations Commission pursuant to section 41 of the Workplace Relations Acts 2015, as amended, in relation to an alleged violation by an employer of their obligation not to permit collective redundancies to take effect until a 30-day period has expired following the employer's notification of the Minister of the proposed redundances pursuant to section 12.
9.	Amendment of section 12 of Act of 1977	Section 9 provides for the amendment of section 12 of the 1977 Act, which requires an employer proposing collective redundancies to notify the Minister in writing. Section 9 proposes to amend subsection (2) of section 12 to authorise the Minister to make Regulations requiring that the written notification contain details of: the employer, the proposed collective redundances, the consultations with the employees' representatives, and any other particulars the Minister considers appropriate. Section 9 also proposes to amend subsection (4) of section 12 to require the "responsible person" to notify the Minister in circumstances where the collective redundancies are arising from the employer's business being terminated as a result of the initiation of bankruptcy or winding up proceedings or as a result of a court decision.
10.	Amendment of section 13 of Act of 1977	Section 10 provides for the amendment of section 13 of the 1977 Act to provide that a responsible person who fails to discharge their obligations under section 12 (4)

Section	Title	Effect
		shall be guilty of an offence punishable on summary conviction by a class A fine (a fine of up to €5,000). Section 10 provides for a defence where it is shown that, having exercised all reasonable professional care and skill, the responsible person had reasonable grounds for believing that the employer had complied with the obligations imposed on the employer under section 12.
11.	Amendment of section 14 of Act of 1977	Section 11 provides for the amendment of section 14 of the 1977 Act to impose an obligation on the responsible person to ensure that collective redundances arising from bankruptcy, winding up proceedings or a court order, do not take effect until at least 30 days have passed since the Minster was notified of the proposed redundancies in accordance with section 12 of the 1977 Act, with the relevant 30-day period commencing on the date of the relevant notification.
12.	Amendment of section 20 of Act of 1977	Section 12 provides for the amendment of section 20 of the 1977 Act to stipulate that any written notice or document which an employer is required or authorised to provide the Minister under the 1977 Act may be provided via electronic means.
Part 3: Establishment of Employment Law Review Group		
13.	Establishment of Employment Law Review Group	Section 13 provides for the establishment of the Employment Law Review Group.
14	Functions of Review Group	Section 14 sets out the functions of the Employment Law Review Group. It provides that the Review Group shall monitor, review and advise the Minister in accordance with the programme of work determined by the Minister. In providing advice to the Minister, the section states that the Review Group will promote the modernisation and efficacy of legislation relating to the employment of persons and redundancy practices.
15.	Membership of Review Group	Section 15 provides that the membership of the Review Group will be determined by the Minister and from this Group, the Minister shall appoint a chairperson. Members of the Review Group shall be paid remuneration and allowances for expenses as determined by the Minister, with the consent of the Minister for Public Expenditure, National Development Plan Delivery and Reform.
16.	Work programme and Review Group meetings	Section 16 provides that the Minister, following consultation with members of the Review Group, shall determine the work programme of the Review Group at

Section	Title	Effect
		least once every two years, and that this work programme may be amended by the Minister from time to time. This provision also provides that the members may elect a chairperson from the members present for any meeting where the chairperson is absent. Furthermore, it provides that a member of the review group, other than the chairperson, may nominate a deputy to attend a meeting in his or her place.
17.	Annual report and provision of information to Minister	Section 17 outlines the annual reporting obligations of the Review Group and provides that the Review Group shall provide a report to the Minister regarding the activities of the Review Group during that year and the Minister shall cause copies of the report to be laid before each House of the Oireachtas within 2 months of receiving the report. This section also provides that the Review Group shall, if requested by the Minister, provide a report on any matter concerning the functions or activities of the Review Group or any matter that has been referred by the Minister to the Review Group for its advice.
18.	Expenses (Part 3)	Section 18 provides that the expenses incurred by the Minister under Part 3, to such extent as may be sanctioned by the Minister for Public Expenditure, National Development Plan Delivery and Reform, are to be paid out of monies provided by the Oireachtas.
Part 4: Amendments to Companies Act 2014		
19.	Definition (Part 4)	Section 19 defines the Act of 2014 to mean the *Companies Act 2014*.
20.	Amendment of section 571 of Act of 2014	Section 20 inserts an amendment to section 571 of the *Companies Act 2014* to require directors to notify employees and, where applicable, employees' representatives of a winding up petition when it is presented to the court or as soon as reasonably practicable after this, where the winding up petition is presented by the company under section 571 (1).
21.	Amendment of section 572 of Act of 2014	Section 21 inserts an amendment into section 572 of the *Companies Act 2014* to provide that, in deciding whether it is just and equitable to make an order on hearing a winding up petition, the court shall have regard to whether the directors of the company have met their legal obligations under section 571 (1A) to inform the employees and, where applicable, their representatives of the winding up petition.

Section	Title	Effect
22.	Amendment of section 573 of Act of 2014	Section 22 amends section 573 of the *Companies Act 2014* to insert new subsections (2) and (3). These new subsections provide that, when a provisional liquidator is appointed under section 573 (1), the court shall direct that, as soon as reasonably practicable and in any case within such period as may be specified by the court, the provisional liquidator shall: inform employees and, where applicable, employees' representatives of his or her appointment; explain the process to them; invite them to provide any information that they have about matters they consider to be relevant; and inform them of any other matter that the provisional liquidator considers relevant.
23.	Amendment of section 594 of Act of 2014	Section 23 amends section 594 of the *Companies Act 2014* to require the liquidator or provisional liquidator as the case may be, no later than 7 days after they have been served a copy of the statement of the company's affairs, to notify employees and, where applicable, employees' representatives that they have been served a copy of the statement. Section 23 provides that this notice shall be given by electronic means where the liquidator is aware of a relevant person's email address, although ordinary post may be used if the liquidator or provisional liquidator is unaware of the recipient's email address or receives a failed delivery notification in response to an email. This section also provides that employees or employees' representatives can request in writing that a copy of the statement is provided to them, and the liquidator or provisional liquidator must comply with this request no later than 7 days after the request.
24.	Amendment of section 599 of Act of 2014	Section 24 amends section 599 of the *Companies Act 2014*, which relates to the contribution of a related company to the debts of the company being wound up. This section expands upon the factors that the court must have regard to when considering whether a related company should be required to contribute to the debts of the company in liquidation and provides that the court must also have regard to the extent to which the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company and such other matters as the court considers appropriate.
25.	Amendment of section 604 of Act of 2014	Section 25 amends section 604 of the *Companies Act 2014* concerning the transfer of property from a company that is unable to pay its debts as they become due, to a creditor of the company within the 6-month period

Section	Title	Effect
		immediately prior to the commencement of the winding up of the company (or within the 2-year period immediately prior to commencement where the recipient is a connected person) with a view to affording the creditor a preference over other creditors. Section 25 amends this section concerning unfair preferences to allow the court to increase the applicable time periods (6 months or 2 years) in individual situations where the court considers that is just and equitable to do so having regard to the particular act in question.
26.	Amendment of section 608 of Act of 2014	Section 26 substitutes text in subsection 3 of section 608 of the *Companies Act 2014* to ensure that payments made in the ordinary course of business are not captured by this provision, which relates to the power of the court to order the return of assets which have been improperly transferred.
27.	Amendment of section 610 of Act of 2014	Section 27 amends section 610 of the *Companies Act 2014* which relates to civil liability for fraudulent or reckless trading. It proposes to amend the test for reckless trading in this section. In this regard, it removes the express requirement in subsection (1a) that the company officer was "knowingly" carrying on the business in a reckless manner. It also proposes to amend subsection (3) so that officers may be deemed to have been knowingly a party to reckless trading in situations where they ought to have known that their actions or those of the company would be likely to cause loss to the company's creditors. Section 27 also replaces the "acted honestly and responsibly in conducting the company's affairs" test, which the court is currently required to use under section 610 (8) when determining whether to grant relief to a company officer accused of reckless trading, in whole or in part, from personal liability. Instead, section 27 affords the court the discretion to consider the facts of a particular case and to provide relief under subsection (8) where it appears to the court that the officer took such steps as were reasonably practicable with a view to minimising loss to creditors at the relevant time, namely, the time from which the officer ought to have known that his or her actions or those of the company were likely to cause loss to the company's creditors

Source: Derived from Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill

Background

The Department of Enterprise, Trade and Employment (DETE/the "Department") published the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill (the "Bill") on 27 October 2023. The Bill was formerly known as the Plan of Action on Collective Redundancies Following Insolvency Bill. According to the DETE Press Release announcing its publication, the Bill proposes to:

- enhance the protection of employees in a collective redundancy situation in a way that does not unduly impede enterprises in the conduct of their business;
- implement the remaining commitments in the Government's Plan of Action – Collective Redundancies following Insolvency;
- deliver on commitments included in the Programme for Government;
- amend the *Protection of Employment Act 1977* concerning collective redundancy to enhance transparency for employees of insolvent employers and expand the avenues of redress available to employees should their employer fail to comply with the collective redundancy rules;
- provide for the establishment of a new statutory Employment Law Review Group to advise the Minister for Enterprise, Trade and Employment on all aspects of employment and redundancy law; and
- amend the *Companies Act 2014* to improve the quality and circulation of information to workers as creditors, and ensure that remedies for transactional avoidance are more accessible for creditors.

The General Scheme of the Bill was published on 8 May 2023 together with a Regulatory Impact Analysis (RIA). The General Scheme was referred to the Joint Committee on Enterprise, Trade and Employment for Pre-legislative Scrutiny (PLS) on 16 May 2023. The Committee published its PLS Report on the General Scheme (the "PLS Report") on 13 July 2023.

Policy and legislative context

The Programme for Government included a commitment to "review whether the legal provisions surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers".[6] Further to this commitment, DETE published the Plan of Action on Collective Redundancies following Insolvency in May 2021 (the "Plan of Action"). The Plan of Action examines the existing legal protections afforded to workers in a collective redundancy situation, paying particular attention to company insolvency. In particular, it seeks to identify ways of ensuring that the principle of incorporation/limited liability cannot be used as a pretext for avoiding a company's legal obligations to its employees.[7]

In preparing the Plan of Action, DETE had regard to several reports, including:

- the 'Expert Examination and Review of Laws on the Protection of Employee Interests when assets are separated from the operating entity' (the "Duffy-Cahill Report") (April 2016);

[6] Programme for Government, 'Our Shared Future' (2020), p. 22, available here.
[7] DETE, Plan of Action on Collective Redundancies following Insolvency (May 2021), p. 2.

- the Report of the Company Law Review Group (CLRG)[8] on the 'Protection of Employees and Unsecured Creditors' (2017); and
- the CLRG's 'Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees' (the "CLRG's March 2021 Report") (March 2021) – including the minority report of the Irish Congress of Trade Unions (ICTU).

The Plan of Action includes three core policy commitments:

i. the development of a Guidance Document to provide clear and accessible information concerning the rights and remedies available to employees facing a collective redundancy situation following a company insolvency;
ii. the amendment of existing legislation in the areas of employment law and company law concerning matters relating to collective redundancies following company insolvency; and
iii. the establishment of a statutory Employment Law Review Group comprised of experts in the area of employment law analogous to the CLRG.

In order to give effect to the first policy commitment above, DETE published an Information Handbook on the rights and remedies available to employees facing collective redundancy in December 2021. It took into account the remaining policy commitments when drafting the General Scheme of the Bill. It also had regard to the recommendations contained in the CLRG's December 2021 Report on the consequences of certain corporate liquidations and restructuring practices, including the splitting of corporate operations from asset holding entities in group structures.[9]

The background sections below consider the economic context, existing relevant legislation, and the role of the CLRG.

Economic context

> **"*Although we have not yet seen a material fallout from the economic impact of Covid-19 or increased interest rates and inflation, it is evident from H1 2023 that we are moving towards pre-covid insolvency levels, after a period of artificially low levels. However, it is worth noting that we remain far below the levels of 2012-2018 when the average annual insolvency level was over 1,000. For 2023, a forecasted level of above 600 Corporate Insolvencies is anticipated.*"**
>
> [David Van Dessel, Partner, Financial Advisory at Deloitte Ireland]

A core aim of the Bill is to reinforce existing legislative protections and safeguards afforded to employees in collective redundancy situations, including where the employer is insolvent. As noted in the PLS Report:

[8] The CLRG is a statutory body whose responsibilities include advising the Minister on the implementation of the *Companies Act 2014, as amended*, and the development of company law. Its membership includes legal practitioners, academics, experts in insolvency and representatives of trade unions, business associations, the Law Society, the funds industry and banking and auditing bodies.
[9] RIA, p. 6.

