General Scheme

Plan of Action on Collective Redundancies following Insolvency Bill 2023

23/03/2023

Contents

PART 1
General

Head 1 - Short title and commencement

(1) This Act may be cited as the Plan of Action on Collective Redundancies following Insolvency Bill 2023

(2) The Protection of Employment Acts 1977 to 2014 and Part 2 may be cited together as the Protection of Employment Acts 1977 to 2023 and shall be construed together as one Act.

(3) The Companies Acts 2014 to 2021 and Part 4 may be cited together as the Companies Act 2014 to 2023 and shall be construed together as one Act.

(4) This Act shall come into operation on such day or days as the Minister for Enterprise, Trade and Employment may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions.

Explanatory Note

This is a standard provision dealing with short title and commencement.

Head 2 - Definitions

Provide that:

In Part 2, “Act of 1977” means the Protection of Employment Act 1977.

In Part 4, “Act of 2014” means the Companies Act 2014.

Explanatory Note

This is a standard provision dealing with definitions.

PART 2
Amendments to the Protection of Employment Act 1977

Head 3 - Amendment of section 2 (Interpretation)

Provide that:

The Act of 1977 is amended in section 2 by the insertion of the following definition:

"'person responsible for the affairs of the business' means, in the case of an employer whose business is being terminated following the commencement of bankruptcy or winding up proceedings or for any other reason as a result of a decision of a court of competent jurisdiction, the person who has assumed full responsibility for the management of the business concerned;"

Explanatory Note

Section 2 of the 1977 Act deals with definitions used throughout the Act.

This Head inserts a new definition of the "person responsible for the affairs of the business". The policy intention is that the definition will cover the following type of appointees:

- Liquidators or provisional liquidators
- "Receiver Managers", that is receivers who act as the manager of the business for the duration of the receivership.

The type of appointee to whom this obligation will not apply would include:

- Examiners: as company directors can still retain their functions in relation to management during examinership, and examinership does not lead to the wind-up of the company;
- Receivers, where the company directors still retain control of management of the business, except for the relevant property / assets managed by the receiver;
- Process Adviser under Small Companies Administrative Rescue Procedure (SCARP): as company directors retain their functions in relation to management during SCARP.

This Head is adapted from the existing section 12(4) of the 1977 Act. The only change in the wording used is to specifically include the "commencement" of bankruptcy or winding up proceedings. This change avoids any ambiguity around when the obligations apply to liquidators and receivers; it reflects the policy intention that such obligations apply following the commencement of the wind-up process (i.e. from the date they are appointed).

Head 4 - Amendment of section 9 (Obligation on employer to consult employees' representatives)

Provide that:

The Act of 1977 is amended in section 9 by the insertion of the following subsections after subsection (3) -

"(4) The person responsible for the affairs of the business may continue any consultation initiated by the employer in accordance with subsection (1).

(5) Where the person responsible for the affairs of the business proposes to create collective redundancies, the obligations imposed on an employer under this section and section 10 shall instead apply to that person."

Explanatory Note

Subsection (4) is a saver clause regarding the running of a consultation with employees' representatives.

It allows a liquidator or receiver to continue a consultation under section 9 which was initiated, but not concluded, by the employer prior to the appointment of the liquidator or receiver.

Without this provision, the appointment of a liquidator or receiver would interrupt the consultation period and would necessitate a new 30-day consultation period.

Subsection (5) confirms, for the avoidance of doubt, that the employer's obligations under sections 9 and 10 of the Act also apply to the person in charge of the affairs of the business (i.e. a liquidator or receiver), who is managing a collective redundancy arising from the commencement of bankruptcy or winding-up of a business. These obligations are:

- Section 9 (1): obligation to consult with employees' representatives, and
- Section 10 (1): obligation to provide certain information to the employees' representatives.

This reflects European case law on this issue, particularly *C-235/10 Claes v Landsbanki Luxembourg SA*.

