



The Insolvency  
Service

# Responses to Call for Evidence on Collective Redundancy Consultation for Employers facing Insolvency

November 2015

# Contents

	Page Number
<b>Foreword</b>	3
<b>Executive Summary</b>	4
1 Introduction	4
2 Background	4
3 Emerging issues	5
4 Next steps	5
<b>Summary of Responses</b>	7
5 Introduction	7
6 Current understanding of the requirements to consult in insolvency situations	7
7 Benefits of consultation and notification	7
<b>The Consultation Process</b>	9
8 How long should a consultation last? The 'minimum' period	9
9 Common understanding of 'meaningful consultation'	9
10 Factors that inhibit effective consultation in an insolvency context	11
11 General inhibitors	11
12 Inhibitors for directors	14
13 Sanctions for failing to consult	15
14 Factors that facilitate consultation in an insolvency context	17
<b>The Notification Process</b>	18
15 Inhibitors to notification	18
16 Sanctions for failing to notify	20
17 Memorandum of Understanding	21
<b>Guidance</b>	22
18 Would guidance be helpful?	22
19 What should guidance cover?	24
<b>Annexes</b>	
A List of respondents	26
B Responses to call for evidence on Collective Redundancy Consultation for Employers facing Insolvency	27
<b>Tables and Charts</b>	
Chart 1 Benefits to consultation	8
Table 1 Inhibitors to consultation in an insolvency context	11
Chart 2 Inhibitors for directors in carrying out consultation	14
Chart 3 Reasons given why protective awards are not effective	16
Chart 4 Factors that facilitate consultation	18
Chart 5 Factors identified in the responses which inhibit notification	19
Chart 6 Would guidance be helpful?	22
Chart 7 Who should receive guidance?	23
Chart 8 What should guidance cover?	24

## Foreword

Constructive engagement with employees is important in any business at all times. However, when a business is facing insolvency or is moving into a rescue procedure, positive engagement is even more important.

Insolvency presents business and government with a number of challenges. Competing interests are often delicately balanced during attempts to save the business. The necessity of making some redundancies in order to save the business and secure the remaining jobs has a huge impact on individuals as well as on the remaining business. That is one reason why legislation places a duty on employers to consult with their employees and to notify the Secretary of State before collective redundancies are made.

The benefits of good consultation are widely acknowledged. Effective engagement can foster employee loyalty, productivity and can provide useful cost-saving suggestions. Consultation can also enable employees to contribute to decisions that affect them and help them make better choices about their future. Furthermore, notifying the Secretary of State helps government activate resources to assist those who will be affected by the redundancies and try to mitigate some of the devastating effects of a job loss.

The previous government published a call for evidence to understand the employee consultation process when a company is facing insolvency. A number of responses were received which will help shape the work by this government to improve outcomes for both employees and businesses when proposing redundancies during an insolvency process.

As a result of the evidence gathered, this government will next consider how to ensure better outcomes where businesses are required to consult with their employees. The government plans to hold further discussions with interested parties, in the light of the responses to this call for evidence, to explore how consultation can be improved where collective redundancies are proposed in insolvency or near insolvency situations.

# Executive Summary

## 1 Introduction

In March 2015 the previous government launched a call for evidence on Collective Redundancy Consultation for Employers facing Insolvency. The call for evidence, which closed in June 2015, sought to better understand how collective redundancy consultation works in practice when a company is facing or has moved into formal insolvency. Responses were received from a range of interested groups including lawyers, insolvency practitioners and trade unions (see Annex A).

## 2 Background

2.1 As summarised in the call for evidence, recent Employment Tribunal findings have highlighted the need for the government to return to the issue of collective redundancy consultation and to look in more detail at the particular circumstances that surround consultation in the face of, and during, insolvency.

2.2 The call for evidence sought views on:

- existing understanding of the current requirements of consultation in an insolvency situation;
- factors that facilitate and inhibit effective consultation in an insolvency context;
- the role of directors and insolvency practitioners in consulting within an insolvency context; and
- how timely notification is achieved in an insolvency context.

2.3 This paper provides a summary of the responses received and considers them under common key themes which have emerged through the responses:

- current understanding of the requirements to consult in insolvency situations and sanctions for failing to consult;
- factors impacting on the notification process and sanctions for failing to notify; and
- whether there is a need for further guidance on how consultation and notification in an insolvency situation works.

2.4 Discussions were also convened with different organisations, including a roundtable in June 2015, with representatives from trade unions, law firms, insolvency practitioners, trade bodies and HR organisations.



### **3 Emerging issues**

The main issues that emerged from the consultation responses to the call for evidence were:

- (a) Almost all respondents believed meaningful consultation with a view to reaching an agreement, particularly on ways to avoid or reduce dismissals, could often not happen in an insolvency situation.
- (b) Respondents believed tensions between employment law and insolvency law inhibit consultation when a company is in formal insolvency.
- (c) There is uncertainty about when the requirement to consult and to notify begins.
- (d) Responses showed there is some confusion as to how long consultation should last for with a number of respondents believing there to be a fixed statutory period.
- (e) Some concerns were raised that disclosure about a company's financial difficulties could undermine rescue and survival of the business.
- (f) A lack of time and money was seen as a major inhibitor to beginning consultation by trade unions, employment and insolvency lawyers and insolvency practitioners.
- (g) For insolvency practitioners in particular, where there is no recognised trade union or employee representative in place, the process for electing employee representatives at a point when a company has entered into an insolvency process was perceived to be onerous and prohibitive to rescuing and preserving the value of the business.
- (h) Several respondents expressed the view that, in insolvency situations, the effectiveness of protective awards was undermined because the burden for failing to consult falls on creditors and taxpayers.

### **4 Next Steps**

- 4.1 While the government's position remains that there is no conflict between insolvency law and employment law, the responses highlight the strong perception that tensions do exist between the two which in practice may impede effective consultation from taking place where redundancies are proposed in an insolvency situation.
- 4.2 The government recognises that an unfortunate consequence of insolvency and business re-structuring is that dismissals may be necessary and in some cases these can be needed in order to rescue a business and preserve some jobs. However, it remains important that meaningful consultation is carried out and the Secretary of State is

notified in order to enable the right structures to be put in place to support and assist those facing redundancy. The role of government is to ensure that the framework facilitates that consultation and notification process.

- 4.3 Respondents were sceptical as to whether meaningful consultation is possible in insolvency situations as often dismissals cannot be avoided or reduced. The responses showed that there is a case for government to look further at options that will clarify what is required from employers and their representatives in an insolvency situation and at the same time increase the effectiveness of sanctions for non-compliance.
- 4.4 In insolvency a lack of funds, time and options may result in a shorter consultation but it is nevertheless important that there is open and genuine engagement with employees with a view to reaching agreement, even if ultimately agreement cannot be reached and dismissals are necessary.
- 4.5 The responses also highlighted misunderstandings around the current legal requirements including, for example, the belief that there is a fixed period for consultation.
- 4.6 Insolvency practitioners were recognised to be in a particularly unusual position. By the time insolvency practitioners are appointed, the business is likely to be in severe financial distress and this can make constructive engagement with employees more challenging. For a number of respondents, this is one reason why, wherever possible, consultation needs to begin sooner.
- 4.7 The view of many respondents was that protective awards were not an effective sanction in insolvency as the burden for payment falls on the business with payment guaranteed by the National Insurance Fund (within statutory limits) if there are insufficient assets in the company's estate.
- 4.8 Government will therefore carry out further work to see how best to address the points raised in the responses to the call for evidence.

# Summary of responses

## 5 Introduction

5.1 A total of 28 responses were received from two legal firms, ten insolvency practitioner firms, four Recognised Professional Bodies (RPBs - responsible for regulating and licencing insolvency practitioners), five trade unions and seven trade bodies (for insolvency practitioners, lawyers and personnel professionals). The distribution of respondents is in Annex A and all responses can be found in Annex B. Some of the detail in the responses has been redacted to anonymise some of the companies used in case examples provided.

## 6 Current understanding of the requirements to consult in insolvency situations

6.1 The call for evidence firstly tried to identify how interested parties understood the current requirements of consultation in insolvency situations.

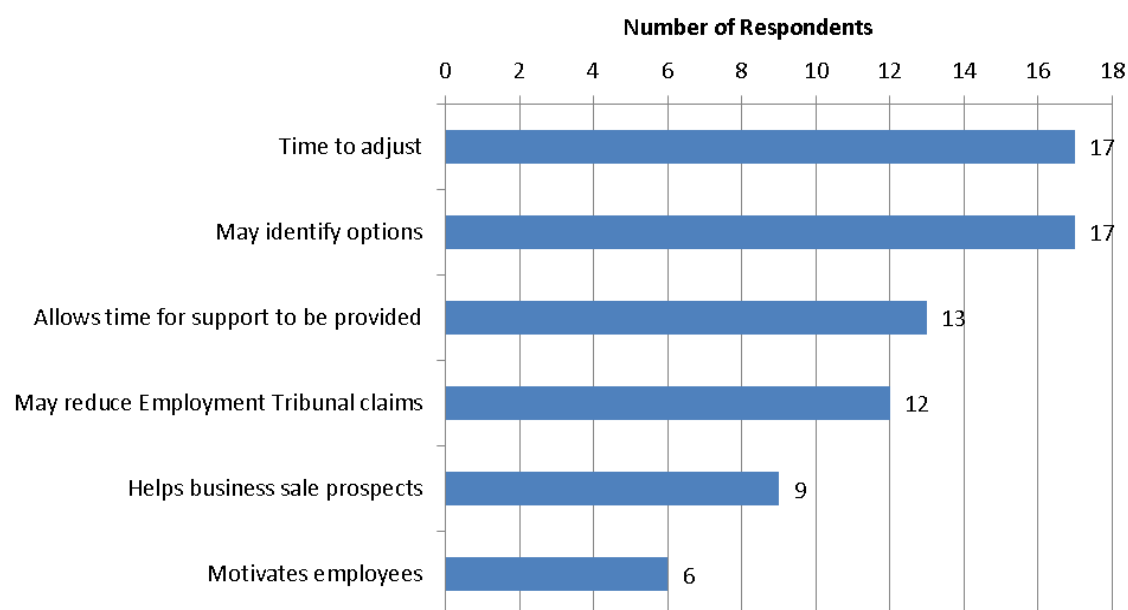
6.2 The responses suggested that all respondents recognised there is a requirement to consult before collective redundancies are made where there are 20 or more employees, even in an insolvency situation.

## 7 Benefits of consultation and notification

7.1 The majority of respondents (79%) recognised the benefits of consultation and notification where a company needs to make redundancies in an insolvency situation. However, a large proportion within this majority group also qualified their response by saying that the benefits were of limited value unless the business was to be sold as a going concern or was to continue trading in some form. The identified benefits to consultation are shown in chart 1.

7.2 The most frequently referenced benefit to consultation was that consultation provides time for employees to adjust to the potential changes in the business, including time to seek alternative employment (17 respondents). The third most common response was that consultation allows time for government agencies to provide support to employees (13 respondents). These benefits are associated more closely with the notification process and the advantage the process provides employees who receive the benefit of the government resourcing but were discussed in the context of consultation.

**Chart 1: Benefits to consultation**



7.3 Respondents, including trade unions, thought the consultation exercise could be helpful to alleviate concerns, maintain morale and productivity and stop rumours, even if redundancies are inevitable. For 17 respondents, the consultation exercise is also a useful opportunity to draw on the experience of employees to identify ways to help the business survive. One respondent gave an example of how this worked in their experience:

*“When a company I was working for entered a period of loss making, early discussions with employees identified savings which improved cash flow. Also the fact that the management were open led to better engagement of employees and acceptance of a period of short time working which enabled the company to survive.” (Trade Body).*

7.4 A total of 12 respondents associated carrying out consultation with reducing the size of an Employment Tribunal award. Many respondents mentioned that, if fewer claims were made against an insolvent employer, then the overall cost to the tax payer would also be reduced.

7.5 Despite being asked the question, very few responses explicitly discussed the benefits of notification. Only 25% commented on whether they thought there were any benefits specifically to notification. The majority (75%) did not answer this question, but rather discussed the benefits of consultation.

## **The Consultation Process**

### **8 How long should a consultation last? The ‘minimum’ period**

8.1 Employers have a duty to consult with employees if proposing to make redundant 20 or more employees at one establishment. The consultation should start in ‘good time’ and the first dismissal should not take place until at least 30 or 45 days after the consultation has started (section 188 of the Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992). However, the legislation does not provide for a fixed period of consultation.

8.2 Although the call for evidence did not ask participants about how long a consultation should last, from responses, it was clear that there was a common perception of ‘fixed’ or a ‘statutory’ period for consultation.

8.3 Despite there being no statutory fixed period, 17 respondents (60%) suggested or explicitly referred to a ‘statutory’ period for consultation or showed some potential confusion in their response as to whether there was a fixed period. An interpretation of the legislation emerging from the responses is that consultation should run for the duration of the period before which the first dismissal can be made, which is 30 or 45 days depending on the number of employees the employer is proposing to dismiss.

8.4 A small proportion of respondents did not make any reference to the consultation period, while a smaller proportion stated that the consultation period should be carried out before the first dismissal takes place, with no reference to timescales for the actual consultation.

### **9 Common understanding of ‘meaningful consultation’**

9.1 Respondents were asked how meaningful consultation with a ‘view to reaching agreement’ works in practice.

9.2 Under section 188 of the TULRCA 1992, employers are required to consult with their employee representatives with a view to reaching an agreement on ways to (a) avoid dismissals, (b) reduce the numbers to be dismissed, and (c) mitigate the consequences of the dismissals.

9.3 Many of the respondents referred to TULRCA 1992 to base their assessment of what ‘meaningful consultation’ was in reference to the aims and requirements of the legislation. Of all the respondents, 23 (82%) expressed explicitly that in their view it was not possible to achieve meaningful consultation in an insolvency situation. An additional 4 (14%) thought there was some limited scope for consultation to be meaningful.

9.4 While many respondents considered that consultation could work where a company was solvent, nearly all respondents argued that by the time a company enters into insolvency proceedings, it is too late to consider options. By that stage all possible alternatives to redundancy would already have been explored and therefore other possible outcomes would be very limited. However trade unions also argued that often insolvency practitioners did not attempt consultation even where some limited consultation was possible.

9.5 The majority of respondents cited an inability to comply with both insolvency and employment law. For many, carrying out a consultation conflicted with the realities of an insolvency situation where the survival of the business was uncertain and consequently there were very limited options for the business to survive and there were insufficient funds to continue paying all employees.

9.6 Responses from trade unions stated that meaningful consultation was not possible in insolvency situations because consultation was often left too late in the process when it was almost impossible for trade union officials to influence outcomes and alternative outcomes were often very limited.

9.7 Generally, respondents commented that by the time insolvency practitioners are in office, achieving (a) and (b) in s. 188 (2) TULRCA 1992 was difficult and only a discussion to inform employees and try to mitigate the effects of the redundancies by facilitating discussions and meetings with local employment support agencies was considered viable. The strong suggestion therefore was that consultation and engagement with employees needs to begin sooner, when changes can be made and there is still time to influence decisions.

9.8 Respondents provided examples of where consultations were carried out in short periods of time and produced positive outcomes, including savings jobs and avoiding protective awards:

*“A software gaming company employing c270 persons entered administration with the decision taken to cease development work but retain the online gaming as operational. Management had identified certain positions as being in relation to development work and therefore to be made redundant, but as part of the consultation exercise carried out with employees it was identified that a small number of these positions were actually also required to fulfil operational functions due to their skill sets. As a result some redundancies were not made. The overall consultation period was less than 48 hours.” (Insolvency Practitioner)*

9.9 The above quote supports the views shared in paragraph 7.4 that consultation can help identify options for the business, thus demonstrating that a valuable consultation exercise was possible to achieve in a short space of time.

## **10 Factors that inhibit effective consultation in an insolvency context**

10.1 Respondents were asked specifically what factors acted as inhibitors to starting consultation or notifying the Secretary of State when an employer is facing or has moved into an insolvency process. Respondents were also asked what factors negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency or has become insolvent.

10.2 Neither directors nor director representatives responded to the call for evidence. Therefore the information gathered of the director's experience is based on the views from lawyers, insolvency practitioners, and their trade bodies as well as trade unions.

10.3 All respondents identified at least one inhibitor to starting consultation or a factor that negatively impacted on the quality and effectiveness of consultation when an employer is or has become insolvent. The inhibitors identified are outlined in the table below and separated between general inhibitors and those affecting directors in particular.

**Table 1: Inhibitors to consultation in an insolvency context**

	<b>General Inhibitors</b>	<b>Inhibitors for directors</b>
Legal tensions	27	16
Retaining confidentiality	22	23
Employee engagement issues	25	0
Lack of funds/time	20	15
No incentive to consult	13	5
Reluctance to accept that company is struggling	6	4
High professional fees for consultation	5	0
Requirement to begin consultation unclear	0	6

## **11 General inhibitors**

11.1 With the exception of 1 trade body, all respondents (27) cited inconsistencies in the legal framework as a significant inhibitor to starting consultation, while 16 identified tensions between insolvency/company law and employment law as a particular inhibitor for directors.

11.2 Insolvency practitioners, their trade bodies and RPBs discussed the practical difficulties of administering cases due to what they viewed as a conflict of interest between safeguarding creditor interests and consulting with employees. Non-court based liquidations pose a particular difficulty according to insolvency practitioners where the company is in a terminal procedure but the requirement to consult with employees remains.

11.3 However trade unions, though acknowledging the legislative tensions, did not believe they should prohibit consultation:

*“Any employer has to face different and conflicting priorities, but they are rightly expected to fulfil their obligations to their employees, and insolvency practitioners should be no exception.” (Trade Union)*

11.4 For 22 respondents, confidentiality or the need to protect commercially sensitive information, was a reason for not beginning the consultation process earlier. These respondents were mindful of the impact that information disclosure would have on the company's survival or value of the business as it was perceived it could become widely known that the business was experiencing financial difficulties. In particular, responses identified an impact on:

- workplace morale which could affect productivity at a critical time when stabilising the business and structure of the workforce was paramount;
- supplier and employee confidence being undermined;
- loss of key personnel or staff who choose to leave rather than wait and risk having no job if the turnaround were to fail;
- secured creditors withdrawing credit or placing pressure on directors to safeguard their loans; and
- the impact on trade credit insurance or supplier credit terms generally if rumours of distress were to circulate.

11.5 A lack of time and money were also considered significant inhibitors to beginning consultation. Both were particular issues considered unique to insolvency situations where achieving a successful turnaround was dependent on taking speedy action often when there was little or no money left in the business. Swift action often includes reducing the size of the workforce quickly to achieve a successful sale or to complete only particular contracts for the benefit of the business.

11.6 The pre-existing structure of the business is a significant prohibitive factor for insolvency practitioners trying to carry out the consultation process effectively. For 25 respondents the challenges of engaging with employees was considered an inhibitor to starting consultation.



11.7 The absence of employee information (for 6 respondents) or lack of experienced or elected employee representatives (for 21 representatives) was seen as barriers to beginning consultation. From the 25 respondents who identified employee engagement issues as an inhibitor, 17 respondents said appointing representatives in line with the requirements under TULRCA 1992 was onerous and time consuming given the demands of dealing with a business in an insolvency situation.

11.8 For some respondents, a consequence of stepping into the management of a failing company means the options available by that time are more limited. This supports the views shared by respondents when asked whether meaningful consultation was possible in an insolvency situation. Many responded that by the time the business is in an insolvency proceeding, all alternative options have already been considered (see paragraphs 9.4 – 9.7 above).

11.9 Not having alternative options available to redundancies leads to viewing the consultation as futile, which may explain why 11 respondents said there is no useful purpose to consultation for insolvency practitioners, compared to 3 for directors. The suggestion here is that directors may have more options available to them than insolvency practitioners, which supports the argument that for consultation to be meaningful (and therefore successful), it needs to happen before the business enters into an insolvency process.

11.10 Almost half of respondents (13) identified a lack of incentives as a general inhibitor to starting consultation, suggesting that existing sanctions for failing to consult are not as effective as they could be (see section 13).

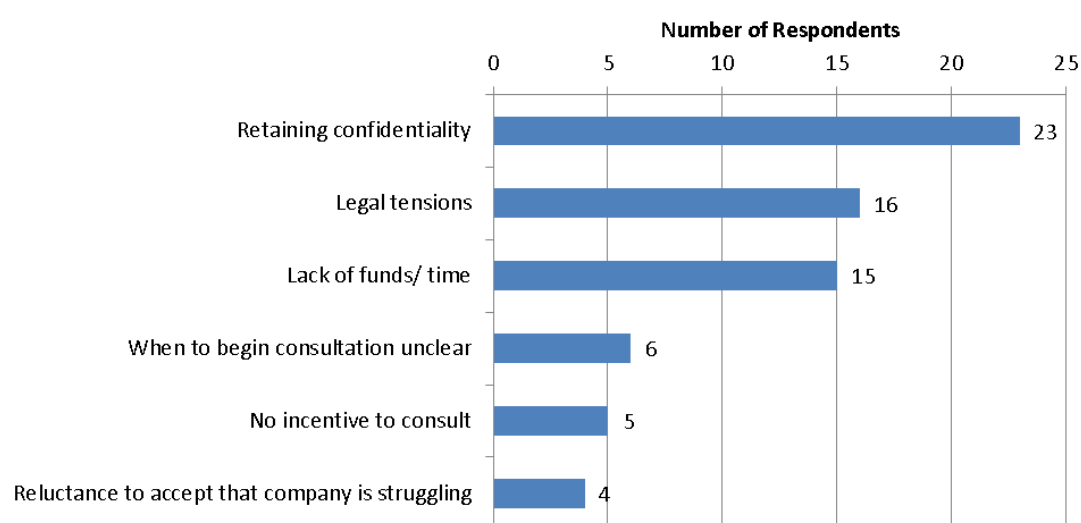
11.11 Fifteen respondents identified a lack of funding and time as inhibiting directors, while 20 respondents identified funding and time as a general inhibitor. Arguments were put forward in the responses that insolvency practitioners in particular have to balance their obligations to act in the best interests of all creditors of the company against the interests of a specific group of creditors i.e. employees. These decisions are often in the context of very little money being available in the company to pay the workforce before the first dismissal can be made.

11.12 The need to dismiss employees was a significant factor for insolvency practitioners who highlighted the obligation in administration cases to adopt contracts of employment within 14 days. Delaying dismissals would, by virtue of insolvency law, result in the administrator adopting all employment contracts and all the liabilities attached to those contracts. To avoid adopting employment contracts, administrators would dismiss the workforce before the specified dismissal period.

## 12 Inhibitors for directors

12.1 The call for evidence asked whether directors are being informed of their duty to start consultation when there is the prospect of collective redundancies. None of the respondents identified themselves as directors or as representing directors therefore the responses reflect others' views of the director's experience. Inhibitors identified for directors in carrying out consultation in near insolvency situations are shown in chart 2 below.

**Chart 2: Inhibitors for directors in carrying out consultation**



12.2 Almost two-thirds of respondents (64%) said directors were advised of their obligations. Amongst those who said directors do receive advice, 4 said they do not know what advice the directors were given as they were not privy to that information.

12.3 Some of the respondents thought the advice may not always be followed while other respondents thought, balanced against their other duties, directors could not always comply with the advice they were given. Other respondents and one lawyer's association thought directors weigh up the options and focus their efforts on what they can achieve before making their own decisions.

12.4 For 8 respondents, these perceived inconsistencies include the offence of wrongful trading in insolvency law as an inhibitor for directors. The view was that by beginning the consultation process and then retaining employees for the period of consultation, if the company subsequently entered into insolvency liquidation, the director could be exposed to the allegation in disqualification proceedings of continuing to trade with the knowledge that the company was in an insolvent position.

12.5 Safeguarding commercially sensitive information was the main inhibitor for directors to starting consultation and the second most common reason given generally for not beginning consultation (see paragraph 11.4). According to respondents directors feared that exposing the company's affairs would compromise a potential rescue or sale of the business.

12.6 Concerns were also raised by 6 respondents about when to begin consultation. The uncertainty in some instances delays the start of the consultation as directors have not identified the point at which they are 'proposing' redundancies (and therefore required to begin consultation), whether because of denial or a lack of understanding of the situation or their obligations.

12.7 According to responses, the responsibility to consult is then passed on to insolvency practitioners which can often mean the options available by that time are considerably reduced (see paragraph 9.4 and 9.7).

### **13 Sanctions for failing to consult**

13.1 If an employer has failed to consult with employees, employees are entitled to claim a protective award against the employer. The purpose of the protective award is to ensure there is a procedure available which would enforce the obligations of the employer to consult before making redundancies. The award is payable by the employer to the former employees who were made redundant.

13.2 The call for evidence asked whether the current sanctions against employers who fail to consult are proportionate, effective and dissuasive in an insolvency context.

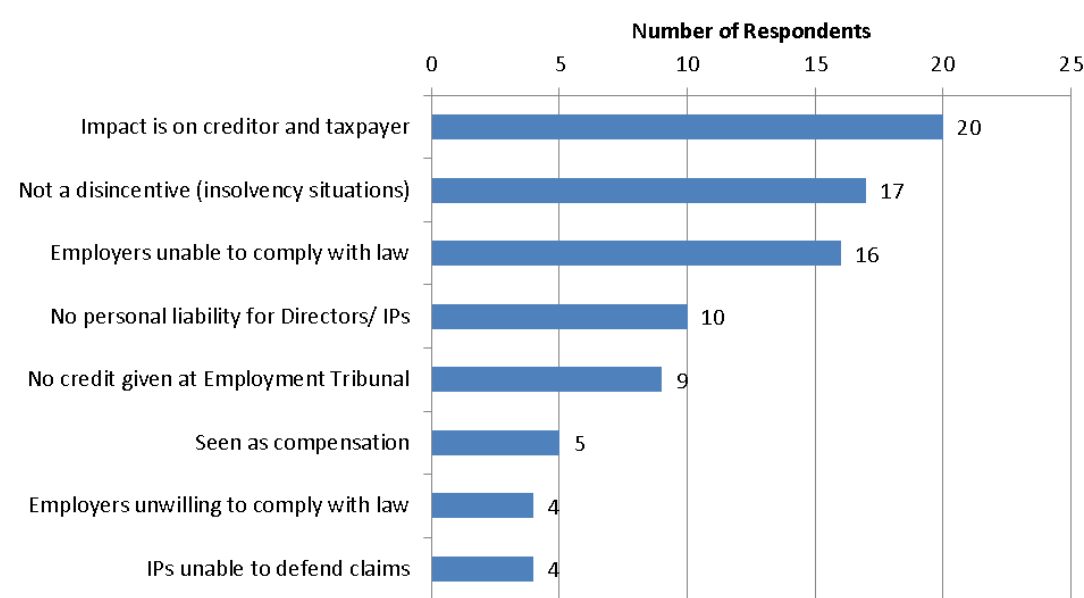
13.3 Only 4 of the total number of respondents, including 3 trade unions, thought protective awards are proportionate. A total of 16 respondents thought protective awards are not proportionate while the remaining 8 did not answer the question or were unclear in their answer.

13.4 Of those that commented on this question, a significant proportion thought protective awards were not effective as sanctions.

13.5 Only 1 respondent thought protective awards were effective but still recognised the difficulties and challenges experienced by employers in an insolvency situation and believed that there are circumstances where employers would not be able to comply with all the requirements in the consultation process and therefore would have grounds for mitigation.

13.6 The reasons why protective awards are not considered effective are outlined in the chart below:

**Chart 3: Reasons given why protective awards are not effective**



13.7 The main reason given by 20 respondents why protective awards are not effective as sanctions in insolvency was the fact that the penalty for failing to comply with the legislation does not fall on the employer or its agents, but rather on unsecured creditors and most significantly for respondents, the taxpayer.

13.8 Where the company is insolvent, the individual can claim a limited amount (within a statutory limit) from the Secretary of State. Those payments are made by the Redundancy Payments Service (RPS) on behalf of the Secretary of State, using money held in the National Insurance Fund (NIF). The amount paid can then be claimed against the often limited funds available in the insolvent estate.

13.9 A lack of personal liability for directors or insolvency practitioners was seen by 10 respondents as a factor why employers may not start consultation promptly or at all.

13.10 Concern was raised in a number of responses (5) that protective awards are viewed as compensation or an entitlement by employees and their representatives for being made redundant rather than as a sanction against the employer.

13.11 While 16 respondents commented that employers are unable to comply with the requirement to consult due to tensions in the legal framework, another 4 respondents, all trade unions, believed that employers are unwilling rather than unable to comply.

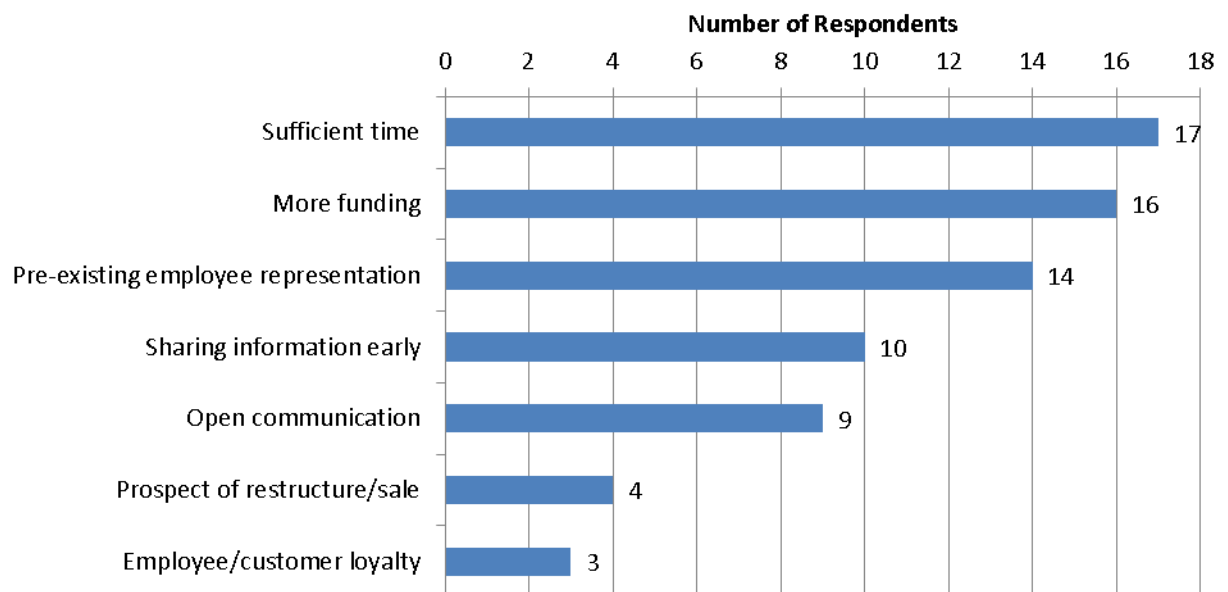
13.12 A number of respondents also argued that there is an inconsistent approach taken by different Employment Tribunals in considering the actions taken by employers to consult. For some respondents (9) there is little incentive to consult if any efforts made are not taken into account in the award granted by the Employment Tribunal.