> "Given the cumulative economic impacts of Covid-19, Brexit, and the invasion of Ukraine on the liquidity of companies, it is reasonable to anticipate an increase in winding-up petitions. The General Scheme seeks to mitigate this, with a view to enhancing the protection of employees that is already a feature of the existing legal landscape."[10]

Up until relatively recently, the number of insolvencies in Ireland remained significantly below pre-pandemic levels.[11] Nevertheless, past experience demonstrates that economic shocks can have a delayed impact on business closures in developed economies. According to the World Bank, it took 13 quarters from the start of the 2007 financial crisis before insolvent liquidations reached their peak in OECD States.[12]

A Financial Stability Note published by the Central Bank of Ireland in October 2022, entitled '*Enterprise Policy Issues for Distressed Businesses Following the Unwinding of Pandemic Support*', estimated that 4 per cent of active Irish businesses, representing approximately 10,000 firms, may require restructuring, liquidation, or some form of company dissolution.[13] By way of context, the report indicated that approximately 6,000-7,000 companies are dissolved by way of either insolvent liquidation or involuntary strike-off in an ordinary year.[14] DETE anticipated in the RIA, completed in March 2023, that the withdrawal of COVID-19 pandemic supports combined with inflationary pressures would contribute to an increase in insolvency rates.[15]

Recently published data suggests that DETE's prediction is being borne out. Deloitte Ireland published statistics during the Summer of 2023, which indicate that the rate of corporate insolvencies in Ireland has been steadily increasing since January 2022. 329 corporate insolvencies were recorded during the first six months of 2023, representing an increase of 30 per cent when compared with the same period in 2022.[16] 186 corporate insolvencies were recorded during Quarter 2, 2023, representing a 30 percent increase on Quarter 1, 2023, and the highest number of insolvencies recorded in a single quarter since Quarter 1, 2019.[17] An Irish Examiner article, published on 26 July 2023, asserts that:

> "the increase in business closures coincides with rising interest rates following eight consecutive hikes by the European Central Bank to curb inflation, with a number of 'zombie businesses' - those that could not be kept open without the help of government support - declaring insolvencies once they were removed".

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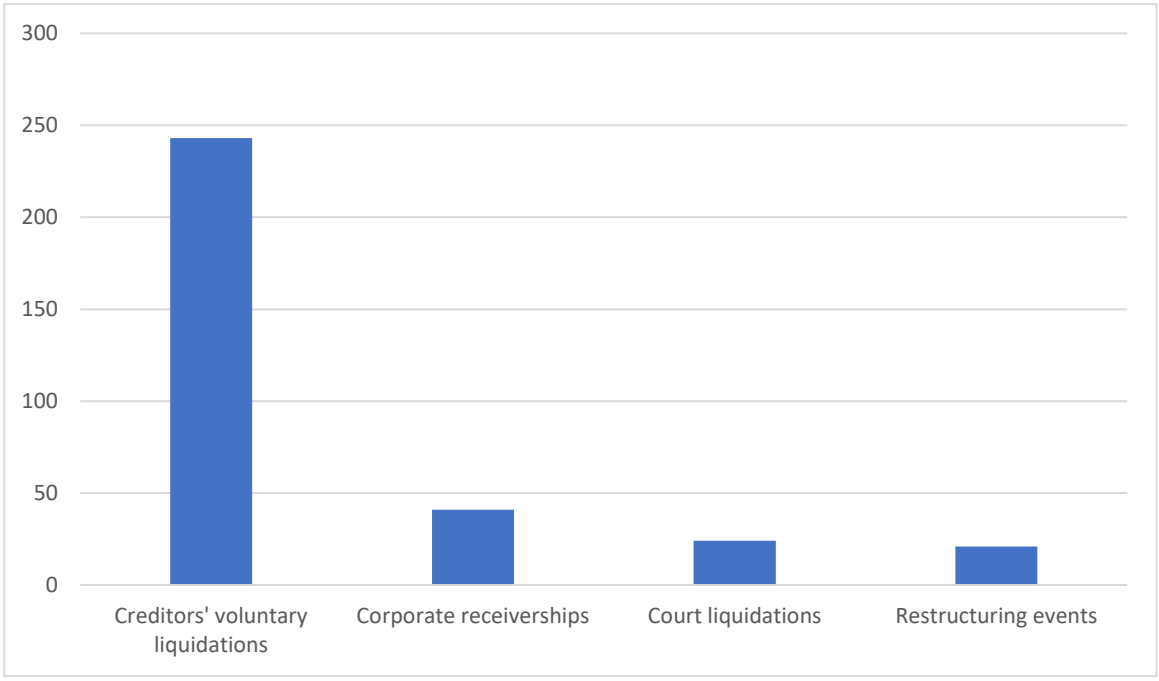
[10] Joint Committee on Enterprise, Trade and Employment, 'Report on the Pre-Legislative Scrutiny of the General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill' (July 2023), p. 13. available here [hereinafter PLS Report].
[11] RIA, p. 6.
[12] RIA, p. 7.
[13] Fergal McCann and Niall McGeever, 'Enterprise Policy Issues for Distressed Businesses Following the Unwinding of Pandemic Support' (2022) p. 2, available here.
[14] Ibid.
[15] RIA, p. 7.
[16] Deloitte, 'Corporate insolvencies saw 30% year-on-year increase in H1 2023' , available here.
[17] 195 corporate insolvencies were recorded in Quarter 1, 2019 and 310 insolvencies in total were recorded during the first half of 2019. See ibid.

Of the 329 insolvencies recorded during the first half of 2023, 243 (approximately 74 per cent of the total) represented creditors' voluntary liquidations (a 43 per cent increase on the same period in 2022).[18] Furthermore, 41 of the 329 insolvencies were corporate receiverships (a 29 per cent decrease on 2022); 24 derived from court liquidations (an 85 per cent increase on 2022); and 21 represented restructuring events (a 75 per cent increase on 2022).[19] The restructuring events comprised of 17 appointments under the small company administrative rescue process (SCARP) and four examinership appointments.[20]

Figure 1: Insolvencies during the first half of 2023 (H1 2023)



Source: Library and Research Service, based on figures published by Deloitte Ireland (2023)

When compared to the same period during 2022, there was a 43 per cent increase in the number of creditors' voluntary liquidations; a 29 per cent decrease in corporate receiverships; an 85 per cent increase in court-ordered liquidations; and a 75 per cent increase in restructuring events.[21]

The services sector witnessed the highest number of corporate insolvencies during the first half of 2023 (128), although this represents a decrease of 19 per cent compared with the first half of 2022.[22] Indicative of the challenges it currently faces, the construction sector recorded 50 insolvencies during the first half of 2023, a similar level to 2019 and a significant increase on the first half of 2022 (23 insolvencies).[23] The hospitality sector recorded 41 insolvencies representing a

[18] Ibid.
[19] Ibid.
[20] Ibid. The Small Company Administrative Rescue Process (SCARP) was introduced by the *Companies (Rescue Process for Small and Micro Companies) Act 2021* which commenced on the 8 December 2021. This Act will be discussed briefly below as part of the section on relevant legislation in the area of company law. For further information, see: DETE, 'The Small Company Administrative Rescue Process', p. 3, available here.
[21] Deloitte, 'Corporate insolvencies saw 30% year-on-year increase in H1 2023' , available here.
[22] Ibid.
[23] Ibid.

significant increase on the same period in 2022 when 14 insolvencies were recorded.[24] 29 insolvencies were recorded in the retail sector, as compared with 19 during the first half of 2022.[25] Other sectors also recorded increases, including manufacturing (26 insolvencies), transport (13 insolvencies), wholesale (11 insolvencies), and IT (11 insolvencies).[26]

Within the services sector, financial services had the largest share of insolvencies (42), followed by technical and professional services (19), real estate (13), fitness and beauty (15), and health and social work (10).[27] The education, entertainment and other services category accounted for the remaining 29 insolvencies within the services sector.[28]

In terms of the geographical breakdown, Leinster-based companies had 252 insolvencies during the first half of 2023 representing 77 per cent of the total number recorded.[29] Munster recorded 39 insolvencies (12 per cent of the total); Connaught recorded 25 (8 per cent of the total); and Ulster recorded 13 (4 per cent of the total).[30]

Deloitte Ireland observe that the Quarter 2, 2023 insolvency rate remains approximately 30 per cent below 2017 and 2018 levels, which it indicates is "somewhat reflective of the resilience the wider economy continues to display".[31] In this regard, it observes that employment increased by 4 per cent in the twelve months to Quarter 1, 2023 and that personal consumption increased by 5.1 per cent in Quarter 1, 2023, as compared with Quarter 1, 2022, notwithstanding persistent inflation.[32]

Existing legislation related to the current Bill

The sections below examine existing legislation in the areas of employment law and company law concerning matters relating to collective redundancies following company insolvency and central to the protection of workers as creditors.

Relevant legislation in the area of Employment Law

The *Protection of Employment Act 1977*, as amended, (the "1977 Act") currently contains the main legislative provisions concerning collective redundancies. The rights and obligations set out below derive from EU law, including the consolidated version of Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies.

Definition of Collective Redundancies and Employees and Establishments Covered

Section 6 of the 1977 Act clarifies that collective redundancies mean dismissals for reasons unrelated to the individual concerned where, over a period of 30 consecutive days:

- at least 5 employees are dismissed in an establishment that normally employs more than 20 and less than 50 employees;

[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Ibid.
[32] Ibid.

- at least 10 employees are dismissed in an establishment that normally employs at least 50 but less than 100 employees;
- at least ten per cent of the total employees are dismissed in an establishment that normally employs at least 100 but less than 300 employees; or
- at least 30 employees are dismissed in an establishment that normally employs 300 or more employees.

It should be noted that where an employer is insolvent or winding up their business, collective redundancies will impact all of their employees.[33]

"Establishment" is defined under section 6 (3) of the 1977 Act as "an employer or a company or a subsidiary company or a company within a group of companies which can independently effect redundancies". The number of employees normally employed in an establishment is calculated as the average of the number of employees employed in each of the 12 months preceding the date on which the first dismissal took effect (section 8 of the 1977 Act).

Section 7 provides that the 1977 Act applies to all persons employed in establishments normally employing more than 20 persons, and does not apply to the following categories of dismissal:

- dismissals of employees employed under fixed terms or specific purpose contracts solely due to the expiry of the relevant term or cessation of the relevant purpose;
- persons employed by or under the State, other than persons standing designated under section 17 of the *Industrial Relations Act, 1969;*
- officers of local authorities; or
- any employees that the Minister declares by order to be excluded from the Act.

Employers' Obligations

The 1977 Act imposes certain obligations on employers considering collective redundancies. In particular, section 9 requires employers to consult with employees' representatives at the earliest opportunity and, at latest, 30 days before giving the first notice of dismissal. The consultation should address matters, including:

- the possibility of avoiding the proposed redundancies;
- the possibility of reducing the number of employees affected;
- the possibility of mitigating the consequences of redundancies through social measures whose aims should include redeploying or retraining employees made redundant; and
- the grounds for determining which employees will be made redundant.

Section 2 of the 1977 Act defines "employees' representatives" as follows:

> "'employees' representatives', in relation to employees who are affected, or are likely to be affected, by proposed collective redundancies (whether by being selected for redundancy or otherwise), means-

[33] RIA, p. 5.

> (*a*) a trade union, staff association or excepted body with which it has been the practice of the employer to conduct collective bargaining negotiations, or
> (*b*) in the absence of such a trade union, staff association or excepted body, a person or persons chosen (under an arrangement put in place by the employer) by such employees from amongst their number to represent them in negotiations with the employer."

Section 10 of the 1977 requires the employer, in the context of these consultations, to supply employees' representatives with all relevant information, including written details of:

- the reasons for the proposed redundancies;
- the number, and descriptions or categories, of employees whom it proposes to make redundant;
- the number, and description or categories, of employees normally employed;
- the number of agency workers engaged by the employer to which the *Protection of Employees (Temporary Agency Work) Act 2012* applies, and details of their work;
- the period when it is anticipated that the proposed redundancies will be made;
- the proposed criteria for selecting the workers to be made redundant; and
- the proposed method for calculating any redundancy payments other than those methods set out in the *Redundancy Payment Acts, 1967 to 1991*, or any other relevant enactment.

Section 10 (3) requires the employer to provide the Minister with copies of the above information as soon as possible.

Section 12 of the 1977 Act requires an employer who is considering collective redundancies to notify the Minister in writing at least 30 days before the first dismissal takes effect and to provide a copy of the notification as soon as possible to the employees' representatives. The latter may then make written observations to the Minister regarding the notification.

However, section 12 (4) clarifies that, in circumstances where the collective redundancies arise as a result of the termination of the employer's business following bankruptcy, winding up proceedings or for any other reason as a result of a court decision, the person responsible for the affairs of the business must only comply with the notification requirement if the Minister makes a request to this effect.

The Bill proposes to amend sections 9, 10 and 12 of the 1977 Act to require a liquidator, provisional liquidator, receiver manager or any other court-appointed person made responsible for managing the affairs of an insolvent company, to:

- initiate consultations with employees' representatives regarding any proposed collective redundancies at least 30 days before the first notice of dismissal is provided;
- provide all relevant information to employees' representatives and provide certain information in writing to the Minister regarding any proposed collective redundancies; and
- notify the Minister in writing of the proposed collective redundancies at least 30 days before the first dismissal takes effect.

Section 14 (1) of the 1977 Act prohibits employers from giving effect to collective redundancies within 30 days of notifying the Minister of their intention to make the proposed redundancies. Section 14 (3) currently allows for an exemption to this requirement in the case of collective redundancies arising from the employer's business being terminated following bankruptcy or winding up proceedings or as a result of a court decision.

The Bill proposes to remove the exemption currently included in section 14 (3) of the 1977 Act and also require the "responsible person" to ensure that no collective redundancies take effect until at least 30 days have passed since the Minister was notified of the proposed collective redundancies.