The policy intention is that the obligations under the sections referred to will apply to:

- the employer, in the first instance; or
- a liquidator or receiver, where they have been appointed to wind-up the company and they have assumed full responsibility for the management of the company.

Head 5 - Amendment of section 11 (Penalty for contravention of section 9 or 10)

Provide that:

The Act of 1977 is amended by the substitution of the following section for section 11 -

"11. (1) An employer who fails to initiate consultations under section 9 or fails to comply with section 10 shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000.

(2) Subject to subsection (3), a person responsible for the affairs of the business who fails to initiate consultations under section 9 or fails to comply with section 10 shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000.

(3) In proceedings for an offence under subsection (2) against the person responsible for the affairs of the business, it shall be a defence for that person to show that, having exercised all reasonable professional care and skill, the person concerned had reasonable grounds for believing that the employer had complied with the obligations imposed on an employer under section 9 or 10."

Explanatory Note

Under section 11 of the 1977 Act, an employer who fails to consult with or provide certain information to employees' representatives is guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000. Under section 37 of the Workplace Relations Act 2015, the Workplace Relations Commission is the statutory body responsible for bringing such prosecutions.

This Head provides that a prosecution may also be brought against a liquidator or receiver, where:

- the employer is insolvent,
- they have been appointed to wind up the company and are wholly responsible for managing the collective redundancies process as part of the wind-up of the business, and
- they fail to fulfil their obligations under sections 9 and 10 of the Act.

The effect of this proposal, should this prosecution be successful, is that the liquidator or receiver would be liable to pay any fines issued.

The rationale for this approach is as follows:

- This General Scheme imposes new obligations on liquidators and receivers. This Head is required to ensure there is a proportionate measure to ensure compliance with these obligations.
- Liquidators and similar appointees are well experienced in managing their obligations in this area and so a high level of compliance would be expected. Consultations with insolvency practitioners' representative groups support this position. Therefore, the risk of prosecution being brought for failure to comply should provide a sufficient deterrent against breaching their obligations under the Act.
- The Head also provides for a defence, where a liquidator or receiver, having done their full due diligence, had a reasonable belief that the employer already complied with these obligations prior to their appointment. The grounds for defence are adapted from sections 286(6) and section 484(13) of the Companies Act 2014.

Head 6 - Amendment of section 11A (Decision of adjudication officer under section 41 of Workplace Relations Act 2015)

Provide that:

The Act of 1977 is amended in section 11A, by deleting "section 9 or 10" and replacing with "section 9, 10 or 14(1)".

Explanatory Note

The intention of this Head is to provide that an employee may bring a complaint to the Workplace Relations Commission should their employer make them redundant prior to the expiry of the 30-day period following notification to the Minister under section 12.

This provision will apply to all collective redundancies, not just those arising from the employer's insolvency.

This is a new ground for complaint and is in addition to employees' existing right to bring a complaint for breaches of section 9 ("obligation on employer to consult with employees' representatives") or section 10 ("obligation on employer to supply certain information").

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.

Head 7 - Amendment of section 12 (Obligation on employer to notify Minister of proposed redundancies)

Provide that:

The Act of 1977 is amended in section 12 by the substitution of the following subsection for subsection (4) -

"(4) 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 decision of a court of competent jurisdiction, the person responsible for the affairs of the business shall comply with the obligations of an employer under this section."

Explanatory Note

Subsection (1) of section 12 obliges an employer to notify the Minister where they intend to create collective redundancies.

The existing subsection (4) provides that, where the collective redundancy arises from the bankruptcy or winding up of a business, the person responsible is obliged to comply with subsection (1) only if the Minister so requests.

The *Plan of Action on Collective Redundancies following Insolvency* commits to removing this exemption. By removing this exemption, all collective redundancies (including those caused by the bankruptcy or winding up of a business) will need to be notified to the Minister. Therefore, this section requires amendment to impose a positive obligation on all those effecting collective redundancies precipitated by insolvency to notify the Minister.