13.13 This view aligns with some of the responses to the question posed on inhibitors to consultation. Thirteen respondents replied that there was no incentive to consult as any consultation activity would not be considered by an Employment Tribunal (see table 1). For some insolvency practitioners and their trade bodies, varying and inconsistent awards given by different Employment Tribunals sends an unclear message as to what best practice should be for collective redundancies in an insolvency situation when options are limited.

## **14 Factors that facilitate consultation in an insolvency context**

14.1 Recognising that there are inhibitors to consultation, the call for evidence also wanted to explore what factors could and do help the consultation process when present. The chart below shows the facilitators to consultation identified in the responses.

**Chart 4: Factors that facilitate consultation**



14.2 All the trade unions, and many of the insolvency practitioners, lawyers and trade bodies, totalling 17 respondents, talked about 'sufficient time' or more time as a facilitator to consult.

14.3 The lack of funding was suggested as the second biggest inhibitor to consultation mentioned by 16 respondents across the different sectors. Consequently respondents commented that if funding was available to retain employees for the period before dismissals, there would be greater compliance with the requirement to consult. A number of respondents, in particular the trade unions and insolvency practitioners, suggested that the government could provide this funding for the consultation period.

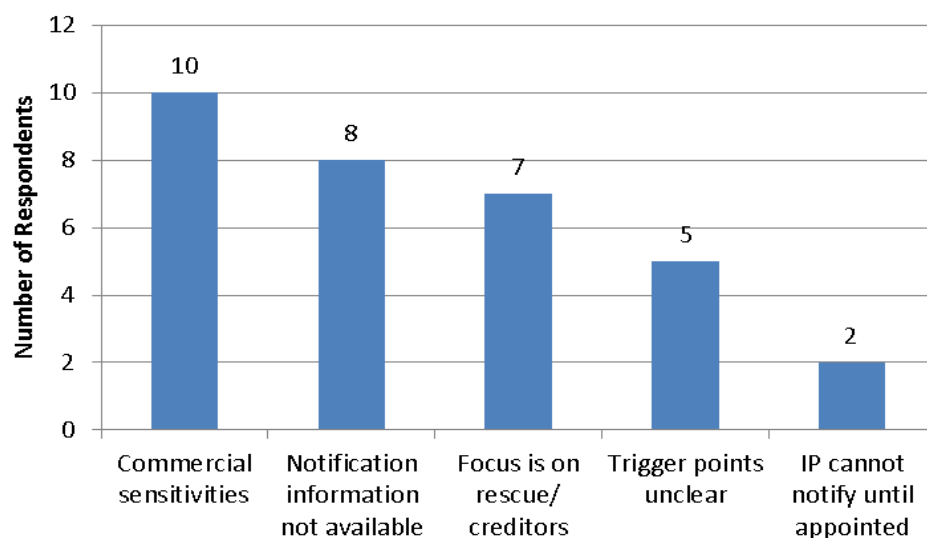
14.4 For 14 respondents including trade unions, having an existing employee representative framework in place for the purpose of consultation would facilitate the consultation process. Good, open communication channels were seen by 9 respondents as being a positive factor in facilitating consultation which supports the comments made by the trade unions about trusting relationships facilitating constructive discussions.

# The Notification Process

## 15 Inhibitors to notification

15.1 Respondents were asked whether there were any inhibitors to notifying the Secretary of State when an employer is imminently facing, or has moved into an insolvency process. Twenty-one responses were received. For 4 respondents (14%), there are no inhibitors to notifying the Secretary of State while 17 respondents (61%) thought the contrary. Identified inhibitors to notification are shown in the chart below:

**Chart 5: Factors identified in the responses which inhibit notification**



15.2 Concerns around commercial sensitivities (as outlined in paragraph 11.4) were the most common reason given for not notifying the Secretary of State. As well as the Secretary of State, the employer must also send the notice to the employee representatives at the same time, adding to the employer's concerns to maintain confidentiality. Of the 17 respondents that thought there were inhibitors, 10 listed the need to retain confidentiality so to not compromise commercially sensitive information. These views were identified by respondents across the different sectors, including insolvency practitioners, lawyers and the trade unions.

15.3 For 8 insolvency practitioners and their trade bodies, there were issues around completing the notification form where the required information may not be available until shortly before the redundancies are actually made, particularly the number and description of employees who will be affected and the proposed method of selecting the employees who may be dismissed, which is a requirement under TULRCA 1992.

15.4 Respondents also said there was uncertainty about when the notification form should be submitted, a concern highlighted by 5 respondents including insolvency practitioners, lawyer groups and trade unions.

15.5 Respondents expressed concerns that when it becomes apparent that redundancies are being proposed, directors frequently do not start the notification process as their focus still remains to try and rescue the business. Other respondents attributed the delay in notifying and consulting to a denial of the reality of the situation on the part of some directors (see chart 2).

15.6 Ten respondents suggested simplifying the notification submission process, for example by allowing online submissions to the RPS.

## **16 Sanctions for failing to notify**

16.1 The sanction for failure to notify the Secretary of State of collective redundancies is a criminal offence, punishable on summary conviction by a fine of up to £5,000. Where the employer is a company, if it is proved to have been committed with the consent or connivance of, or to be attributable to neglect on the part of, any director, manager, secretary or other similar officer of the company, or any person purporting to act in any such capacity, then that person is also guilty of the offence.

16.2 The sanction therefore applies to both insolvency practitioners and directors. Insolvency practitioners can also be referred to their RPBs for consideration of disciplinary action while directors could be liable for disqualification if the company enters into an insolvency proceeding and their conduct makes them unfit to act as a director.

16.3 Respondents were asked whether they thought the sanctions for failing to notify the Secretary of State were proportionate and effective. A total of 11 responses were received and only 4 of those respondents thought the sanctions were proportionate and/or effective. The majority of those who responded (6) thought they were not proportionate or effective and 1 respondent thought the sanctions were proportionate but did not provide a clear view as to whether they thought the sanctions were effective or why.

16.4 Although 4 respondents thought criminal sanctions were proportionate (including an insolvency practitioner and an insolvency practitioner trade body), the only explanation given by the respondent who provided commentary in their answer was that they thought the sanctions were sufficient as insolvency practitioners are subject to regulatory review.



16.5 The remaining 3 respondents, who considered that criminal sanctions are proportionate, commented on the failure of the regime and the lack of consequences for those who fail to comply. They also warned that further sanctions against insolvency practitioners could result in fewer administrations, more liquidations and higher fees as insolvency practitioners would be less inclined to take on the risks of greater sanctions.

16.6 Respondents who answered that criminal sanctions are not proportionate were the same as those who answered those sanctions for failure to notify are not effective. The reasons given were because there was seen to be an imbalance between the civil penalty for failing to consult and the criminal sanction of failing to notify, with respondents believing both should be civil penalties. A further view was that the penalty was disproportionate given that insolvency practitioners could not comply with the legislation.

## **17 Memorandum of Understanding**

17.1 The Memorandum of Understanding (MoU) was launched in 2009, between the Insolvency Service, R3, the trade body for insolvency practitioners in England and Wales and Job Centre Plus (JCP) who are part of the Department for Work and Pensions.

17.2 The voluntary partnership was designed to provide agreement to ensure assistance could be given to individuals facing redundancy as a result of insolvency through the provision of early confidential warnings of pending insolvencies. Employees would be given help and support in finding new employment or training. Insolvency practitioners are encouraged to take advantage of this voluntary arrangement when redundancies are likely or are due to take place.

17.3 The call for evidence asked how well the MoU was working. Of the total 28 respondents, 11 (39%) did not answer and a further 8 (29%) felt unable to answer with some explaining they felt the parties to the MoU are better placed to answer this question.

17.4 Five respondents (18%), including 3 insolvency practitioner firms and 2 trade bodies thought the MoU works or appears to work well, but could do with a 'refresh and review' and 4 responses (14%) were unclear in their response.

17.5 Nineteen respondents offered suggestions on how the MoU could be improved or commented on the service they have experienced from local support agencies. Suggestions included:

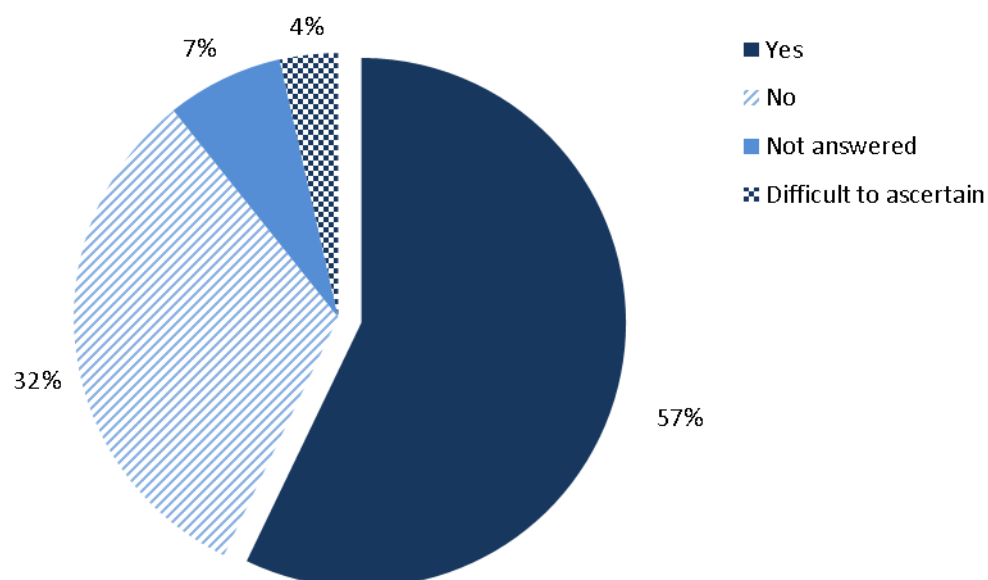
- (a) Remove Job Centre Plus (JCP) minimum limits for providing support (i.e. for attending sites);
- (b) A more consistent approach by all support agencies throughout regions;
- (c) Make insolvency practitioners more aware that JCP can be invited on site to provide advice and information directly to employees;
- (d) Better organisation and communication with JCP and between JCP offices;
- (e) Boost JCP resourcing at a local level.

## Guidance

### 18 Would guidance be helpful?

18.1 The call for evidence asked whether further guidance would be helpful and if so, who should the guidance be aimed at and what the guidance should cover. The question also asked how the guidance should be marketed. The chart below shows the proportion of respondents who thought guidance would be helpful.

**Chart 6: Would guidance be helpful?**



18.2 While 2 respondents (7%) did not answer this question at all, 1 respondent thought it was difficult to determine whether guidance would be helpful.

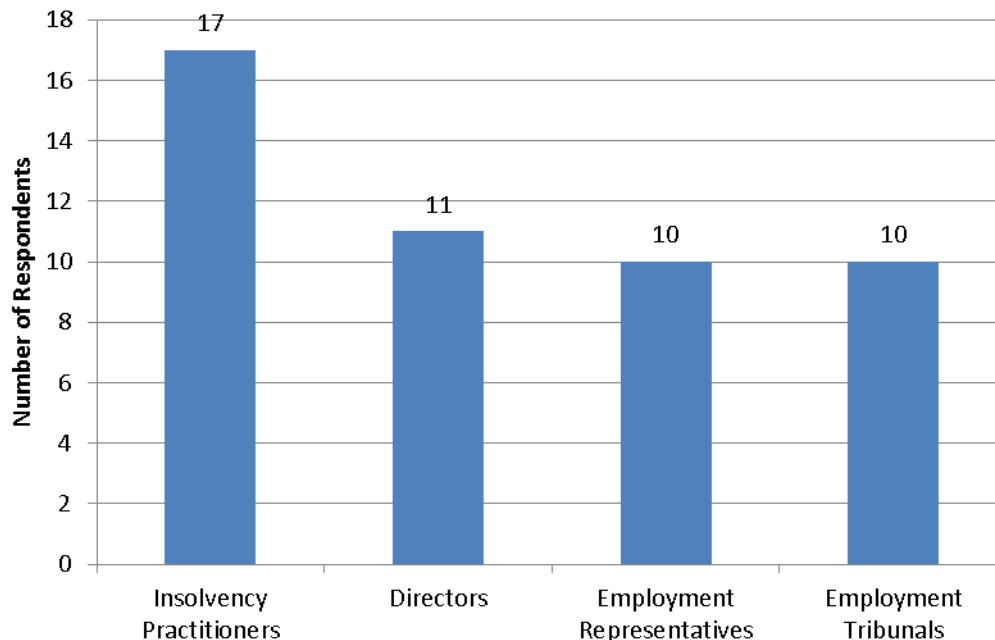
18.3 Of the remaining 25 respondents that did answer the question, 9 thought guidance would not be helpful. Some questioned whether directors would follow further guidance as there is already guidance and information available.

18.4 Sixteen thought guidance would be helpful but many also qualified their response with the view that they considered that guidance would also need to be accompanied by a change in the legislation to address more fundamental conflicts between employment law and insolvency law.

18.5 Training for insolvency practitioners, employment representatives and for Employment Tribunal judges to better understand issues specific to insolvency was also viewed as beneficial to complement guidance.

18.6 Even though some respondents thought guidance would not be helpful, nearly all the respondents did provide their view on who guidance should be targeted at, as the chart below shows.

**Chart 7: Who should receive guidance?**



## **19. What should guidance cover?**

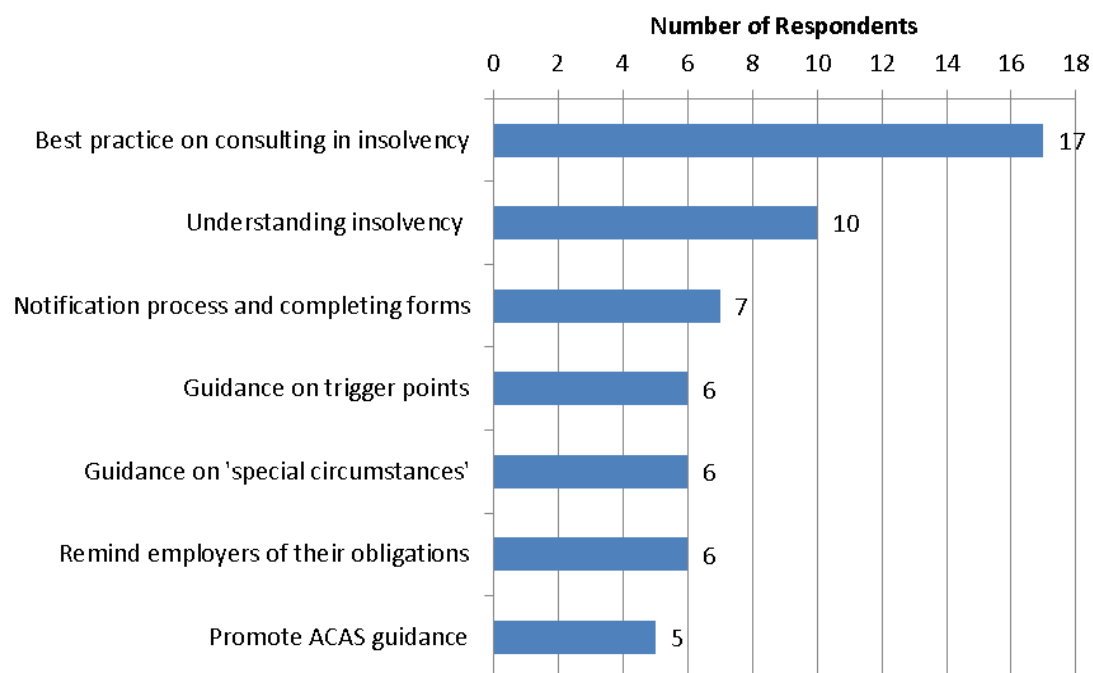
19.1 Respondents were also asked what they thought guidance should cover. Most respondents (17), including insolvency practitioners and their trade bodies as well as trade unions, thought insolvency practitioners in particular should receive practical guidance given the tensions between insolvency law and employment law; in particular, what action to take where there are no employee representatives and what to do where there are no funds in the estate. Some respondents thought this guidance should be in the form of a Statement of Insolvency Practice (SIP).

19.2 The employment lawyer trade body also highlighted concerns about how decisions made in Employment Tribunals impact on the decision to consult in an insolvency situation and therefore thought 'best practice' guidance and general guidance for understanding insolvency would be beneficial to Employment Tribunals.

19.3 Insolvency practitioners and the trade unions thought that existing guidance should remind employers of their obligations to consult and notify. These 6 respondents thought that directors are not held to account for their failure to notify or consult and often this obligation is passed on to the insolvency practitioner when the company enters into formal insolvency proceedings. Reminding the director of the company's obligations and their duty to the company before the insolvency process begins was considered important.

19.4 Many respondents, with the exception of trade unions, believed that insolvency is a 'special circumstance' which makes it neither reasonable nor practicable for the employer to comply with the requirements of TULRCA 1992. For 10 respondents, guidance should provide information on the challenges of insolvency, while 6 respondents thought guidance should specify how insolvency should qualify as a 'special circumstance' for the purpose of Employment Tribunal claims. The chart below summarises what respondents thought guidance should cover.

**Chart 8: What should guidance cover?**



19.5 Seven of the responses highlighted the need for further guidance on the notification process and completing the notification form for the Secretary of State.

19.6 Guidance is already available through ACAS and gov.uk. Organisations such as the Institute of Directors, Confederation of British Industry and ACAS were identified as good sources of guidance – both in helping prepare the guidance and helping distribute guidance. A large number of respondents called on government to provide guidance.

**ANNEX A – List of respondents to the Call for Evidence on Collective Redundancy Consultation for Employers facing Insolvency (March 2015)**

<b>Organisation name</b>	<b>Category</b>	<b>Page Number</b>
Baker Tilly	Insolvency Practitioner	28
Begbies Traynor	Insolvency Practitioner	36
Chartered Institute of Personnel and Development (CIPD)	Trade Body	45
Confederation of British Industry (CBI)	Trade Body	53
City of London Law Society	Trade Body	55
CMS Cameron McKenna LLP	Insolvency Practitioner	59
David Oprey	Insolvency Practitioner	71
Deloitte LLP	Insolvency Practitioner	84
Duff and Phelps Limited	Insolvency Practitioner	100
Employment Lawyers Association (ELA)	Trade Body	113
Ernst and Young LLP	Insolvency Practitioner	120
Fraser Frayne Insolvency Practitioners Limited and Price Sterling	Insolvency Practitioner	132
Grant Thornton UK LLP	Legal Representative	144
Institute of Chartered Accountants in England and Wales (ICAEW)	Recognised Professional Body	148
Institute of Chartered Accountants in Ireland (ICAI)	Recognised Professional Body	158
Institute of Chartered Accountants of Scotland (ICAS)	Recognised Professional Body	164
Insolvency Lawyers Association (ILA)	Trade Body	177
Insolvency Practitioner Association (IPA)	Recognised Professional Body	185
KPMG	Insolvency Practitioner	197
PricewaterhouseCoopers LLP (PWC)	Insolvency Practitioner	202
Association of Business Recovery Professionals (R3)	Trade Body	213
R3 Scottish Technical Committee	Trade Body	222
The National Union of Rail, Maritime and Transport Workers (RMT)	Trade Union	233
Trade Union Congress (TUC)	Trade Union	267
UNISON	Trade Union	281
Unite	Trade Union	293
Union of Shop, Distributive and Allied Workers (USDAW)	Trade Union	315
Wragge Lawrence Graham & Co LLP	Legal Representative	324

# **ANNEX B**

**Responses to Call for Evidence on Collective  
Redundancy Consultation for Employers facing  
Insolvency (March 2015)**

# **Call for Evidence Collective Redundancy Consultation for Employers facing Insolvency**

## **General Comments**

The response set out below has been provided on behalf of Baker Tilly Restructuring and Recovery LLP and Baker Tilly Creditor Services LLP.

Generally, we welcome the Government's consultation in this regard, the impact of which has significance both for the insolvency profession as well as employees affected by the insolvency of their employers. In our view a balance must be struck between ensuring that employees are treated fairly whilst also encouraging an entrepreneurial society and minimising the impact of any legislative requirements on the ability of the insolvency practitioner to maximise returns to creditors generally in relation to any specific insolvency.

It is our view that, overall, Insolvency Practitioners, wherever possible, endeavour to provide employees with as much support and assistance as possible when they are facing redundancy and the insolvency of their employer. This frequently extends to providing advice, free of charge, prior to their employer entering into a formal insolvency process, when the Insolvency Practitioner is acting in an advisory capacity. The advice and support provided often extends past that required by legislation, including both practical and emotional support to employees.

It should be borne in mind that, in our opinion, the vast majority of Insolvency Practitioners do not seek to avoid compliance with the legislative requirements to consult with employees, rather they are prohibited from doing so due to time constraints and the need to preserve the value of the business, thereby maximising the return to creditors which is the primary duty of Insolvency Practitioners.

It is also worth noting that statistics produced by the Insolvency Service indicate that approximately 83%<sup>1</sup> of companies enter into a terminal insolvency procedure, where it is likely that employees would have been redundant prior to the appointment of an Insolvency Practitioner.

We would prevail upon the government and regulators to consider providing clarity and guidance generally, and in particular to the Employment Appeal Tribunal ("EAT"), regarding the Insolvency Practitioners' role in the pre-appointment period and the limitations placed upon their ability to consult, both prior to and after appointment, to address the misunderstandings that currently exist in this area.

.

---

<sup>1</sup> The Insolvency Service, Insolvency Statistics: January to March 2015, first published 29 April 2015



## Consultation Response

Q1. What are the considerations undertaken when deciding whether or not to start a consultation? How is this decided in practice where an employer is facing or has moved into, insolvency? Please provide examples where possible.

The Insolvency Practitioner will, ordinarily, be desirous of complying with the legislative requirements to consult in all circumstances. The ability to do so is generally hampered by logistical barriers, including the timescale involved.

In the pre-appointment phase, when consultation would arguably be of the most benefit, the Insolvency Practitioner has no locus to act in terms of commencement of the consultation and is acting only in an advisory capacity. At this stage it is the obligation of the company, acting by its directors, to commence consultation. It is often the case that the Insolvency Practitioner will not be involved until the latter stages of the company's demise and there is a very limited timescale during which decisions can be made in relation to the company. The timescale is often much shorter than the requisite consultation period and there are often insufficient funds, or access to finance, to allow the company to continue trading for the purposes of facilitating a consultation.

At an early stage in the process, usually during the pre-appointment discussions (or the advisory period if the Insolvency Practitioner has been appointed to undertake an independent business, or other, review) Insolvency Practitioners are encouraged to advise directors of their statutory duty to consult with employees at the earliest opportunity. It is worth noting that the Insolvency Practitioner is generally engaged to advise the company as opposed to the directors personally. The decision as to whether to consult or not will then rest with the directors.

There is a concern that advising the directors to consult at an early stage, particularly when a decision has not been made regarding the future viability of the business, may have an overtly negative impact on the ability of the company or the insolvency practitioner to retain the value of the business to allow for a going concern sale. It may also hamper the ability of the company and Insolvency Practitioner to continue trading in the pre and post appointment period. Goodwill may be lost, and key employees may depart which, whilst this may protect the individual employee, conversely it may have a detrimental impact on the general employee and creditor body. For example the loss of several key employees may result in the termination of trading, which will have an impact on all employees. Similarly, termination of trading may adversely affect the collection of the debtor book, as well as reducing the value of assets, which are generally worth more on a going concern than break up basis, which will have a detrimental effect on returns to creditors.

Following appointment, the Insolvency Practitioner's primary responsibility and duty is to the general body of creditors as a whole.

If the aim of a consultation is to ensure employees are appropriately informed and enables them to 'contribute to decisions that affect them' and 'ensure that all possible options for rescuing the business' this is unlikely to be achieved unless there is a viable business and financial support for the continuance of the company. In the vast majority of insolvencies, this will not be the case and, as noted in our opening remarks, in excess of 80% of insolvencies result in a terminal insolvency procedure (liquidation), at which stage consultation would not be meaningful, and there would be little opportunity or funds available to allow for consultation.

As mentioned in our opening remarks, Insolvency Practitioners, wherever possible, endeavour to provide employees with as much support and assistance as possible when they are facing redundancy and the insolvency of their employer, this will extend to providing advice and support in excess of that required by legislation, including both practical and emotional support to employees, in addition to ensuring employees have access to additional information from various support bodies. Within our firm there is a team dedicated to providing support and guidance to employees and, it is our understanding that firms will out-source this aspect to specialist firms where they do not have in-house experience or teams.

It would seem counter-intuitive to expect a director to act with integrity and commence a consultation process when they know that a formal insolvency process cannot be avoided. In our view, more could be done to encourage directors to take the appropriate advice at a much earlier stage to avoid a terminal insolvency procedure and allow for the rescue of the business and therefore facilitate meaningful consultation.

**Q2. How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.**

In our experience, it is often difficult for a meaningful consultation to be undertaken, bearing in mind the vast majority of insolvencies result in immediate termination of trading. A distinction should be drawn in the consultation requirements having regard to the differing types of insolvency process. Where there is no option but to cease trading, there is little point in incurring the cost of consultation, and usually no funds to do so. The cost of any consultation, either in terms of a direct cost (via financing the payroll during the consultation period) or indirectly (via the time spent by the Insolvency Practitioner in doing so) must, of course, be borne by the general creditor body. There is little in advantage in incurring these costs when redundancy is unavoidable. Whilst the lack of consultation may have an impact on the level of any protective award, if there is little or no return to creditors, this would not be a relevant or defining consideration.

Similarly, where there is no justification for a going concern sale, or justification only for a limited period of trading, these decisions should not be driven by the need to consult, but for the overall impact and benefit these decisions have on the general creditor body (which may include employees). Where there is only a limited period of trading, every effort is made to consult with employees. However, in reality, this would most likely take the form of notification rather than having an impact on the final outcome, or result in the achievement of the stated purposes of the consultation process.

Moreover, additional guidance could be provided to the EAT such that protective awards are not set at disproportionate or punitive levels when the insolvency practitioner, or directors, have been prohibited from consulting for the reasons set out elsewhere in this response. Where there is a distribution to creditors, the level of these awards has a significant impact on the returns to the general body of creditors, which is disproportionate and may unduly harm small businesses.

**Q3. What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

Employees, when entering a consultation process, are generally focussed on the impact of any potential insolvency on their personal position for example: will we get paid, are we going to be made redundant and if so when, when will the business close, will the new owners wish to retain all employees, who are the likely purchasers?

There are likely greater benefits in the notification requirements than the consultation. The employee will have a greater level of information and the opportunity to seek other employment or undertake limited financial planning. In our experience employees, particularly in either long established, local or small businesses where they have been employees for a significant period of time and consider themselves to have contributed to the historical success of the business, may also be willing to work for reduced or, in some cases, no pay to allow opportunity to seek a buyer or explore other finance options. Consultation requirements should take into account the size of the work force, in addition to length of service. Employees will be more aware of the risk of failure of a young company rather than an established company.

Employees may consider supporting a management buy-out and may be more willing to support the rescue of the company through a formal insolvency process if they feel that they have been part of the process. Often employees will be aware that the company is in financial difficulties and consultation or notification can bring clarity and stability to the process.

**Q4. In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

We consider it unlikely that the consultation process would result in employees taking an active engagement in the rescue process, this may be for a combination of reasons: lack of experience or knowledge of the process and/or business as well as access to funding and, potentially, confidential information to which they will not be party as an employee. The focus of the employee group is not, generally, or on how the business might be saved, as opposed to their personal position, as set out in our response at Q3 above.

Whilst key employees with the financial knowledge of the business may be able to contribute to a meaningful discussion; when a company is nearing insolvency, even when consultations are undertaken in an open and meaningful manner, they rarely result in the employee group generating an effect strategy for survival. If employees have an active interest in rescuing the business this will have been identified at an early stage of the process; most likely before the involvement of the Insolvency Practitioner.

Active engagement tends to be driven by the management team, which may not necessarily by the employee representatives. It is more likely that any offer or interest in the business would most likely be driven by the management team, who will have had a closer involvement in the business and financial position of the company.

Ultimately, Insolvency Practitioners have a wealth of knowledge and experience in dealing with insolvent business and are usually the best placed, together with key officers, key employees and financial backers, in identifying the most effective strategy for the survival of the business. There is a danger that consultation could result in numerous, conflicting, proposals with limited or no financial merit or backing being put forward which could be time consuming to explore, and which could delay the process and devalue the business.

More could be done to make the process of engaging or appointing employee representatives more quickly and efficiently and requiring that they are engaged only where rescue of this business is a viable option.

Moreover, the decision to consult should be left to the Insolvency Practitioner, without punitive impact should it be inappropriate, impossible or unnecessary to do so. If the Insolvency Practitioner fails to consult when they could have done, this should be a matter for their regulatory body to address rather than forcing legislation, with which compliance is impossible in many scenarios, giving rise to punitive awards being made to the detriment of the wider creditor body.

**Q5. What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.**

Either a trade union or employee representative group being in place prior to the insolvency process commencing would assist in the consultation process. That said, as noted elsewhere, a distinction should be drawn between a terminal insolvency process with the immediate closure of the business and those where rescue is possible. In our view, as set out in our response to Q3, employees are more concerned on the personal impact and effective notification usually serves greater purpose in this scenario.