Enforcement Provisions

Section 11 of the 1977 Act provides that an employer who fails to initiate consultations with employees' representatives, as required under *section 9*, or who fails to provide the requisite information outlined in section 10, to either employees' representatives or the Minister within the respective timeframes outlined in section 10, shall be guilty of an offence and liable upon summary conviction to pay a fine of up to €5,000. Section 13 provides that an employer who breaches their obligation to inform the Minister of proposed redundancies under section 12 shall be guilty of an offence and liable upon summary conviction to pay a fine of up to €5,000.

The Bill proposes to amend sections 11 and 13 of the 1977 Act to provide that any liquidator, provisional liquidator, receiver manager or other court-appointed person made responsible for managing the affairs of an insolvent company who fails to discharge their obligations under sections 9, 10 and 12 of the Act shall be guilty of an offence punishable on summary conviction by a class A fine (a fine of up to €5,000). The Bill provides for a defence (as explained below when discussing the principal provisions of the Bill).

Section 11A clarifies that an employee may submit a complaint to the Workplace Relations Commission (WRC) pursuant to section 41 of the Workplace Relations Act 2015, as amended, regarding their employer's alleged contravention of section 9 and/or section 10 of the 1977 Act. Section 11A provides that if the complaint is well founded, the WRC adjudication officer may require the employer to:

- comply with the provisions of section 9 and/or section 10, as relevant; and/or
- pay such compensation to the employee as is just and equitable in the circumstances, subject to a maximum of four weeks' remuneration.

Section 11B provides that if the WRC adjudication officer's decision is appealed to the Labour Court, the Labour Court may affirm it, vary it or set it aside.

The Bill proposes to amend section 11A of the 1977 Act to permit employees to submit complaints to the WRC in relation to an employer's alleged contravention of their obligation under section 14 (1) not to give effect to collective redundancies within 30 days of notifying the Minister that they are considering collective redundancies.

Section 14 (2) of the 1977 Act provides that where an employer gives effect to collective redundancies within 30 days of notifying the Minister of their intention to make the proposed redundancies, the employer shall be guilty of an offence and shall be liable upon conviction on indictment to pay a fine not exceeding €250,000.

Relevant legislation in the area of Company Law

In the Plan of Action, the Department stated that given "concerns expressed following previous liquidations", they had placed a "particular focus…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". In the Plan of Action, the Department proposed legislative provisions "in the area of company law that are material to the protection of workers as creditors" and made recommendations regarding improving the "quality and circulation of information to employees as creditors", including amendments to the *Companies Act 2014*.

The *Companies Act 2014* (as amended) ("2014 Act") outlines the legislative framework governing companies in Ireland. Part 11 of the 2014 Act relates to the winding up of companies. Under this Part, there are two forms of winding up; winding up "by the court" (High Court)[34] and "voluntary" winding up by members of the company or the creditors of a company.[35] For a company to be wound up under the 2014 Act, it is not required to be insolvent.[36] However, where a company is insolvent, the winding up process can give rise to greater "difficulties" surrounding the rights of "ordinary, preferential and secured" creditors and the liquidator may have to apply to the court for directions".[37]

[34] *Companies Act 2014* (as amended), sections 561 and 564 (following interpretation of "Court" in section 2).
[35] *Companies Act 2014* (as amended), sections 561 and 562.
[36] Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) paras 36.03 to 36.06.
[37] Ibid.

This Bill proposes to amend the 2014 Act in order to "further improve the quality and circulation of information to workers as creditors and ensure remedies for transactional avoidance are more accessible to creditors".[38] In 2021, some "improvements" were made to the information to be "circulated" to employees as creditors by virtue of the *Companies (Rescue Process for Small and Micro Companies) Act 2021*[39] which amended the 2014 Act to provide for a "rescue process for small and micro companies which are, or are likely to be, unable to pay their debts".[40] However, if enacted, the current Bill will make further important amendments to the 2014 Act, and will:

- Permit "workers as creditors to have greater access to information regarding liquidations";[41]
- Raise the "bar for the permissibility" [42] of transfers of assets of a company being wound up;
- Lower the "threshold required by the court to order a related company to contribute to the debts of the company being wound up";[43]
- Amend the provision relating to civil liability for fraudulent or reckless trading.[44]

Provision of information to employees as creditors

In relation to the provision of information to creditors, this Bill proposes to amend sections 571, 572, 573, and 594 of the 2014 Act.

Section 571 provides that an application to the court for a company to be wound up can be made by a petition presented by the company, a creditor or creditors (including contingent or prospective creditor(s)), a contributory or contributories of a company or "by all or any of those parties, together or separately".[45] This section does not currently include any requirements regarding the notification of any individual of a petition. However, there are certain requirements outlined in Order 74, Rule 10(1) of the Superior Courts Rules, which provides:

> "Every petition shall be advertised seven clear days before the hearing, once in Iris Oifigiúil and once at least in two daily newspapers or in such other newspapers as the Registrar when appointing the time and place at which the petition is to be heard shall direct".[46]

Order 74, Rule 13 of the Superior Courts Rules also provides that:

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[38] Explanatory Memorandum to the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023, p.1.

[39] Ms Fiona O'Dea, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).

[40] Per long title of the *Companies (Rescue Process for Small and Micro Companies Act) 2021*.

[41] Ms Fiona O'Dea, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).

[42] Ibid.

[43] Ibid.

[44] See section 27 in the Explanatory Memorandum to the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023, p.4.

[45] *Companies Act 2014* (as amended), section 559 defines a "contributory" as "every person liable to contribute to the assets of a company in the event of its being wound up". Subsection 2 of this section states that a contributory includes "…any person alleged to be a contributory". A creditor is defined by the Office of the Director of Corporate Enforcement (ODCE) as a "a person or company that is owed money (a debt) by the company". See ODCE, 'The Principal Duties and Powers of Creditors under the Companies Act (2015) available here.

[46] RSC 1986, Ord 74, r 10(1), available here.

> "Every contributory or creditor of the company shall be entitled to be furnished by the solicitor of the petitioner with a copy of the petition within twenty-four hours after making the request for such copy on paying for it at the rate specified in Order 117".[47]

There is currently no specific legislative requirement under section 571 for an employee or their representative to be notified of an application to the Court for an order for a company to be wound up.

Section 573 provides the court with the power to appoint a "provisional liquidator" at "any time after the presentation of a winding-up petition and before the first appointment of a liquidator". According to the CLRG, the appointment of a provisional liquidator is "exceptional, made on an *ex parte* basis once the petition process has begun and usually made to protect assets of the company".[48] This section does not specify any requirements regarding notification or the provision of information to creditors, such as employees. Order 74, Rule 14 of the Superior Courts Rules states that the Court may appoint a provisional liquidator "…upon the application of a person entitled by law to present a petition, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator and without advertisement or notice to any person (unless the Court shall otherwise direct)".[49]

There is currently no express legislative requirement under section 573 for an employee or their representatives to be notified when a provisional liquidator is appointed.

Section 593 relates to the filing of a statement of affairs of the company. This section provides:

> "Where the court has made a winding-up order or appointed a provisional liquidator in relation to a company, there shall, unless the court thinks fit to order otherwise and so orders, be made out and filed in the court a statement as to the affairs of the company (the "statement") in the prescribed form, verified by affidavit."

This statement must be filed and verified by one or more of the company directors or by a person required to do so by the court.[50] It must be filed within 21 days after the "relevant date" or within an "extended" time period permitted by the court. The "relevant date" is defined in Section 594 as being either the date of appointment of a provisional liquidator or the date of the winding-up order.

Under section 594(2), the person(s) who has made the statement of affairs must "serve a copy of the statement on the liquidator (or the provisional liquidator, as the case may be) of the company as soon as may be after it is prepared and in any case not later than the expiry of 21 days after the relevant date or such extended time as the court may appoint…" Under section 594(9), a creditor or contributory of the company is, after paying a prescribed fee, "entitled personally, or by his or

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[47] RSC 1986, Ord 74, r 13, available here.
[48] Company Law Review Group, 'Report of the Company Law Review Group: Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees' (March 2021) available here, p.21.
[49] RSC 1986, Ord 74, r 14(1), available here.
[50] This may include, but is not limited to, a person involved in the formation of the company or who was employed in the company and who would be, in the opinion of the court, able to provide the required information". See *Companies Act 2014* (as amended), section 593(4).

her agent—(a) to inspect, at all reasonable times, the statement registered in pursuance of *section 593*, and (b) to be furnished with a copy of, or an extract from, it". Order 74, Rule 28 of the Rules of the Superior Courts provides that:

> "Unless the Court shall otherwise order, the liquidator shall, as soon as practicable, send to each creditor mentioned in the company's statement of affairs and to each person appearing from the company's books or otherwise to be a contributory of the company a summary of the company's statement of affairs including the causes of its failure and any observations thereon which the liquidator may think fit to make".[51]

There is no express legislative requirement under section 594 for the liquidator to notify employees that a statement of affairs has been served upon them.

The power of the court to order a related company to contribute to the debts of the company being wound up

In relation to the power of the court to order a related company to contribute to the debts of the company being wound up, this Bill proposes to amend section 599.

In the process of winding up a company, it is possible that there are other companies that are "related" to the insolvent company which may be continuing to trade. This may be a point of dissatisfaction for the creditors of the company that is being wound up, as they may be facing outstanding payments from the insolvent company whilst a related company continues to operate.[52] In this respect, section 599 provides that a "related" company "may be required to contribute to the debts of the company being wound up".[53] The Court can make an order under this section "if it is satisfied that it is just an equitable to so do". Under section 599(4), in deciding if it is "just and equitable" to make an order, the court "shall have regard to":

> "(a) the extent to which the related company took part in the management of the company being wound up;
>
> (b) the conduct of the related company towards the creditors of the company being wound up;
>
> (c) the effect which such order would be likely to have on the creditors of the related company concerned."

Under section 599(5), an order shall not be made under this section "unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company". It shall not be considered to be "just and equitable" if the only basis for making an order is that the company is related to the company being wound up or the creditors of the company being wound up have depended on the fact that there is a related company.[54] This Bill proposes to amend subsections 4 and 5 of section 599 in order to "modify the

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[51] RSC 1986, Ord 74, r 28(1), available here.
[52] Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) paras 36.195 to 36.198.
[53] See General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023, Head 19
[54] *Companies Act 2014* (as amended), section 599(6).

attribution test" that can be applied by the court in deciding whether a related company should contribute to the debts of a company that is being wound up and to make this provision "less restrictive".[55]

The Bill proposes to amend the test under section 599 that can be applied by the court in deciding whether a related company should contribute to the debts of a company that is being wound up.

Transfer of assets of a company being wound up

In relation to the transfer of assets of a company being wound up, this Bill proposes to amend sections 604 and 608 of the 2014 Act.

Section 604 relates to the creation of an "unfair preference" through the transfer by a company of its assets when it is "on the verge of being wound up".[56] Section 604 prohibits a company that is unable to pay its debts as they become due from transferring assets to a creditor of the company (or a person on trust for a creditor) within the 6-month period immediately preceding the commencement of the winding up of the company, or within the 2-year period immediately preceding the commencement of the winding-up where the recipient is a connected person, where the transfer is made with a view to affording the creditor in question a preference over the company's other creditors.[57] Under this provision, the court currently does not have discretion to consider transactions that took place outside of the six-month or two-year periods in question.

This Bill seeks to amend section 604(2) and (4) concerning transfers of assets to creditors prior to winding-up, which may amount to unfair preferences, in order to permit the court to consider transfers outside of the 6-month and 2-year time periods currently provided.

Academic commentary suggests that it can be "difficult to prove" that a transaction amounted to an unfair preference under section 604 unless "connected persons are involved".[58] In the case of connected persons the intent to prefer is presumed.[59]

Under section 608, the court also has the power to order a person to return company property or the proceeds of the sale or development of company property that was transferred to them where the "effect of such disposal was to perpetrate a fraud on the company, its creditors or members". An order under this section can be made "on the application of a liquidator, creditor or contributory of a company which is being wound up" and in making an order the court "shall have regard to the rights of persons who have *bona fide* and for value acquired an interest in the property the subject

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[55] See Explanatory Memorandum to the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023, p.4.
[56] Joint Committee on Enterprise, Trade and Employment, 'Report on the Pre-Legislative Scrutiny of the General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill, 2023' (July 2023), p. 33, available here.
[57] *Companies Act 2014* (as amended), section 604(2) and (4).
[58] Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) para 36.191.
[59] Ibid, para 36.186.

of the application".[60] To prove that section 608 applies, it is "not necessary to prove that the company was insolvent at the time of the transaction", or that the disposal of property "occurred within any particular time frame" or that there was " fraudulent intent".[61] It is necessary, however, to prove fraudulent effect, namely, "that property has been diverted from the company, creditors or members who were lawfully entitled to it".[62] This section does not apply to disposals of property that are covered by section 604,[63] though parties may plead both sections at the same time "in the alternative".[64]

The Bill seeks to amend section 608 regarding the power of the court to order the return of assets which have been improperly transferred in order to exclude "payments made in the ordinary course of business" (Explanatory Memorandum).