Head 8 - Amendment of section 13 (Penalty for contravention of section 12)

Provide that:

The Act of 1977 is amended by the substitution of the following section for section 13 -

"13. (1) An employer who contravenes section 12 shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000.

(2) Subject to subsection (3), a person responsible for the affairs of the business who contravenes section 12 shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000.

(3) In proceedings for an offence under subsection (2) against the person responsible for the affairs of the business, it shall be a defence for that person to show that, having exercised all reasonable professional care and skill, the person concerned had reasonable grounds for believing that the employer had complied with the obligations imposed on an employer under section 12."

Explanatory Note

Under section 13 of the 1977 Act, an employer who fails to notify the Minister of proposed collective redundancies is guilty of an offence and shall be liable on summary conviction to a fine not exceeding €5,000. Under section 37 of the Workplace Relations Act 2015, the Workplace Relations Commission is the statutory body responsible for bringing such prosecutions.

This Head provides that a prosecution may also be brought against a liquidator or receiver, where:

- the employer is insolvent,
- they have been appointed to wind up the company and are wholly responsible for managing the collective redundancies process as part of the wind-up of the business, and
- they fail to fulfil their obligations under section 12 of the Act.

The effect of this proposal, should this prosecution be successful, is that the liquidator or receiver would be liable to pay any fines issued.

The rationale for this approach is as follows:

- This General Scheme imposes new obligations on liquidators and receivers. This Head is required to ensure there is a proportionate measure to ensure compliance with these obligations.
- Liquidators and similar appointees are well experienced in managing their obligations in this area and so a high level of compliance would be expected. Consultations with insolvency practitioners' representative groups support this position. Therefore, the risk of prosecution being brought for failure to comply should provide a sufficient deterrent against breaching their obligations under the Act.
- The Head also provides for a defence, where a liquidator or receiver, having done their full due diligence, had a reasonable belief that the employer already complied with these obligations prior to their appointment. The grounds for defence are adapted from section 286(6) and section 484(13) of the Companies Act 2014.

Head 9 - Amendment of section 14 (Collective redundancies not to take effect for 30 days)

Provide that:

The Act of 1977 is amended in section 14 by the deletion of section 14(3).

Explanatory Note

Subsection (1) of section 14 protects employees by providing that collective redundancies cannot take place prior to the expiry of the 30-day period following the notification to the Minister under section 12. Subsection (2) provides that employers may be fined up to €250,000 for breaches of this provision.

Subsection (3) provides for an exemption to this protection, where the collective redundancy arises from the bankruptcy or winding up of a business.

The *Plan of Action on Collective Redundancies following Insolvency* commits to removing this exemption. Amending this section will mean that all collective redundancies, including those due to the bankruptcy or winding up of a business, cannot take place until 30 days after the Minister is notified.

This amendment also reflects European case law on this issue, particularly *C-235/10 Claes v Landsbanki Luxembourg SA*.

Head 10 - Amendment of section 20 (Notices, etc. to Minister)

Provide that:

The Act of 1977 is amended in 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.

Explanatory Note

This Head is a technical amendment, which will modernise the methods by which notices and documents can be given to the Minister. This section has not been updated since the introduction of the Act in 1977.

The existing section 20 sets out that such notices or documents may be delivered or sent by registered post to the head office of the Department.

This Head gives the power to the Minister to prescribe such notices may also be submitted by electronic means. It is preferable to allow the Minister to prescribe such means as this will provide for greater flexibility to update the means to reflect modern communication practices now and into the future.

This reflects the Digital by Default core principle outlined in *Connecting Government 2030: A Digital and ICT Strategy for Ireland's Public Service*.

This Head is adapted from section 58 of the Employment Permits Bill 2022.

PART 3
Establishment of the Employment Law Review Group

Head 11 – Establishment of the Employment Law Review Group

Provide that:

(1) There is hereby established a body to be known as the Employment Law Review Group.

(2) That Group is referred to in this Part as the "Review Group".

Explanatory note

The purpose of Head 11 is to provide for the establishment of a statutory Employment Law Review Group.