**Q6. What factors, where present, act as inhibitors to start consultation or notifying the Secretary where an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

Consultation with employees could have a negative impact on the business due to the departure of key employees, as well as reduced productivity once employees are aware of the threat of redundancy. These factors could reduce the options available to facilitate the survival of the company. Information could be leaked to competitors that could hamper the sale process and reduce the value of the business, for example the debtor book could be more difficult to collect and competitors may target customers.

In terms of notification to the Secretary of State, or the employee group, concerns arise as to the ability of the director, and their advisers, to control the information flow as well as preserve confidentiality.

Q7. What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

The time pressures under which the directors and their advisers will be operating under, there is often a very shortened time period available either to actively market the business and seek alternative finance options to enable the survival of the business. This can be a matter of days. Whilst directors are consistently actively encouraged to make early contact with specialist advisers as soon as they have concerns as to the future viability of the business, the reality is they will often explore other re-finance options in the first instance, turning only to restructuring specialists as a 'last resort'. Consultation at the re-finance stage may be precipitous, inappropriate and unnecessary, for the reasons set out at elsewhere and it may not become clear until late in the day that survival of the business is no longer possible.

Once an insolvency event has arisen, consultation will, other than when a rescue option is being explored, or there is adequate finance to allow continued trading, be largely rendered irrelevant or impossible. The consultation length will, even when there is continued trading or a rescue option being explored, be driven by the availability of, and access to, adequate financial support. The key factors for an insolvency practitioner at this stage will be to maximise the assets available for creditors, and in relation to an administration for creditors as a whole, which will drive their ability to consult, or not as set out elsewhere in our response.

Q8. Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?

Our standard procedures require that the directors are notified of their obligations to consult at an early stage, however there are concerns as to the negative impact consultation could have, as set out elsewhere in our response.

Q9. Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

As set out in our response to Q7, whilst we actively endeavour to encourage directors to contact an Insolvency Practitioner at an early stage, they often do so as a 'last resort'. Whilst lawyers and other advisers to the company will be aware of the obligation to consult we cannot comment as to whether they have done so. We find that directors are often acutely aware of the impact insolvency may have on the employees, particularly in owner managed businesses. However it is often the case that directors are perpetually hopeful of a rescue option and do not envisage redundancies until the stage at which they contact an insolvency practitioner and, on those grounds, it is unlikely that much consultation has been undertaken prior to the engagement of an insolvency practitioner.

Q10. Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

In our experience, it is usually the case that there are either Union Representatives in place, or a team of leaders / managers who have acted on behalf of the employee group, albeit they have not been formally appointed. We will continue to liaise with informally appointed leaders / managers where it is appropriate to do so. Officially employee representatives are rarely in place, in our experience.

Where there is no recognised union, consultation should be with the elected representatives. If there are elected representatives in place, they must be fit for purpose. If they had previously been elected for another specific reason, they might not be appropriate for consultation purposes. Voting for representatives must be confidential and all categories of employee must be represented (for example, it would not be fair to have representatives who are all from the finance department when there are also factory workers.). If no, or inappropriate, representatives have been elected then the consultation will need to be undertaken directly with the entire employee workforce.

Appointment of representatives is a time consuming process that could ultimately delay the consultation process and thereby hamper it. During this period of time it will have been necessary to make critical strategic decisions without involving the employee representatives.

Elected representatives may not necessarily have the correct skill set to represent the wider employee group effectively when facing an insolvency scenario and may inadvertently hamper the employee position through lack of understanding.

Consideration should be giving to allowing consultation with an appropriate representative group, which could be determined by the Insolvency practitioner, for example, if there is a pension scheme with employee representatives forming part of the Trustee group for the company pension scheme, it may be they are best placed to take on the role of employee representatives in a consultation scenario (subject to them meeting the necessary criteria), as they will have wider knowledge of the business from their Trustee role, have an established route to communicating with, and the trust of, the employee group

**Q11. How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

The hand-over from directors to Insolvency Practitioner will depend on the strategy being adopted following appointment: close down, limited trading, trading with a view to a going concern sale. However, in reality, the directors have rarely commenced any formal consultation prior to our involvement for the reasons set out elsewhere.

In a close down or limited trading scenario the Insolvency Practitioner will usually take over all consultation with employees, and in effect this often happens free of charge prior to appointment, in conjunction with Job Centre Plus if appropriate.

Where the strategy is for the business to continue trading whilst marketing is undertaken to identify a potential purchaser or going concern sale, the Insolvency Practitioner will often work alongside the directors in relation to the day to day operational matters, with the Insolvency Practitioner retaining overall control. However, it is our experience that the employees will usually liaise with the Insolvency Practitioner's staff in relation to any potential impact on their future employment and in terms of facilitating claims. As mentioned elsewhere, insolvency practitioners often assist employees over and above that required by the legislation and seek, wherever possible, to minimise the impact on them and provide

**Q12. How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

Reducing the instances when notifications have to take place; only requiring notification when the Secretary of State can provide positive supportive action.

Greater information needs to be provided to directors and Insolvency Practitioners as to the criteria adopted by the Secretary of State when determining when they may take action and provide support.

Improved guidance to EAT to ensure that protective awards are reflective of the constraints on the insolvency practitioner's ability to consult.

**Q13. Could the process requirements for consultation be further clarified or improved?**

Yes, in terms of the limitations placed on the Insolvency Practitioners and their ability to consult given the financial position of the company, the shortened time frame and limited funds available to facilitate ongoing trading solely for the purpose of consultation. If the Insolvency Practitioner is unable to secure finance to facilitate ongoing trading, the general body of creditors should not be penalised by the granting of, what may seem to be, a punitive Protective Award where the Insolvency Practitioner had no ability to undertake a meaningful consultation.



Q14 Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

Clear guidance should be given to directors in terms of the expectations on them in relation to consultation when faced with an insolvency process. However, the process is driven by the constraints mentioned elsewhere and this should be reflected within the legislative requirements.

Q15. How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

As with other questions, there should be a clear distinction between the obligations on directors and insolvency practitioners.

Insolvency Practitioners do not require incentivising; if they have not complied with legislation that is a matter for their professional bodies. In the whole, our experience is that there is little opportunity for Insolvency Practitioners to consult in a meaningful fashion, nor the finances available to do.

Protective awards do not act as a disincentive as these rank alongside other unsecured creditors and therefore have little impact on the directors (unless they are a creditor). Similarly, they are not an effective disincentive from an insolvency practitioner's perspective due to the relatively low returns and instances in which a distribution to unsecured creditors is made, despite the UK's overall high ranking in the World Bank Report in terms of returns to creditors (8 cents on the dollar). Where there may be a significant impact on the return to the general body of creditors, Insolvency Practitioners may attend EAT hearings with a view to minimising the level of any protective award.

Incentives are likely to be more effective in terms of directors, consideration should be given to 'payroll loans' being made to those companies where effective consultation has been commenced, which will be repayable if the company survives, or is otherwise rescued, or form part of the RPO's claim if it fails. This could encourage early consultation, with a reduced financial risk.

Consideration could also be given to personal fines being levied, or directors being held financially responsible for failing to consult at a time when they knew the company could not avoid redundancies or a formal insolvency process.

Q16. What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

As mentioned elsewhere, employees, when faced with an insolvency scenario are usually primarily concerned with the personal, rather than collective, impact. They may not have the relevant tools at their disposal to ensure that their rights are being recognised and they are being treated fairly. We would consider that steps should be taken to ensure that employees are communicated with effectively and expediently. They should be kept informed of key decisions which may impact on them as soon as possible, to the extent that this is not commercially detrimental, and subject to any market sensitive and confidential information.

We understand that it is difficult to find employees willing to act as a representative. It would also be necessary to ensure that representatives remain part of the workforce for the duration of the insolvency process. Financially incentivising employee representation may make the nomination and selection process quicker and easier may be a solution, however, this would need to be supported in funding by the government in the first instance, given the financial constraints that exist in an insolvency scenario.

Q17. Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

We do not have any appropriate, recent, examples.

Q18. The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively? Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

We do not agree that these sanctions are proportionate in the context of an insolvency scenario. Where funds become available to unsecured creditors, the level of these awards can have a significantly detrimental effect on the dividend available to the general body of unsecured creditors; and could have particular impact on small business creditors. In essence the general body of creditors is being penalised for the inability of the Insolvency Practitioner to comply with the legislation in this area.

These sanctions also have an adverse impact on the reputation of the insolvency profession as a whole signifying, as they do, to the lay person that the insolvency practitioner has failed to comply. The reality, most often, is that the insolvency practitioner has no locus to act until appointment and, in a terminal insolvency scenario, where there is no possibility of trading (due to lack of finance, a viable business or any other reason) has no authority or ability to comply. The EAT do not seemingly take into account the 'special circumstance' clause in the regulations when day one closures are required in terminal insolvency scenarios.

We agree that there should be sanctions where appropriate, to discourage abuse of the process, however these should recognise the distinction between wilful failure to comply and inability to do so. The sanctions should not be as punitive to significantly impact upon the distribution to the general body of creditors as a whole, in the event that there is a distribution.

There should however be a distinction between 'terminal' insolvency scenarios, consultations that more ought to have been properly undertaken by the company prior to the appointment of an insolvency practitioner, and wilful failure to comply, on the part of the Insolvency Practitioner, when they are in a position to do so.

Q19. How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

Generally, we consider that the memorandum of understanding is working well. Insolvency Practitioners and their staff are encouraged to contact Job Centre Plus at the earliest opportunity when it is clear that redundancies will take place. There are concerns that notifying too early in the process may impact on any ongoing negotiations to rescue the company. It is clear that Job Centre Plus has made a significant effort to gain an understanding of insolvency processes and how they work. Whilst we do not often have the need to involve Job Centre Plus, when we have our experience has been that they are co-operative and provide a useful service to employees.

We have found Job Centre Plus to be most effective when they attend on a site and there are a sufficient number of employees to warrant their attendance. Consideration could be given to setting out the criteria which would require the attendance of Job Centre Plus on site, as well as introducing minimum criteria in terms of employee numbers before notification is required.

## **Response to the Insolvency Service's Call for Evidence – Collective Redundancy Consultation for Employers facing insolvency**

This is a response on behalf of Begbies Traynor (Central) LLP. It has been compiled from responses received from some of our insolvency practitioners and so does not represent the views of every practitioner in the firm.

We would ask the Insolvency Service to take into account the following general points:

- The vast majority of insolvencies that our practitioners deal with do not have more than 20 employees and so the duty to consult under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 will not arise;
- Trading by the appointed IP only occurs in a limited number of cases, so it would not normally be an IP that would commence the consultation process. This is due to the fact that the business is likely to have ceased to trade before the directors seek advice, or it will have to cease to trade very shortly after advice is obtained and most likely before the appointment of an IP (see below for further details);
- Although our practitioners bring the duty to consult to the attention of the directors, it is not something that an IP can control prior to appointment because he/she has no authority over the company.
- There are competing interests that an IP must consider and try to balance both before and after appointment.
  - The IP's primary duty (in most cases) is to realise the assets for the benefit of all of the creditors at the best price that can be achieved, this will include ensuring that the value in the assets is preserved. This does not sit comfortably with the duty to consult where there is a potential for information regarding the employer's financial position to leak into the public domain and diminish the value of the business and/or assets.
  - Where a company is insolvent, given the risks for directors in terms of personal liability for wrongful trading and/or misfeasance, they are unlikely to continue to trade for the sole purpose of facilitating consultation with the employees.
- There is an inherent conflict between the duty to consult with employees about proposed redundancies and the duty to act in the interests of the creditors as a whole. This latter duty translates into value maximisation and the equal treatment of creditor claims under the pari passu principle (subject to the statutory order of priorities). Therefore the duty to all creditors may be seen as the fairer option than the duty to a defined class; the employees.

QUESTION	RESPONSE
<p><b>Current Practices</b></p> <p><b>1)</b> What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into,</p>	<p><b>1)</b> The main considerations are (a) timing, both in terms of the cessation of trade and also where there is the possibility of a sale of the business, and (b) having funds/resources available to commence or complete the process.</p> <p>In almost all cases our practitioners are approached 'at the eleventh hour'. By the time that they meet with directors quite often the company has run out funds. A typical scenario is that the company has insufficient funds to pay wages due within the next few weeks.</p> <p>Where our practitioners deal with an SME they are usually approached after the directors have exhausted all options for</p>



<p>insolvency? Please provide examples where possible.</p>	<p>raising additional internal and/or external funding and there is often little alternative than for the company to cease trading. In these situations to continue trading solely to carry out 90 days' consultation would increase the company's liabilities to the employees concerned (because during this time they will not be able to be paid) and also increase liabilities to trade suppliers, banks and HMRC because there would be insufficient funds to pay these creditors. The directors would be at risk of wrongful trading/misfeasance claims if they had been advised that the company was insolvent but they continued to trade and incur further liabilities.</p> <p>In an Administration, the sale of the business as a going concern is a possibility. In cases where such a sale is envisaged, the consultation process is unlikely to start before the appointment of the administrator so as not to jeopardise any sale or negotiations that might have been commenced prior to his/her appointment. In particular, the concern is that sensitive information including the fact that the company is insolvent could be disclosed by the employees which would reduce or eliminate the value of the business.</p> <p>The availability of resources such as HR staff or employee representatives is considered because the cost of the process is likely to be much lower and potentially more manageable if these are in place/available to assist. The directors' main concerns will be addressing the insolvency of the company and so if there are HR staff available to assist with the consultation this will take some of the burden off the directors.</p> <p>In practice the decision as to whether realisation of assets for maximum value or consultation with employees should take precedence will involve an assessment of all the circumstances as some industry sectors will be more prone to value evaporation than others and some groups of employees might be thought of as more likely to maintain confidentiality than others.</p> <p>In a recent case that one of our practitioners dealt with, she had some initial discussions with the directors regarding a possible CVA; as no redundancies were envisaged it was concluded that no consultation was required. However having had the opportunity to consider the company's financial circumstances in detail it was apparent that the company was insolvent. This meant that over 100 employees could not be paid when their wages were due in just 4 days. The company ceased to trade on the day following the director admitting that it did not have sufficient funds to continue in the short or medium term.</p>
<p>2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.</p>	<p>2) In short, meaningful consultation with a view to reaching agreement does not work in practice in an insolvency situation for the reasons stated above. In the majority of cases that our practitioners deal with, the business needs to close immediately or in the very short term and there simply is not enough time in which to consult with the employees.</p> <p>In addition, as stated above, where consultation could materially affect a sale of the business the directors and/or IP are unlikely to want to begin the process because this could have a detrimental impact on the value of the business and therefore the return to creditors.</p>

	<p>Where the employer is entering into a terminal insolvency procedure such as liquidation, even if there is consultation it is questionable what purpose this serves and the value in undertaking what amounts to a hollow exercise; if the employer should stop trading then discussions to avoid or reduce the number of dismissals are meaningless.</p> <p>Where the business has ceased to trade before the directors consult our practitioners, notice of redundancy is given by the directors. Where our practitioners are consulted and it is recommended that the company be wound up but trading has not ceased, the directors are encouraged to consult with the employees. Again, it is unclear how agreement can be reached in relation to avoiding dismissals, reducing the number of dismissals or mitigating the consequences of the same where there are insufficient funds available for the employer to continue to trade and the business needs to close. In the majority of cases, it appears that the only agreement that can be reached is that the business should close and all staff be made redundant.</p> <p>In practice, notification of dismissal for reasons of redundancy would either be given by the directors prior to engaging an IP or by the IP very shortly after appointment. Our practitioners would normally call a staff meeting and inform the staff of their appointment and the fact that the business is ceasing to trade. This would be followed up by a letter or letters confirming the position which would normally be handed out at the meeting.</p>
<p><b>Benefits</b></p> <p>3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?</p>	<p>3) In an insolvent scenario, for the reasons stated above, there would be very few occasions where consultation would have either of the main benefits envisaged by the legislation i.e. to avoid or reduce the number of dismissals. It may have the benefit of mitigating the consequences of the dismissals by allowing employees to seek new employment as soon as possible and also to give them a full and proper understanding of the employer's situation but it is questionable whether these benefits would be seen by employees to have any real value. The other way in which it could mitigate the consequences of the dismissals is to restrict or eliminate the possibility of a claim to the Employment Tribunal for a protective award for failure to consult. The creditors as a whole would benefit from this.</p> <p>The consultation and redundancy process could improve the prospects of a sale where it is conducted properly and the workforce is reduced to levels that are likely to be sustainable by a purchaser. In such a case the business would have to be continuing to trade with a view to sale out of insolvency. However, if the process is not conducted properly this could lead to claims and reduced value in the business so it is a difficult balance which is likely to be considered only in the minority of cases.</p> <p>Where it is possible for consultation to be commenced some employees may have ideas of working practices which could be altered with a view to making savings which could assist in the restructure of the business. However, as stated above, our practitioners are usually approached very late and so it is unlikely that the cases that they deal with would benefit from such suggestions.</p>

<p>4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?</p>	<p>The benefit to the Government would be that the RPS would be on notice of potential large numbers of claimants so they could prepare accordingly.</p> <p>4) It is the unfortunate reality that employees/employee representatives do not play any role if the business is ceasing to trade. There is no option but to dismiss the entire workforce if the employer closes its operation.</p> <p>Where there is a hope that the business could be rescued or sold as a going concern and it continues to trade in insolvency the employees will play a role in assisting with trading and potentially putting forward ideas in relation to savings etc. but it must be remembered that they will not have full knowledge of the employer's financial circumstances and so their suggestions may not be viable/appropriate.</p>
<p><b>Facilitators</b></p> <p>5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.</p>	<p>5) In such a situation the directors' primary focus will be on the insolvency of the business and how to deal with it. Redundancy consultation is a daunting prospect for any employer and so the added aspect of insolvency will only add pressure to those managing the business. Where expert employment law advice might otherwise be sought this is unlikely to be available due to lack of funds. If the employer has an HR function then this may allow some consultation to be undertaken.</p> <p>Again, the type of insolvency process that the employer enters is likely to have an effect upon whether or not consultation is commenced. Where restructuring and/or rescue is envisaged this is likely to mean that consultation is commenced.</p>
<p><b>Inhibitors</b></p> <p>6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.</p>	<p>6) Please see the answer to Question 1.</p> <p>Prior to the appointment of an IP it will be the directors that are in control of the process and so it is really a question of their willingness to commence consultation. The IP will not have been appointed at this time and will not have any authority over the company; he/she will not be able to commence the process and so all that can be done is to encourage the directors/management to do so. In the experience of some of our practitioners, directors tend to be very concerned about the confidentiality of their company's precarious financial position and the potential business damage emanating from a breach of that confidentiality. This undoubtedly comes from experiencing the viral nature of their company/industry/community grape vine, particularly so since the rise of social media. Clearly this would be a factor which would inhibit them from commencing consultation.</p> <p>As stated above, in an administration confidentiality of the employer's financial position may be key. An IP will want to ensure that as much value in the business is retained as possible in order to obtain the best price for the benefit of the creditors. The requirement to consult means that information will often leak out to competitors, suppliers and other parties whose support may be required at the appropriate time and so the IP has to weigh the</p>

<p>7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.</p>	<p>interests of the employees against those of the creditors generally.</p> <p>Concerns over the employer's financial position becoming public knowledge include the potential for it to cause an acceleration of the company's downward financial position if for example suppliers remove credit terms and insist on cash on delivery arrangements, or they seek to recover goods supplied under any retention of title provisions in their terms and conditions. Landlords could be alerted meaning they could commence CRAR action thereby putting further pressure on finances. Staff could start to walk out, become unproductive or even disruptive. Creditors could start to exploit their position and/or try to better it if they become aware of the company's financial difficulties. Customers will naturally seek alternative sources of supply fearing the possibility of the collapse of their current supplier. All of these potential outcomes inhibit the commencement of the consultation process especially where a sale of the business is planned or envisaged.</p> <p>Funding also inhibits undertaking a full consultation process. For example, prior to the appointment of an IP the employer is unlikely to have funds available to pay for any advice or assistance with the redundancy process.</p> <p>The requirement to notify employees in writing may also inhibit the commencement of the process on the basis that this could be copied, scanned or otherwise disseminated by the employees.</p> <p>7) As above: timing (there is usually no time to undertake consultation without risking further deterioration of the employer's financial position), funding for advice and assistance on the process, the absence of an HR function within the insolvent entity's business, reluctance to disclose full details of the employer's financial position, obtaining expert insolvency advice very late and when there is no option but to cease trading.</p>
<p><b>Director's Role</b></p> <p>8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?</p>	<p>8) Our practitioners inform directors of the need to start redundancy consultation when they are consulted prior to appointment. Some recommend that they take specific employment law advice on the process. However, they also have to advise the directors that once they recognise that the company is insolvent their duties are to the creditors and they need to take steps to minimise losses to creditors which typically will mean ceasing to trade. In those circumstances there is a tension between the interests of the creditors generally and the interests of the employees.</p> <p>In addition, there is a balance between the requirement to complete a contract or manufacturing process in order to maximise asset realisations against informing staff and commencing consultation which may have the effect of hampering the ability to complete it because employees find alternative employment, are not motivated, become disruptive or, in extreme cases, remove assets.</p> <p>Directors are normally averse to start consultation for the reasons already mentioned. In addition to which, where the closure of the</p>

<p>9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?</p> <p>10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?</p> <p>11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?</p>	<p>business is inevitable they are unlikely to see any value in commencing consultation because the result will be the same, i.e. redundancy of all employees.</p> <p>They usually look to our practitioners for practical advice about the timing and extent of the consultation with employees.</p> <p>9) It is our practitioners' experience that directors of SMEs generally are not doing this and that there are insufficient consequences for those who fail to comply.</p> <p>In practice it is the IP that notifies the Secretary of State where necessary.</p> <p>We would suggest that raising awareness within the business community of the need to consult and educating directors on the obligation and process is likely to assist greatly.</p> <p>10) Employee representatives are not normally already in place in the majority of SME cases which our practitioners deal with.</p> <p>The experience is that it is usually possible to have one of the employees act as spokesperson although it is appreciated that technically this does not meet the employee representative requirements of the Information and Consultation of Employees Regulations 2004 which requires a ballot. However, as stated above, the majority of our cases do not have more than 20 employees.</p> <p>11) Most directors of SMEs prefer to instruct the IP to handle communication with the employees due to their lack of experience and confidence in this area. Therefore the IP will usually speak to staff at the earliest opportunity that is deemed appropriate after appointment.</p> <p>Where the business has ceased or is about to cease trading the engagement will be minimal because redundancy cannot be avoided as a result of the insolvency. Where the business will trade in insolvency or it is hoped that it will be rescued there is more significant engagement as the employees are likely to be key to the business rescue.</p>
<p><b>Process for Notification and Consultation</b></p> <p>12) How might the process for notifying the</p>	<p>12) One of our practitioners has suggested linking the notification of the Secretary of State to the PAYE online real time information system to make sure that directors comply. Another practitioner</p>

<p>Secretary of State and sharing information with third parties be improved?</p> <p><b>13)</b> Could the process requirements for consultation be further clarified or improved?</p>	<p>commented that having had recent experience of notifying the Secretary of State on behalf of a company, this process seemed to be relatively straightforward. The suggestion was made again to raise awareness of directors' responsibilities in this area through education.</p> <p><b>13)</b> One of our practitioners commented that the Government could save significant sums if it removed the requirement to consult from businesses that have no option but to cease trading.</p> <p>Another commented that it is unrealistic to expect a company director to carry out the process without legal assistance and that a step by step, clear guide with checklists of issues to be covered at meetings, template letters etc may help in this area. It is appreciated that there are ACAS guides to redundancy available on their website; the wider promotion of these should be considered.</p>
<p><b>Guidance</b></p> <p><b>14)</b> Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?</p>	<p><b>14)</b> See response to Question 13 above. It may also help to have a guide for IPs undertaking redundancy consultation for those who are able to consult.</p>
<p><b>Incentives and disincentives</b></p> <p><b>15)</b> How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?</p> <p><b>16)</b> What would most encourage</p>	<p><b>15)</b> Please see the answers above. There is nothing that can be done (short of the provision of funding to allow a company to continue to trade in the period of the consultation) to encourage IPs to consult where there is insufficient time or resource to do so and consultation is likely to conflict with the duties owed to creditors as a whole. IPs will continue to use their commercial judgment to decide whether it is appropriate to consult and if so how this is carried out. IPs are aware of this duty but are restricted by the circumstances of the case and their statutory duties under the Insolvency Act. Directors are also restricted by their duties under the Companies Act 2006 to act in the interest of creditors where the company is insolvent. The reality of the matter is that timely and effective consultation in an insolvency situation is very unlikely especially in small and medium sized businesses.</p> <p>Although one of our practitioners commented that directors should be subject to some form of penalty for non-compliance, another was of the view that the consultation requirements are too onerous to be placed onto directors and practitioners in situations where time is almost always of the essence having regard to all the other competing factors such as creditor pressure, threat of landlord action, winding up petitions, lack of cash and trying to come up with solutions to preserve the business via a sale. It is clear that there are differences of opinion on this question.</p> <p><b>16)</b> Employees are unlikely to see it to be in their interests to engage in the consultation process where it appears that redundancy is</p>



<p>constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?</p> <p><b>17)</b> Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?</p>	<p>inevitable and the process is just being undertaken in order to reduce their possible claims against the company. It is therefore difficult to see what might encourage them to engage.</p> <p>As most of the insolvencies that our practitioners deal with have less than 20 employees we do not have any suggestions for how employee representatives can be supported.</p> <p><b>17)</b> No</p>
<p><b>Sanctions</b></p> <p><b>18)</b> The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?</p> <p>Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?</p>	<p><b>18)</b> Our practitioners do not consider protective awards to be proportionate, effective or dissuasive in an insolvency context for all of the reasons stated above. If the business is ceasing to trade then the directors are unlikely to be concerned about additional liabilities to employees when it is not practical to carry out consultation because continuing to trade will mean that further liabilities to other parties are incurred and that they could be found personally liable for them.</p> <p>Although our IPs recognise that failing to consult is likely to lead to an increase in unsecured claims because of the protective award, faced with the competing interests referred to above, they have little alternative.</p>

<b>Memorandum of Understanding</b> <b>19)</b> How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?	<b>19)</b> The experience of how the memorandum of understanding is working in practice will differ between IPs.  However, one of our practitioners commented that the rapid response team has proved excellent in response times, understanding and has provided excellent support to employees.  Another has said that in the case mentioned in the response to Question 1 above contact was made with jobcentre plus which provided relevant information and sent 2 local jobcentre staff to assist and give advice on the day of the redundancies which was the following day.
--	--

Begbies Traynor (Central) LLP

10.06.15



## **Collective Redundancy Consultation on Employers Facing Insolvency**

---

Submission to the Insolvency Service

**Chartered Institute of Personnel and Development (CIPD)**

**May 2015**

## Background

1. The CIPD is the professional body for HR and people development. We have over 130,000 members internationally – working in HR, learning and development, people management and consulting across private businesses and organisations in the public and voluntary sectors. As an independent and not-for-profit organisation, the CIPD is committed to championing better work and working lives for the benefit of individuals, businesses, economies and society.
2. Public policy at the CIPD exists to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level.
3. Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level. We draw on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership base to champion better work and working lives.

## General

4. We respond below to the specific questions in the Call for Evidence. We have drawn on responses to a survey of CIPD members which attracted 41 responses. We have not included detailed percentages in our response, since the numbers are too small to have much statistical significance but we should be happy to forward this information if it would be helpful. We should also be happy to discuss any issues relating to our response, including for example the form and content of any further guidance on redundancy consultation.

## Current Practices

- 1) *What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.*

Our members' experience of some of the key factors influencing employers in insolvency situations is outlined in our responses to questions 6 and 8 below.

- 2) *How does meaningful consultation with a ‘view to reaching agreement’ work in practice? How does notification work in practice? Please provide examples where possible.*

Essentially the phrase “meaningful consultation” means that both parties should enter into consultation **willing to consider and respond to the points made by the other**. In practice, agreement will generally be heavily constrained by the company’s commercial position and failure to agree will not vitiate the consultation process. But both sides are encouraged to conduct their discussion in good faith, and be prepared to give weight to matters raised by the other side.

## Benefits

- 3) *What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?*

Insolvency does not necessarily mean that the business has no future. The situation may need to be managed so that employees are not tempted to “jump ship” prematurely, and can see that they may have a continuing job in a scaled-down operation, possibly under new management. **Consultation at this stage can help to retain or promote employee motivation and commitment, which may be critical to the organisation’s prospects for survival.** It can also draw on employees’ experience to come up with plans to help rescue the business.

Members have provided the following examples of situations where effective consultation has taken place in insolvency situations:

*“The unions were informed of the financial situation and invited to work in partnership to offer a solution. A buyer was identified and voluntary redundancies offered, including early retirement. A much reduced business continued trading and has grown a little. Some ex-employees work part-time during peak activity. Trust and respect continues to exist between employer and employees.”*

*“When a company I was working for entered a period of loss making, early discussions with employees identified savings which improved cash flow. Also the fact that the management were open led to better engagement of employees and acceptance of a period of short time working which enabled the company to survive.”*

- 4) *In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?*

Please see our response to question 3 above.

## Facilitators

- 5) *What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.*

Consultation works best where it is part of the culture. Members suggest that an employer should inform and consult employees regularly on the state of the business, well before the risk of insolvency becomes apparent. This will ensure that experienced representatives – union, non-union or both – are available to be consulted when this becomes necessary. A climate of open communication in which employees are willing to engage in discussions with managers in a constructive spirit can be invaluable.

Even where there is no existing culture supporting consultation, the “burning platform” of threat to the business can help create a sense of shared purpose between management and employees. One member suggests that:

*“The sword of Damocles hanging over the firm can create a common enemy in the dole queue, and this can give HR more levers to pull to manage the consultation process positively.”*

## Inhibitors

- 6) *What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.*

Members believe that uncertainty about the company’s commercial situation or the prospects of the business surviving is the single most influential factor inhibiting employers from consulting employees in insolvency situations, followed closely by worries about the impact of any public disclosure on the chances of avoiding insolvency. Other significant factors are the risk of losing key staff, the absence of effective sanctions on the employer for failing to consult, and the employer’s disbelief that consultation will serve any useful purpose.