Amend the provisions relating to civil liability for fraudulent or reckless trading

In addition to the above, this Bill also proposes to amend section 610 of the 2014 Act. This section provides for "[c]ivil liability for fraudulent or reckless trading" by an officer of a company that is being wound up. "Officers" in this regard include directors, secretaries, shadow directors, statutory auditors, liquidators, provisional liquidators and receivers.[65] Under section 610, the court can declare that a company officer be held "personally responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct" where it appears that, whilst an officer, they were:

- "knowingly a party to the carrying on of any business of the company in a reckless manner" or
- "knowingly a party to the carrying on of any business of the company with intent to defraud creditors of the company, or creditors of any other person or for any fraudulent purpose".[66]

Section 610 (3) outlines the grounds where "an officer of a company shall be deemed to have been knowingly a party to the carrying on of any business of the company in a reckless manner". These include where, having regard to the "general knowledge, skill and experience that may reasonably be expected of a person in his or her position", he or she "ought to have known that his or her actions or those of the company would cause loss to the creditors of the company".[67]

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[60] *Companies Act 2014* (as amended), section 608(1) and (4).
[61] Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) para 36.192.
[62] Ibid.
[63] See *Companies Act 2014* (as amended), section 608(3).
[64] Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) para 36.193.
[65] Ibid., para 33.08; and *Companies Act 2014* (as amended), section 611(6) provides "…"officer", in relation to a company, includes a statutory auditor or liquidator or provisional liquidator of the company, a receiver of property of the company and a shadow director of it".
[66] This power can be exercised by the Court on the application of the "liquidator, examiner or process adviser of the company, a receiver of property of the company or any creditor or contributory of it" per *Companies Act 2014* (as amended), section 610(1).
[67] See *Companies Act 2014* (as amended), section 610(3) also provides that " an officer of a company shall be deemed to have been knowingly a party to the carrying on of any business of the company in a reckless manner if…. The person was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts (taking into account the contingent and prospective liabilities)."

The Court may only make a declaration regarding reckless business practices if the company is deemed to be unable to pay its debts under section 570 and the applicant seeking a declaration under this section is a creditor or contributory who has "suffered loss or damage as a consequence" of the recklessness.[68] If the Court considers that the company officer in question "has acted honestly and responsibly in relation to the conduct of the affairs of the company" or other matters stated in the application, then the Court may "relieve him or her either wholly or in part, from personal liability".[69] If the Court makes a declaration under section 610, then this declaration "may provide that sums recovered under this section shall be paid to such person or classes of persons, for such purposes, in such amounts or proportions at such time or times and in such respective priorities among themselves as such declaration may specify".[70] This Bill proposes a number of amendments to section 610, as will be explored further below.

The role of the Company Law Review Group (CLRG)

The Bill proposes to create a new statutory Employment Law Review Group (ELRG) to advise the Minister on all aspects of employment and redundancy law, and to help ensure that the relevant legislation remains fit for purpose and in line with international developments.[71] It is intended that the proposed new Group will function akin to the CLRG, albeit in the area of employment law. For context, the existing role of the CLRG is described below.

The CLRG was originally established on a statutory basis under Part 7 of the *Company Law Enforcement Act 2001* ('2001 Act'). This was following the recommendation of the 1998 'Report of the Working Group on Company Law Compliance and Enforcement' (also known as the McDowell Report), a group which was mandated (amongst other functions) to "…examine and identify the resources and structures necessary to achieve a more frequent updating of companies legislation; and to make appropriate recommendations to address these issues".[72] Prior to this, the CLRG had existed on a non-legislative basis since 1994.[73]

In establishing the CLRG under the 2001 Act, the "objective" of the Government was "to provide Ireland with a modern, simplified and intelligible system of company law which would complement the remarkable economic progress of recent years and provide us with a regulatory system the equal of any other in the world".[74] Sections 67 to 71 of the 2001 Act provided for the functions, membership and reporting obligations of the CLRG. These provisions were replaced by sections 958 to 962 of the 2014 Act.

Section 959 of the 2014 Act outlines the functions of the CLRG, which include (but are not limited to) monitoring, reviewing and providing advice to the Minister for Enterprise, Trade and Employment in relation to the "implementation" and "amendment" of the 2014 Act and regarding the "introduction of new legislation relating to the operation of companies and commercial practices in Ireland".

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[68] See *Companies Act 2014* (as amended), section 610(4).
[69] See *Companies Act 2014* (as amended), section 610(8).
[70] See *Companies Act 2014* (as amended), section 610(6).
[71] RIA, p. 12.
[72] CLRG, 'Report of the Working Group on Company Law Compliance and Enforcement' (1998) available here [hereinafter "McDowell Report"], p. i.
[73] McDowell Report, p. ix. The history of the CLRG prior to its establishment in legislation is examined in this report at pages 65 to 66.
[74] Brian Hutchinson, *Keane on Company Law* (5th edn, Bloomsbury Professional 2016) para 2.44.

Section 960 of the 2014 Act provides that the members and the chairperson of the CLRG shall be appointed by the Minister and they "shall be paid such remuneration and allowances for expenses as the Minister, with the consent of the Minister for Public Expenditure and Reform, may determine".

Section 961 of the 2014 Act states that the "Minister shall, at least once in every 2 years, after consultation with the Review Group, determine the programme of work to be undertaken by the Review Group over the ensuing specified period". During the two-year period, the Minister can add additional "items of work to the programme as matters arise".[75] The current CLRG Work Programme (2022-2024) comprises of 9 areas of focus (6 topical and 3 standing) that relate to the review of certain aspects of Irish company law and contributions by the CLRG regarding potential developments in EU law.[76]

Section 962 of the 2014 Act provides that "[n]ot later than 3 months after the end of each year, the Review Group shall make a report to the Minister on its activities during that year and the Minister shall ensure that copies of the report are laid before each House of the Oireachtas within 2 months after the date of receipt of the report". The CLRG shall, if requested by the Minister, "provide a report to the Minister on any matter" which relates to the "functions or activities of the Review Group" or which was "referred by the Minister to the Review Group for its advice".

According to the Plan of Action, it is intended that the ELRG will adopt the "model of the CLRG" and that it will "act independently, with the Chair appointed by the Minister". It was proposed therein that the annual work programme of the ELRG will be "agreed with the Minister, who will also have the power to refer additional matters to the Group for deliberation". The provisions relating to the establishment of ELRG are outlined later in this Digest.

Regulatory Impact Analysis (RIA)

The RIA of the General Scheme of the Bill was published in May 2023. The RIA notes that the core policy objectives of the Bill are to "further enhance the protection of employees who find themselves in a collective redundancy situation following insolvency and in a way that does not unduly impede enterprises in the conduct of their business, and to provide for a statutory Employment Law Review Group to advise the Minister on employment rights and redundancy and insolvency laws in the State."

The following two policy options are included in the RIA:

- Option 1: do nothing; and
- Option 2: amend the existing legislation in certain aspects.

The RIA lists Option 2 as the preferred option.

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[75] CLRG, 'Annual Report 2022' (2023) available here, p. 12; See *Companies Act 2014* (as amended), section 961(3) provides that the "Minister may, from time to time, amend the Review Group's work programme, including the period to which it relates".

[76] CLRG, 'Work Programme', available here.

Table 3: Table of Policy Options included in the RIA

Overview of Policy Options included in the RIA			
Option No.	**Costs**	**Benefits**	**Impacts**
1.	No additional direct costs.	No State intervention required.	Existing robust legislative protections and safeguards afforded to employees involved in a redundancy following insolvency remain in place. Does not address the issues raised by stakeholders over a period of time. Will not meet the commitment in the Programme for Government.
2.	No additional direct costs for employers/companies associated with this option. Minimal additional indirect /compliance costs for employers and liquidators. Additional costs to the Exchequer with the Employment Law Review Groups' (ELRG) Chairperson stipend at €8,978 per annum, plus €10k approx. in annual expenses supporting the ELRG.	Seeks to further supplement the already robust legislative protections and safeguards afforded to employees involved in a collective redundancy following insolvency particularly at a time when there is a potential for significant increase in insolvencies. Irish employment legislation will reflect CJEU case law. The transparency of the collective redundancy consultation processes for employees will be enhanced. Administrative processes pertaining to collective redundancies will be streamlined. Discreet amendments to company law will further enhance the flow of information to employees as creditors during a court liquidation. Those company law provisions that protect the insolvency estate from being put out of reach of creditors, including employees, will be more accessible.	As the context for this proposal is the intersection between insolvency and redundancy/employment rights legislation, on the one hand, and company law, on the other, this area has presented certain complexities in terms of developing further safeguards and could result in unintended consequences. There are potential resourcing implications for the Workplace Relations Commission given the proposed expansion of the grounds for complaint. The ELRG would play an important role in ensuring that the State's suite of employment rights and redundancy legislation remains relevant and fit for purpose and is updated to reflect international developments.

Pre-legislative scrutiny of the General Scheme of the Bill

The Minister of State for Business, Employment and Retail, Neale Richmond T.D., and the Minister of State for Trade Promotion, Digital and Company Regulation, Dara Calleary T.D., jointly referred the General Scheme to the Joint Committee on Enterprise, Trade and Employment (the "Committee") on 16 May 2023 with a request to commence PLS at the Committee's earliest convenience. As part of its PLS of the General Scheme, the Committee met with officials from DETE in public session on 31 May 2023, and obtained submissions from ICTU, the Irish Business and Employers Confederation (Ibec) and the CLRG.[77] The Committee published its PLS Report on 13 July 2023, which included nine recommendations.

L&RS traffic light analysis of PLS recommendations versus published Bill

This section seeks to assess the extent to which the Committee's recommendations have been addressed in the Bill, as presented for Second Stage. To do this, a traffic light system is used by the L&RS, indicating: (i) whether a key issue is accepted and reflected in the Bill, (ii) whether a consistent or unclear approach is used, or (iii) whether the recommendation has not been accepted or is not reflected in the Bill. This traffic light approach represents the L&RS's own, independent analysis of the Bill. A key to this dashboard is shown in Table 4 below.

Table 4: Key to traffic light dashboard comparing the Bill as published with Committee's PLS recommendations.

L&RS categorisation of the Department's response in the Bill to the Committee's key issue	Traffic light dashboard used in Table 5 to highlight impact of the Committee's PLS conclusion
Key issue has clearly been accepted and is reflected in the Bill.	
The Bill may be described as adopting an approach consistent with the key issue or the impact of the key issue is unclear.	
Recommendation has not been implemented in the Bill, but additional considerations are present.	
Key issue has not been accepted or implemented in the Bill.	

[77] PLS Report, p. 2.

Table 5: Traffic light dashboard comparing the Bill as published with Committee PLS recommendations.

Commentary/recommendation as per Committee report	Whether addressed (either in whole or in part) in the Bill	
1: The Committee welcomes the inclusion of recommendations from the Duffy-Cahill report in this General Scheme. The Committee welcomes the removal of the exemption outlined in section 14(2) of the Protection of Employment Act 1977, this exemption applies to collective redundancies arising from the winding up of a company or bankruptcy are exempt from this criminal liability. The Committee considers this removal to be welcome, the Committee would further recommend that the proposed legislation provides that the directors or other persons in control of a company are also held responsible for any contravention.		This recommendation does not require legislative change. Section 21(3) of the Protection of Employment Act 1977 already provides that prosecutions may be brought against a director or officer of a company.
2. The Committee recommends the protection of apprentices, trainees and temporary workers for the purposes of this legislation.		This recommendation does not require legislative change. These categories of employees (i.e. apprentices, trainees and temporary workers) are already protected by both the 1977 Act and the definition of "worker" under EU law.
3. The Committee further recommends including a provision that provides where a consultation period has commenced, it must not be interrupted by the		Not addressed in the Bill. Adopting the Committee's recommendation would remove a liquidator's discretion to initiate a new consultation with employees' representatives. In some circumstances it could disadvantage

Commentary/recommendation as per Committee report	Whether addressed (either in whole or in part) in the Bill	
appointment of a liquidator or receiver.		employees, for example, by depriving them of a fresh consultation in changed circumstances.
4. The Committee recommends that the provisions of Head 16 be expanded to include the compulsory notification to Trade Union members and all other employees.		The Bill will oblige the director to notify all the employees of the company, and where applicable employees' representatives, of the winding up petition. It is not intended to include provisions specific to any particular type of employee i.e. trade union members or non-trade union members.
5. The Committee recommends that a comprehensive information campaign is undertaken to provide awareness to the public who may not be aware of their rights in redundancy situations.		This recommendation does not require legislative change. In 2021, a guidance document to help workers and their representatives navigate the existing legal frameworks was published by the Department. The Department will update this Information Handbook to reflect the changes effected by the Bill following its enactment.
6. The Committee supports the lowering of the bar or test in the consideration of "related companies" as it will provide discretion to the court to have regard to additional factors when making a decision.		This Bill will make section 599 more accessible to creditors by reducing the onus of proof and affording further discretion to the courts.
7. The Committee recommends that employees subject to a collective bargaining agreement and other employees in redundancy situations be given preferential creditor status.		Not addressed in the Bill. Preferential payments are provided for under section 621 of the Companies Act 2014. A preferential creditor is one whose debts are deemed to be more important than the debts of another creditor. While these preferential debts include rates and taxation claims, employees are also considered preferred creditors in terms of wage arrears, outstanding holiday pay, sick pay, pension scheme contributions and statutory redundancy.