The Employment Law Review Group ("Review Group") is to be set up on a statutory basis to monitor, review and advise the Minister on matters concerning –

(a) the implementation of all employment and redundancy enactments,
(b) the amendment of those enactments,
(c) the introduction of new legislation relating to the protection of employees and regarding redundancy matters,
(d) judgments of courts related to the enforcement of employment and redundancy law and relevant Rules of the Superior Courts,
(e) issues arising from the State's membership of the European Union, in so far as they affect the operation of the national suite of employment rights and redundancy legislation,
(f) international developments in employment and redundancy law, in so far as they may provide lessons for improved State practice, and
(g) other related matters or issues, including issues submitted by the Minister to the Review Group for consideration.

In advising the Minister, the Review Group will seek to ensure that the State's suite of employment rights and redundancy legislation remains relevant and fit for purpose and is updated to reflect international developments.

The *Plan of Action on Collective Redundancies following Insolvency* commits to providing for this measure.

Head 12 – Functions of Review Group

Provide that:

(1) The Review Group shall monitor, review, and advise the Minister on matters concerning—

(a) the implementation of employment and redundancy law in the State,

(b) the amendment of employment and redundancy law in the State,

(c) where subsequent enactments amend employment and redundancy law in the State, the consolidation of those enactments and existing law or the preparation of a restatement under the Statute Law (Restatement) Act 2002 in respect of them,

(d) the introduction of new legislation relating to employment and redundancy law in the State,

(e) the Rules of the Superior Courts and case law judgments in so far as they relate to employment law in the State,

(f) issues arising from the State's membership of the European Union in so far as they affect the operation of employment and redundancy law in the State,

(g) international developments in employment and redundancy law in so far as they provide lessons for improved State practice, and

(h) other related matters or issues, including issues submitted by the Minister to the Review Group for consideration.

(2) In advising the Minister the Review Group shall seek to promote the improvement and maintenance of good workplace relations in the State, simplify the operation of employment and redundancy law in the State, and provide guidance in relation to developments as respects workplace relations, and employment and redundancy law in the State.

Explanatory note

The purpose of Head 12 is to set out the functions of the Review Group. The functions are to monitor, review, and advise the Minister on all aspects of employment and redundancy law, with a specific focus on promoting good workplace relations in the State, simplifying the operation of employment and redundancy law in the State, and 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.

Head 13 – Membership of Review Group

Provide that:

(1) The Review Group shall consist of the persons appointed by the Minister to be members of it.

(2) The Minister shall appoint a member of the Review Group to be its chairperson.

(3) Members of the Review Group shall hold office for such period not exceeding 4 years from the date of his or her appointment as the Minister may determine.

(4) The Minister may reappoint a person whose membership of the Review Group expires by the efflux of time to be a member of the Review Group.

(5) A person who is reappointed to be the chairperson of the Review Group in accordance with subsection (4) shall not hold office for periods the aggregate of which exceeds 10 years.

(6) A member of the Review Group may at any time resign his or her membership by letter addressed to the Minister.

(7) The Minister may at any time, for stated reasons, terminate a person's membership of the Review Group.

(8) Members of the Review Group 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.

Explanatory note

The purpose of Head 13 is to provide for the membership of the Review Group

A member of the Review Group will be nominated to contribute their expert knowledge and experience to assist the Minister in the ongoing development and refinement of employment and redundancy law. Members will engage with the work programme of the Review Group and contribute to Review Group reports for the Minister’s consideration. The members of the Review Group will be appointed by the Minister.

Head 14 – Meetings and business of Review Group

Provide that:

(1) 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.

(2) Notwithstanding subsection (1), the Minister may, from time to time, amend the Review Group's work programme, including the period to which it relates.

(3) The Review Group shall hold such and so many meetings as may be necessary for the performance of its functions and the achievement of its work programme and may regulate the procedure of those meetings (including by the establishment of subcommittees and fixing a quorum) as it considers appropriate.