- 7) *What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.*

See answer to question 6 above.

## Director’s Role

- 8) *Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?*

It is a basic part of the responsibilities of senior HR professionals to ensure that senior managers are aware of their statutory duties in respect of employment regulation, including that of consulting employees when there is the prospect of collective redundancies.

However members point to a number of factors that can influence employers' behaviour in redundancy situations (not just those involving insolvency). This is the fear that senior managers often feel in facing up to having to accept responsibility, as part of the top team, for creating a situation in which both they and their colleagues are facing the prospect of unemployment. This fear is accentuated where the business itself is on the line and the likely damage to the reputation of senior leaders is most obvious. **The senior team may be in denial** and take an unduly optimistic view of the business prospects, leading to them being reluctant to accept the inevitable.

One member with experience of advising small businesses comments:

*"Directors of SMEs can be secretive: they may tell their HR consultant almost nothing about the state of the business. They're not villains: they don't want the business to fail, possibly putting members of their extended family out of work. They go to an insolvency practitioner hoping for some kind of magic cure, and carry on putting money into their failing business."*

- 9) *Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?*

Three out of every four members believe that the CEO or directors should be responsible for ensuring that consultation is effective. One in five believe that responsibility should rest with the HR director, while a small minority see this as a job for the insolvency practitioner. In the absence of machinery for regular consultation, most CIPD members believe that consultation should take place when it becomes obvious that redundancies are likely to be needed. (For how best to encourage consultation, see below.)

- 10) *Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?*

The Workplace Employment Relations Survey (WERS) 2011 found that 25% of workplaces had a joint consultative committee, either at workplace level or at a higher level

in the organisation. The proportion in the private services sector was 21% and in manufacturing 9%. Where a JCC is in existence, this will normally imply that employee representatives – union, non-union or both – are in place. Where no such machinery is in place, it will often be necessary for management wishing to initiate urgent consultations to canvass volunteers from among the workforce, for what may be seen as an unrewarding and demanding job. Our impression is that, despite the statutory requirement to do so (and no doubt reflecting the opportunity to plead mitigating circumstances), many employers do not hold elections for the purpose of appointing representatives, and this is particularly likely to be the case where time is short.

*11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?*

We have no evidence on this matter.

## **Process for Notification and Consultation**

*12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?*

Nearly half of CIPD members say that the arrangements for notifying the Secretary of State are not very effective. One in four regard them as ineffective. It is likely that “effectiveness” is judged in part by the extent to which notification is seen to be followed by redundant employees finding suitable alternative employment, and this will to a large extent be influenced by local labour market conditions.

*13) Could the process requirements for consultation be further clarified or improved?*

Despite some uncertainty about the process requirements, particularly in relation to the timing of consultation, we do not believe that process is at the heart of the problem of securing compliance in insolvency situations.

## **Guidance**

*14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?*

Guidance on good practice in managing consultation in respect of collective redundancies can give managers confidence in dealing with situations that many will not have encountered previously. It can also set out the benefits of consultation for both employers and employees. Acas has published an advisory booklet on *Handling large-scale redundancies* (see <http://www.acas.org.uk/index.aspx?articleid=747>). It would be important for BIS to consider publishing or promoting further **guidance focusing**

**specifically on insolvency situations**, in support of any change to employers' statutory duties (see our response to question 15 below).

## Incentives and disincentives

*15) How can Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?*

CIPD believes that the Government should clarify that an employer's duty to his employees in respect of collective redundancies takes priority over its obligations to shareholders (as is the case in relation to employment regulation generally, and health and safety). Two in five members surveyed expressed support for this view. A similar proportion believe that the Government should publish guidance for employers on handling redundancy consultation in insolvency situations.

*16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?*

Employees are most likely to wish to engage when they believe that their views are being genuinely sought, and will be listened to and taken into account. Where trade unions are recognised, the job of supporting representatives will fall mainly to them. Management can best support representatives by providing timely information about the state of the business and, if necessary, reassuring them that their personal position will not be adversely affected by their involvement in the consultation process.

*17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?*

See examples under question 3 above.

## Sanctions

*18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?*

We understand that many employers facing insolvency are failing to comply with the statutory requirement to consult, which suggests that the current sanctions are neither



effective nor dissuasive. Increasing the level of penalties on the company might have little positive effect on compliance if it appeared to require employers to act contrary to the interests of shareholders. However one member with experience of managing insolvency situations has suggested that:

*“Senior directors should be held personally financially accountable for fulfilling their duty to consult employees in insolvency situations.”*

A member has suggested that the remuneration of insolvency practitioners should be influenced, not only by the timescale against which they complete their task, but by qualitative issues including management of the consultation process. Another member believes that - aware that the Government will pick up the tab - insolvency practitioners “ride roughshod” over employment rules, and tell directors not to be honest and direct in communicating with employees.

### **Memorandum of Understanding**

*19) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?*

See under question 12 above on effectiveness. The existing memorandum seems fit for purpose: its implementation will in practice depend largely on the level of awareness of all three parties, and resources within JCP.



12 June 2015

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

*Dear Pabitar,*

The CBI welcomes the opportunity to share its views on collective redundancy consultation in insolvency situations. As the UK's leading business organisation, speaking for some 190,000 businesses that together employ around a third of the private sector workforce, the CBI believes that the law on collective redundancy is well understood by employers. However, in insolvency situations consultation processes are inevitably strained. The introduction of new managers to the business, in the form of Insolvency Practitioners (IPs) and the need to act quickly to save the business mean there can be mitigating circumstances where consultation is shortened in the interest of saving the business. In these circumstances we have adequate protections in place through the provision of Protective Awards.

***Strong understanding of the law on collective redundancy is widespread***

The business environment is constantly evolving and requires businesses to adapt and react to change quickly in order to remain competitive and grow. Inevitably, such dynamism involves business failure. While this can take many forms in some cases this will mean restructuring, and in other cases it can result in insolvency. The decision to make collective redundancies is never taken lightly by a firm. It is for this reason that clarity and consistency in the law is critical to ensure that employers fully understand their role and responsibilities when making collective redundancies in the case of insolvency.

Compliance with employment law is driven by simplicity and consistency. Business welcomed the recent European Court of Justice's ruling on "establishment" as a return to much needed consistency in UK law. Following this ruling we are now in a position where the law on collective redundancy is understood by employers and should not be subject to further change.

***Insolvency situations are unique and stressful situations***

The purpose of a collective redundancy consultation in a situation of insolvency is to explore possible options for rescuing the business, preserve jobs and support employees. However it must be recognised that insolvency situations are unique and strenuous for both employers and employees. In such situations, there can be mitigating circumstances in a small minority of insolvency situations, where it is not reasonable practical to comply with all processes within the consultation process. In these cases, the CBI believe we have appropriate protections for employees through the provision of Protective Awards.

***Increasing the consultation period would drive up costs but would not deliver better outcomes***

As compliance with employment law is driven by simplicity and consistency the CBI does not believe further changes to the law on collective redundancy would serve to enhance employers' or IPs' understanding of the law. In particular, increasing the consultation period or required scope of consultation would not only increase the regulatory burden on employers but would fail to deliver better outcomes for either party. A longer consultation period, especially in insolvency situations, could serve to hasten a business' closure by; delaying rescue deals, leaking the likelihood of insolvency to customers and increasing the uncertainty for employees, encouraging them to seek alternative employment, further destabilising the business. This would run counter to the aims of a consultation – to explore possible options for rescuing the business, preserve jobs and support employees.

***Fostering constructive employment relations delivers benefits to both employers and employees***

Constructive employment relations deliver benefits to all businesses regardless of size or sector. The importance of developing positive employment relations is widely recognised - CBI members ranked improving levels of engagement as their second workforce priority for 2015 behind skills development. In recent decades, the employment relationship in the UK has evolved and is now typified by direct engagement. Although collective representation via trade unions works well in many businesses, for many others direct consultation work. Our current legislation is fit for purpose as it provides some flexibility in who an employer is require to consult about the dismissals.

A handwritten signature in black ink, appearing to read 'Neil Carberry', with a horizontal line underneath.

Director of employment and skills  
[Neil.carberry@cbi.org.uk](mailto:Neil.carberry@cbi.org.uk)

## **City of London Law Society Insolvency Law Committee response to the Insolvency Service call for evidence on collective redundancy consultation for employers facing insolvency**

---

The City of London Law Society (“CLLS”) represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response, in respect of the Insolvency Service call for evidence on collective redundancy consultation for employers facing insolvency has been prepared by the CLLS Insolvency Law Committee with the support of, and contributions from the CLLS Employment Law Committee.

### **Summary**

The CLLS working party has had the opportunity to review the responses to the call for evidence of both R3 and the Insolvency Lawyers’ Association. The CLLS Insolvency Law Committee agrees with the comments put forward by R3 and the ILA and will not therefore repeat the comments in this response. We would, however, emphasise the fact that we share the concerns expressed by these bodies that the requirements of the Insolvency Act 1986, combined with the practical realities of insolvency, often make it impossible, or impractical, for insolvency officeholders (and, to some extent, the directors of insolvent companies), to fully comply with the statutory consultation process.

In particular, we are of the view that insolvency officeholders should not be criticised, given the tensions between employment law and insolvency legislation, for failing to consult where they reasonably believe that compliance with their obligation to consult would either jeopardise jobs or be contrary to their statutory duty to act in the interests of the creditors as a whole.

While acknowledging that there are clearly underlying policy considerations which need to be balanced, we also consider that the circumstances in which an insolvent employer finds itself should always be taken into account by a tribunal, as a “special circumstance” when deciding whether it is appropriate to make an award, and, where it is considered appropriate to do so, when deciding on the size of any such award.

### **Specific Considerations**

#### **(i) Ability of employer to meet the requirements of consultation where the employer is facing insolvency**

The collective redundancy provisions of TULRCA require consultation “*with a view to reaching agreement with the appropriate representatives*” on ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissals. This requirement assumes both that the insolvent employer is able to carry on its business during that

consultation period and that, given the insolvent employer's circumstances, there remains a possibility of there being a meaningful dialogue. For the reasons noted in the R3 and ILA responses, the options available to an insolvent employer may be limited, particularly where the company in question does not have sufficient cash to continue trading during the consultation period, and, in addition, there may be little scope to negotiate meaningfully with a view to reaching an agreement.

Where the company's financial position permits, consultations do generally appear to take place, but, in practice, particularly where the company has been put into liquidation, the consultation will often be simply seeking to mitigate the effects of the redundancy on the employees. In our experience insolvency officeholders do actively engage with employees to assist them in considering alternative employment options and putting them in touch with the appropriate advice agencies, even though strict adherence to the consultation period may not always be possible, given funding restraints which may limit the company's ability to continue trading during the full consultation period.

## **(ii) Saving jobs or talking about saving jobs?**

It is often the case that the best way of reducing the number of employee dismissals is to arrange for a rapid sale of at least part of the business, so that the purchaser takes on at least some employees, even if this means that the remaining employees cannot be kept on. A quick sale, which is completed before suppliers and customers become aware that the relevant company has entered into an insolvency process, and which therefore allows all parties to downplay the impact of that process, can both increase stakeholder returns and preserve jobs. This is, in our experience, particularly the case in the service sector, where the damage to a company's brand and goodwill, combined with the poaching by competitors of key employees, would generally mean that there would no longer be a viable business after the full statutory consultation period had expired.

The insolvency officeholder can be placed in an invidious position if he or she is forced to choose between conducting a quick sale which will save jobs and waiting until the conclusion of the statutory consultation process, in the interests of ensuring that there is a meaningful consultation with all options left open. In practice, the insolvency officeholder will almost invariably pursue the quick sale option, if he or she considers that this is in the interests of the company's creditors. He or she may be able to satisfy the TUPE consultation requirements for employees whose contracts are transferred following a sale, where no minimum consultation period is required, but not the consultation period required for employees facing redundancy, so may potentially expose the insolvency officeholder to criticism and, depending on the facts, result in the company's creditors receiving a lower recovery as a result of the imposition of a protective award. Similar considerations could apply to the directors prior to the commencement of formal insolvency proceedings but in circumstances where the company is distressed which is why we would discourage any "one size fits all" approach.

## **(iii) Statutory inconsistencies**

(a) Inconsistency of time periods for administrators to adopt employment contracts and the redundancy consultation period

It appears to be inconsistent to require a 45 day period of collective redundancy consultation during which no dismissals can be made, when administrators are given only 14 days in which to decide whether to adopt a contract of employment under the Insolvency Act, with it being deemed to being adopted under the *Paramount* case if employment continues after the 14 day period. The consequences of adoption of the contract are that the employee's wages become an expense of the administration payable in priority to other creditors (in accordance with paragraph 99 of Schedule B1 to the Insolvency Act 1986), so an administrator must consider carefully his or her duties owed to all creditors when adopting employment contracts.

(b) Inconsistency of time periods for administrative receivers to adopt employment contracts and the redundancy consultation period

A similar point applies to administrative receivers, who are personally liable in respect of any "qualifying liability" on any employment contract which they adopt under Section 44(1)(b) Insolvency Act 1986. As with administration, there is a 14-day grace period in which to decide whether to adopt a

contract of employment, with the administrative receiver being treated as having adopted employment contracts unless he or she takes steps to terminate them within 14 days of appointment.

(c) Inconsistency with the administrator's statutory duties

Paragraph 3(2) of Schedule B1 to the Insolvency Act 1986 provides that "*the administrator of a company must perform his functions in the interests of the company's creditors as a whole.*" While the administrator of a company is required to consult, he or she must also comply with his or her statutory duties as administrator. Where a company's business is loss making, carrying on trading (and making losses) during the consultation period would result in lower recoveries for the company's creditors, as otherwise available cash would have to be used to fund ongoing trading losses. It is difficult to see how an administrator could properly argue that he or she was acting in the interests of the company's creditors as a whole if the administrator chose to pursue a course of conduct which reduced the overall repayment to those creditors unless, arguably, the administrator believed that a Tribunal would make an award greater than that of the resulting loss as a consequence of the administrator's failure to consult.

(d) Inconsistency with "wrongful trading" legislation

Any consultation which is taking place because the employer is facing imminent insolvency would generally be taken as evidence that the employer was "in the zone of insolvency", at which point the company's directors may, depending on the exact circumstances, face a potential wrongful trading liability. If a director has formed the view that liquidation is inevitable, he or she is required under Section 214(3) Insolvency Act 1986 to take "*every step with a view to minimising the potential loss to the company's creditors as (assuming him to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation) he ought to have taken*". This requirement may be inconsistent with the obligation to carry out a consultation exercise, particularly where the company is trading at a loss, as stopping trading immediately may, depending on the relevant facts, be the only way of satisfying Section 214(3).

**(v) Electing employee representatives and the issues of confidentiality**

Dear IP issue 39 states that "If an employer genuinely believes that open consultation could jeopardise the business the employees' representatives may be asked to keep details of the consultation confidential." The reason behind this is that the very fact that a redundancy process has been commenced may be perceived as a signal that the business is distressed and if the process is not kept confidential then this can be damaging to the business and make rescue less feasible. Often, however, there are no employee representatives in place, and they will need to be elected. In practice the process of finding and appointing representatives can take a number of weeks, during which time it is extremely difficult to keep a distressed situation confidential, which can, as mentioned, be damaging to all creditors, including the employees.

**(vi) Tribunal Awards**

Given the points outlined above, we agree with the view expressed by R3 that there appears to be a strong case, given inconsistencies in the approaches taken by individual tribunals when dealing with the tensions between employment law and insolvency legislation, for providing guidance to tribunals, so that the size of the award can be balanced against the effort made by the insolvency practitioner or by the board of a company facing imminent insolvency to conduct as meaningful a consultation as possible in the circumstances. It would also be helpful to tribunals in following such guidelines if they received some training to enable them to better understand the issues which may affect how the consultation process can be usefully conducted when an employer is insolvent.

**11 June 2015**

© CITY OF LONDON LAW SOCIETY 2015

All rights reserved. This paper has been prepared as part of a consultation process. Its contents should not be taken as legal advice in relation to a particular situation or transaction.

## **THE CITY OF LONDON LAW SOCIETY**

### **INSOLVENCY LAW COMMITTEE**

Individuals and firms represented on this Committee are as follows:

Hamish Anderson (Norton Rose Fulbright LLP) (Chairman)

C. Balmond (Freshfields Bruckhaus Deringer LLP)

J. Bannister (Hogan Lovells International LLP)

G. Boothman (Ashurst LLP)

T. Bugg (Linklaters LLP)

A. Cohen (Clifford Chance LLP)

L. Elliott (Herbert Smith Freehills LLP)

S. Frith (Stephenson Harwood)

I. Johnson (Slaughter and May)

B. Klinger (Sidley Austin LLP)

B. Larkin (Jones Day)

D. McCahill (Skadden Arps Slate Meagher & Flom (UK) LLP)

Ms J. Marshall (Allen & Overy LLP) (Deputy Chairman)

B. Nurse (Dentons UKMEA LLP)

J.H.D. Roome (Bingham McCutchen LLP)

P. Wiltshire (CMS Cameron McKenna LLP)

M. Woollard (King & Wood Mallesons SJ Berwin)

Working party members for this consultation:

Jennifer Marshall (Allen & Overy LLP)

Byron Nurse (Dentons UKMEA LLP)

Gabrielle Ruiz (Clifford Chance LLP)

Jo Windsor (Linklaters LLP)





The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015

## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

CMS Cameron McKenna LLP

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	
Business representative organisation/trade body	
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	X
Individual	
Other (please describe):	



## 2.1. Employer's Understanding

### Current Practices

1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

Our advice to clients is to always attempt consultation. In our experience, the majority of Insolvency Practitioners (IPs) do attempt some degree of consultation where possible, although in practice the best that can generally be achieved is providing information to employees (for example, about the timing of any dismissals and the amount of any statutory redundancy payment) rather than consulting in a meaningful way with a view to preserving jobs.

It is also often unclear what *should* and *could* be done to satisfy the consultation criteria in an insolvency context. The law at present does not have regard to what can realistically be achieved through consultation. As it will invariably not be possible to avoid or reduce the risk of redundancies, the primary objective of consultation cannot be achieved and Tribunals can often be critical despite IPs best efforts at compliance.

2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

In insolvent situations, meaningful consultation with a view to reaching agreement on reducing or avoiding redundancies is invariably not possible. Occasionally mitigation may be possible, but an insolvent company is generally not in a position to provide advice on employment opportunities, training and benefits. Generally the sharing of information is the best that can be achieved. In practice, consultation in an insolvency context consists of the IP providing as much information as possible in the circumstances. The current requirement to "consult" in the literal sense of the legislation therefore does not work in practice.

## Benefits

3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples

The principal difficulty with the current legislation is that, in the vast majority of cases, consultation in the true spirit of the legislation is unachievable. Where an IP has been appointed, the goal of rescuing the company as a going concern will invariably not be possible to achieve and instead the IP will work towards achieving a better result for creditors as a whole compared with a liquidation scenario or making a distribution to one or more secured or preferential creditors. As the company itself will not survive, it will not be possible to consult with a view to avoiding redundancies.

The insolvency legislation and the employment legislation are not aligned as with the exception of making certain sums due to employees payable as a preferential debt, the insolvency legislation does not treat employees any differently from any other type of creditor so the IP is not required or even permitted to treat them more favourably. For example, he is not expected to incur the cost of funding training to facilitate employees in finding alternative employment to mitigate the effect of redundancies. In most cases the best that can be achieved is the sharing of information rather than consultation per se. For example, by giving employees 7-14 days' notice of any dismissals and providing information about how they can claim for their statutory entitlements. The whole premise of consultation is flawed in an insolvency context and as such the current law is unfit for purpose as it invariably cannot be complied with. An objective of providing information would be more appropriate where insolvency proceedings have commenced. To most employees, the provision of information is what they receive benefit from.

where possible. What further benefits do you think we could encourage?

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

Employees and employee representatives generally play little or no role in considering options to rescue the business or reduce or mitigate the impact of redundancies. Occasionally an employee may know of a potential purchaser of stock or even the business itself, but as the company is insolvent, there is usually nothing that can be done to reduce redundancies unless a purchaser is found and the employees TUPE across. Where a TUPE transfer is a prospect, there are separate consultation and information sharing obligations but in our clients' experience, as jobs are likely to be preserved (and potentially indemnities given by the purchaser), TUPE consultations are less controversial and problematic than redundancy consultations.

## 2.2. Facilitators and Inhibitors

### Facilitators

5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

It is helpful where employee representative committees have already been set up as this saves time and resource. Otherwise it is a question of funding in that the more cash is available, the longer a business can trade for and the more consultation can take place.

### Inhibitors

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

See answer 7.

7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

There are two key factors that usually prevent effective consultation: time and resource. In insolvency situations, there are unlikely to be sufficient funds to allow a business to trade long enough to carry out the degree of consultation required (e.g. 45 days where 100 or more employees are to be dismissed). The best hope of saving jobs is usually to sell the business as soon as possible. Where a sale can be achieved, this process must happen quickly to avoid goodwill and value in the business being lost. There is therefore often little time for IPs to consult with employees.

As there is no obligation on businesses to set up a standing group of employee representatives, IPs often have to waste time while representatives committees are set up, which eats into the limited time IPs have for consultation. A further difficulty is that where trade unions represent certain employees, it is not always easy to determine which employees are represented and which are not. Therefore IPs may engage in consultation only to find out that not all employees were represented by the representatives.

## 2.3. Role of Directors

8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies?

The issue is not so much whether directors are being provided with the correct employment law advice as whether it is realistic for them to comply with it. Under insolvency law, directors wishing to avoid liability for wrongful trading for example must take every step to minimise losses to creditors where there is no realistic possibility of avoiding insolvent liquidation. In many cases it will be necessary to cease trading. On the other hand, under employment law directors should consult for up to 45 days where redundancies are expected. Directors can therefore be pulled in opposite directions.

Where a company is facing insolvency, directors will often be reluctant to advise employees of this due to the fact that this could potentially do more harm to both the business and the employees' employment prospects than good. Employees may stop turning up to work and look for alternative employment. Without staff, value in the business will be lost and the prospect of achieving a sale (in which the employees would continue to be employed as they would TUPE across to the purchaser). Further, once news of the company's financial difficulties leak into the market, goodwill is also likely to deplete resulting in a worse recovery for creditors and a poorer outcome for employees.

However, once a notice of intention to appoint administrators or an administration petition is presented at court, this may present a far better opportunity for directors to take steps to consult with employees. For example, this could include the setting up of employee representative

9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

Often directors of insolvent businesses will have attempted to make efficiencies to avoid insolvency long before an IP is appointed or even approached. Redundancies may already have happened. Once a director does consult an IP, he is unlikely to want to do anything that will destroy value in the business and hinder the prospect of a sale, itself resulting job losses. Notifying the employees of its imminent insolvency may well risk this.

However, we would suggest an obligation could be placed on directors to begin a consultation process with employees once a notice of intention to appoint administrators or an administration petition has been filed at court. In practice the consultation achievable is likely to be limited to providing basic information or taking steps to elect representatives and there is a risk that notifying employees would demotivate them. However, on balance once steps have been taken to appoint an IP, the risk is likely to be outweighed by the value to the employees in receiving information.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

Our understanding is that in the majority of cases employee representatives are not in place. As discussed above, even where employees are unionised, unions do not always provide complete lists of all those that they represent and often may not represent all affected employees. It takes time and resources to hold elections and set up a suitable employee representative body. In an insolvency context where time is in short supply and events unfold quickly, this additional step is unlikely to assist with compliance, particularly in most cases all that can be achieved is the disseminating of information.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

Often directors will have taken few if any steps to consult with employees immediately before an IP is appointed. In other cases, the IP will not necessarily be able to rely on any consultation that has taken place being effective and will need to take his own steps. If greater obligations were placed on directors to commence consultation, the handover would be smoother and more efficient.

## 2.4. Ensuring Effective Consultation and Notification

### **Process for Notification and Consultation**

12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?

As noted in Answer 8, once news of a company's looming insolvency leaks into the marketplace, value in the business is often lost with detrimental consequences for creditors, including employees. Some directors express concerns about notifying the Secretary of State for this reason, because they are concerned that commercially sensitive information may be leaked in the process. We are aware of at least one example where the directors chose not to notify the Secretary of State and accepted the risk of a fine for this reason. Guaranteeing confidentiality may encourage more notifications. However we would suggest that amending the requirement to notify so that it arises on the filing of a notice of intention to appoint an administrator or the filing of a petition would be a simpler solution. By this time, the company's financial position is a matter of public record meaning leaked information would not be a concern.

13) Could the process requirements for consultation be further clarified or improved?

See our answer to Question 14. There is often a difference between what *should* be done under the legislation and what *can* be done in practice. In our experience it is the substance of consultation rather than the process for notifying employees that is most in need of amendment.

However, a modified process to allow for the establishment of an employee representative body more quickly would be beneficial. Alternatively, if the best outcome of consultation that can be achieved is information sharing, there is no reason why this information cannot be shared with employees direct rather than through representatives.

## Guidance

14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

We have considered whether a Statement of Insolvency Practice would be helpful to provide guidance to IPs as to what is required of them. However, such a SIP would require amendments to the primary legislation so that the SIP would operate in harmony within the legislative regime. It would also need to be based on principles rather than being overly prescriptive as the level of consultation achievable will vary from case to case. A one size fits all approach (which arguably is the current state of the law) would not work and would arguably make the situation worse. A SIP based on the current law that sets out standards to be met that are clearly unachievable in an insolvency context would add no value and IPs could face action by their regulator for failing to comply with a regime that cannot in practice be complied with.

## Incentives and disincentives

15) How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

It is less of question of incentives than it is a question of whether the law can be complied with. In our experience, IPs do attempt to consult (or at least inform) to the extent possible. The extent to which this is possible will vary from case to case. We are not aware of any case where full consultation has taken place in insolvency. The present consultation regime is therefore unsuitable for insolvency situations.

If consultation as it stands is to remain a statutory requirement in insolvency, the best that can be achieved is likely to be recognition of the level of consultation that has been attempted. We believe that insolvency should be a mitigating, special circumstance where Employment Tribunals should look at the specific circumstances and consider what level of consultation was realistically achievable and judge the consultation undertaken by that measure. The level of protective award made (if applicable at all) should reflect this.

16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

Our clients tell us that most employees are principally concerned with whether they are going to be paid. After that, employees' next greatest concern is whether they will still have a job tomorrow, next week, the week after etc. As consultation is invariably not going to result in the preservation of jobs, sharing information is often the most that can be achieved and in our clients' experience, employees greatly appreciate this. It is generally our clients' experience that employee representatives and employees are willing to engage in this process.



17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

We are not aware of any examples where consultation was able to avoid or reduce redundancies. Redundancies are generally only avoidable if there is a sale of the business and a TUPE transfer. However, by giving employees information it enables them to make informed choices. For example, by letting employees know whether a sale is likely to be achievable which will enable the employees to TUPE to the purchaser, or letting them know that they will be given at least 7 or 14 days' notice of any dismissal.

We are aware of one example where funding was available to allow employees to attend training to gain a qualification to help them secure new employment, although the circumstances in which this will be possible will be extremely limited.

The point we would emphasise is that there is usually no lack of willingness to consult. However there is often very little time and resource to do so in a meaningful way under the current regime.

## Sanctions

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners?

**See continuation sheet.**

19) Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

See answer 18.

## Memorandum of Understanding

Email completed forms to [Policy.Unit@insolvency.gsi.gov.uk](mailto:Policy.Unit@insolvency.gsi.gov.uk)

20) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

As legal advisers, this is not something we have direct experience of.

**Continuation sheet- Answer 18**

The maximum level of protective award is not problematic in itself. If some level of consultation or information sharing is achievable, IPs and directors should make efforts to consult. Arguably it is easier for directors to consult in a meaningful way as they are likely to have more time and opportunity to do this.

The difficulty is that even where directors and IPs make reasonable attempts at consultation, this is often not taken into account when determining whether to make a protective award or the level of protective award.

Current case law makes it clear that insolvency is not a special circumstance. Further, even where Tribunals recognise that full consultation is not achievable, generous protective awards are often still awarded. For example, in the case of [REDACTED] the Employment Appeal Tribunal accepted that the company was insolvent and that the directors could potentially face personal liability for wrongful trading were they to continue trading, thereby making it impossible to consult for more than a few days, but still made protective award of 60 days' pay per employee, which was arguably still punitive despite compliance being unrealistic. Further while the Government has reduced the consultation period from 90 to 45 days where 100 or more employees are at risk of dismissal, the maximum protective award available is still 90 days' wages, which in an insolvency context will be met in part by the taxpayer through the National Insurance Fund.

We consider that the awards granted are often not proportionate and more credit should be given for the efforts made towards consultation. In our view insolvency should be a special circumstance and Employment Tribunals should look at the specific circumstances and consider what level of consultation was realistically achievable. The level of protective award should reflect the extent to which that level was achieved.

In many cases reducing the time period (and accordingly the maximum level of protective award) for consultation would achieve little as any prescribed period of consultation is unlikely to be appropriate in most cases. In some cases, such as pre-packs, no consultation will be possible. In other cases, a few days' consultation may be achievable, but this period will vary from case to case. A prescriptive length of consultation is therefore largely meaningless in an insolvency context and Tribunals punishing employers (and by extension, the tax payer through the National Insurance Fund and other creditors) for failing to achieve a prescribed period of consultation is unhelpful.

The nature of insolvency is that rights will inevitably be compromised as there will be insufficient funds available to preserve all rights in full. Creditors generally suffer this by receiving a dividend, rather than payment in full in respect of their claims. As noted above, under insolvency legislation, employees are treated in the same way as any other creditor (save that some of their claim will be preferential). In the context of redundancies, we would suggest it would be more sensible to make insolvency a special circumstance or amend the consultation requirements in an insolvency context (which is likely to be more difficult to legislate for) rather than continue with an unrealistic and unworkable requirement that makes awards for non-compliance at the expense of the other creditors and the taxpayer.

A change in the law would of course require careful consideration and the introduction of anti-abuse provisions so that, for example, administration could not be used as a device simply to circumvent the usual requirements.