Commentary/recommendation as per Committee report	Whether addressed (either in whole or in part) in the Bill	
		Extending the statutory rights to enhanced payments arising from collective agreements would expand the guarantee which would have serious consequences: • It would risk creating two classes of employees – a special class of worker who is made redundant due to insolvency with enhanced legal rights that go beyond those afforded to workers who are made redundant for other reasons. There is little justification to promote one type of redundancy over another. This may also be constitutionally unsound; • It would have a detrimental knock-on effect on other creditors such as SMEs and suppliers who are themselves employers; • It may incentivise employers and employees to agree enhanced collective agreements ahead of insolvency situations in the knowledge that they will be funded from the sale of assets and or State funding via the Social Insurance Fund. It would also create additional financial burden for the State as it guarantees redundancy payments and creates financial risk in that the State would pay-out at a level agreed between two private parties; • As preferential debts also include rates and taxation claims, the State is also a preferential creditor and such a proposal would adversely affect the Exchequer depriving both the taxpayer of monies owed to local authorities, the Department of Social Protection and Revenue. Enhanced redundancies over and above the statutory entitlement are a voluntary matter between employers and employees. Ireland's system of industrial relations is based on a voluntary approach and collective agreements are not binding in law.

Commentary/recommendation as per Committee report	Whether addressed (either in whole or in part) in the Bill	
8. The Committee welcomes the substantial fines under Section 14. The Committee would further recommend that the proposed legislation provides for further supports to employees unfairly dismissed where sections 9, 10 or 14 are contravened.		The Bill makes additional redress available to employees. Employees may complain to the Workplace Relations Commission if they are dismissed prior to the expiry of the 30-day period following notification of a collective redundancy to the Minister. If the complaint is upheld, they may be awarded up to four weeks' remuneration.
9. The Committee welcomes the establishment of the Employment Law Review Group on a statutory footing.		The Employment Law Review Group will be an expert and technical advisory group, and this will be reflected in the membership of the Group, which should include members of the legal and insolvency professions, practitioners, academics, and Ministerial nominees. It is intended that bodies including those representing workers and employers, will be invited to nominate a member for inclusion in the Group. Ministerial nominees will be appointed following a call for expressions of interest. It is intended that this will be open to all interested parties with qualifications and/or professional experience in areas including employment law and/or redundancy and insolvency law. Once the Chairperson and members are appointed an inaugural meeting will be held.

Principal provisions of the Bill

This section of the Bill Digest examines the principal provisions of the Bill, which contains 4 Parts and 27 Sections. A synopsis of each section of the Bill is given in Table 2 above.

Part 1 – Preliminary and General

Part 1 of this Bill deals with preliminary and general matters.

Section 1 provides for the short title of the Bill and proposes that Part 2 of the Bill and the existing Protection of Employment Acts shall be collectively referred to as the *Protection of Employment Acts 1977 to 2023.* Section 1 also includes commencement provisions. It provides that the Bill, if enacted, shall come into operation by way of Ministerial order(s). Furthermore, it clarifies that different provisions may be commenced at different times.

Section 2 is a definitions section and provides that references to "Minister" in the Bill mean the Minister for Enterprise, Trade and Employment.

Part 2 - Amendments to Protection of Employment Act 1977

Part 2 of the Bill concerns proposed amendments to the 1977 Act. The discussion of these proposed amendments below is divided into the following sub-headings:

- definition of "responsible person";
- responsible person's proposed obligations under the Bill;
- mode of delivery for notifications required under the 1977 Act; and
- enforcement provisions.

Definition of "Responsible Person"

Section 4 of the Bill provides for the amendment of section 2 of the 1977 Act to insert a definition of "responsible person" for the purposes of the Act. It provides that the "responsible person", in circumstances where an employer's business is being terminated following the commencement of bankruptcy or winding up proceedings or as a result of a court decision, shall mean: the liquidator, the provisional liquidator, the receiver who has received full responsibility for the management of the business, or any other court-appointed person who has assumed full responsibility for the management of the business.

The provisions of section 4 are similar to those included in Head 3 of the General Scheme, which proposed to amend section 2 of the 1977 Act to insert a definition for the "person responsible for the affairs of the business" following the commencement of bankruptcy or winding up proceedings or as a result of a court decision. This person was defined as: "the person who has assumed full responsibility for the management of the business concerned". An explanatory note to Head 3 indicated that the underlying policy intention was to ensure that the definition would include liquidators and receiver managers, but would exclude:

- examiners, as directors can still retain their functions in relation to management of the company during examinership;[78]
- receivers, where the company directors still retain control of the management of the business, apart from the relevant property/assets managed by the receiver; and
- process advisers under the Small Companies Administrative Rescue Procedure (SCARP), as company directors retain their functions in relation to management during this procedure.[79]

The explanatory note to Head 3 suggests that the reference to the "commencement" of bankruptcy or winding up proceedings in **section 4** is intended to clarify that the obligations of "responsible persons" begin on the date of their appointment.[80]

Responsible person's proposed obligations under the Bill

Section 5 of the Bill provides for the amendment of section 9 of the 1977 Act to require a "responsible person" to initiate consultations with employees' representatives where the responsible person proposes to make redundancies with a view to reaching an agreement.

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[78] Examinership also protects a company from its creditors during the period of examinership.
[79] General Scheme, Explanatory Note for Head 3, p. 6, available here.
[80] Ibid.

Currently, section 9 only explicitly imposes this obligation on employers who are proposing collective redundancies. The responsible person is required to initiate these consultations at the earliest opportunity and, at a minimum, 30 days before the first notice of dismissal is provided. DETE has indicated that this provision is intended to remove any doubt regarding whether the requirement to initiate consultations applies to responsible persons and reflects European case law on this issue, particularly *C-235/10 Claes v Landsbanki Luxembourg SA* (for the full judgment, see here).[81]

Ibec has expressed concerns regarding the imposition of a statutory duty on responsible persons who are considering collective redundancies to commence consultations with employees' representatives. Ibec has inferred that such an obligation could actually prove detrimental to employees:

> "Ibec submits that there is little value to employees of a consultation period in an insolvency situation given that the situation is irretrievable and there is, as such, no prospect of reducing the number of redundancies to be made. Indeed, a situation could result from this proposal, where employees, although not in receipt of wages, would be unable to claim job seekers benefit from the Department of Social Protection on the basis that they are not yet unemployed. Ibec submits that requiring consultation in an insolvency situation, is in fact detrimental to employees' interests."[82]

Section 5 of the Bill also proposes to add a new subsection (4) to section 9 of the 1977 Act permitting a responsible person to continue any consultations with employees already initiated by an employer under section 9. An explanatory note in the General Scheme indicates that this proposed subsection is intended to enable the responsible person to continue an unfinished consultation initiated by the employer as, otherwise, the appointment of the responsible person "would interrupt the consultation period and would necessitate a new 30-day consultation period".[83]

In its submission to the Committee as part of the PLS process, Ibec suggested that the Bill explicitly provide that any consultation period with employees, which has commenced, "must not be interrupted by the appointment of a liquidator or receiver such that it would necessitate a new 30-day consultation period".[84] The Committee included this as a recommendation in its PLS Report.[85] However, DETE declined to implement this recommendation in the Bill on the basis that it would remove a responsible person's discretion to initiate a new consultation with employees' representatives.[86] DETE felt that this could potentially disadvantage employees, for example, by depriving them of a fresh consultation in a situation where circumstances had changed.[87]

Section 6 of the Bill provides for the amendment of section 10 (1) of the 1977 Act to impose a statutory duty on "the responsible person concerned" to supply employees' representatives with all relevant information in relation to the proposed redundancies for the purpose of the consultations

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[81] General Scheme, Explanatory Note for Head 4, p. 7, available here. Head 4 contained similar, albeit not identical, provisions to those currently contained in section 5.
[82] PLS Report, p. 21.
[83] General Scheme, Explanatory Note for Head 4, p. 7, available here.
[84] PLS Report, p. 26.
[85] Ibid., p. 5.
[86] DETE's Responses to the Committee's PLS Recommendations as reflected in the Traffic Light Analysis contained in Table 5 of the Bill Digest above.
[87] Ibid.

with employees' representatives under section 9, including certain information in writing specified in section 10 (2). Section 6 also provides for the amendment of section 10 (3) of the 1977 Act to require the "responsible person" to supply the Minister with copies of the information in writing specified in section 10 (2) as soon as possible.

Section 9 of the Bill provides for a number of amendments to section 12 of the 1977 Act. Section 12 (1) currently requires an employer proposing to create collective redundancies to notify the Minister in writing of their proposals at the earliest opportunity and, in any event, at least 30 days prior to the first dismissal taking effect. Section 12 (2) currently permits the Minister to make Regulations prescribing the particulars to be contained in the written notification to the Minister required under section 12 (1). **Section 9** of the Bill proposes to amend subsection (2) to stipulate that any Regulations made under section 12 (2) expressly require that the written notification include, at a minimum, particulars of: the employer, the proposed collective redundances, the consultations with the employees' representatives, and any other particulars concerning the employer's proposal that the Minister considers appropriate.

Section 12 (4) of the 1977 Act currently provides that, in the case of collective redundancies arising from the employer's business being terminated following bankruptcy or winding up proceedings or for any other reason as a result of a court decision, the person responsible for the affairs of the business need only comply with subsection (1) of section 12 where the Minister makes a specific request. **Section 9** of the Bill, if enacted, would effectively remove this exemption and impose a mandatory obligation on the "responsible person" to notify the Minister. If this section is enacted, all collective redundancies will have to be notified to the Minister, including collective redundancies caused by the bankruptcy or winding up of a business.

The explanatory note to Head 7 of the General Scheme, which contained similar provisions to those included in section 9 of the Bill, indicated that the removal of the exemption was necessary to give effect to a commitment in the Plan of Action.[88] The PLS Report notes that Ibec questioned the merit of this proposed amendment:

> "Ibec also notes that the Directive explicitly permits Member States to provide that in the case of planned collective redundancies arising from termination of activities because of a judicial decision, the employer shall only be obliged to notify the competent public authority if the latter so requests. Ibec does not, therefore, see a positive obligation on all those effecting collective redundancies precipitated by insolvency to notify the Minister as being warranted and believes that the provisions of the Directive as transposed in the 1977 Act are proportionate. Without prejudice and notwithstanding this position, Ibec submits that if this proposal is implemented, it gives further weight to the position that Head 9 should be removed."[89]

Article 3 (1) of Council Directive 98/59/EC of 20 July 1998[90] provides that "Member States may provide that in the case of planned collective redundancies arising from termination of the establishment's activities as a result of a judicial decision, the employer shall be obliged to notify the competent public authority in writing only if the latter so requests".

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[88] General Scheme, Explanatory Note for Head 4, p. 10, available here.
[89] PLS Report, p. 22.
[90] This is the Directive to which Ibec is referring in the cited passage.

Section 11 of the Bill proposes to amend section 14 of the 1977 Act. Currently, section 14 (1) prohibits employers from giving effect to collective redundancies within 30 days of notifying the Minister of their intention to make the proposed redundancies. Section 14 (3) currently provides for an exemption to this requirement in the case of collective redundancies arising from the employer's business being terminated following bankruptcy or winding up proceedings or as a result of a court decision. Section 11 of the Bill proposes to remove this exemption so that the "responsible person" would also be required to ensure that no collective redundancies take effect until at least 30 days have passed since the notification of the Minster.

The explanatory note to Head 9 of the General Scheme, which contained similar provisions to those included in section 11 of the Bill, indicates that the Head's provisions reflect European caselaw on the issue, particularly *C-235/10 Claes v Landsbanki Luxembourg SA* (for the full judgment, see here).[91] The explanatory note also clarifies that the removal of the exemption in section 14 (3) seeks to give effect to a commitment in the Plan of Action.[92] Indeed, page 3 of the Plan of Action states that "[i]t has been decided that this exemption will be removed to ensure that all collective redundancies will be subject to the 30-day notification period."

The PLS Report notes that ICTU and the Committee welcomed the removal of the exemption in section 14.[93] However, ICTU called for a further amendment to section 14 to enhance the protection afforded to employees:

> "The Duffy-Cahill Report recommended that any purported dismissal, where the provisions of Sections 9, 10, or 14 of the 1977 Act were contravened, should be regarded as a legal nullity. That, in effect, means that any dismissal in these circumstances would be of no effect and the employees concerned would continue as employees of their employer, and be entitled to continue being paid their wages, until the consultation provisions were complied with fully. ICTU recommends giving effect to this recommendation would require an amendment to Section 14 of the 1977, by inserting a new subsection providing that a purported dismissal in contravention of the section is void and of no effect."[94]

Ibec also expressed reservations regarding Head 9 of the General Scheme, albeit for different reasons to ICTU. According to the PLS Report, Ibec stated:

> "Ibec noted the authors of the Duffy-Cahill Report suggest that a situation could result from this proposal, where employees, although not in receipt of wages, would be unable to claim job seekers benefit from the Department of Social Protection on the basis that they are not yet unemployed. Ibec respectfully questions whether such a measure is in the interests of staff.
>
> Ibec believes that the result of implementation of Head 9 would be an increased continued cost to the Exchequer of such unpaid wages which would have to be paid from the Social Insurance Fund. Ibec submits that the implementation of Head 9

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[91] General Scheme, Explanatory Note for Head 9, p. 12, available here.
[92] Ibid.
[93] PLS Report, pp. 17-18.
[94] Ibid., p. 17.