(4) The members shall elect one of themselves as chairperson for any meeting from which the chairperson of the Review Group is absent.

(5) A member of the Review Group, but not the chairperson, may nominate a deputy to attend in his or her place any meeting that the member is unable to attend.

Explanatory note

The purpose of Head 14 is to provide for the meetings and business of the Review Group. It provides that the Minister shall, at least once in every two years, after consultation with the Review Group, determine the programme of work to be undertaken by the Review Group.

Head 15 – Annual report and provision of information to Minister

Provide that:

(1) Not 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.

(2) The report shall include information in such form and regarding such matters as the Minister may direct.

(3) The Review Group shall, if so requested by the Minister, provide a report to the Minister on any matter—

(a) concerning the functions or activities of the Review Group, or

(b) referred by the Minister to the Review Group for its advice.

Explanatory note

The purpose of Head 15 is to provide for the annual report of the Review Group and the provision of information to the Minister.

It is envisaged that not later than three months after the end of each year, the Review Group will make a report to the Minister on its activities during that year and the Minister will ensure that copies of the report are laid before each House of the Oireachtas within two months after the date of receipt by the Minister of the report.

The report will include information in such form and regarding such matters as the Minister may direct.

The Review Group will, if requested by the Minister, provide a report to the Minister on any matter—

(a) concerning the functions or activities of the ELRG, or
(b) referred by the Minister to the ELRG for its advice.

PART 4
Amendments to the Companies Act 2014

Head 16 - Amendment of section 571 (Provisions as to application for winding up)

Provide that:

Section 571 of the Act of 2014 is amended by the insertion of the following subsection after subsection (1) -

"(1A) Where a winding up petition is presented by the company in accordance with subsection (1), the directors of the company concerned shall notify the employees of the company concerned of that petition at the time the winding up petition is presented or as soon as reasonably practicable (save where it has already been done).

(1B) In deciding whether it is just and equitable to make an order under section 572, the court may have regard to compliance by the directors of the company with the requirements of subsection (1A)."

Explanatory note

Head 16 provides for an amendment to section 571 of the 2014 Act obliging directors to notify employees or their representatives of the winding up petition at the time of presenting it to court, either by the company itself or together with any of the other parties under subsection (1).

This new obligation is not intended to interfere with the court's ability to proceed to hear a winding up petition. However, the court can have regard to whether the company has met its legal obligations to inform employees or their representatives of the petition.

The *Plan of Action on Collective Redundancies following Insolvency* commits to providing for this measure.

Head 17 - Amendment of section 573 (Appointment of a provisional liquidator)

Provide that:

Section 573 of the Act of 2014 is amended by substituting the following for the section -

"(1) The Court may appoint a liquidator provisionally at any time after the presentation of a winding-up petition and before his or her first appointment of a liquidator.

(2) In making an order under subsection (1), the court shall direct that, as soon as reasonably practicable and within a specified period, the provisional liquidator inform the employees —

(a) the fact of his or her appointment as provisional liquidator and the date of appointment;

(b) the process under Part 11 as it relates to the employees;

(c) that they may provide the provisional liquidator with information about matters they consider to be relevant; and

(d) any other matter the provisional liquidator considers to be relevant."

Explanatory note

Section 573 provides that the court may appoint a liquidator provisionally at any time after the presentation of a winding up petition and before the first appointment of a liquidator. An application will usually be made by the petitioning creditor although it can be made by any person entitled by law to present a petition who is concerned that unless the assets of the company are immediately preserved they are likely to be "spirited" away by the controllers of the company or other anxious creditors.

Provisional liquidators are typically appointed in emergency situations to protect the assets of the company. The position of a provisional liquidator is provisional and a court-appointed liquidator will normally be appointed immediately upon the actual making of the winding up order.

While such appointments are time sensitive, employees of the company should be made fully aware of what is happening at the earliest opportunity. Thus, the Head provides that the court direct the appointed provisional liquidator to inform employees or their representatives of the appointment, to explain the process and to invite them to provide information they have and which they deem would provide a complete overview of the company's affairs.