The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015

## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

[David Oprey](#)

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	
Business representative organisation/trade body	
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	
Individual	<a href="#">Insolvency Practitioner</a>
Other (please describe):	

## 2.1. Employer's Understanding

### Current Practices

1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

I am an Insolvency Practitioner with over 30 years experience and I would say that in the majority of situations I have seen, the employer has made no attempt to commence the consultation process with the employees prior to the insolvency appointment. This is invariably due to the commercial sensitivity of the possible insolvency of the company.

Indeed, the company's directors would fall foul of the Wrongful Trading provisions of the Insolvency Act, if they were advised that insolvent liquidation was inevitable, yet they delayed an insolvency appointment to allow the consultation period to take place.

The Insolvency Practitioner therefore has to try to make the best of the position following appointment and almost inevitably has no hope of complying with the legislation.

2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

The most significant problems arise in Administration appointments, where there is a direct contradiction between Insolvency and Employment Law. Under Insolvency Law, an Administrator has 14 days within which to decide whether he wishes to continue the contracts of employment of the staff. After 14 days, the employee contracts become adopted by the Administrator as an expense of the Administration to the extent set out in the Act. Even in situations where the Administrator wishes to continue trading post appointment, he is constrained by the availability of funds and so decisions have to be made within that 14 day period, which does not give adequate time to go through the consultation process.

The Administrator's role is to manage the company's affairs and this often means that harsh decisions have to be taken on the expenses that can be afforded and this includes employee wages and salaries. It would be detrimental to the other creditors if an Administrator was forced to retain staff that were not required and this can (and does) prejudice the chances of rescuing parts of the business as a going concern, as any purchaser adopts the employee contracts and liability for any defects in the consultation process.

## Benefits

3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples

I don't see any real benefit of consultation in an insolvency process. IP's do try to keep employees informed of their intentions, but events inevitably move quickly and details of options being pursued are often confidential due to commercial sensitivity.

For example, if an IP has decided that he can only afford to trade for the 14 day period without adopting employee contracts, but then would have to make everyone redundant in the absence of a purchaser for the business coming forward, it would be prejudicial to the prospective sale if this information was known by the purchaser

where possible. What further benefits do you think we could encourage?

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

I cannot personally think of any situations from my experience where discussions with employees or employee representatives has helped reduce or mitigate the impact of redundancies in an insolvency situation.

## 2.2. Facilitators and Inhibitors

### Facilitators

5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

[This would only be viable if there was adequate funding for the consultation process to be properly undertaken and to be effective, there would have to be some sort of moratorium in place.](#)

[Possible this could be achieved through the CVA process but could to run into problems with the Redundancy Service and the acceptance of employee claims once the CVA has commenced.](#)

### Inhibitors

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

[See above. Commercial sensitivity and funding are probably the biggest factors in preventing adequate consultation.](#)



7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

[As above.](#)

## 2.3. Role of Directors

8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do

[This would be part of the IP's normal advice but unless there is an immediate insolvency appointment, this advice is usually not followed due to commercial sensitivity.](#)

directors respond to such advice?

9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

No they are not generally notifying the SoS.

As discussed above, I don't know how you can encourage this, because the moment it becomes public knowledge that redundancies are being considered, this is likely to be severely detrimental to the value of the business and the ability to continue trading eg credit insurers are likely to withdraw cover and suppliers refuse to give credit.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

It is very unusual for employee representatives to be in place in the SME marketplace. The practicalities of appointment are usually to do with time pressures as this simply causes further delay to the commencement of the consultation process.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

[The IP is usually well versed at meeting the employees and explaining the options/likely outcomes.](#)

[Directors tend to be relieved that there is someone to take on this responsibility as they are generally closer to the staff and find it too personal.](#)

## 2.4. Ensuring Effective Consultation and Notification

### **Process for Notification and Consultation**

12) How might the process for notifying the Secretary of State and sharing

[I cannot see how the process can be improved without an effective moratorium and possibly external funding.](#)

information with third parties be improved?

13) Could the process requirements for consultation be further clarified or improved?

[No](#)

### **Guidance**

14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

[No](#)

### Incentives and disincentives

15) How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

[The Government would have to underwrite the employee cost during the period of consultation.](#)

16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

[I don't know.](#)

17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

No

### **Sanctions**

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

The sanctions merely act as a disincentive to a prospective purchaser to take on a business as a going concern. Directors don't care if a Protective award is made as they generally (unless there is a personal guarantee) have no financial interest in the outcome.

As an Insolvency Practitioner I find it frustrating that a Protective Award might be made but there is nothing generally I can do about it, so it is something that simply diminishes the pool of funds for the creditors as a whole.

19) Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

[No](#)

### **Memorandum of Understanding**

20) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

[In my experience, Job Centre Plus is not geared up to dealing with notifications within the time frames necessary eg 14 days in an Administration situation.](#)



The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015



## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

Deloitte LLP, Restructuring Services.

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	X
Business representative organisation/trade body	
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	
Individual	
Other (please describe):	

## 2.1. Employer's Understanding

### Questions

#### Current Practices

**(1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.**

In circumstances where an employer is facing but not yet moved into insolvency, the stewardship of the employer will be in the hands of the Board of Directors ("the Board"). The Board's focus will be on protecting the interests of the employees in addition to further statutory duties and obligations. Whilst the primary focus of these duties is generally to promote the success of the company for the benefit of its members, where the company is facing insolvency, the Board's statutory duties and obligations move away from the members and focus on the interests of all creditors.

The primary focus on the interests of the creditors will invariably be on a financial restructuring, an operational turnaround or a sale process (or a combination of these). This is because these are likely to avoid or at least mitigate the losses of creditors. In these circumstances it would not be unusual for some redundancies to be necessary as part of a turnaround plan and consultation will be carried out by the Board at that time (but see the comments on deterrents below).

Where a turnaround cannot be achieved, then an insolvency process will be inevitable, possibly leading to the closure of the business and diminished returns, if any, for all creditors, including the employees.

As a result, our experience is that the Board will focus on the avoidance of an insolvency process until that is no longer feasible. This is because the Boards' duties are more clearly served by doing so. It is usual that the consequence of failure and the likelihood of further redundancies in an insolvency process will be recognised, but rarely planned for. For this reason it is our general experience that Boards of Directors rarely commence a consultation process for proposed redundancies that would occur *after* the commencement of the insolvency.

We are only aware of one instance (A) where a decision was made by the directors to commence consultation pre appointment. In this case, a sale of part of the business was to be made through a pre-packaged sale, with some of the workforce transferring and the remaining parts of the business being closed on an orderly wind down. This is discussed further in our response to Q8.

When redundancies are contemplated as part of a turnaround plan to avoid insolvency, the Board will need to assess the likely impact of proposing redundancies and starting consultation on a turnaround plan. We have noted below a number of issues which might serve to deter Boards from proposing redundancies and starting consultation when attempting to avoid a formal insolvency:

- Security and 'in confidence' issues - see ACAS Policy Discussion Paper – Collective Consultation on Redundancies <http://www.acas.org.uk/media/pdf/1/2/pdp-collective-consultation-on-redundancies-accessible-version-July-2011.pdf> ). Can the employer trust the employee representatives with what might be market or price sensitive information? What would be the likely impact if the financial difficulties were leaked to the public domain – how would that impact options? An example of such concerns would be the possible impact on the provision of trade credit insurance or supplier credit terms generally if rumours of distress were to circulate.

- Loss of key staff/personnel. Proposing redundancies and commencing a consultation process can create uncertainty for unaffected employees. Key staff could choose to leave rather than wait and risk having no job if the turnaround plan were to fail.
- Similarly, the impact on workforce morale could affect productivity at a critical time when the employer is working to stabilise the business.
- Potential insolvency 'offences'. Boards may fear that proposing redundancies and starting the consultation process will amount to an admission of insolvency, making further trading outside of a formal insolvency process more difficult and potentially risk the Directors becoming personally liable for the losses of the company.

Despite these concerns it may be necessary to propose redundancies and start consultation as without a reduction in the cost base a turnaround may not be deliverable in any circumstance.

In the context of an insolvency process having commenced, the ability of the insolvency practitioner to start consultation prior to implementing proposed redundancies will be determined by the time available, and that in turn is usually determined by the funding available to meet the costs of retaining the employees. Insolvency practitioners will only be in a position to meet the costs of retaining employees for the purpose of completing a consultation on proposed redundancies in the following circumstances:

- There are sufficient funds to hand to meet those costs;  
**and**
- It is likely that the interests of the creditors as a whole will not be prejudiced by doing so.

It will be seen, therefore, that if these conditions are not met then redundancies will be necessary, even though the consultation requirements will not have been met.

Consultation in insolvency situations may be regarded in three broad categories:

1. Where it is necessary to make all or some of the work force redundant very shortly after the process has started. In these cases meaningful consultation is not possible.

In an administration appointment (B) taken over a manufacturing company in 2013, production had ceased already, there were no forward orders, no funding, and no prospect of a sale of business. However, one of the production lines had work in progress that customers were keen to see completed and in respect of which we were able to negotiate settlement terms with the customers to fund a limited period of trading to complete the production, and which ran to circa three weeks. Employees needed to fulfil the orders were retained and the remaining employees, comprising two thirds of the workforce, were made redundant on day one. The retained employees were made redundant three weeks later when the production lines closed for the last time. No formal consultation was run, nor could it have been for the majority of the employees. The retained employees were informed that there was no prospect of a sale of business, that the sites would close once the work was built out and that all remaining jobs would then be lost. Again, no formal consultation took place. Claims were made for protective awards by circa 100 of the employees (primarily those laid off on day one and whose claims were coordinated by a specialist law firm) and in respect of whom 90 day awards were made<sup>1</sup>, amounting to £734,000.

---

<sup>1</sup> We have just learned that a further late claim has been accepted some 2 years out of time and in respect of which the RPS has objected to the Employment Tribunal.



By contrast, in an administration appointment over a retail chain (C), taken in June 2013, there was again no funding but, this time, a good prospect of a sale of business. A decision to trade was taken, but, in view of the fact that all costs would need to be met out of trading revenue, it was necessary to make 18 (just under half) of the head office staff redundant on day one, retaining a skeleton administrative team that dealt with functions that were still relevant to the trading administration, such as ordering and requisitions. Within two weeks it had become apparent that a sale of business was unlikely and a further 10 head office staff were made redundant and formal consultation begun with remaining staff, the remaining head office staff (7) being made redundant over the following weeks.

2. A period of trading is in the interests of the creditors in order to enhance the value of the assets through a sale of the business as a going concern. The funding conditions noted above are met but the time available is restricted by the amount of that funding. Consultation may be started on the basis of a proposal to make redundancies because the sale process has failed, but it may not be possible to complete the process.

Continuing with the retail example (C) given above, we conducted a phased store closure over a period of 10 weeks, redeploying the 333 staff where possible, with the final redundancies made in August 2014. The period of consultation ranged from 7 days to 40 days and was focused entirely on information provision and mitigation of the impact of the, by then, unavoidable redundancies. No claims were made by store level staff.

3. A period of trading is sufficiently lengthy to allow the required period of consultation on proposed redundancies to be funded. This is likely to be possible only where the trading is profitable and enhances the overall return to creditors and there is sufficient clarity over the proposed redundancies either 30 or 45 days in advance. As a consequence, this is only likely to occur in a relatively small number of situations.

In a 2009 appointment as administrative receivers over a hotel (D), trading was continued for some five years whilst seeking a buyer, with no redundancies made or proposed. Ultimately it became apparent that a going concern sale would not be possible and negotiations began with a prospective purchaser for a sale of the property. At this point, on 5 August 2014 a consultation process began with the 36 employees as it was then probable that the hotel would close with the loss of some or all jobs. The first consultation meeting was held on 11 August 2014 and the consultation was run for a period of 30 days, ending with all employees being made redundant and the hotel closed on completion of the sale on 11 September 2014. Despite what appeared to be effective and meaningful consultation, the ET has accepted late claims the outcome of which has not yet been determined.

**2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.**

What 'meaningful' consultation might be is not made clear either within the statute itself or from judicial interpretation. This subjectivity makes the effectiveness of "meaningful consultation with a view to reaching agreement" open to interpretation. .

The requirement under s 188 TULRCA is to consult with the representative of any employees who the employer is proposing to make redundant with a view to reaching agreement on matters not limited to but including:

1. Avoiding the dismissals;

2. Reducing the numbers to be dismissed; and
3. Mitigating the consequences of the dismissals.

Given that insolvency does not in itself amount to special circumstances, it is our understanding that the legislation must be interpreted such that it is possible for consultation to be meaningful, even where there is no practical option other than wholesale redundancy.

There may be no prospect of an outcome that differs from the proposed redundancies, but by transparent and open communication between the employer and the employee representatives there can be an acknowledgment that every avenue has been explored to the fullest extent. Such discussions will include the provision of information about the underlying reasons for the proposed redundancies and an opportunity to exchange ideas and information within the time constraints that will be operating. Focus can then be given to mitigating the impact for the individual employees. In our experience this can be achieved through the insolvency practitioner working in conjunction with internal HR teams and external agencies, such as Job Centre Plus to provide support and guidance to employees so as to enable a smooth transition into the job market.

ACAS in their discussion paper (<http://www.acas.org.uk/media/pdf/1/2/pdp-collective-consultation-on-redundancies-accessible-version-July-2011.pdf>) take the view that in order to be meaningful "there should be adequate time allowed for employee representatives to respond and that there needs to be a conscientious consideration by the employer of that response". The guidance does not then make clear what is meant by either 'adequate time' or 'conscientious consideration' other than to make reference to timetabling. Despite this lack of clarity, it is our experience that, in the context of a formal insolvency procedure, an IP will do all that can be done within the time constraints to have some form of dialogue with the workforce although rarely, if at all, will there be sufficient funding to enable timetabled information/feedback and response sessions. The holding of a conference call was deemed sufficient by an Employment Tribunal on one of our cases (E) to reduce the length of the protective award from 90 to 60 days – a significant saving.

Where there is time to consult on proposed redundancies in an insolvency procedure, recent experience on two retail administrations was that the consultation process had been positive and meaningful, albeit focused heavily on mitigating the impact of redundancies:

- In the retail case, (C), which we have discussed already at points 1 and 2 of our response to Q1 above, none of the store level employees lodged claims for a PA, even though the minimum period had not been achieved, for reasons outlined already. The last of the redundancies was made on 21 August 2013 and thus any claim made now would be out of time.
- In a second more recent retail appointment, (F), in January this year, head office staff were made redundant within the first week, and, whilst further redundancies were not initially contemplated, the possibility of redundancy was acknowledged and a consultation process started with the remaining 1000 or so store staff. We maintained clear and open communication with the 50 plus elected representatives and were clear from day one that the whilst the strategy was to seek a buyer for the business, without a sale we would be looking at orderly wind down of the business and closure, starting with least performing stores. A sale was not achieved but with funding of the sales process and strict cost control (of which the head office redundancies formed a part) we were able to run a 45 day consultation, following which the stores were closed and all employees made redundant, the last of which were made redundant in April. No claims have been made to date and we had very positive feedback from employees about the level of information and transparency provided during the process. What distinguishes this appointment from others, in



terms of the openness of communication and the length of the consultation period, was that the Company had the support of an ongoing, solvent and strong former parent company under a transitional services agreement which included access to the former parents' HR function. This helped facilitate an extended trading period (more than 45 days) which would otherwise have been challenging to achieve. In addition, the workforce were themselves perhaps more motivated than usual as there were known work opportunities going forward with the former parent and indeed a number of employees took advantage of these opportunities during the administration.

However, in neither case did the initial conversations result in a response from the employee representatives giving alternative proposals about the avoidance or reduction of job losses. Rather, the consultation discussions quickly turned to mitigation issues such as "how much notice will I get?" and "how much money will I get and when will I get it?", and in the second retail case "is there work for me with parent?"

In these cases, where possible, we were transparent about strategy and the timing of store closures; providing trading figures to demonstrate underperformance and ask for suggestions on how this could be improved. Even where we were unable to trade for long enough to meet the 45 day minimum consultation period requirement before the first redundancies were necessary, claims made for protective awards were limited to the initial day one redundancies.

However, despite adopting this approach to consultation, claims in other cases that the process has not been meaningful have still been made. Our experience is that there is a trend of redundant employees asking how to claim on form RP1 for their 90 days' pay as if a Protective Award is regarded as 'a given', part of an employee's claim in the event of an insolvency procedure. This may have arisen from the publicity afforded to a number of high profile Employment Tribunal ("ET") judgments in recent years.

However, as indicated at point 3 of our response to Q1 above, even where it appears that a meaningful consultation has been achieved, and such as we have described already, this will not always rule out the possibility of a claim being made, as discussed in our response to Q1 above.

### **Notification to the RPS**

Notification of "proposed redundancies" in the event of there being twenty or more<sup>2</sup> affected employees at any establishment should be provided to the Secretary of State. The method of providing that notice is through the form HR1 which prescribes the information to be provided. Submission to the Redundancy Payments Service ("RPS") Business Affairs team is deemed to meet the requirement. This information includes the number, location and date of the proposed redundancies. There are criminal penalties for the failure to provide the notification.

The form HR1 should also be issued to the employee representatives upon the commencement of consultation. It follows, therefore, that consultation cannot begin until the form has been completed and signed by the employer, issued to the Secretary of State and issued to the employee representatives.

The point at which an IP should provide notification of proposed redundancies to the RPS is not clear either from the legislation itself or from the guidance such as is provided by ACAS (see link here

---

<sup>2</sup> Section 193(1) Trade Union and Labour Relations (Consolidation) Act 1992

[http://www.acas.org.uk/media/pdf/p/s/How\\_to\\_manage\\_collective\\_redundanciesAPRIL\\_2013%28FINAL%29.pdf](http://www.acas.org.uk/media/pdf/p/s/How_to_manage_collective_redundanciesAPRIL_2013%28FINAL%29.pdf) ) or by the Secretary of State (see link here <https://www.gov.uk/staff-redundant/redundancy-consultations> ).

The issue hinges on the interpretation of when the relevant redundancies are 'proposed' rather than simply 'probable' or even 'possible'; the former suggests that a proposal has been formulated which should be consulted upon and absent an agreement with the employee representatives to alter the proposal, will be implemented and the latter are simply indicative that redundancies might happen. It could be interpreted that the mere fact of a formal insolvency process is sufficient to provide the grounds for supposing that a proposal for redundancies exists and that advance notice should automatically be given on day one, if not before.

A simple illustration of the difficulties this presents can be seen in the not uncommon example of an administration appointment, followed by a period of trading during which the insolvency practitioner attempts to sell the business as a going concern. The sale process is likely to take, say, six to eight weeks. A successful sale will result in the transfer, under TUPE, of all employees to the buyer. Failure to sell the business will result in its closure and the dismissal of all employees.

Whilst the number, location and date of possible redundancies may not be known, the circumstances by which redundancies will become necessary are clearly understood. Strict interpretation would suggest that HR1 should not be issued as the information required is not known. However, some ETs have suggested otherwise, particularly where there has been pre-insolvency scenario planning contemplating one scenario where there would be a need for redundancies, and this has placed insolvency practitioners at risk of criminal sanction.

As a consequence, insolvency practitioners have adopted the solution of issuing form HR1 on the first day of every trading insolvency. This enables the insolvency practitioner to avoid the risk of sanction were an ET to interpret the insolvency event (and the planning that led up to it) as being sufficient to suggest that redundancies were proposed.

In practice the insolvency practitioner may be unable to provide the RPS with the information required, without which there is a limited amount that can be done for the RPS or JCP to prepare. In this event, we have adopted the practice of providing additional information to the RPS which sets out why the form has been issued in an incomplete state and provides background to the business, the total number of employees and their locations. We have also begun to hold regular case calls and updates with the RPS contacts enabling us to discuss events as they unfold, within the constraints of confidentiality. From this interaction it is our understanding that the RPS would prefer to have the HR1 sooner rather than later, even if only partially completed.

These informal ways of working with the RPS on HR1 issues have proved effective and provide a degree of assurance that our insolvency practitioners are unlikely to be criticised and sanctioned for their actions. However, this remains an informal approach and carries no authority.

This is clearly unsatisfactory for all parties. The insolvency practitioner is forced to issue an incomplete document and rely upon making further informal representations in the hope of avoiding the refusal of the RPS to accept the form and/or face criminal sanction. The RPS has to interpret incomplete information and rely upon the insolvency practitioner to communicate on an ad hoc basis.

An alternative solution would be to recognise the difficulty in interpreting “proposed” in insolvency situations and to permit notification by an insolvency practitioner of the possibility of redundancies without needing to provide specific detail. This would simply require an alternative HR1 form specifically designed for insolvency situations (sometimes referred to as “HR1 Lite”).

In the meantime, it would be useful if the Secretary of State could issue guidance to clarify when the HR1 should be submitted. We would also welcome the codification of our informal approach, discussed above, into best practice guidance. We suggest that this could be developed between the RPS and R3 (perhaps also involving the Joint Insolvency Committee with the aim of issuing a new Statement of Insolvency Practice (SIP) for collective consultation) and we would be pleased to provide input.

The role of the employer and the requirement to notify is discussed in more detail at Q6.

## Benefits

### **3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

Where a company is distressed and facing insolvency if a turnaround strategy fails, the benefits that consultation can bring are clear. We have referred to the factors that may act against an employer proposing redundancies and starting consultation in these circumstances in our response to Q1 above. However, where a consultation is started, this will provide the forum for an employer to explore options to proposed redundancies. This may result in proposals from employee representatives to signal a willingness to propose other means of reducing costs and, thereby, avoid or reduce the number of redundancies necessary. Such proposals may include job share arrangements, redeployment, temporary pay cuts or layoffs or swapping holiday for retraining.

Where a company has become insolvent and has entered into a formal process it is our experience that these options are unlikely to be sufficient to avoid or reduce the number of redundancies necessary. In an insolvency scenario the options are severely limited by the time available to reduce costs sufficiently quickly and in many cases there are no options or they are limited to either the sale of the business in a short period or its closure when the available funding is exhausted.

Despite this and as indicated in our response to Q2 above, we do believe that meaningful consultation can be possible albeit potentially limited in scope by the financial predicament of the company.

In practice, Employment Tribunals have been required to interpret how meaningful such consultation has been. In our experience, the interpretation has been inconsistent.

In a retail administration (E) with more than 27,000 employees and no funds to continue trading beyond an orderly closure, the Employment Tribunal, despite accepting that attempt at consultation had been made (see response to Q2 above) were nonetheless critical of the fact that the consultation meetings were focused on mitigating the impact of redundancies caused by the unavoidable store closures rather than ways of avoiding or reducing dismissals. In our view this approach ignored the benefit of the consultation in mitigating the impact of the dismissals and was focused on the absence of “meaningful” consultation on avoiding dismissals and ignored the financial predicament of the company. Our experience is that this is not the reality of most consultations in an insolvency process.



As we have discussed, we believe the benefits of consultation inside a formal insolvency process are to provide a forum for the insolvency practitioner to be as open and honest on strategy as possible. Whilst the employee representatives will recognise that some information may have to be held back as commercially sensitive, in taking this approach a degree of trust and cooperation can be created. Once the reality of the financial predicament has been explained and understood, employee representatives show little appetite for exploring options to avoid or reduce the numbers of redundancies. Rather, they prefer to focus on facts, timings, information and help to access any benefits, training and other support that may lead to new gaining new employment. The early notification to the RPS contributes to the benefit that such consultation brings and enables the support agencies to coordinate their response to support the employees that may be made redundant. We have discussed at Q2 above that it is not always possible to provide complete information nor is it always clear at what point the notification should be made, but as has also been discussed, we have begun to work more closely on an informal basis with the RPS and urge the Secretary of State to consider formalising a protocol in this regard.

**4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

We have noted in our response to Q3 where employee representatives can assist in playing a part in a rescue or turnaround plan where the business is striving to avoid an insolvency process. The role that they can play could be of significant benefit.

In the context of an insolvency process the question assumes that there are likely to be options which employee representatives can discuss with employers. As we have noted in our previous responses, in our experience this is unlikely to be the case.

The proposal for redundancies will be made by the insolvency practitioner, presumably after considering all other options having had regard to duties and responsibilities as regards the creditors as a whole. In our experience we can find no examples of situations where employee representatives have proposed alternative solutions which would avoid or reduce the number of redundancies and still enable the insolvency practitioner to meet his duties to all creditors.

In many cases there is, therefore, a continuing disconnect between the expectation and the reality of applying the statutory requirement and the best practice guidance as issued by ACAS after the 2012 consultation (<http://www.acas.org.uk/media/pdf/h/3/Handling-large-scale-collective-redundancies-advisory-booklet.pdf>). In essence this is because both were developed for and aimed at dealing with collective consultation outside of an insolvency process.

The ACAS guidance in its current form does not fully recognise or address the approach to be taken where the consultation is being conducted inside or as a precursor to an insolvency process and where, for reasons we have rehearsed already, all that can be done is to discuss as openly as possible ways of mitigating the impact of what are by then unavoidable redundancies. As has been discussed above, it is our understanding and indeed experience that even where there are no options for reducing the number of proposed redundancies, we can still achieve a meaningful consultation process within the time available and as limited by constraints (such as funding) outside of our control. We would welcome clarification and such further guidance as can be provided.

As previously discussed, we do believe that effective dialogue with employee representatives on mitigating the outcome can be helpful.

## 2.2. Facilitators and Inhibitors

### Facilitators

**5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible**

This response is given in the context of an insolvency situation:

- Having the time and the funding available to run a process effectively. If the business can be sufficiently stabilised on appointment and sufficient cash flow generated to support trading without additional third party funding or the risk of increasing losses to creditors, then a longer period of trading is possible. The insolvency practitioner will then have the time and opportunity to consult with employee representatives on proposed redundancies related to, for example, underperforming sites and exploring whether profitability can be returned.
- Having a recognised and informed, elected, employee representative body ("ERB") in place prior to the appointment of an insolvency practitioner. In practice, other than with Trade Union representation, we have never seen this but we discuss at Q6 why this is desirable.
- As discussed in our response to Q1 and Q8, we believe that employers are more likely to commence the consultation process prior to formal insolvency where they are adequately supported by a credible HR function, internal or external.

### Inhibitors

**6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

- Please refer to our response to Q1 above for discussion on why employers are reluctant to commence consultation when formal insolvency is likely.
- In an insolvency situation, the mechanics of electing an ERB, a process often hampered by lack of reliable company data, delays the start of the statutory consultation process. This can often be further delayed or the process impaired as those on whom the insolvency practitioner is seeking to rely will themselves be facing redundancy and this can impair judgment and impact the quality of information provided. By way of example, in a retail administration, (G), assurances were given by management that despite representations to the contrary from purported union officials, no union was recognised. In reliance on this advice, the purported union officials were not included in the selected constituencies from which representatives were elected. A court subsequently ruled against us and our conduct was criticised in an ET.
- In some cases, (H), there is simply no appetite amongst the workforce to stand for election or offer to serve as a representative. Time can be lost trying to run a process that is not wanted by those it is intended to assist. We discuss this further in our response to Q 10.
- As recognised by ACAS and BIS, the process of collective consultation can lead to loss of key staff and personnel.

**7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.**

We have covered this, in part, in our responses above. In the context of insolvency, the factors that negatively impact upon the quality and effectiveness of consultation are almost all derived from the observation that the legislation is based on the presumption of solvency. These can be summarised as:

- Lack of guidance and clarity as applied specifically in an insolvent scenario – See response to Qs 2, 3 and 4.
- Lack of options - see response to Q1 and Q4.
- Lack of time – see response to Q6.

## 2.3. The Role of Directors

### Director's Role

**8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

There are many issues to discuss and consider during a contingency planning phase and this will include the likelihood of closure and redundancy. In our response to Q1 we have explained the reasons why the Board will focus on the avoidance of collective redundancy, rather than the prospect of its requirement.

We also note that even if the *prospect* of redundancies is considered, this is still some distance from making *proposals* for redundancies (that is, all other options have been discounted and absent workable alternative proposals from employee representatives, will lead to redundancies) and triggering the consultation process.

As indicated in our response to Q1 we are only aware of one instance (A) where consultation began pre-appointment. In this case the Directors not only filed the HR1 but they also ran an election process for employee representatives and held a number of briefing meetings with them before our appointment as administrators. The Directors were supported by an independent HR consultancy and were thus well informed and able to conduct the process effectively. An insolvency practitioner in waiting should not be expected to deliver that level of support and guidance. All that should be required is an overall duty to assist the Directors in balancing the interests of all parties.

**9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

In our experience where insolvency is inevitable, the directors will most likely take immediate action to put the company into a formal insolvency process, predominantly to mitigate the risk of worsening the company's position and possible offences under IA 86 or CDDA 86.

As we have discussed above, in an insolvent situation the directors must balance their duties and have regard to the interests of all stakeholders, not simply employees. By the time the point of insolvency is reached, it is not clear what benefits, if any, can be achieved from commencing consultation prior to the appointment of the insolvency practitioner. .



As noted above, the lack of guidance about HR1 in an insolvent scenario and the uncertainty over what can be discussed in advance of the formal insolvency doubtless deters employers from submitting the form in advance. As can be seen from our response above to Q8, where the management were guided by an informed and independent HR consultancy, and the benefits, risks and process of consultation explained and understood, the management were able to start the process.

**10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

No. As discussed in our response at Q6 this needs to be addressed. Once in an insolvency process, generating engagement with employees can be difficult, as we experienced on a retail appointment, (G), in 2013. In this case we actively sought and asked people to serve as employee representatives as too few had come forward of their own volition. We were subsequently criticised for what was seen as a selection process when the matter came before the Employment Tribunal.

We invite the Secretary of State to consider introducing legislation/best practice guidance for:

- the mandatory establishment of employee representative networks for the purposes of collective consultation in all qualifying businesses (i.e. those to which TULRCA would apply) with penalties for employers who fail to comply;
- mandatory training for directors and employee representatives on employee issues and consultation;
- in an insolvency or other specified situations where confidentiality may be an issue, template confidentiality agreements to facilitate and promote continued engagement where there are sensitivities.

Failing that and as indicated in our response to Q6, some guidance on best practice for insolvency practitioners would be welcome and to cover issues such as dealing with apathy or unwillingness to serve as representatives and constituencies.