> would not be in the interests of employees. In the first instance, any imposed implementation could give rise to employees having an expectation that agreement may be reached on those matters set out in Head 9(2), when that simply cannot be the case in an insolvency."[95]

Ibec also inferred that the requirement to inform the Minister of proposed redundancies in an insolvency situation would be a sufficient safeguard for employees without also requiring that the employees be maintained in employment for 30 days following the notification:

> "Informing the Minister of proposed collective redundancies, even in an insolvency, enables the Minister to ensure that employees receive an appropriate level of information regarding the collective redundancy without requiring the company to keep employees in employment for 30 days where there is no work to be done and no chance of reducing the number of redundancies which will result."[96]

As both ICTU and Ibec refer to the Duffy-Cahill Report to support their respective positions, it may be beneficial to recall some of the relevant passages in the Duffy-Cahill Report concerning this issue:

> **"14. Proposal 1 - Remove the insolvency exception from the prohibition on implementing collective redundancies during the consultation period**
>
> 14.1. A central complaint articulated by the Unions representing the former Clerys' employees related to the peremptory manner of their dismissal. This objection could be addressed by deleting the statutory exemption at section 14(4) of the Protection of Employment Act from the prohibition against the giving effect to collective redundancies until the expiry of 30 days after the notification to the Minister in circumstances of insolvency….
>
> …14.3. Further, there is no reason in principle why the Act could not be amended so as to expressly provide that, in addition to the other remedies and sanctions that are available where the Act is contravened, a dismissal in contravention of section 14(1) would be treated as a legal nullity. A provision to similar effect is contained at section 23 of the Maternity Protection Act 1994 where a purported dismissal of a woman while on leave to which she is entitled under that Act is rendered void *ab initio*.
>
> 14.4. A provision which prohibited dismissal until the expiry of the mandatory period would need to be supported by effective sanction where the provision is contravened. This could include both criminal sanctions and effective civil redress. In respect to the latter, the current maximum compensation that can be awarded to an aggrieved employee (four weeks' pay) may not constitute an effective remedy having deterrent effect…

[95] Ibid., p. 22.
[96] Ibid., pp. 22-23.

> …14.5. It might also be necessary to provide that the consultation / notification period required could not run concurrently with the notice period that applies under the Minimum Notice and Terms of Employment Acts 1973 to 2005, so as, in effect, notice of dismissal could not be given until the end of the statutory consultation / notification period.
>
> 14.6. Such a provision, if made, would not have the effect of requiring an insolvent business to continue trading during the 30 day period….
>
> …14.7. Rather, its net effect would be to give employees an entitlement to payment of their normal wages and an opportunity to consult with their employer while still in employment during the consultation period. In cases where the employer is unable to pay the wages the payments would ultimately be made out of the Social Insurance Fund. That may not be considered a desirable outcome unless the amounts paid out of the Fund could be recovered from another undertaking (as considered in Proposal 4, below). There is a policy question involved in this assessment on which we do not express a view…
>
> …14.9. Presumably, the exemption in cases of insolvency from the normal requirement to retain employees in employment for the mandatory period was intended to recognise the practical difficulties that would otherwise ensue where a liquidator does not have funds from which to pay wages during the statutory period. This could operate to the disadvantage of employees who might not be entitled to claim job seekers benefits from the Department of Social Protection because they have not been technically unemployed. While unpaid wages could eventually be recovered from the Social Insurance Fund, in the interim, workers could be left without an income.
>
> 14.10. These are questions that require further consideration and may require some modifications in the social welfare code but are not within the scope of the Terms of Reference for this examination."[97]

Mode of Delivery for Notifications required under the 1977 Act

Section 12 of the Bill provides for the amendment of section 20 of the 1977 Act regarding the means of delivering any notifications required under the 1977 Act. Section 20 currently provides that: "Any notice or other document which is required or authorised by this Act to be given by an employer to the Minister shall be in writing and shall be sent by registered post addressed to the head office of the Department of Labour or, where that is not practicable, shall be delivered to that office."

Section 12 proposes to substitute "shall be sent by electronic means or by registered post" for "shall be sent by registered post" in section 20. The combined effect of **section 12** of the Bill, when

[97] The Duffy-Cahill Report (April 2016), pp. 32-34.

read in conjunction with **section 9** of the Bill, is to permit both employers and responsible persons to submit relevant notices and documents to the Minister by electronic means.[98]

During the Committee's meeting with officials from DETE on 31 May 2023, a DETE official explained how the change could help to precisely calculate the 30-day period for the purposes of section 14 of the 1977 Act, which is "30 days from when the ministerial notification is received in their offices".[99] The Committee was informed that currently, the notification:

> "is received by quite old-fashioned methods, generally by registered post or hand delivered. Under these new proposals the Department will also be accepting by electronic means. The Department will get it on the day and so, as a rule, the Department will know exactly when it comes in."[100]

Head 10 of the General Scheme contained a similar provision, which sought to amend section 20 "by authorising the Minister to prescribe that notices or documents given to the Minister under this Act may be served by electronic means".[101] The accompanying explanatory note for Head 10 clarified that the proposed amendment in Head 10 "is a technical amendment, which will modernise the methods by which notices and documents can be given to the Minister".[102] The explanatory note stated that it was preferable to allow the Minister to prescribe the electronic means by which the relevant notices or documents may be provided, "as this will provide for greater flexibility to update the means to reflect modern communication practices now and into the future".[103] It indicates that this position "reflects the Digital by Default core principle outlined in *Connecting Government 2030: A Digital and ICT Strategy for Ireland's Public Service".*[104] The explanatory note also clarifies that Head 10 was "adapted from section 58 of the Employment Permits Bill 2022."[105]

In order to ensure legal certainty, it may be desirable for the Bill to clarify what is meant by "electronic means" for the purposes of section 20, for example, by providing for the amendment of section 2 of the 1977 Act to insert a definition of "electronic means". By way of example, section 2 of the 2014 Act includes a definition of "electronic means" for the purposes of the Act. Alternatively, an approach akin to that proposed under Head 10 of the General Scheme could be used, whereby the Minister is authorised to prescribe the electronic means by which the relevant notices or documents may be provided.

Enforcement Provisions

Section 7 provides for the amendment of section 11 of the 1977 Act to provide that a responsible person who fails to initiate consultations with employees' representatives, as required under

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[98] Section 9 of the Bill proposes to amend *section 12 (4)* of the 1977 Act to require the "responsible person" to comply with the employer's obligation to notify the Minister under *section 12* in situations where the collective redundancies arise from the employer's business being terminated following the commencement of bankruptcy or winding up proceedings or for any other reason as a result of a court decision.

[99] Ms Dara Breathnach, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).

[100] Ibid.

[101] General Scheme, Explanatory Note for Head 10, p. 13, available here.

[102] Ibid.

[103] Ibid.

[104] Ibid

[105] Ibid.

section 9 of the 1977 Act, or who fails to provide the information required under section 10 of the 1977 Act, shall be guilty of an offence punishable on summary conviction by a class A fine (a fine of up to €5,000). These enforcement provisions already apply to employers who fail to discharge their obligations under sections 9 of 10 of the 1977 Act. In accordance with section 37 of the *Workplace Relations Act 2015,* the WRC is the statutory body responsible for bringing and prosecuting summary offences under section 11 of the 1977 Act.

An explanatory note to Head 5 of the General Scheme, which contained similar provisions to section 7, states that the "effect of this proposal, should this prosecution be successful, is that the liquidator or receiver would be liable to pay any fines issued".[106] The explanatory note indicates that this provision was included in recognition of the new obligations imposed on responsible persons under the Bill and suggests that it "is required to ensure there is a proportionate measure to ensure compliance with these obligations".[107] The explanatory note advised that DETE's consultations with insolvency practitioners' representative groups suggest that liquidators and similar appointees in situations of insolvency are well experienced in managing their obligations and accordingly, a high level of compliance with the proposed provisions is to be expected.[108] The explanatory note suggested that the risk of prosecution under the section should provide a sufficient deterrent for liquidators and similar appointees against breaching their obligations under the proposed new legislation.[109]

Section 7 of the Bill provides for a defence where a responsible person can show that, having exercised all reasonable professional care and skill, they had reasonable grounds for believing that the employer complied with their obligations under sections 9 or 10 of the 1977 Act. Head 5 of the General Scheme contained a similar defence.[110] Correspondence received from DETE officials indicates that the grounds for the defence are adapted from section 286 (8) and section 484 (3) the 2014 Act.[111] Section 286 (8) provides for a defence for a company director accused of failing to take all reasonable steps to secure compliance by a company with its obligations to maintain adequate company accounts in accordance with the requirements of section 281-285 of the *Companies Act 2014*. Section 286 (8) stipulates that it shall a defence to prove:

> "(a) that the defendant had reasonable grounds for believing and did believe that a competent and reliable person was—
>
> (i) charged with the duty of undertaking that those requirements were complied with, and
>
> (ii) in a position to discharge that duty,
>
> and

[106] General Scheme, Explanatory Note for Head 5, p. 8, available here.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid. Section 286 of the 2014 Act concerns offences relating to the failure by a company to maintain accounting records, as required under sections 281-285 of the 2014 Act. Section 484 of the 2014 Act concerns criminal liability for untrue statements in merger documents.
[111] The explanatory note to Head 5 of the General Scheme indicates that the grounds for this defence are adapted from section 286 (6) and section 484 (13) of the 2014 Act. However, correspondence received by the L&RS from officials in DETE on 9 November 2023 clarified that the reference to these provisions was a typo and that the intention was to refer to sections 286 (8) and 484 (3) of the 2014 Act respectively.

> (b) that the discharge of that duty by such competent and reliable person was monitored by the defendant, by means of reasonable methods properly used."

Section 484 (3) provides for a defence in criminal proceedings against certain persons (for example, directors) in respect of an offence under the section relating to the inclusion of untrue statements in merger documentation. Subsection (3) provides that "it shall be a defence to prove that, having exercised all reasonable care and skill, the defendant had reasonable grounds for believing and did, up to the time of the issue of the document concerned, believe that the statement concerned was true."

Section 8 of the Bill provides for the amendment of section 11A of the 1977 Act to permit employees to submit complaints to the WRC pursuant to section 41 of the *Workplace Relations Act 2015, as amended*, in relation to an employer's alleged contravention of their obligation under section 14 (1) of the 1977 Act not to give effect to collective redundancies within 30 days of notifying the Minister. Employees are already permitted to submit a complaint to the WRC regarding an alleged contravention by their employer of the employer's obligation to consult with employees' representatives (section 9) and provide certain relevant information (section 10).

Section 11A provides that if the complaint is well founded, the WRC adjudication officer may require the employer to:

- comply with the provisions of the impugned section; and/or
- pay such compensation to the employee as is just and equitable in the circumstances, subject to a maximum of four weeks' remuneration.

An explanatory note to Head 6 of the General Scheme, which contained similar provisions to section 8 of the Bill indicates that it is intended that the provision will apply to all collective redundancies, not just those arising from the employer's insolvency. The explanatory note explains the rationale underlying the provision:

> "This amendment aims to promote additional compliance amongst employers by providing for an additional sanction where an employer effects collective redundancies prior to the expiry of the 30-day notification period to the Minister. This is in addition to the existing sanction of a fine not exceeding €250,000 under section 14(2).
>
> Redress of up to 4 weeks' remuneration for breaches of this obligation is considered proportionate, matching the redress available for breaches of section 9 or 10. This reflects the position set out in Appendix 1 of the *Plan of Action on Collective Redundancies following Insolvency*.
>
> Where an employer fails to comply with all three sections, an employee is entitled to make a complaint under each section of the Act. Therefore, should their claim be successful, an adjudication officer could potentially award them up compensation to 12 weeks' remuneration (four weeks for each breach). Any amount awarded must be deemed to be just and equitable by the adjudication officer.

> It should also be noted that employees who feel the redundancy situation is not genuine may also bring a separate complaint under the Unfair Dismissals Acts. The redress available under those Acts is up to two years' remuneration."[112]

The PLS Report noted Ibec's opposition to the provisions proposed under Head 6:

> "Although Ibec notes that the 1977 Act does not provide an individual right of redress for an employee where they are dismissed before the expiry of the 30-day notice period, this cannot be looked at in isolation of the severe punitive measures that already exist for employers that do dismiss within that period, and the other avenues of redress available to employees including those pursuant to the 1977 Act. Ibec submits that it would be disproportionate to impose further sanctions on those employers, particularly where those employers are already facing financial difficulty."[113]

In contrast, the PLS Report notes that ICTU "strongly advocate that the proposed legislation should adopt all the relevant recommendations of the Duffy-Cahill Report".[114] The Report proceeds to state:

> "The Duffy-Cahill Report recommended that the quantum of compensation that can be awarded to an employee where sections 9 and 10 of the Protection of Employment Act 1977 are contravened be increased from an amount equivalent to 4 weeks' pay to an amount equivalent to 2 years pay. This proposal was intended to bring the redress provisions of the 1977 Act into line with those in the generality of employment enactments. Moreover, it is a general principle of European Law that sanctions available for a contravention of a right derived from Union law should be "effective, proportionate and dissuasive of future infractions." An award of 4 weeks' pay for a failure to consult in the case of proposed collective redundancies could not be regarded as effective, proportionate and dissuasive in every case, no matter how serious the actual or potential consequences for the employees concerned. ICTU recommends this would require an amendment to Head 6 of the proposed Bill."[115]

The relevant passage from the Duffy-Cahill Report is set out below:

> "**16. Proposal 3. –Redress for a failure to notify and consult**
>
> 16.1. Article 6 of the European Communities (Protection of Employment) Regulations 2000, S.I 488/2000 makes provision for the bringing of complaints before an Adjudication Officer of the WRC that an employer has contravened sections 9 or 10 of the Protection of Employment Acts. The maximum compensation that can be provided under the Regulations is set at the equivalent of four weeks' pay. There is no provision in the Regulations for civil redress where collective redundancies are given effect before the expiration of

[112] General Scheme, Explanatory Note for Head 6, p. 9, available here.
[113] PLS Report, pp. 26-27.
[114] Ibid., p. 16.
[115] Ibid.