The *Plan of Action on Collective Redundancies following Insolvency* commits to providing for this measure.

Head 18 – Amendment of section 594 (Supplemental provisions in relation to section 593)

Provide that:

Section 594 of the Act of 2014 is amended by –

(1) Inserting the following after subsection (2) –

"(2A) Where a copy of the statement is served on the liquidator (or provisional liquidator, as the case may be) in accordance with subsection (2), the liquidator (or provisional liquidator, as the case may be) 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).

(2B) Notice under subsection (2A) shall be given-

(a) where the liquidator (or provisional liquidator) is aware of the person's email address, by electronic means to that email address, or

(b) where the liquidator (or provisional liquidator) —

(i) gives notice by electronic means to an email address but receives in response a failed delivery notification, or

(ii) is not aware of the person's email address

notice shall be sent by post where the liquidator (or provisional liquidator) is aware of the person's postal address.

(2C) An employee of the company concerned may request the liquidator (or provisional liquidator) in writing to deliver a copy of the statement by electronic means to him or her, and such requests shall be complied with by the liquidator.

(2D) If default is made by the liquidator (or provisional liquidator) in complying with subsections (2A) or (2C), the liquidator shall be guilty of a category 3 offence."

(2) Substituting in subsection (9) "Notwithstanding subsection (2A), any person" for "Any person".

Explanatory note

This Head provides for employees as creditors to request a copy of the Statement of Affairs that has been filed with the Courts within a reasonable period of it having been furnished to the liquidator.

Section 593 requires that in a court-ordered liquidation, the Statement of Affairs of the company concerned be filed with the Court within 21 days of the appointment of the liquidator or such extended time as the court may for special reasons appoint.

Section 594 provides that a copy of the Statement be provided to the liquidator as soon as it may be after it is prepared and no later than 21 days after the appointment of the liquidator.

Section 594 is to be amended with the insertion of:

- a new subsection (2A) to provide that within 8 working days of the Statement being served on the liquidator, he/she shall issue a notice to employees or their representatives of this fact and that the Statement shall be made available by the liquidator to the employees of the company concerned in accordance with subsections (2B) and (2C);
- a new subsection (2B) to provide for the manner in which the notice shall be issued by the liquidator;
- a new subsection (2C) to provide for the manner in which the employees may request access to the Statement.
- A new subsection (2D) to provide that failure by the liquidator to issue the notice under subsection (2A) or provide for access to the Statement under subsection (2C) will be a category 3 offence under subsection (8).

Subsection (9) is also amended to provide that creditors can continue to request a copy of the Statement of Affairs on payment of a fee to the Courts.

The *Plan of Action on Collective Redundancies following Insolvency* commits to providing for ease of access by employees as creditors to this Statement.

A review of the Statement of Affairs will also be undertaken as recommended by the CLRG in its March 2021 report *'Review of existing legislative provisions regarding the provision of information to creditors generally and in particular to employees'*.

Head 19 – Amendment to section 599 (Related company may be required to contribute to debts of company being wound up)

Provide that:

Section 599 of the Act of 2014 is amended by -

(1) Deleting subsection (5),

(2) Inserting after subsection (4)(c) the following paragraphs:

"(d) the extent to which circumstances that gave rise to the winding up of the company are attributable to the acts or omissions of the related company;

(e) such other matters as the court thinks fit."

Explanatory note

Section 599 provides that related a company may be required to contribute to the debts of the company being wound up. It provides a means by which a liquidator can bolster the assets of the company being wound up by applying to the court for an order directing that a related company contribute its assets.

Head 19 provides amendments to section 599(4) and (5) to:

- modify the attribution test contained in subsection (5) to provide for a less restrictive provision stating that the court can 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;
- lower the test required to make a contribution order under section 599 thus affording further discretion to the courts and making the provision more accessible to creditors and employees. This mirrors the equivalent New Zealand provision, section 271(1)(a) and 272 of New Zealand's Companies Act 1993, which allows the court to have regard to any other factor it considers fit in exercising its discretion to make an order.