**11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

In our experience and in the majority of cases, the hand over from Directors as regards the engagement with employees is not, of itself, a difficulty.

In a small number of cases, the insolvency practitioner may be appointed by creditors and not with the co-operation of the Directors (often referred to as “hostile” appointments). In such cases, engagement levels can be impacted detrimentally.

It is otherwise difficult to generalise. However, as has been discussed, poor quality information is a factor that must be taken into account by insolvency practitioners.

## **2.4. Ensuring Effective Notification and Consultation**

### **Process for Notification and Consultation**

**12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

We believe that best practice guidance is needed to address the issues specific to employers in insolvency processes; in particular, guidance on how the requirement to consult can be fulfilled given the need to balance the interests of all parties, not just employees, together with guidance on the submission of HR1 to clarify when it should be submitted with what information.

The fear of the breach of confidentiality and data leak (recognised as a deterrent in starting consultation by ACAS and BIS) could be alleviated by the introduction of mandatory employee representatives for qualifying employers (see response at Q10), enabling employers to engage with a team of people familiar with the process, and subject to confidentiality agreements, if appropriate.

We would also welcome and be willing to assist in the formulation of a protocol covering interaction with RPS to formalise ways of working in the period immediately prior to an insolvency process.

**13) Could the process requirements for consultation be further clarified or improved?**

Yes. See response above.

**Guidance**

**14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

Yes. See response at Q12. In the absence of a coherent legal framework, we would suggest that further guidance is needed.

Guidance could be targeted at employers through bodies such as CBI, IoD, RPS and ACAS.

We would also observe that the guidance should be provided to Employment Tribunal judges to ensure that an insolvency practitioner led consultation is considered having regard to the factors and constraints to which we have referred in our responses.

We also believe that such matters should only be heard by experienced tribunal judges of at least 2 years' standing, preferably drawn from a dedicated panel.

Guidance in the form of a protocol between the RPS/BIS and insolvency practitioners is also needed to clarify best practice should a claim for a Protective Award be made.

Where there are no funds to distribute to unsecured creditors, if an award is made it will have no economic impact on the outcome of the administration. If the insolvency practitioner were to expend costs in defending the claim, this could expose the insolvency practitioner to claims from the creditor community for worsening their returns for no reason, whatever the outcome of the ET.

However, it is recognised that Protective Awards do impact financially upon the RPS and the Insolvency Fund. It is therefore our view that the Secretary of State and the RPS should take a proactive role in providing guidance to insolvency practitioners, recognising the costs issue, and consider funding insolvency practitioner's defences of claims arising from consultation processes in appropriate cases.

**Incentives and disincentives**

**15) How can Government best incentivise or disincentive the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

In our responses to the questions above we have outlined why it is sometimes difficult, and in many cases impossible for insolvency practitioners to provide notification to the Secretary of State and conduct consultation in accordance with the processes set out in the legislation and ACAS guidance.

In our experience, insolvency practitioners are well aware of the requirements of the legislation and it is not the absence of will to comply that could give rise to consultation not being conducted in a timely or effective manner. We anticipate that the Call for Evidence will generate a body of responses from insolvency practitioners that will confirm this.

As a result, it is unlikely that any form of incentive or disincentive will serve to change the ability of insolvency practitioners to improve that position. Rather we would suggest that only through legislative reform to recognise and address the conflicts of interest that insolvency presents when trying to balance the interests of all stakeholders, or failing that, clear guidance on what priorities if any are to be afforded and to whom, will matters improve.

**16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?**

We believe this has been covered in our responses already. We believe that employers and employee groups need access to information, support and training.

**17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

We have provided in our response to Q1 examples of what we would consider to be constructive consultation even where the minimum period was not always achieved. We have identified in our responses to Q2 and Q5 what we believe to be some of the key components to constructive consultation including suggestions for mandatory establishment of ERBs with supported learning and training for 'qualifying employers', that is, employers with 20 or more employees at one or more establishment.

However, as indicated in our response to Q4, we have no examples of consultation where the ERBs have proposed alternative solutions so as to avoid or reduce the number of proposed redundancies.

**Sanctions**

**18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?**

Currently the sanctions apply if there was a failure to comply with a requirement of section 188 or 188A TULRCA. As we have discussed in our responses already, despite a willingness to follow the legislation and best practice guidance, it is often impossible to comply fully where the employer is in, or facing, an insolvency process and having to balance other demands such as lack of cash to support trading or risk of worsening the position for creditors generally.



As outlined in our response to Q1 above, only in rare cases will there be funding in place to support a period of trading of sufficient length to allow the requisite period of consultation on proposed redundancies, and, even then, consultation will most likely focus solely on mitigating the impact of those redundancies. Whilst this increases the likelihood of claims being made for protective awards and will be a consideration, it is not one that can shape the strategy. In our experience, and as outlined in our response at Q3, Employment Tribunals, in assessing the amount of an award, have focused on the failures to achieve in full the requirements without taking into account the financial predicament of the company and the restrictions that that imposed on the consultation process.

In the case (E) referred to at Q3, 60 day awards were made in respect of some 25,000 employees at a cost of in excess of £70million all of which was paid out of public funds. In a second retail case (G), up to 90 day awards were made in respect of some 6,500 employees with a cost to the tax payer of some £25 million. In neither case, would, or could, the outcome – closure and full scale redundancy – have been avoided nor delayed sufficiently to enable a full consultation process. Whilst it cannot be denied that such an outcome was effective in terms of the adverse public commentary, we question whether the awards were proportionate given the circumstances. As to whether such an outcome is dissuasive is perhaps not applicable, from an insolvency practitioner's perspective and for the reasons outlined above and in our response to Q15.

We question whether, then, in the context of consultation in an insolvency process, failure to meet the requirements of sections 188 and 188A should amount to a failure to consult or whether the fact of insolvency should instead automatically trigger the 'special circumstances' provisions of s 189(6). It would then be a matter for the insolvency practitioner to demonstrate and evidence that, what steps were taken, were as reasonably practicable in the circumstances and which would be assessed against agreed protocols/best practice guidance such as a new SIP for consultation inside an insolvency process.

Given the likely limitations to full consultation once in an insolvency process, we invite BIS to consider ways of encouraging and supporting an earlier commencement of consultation before the employer enters a formal insolvency procedure, thus increasing the likelihood of meeting both duration and scope of consultation and engagement before redundancies begin. Please see our response to Q8 and Q9 above.

However, if there is no appetite to provide recognition for the special circumstances of insolvency, has consideration been given to formal acceptance, as a default position, that failure to consult in a formal insolvency is a given and that awards will be a consequence of the insolvency?

**Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?**

We have discussed in our responses to Q2 and Q12 above the lack of guidance on when the HR1 form should be submitted to RPS where formal insolvency is imminent, or, most likely, begun and where redundancy will invariably be a possibility but may not yet be proposed. We have also discussed the various work arounds that we have developed and implemented to try to 'fix' the issue.

Given the current uncertainty over what is required, we question whether the potential sanctions for getting it wrong – criminal, financial and potentially, regulatory – are proportionate? We invite BIS to work with stakeholders to develop a protocol to codify ways of working between RPS and employers facing insolvency and insolvency practitioners, breach of which would render employer/insolvency

practitioner exposed to the full breadth of sanctions, be that financial, criminal or regulatory, the latter including disciplinary action by his/her licencing body.

### **Memorandum of Understanding <sup>3</sup>**

#### **19) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

We feel this is a question perhaps best reserved for the parties to the MoU.

From our perspective, we would like to see better communication and feedback both to and from the various agencies<sup>4</sup>, which we suggest could, in addition to case specific matters, be fed to insolvency practitioners through R3. There are regional differences, however. PACE will generally be content to rollout their support programme, with little or no reliance on the insolvency practitioner, having been provided with store closure programme and contact details for each affected site. JCP however, tend in our experience to lack ownership of the situation and to rely on the insolvency practitioner's staff to organise meetings etc., which is not always helpful and has recently led to criticism from JCP staff when affected employees of Company (F) chose not to attend any of the meetings organised by us. Had JCP organised their own meetings with the employee representative they would have perhaps been better placed to gauge the level of interest. These are however minor issues and we otherwise value the service being provided.

---

<sup>3</sup> <https://www.gov.uk/government/publications/workers-of-companies-facing-closure-memorandum-of-understanding>

<sup>4</sup> Job Centre Plus (England); PACE (Partnership for Continuing Employment) Scotland; ReAct (Wales)





The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015

## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

Jimmy Saunders / Duff & Phelps Limited

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	
Business representative organisation/trade body	
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	
Individual	
Other (please describe): Corporate Restructuring Practice	✓

## 2.1. Employer's Understanding

### Current Practices

1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

An insolvency practitioner ("IP") has no legal standing over a Company before taking office. In practice the Board is often reluctant to enter into consultation prior to an insolvency process as the uncertainty caused can be damaging to the business however they are guided to take legal advice. It is common for the directors to simultaneously continue to seek external funding to rescue the business, therefore a solvent outcome (without redundancies) is often not entirely ruled out until immediately prior to insolvency. The Directors have an overriding duty set out in statute to maximise realisations to creditors once there is recognition that a formal insolvency process is unavoidable which sometimes causes a perceived contradiction with their duty to consult. Any potential future redundancies by an appointed IP often remain uncertain and are entirely outside of the Directors' control as the Directors executive powers cease upon appointment.

Once in an insolvency process, the only factor driving the decision to make redundancies is the company's economic position and short term prospects of the business if the business is to be traded in Administration. The business must have the ability to generate sufficient cash to meet ongoing liabilities including wages and salaries (including ransom and hostage payments). Depending upon the timing of the appointment, arrears of wages and salaries will also need to be funded to maintain the goodwill of the workforce pending a sale. Employee costs are often the largest cost in the business therefore usually the only way to make a business viable is by making immediate redundancies and align costs to revenue. An IP has to make a very quick judgement call as to the levels of redundancies necessary in view of many trading variables.

A natural consequence can be that the reduced overhead costs invites additional interest in the business from prospective purchasers and this can achieve an enhanced value which providing a greater return to creditors; or lead to offers for the business which would not have otherwise been received, thereby preserving the remaining employment.

2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

If an insolvency practitioner is appointed, for example the day before wages are due, and the business is forecasting losses, then the IP may need to make immediate redundancies to ensure that the remaining business can continue to trade.

The economic reality of an insolvent company is very often that there is not enough money in the bank account to pay the whole of the workforce, or forecasts indicate that the business will not generate enough cash to meet all of its liabilities and the Administrator cannot obtain additional funding with no means of repayment.

In certain circumstances a lender (often secured) could agree to underwrite an Administrators trading loss (e.g. funding wages and salaries in full), however this would usually only be in circumstances where another valuable asset is being realised for the benefit of that creditor e.g. a mortgaged machine which has far higher value in a going concern sale than would be achieved if the IP chose not to trade the business. Whilst the saleability of the business is not a consideration for the IP (only preserving the business is), any restructuring of overheads will naturally impact upon a prospective purchasers level of interest (and/or offers received).

In summary therefore the economic position of the business drives the decision making process by an IP and any consultation is usually limited by time constraints.

In terms of the HR1, there are industry guidelines for submission and this is issued as soon as it is recognised that redundancies are possible (albeit not always certain).

## Benefits

3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?

A benefit of consultation is that any notice period is used by employees to pro-actively seek alternative employment.

The downside of this for the company is the risk that a sale of the business as a going concern is initially achievable but then becomes impossible due to the loss of key personnel and skills (often to a competitor) leading to ultimate closure of the business.

The second benefit is that creditor claims are mitigated meaning a potentially higher return to other creditors.

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

Insolvency practitioners will always have dialogue with trade unions and/or employee representatives however as discussed above this is subject to time constraints.

Employee representatives are trusted by the workforce and they are able to relay the financial position of the company to the wider workforce and act as a point of contact.

Sometimes employee representatives will make recommendations as to efficiencies which can be achieved within the business to cut costs, or to provide their input into those positions which are redundant. However, this can be a very subjective opinion.

Insolvency practitioners work closely with Job Centre Plus, the RPS and local employment agencies in order to maximise the opportunities for redundant employees to find alternative employment and to claim their statutory entitlements. Employee representatives may assist with this process, and in addition may advise the redundant employees about bringing an action for protective award.

## 2.2. Facilitators and Inhibitors

### Facilitators

5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

Securing the agreement of both customers and suppliers to ensure cash-flows are preserved and ongoing cash generation via trading is possible is a pre-requisite but this usually takes a few days or weeks in a distressed/insolvent business.

The major funders/creditors of the business may need to offer financial support as any prolonged consultation period can erode their security and diminish the final return to them.

### Inhibitors

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

The major issue is the lack of funds available to i) meet wages and salaries during a consultation; and ii) meet the costs of the consultation itself. Lenders have stakeholders to whom they must report and therefore from a financial perspective it is difficult to secure their agreement to fund a legal obligation of the borrower in an insolvency situation.

It should also be noted that a potential consequence of proposed redundancies is industrial action and this could undermine the saleability of an insolvent business.

Confidentiality issues are of paramount importance as the start of a consultation period prior to formal insolvency will inevitably become public knowledge and can cause suppliers to immediately withdraw credit and supply. Therefore if a business is on the brink of insolvency but still looking to attract emergency funding, a consultation exercise can force the business into an insolvency process which could otherwise have been avoided via new funding.

Whilst Management are advised to seek legal advice about redundancy consultation when the business is in a distressed state, much attention is focussed on potential rescue options and dealing with ongoing supplier and customer problems caused by the financial problems.

7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

As per box 6) above.

In addition i) Poor quality or missing information; ii) Co-operation of management/Directors; iii) workforce desire to take industrial action; iv) lack of certainty of outcome; v) opportunistic competitors seeking to destabilise the business.

## 2.3. Role of Directors

8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?

As per box 1) above, the Directors' duty is to protect creditors – it is often perceived that better value can be achieved for a business as a going concern. Entering into consultation when the financial position is fragile can be construed by Directors as damaging to value. Although IPs are not legally qualified legal advice from Employment Lawyers is often sought, but less often heeded, by the Directors.

9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

In our experience they are often not, due to the commercial constraints of an insolvent business and the fast moving nature of events as set out above.

Notification is undertaken by the IP as soon as it becomes likely that redundancies will be required via HR1.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

Employee representatives are usually in place.

When they are not, and there is no trade union, the workforce is usually addressed collectively or via their line managers and informal process and often an employee will agree to be the first point of contact.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

Once an IP is appointed to office he takes responsibility for all engagement with employees.

The IP will often retain the Directors to assist on an ongoing basis; however the Directors executive powers cease upon appointment.

## 2.4. Ensuring Effective Consultation and Notification

### Process for Notification and Consultation

12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?

Guidance notes should be created which explain to employee representatives and trade unions exactly what the issues are as regards funding and the ability to effectively consult in an insolvency scenario as quite often those parties are unable to recognise the funding constraints faced by the business.

IPs should be able to pass these notes to the employee representatives upon appointment.



13) Could the process requirements for consultation be further clarified or improved?

Full consultation in the context of an insolvency scenario can be impractical due to the issues detailed above and clarity would be welcomed. At present IPs are advised to 'balance' the interests of creditors against the statutory notification and consultation requirements, actual guidelines could be provided.

### **Guidance**

14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

As per 12) above.

## Incentives and disincentives

15) How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

Provide clear guidelines in insolvency scenarios where there is insufficient funding to fully comply with the consultation requirements of the business.

16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

As stated in section 12) above it would be useful if independent guidance could be provided to employee representatives which explains the role of the insolvency practitioner and the underlying reasons for any redundancies and timings of those redundancies.

17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

N/A

## Sanctions

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

Limited liability restricts most sanctions to the employer directly and not its officers. The protective awards are usually an unsecured claim against the insolvent company which therefore dilutes the dividend to remaining unsecured creditors. It is therefore not an effective deterrent to an officer of a company in the circumstances where it has failed, unless the diluted dividend impacts upon that person individually (for example if a Director is owed monies from a company loan account).

On the face of it, it is a deterrent to an IP who has a statutory duty to mitigate creditor claims; however, the restrictive factors detailed above and potential improved return to creditors if business continuity is maintained can outweigh the impact of this mitigation. Also it should be noted that often financial restraints can result in lack of legal representation at Employment Tribunal and the IP therefore is forced to take a passive position.

19) Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

Yes

### Memorandum of Understanding

20) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

It is improving the information flow and opportunities to the redundant employees.

It is our experience that Job Centre Plus will attend the company premises when there are a certain number of employees being made redundant; this *de minimus* principle could be removed albeit we recognise that it is not always practical to attend the premises when there are a small number of redundancies being made.



EMPLOYMENT  
LAWYERS  
ASSOCIATION

P.O. BOX 353  
UXBRIDGE UB10 0UN  
TELEPHONE/FAX 01895 256972  
E-MAIL [ela@elaweb.org.uk](mailto:ela@elaweb.org.uk)  
WEBSITE [www.elaweb.org.uk](http://www.elaweb.org.uk)

## **Collective Redundancy Consultation for Employees facing Insolvency**

### **Response from the Employment Lawyers Association**

**12 June 2015**

# **Collective Redundancy Consultation for Employees facing Insolvency**

## **Response from the Employment Lawyers Association**

**12 June 2015**

### **INTRODUCTION**

1. The Employment Lawyers Association (ELA) is an unaffiliated and non-political group of specialists in the field of employment. Our membership includes those who represent and advise both employers and employees. It is not our role to comment on the political merits of proposed legislation, rather we make observations from a legal standpoint.
2. ELA's Legislative and Policy Committee is made up of both Solicitors and Barristers who meet regularly for a number of purposes; including to consider and respond to proposed new legislation.
3. A working group was set up by the Legislative and Policy Committee under the chairmanship of Robert Davies of CMS Cameron McKenna LLP to consider and comment on the Insolvency Service's Call for Evidence in respect of Collective Redundancy Consultation for Employers facing Insolvency ("the Call for Evidence"). A full list of the members of the working group is set out in the Appendix. Our response is set out below.
4. We have sought to provide observations from the working group's experience in advising companies and insolvency practitioners (IPs) in responding to the Call for Evidence. There are, however, certain questions which are more naturally answered by IPs and directors by virtue of their subject matter and we have not sought to speculate in relation to such questions. It is also important to emphasise that it was not possible to involve a member of ELA as part of the working party who has extensive or pre-dominant experience of advising individual employees and/or trade unions in the context of collective redundancies. Whilst we have sought to incorporate some thoughts from this perspective we emphasise this point which should be taken into account when reviewing this response. (We also expect that the Insolvency Service will receive responses from trade unions and their advisers to the Call for Evidence.)

### **BACKGROUND**

An insolvency process (or the threat of one) does, of course present particular challenges for employers and IPs who seek to comply with employment law and have due regard to the rights of creditors and potentially save some or all of the business. Insolvency scenarios perhaps throw into very sharp relief why a "one size fits all" approach is not helpful. In some cases, it may be possible for the employer and/or the IP to comply with both their employment law and wider obligations, however, certain practical difficulties and potential anomalies do arise under the current regime.

The minimum consultation periods under TULRCA are 30 and 45 days, depending on the number of affected employees. However, this is at odds with the “window” of 14 days in which an administrator has to decide whether or not to adopt the contracts of employment of the employees under the *Paramount* ([1994] 2 All ER 513) principles. Any employee who remains in employment after that date has his or her contract of employment adopted.

The consequences of adoption are that qualifying liabilities under those contracts incurred after adoption acquire “super priority” status. Qualifying liabilities are limited to wages and salary, but include holiday pay, sick pay, pay in lieu of holiday and payments into an occupational pension scheme. They do not include a protective award (*Krasner v McMath* [2005] EWCA Civ 1072).

Clearly every insolvency will be different and in some cases, the employees will be retained for a period longer than the 14 day window in order to, for example, achieve a sale of some or all of the business or to effect an orderly wind down etc. However, where the on-going operation of the business is not feasible, IPs are left with the prospect of incurring super priority debts which are likely adversely to impact the monies available for floating charge holders and unsecured creditors if they continue to employ the employees for the full consultation period, or using the 14 day window to avoid this, but then potentially incurring a liability for a failure to inform and consult.

## QUESTIONS AND REPLIES

- 1) **What are the considerations undertaken when deciding whether or not to start consultation? How is it decided in practice where an employer is facing, or has moved into, insolvency?**

The obligation to inform and consult may present an employer facing the prospect of insolvency with significant practical difficulties. If a standing employee body already exists which covers the entire workforce, then it may be possible to seek to inform and consult that body on a confidential basis. However, even in this case, the risk of a leak is likely to be a concern for the directors. Where no standing body exists, or where that body does not represent the entire workforce the employer would need to organise elections. As well as being time consuming (typically, an election process might take between 2 and 4 weeks if a multi-site national operation), engaging with the workforce on this basis means that it is highly likely that a leak would occur. If trading partners etc become aware that a business is consulting about the redundancy of, potentially, its entire workforce, then this is likely significantly to increase the risks to the business and may result in insolvency becoming a self-fulfilling prophecy. It is a policy consideration and decision for government to determine where the balance should lie in these circumstances.

- 2) **How does meaningful consultation with a “view to reaching agreement” work in practice? How does notification work in practice?**

The legislation specifies consultation about ways of avoiding dismissals, reducing the number of dismissals and mitigating the consequences of dismissals. In an insolvency situation, in many cases the first (and, often, the second) of these aims is unlikely to be achieved and the parties are more likely to concentrate on reducing numbers of dismissals and mitigating the effects. In cases where there are only modest (if any) sums available, mitigation may take the form of practical

assistance e.g. help with CV writing, generous time off to seek alternative employment, a visit by the local job centre etc.

- 3) **What do you understand the benefits of consultation and notification where an employer is facing, or has become, insolvent? What further benefits do you think we could encourage?**

Provision of information at the appropriate time is important to help employees to assess what they need, individually as well as collectively, to do. There is a risk that expectations on the part of the workforce may be raised beyond what is realistic in practice in the event of an employer facing insolvency, in that the actual scope to avoid, or even to reduce the number of, dismissals may be severely constrained.

- 4) **In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

In a non-unionised environment our experience is that this is very limited.

- 5) **What factors, where present, best facilitate effective consultation where an employer is imminently facing or has become, insolvent?**

Consultation may more readily occur if there are pre-existing employee representatives. Even then, the lack of time within which to make decisions about the employees may, in some cases, hinder effective consultation.

- 6) **What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing or has moved into insolvency?**

See general comments above in the Background and the previous answers.

- 7) **What factors, where present, negatively impact on the quality and effectiveness of consultation where an employer is facing insolvency, or has become insolvent?**

In essence, time and resources.

- 8) **Are advisors informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

In our experience, yes. The focus then becomes one of how realistic some consultation may be in the circumstances.

- 9) **Are directors facing insolvency starting consultation and notifying the Secretary of State as soon as collective redundancies are proposed and at the latest when they first make contact with an IP? If not, how can this be encouraged?**

This is beyond the scope of our response.

- 10) **Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

Unlike in some other EU countries, absent a request from the workforce, there is no requirement under English law for employers to have a standing employee representative body. Where no such body exists, or where one does exist but does not cover the entire workforce, there can be



significant practical difficulties in organising elections. This is exacerbated if employees are in disparate locations, are not desk based and/or do not have access to personalised work or home based electronic communications.

- 11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

This is beyond the scope of our response.

- 12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

This is beyond the scope of our response.

- 13) Could the process requirements for consultation be further clarified and improved?**

It would be helpful to have a clearer acknowledgement/understanding of the consequences in terms of likely awards/compliance in circumstances where, despite the efforts of the employer and/or IP, consultation is likely to prove futile.

- 14) Would further guidance be helpful, and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

Please see response 13. We would suggest revisiting the primary legislation first (although acknowledging that European jurisprudence may significantly restrict any changes to the designation of “special circumstances”), but recognise that this is a policy issue for Government.

- 15) How can the Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

Please see our response to questions 14 and 18.

- 16) What would most encourage constructive engagement by employees when in this situation? How can employees be best supported?**

This is beyond the scope of our response.

- 17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

No.

- 18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become, insolvent? Is the situation different as it applies to directors and IPs respectively?**

Please refer to our response to questions 13 and 14 above. We think that it might be helpful if the Insolvency Service might be able to summarise, whether in the form of guidance or otherwise, various of the practical/financial challenges faced by IPs, in the context of insolvencies, when there are no pre-existing employee representatives. Such information might be usefully shared with the Employment Tribunals and may be referred to when assessing protective awards.

Ultimately, if insufficient account is taken of the challenges faced in undertaking consultation with the aims specified in TULRCA, that may prove to be a dis-incentive for consultation to occur; in other words, if the likely outcome is a protective award at or towards the upper end of the 90 day spectrum irrespective of the actual circumstances, that may prove to be a dis-incentive to consult at all.

**19) How well is the MoU working?**

This is beyond the scope of our response.

## **APPENDIX**

### **WORKING PARTY**

Robert Davies, CMS Cameron McKenna LLP  
Catrina Smith, Norton Rose Fulbright LLP



The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015

## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

Amanda Rowe – Ernst & Young LLP ( Restructuring)

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	X
Business representative organisation/trade body	
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	
Individual	
Other (please describe):	

## 2.1. Employer's Understanding

### Current Practices

1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

Consideration is always given to whether a consultation process is appropriate/possible. However this will depend on:

- Whether there are any proposals to make collective redundancies and whether the information required in TULRCA is available
- Whether the business is going to continue to trade or shut down on appointment
- Availability of funding to continue to employ the workforce through a consultation period

2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

By the time an insolvency practitioner has been appointed to an insolvent company it is too late. Consultation with employee representatives will not change the outcome for the Company or the employees.

## Benefits

3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

There are no benefits to an insolvency practitioner who is acting in the best interests of all creditors. A consultation process just publishes the perilous financial position of the Company to creditors/suppliers/customers.

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

None – the insolvency practitioner acts in the interests of all creditors and not just employees. Decisions as to whether to continue to trade the business are made for commercial and financial reasons and not whether a 30/45 day consultation period can be undertaken.

As an insolvent company is already in financial distress – who will fund a consultation period?

## 2.2. Facilitators and Inhibitors

### Facilitators

5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

In an insolvency situation, effective and meaningful consultation can only work in situations where there is a long time line between appointment of the insolvency practitioner, development of a redundancy proposal and the date of the first proposed redundancies.

In many cases there is insufficient funding to continue to trade the Company for a consultation period. If an insolvent employer has to enter into a 30/45 day consultation period prior to making redundancies, it will need to have sufficient funding to meet its ongoing financial obligations.

### Inhibitors

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

Redundancies whilst a business is in an insolvency process often have to be made with little or no notice and there may be no opportunity to consult with employee representatives regarding any decisions being made.

The information required to start the consultation process under TULRA is often not available until shortly before the redundancies are made (in particular items 2 and 3).

1. reasons for the proposed redundancies
2. numbers and descriptions of employees affected
3. proposed method of selecting the employees who may be dismissed
4. proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which the dismissals are to take effect
5. how redundancy payments, other than the legal minimum, will be calculated.



7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

It is uncommon for many insolvent businesses to trade for more than 30 days and therefore there is insufficient time to develop a redundancy proposal, hold elections for employee representatives and run a 30/45 day consultation period prior to making the first redundancies.

## 2.3. Role of Directors

8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

No – in the pre insolvency phase of any contingency planning work we undertake, we do not as a matter of policy provide employment advice to the directors.

9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

No – in the period pre insolvency, the directors are working to save the business and are unlikely to have formulated a redundancy proposal. We would not expect a director to start redundancy consultation and notify the Secretary of State as soon as they make contact with the Company's potential insolvency practitioner as redundancies may not be proposed and the information available to comply with TULRA not available.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

No – in the majority of cases there are no elected employee representatives in place. By the time a nomination and election process has been undertaken, redundancies are often being implemented.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

No issues. Meetings are held on appointment with the employees to advise of the appointment of the insolvency practitioner.

## 2.4. Ensuring Effective Consultation and Notification

### Process for Notification and Consultation

12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

We consider that there should be a separate HR1 form for insolvency appointments as the current form does not take into account the limited time and information often available to insolvency practitioners.

Third parties – i.e. Jobcentre Plus are, in cases with a large number of redundancies also notified directly. However names and addresses of the affected employees are not released due to the Data Protection Act.

13) Could the process requirements for consultation be further clarified or improved?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

We are fully aware of the consultation requirements but they are unwieldy and impracticable in an insolvency situation.

### **Guidance**

14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

No. The current legislation does not address the issue that to carry out consultation fully means that an insolvency practitioner must continue to employ the workforce for a minimum of 30/45 days (after the preparation of a redundancy proposal and the election of employee representatives). This is in conflict with insolvency legislation as it has an impact on the recovery for other creditors.

## Incentives and disincentives

15) How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

Recognise that insolvency is a special circumstance as there is a conflict between insolvency and redundancy legislation.

16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

By the time an insolvency practitioner has been appointment, all alternatives have already been explored and exhausted and therefore what can constructive engagement with the employees achieve? The employees are more interested in knowing how the redundancy claims process works and what will be their last date of employment.

17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

We have had insolvency appointments where we have engaged fully with the employees and their representatives throughout the post appointment period. However, as the decision to cease to trade was made on appointment, as there was no other viable alternative and trading was only for the purposes of completing the work in progress in order to maximise realisations for creditors, the consultation process could not be meaningful as the employee representatives had no opportunity to input into the outcome for the Company and ultimately the maximum protective award was made.

## Sanctions

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

The current system is inappropriate in a formal insolvency context

19) Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

The current system is inappropriate in a formal insolvency context and as stated at question 12 a separate style of form should be developed which would ensure insolvency practitioners could comply with the notification requirements.

### **Memorandum of Understanding**

20) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

RESPONDING AS AN INSOLVENCY PRACTITIONER – COMMENTS THEREFORE RELATE TO THE POST APPOINTMENT PERIOD ONLY

In line with the MoU we notify the JCP of any large scale redundancies and supply the redundant employees with the JCP leaflet. The leaflet is often poorly received by employees (left behind in the room when they are made redundant) as they are only interested in finding out about how to claim their benefits.