> the 30 notification period to the Minister in contravention of section 14(1) of the Act.
>
> 16.2. A contravention of sections 9.10 and 14(1) of the Protection of Employment Acts can have consequences of varying degrees of gravity for the employees concerned. The purpose of consultation is set out at section 9(2) of the Act and includes the possibility of avoiding some or all of the redundancies and of mitigating their consequences. That can include such matters as offering redeployment, retraining or financial compensation. Where an employer fails to respect its statutory duty to engage in the process of consultation required by the Act employees are deprived of the opportunity to pursue all or any of these possibilities and to put forward their own proposals as to how they might be achieved.
>
> 16.3. Against that background an award of the amount currently allowed for may not provide adequate redress where the rights of employees are not respected, nor can it have a sufficient deterrent effect in all cases. The monetary jurisdiction of an Adjudication Officer and the Labour Court on appeal, under most employment rights enactments is limited to an award of up two years pay. Consideration should be given to bringing the amount that can be awarded for a relevant contravention of the Protection of Employment Act up to that amount. Further, a complaint concerning a contravention of section 14(1) of the Protection of Employment Act should be brought within the ambit of Article 6 of the European Communities (Protection of Employment) Regulations 2000."[116]

Section 10 of the Bill provides for the amendment of section 13 of the 1977 Act to provide that a responsible person who fails to discharge their obligations to notify the Minister of proposed collective redundancies, as required under section 12 (4), shall be guilty of an offence punishable on summary conviction by a class A fine (a fine of up to €5,000). In accordance with section 37 of the *Workplace Relations Act 2015,* the WRC is the statutory body responsible for bringing and prosecuting summary offences under section 13 of the 1977 Act.

Section 10 of the Bill provides that it shall be a defence for the responsible person to show that, having exercised all reasonable professional care and skill, they had reasonable grounds for believing that the employer had complied with their obligations under section 12. Head 8 of the General Scheme provided for a similar offence and corresponding defence.[117] The explanatory note for Head 8 indicates that this provision was included in recognition of the new obligations imposed on responsible persons under the Bill and suggests that it "is required to ensure there is a proportionate measure to ensure compliance with these obligations".[118] Furthermore, correspondence received from DETE officials indicates that the grounds for the defence proposed

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[116] The Duffy-Cahill Report (April 2016), pp. 36-37.
[117] General Scheme, Explanatory Note for Head 8, p. 11, available here.
[118] Ibid.

in section 10 are also adapted from section 286 (8) and section 484 (3) of the 2014 Act (explained above).[119] In the PLS Report, it was noted that Ibec welcomed the inclusion of this defence.[120]

Fines

Section 11 of the Bill proposes to amend subsection (1) of section 14 of the 1977 Act and delete subsection (3), as discussed above. Section 11 does not propose to amend section 14 (2) of the 1977 Act, which currently stipulates that "where collective redundancies are effected by an employer before the expiry of the 30-day period mentioned in subsection (1) the employer shall be guilty of an offence and shall be liable on conviction on indictment to a fine not exceeding €250,000."

It appears therefore that the intention is not to create a new offence punishable upon conviction on indictment by a €250,000 fine in circumstances where a "responsible person", as opposed to an employer, gives effect to collective redundancies within 30 days of having notified the Minister, in contravention of their obligation under section 14 (1). During the Committee's meeting with DETE officials on 31 May 2023, a DETE official in attendance provided clarification that the €250,000 fine:

> "relates to very specific types of situations where people were made redundant and were essentially displaced by cheaper labour from elsewhere. That is not appropriate for a liquidator simply because he or she is not going to be displacing the existing workers in favour of others. That is intended as a punitive measure and is not appropriate in the circumstances of a liquidation."[121]

As discussed above, the Bill proposes to impose a fine of up to €5,000 on responsible persons found guilty of the proposed offences of failing to: (i) consult with employees' representative organisations as required under section 9 of the 1977 Act; (ii) provide relevant information, as required under section 10; and (iii) notify the Minister of proposed redundancies, as required under section 12 (4).

During the PLS process, ICTU submitted that the proposed fine of up to €5,000, in respect of the offence of failing to notify the Minister of proposed collective redundancies as required under section 12 (4), is inadequate.[122] ICTU called for provision to be made in the Bill for the prosecution of this contravention as an indictable offence punishable by a fine of up to €250,000.[123] In contrast, Ibec stated that the proposed fine was proportionate and argued that "any increase would risk depriving creditors, including the employees themselves, of the benefit of assets of the company".[124]

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[119] The explanatory note to Head 8 of the General Scheme indicates that the grounds for this defence are adapted from section 286 (6) and section 484 (13) of the 2014 Act. However, correspondence received by the L&RS from officials in DETE on 9 November 2023 clarified that the reference to these provisions was a typo and that the intention was to refer to sections 286 (8) and 484 (3) of the 2014 Act respectively.

[120] PLS Report, p. 36.

[121] Ms Dara Breathnach, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).

[122] PLS Report, p. 35.

[123] Ibid.

[124] Ibid.

During the Committee's meeting with DETE officials on 31 May 2023, the Committee suggested that some of the proposed fines under the General Scheme were small and would not be dissuasive.[125] In response, a DETE official in attendance stated:

> "We examined the fines. The fines we are looking at here are the fines that we would apply to a liquidator and equivalent receivers. Those are relatively small, as the Deputy has observed but that is really so that we are not displacing the assets of the business and thereby depriving the various creditors of those assets, including the actual employees themselves".[126]

The reference to the displacement of the assets of the business suggests that the fine would be payable from the assets of the company concerned. The legal basis for this proposition is unclear from the surrounding discussion that took place during the Committee's meeting with DETE officials on 31 May 2023. Under section 627 of the 2014 Act, a liquidator is afforded the power to bring and defend any action or other legal proceeding in the name of, and on behalf of, the company. In *Revenue Commissioners v Fitzpatrick in his capacity as liquidator of Ballyrider Ltd (in liquidation)*, Justice McKechnie outlined principles that should apply in relation to applications for costs against a liquidator ('the Ballyrider Principles").[127] These principles stipulate, amongst other things, that:

(1) where legal proceedings are initiated or defended by the liquidator in the name of, and on behalf of, the company, the liquidator will not be personally liable in respect of any cost order made in favour of an adverse litigant; rather, any such order is against the company; and
(2) where a liquidator brings proceedings in his own name and is acting for and on behalf of the company, the liquidator will ordinarily be entitled to have recourse to the assets of the company to pay any adverse costs, UNLESS the liquidator has committed acts or omissions amounting to misconduct, for example, misfeasance, bad faith, negligence, personal unfitness for office and dishonesty.[128]

As noted above, the Ballyrider Principles concern situations where adverse costs have arisen as a result of legal proceedings initiated or defended by the liquidator. However, this is a different situation to that, which would arise should a "responsible person" be found guilty of an offence under the Bill, if enacted, for failing to adhere to their obligations under sections 9, 10 or 12 (4) of the 1977 Act, as amended by the Bill. In the interests of legal certainty, it would appear desirable to obtain more clarity regarding the legal basis for the suggestion that any fines imposed on "responsible persons" under the Bill would be recoverable from assets of the business concerned.

Part 3 – Establishment of Employment Law Review Group

Part 3 of the Bill relates to the establishment of the Employment Law Review Group (ELRG/the "Review Group"). It is intended that the ELRG will adopt the same "model" as the Company Law Review Group (CLRG), which was discussed in an earlier section of this Digest.[129]

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[125] Ibid.
[126] Ms Dara Breathnach, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).
[127] (Unreported, Supreme Court, 31 July 2019), para. 88.
[128] Ibid; and see also: James Morrin, 'Managing the Risks of Liquidators' Personal Liability' (Mason, Hayes and Curran, 13 September 2023) available here.
[129] DETE, Plan of Action on Collective Redundancies following Insolvency (May 2021), p. 7.

Section 14 of the Bill outlines the proposed functions of the ELRG. Under this section, the ELRG "shall monitor, review and advise the Minister in accordance with the programme of work determined by the Minister under section 16(1) on matters concerning—

(a) the implementation, amendment and consolidation of employment enactments,
(b) legislative proposals and the introduction of new legislation relating to the employment of persons and redundancy practices in the State,
(c) the Rules of the Superior Courts and judgments of courts which relate to the operation of employment enactments,
(d) the State's membership of the European Union in so far as it is relevant to the operation of employment enactments,
(e) international developments in employment and redundancy law in so far as they represent best practice and may provide a model for developments in the State,
(f) emerging trends in the workplace or changes to the way employment and redundancy matters operate, and
(g) other related matters."

Under **section 14 (2)** of the Bill, the ELRG has a role in promoting "the modernisation and efficacy of legislation relating to the employment of persons and redundancy practices" as part of its function in advising the Minister. During PLS of the General Scheme, a representative from the Department stated that the ELRG will be "a significantly valuable resource to the Department, allowing for an ongoing assessment of employment and redundancy law to ensure it is fit for purpose".[130]

Section 15 of the Bill relates to the membership of the ELRG. This section provides the Minister with an element of discretion regarding the membership of the Review Group, including the power to determine the size of the group and the power to appoint the Group's members and Chairperson. The membership of the ELRG was discussed as part of the PLS of the General Scheme, with questions raised regarding the "balance" that will be sought within the membership of the group. In response, a representative from the Department noted the following:

> "We are establishing the ELRG here in statute and it is intended that there will be a piece around a decision required by the Minister in terms of the operational establishment later on. I can say that it is intended to seek nominations from representative organisations. The intention is that the membership of the ELRG will comprise people [with] professional, technical, and legal expertise and skills to contribute to the development of employment, redundancy and insolvency law. It is intended that there will be worker and employer representation, along with representation from academia, the Law Society and practitioners from entities such as the Labour Court."[131]

Section 16 of the Bill provides that the work programme of the ELRG shall be determined by the Minister "at least once in every 2 years, after consultation with the Review Group". This work programme can be amended by the Minister and the ELRG shall hold meetings in order to ensure that it performs its function and achieves its work programme. This section also provides that,

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[130] Ms Fiona O'Dea, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).
[131] Ms Áine Maher, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).

should the Chairperson be absent from any meeting, the ELRG members may elect a person from amongst the members present to chair the meeting. Section 16 also authorises any ELRG member, other than the Chairperson, to nominate a deputy to attend a meeting in their place should they be unable to attend a meeting. The establishment of a work programme every two years appears to model the biennial approach taken to the work programme of the CLRG, which is currently determined by the Minister for Enterprise, Trade and Employment.[132]

Part 4 – Amendments to the Companies Act 2014

Part 4 of the Bill relates to the amendment to the *Companies Act 2014*. An overview of the relevant provisions of the 2014 Act that this Part proposes to amend is provided above in the section of the Bill Digest entitled 'Relevant legislation in the area of Company Law'. The discussion of these proposed amendments below is divided into the following sub-headings:

- the provision of information to employees as creditors,
- the power of the court to order a related company to contribute to the debts of the company being wound up,
- the transfer of assets of a company being wound up, and
- civil liability for fraudulent or reckless trading.

The provision of information to employees as creditors

Section 20 of the Bill provides for the amendment of section 571 of the 2014 Act, which relates to the application by petition to the court for a company to be wound up. Section 20 of the Bill amends this section to provide that when a petition from a company is presented to the court, the directors of the company shall notify the employees and, where applicable, an employees' representative of the petition "at the time that petition is presented or as soon as reasonably practicable after such presentation".

ICTU, in their Minority Report appended to the CLRG's March 2021 Report (the "Minority Report"), recommended that section 571 of the 2014 Act be amended to require the court to not hear a winding up petition unless notice is provided to "employee creditors".[133] In the March 2021 Report of the CLRG, it was noted that ICTU had received "reports from trade unions that employees are not put on notice of the intention of the company to petition the court".[134] The recommendation of ICTU to amend section 571 was included by the Department in their Plan of Action and was included in Head 16 of the General Scheme.[135] In their PLS Report, the Committee recommended that this obligation be expanded to "include the compulsory notification to Trade Union members

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[132] Section 961 of the 2014 Act provides that "the programme of work to be undertaken by the [Company Law] Review Group over the ensuing specified period" shall be determined by the Minister at "least once in every 2 years". For further information on the current CLRG work programme, see CLRG Work Programme (2022-2024).

[133] The Minority Report by the ICTU can be found in Appendix 5 of the Company Law Review Group, 'Report of the Company Law Review Group: Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees' (March 2021) available here [hereinafter "ICTU Minority Report"].