The proposed amendment will give the Courts broad discretion to effect a result which accords with common notions of fairness in all circumstances bearing in mind the cardinal principle of insolvency - that there is equality among creditors of equal standing.

In summary the amendments give creditors an opportunity to prove why the related company should contribute to the debts of the company being wound up. This is a move away from the current situation where the contribution order can be made if the winding up was attributable to the acts or omission of the related company.

The origin of this Head is the Company Law Review Group's December 2021 *'Report on the consequences of certain corporate liquidations and restructuring practices, including splitting of corporate operations from asset holding entities in group structures'*. The CLRG's work on the matter was referenced in the *Plan of Action on Collective Redundancies following Insolvency*.

Head 20 – Amendment to section 604 (Unfair preference: effect of winding up on antecedent and other transactions)

Provide that:

Section 604 of the Principal Act is amended by inserting after subsection (6) the following subsection -

"(7) The Court may make an order under this section notwithstanding that the transaction or transactions the subject of an application pursuant to the section do not fall within the time periods specified in subsections (2)(a) and (4), where it is satisfied that it would be just and equitable to do so based on the circumstances surrounding the transaction or transactions."

Explanatory note

Section 604 deals with unfair preference and the effect of a winding up on antecedent and other transactions. It restricts the powers of the controllers of the company to dispose of its assets on the verge of being wound up.

Subsection (2) provides that if a transaction is an unfair preference and is made within 6 months of the winding up of the company, it is invalid. Subsection (4) provides that if the preferential transaction is made in favour of a connected person, it is invalid where it is made within 2 years of the commencement of the winding up.

Head 20 amends section 604 to increase the time periods within which the court may make an order, where it is satisfied that it would be just and equitable to do so based on the circumstances surrounding the transaction.

The origin of this Head is the Company Law Review Group's December 2021 *'Report on the consequences of certain corporate liquidations and restructuring practices, including splitting of corporate operations from asset holding entities in group structures'*. The CLRG's work on the matter was referenced in the *Plan of Action on Collective Redundancies following Insolvency*.

Head 21 - Amendment to section 608 (Power of the court to order return of assets which have been improperly transferred)

Provide that:

Section 608 of the Act of 2014 is amended in subsection (3) by inserting ", payments made in the ordinary course of business" after "This section shall not apply to any conveyance, mortgage, delivery of goods, payment, execution".

Explanatory note

Section 608 deals with the power of the court to order the return of company assets which have been improperly transferred. In order for the liquidator to set aside a disposition of assets, the liquidator must establish that the *effect* of the disposition has been to defraud the creditors or members of the company. The evidentiary burden of proof is lower than similar provisions in the Act as it requires the liquidator only to demonstrate that the *effect* of the transaction was to perpetrate a fraud, rather than prove any *intent*.

Case law is clear that the provision is intended to deal with circumstances where payments are made outside the realms of what could be considered payments made in the ordinary course of business e.g. the transfer of stock and assets as payment of rent outstanding. However, a more recent court decision has caused some concern that this is open to interpretation and there is ambiguity as to the application of the provision.

To address the ambiguity, this amendment to section 608 ensures that payments made in the ordinary course of business, such as wages to employees, are not captured by the provision.

Head 21 arises from the Company Law Review Group's December 2021 *'Report on the consequences of certain corporate liquidations and restructuring practices, including splitting of corporate operations from asset holding entities in group structures'*. The CLRG's work on the matter was referenced in the *Plan of Action on Collective Redundancies following Insolvency*.