We do not arrange redundancy surgeries for JCP to come and talk to the redundant employees unless there are a large number of redundancies on one site at the same time. We do not hold redundancy surgeries at the Company premises but would rely on JCP to arrange for alternative premises.



The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015



## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

Matthew Frayne of Fraser Frayne Insolvency Practitioners Limited and Price Sterling

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	X
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	
Business representative organisation/trade body	
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	
Individual	X
Other (please describe):	

## 2.1. Employer's Understanding

### Current Practices

1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

In many of my small cases, the directors present me with a fait a compli. The business is closed and, effectively, it is too late to consult anyone as they have been paid off. In my liquidation: [REDACTED], the director had made all 60 employees redundant (by text) before I was even consulted ( a real "not how to do it" case).

When I was approached about the liquidation of [REDACTED] [REDACTED], the controlling shareholder and landlord has decided, as landlord, to sell the site and so close down the business. Prior to my involvement, there had been some efforts to relocate, so the 8 employees, informally, were well aware of what was happening. Formal consultation at my involvement stage was a nonsense as there was nothing to say other than that 'the business is closed and you are redundant'. There was no alternative as the shareholder-landlord would not contemplate any alternative.

Generally, consultation, in liquidation settings seems to be utterly pointless and can compromise a business sale as it triggers valuable staff to head for the exit prematurely.

2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

It doesn't.

In practice in small liquidation settings, the staff have informally discussed things with the director beforehand and know perfectly well what is happening. The staff are therefore either accepting their fate and holding out for their entitlements (redundancy and pay in lieu etc), or preparing to move over to a successor business with the purchasers/directors.

## Benefits

3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples

I have yet to see any benefits whatsoever of formal consultations in the context of a small liquidation. In practice, in small liquidations, the staff know damn well what is happening and, in practice, those that are going to be helpful will be and those that are not leave. The directors of "phoenixing", or business buyers, take on staff and the business and deal with redundancy issues in the successor business if there is one. The formal process in this context is a monumental waste of time and money which no one wants to be bothered with: directors, business buyers, shareholders, creditors, employees and nor do I.

What benefits? Yes, please scrap this nonsensical and unworkable requirement.

where possible. What further benefits do you think we could encourage?

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

I have yet to see any examples where they have been anything other than helpful in telling staff they are redundant - relieving me of the task. However, usually, I am saddled with this instead. Union representatives are usually very pragmatic and realise "consultation" is pointless.

Where an employee may be interesting in acquiring part of the business or taking an opportunity to take over, this is normally done informally between the directors, employees and me with perhaps a valuer involved if required. This occurred in the context of [REDACTED].

## 2.2. Facilitators and Inhibitors

### Facilitators

5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

Not sure what you mean.

### Inhibitors

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

The Stock Market rules regarding confidentiality limit consultation until a decision has been made already.

In many businesses, if you start a consultation formally before the business ceases, then you will trigger creditors to come running to the door and claiming retention of title claims, refusing to supply (even if being paid upfront as required) and customers cancelling orders and so triggering the business collapse that could have otherwise been avoided. Basically, some employees will gossip and start immediately approaching rival businesses so publishing a confidential crisis situation and making quiet negotiations very public.

7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

See 6.

## 2.3. Role of Directors

8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do

Generally, I find accountants advise on what to do in broad terms (as do I), but for practical reasons illustrated at point 6, directors refuse to consult until matters are settled one way or the other and the consultation has been rendered pointless.

In my liquidation, [REDACTED] ( a small delivery business), I advised the director he need to consult his 3 staff with a view to their suggestions and inputs and to see if they wanted to buy the business or part of it and, if not, then to arrange for their redundancy as the business was facing compulsory liquidation otherwise. He did nothing at all (although he lied to me saying he had consulted the staff). The notices of the creditors meeting for a S98 Meeting came as a considerable shock to the staff as result.

directors respond to such advice?

9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

No directors *never* seem to do this and leave it to the IP.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

I have not dealt with a Union representative in years - so no to question 1. Normally, the staff will discuss matters informally and informally someone will come forward for everyone else. Given the small nature of my case load, formal appointments is not required.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

Highly variable.

In my liquidation, [REDACTED], the employees were redundant and no correct procedures has been followed whatsoever by the director. Faced with this fait a compli, we dealt with 60+ very angry employees scattered across the UK as best as we could, tying up my staff in hours and hours of one to one telephone consultations and how to fill in RP1 and RP2 forms; we dealt with things as best we could as it was a case of 'too late'.

In my liquidation, [REDACTED], the directors met the employees on site to tell them the company was "going down". I offered to meet the staff to go through their rights, but they decided not to bother as they could see it was pointless and the managing director was so incredibly helpful to them all personally herself.

In my liquidation, [REDACTED] (another garage), the director and I consulted the staff informally together and worked out, with them, a practical plan for winding down the business and finishing of client repairs and I went through their claims, entitlements etc in person. The formal consultation period was not appropriate. Here, fortunately, the staff proved to be reliable and able to keep quiet, so the orderly closure was not compromised.

## 2.4. Ensuring Effective Consultation and Notification

### Process for Notification and Consultation

12) How might the process for notifying the Secretary of State and sharing

In small cases, the rather practical and informal methods used work, best left alone.

information with third parties be improved?

13) Could the process requirements for consultation be further clarified or improved?

Yes, how about scrapping them? In the small business context, they are sort-of complied with anyway as the requirements just specify commonsense mostly although the time periods are not practical.

### **Guidance**

14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

The Companies Act and Insolvency Act are a minefield for directors already who, generally, are blissfully unaware of most of their requirements. Adding yet more bumph, will just add to the pile of legal "guff" (as one director rather accurately called it) they don't read and ignore. More waffle seems utterly pointless to me. Howabout scrapping the consultation requirements for businesses with less than 100 employees instead?



## Incentives and disincentives

15) How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

I honestly don't think you can. You can incentivise IPs to leave the profession by overloading them with regulations and then proposing regulations to cap their fees so as to make it not worthwhile being an IP

16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

In practice, in small cases, a good manner, listening and being willing to talk is all that is needed

17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

In my liquidation [REDACTED], we discussed with the landlord-director, the landlord of the second premises and the managing director and employees at the second garage how they (the employees) could take over the second garage and set up in business as a successor business. This was not done formally as that was just inappropriate, but collectively and with the considerable help of the MD. To my mind it was a very good example of practical and co-operative thinking.

### **Sanctions**

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

No and generally employees don't think they are much use either.

19) Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

Clearly they are not effective as consultation is ignored. Personally, in the small case context, this seems appropriate too.

### **Memorandum of Understanding**

20) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

No idea. A

A little off the point, but I believe worth noting: my experience of dealing with the Job Centre helping a member of my own staff has been dispiriting beyond belief and I have formed an abysmal opinion of the Job Centre as to its function, administration and purpose. It is a disgraceful institution that seems to be designed to make compliance with its regulations very onerous, inflexible, unreasonable and downright unfair. I, dutifully refer people to sign on to claim benefits, but if they do not need to do so, my personal experience leads me to recommend people to have nothing to do with the Job Centre at all costs, especially if they are from the EU. The large number of blatant bigots with which I have to battle on behalf of my own, Polish, member of staff before he was my employee has required the intervention of my MP twice and endless hours on the telephone and in personal visits by me to the Job Centre to overcome deliberate obfuscation and obstruction and ended up with me reading the entire set of regulations relating to signing on to demonstrate the Job Centre was wrong and I was right. I am self-employed and can opt to undertake what was a pro bono case that cost me £1,000s of chargeable time; normally this is not a viable option.

Our Ref SBH/LTR150612/Mr Powar

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

12 June 2015

Dear Mr Powar

**Recovery and Reorganisation**

**Grant Thornton UK LLP**  
30 Finsbury Square  
London EC2P 2YU

T +44 (0)20 7383 5100  
F +44 (0)20 7184 4308  
[www.grant-thornton.co.uk](http://www.grant-thornton.co.uk)

**Call for Evidence: Collective Redundancy Consultation for Employers Facing Insolvency**

This is the response of Grant Thornton UK LLP to the Call for Evidence: Collective Redundancy Consultation for Employers facing Insolvency. Partners and Directors of Grant Thornton frequently accept appointment as insolvency officeholders. We recognise and respect the intentions of the legislation regarding collective redundancy consultation and seek to comply so far as circumstances permit. We are nevertheless firmly of the view that there is a conflict between the duty of an insolvent employer to consult and the duties, firstly of the directors and subsequently of the officeholder, to protect the position of the whole body of creditors once the insolvency is apparent.

The Call for Evidence appears to be based on a possible need to make minor adjustments to the current law regarding collective redundancy consultation for employers facing insolvency, or even merely better compliance to be achieved through education or codes of practice.

We believe, however, that there is a fundamental difficulty in that the legislation assumes that time and funding are available to the business while the consultation takes place over a duration of 45 or 30 days as the case may be. In the context of an insolvency this is unlikely to be the case.

Accordingly we do not attempt to answer the 19 detailed questions in the Call for Evidence, but offer our high level views in this letter.

In our view, the root of the problem lies in the case law decisions that insolvency is not a special circumstance. With respect we consider this to be an indefensible position. Insolvency plainly is a special circumstance. The very nature of insolvency is that legal rights have to be cut down to fit the cloth available. Most claimants suffer this by receiving a dividend, rather than payment in full. In the context of redundancies it is far more sensible to cut down the entitlement to consultation rather than leave in place an unworkable requirement and then admit claims for non-compliance at the expense of the other creditors and indeed at the expense of the public purse.

**Chartered Accountants**

Grant Thornton UK LLP is a limited liability partnership registered in England and Wales: No.OC307742. Registered office: Grant Thornton House, Melton Street, Euston Square, London NW1 2EP.

A list of members is available from our registered office. Grant Thornton UK LLP is authorised and regulated by the Financial Conduct Authority.

Grant Thornton UK LLP is a member firm of Grant Thornton International Ltd (GTIL). GTIL and the member firms are not a worldwide partnership. Services are delivered by the member firms. GTIL and its member firms are not agents of, and do not obligate, one another and are not liable for one another's acts or omissions. A list of personnel permitted by Grant Thornton to accept appointments as insolvency practitioners and of their respective authorising bodies may be inspected at the above address. Please see [www.grant-thornton.co.uk](http://www.grant-thornton.co.uk) for further details.



In the context of a formal insolvency, unless a rapid sale of the business is clearly in sight, then the redundancies are almost certainly inevitable, with the consequence that a consultation on ways to avoid the redundancies is not meaningful. The hard reality is that, despite the best of intentions, the process is "information", not "consultation". As regards consulting on steps to mitigate the impact of redundancies, an insolvent company is not in a position to provide counselling, advice on retraining / claiming benefits / help with CVs or jobseeking, so this aspect of the requirement to consult is also divorced from reality.

We do not see that anything less than a statutory exemption for insolvency cases can adequately remedy the situation. A change in the law would need some anti-abuse provisions so that administration could not be used as a device simply to circumvent the usual requirements, followed by a hand back of the company to the control of its directors.

A mere reduction of the requirements in an insolvency would reduce the scale of non-compliance, but would not wholly cure it, although simultaneously raising expectations that there should be full compliance. A reduction of the consultation period in cases of insolvency, or other specification of minimum standards, will run into trouble with the problem that if a continuation of trading is not a viable strategy for the insolvency officeholder, then no-one is going to fund the payroll for the period while the consultation takes place. If it is envisaged that the consultation might take place during a period when the employees have not been formally dismissed, but are not expected to attend for work and are not required to be paid, we see no merit whatsoever in that.

If there were to be penalties on the officeholder in respect of any non-compliance with an insolvency-specific code, then appointments carrying that risk will simply be refused. Either the directors will be left in charge for a prolonged period after they have recognised the insolvency, or cases will fall increasingly to the official receiver through creditor petitions leading to a winding up by the court. We do not see either of these outcomes as desirable and each would certainly be inimical to the rescue culture. It would no longer be possible to rescue a business with a reduced workforce; instead the business will simply close without the benefit of an insolvency practitioner taking charge.

There are only two possible sources of funding to enable the payroll to be paid while a consultation takes place. One source is the assets of the insolvent company, but drawing upon those, such as they are, is by definition to make the company's creditors bear the cost of the consultation. That only has to be stated to be seen to be entirely inappropriate. To some extent this happens at present by reason of the protective award competing for dividend. The other potential source of funding is the public purse. If the legislature insists on compliance with consultation requirements that are unfundable, then the legislation must itself provide for funding from the public purse. Further work would be necessary to assess how far this would cause additional cost, or to what extent it would merely divert the cost away from the retrospective protective award (funded by the public purse up to £475 per week and up to 8 weeks) and instead be a funding of the payroll.

It would be instructive to understand better how the requirements of the Directive are managed in other EU member states, although noting that the insolvency regimes elsewhere in the Union are very different, so that practice as regards redundancies may not be transferable to the UK.

We reiterate our key point that insolvency is a special circumstance as it is axiomatic that neither time nor funding will be available other than in rare instances. Unless and until this is recognised, debate on the finer points of the requirements and compliance can bear little fruit.

Yours sincerely

A handwritten signature in black ink that reads "Stephen Hill". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Stephen Hill  
Associate Director, Quality and Risk Management, Advisory  
For Grant Thornton UK LLP

T +44 (0)20 7865 2633  
F +44(0) 207 184 4308  
E [stephen.b.hill@uk.gt.com](mailto:stephen.b.hill@uk.gt.com)



---

## **Collective Redundancy Consultation for Employers facing Insolvency**

ICAEW welcomes the opportunity to comment on the call for evidence *Collective Redundancy Consultation for Employers facing Insolvency* published by the Insolvency Service on 23 March 2015, a copy of which is available from this [link](#).

This response of 12 June 2015 reflects consultation with ICAEW's Insolvency Committee, which is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. The Committee represents the views of ICAEW licence holders.



ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 142,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.

ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and ICAEW is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners.

Copyright © ICAEW 2015  
All rights reserved.

This document may be reproduced without specific permission, in whole or part, free of charge and in any format or medium, subject to the conditions that:

- it is appropriately attributed, replicated accurately and is not used in a misleading context;
- the source of the extract or document is acknowledged and the title and ICAEW reference number are quoted.

Where third-party copyright material has been identified application for permission must be made to the copyright holder.

For more information, please contact [representations@icaew.com](mailto:representations@icaew.com)

[icaew.com](http://icaew.com)

## MAJOR POINTS

1. We welcome this consultation in particular because flaws in the UK's legal regime present our licenced insolvency practitioners (**IPs**) with practical difficulties in performing their role.
2. The conflicting legal requirements are revealed most starkly in the case of compulsory liquidation where contracts of employment terminate immediately upon appointment of the liquidator as a matter of law. It will then be impossible (or, if possible, pointless) for the company to consult, but it seems (from European case law) that consultation would still be required.
3. We express no views on whether priorities of creditors should be changed, this being a matter for government; so far as the distribution of assets is concerned, the role of an IP is to follow the priorities prescribed by law. However, any change to existing priorities would need to be considered carefully taking into account not only the interests of particular persons such as employees or suppliers, but implications for the wider economy, including on investment.
4. We are making this response as the representative body for our licensed IPs and in the interests of assisting the government. Nothing in this response is intended to have any bearing on our consideration, as a disciplinary body, of any particular case, neither would the outcome of any particular case be expected to have a bearing on our comments. We are concerned here with the principles arising from the legal framework itself.
5. Many of the concerns expressed here have been raised in the past, including by R3 in its [response](#) to the calls for evidence issued by the Department for Business Innovation and Skills in November 2011 and its submission to the public bills committee on the Enterprise and Regulatory Reform Bill. That response contains further detail on some of the statutory provisions and case law concerned.
6. By way of background, we would note that an IP is appointed as office holder only if and when the business enters a formal insolvency procedure. A person who advises a company before this time may, or may not be the same person (and may or may not be a qualified IP). The role of the IP is governed by statute, whereas the duties of an adviser are determined by contract.
7. The consultation does not directly ask for comments about the role played by the National Insurance Fund in connection with collective consultations and protective awards. However, we wish to make clear that the implications for the taxpayer, again, arise as a result of the legislative regime, not as a matter of discretion of the IP.

## RESPONSES TO SPECIFIC QUESTIONS

### Current Practices

**Q1:What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.**

8. Considerations will be many and depend upon the circumstances of each case. Deciding whether or not the relevant thresholds are met, for instance, may involve consideration of the meaning of 'establishment' and relevant case law. The purpose of this response, however, is to highlight areas where insolvency itself gives rise to issues of principle and degrees of conflict in relation to the legal framework.
9. A company is required to consult when it is 'proposing' to make relevant redundancies and the consultations must begin 'in good time' before the first dismissals take place (at least 30

or 45 days before, where the relevant thresholds are met). A key consideration for directors will, therefore, be at what point the prospect of redundancies of the requisite scale becomes a 'proposal', as opposed to, for instance, a possibility. Considerations in that context include whether or not there is any prospect of the business being sold as a going concern, in which case the redundancies might be avoided (or would become a matter for the purchaser) and whether or not necessary sources of finance can be found or will be maintained.

10. Where the directors believe that there is no longer a reasonable prospect of avoiding an insolvent liquidation they are also required **to take every step with a view to minimising the potential loss to the company's creditors** [*emphasis added*] (s214 Insolvency Act 1986). This obligation is to protect the interests of all creditors; but entering into a collective redundancy consultation process may lead to the enterprise value of the business being reduced, which may not be in the interests of the general body of creditors. Similarly, it is not reasonable to expect directors to delay filing for insolvency in order to carry out lengthy consultation.
11. The duty to consult does not arise where there are 'special circumstances' so that it is not reasonably practicable for the employer to consult. However, insolvency in itself (i.e. the ability of the company to pay its employees during any period of consultation) has been held by case law not, of itself, to be a special circumstance.
12. Exactly when redundancies are 'proposed' may be a difficult issue to determine. It is dependent upon all the facts and requires exercise of judgment in often fraught circumstances. In the case of a company in financial distress, the position may change from one where there is a prospect of redundancies being avoided to one where redundancies become inevitable in a very short timeframe.
13. Given the difficulties involved, directors might consider whether to err on the side of caution and consult before there is a 'proposal' (or when it is uncertain whether or not plans amount to a proposal). There are, however, risks in taking this approach where a company is in financial distress, including, most obviously, that it might result in employees seeking employment elsewhere and that the action would become widely known, so undermining the confidence of suppliers and customers in the business and, potentially leading to (or accelerating) its collapse. It might also mean that the consultation process as a whole would be more drawn out because the fixed periods start to run only from the time that there is a 'proposal' and consultation before this time would not count.
14. The requirement for consultations to take place 'in good time' before the dismissals take place leads to a dilemma for directors, because by the time redundancies are 'proposed' (for instance, because a potential purchaser has withdrawn), the company may be unviable and redundancies inevitable.
15. At this point, the company may be insolvent, or likely to become insolvent, and an IP may be appointed, but whether the proposal is implemented by the directors or an IP, the law requires the company to consult for the relevant time (eg, at least 45 days) (the **minimum consultation period**) before making any redundancies. If, as is often the case, there is no realistic prospect that the company will be able to afford to pay all employees during the minimum consultation period, the company has an uncomfortable choice. Either it continues all contracts of employment in the knowledge that it cannot pay the employees (and that they will not be able to accept alternative employment, claim unemployment benefits or claim against relevant insurance they may have, as they will still be employed) or it makes redundancies despite the fact that this will not be in accordance with the regulations on collective consultation. It is unclear which of these unattractive alternatives is less disadvantageous for employees, but in normal circumstances the protective award regime ranks only as an unsecured creditor to which dividends cannot be paid until sums are available and claims agreed (and very few unsecured claims receive dividends of 100 pence in the pound).

16. This is not, however, the only consideration because, once the company has become insolvent and an IP is appointed, insolvency law also applies. The obligations of an IP depend upon the insolvency procedure concerned. As noted in our introductory comments, in some cases, it will be impossible for an IP to comply with the regulations on collective consultation.
17. In the case of administration, the IP's duties are prescribed by the Insolvency Act 1986 (the '**Insolvency Act**'). In particular, the administrator of a company:
- **must** perform his functions to meet one of three specified objectives. The first of these objectives is to rescue the company as a going concern and the third involves distribution to secured or preferential creditors only. However, in this context, we generally assume that rescue will not be possible and that there will be sufficient assets to result in a distribution of some kind to unsecured creditors. It is, therefore the second objective which applies, namely that the administrator is to **achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration)** [*emphasis added*];
  - must perform his functions in the interests of creditors as a whole; and
  - must perform his functions as quickly and efficiently as reasonably practicable.
18. In order to meet the objective of administration, the administrator will (if a sale of the business as a whole is not feasible), seek to wind the business down in an orderly way and continue elements of the business that may be saleable. This frequently requires swift action to minimise outgoings, including salaries or wages. In some cases, redundancies may be made within hours of the appointment and continue over a period of time, for instance as contracts are performed. The interests of creditors as a whole may be best served by making dismissals before the minimum consultation period expires even though this may result in a protective award.
19. The time limits prescribed in the Insolvency Act (Paragraph 99 of Schedule B1) suggest that an administrator has 14 days in which to decide whether, and if so which, employees' contracts will be adopted. As noted above, in a compulsory liquidation all contracts are automatically terminated by operation of law, and in a voluntary liquidation, under section 87 of the Insolvency Act, the company must cease to carry on its business except as required for its beneficial winding up. Clearly none of these situations correspond with the time limits for consultation. In many cases even a 14 day period may be unachievable depending upon the funding available.

**Q2: How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.**

20. Where a company is facing insolvency, the 'meaningfulness' of any consultation is likely to be very limited as the IP is required to meet the statutory objectives outlined above. It is not clear what additional purpose the collective consultation regulations are intended to serve in this context as an IP would be required under the Insolvency Act to consult with employees if necessary to meet the objectives set out in that Act. This might be the case, for instance, if the IP had reason to believe that the employees might purchase the business.
21. Regardless of the effectiveness or otherwise of the consultation regime in the ordinary course, where the company is insolvent the scope for avoiding or reducing the number of dismissals or mitigating the consequences is likely to be extremely limited and it is unclear what employees would have to gain by agreeing or disagreeing with the proposals.

22. In the experience of our members, employees often recognise for themselves that consultation will not result in improved prospects for employment and they want the process to be over with as quickly as possible so that they can make any claim that they may have and seek new employment. It is at least questionable whether, at a time when there is uncertainty and complication in their lives, making employees go through a consultation exercise of this kind in an insolvency situation is the most humane approach.
23. As regards notification to the Secretary of State, similar difficulties arise as for consultation. The requirement to notify arises only when the employer 'proposes' to make redundancies and the notice must, where the thresholds are met, be given at least 30 or 45 days before relevant dismissals take effect, with no recognition that this may be impossible or impracticable where the reason for the redundancies is insolvency of the company. Similar risks would also arise were directors (or IPs) to notify the Secretary of State before there is a legal obligation for them to do so.

**Q3: What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

24. Notification to the Secretary of State of proposals for large scale redundancies helps the Government prepare to provide assistance to those affected. However, this does not justify the continuance of the existing regime, particularly regarding the fixed time periods involved. The fixed periods are a crude measure in this context, where the extent of Government support required (and, therefore, the amount of notice that would be desirable) will vary according to many different factors, not simply on whether the number of redundancies over a given period will, for example, be 19 or 20, or 99 or 100.
25. We do not believe that the collective consultation regulations are beneficial in the insolvency context as currently applied. The main reasons for this should be apparent from our earlier comments. The legal obligation to consult applies whether or not consultation could be 'meaningful' in practice. In some cases where a company is insolvent, consultation is futile (in terms of any prospect of saving a material number of jobs), is a distraction for the IP and distorts the *pari passu* principle, as employees are retained and paid, as an expense of the administration, for more time than they are required for the benefit of the administration, thereby gaining an advantage over trade and other creditors which is not currently provided for by the priorities laid down in law. The process adds to the costs of administration or liquidation and, therefore, potential returns to creditors (which may include HMRC and, therefore, the taxpayer).
26. IPs may consider it necessary to defend claims for protective awards with a view to protecting interests of other creditors in accordance with the IP's duties under insolvency law (and, incidentally, to reduce cost to the National Insurance Fund). The harm arising from the conflict in legal requirements could, to some extent, be ameliorated were employment tribunals to take account of the practicalities involved where a company is insolvent in a consistent and predictable way, when determining the amount of any protective award. However, the experience of our members suggests that it is difficult to predict the approach of any given tribunal and that a full award may be made even when IPs have made a genuine effort to consult with the employees and minimise the effect of the situation in the light of the circumstances and information available to them but where dismissals are made before the end of the fixed consultation periods. The shortcomings of the legal provisions therefore have an additional indirect effect of increasing legal costs payable by insolvent companies at the expense of creditors.

**Q4: In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

27. By the time that insolvency has occurred, the options are very limited. Frequently, the company has made considerable efforts to achieve a rescue or to find a buyer but has already been unsuccessful.

### Facilitators and Inhibitors

**Q5: What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.**

28. The ability of an IP to undertake consultation effectively is hugely dependent upon the preparedness of the employing company, for instance regarding keeping of employee records (and so the effectiveness of communications), understanding of the law, practices on employee engagement generally and whether or not the infrastructure for consultation is already in place. It is unrealistic to suppose that an IP can create the ideal environment for consultation if there are shortcomings in this respect given the short timeframes of insolvency proceedings.
29. An IP is also often reliant upon the accuracy of information provided by management. For example if management state that a particular person has been appointed as a staff representative, the IP may, in practice, need to rely upon this in deciding who to involve in consultation, but a tribunal may not take full account of the practicalities in assessing the amount of any protective award.

**Q6: What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

30. As regards consultation, the administrative burdens involved in the collective consultation process may inhibit directors of companies in difficulties from starting consultations (and, therefore, from making redundancies) and this may result in corrective action being taken later than might otherwise be the case (for instance, when the company is insolvent and an IP has been appointed). Once the consultation process has extended beyond a few employees it is likely that the matter will become public knowledge (irrespective of confidentiality obligations), with potential risk to the prospects of sale or continuation of the business.
31. As regards notifying the Secretary of State, we have noted the difficulties arising under the current regime above.

**Q7: What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.**

32. The critical constraint in insolvency is that, in most cases, there are simply not funds available to pay all employees for the length of time that meaningful consultation of the kind envisaged in the employment legislation takes while fulfilling the objectives in the Insolvency Act to achieve the best outcome for creditors.
33. The regulations themselves are not best designed to produce quality or effectiveness in the insolvency context.

### The Role of Directors

**Q8: Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start**

**consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

- 34. Where our members, whether or not licensed IPs, are acting as advisors to a business, the scope of their role will be as agreed between the advisor and the relevant business. This may, or may not, cover employment related issues. ICAEW members are subject to ongoing requirements regarding professional standards so that, where advising on these matters is within the scope of their engagement we would expect them to provide relevant information to directors.
- 35. It is the duty of the company to decide when, and then to meet, their statutory obligations. When acting as advisor, our members may, subject to the above paragraph, remind the company and its directors of their obligations, but our members have no locus to enforce compliance unless and until they are appointed as insolvency officeholder.
- 36. In many cases where a company is insolvent or at risk of becoming so, the directors have apparently conflicting duties: the duty to consult but also to maximise the value of the estate for its general creditors. They will therefore be reluctant to declare publicly that the business is, or may be, distressed because of its impact on the enterprise value.

**Q9: Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

- 37. The requirements to notify and consult arise from the date that collective redundancies are proposed, as noted above (not when directors 'make contact' with an IP). One of the reasons that directors sometimes delay starting the redundancy process is because of the cash flow implications on the business relating to the cost of redundancy payments. When administrators are appointed they often find that the business is over staffed and potential purchasers are either put off a purchasing or significantly reduce their offer to take into consideration the costs of redundancies after transfers have taken place under TUPE; there are generally concerns about making dismissals which are in contemplation of a sale and are therefore generally automatically unfair and carry financial penalties. This results in a risk that the amount available for creditors is either restricted by lower offers from purchasers or unfair dismissal claims.
- 38. The largest companies which typically have HR and legal resource are more likely to be aware of the requirements and endeavour to make the notifications and consult at the required time, although they too face the issues noted above and the situation varies from one company to another. However, smaller companies will often be less aware of the regulations and, where they are, may be deterred from making redundancies as part of a corrective action plan by the prescriptive nature of the regime itself. It is often the case, therefore, that by the time professional advice is sought (or an IP appointed) it is too late for the business to be rescued or for meaningful consultations to take place. Notification and some degree of consultation might be encouraged by making the regulations less prescriptive in matters of detail (eg fixed timeframes).
- 39. If the government were to require notification and consultation at an earlier stage than is currently required (or done in practice), this would further protect one group of unsecured creditors (employees) at the potential expense of the other unsecured creditors, in circumstances where the employees are already provided with the safety net of the National Insurance Fund.

**Q10: Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

40. We doubt that many businesses (particularly small ones) appoint representatives for redundancy consultation purposes unless and until redundancies are contemplated. The process can be time consuming and disruptive.

**Q11: How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

41. The practice varies from case to case according to relevant circumstances, including the cash flow situation and prospects of sale of all or any parts of the business. The IP becomes responsible upon appointment as administrator and will seek to understand the business, including the position regarding staff, as quickly as possible, including through discussions with the directors.

**Ensuring Effective Notification and Consultation**

**Q12: How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

42. The process of notifying the Secretary of State could be de-linked from that for consulting with employees so that notification could be made (on a strictly confidential basis) to the Secretary of State earlier in the process. However, the form of notification requires certain details to be completed, including the number and location of proposed redundancies, so that it would also need to be amended or notification made in stages. We are therefore not confident that this would be effective.

**Q13: Could the process requirements for consultation be further clarified or improved**

43. We believe that the law needs to be amended so that the obligation to consult does not apply where the redundancies are being made due to insolvency (eg insolvency should be treated as a special circumstance). If this proves incompatible with EU law, then efforts should be made to change the Directive.

**Q14: Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

44. The two areas of law are in direct conflict and it is difficult to see how this can be resolved otherwise than through legislative action.