[134] Company Law Review Group, 'Report of the Company Law Review Group: Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees' (March 2021) available here, p.20

[135] General Scheme, Head 16, p. 19, available here.

and all other employees".[136] This recommendation appears to be reflected in the requirement included in **section 20** of the Bill to inform all employees of the company and, where applicable, an employees' representative. In the interests of legal clarity, it may be beneficial to clarify what is meant by "an employees' representative" for the purposes of the section. As noted previously, a definition of employees' representatives, in relation to employees who are affected, or are likely to be affected, by proposed collective redundancies, is included in section 2 of the 1977 Act. In the interests of legal clarity, it may also be beneficial to clarify in the Bill what exactly is meant by "where applicable" for the purposes of section 20. This may refer to a situation whereby an employees' representative exists; however, the Bill may benefit from clarity in this regard.

Linked to this provision, **section 21** of the Bill proposes to amend section 572 of the 2014 Act to provide that, in hearing a winding up petition for a company, the court, "[i]n deciding whether it is just and equitable to make an order under this section", shall consider whether the requirements to notify the company's employees and, where applicable, an employees' representative, of the petition (as inserted into the 2014 Act by section 20 of the Bill) "have been met".

Section 22 of the Bill provides for the amendment of section 573 of the 2014 Act, which relates to the appointment of a provisional liquidator by the court. In their Minority Report, ICTU expressed concerns that section 573 does not include an obligation for the employees to be notified of the appointment of a provisional liquidator.[137] In their March 2021 Report, the CLRG were not "not in favour of restricting the court's ability to hear an application for the appointment of a provisional liquidator" by requiring notice to be provided, as it stated that the "the imposition of additional notice requirements would restrict the ability of the petitioner and the court to act urgently to protect the position of all creditors".[138] The Department's Plan of Action had regard to ICTU's Minority Report and the CLRG's March 2021 Report. It recommended a legislative amendment to:

> "[e]nable 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".[139]

This proposal was included in Head 17 of the General Scheme. During PLS, a representative from the Department noted that the proposed amendment would:

> "…also ensure that the provisional liquidator appointed in an emergency situation to secure the assets would meet the workers as creditors at the earliest opportunity, because there is a recognition that this is a difficult situation and the workers as creditors should be engaged in the process as quickly as possible, allowing that the provisional liquidator is appointed to deal with an emergency situation".[140]

Head 17 of the General Scheme provided that the provisional liquidator would have an obligation to inform employees of:

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[136] PLS Report, p.27.
[137] ICTU Minority Report, p. 72-73.
[138] Company Law Review Group, 'Report of the Company Law Review Group: Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees' (2021) available here, pp. 21-22.
[139] Plan of Action, p. 6 and Appendix 2.
[140] Ms Fiona O'Dea, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).

- their appointment,
- the process under Part 11 of the 2014 Act for winding up a company,
- the fact that employees can supply him/her with relevant information, and
- any other matters that he/she considers relevant.[141]

This provision has been included in a similar manner in the Bill, although the obligation imposed on the provisional liquidator under section 22 requires him/her to inform the employees and, where applicable, the employees' representative, whom in turn may provide the provisional liquidator with relevant information. As above, in the interests of legal clarity, it may be beneficial to include a definition of "an employees' representative" and a clarification of what is meant by "where applicable" for the purposes of the section.

Section 23 of the Bill provides for the amendment of section 594 of the 2014 Act, which relates to the provision of a statement of affairs for the company, as required under section 593, where a court has "made a winding-up order or appointed a provisional liquidator in relation to a company". As noted earlier in this Digest, there is currently no legislative requirement for the liquidator to notify employees that a statement of affairs has been served upon them under section 594. Under section 594 (9), an employee as a creditor is, after paying a prescribed fee, "entitled personally, or by his or her agent—(a) to inspect, at all reasonable times, the statement registered in pursuance of *section 593*, and (b) to be furnished with a copy of, or an extract from, it".

In Appendix 2 of the Plan of Action, the Department noted:

> "…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.
>
> 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".

In the Explanatory Note for Head 18 of the General Scheme, it was noted that the Plan of Action "commits to providing for ease of access by employees as creditors to this Statement".[142] Head 18 stated that the liquidator or provisional liquidator "shall notify employees of the company concerned that he or she has been served a copy of the statement not later than the expiry of 8 working days after the date the copy is served on the liquidator (or provisional liquidator as the case may be)". Under this provision, an employee can request a copy of the statement of affairs from the liquidator and this would be a distinct process to the procedure outlined in section 594 (9), as discussed above, which permits creditors to receive a copy of the statement upon payment of a fee to the courts.

Section 23 of the Bill is similar in substance to Head 18, although it requires notice to be served to employees and, an employees' representative, where applicable, by the liquidator or provisional liquidator "not later than the expiry of 7 days after the date the copy is served on the liquidator (or the provisional liquidator, as the case may be) …". Section 23 also specifies that if an employee or an employees' representative requests a copy of the statement of affairs, this request should be

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[141] General Scheme, Head 17, p. 20, available here.
[142] General Scheme, Explanatory Note for Head 18, pp. 21-22, available here.

met no later than 7 days following the request. As above, in the interests of legal clarity, it may be beneficial to include a definition of "an employees' representative" and a clarification of what is meant by "where applicable" for the purposes of the section.

The power of the court to order a related company to contribute to the debts of the company being wound up

Section 24 of the Bill provides for the amendment of section 599 of the 2014 Act, which relates to the contribution of a related company to the debts of a company that is being wound up. Under section 599, the court, on the application of the liquidator or any creditor or contributory, may order that a related company pay the liquidator an amount equivalent to the whole or part of all or any of the company's provable debts if the court "is satisfied that it is just and equitable to so do". Section 599 (4) sets out a number of matters that the court shall consider when deciding if it is "just and equitable" to make such an order, including, for example, "the extent to which the related company took part in the management of the company being wound up". Furthermore, section 599 (5) provides for an "attribution test", such that the court shall not make an order under section 599 "unless the court is satisfied that the circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company".

According to the Explanatory Memorandum for the Bill, **section 24** proposes to amend section 599 (4) and section 599 (5) of the 2014 Act to "modify the attribution test" so that it is "less restrictive" on the court. Accordingly, section 24 proposes to delete subsection (5) of section 599 and amend subsection (4) to permit the court to also have regard to "the extent to which the circumstances that gave rise to the winding up are attributable to the acts or omissions of the related company" and "any other factor it considers fit in exercising its discretion to make a contribution order".

This proposed amendment was influenced by the December 2021 Report of the CLRG, entitled 'Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, including Splitting of Corporate Operations from Asset Holding Entities in Group Structures,' which recommended:

> "…that the attribution test contained in section 599(5) be modified by the insertion of s. 599(4)(d) to provide for a less restrictive provision stating that the court can have regard to the extent to which circumstances that gave rise to the winding up are attributable to the acts or omissions of the related company".[143]

During PLS, the Department clarified the basis for this amendment:

> "This section is modelled on a New Zealand provision. When it was introduced under the Companies Act 2014, it was a less liberal provision than the New Zealand model it is based on. These amendments will make it a less restrictive provision. It will align more with the New Zealand provision. This is something ICTU sought. It will be no longer mandatory for the court to be satisfied that circumstances of the winding up were attributable to the company's action. It can have regard to the extent of the circumstances that gave rise to

[143] Company Law Review Group, 'Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, including Splitting of Corporate Operations from Asset Holding Entities in Group Structures' (2021) available here, pp. 19-22.

> the liquidation and how it was attributable to the actions of the related company. In addition, it can have greater discretion to have regard to any other factor…."[144]

This amendment was explored in the Committee in their PLS Report. It was noted that the Committee had "raised a concern that this [amendment] would not provide help to employees if they do not have preferential creditor status in these situations".[145] In this respect, the Department noted during PLS that "workers are already preferential creditors".[146] A representative from the Department further stated that the amendment of employee status could impact the resources available for other creditors and could create "a special class of redundant worker when they are insolvent" who could have "legal rights that go beyond those of workers made redundant generally".[147] In their recommendation, the Committee supported the amendment of section 599. However, they recommended that "employees subject to a collective bargaining agreement and other employees in redundancy situations be given preferential creditor status". As noted in Table 5 above, this recommendation was not included in the Bill.[148]

The transfer of assets of a company being wound up

Section 25 of the Bill provides for an amendment of section 604 of the 2014 Act, which relates to the creation of an "unfair preference" through the transfer by a company of its assets when it is "on the verge of being wound up".[149] Section 604 prohibits a company that is unable to pay its debts as they become due from transferring assets to a creditor of the company (or a person acting on trust for a creditor) within the 6-month period immediately preceding the commencement of the winding up of the company, or within the 2-year period immediately preceding the commencement of the winding-up where the recipient is a connected person, where the transfer is made with a view to affording the creditor in question a preference over the company's other creditors.[150] Section 25 of the Bill proposes to permit the court to extend these time periods "where it is satisfied that it would be just and equitable to do so based on the circumstances surrounding the transaction".[151] During PLS, a representative from the Department stated the following regarding the proposed amendment of this provision:

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[144] Ms Fiona O'Dea, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).
[145] PLS Report, pp. 30-32.
[146] Ms Fiona O'Dea, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).
[147] Ibid; Mr Peter O'Brien Hogan, Assistant Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).
[148] PLS Report, pp. 30-32.
[149] Ibid., p. 33.
[150] *Companies Act 2014* (as amended), section 604(2) and (4).
[151] Explanatory Memorandum to the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023, p.4.

> "What we are putting forward in this proposal is that the court be given greater discretion to extend those periods where it is justifiable and equitable to do so. This was in response to a request from ICTU that those periods be extended out".[152]

Section 26 provides for the amendment of section 608 of the 2014 Act, which relates to the power of the court to order a person to return company property or the proceeds of the property that was transferred to them where the "effect of such disposal was to perpetrate a fraud on the company, its creditors or members". Per the explanatory memorandum, the change in wording proposed in section 26 is intended to: "ensure that payments made in the ordinary course of business are not captured by the provision".[153] This amendment was recommended in the December 2021 Report of the CLRG, entitled 'Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, including Splitting of Corporate Operations from Asset Holding Entities in Group Structures'. This report noted:

> "In considering the case law to date the Committee took the view that the only lack of clarity is whether the provision requires something more than a late payment to a particular creditor. Specifically in the context of this Report the question would be whether payments to companies within a group would be exempt from this provision if these were simply payments of outstanding debts, albeit where the payments were made to related companies.
>
> The Committee considered that the provision could be amended to state that "payments made in the ordinary course of business" are exempt from the provision. The Committee took the view that payments to employees in the ordinary course of business could be specifically mentioned in this exemption from the operation of the provision".[154]

Civil liability for fraudulent or reckless trading

Section 27 of the Bill provides for the amendment of section 610 of the 2014 Act, which relates to "[c]ivil liability for fraudulent or reckless trading" of a company that is subsequently wound up. According to the explanatory memorandum for the Bill, this section:

> "…provides for an amendment to section 610 of the 2014 Act to make the test for reckless trading an objective one in subsection (1); give discretion to the courts to consider the facts of a particular case in subsection (3); and provide that the relief in subsection (8) may be granted only where a director took steps to minimise the loss to creditors".[155]

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[152] Ms Fiona O'Dea, Principal Officer, Department of Enterprise, Trade and Employment, General Scheme of the Plan of Action on Collective Redundancies following Insolvency Bill 2023: Discussion, Joint Committee on Enterprise, Trade and Employment Debate, 31 May 2023 (last accessed 31 October 2023).

[153] Explanatory Memorandum to the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023, p.4.

[154] Company Law Review Group, 'Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, including Splitting of Corporate Operations from Asset Holding Entities in Group Structures' (2021) available here, p. 30.

[155] Explanatory Memorandum to the Employment (Collective Redundancies and Miscellaneous Provisions) and Companies (Amendment) Bill 2023, p.4.

The amendment of section 610 was recommended in the December 2021 CLRG Report entitled 'Report of on the Consequences of Certain Corporate Liquidations and Restructuring Practices, including Splitting of Corporate Operations from Asset Holding Entities in Group Structures'.[156]

Section 27 proposes to remove the express requirement in subsection (1a) of section 610 for the company officer to have been "knowingly" a party to the carrying on of any business of the company in a reckless manner. It also proposes to amend subsection (3) so that officers may be deemed to have been "knowingly" a party to reckless trading in situations where they ought to have known that their actions or those of the company would have been likely to cause loss to the company's creditors. Section 27 also replaces the "acted honestly and responsibly in conducting the company's affairs" test, which the court is currently required to use under section 610 (8) when determining whether to grant relief to a company officer accused of reckless trading, in whole or in part, from personal liability. Instead, section 27 affords the court the discretion to consider the facts of a particular case and to provide relief under subsection (8) where it appears to the court that the officer took such steps as were reasonably practicable with a view to minimising loss to creditors at the relevant time, namely, the time from which the officer ought to have known that his or her actions or those of the company were likely to cause loss to the company's creditors.

[156] Company Law Review Group, 'Report on the Consequences of Certain Corporate Liquidations and Restructuring Practices, including Splitting of Corporate Operations from Asset Holding Entities in Group Structures' (2021) available here, pp. 30-34.

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