Head 22 - Amendment to section 610 (Civil liability for fraudulent or reckless trading of company)

Provide that:

Section 610 of the Act of 2014 is amended by -

(1) In subsection (1)(a) deleting "knowingly";

(2) In subsection (3) by:

(a) after "Without prejudice to the generality of subsection (1)(a), an officer of a company" substituting "shall be deemed to have been knowingly a party" by "may be found to have been a party",
(b) in paragraph (a) after "the person ought to have known that his or her actions or those of the company" substituting "would" by "was likely to";

(3) Substituting for subsection (8) the following:

"(8) Where it appears to the court that any person in respect of whom a declaration has been sought on the grounds set out in subsection (1)(a) did, from the time he or she knew or ought to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation, take reasonable steps with a view to minimising the potential loss to the company's creditors as (on the assumption that he or she had knowledge that there was no reasonable prospect that the company would avoid going into insolvent liquidation he or she ought to have taken, the court may, having regard to all the circumstances of the case, relieve him or her either wholly or in part, from personal liability on such terms as it may think fit."

Explanatory note

Section 610 provides for the imposition of personal liability on an officer of an insolvent company who was *"knowingly a party to the carrying on of any business of the company in a reckless manner"*. The intention of the section is to provide compensation or restitution to creditors and deter reckless risk-taking, through the threat of personal liability, by making officers liable for the debts of the company. The action is available to a liquidator, examiner, receiver, creditor, or contributory[1] of a company. The CLRG considers that there are several difficulties in respect of the interpretation and application of the section which have emerged from case law and are set out below.

Firstly, the section seems to waiver between the imposition of an objective standard and the availability of a subjective defence making it difficult to reconcile. While the concept of recklessness in Irish law is typically considered to set an objective standard, the use of the word "knowingly" in subsection (1)(a) imports a subjective element to the test. This can be contrasted with the objective standards set out in subsection (3) which provides for specific circumstances in which an officer will be judged or deemed to be reckless. There are two separate "deeming provisions", satisfying either of which is sufficient to impose personal liability. The effect of the "deeming provisions" is that behaviour falling outside the subjective reckless test of section 610(1) can be judged to fit within the meaning of that test for the purposes of imposing personal liability. A difficulty arising from this is that it is possible that a director may act honestly and responsibly but still be deemed to have acted

[1] A person liable to contribute to the assets of a company on its winding up.

recklessly thus leaving no room to consider the circumstances of a particular case. This has resulted in inconsistencies in the application of the provision in case law.

Subsection (3)(a) provides that a director shall be found guilty of reckless trading in circumstances where he or she *"ought to have known that his or her actions or those of the company <u>would</u> cause loss to the creditors"*. Case law has set a high standard for the application of the section, and it is not enough to demonstrate that a director *might* have known his or her actions would cause a loss to the creditors but rather that the loss must have been foreseeable to *high degree of certainty*.

Finally, the defence set out in subsection (8), which affords the court a discretion to relieve a director from liability under the section where it is satisfied that the director has acted honestly and responsibly, has been the subject of criticism on two grounds: First, it has been said that the issue of honesty ought to be irrelevant to a consideration of whether somebody has acted recklessly. Second, it is difficult to reconcile a finding that someone has acted recklessly with one that they have acted responsibly.

In response to the issues arising from the interpretation of the section, the Head provides for the following four technical amendments to the section:

1. The use of the word *'knowingly'* is removed from the section, with a view to making the test for reckless trading an objective one;
2. Subsection (3) is amended to give discretion to the courts to consider the facts of a particular case;
3. The use of the word *'would'* in subsection 3(a) of the section is replaced by the phrase *"was likely to…"* with a view to lowering the threshold required under the subsection;
4. The defence in subsection (8) is amended in a manner making it similar to the defence contained in section 214(3) of the Insolvency Act 1986 in England and Wales. This moves the section from a subjective to objective defence. The current section provides for an *"honest and reasonable"* defence, whereas the equivalent provision in the Insolvency Act 1986 provides that relief may be granted only where a director took steps to minimise the loss to creditors.

Head 22 is based on the Company Law Review Group's December 2021 *'Report on the consequences of certain corporate liquidations and restructuring practices, including splitting of corporate operations from asset holding entities in group structures'*. The CLRG's work on the matter was referenced in the *Plan of Action on Collective Redundancies following Insolvency*.