**Incentives and disincentives**

**Q15: How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

45. The Government should provide a coherent legal framework. Failure to notify the Secretary of State is already subject to possible criminal sanctions. IPs face personal liability in certain circumstances and sanction by their regulatory bodies. If the current system does not work, it is because it is flawed, not because IPs are systematically failing to perform their obligations under the Insolvency Act. Passing the financial burden to IPs to fund the consultation period where insufficient funds are available within the case can be expected merely to lead to more liquidations and a less effective rescue culture.
46. IPs will naturally wish to comply with law and do not need to be incentivised to do so (where remunerated generally on a fair basis). Where the law provides for priorities they will apply those priorities. In order to rectify the current situation, the Government would need to make clear whether consultation is a priority in itself, over and above the prospects of saving a



business (or parts of it) and increasing returns to creditors as a whole, if that is, in fact, what the Government believes.

**Q16: What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?**

47. Where IPs are involved in the consultation process, we believe that they do try to encourage constructive engagement, within the significant constraints outlined above.

**Q17: Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

48. Whether or not constructive consultation is possible (or what is meant by 'constructive') will depend upon the circumstances of each case. The means by which consultation is effected may also need to vary depending upon circumstances (and the insolvency procedure concerned).

## **Sanctions**

**Q18: Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?**

49. We believe that the current sanctions are sufficient and that if the notification regime is nevertheless found to be ineffective, then it should be reformed.

50. It should be noted that, if the risks involved in taking IP appointments increase due to the regulatory regime, there may be consequences, for instance, increased insurance costs that would be passed on through increased fees, something that would be contrary to the government objective to minimise costs of insolvency processes.

51. No one aspect of the regime should be considered in isolation because it may have implications in related areas. For instance, if sanctions for failing to notify the Secretary of State when a 'proposal' is made are increased with the intention that notifications would be made sooner than might otherwise be the case, then consultations may also begin earlier with potential consequences regarding returns to creditors outlined above.

## **Memorandum of Understanding**

**Q19: How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

52. We believe that this question is best addressed by the parties to the MOU and do not comment here ourselves.

10/1/3

6<sup>TH</sup> June 2015

Pabitat Powar  
The Insolvency Service  
4 Upper Orchard Street  
LONDON  
SW1P 2HT

Dear Mr.Powar,

“Collective Redundancies”

The Insolvency Technical Committee (“ITC”), on behalf of insolvency practitioners in Northern Ireland, has considered the Call for Evidence “Collective Redundancy Consultation for Employers facing Insolvency”. Our responses to the detailed questions posed therein are attached.

We wish to highlight that-

1. The need for prompt decisions to address the business’ dire financial straits militates against full statutory consultation.
2. Few SMEs have employee representatives.
2. Establishment of a panel of experienced employee representatives, a member of which would be available to assist in situations where there are no employee representatives, would facilitate the consultation process.

Yours sincerely

John Bowen-Walsh  
Secretary  
Insolvency Technical Committee  
ITC/s/collectiveredundanciesJune2015

## **Current Practices**

Q.1 What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

A.1 Where an employer faces insolvency the overarching responsibility is to act in the interests of all the creditors. Management will try to identify ways in which the business as a whole, or significant parts thereof, can be rescued. At that exploratory stage, it is impractical to comply with the statutory consultation requirements.

Once the course of action has been decided, consultation commences promptly. The primary consideration is to reduce, to the extent possible, the impact on employees facing redundancy.

Q.2 How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

A.2 The employer 's decision as to the necessary action/s required, with an emphasis on the achievable as opposed to the ideal solution, means that "reaching agreement" is often not possible.

When carried out as early as possible, the notification process works well. However, instances do arise where the minimum statutory notice period is not complied with.

Q.3 What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? What further benefits do you think we could encourage?

A.3 As noted in A.1 above, there is a responsibility to take account of the interests of all creditors by a company with limited financial resources, reflecting the tension between employment law and insolvency law. Early notification facilitates determination of employee statutory entitlements and the processing of those claims with the relevant Government agency.

Q.4 What role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

A.4 Negligible in the circumstances of an owner managed small or medium-sized business ("SME").

### **Facilitators**

Q.5 What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

A.5 Businesses in financial distress concentrate their efforts (in many cases, exclusively) on possible financial survival. In such circumstances, it is difficult to reach the level of transparency needed for effective consultation.

### **Inhibitors**

Q.6 What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

A.6 The principal inhibitor, referred to earlier, is the tension between employment and insolvency law. The need for prompt decisions to address the business' dire financial straits militates against the full statutory consultation.

Q.7 What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

A.7 See A.6 above.

Q.8 Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?

A.8 Advisors are informing directors of the statutory requirements on employee consultation.

Q.9 Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

A.9 With the exception of very large businesses, first contact with the insolvency practitioner tends to be when the directors are assessing still the merits of several alternative actions. At that point, generally, the directors have not decided whether and to what extent redundancies may be necessary.

Q.10 Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

A.10 Generally, in SMEs employee representatives are not in place. We do not consider it is practical to go through the process of appointing the employee representatives once the insolvency has commenced.

Q.11 How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

A.11 The interests of employees is a key priority of the insolvency practitioner ("IP") on appointment. If the directors have not commenced the consultation process, the IP will do so.

## **Process for Notification and Consultation**

Q.12 How might the process for notifying the Secretary of State and sharing information with third parties be improved?

A.12 We consider the process is working in a satisfactory manner.

Q.13 Could the process requirements for consultation be further clarified or improved?

A.13 Significant enhancement would require resolution of the competing obligations under employment and insolvency, referred to earlier in our response.

## **Guidance**

Q.14 Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

A.14 It is difficult to ascertain.

## **Incentives and disincentives**

Q.15 How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

A.15 Potential options include

- (i) Government to establish a panel of experienced employee representatives, a member of which would be available to assist in situations where no formal representation exists.
- (ii) "Ringfencing" a small proportion of total asset realisations to contribute to employment costs during the consultation period.

Q.16 What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

A.16 See A.15 above.

Q.17 Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

A.17 No.

## **Sanctions**

Q.18 The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

A.18 An insolvent business does not bear the costs of a protective The awards reduce the assets available to unsecured creditors. Lack of funds to pay wages and/or statutory barriers to an insolvent business continuing to trade.

## **Memorandum of Understanding**

Q.19 How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

A.19 We cannot say.



WRITTEN RESPONSE TO CALL FOR EVIDENCE:  
COLLECTIVE REDUNDANCY CONSULTATION FOR EMPLOYERS  
FACING INSOLVENCY

THE INSOLVENCY SERVICE



## **Executive Summary**

### **Introduction**

- 1 The Institute of Chartered Accountants of Scotland (ICAS) is the oldest professional body of accountants and represents over 20,000 members who advise and lead business across the UK and in almost 100 countries across the world. ICAS is a Recognised Professional Body (RPB) which regulates insolvency practitioners (IPs) who can take appointments throughout the UK. We have an in-depth knowledge and expertise of insolvency law and procedure.
- 2 ICAS's Charter requires it to primarily act in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and protect their interests. On the rare occasion that these are at odds with the public interest, it is the public interest that must be paramount.
- 3 ICAS is interested in securing that any changes to legislation and procedure are made based on a comprehensive review of all of the implications and that alleged failings within the process are supported by evidence.
- 4 ICAS is pleased to have the opportunity to submit its views in response to Call for Evidence issued by The Insolvency Service in respect of collective redundancy consultation for employers facing insolvency. We shall be pleased to discuss in further detail with the Insolvency Service any of the matters raised within this response.

### **Executive summary**

- 5 ICAS fully supports the need to provide legislative protection for employees and to ensure that their voice is heard in avoiding unnecessary redundancies or ensuring that where redundancies are necessary that these are mitigated.
- 6 Legislation makes no distinction between redundancies in solvent and insolvent situations. We believe that it is necessary for legislation to recognise the different landscapes and factors at play in each of these situations. In doing so, the inherent tension that exists at present in insolvent situations between employment law and insolvency/company law which are the cause of much conflict at this present time shall be resolved. Legislation should therefore be amended to give clarity and remove conflict rather than leaving resolution to the courts or employment tribunals.
- 7 The detailed process of consultation and the consequences of failing to consult are such that when consultation can be carried out, the focus is on getting the process right rather than on the quality of the consultation. We call upon the Government to simplify the consultation requirements when a company is facing insolvency or is in a formal insolvency process to allow greater focus on quality of the consultation. This would include:
  - Simplified notification process, including ability to submit electronically and using one notification for multiple sites
  - Removing insolvent companies from the current statutory consultation requirements
  - Working with the insolvency profession to introduce a principals based standard for the insolvency profession to work to which would better reflect the wide spectrum of situations which can be faced
  - Providing additional support to employee representatives who will not necessarily have the skill or knowledge to effectively contribute to collective consultations
- 8 We would also recommend that in order to provide support to employees facing redundancies, Data Protection legislation is clarified so that it is clear that insolvency practitioners can be clear about their ability to share personal data with appropriate agencies where the purpose is to support and guide employees through redundancy and finding alternative employment.

- 9 Transfer of Undertakings and Protection of Employment Regulations (TUPER) can act as a barrier to the preservation of employment in insolvency situations. Any redundancies made prior to a going concern sale of the business could result in a challenge being made for unfair dismissal unless the redundancies were for economic, technical or organisational (ETO) reasons. The risk of an unfair dismissal challenge being raised and any subsequent liability passed to the new employer under TUPE poses a significant barrier to such sales and may ultimately lead to greater job losses than would otherwise be required. There may be significant advantages to the wider economy in creating within legislation a presumption that redundancies when a company is within an insolvency procedure are for ETO reasons unless shown otherwise thereby removing a barrier to going concern sales and leading to a wider protection of employment.
- 10 Insolvency practitioners should not be faced with criminal penalties for failing to consult on redundancies in situations where they have no real alternative but to make redundancies immediately on appointment. We would suggest that insolvency practitioners who fail to carry out an adequate level of consultation in all of the circumstances of the case are best dealt with through the insolvency practitioner regulatory regime which can offer tougher penalties than the current legislative provisions. Legislation should therefore be amended to that effect and the Government work with the insolvency profession to introduce appropriate self-regulated standards of practice which would set out on a principal based approach requirements in relation to employee consultations.

### **Detailed Comments**

- 11 We fully support the policy that there should be clear levels of protection for employees in order to avoid situations where unnecessary redundancies may be made or to mitigate the effects of redundancies where they cannot be avoided. We recognise that there are significant benefits to the economy and the wider society by ensuring the effects of redundancy are minimised where possible.
- 12 The effect of redundancies is felt most severely when a business is facing insolvency or has already moved into an insolvency process. At such times, the directors and insolvency practitioners often face complex and conflicting legislative requirements. These are enshrined in a landscape involving employment legislation, insolvency legislation, company law and case law.
- 13 Employment legislation makes little distinction between the requirements where redundancies are being undertaken where a company is insolvent and where redundancies may be envisaged as part of a solvent entity. It is this lack of distinction which in our view leads to many of the current tensions between employees and their representatives or trade unions and management and insolvency practitioners. Legislation creates an expectation gap which in many instances simply cannot be reconciled.
- 14 We believe that in the main, directors and insolvency practitioners act in the best interests of all stakeholders involved in an insolvent company situation. Constraints are applied through a mix of legislative and commercial considerations. It is a matter of policy for the Government to consider whether there is a need and desire to promote the interests of one stakeholder group over others and to then ensure that there is effective legislation to achieve that policy objective.
- 15 In an insolvent situation, the outcome of collective consultation is rarely about whether options exist to rescue the business. These will in most circumstances already have been investigated by management and insolvency professionals. It is unlikely that any significant unexplored options will be able to be identified through collective consultation. Collective consultation should therefore have a focus on ensuring that proposed redundancies do not have unintended consequences which would impact on the insolvency practitioner's strategy or outcome.

16 Our detailed responses to the questions posed within the Call for Evidence are set out in [Appendix 1](#)

**11 June 2015**

Direct contact for further information:

**David Menzies**

**Director of Insolvency**

E-mail: [dmenzies@icas.com](mailto:dmenzies@icas.com)

TEL: +44 (0)131 347 0242

## Appendix 1 – Responses to questions posed in the Call for evidence

### *Current Practices*

- 1) **What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.**

The considerations undertaken will partly depend upon whether the company has engaged specialist professional advisors prior to the company entering a formal insolvency process or whether the company has moved into a formal insolvency process without the ability to engage with professional advisors and in particular the insolvency practitioner who is appointed to the company.

Where an insolvency or restructuring professional has been engaged by the company prior to the company entering insolvency, factors which would normally be taken into account in deciding whether or not to commence employee consultation would include (which are not presented below in any particular order):

- Customer vulnerability
- Order book vulnerability
- Supplier vulnerability
- Employee vulnerability
- Management relationship with workforce
- Erosion of goodwill value
- Cashflow impact
- Adverse publicity
- Statutory responsibilities – in particular under employment legislation, Companies Act legislation and insolvency legislation
- Skill and resource availability to carry out consultation

Where the insolvency appointment has been made without prior engagement with the insolvency practitioner (for example where the insolvency appointment has been instigated by a creditor) then there is no opportunity to engage with the management team prior to the appointment of the IP in order to discuss the impact on employment. In these cases the IP will go in 'blind' and our members report that in the vast majority of cases the IP will have no funds available to pay wages. As a result there is little choice but to make redundancies with very little opportunity to consult meaningfully.

While the availability of cash is often the key driver, even where funds are available the IP will need to consider the best use of those funds. The IP has an obligation to act in a fair and reasonable manner to the general body of creditors as a whole and not to favour or prejudice one class of creditors over another. The consideration generally made by an IP is therefore whether the dividend payable to each class of creditor will be affected by undertaking a consultation exercise and if so by how much. This will be a combination of variance in asset realisation and variance in claims which will result from the decision to consult or not.

- 2) **How does meaningful consultation with a ‘view to reaching agreement’ work in practice? How does notification work in practice? Please provide examples where possible.**

A distinction requires to be made between situations where it is not possible because of the insolvency process to either undertake a consultation and those situations where it may be possible to undertake a consultation. Where the insolvency process is terminal for the employer (liquidation) then there is no possibility to enter into a consultation or reach any form of agreement with employees as the insolvency practitioner is under a duty to cease trading as soon as possible.

It would be our expectation in such circumstances that the IP would notify BIS of the proposed redundancies as soon as possible after appointment. Notification to employees will depend upon the number of employees, number of sites, etc. IPs will wherever possible attempt to gather employees together at the earliest opportunity to notify them of the situation. Due to practical necessity, this initially may be carried out verbally and then followed up with written confirmation once employee information has been gathered from the employer.

### *Benefits*

- 3) **What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

While in theory the purpose of a consultation is to ensure that the most appropriate ‘solution’ is identified and to allow employees an opportunity to test an employer’s proposals, where an insolvency or restructuring professional has been engaged by the company the experience of our members suggest that where consultation is carried out it is unlikely that any suggestions provided by employees will not already have been considered by the company and its professional advisors and deemed unsuitable or unworkable in comparison to the final proposition.

As a result the primary benefit of consultation is not actually about the consultation but about the time it affords employees to commence looking for alternative employment. In addition, there is also a benefit to employees in that they have a period of time to adjust and adapt to their new situation. That will encompass physical, mental and financial adaptation.

- 4) **In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

It is likely that employees and employee representatives will have little input to considering options to rescue the business where the company is facing insolvency. In such situations, the company will already have engaged professional advisors who will have investigated all options available to the business and experience of our members suggests that where consultation has been undertaken then employees and employee representatives are unlikely to come up with options which have not already been considered and discounted.

Employees may be engaged where there may be the possibility for an employee/management buyout of the whole or part of the business. In such circumstances however the involvement is more as a potential purchaser than as employees.

Consultation can however play a useful role where the company must make redundancies in part by ensuring that the redundancies made are at an optimal level. This works particularly effectively for instance where there is a diverse skilled workforce to ensure that the correct skills are retained. Often discussions around the positions which can be made redundant will initially be held with senior management who may be removed from the detailed work environment. It is likely that the impact however is likely to be marginal and it is not the case that significant numbers of redundancies can be mitigated through consultation.

An example of whether this was effective was a software gaming company which entered administration but which was kept trading operationally but without software development being undertaken. While management had identified certain positions as being in relation to development work and therefore to be made redundant, as part of the consultation exercise carried out with employees it was identified that a small number of the positions were actually also required to fulfil operational functions and as a result some redundancies were not made.

#### *Facilitators*

- 5) **What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.**

Effective consultation can be achieved where the following factors are present:

- adequate funding
- strong employee commitment to the employer
- minimal risk to supply chain ceasing
- minimal risk to customer abandonment

The availability of funding is an essential component of effective consultation. Without funding the Insolvency Practitioner faces competing interests in carrying out a consultation exercise and in depleting or severely risking asset recovery values. In order to facilitate an effective consultation there would often need to be a compelling argument to show that increased claims via employee tribunals would prejudice the return to other creditors. In the absence of adequate funding however it is impossible to retain employees for the consultation period.

Risks of employee disenfranchisement, disruption to supply chain or stemming of customer sales/orders all require to be low as any disruption to production or loss in sales can render significant increased risk of business failure during the consultation period.

#### *Inhibitors*

- 6) **What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

Consultation is often prevented from being carried out by:

- Lack of funding
- Risk of key employees being lost to other employers during consultation period
- Risk of supply chain disruption
- Risk of loss of customers/orders
- Ability of company/insolvency practitioner to comply with other legislative requirements during consultation period

One, or a combination of any of these factors, may have a significant impact on either the ability to rescue or save the business or on the ability to maximise returns for the creditors as a whole.

Often the company or insolvency practitioner is faced with one or more legislative requirements which will impact on the ability of the company or insolvency practitioner to carry out collective consultation.

### Example

*An insolvency practitioner could be appointed trustee in the bankruptcy of a partnership which ran several nightclubs and bars. Under licencing legislation, once the bankruptcy is awarded the premises licence required to sell alcohol ceases with immediate effect. The trustee is unable to continue operating the nightclubs and bars without the premises licence. Faced with the inability to operate the nightclub and bars the trustee is unable to pay employee wages during the consultation period and therefore will have no alternative but to make employees redundant without fulfilling the statutory consultation requirements.*

In limited circumstance, it may be possible to notify the Secretary of State while not commencing consultations with employees. There is however a degree of reluctance to do so due to a perceived or actual risk of commercial confidence being breached which would then result in an increased risk of business failure. In addition, management will often not wish to notify the Secretary of State where insolvency is a real possibility as this is perceived to be an admission that insolvency is inevitable. In most SME businesses management will usually try and take every action possible in order to avoid insolvency.

### Example

*An engineering company employing 23 people was facing insolvency. The directors had engaged restructuring and corporate finance professionals for some time with a view to restructuring an unnecessarily complex group of companies, refinancing and allowing additional capital finance to be raised to purchase new equipment to make the engineering process more efficient. Due to a downturn in trade and other factors it was not possible to refinance. Other options such as a sale of the business as a going concern were also investigated.*

*During this period the company however began to experience significant cashflow difficulties with the insolvency of the company becoming inevitable. Talks were progressing with a potential purchaser of the business with the purchaser being aware that any sale would be under a distressed situation. More time was needed for the purchaser to complete some diligence but despite the advanced state of negotiations and the offer of additional security from the company director's the bank was unwilling to extend the overdraft terms available to the company.*

*The employees were highly skilled and as was normal in that sector notice periods were only 1 week. It was anticipated that a significant number of them would find new employment relatively easily. By entering into a consultation period of 30 days there was a severe risk that many of the employees would find alternative employment and leave the company before the end of the consultation period. Without those employees there was no possibility of completing the sale of the business.*

*Again, typical of the sector there was no firm order book with orders being confirmed only days in advance of the work being scheduled. Work could easily be undertaken by competitors and therefore there was a strong risk that customers would no longer place work with the company once its financial situation was known in the marketplace.*

*While it was thought that insolvency was inevitable due to a lack of cashflow and an expectation that the potential purchaser would not be in a position to make a final decision quick enough, consultation was not commenced as the risk of employees leaving and customers withdrawing would have ended any possibility of a business sale. The company did eventually end up in liquidation as the purchaser could not proceed fast enough and virtually all employees found alternative employment within 2 weeks of being made redundant.*

In addition, where it is possible that a going concern sale may be achieved the risk of redundancies being made and viewed under TUPE as not being for economic, technical or organisational (ETO) reasons presents a risk which will impact on negotiations with any potential purchaser. There may be significant advantages to the wider economy in creating within legislation a presumption that redundancies made by a company in an insolvency procedure are for ETO reasons unless shown otherwise, thereby removing a barrier to going concern sales and leading to a wider protection of employment.

- 7) **What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.**

The quality and effectiveness of consultation can be adversely affected by a fear of the consequences of failing to meet precisely the legislative requirements. These can be financial, reputational or operational consequences. Consequently, where consultation can be carried out the focus is often on getting the mechanics correct in order to minimise risks rather than on ensuring that consultation is effective and of appropriate quality.

#### *Director's Role*

- 8) **Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

Accountants and insolvency practitioners are likely to advise directors of the statutory requirements or advise that they obtain specific employment law advice when it is apparent that there is a prospect of collective redundancies.

While directors will often either seek further advice or acknowledge the statutory requirement, they will often balance that requirement with the competing requirements in insolvency legislation to act in the interests of the general body of creditors at a time when insolvency is likely to be unavoidable in making a decision on whether to notify employees and commence consultation. As noted in previous responses above, notice to employees would more than likely compromise the assets of the business, the viability of trading and any prospect of selling the business as a going concern. Given the much wider impact on customers, suppliers and employees who may be able to be retained as part of a going concern sale, it is understandable that directors may decide not to commence consultation at the earliest opportunity.

- 9) **Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

No. See comments in response to Q8. Directors will often perceive commencing consultation as admitting that redundancies cannot be avoided when other options still remain open.

- 10) **Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

The majority of insolvencies are in relation to SME businesses where more often than not no trade union representation is in place. In such scenarios it is unlikely that there will be another mechanism already in place where employee representatives will be identified in place at the necessary time.



The process of electing employee representatives can be drawn out depending upon the business structure, number of sites, etc. In practical terms, even in a relatively straightforward business structure it can take a number of days to elect employee representatives. At the same time the insolvency practitioner will have a large number of other matters to deal with in order to take control of the business, protect assets and ensure that optimal conditions are present to maximise return for creditors or achieve a sale of the business as a going concern.

**11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

The handover between directors and the appointed insolvency practitioner will be dependent on circumstances and the nature of an appointment. Where the appointment is creditor led then the involvement between the directors and the insolvency practitioner is likely to be minimal. Where an appointment is not 'hostile' then it is likely that there will be much greater opportunity for the directors and the insolvency practitioner to work together as part of the handover.

In all circumstances, the handover will involve:

- consideration of whether any employees can or are required to be retained immediately on appointment. This will involve an initial assessment of order book/WIP, funding availability, skills required to be retained, key employees with information or performing functions which will assist the insolvency practitioner, etc.
- how the employees are to be communicated with. This will include consideration of arrangements for multiple site locations, employees on holiday/sick leave, implications for employees based abroad, whether trade union representatives or other employee representatives are in place, etc.
- whether the directors wish to be involved in speaking with employees to communicate the background to what is happening.
- practical arrangements regarding obtaining payroll and HR data and any continued payroll operations necessary.

*Process for Notification and Consultation*

**12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

Where an insolvency practitioner is appointed we would recommend that a simplified version of Form HR1 is required. Only 1 form should require to be completed and submitted for each entity rather than a separate form for each establishment. The form should be digitised and completed via a web portal.

There is also concern that an insolvency practitioner is prevented by the Data Protection Act 1998 from sharing employee information with agencies that may be able to assist employees with redundancy support. We would suggest that legislation is brought forward to specifically exempt insolvency practitioners from the Data Protection principles in providing employee details for the purpose of supporting and guiding employees through redundancy and finding alternative employment.

**13) Could the process requirements for consultation be further clarified or improved?**

The process for consultations takes insufficient account of time and financial pressures which exist in insolvency situations. While it is appropriate for some consultation to be carried out there should be a recognition that it is often impossible to consult for 30/45 days. Recognising that there is likely to be a benefit in consulting with employees, we consider that legislation should recognise the difference in situations between insolvency and non-insolvency situations in relation to collective consultation requirements. Insolvency practitioners appointed to an entity should be exempt from the current collective consultation requirements. We recognise that there may be difficulty in framing appropriate legislation to cover the wide spectrum of situations which an insolvency practitioner could be faced with. Collective consultation exercises in insolvency situations should be proportionate to the specific circumstances. We therefore recommend that if insolvency situations were exempted from collective consultations in legislation that this be enacted in conjunction with changes to the insolvency regulation regime through the introduction of a Statement of Insolvency Practice adopted by all Recognised Professional Bodies.

*Guidance*

**14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

We do not consider further guidance to be a priority.

*Incentives and disincentives*

**15) How can Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

If there is a requirement to incentivise or disincentivise the behaviour of directors and insolvency practitioners this would suggest that there are currently barriers to collective consultation being carried out. It is our view that these barriers should be removed rather than expending resources on incentivising and disincentivising directors and insolvency practitioners.

The inherent conflict in legislation between employment law and insolvency law requires to be resolved as a matter of urgency. It is inequitable that directors and insolvency practitioners are put into a position whereby they have to choose which area of legislation to comply with in the knowledge that in doing so they are unable to comply with other legislative requirements.

We would encourage the Government to work with the insolvency profession to introduce an agreed standard of working practice which would enable consultation to be carried out in an effective manner. We consider that a principals based approach would work effectively as specific circumstances that present themselves in each situation will affect how effective consultation would look.

- 16) **What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?**

We consider that each individual situation is different and therefore it is difficult to set out matters which would encourage constructive engagement by employees. There will be situations where employees simply do not want to engage as they too also accept the company's financial circumstances and that if appropriate professional advice has been sought then they are unlikely to be able to add to the process. In such situations the employees often do not wish to go through a statutory consultation period which only delays the inevitable.

Where collective consultation is to be carried out then we consider that employee representatives are unlikely to have relevant skills and experience to effectively contribute to a collective consultation. Their involvement could be better supported through access to specialist advice and assistance, possibly provided through government agencies such as PACE in Scotland or an extension to the service offered by the likes of ACAS.

- 17) **Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

A software gaming company employing c270 persons entered administration with the decision taken to cease development work but retain the online gaming as operational. Management had identified certain positions as being in relation to development work and therefore to be made redundant, but as part of the consultation exercise carried out with employees it was identified that a small number of these positions were actually also required to fulfil operational functions due to their skill sets. As a result some redundancies were not made. The overall consultation period was less than 48 hours.

#### *Sanctions*

- 18) **The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?**

**Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?**

We do not consider that Protective Awards are effective or dissuasive in insolvency situations but simply add to the complicated and conflicting requirements and considerations that insolvency practitioners and directors have to take into account in balancing all of the legal responsibilities.

Protective Awards may be effective and persuasive in non-insolvent situations to ensure that collective consultations are undertaken.

Similarly we do not believe that it is correct to criminalise the failure of an insolvency practitioner to notify on HR1 or carry out collective consultation where such notification or consultation is impractical. While we anticipate that prosecution in such circumstances may not be deemed to be in the public interest, this should be put beyond doubt in legislation in order to ensure that insolvency practitioners can operate without fear and risk of a criminal record when trying to assist in the rescue of a business which is failing through no fault of the insolvency practitioner. Such penalties are not proportionate, fair, or effective. By decriminalising such matters this will not reduce the effectiveness of potential sanction for any insolvency practitioner who may fail to notify or fail to consult in situations where this would be possible. Regulatory and disciplinary sanctions can be as effective or more effective in dealing with such behaviours. Regulatory financial penalties may indeed be more severe than the financial sanction of £5,000 provided for in legislation.

*Memorandum of Understanding*

**19) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

The MoU is well understood within the insolvency profession. The effectiveness of support when called upon by insolvency practitioners is often met with varied degrees of success. We would encourage a more consistent approach throughout all regions.

## **Collective redundancy consultation for employers facing insolvency: call for evidence (the Call for Evidence). Response of the Technical Committee of the Insolvency Lawyers' Association**

This is the response of the Technical Committee of the Insolvency Lawyers' Association to the Call for Evidence. By way of background, the ILA provides a forum of c 450 full, associate, overseas and academic members who practice insolvency law. The membership comprises a broad representation of regional and City solicitors, barristers and academics and overseas lawyers. The Technical Committee of the ILA (the **Committee**) is responsible for identifying and reporting to members on key developments in case law and legislative reform in the insolvency and restructuring market place and is often consulted by the UK Government in relation to insolvency law reforms.

The Committee has responded to previous consultations on this issue, which are attached. The comments made in those responses are equally relevant to the Call for Evidence and we would invite those considering this response to revisit them. The Call for Evidence is very much directed at the practical barriers to (and potential benefits of) "compliant" consultation, and seeks empirical evidence. As a general rule, ILA members will play little, or no, part in the consultation process itself, and how it is implemented and conducted. Most insolvency practitioners (acting both in an advisory capacity pre-formal insolvency and as office-holder post-formal insolvency) are however well aware of the legislative framework.

Consideration of the questions in the call for evidence gives rise to some general comments, and also to common themes. For ease of reference, after setting out some general comments, we identify those common themes. We then refer back to those common themes where appropriate in the responses to each of the questions to which the Technical Committee responds. Where we have not responded to a specific question in the Call for Evidence, these general comments and general themes can also be relevant.

### **General comments**

- An approach which recognises the commercial realities and the special features and pressures present in a distressed or insolvency situation, and which is workable against that background, is more likely to be complied with than one which would require reconciling incompatible duties. Many distressed and almost all formal insolvency situations appear to (or ought to) satisfy the "special circumstances" criteria which are supposed to form an exception to the obligation to consult. In such cases, it is not reasonably practical to comply with the obligation to consult, or to the extent that some consultation is possible, and those steps which were reasonably practical were taken, then this should be used as a starting point for the consideration by an employment tribunal and not the default position on 90 day awards.
- A "one size fits all" approach is not appropriate in a distressed or insolvency situation.
- Pre- (and indeed often post-) insolvency, it is usually the case that efforts (by the company, its officers, funders, key creditors and advisers) will be primarily devoted to achieving a rescue, or a sale as a going concern (with the associated TUPE benefits for employees), with collective redundancies and the demise of the business very much seen as the option of last resort. Usually, an attempt to run a redundancy consultation process in parallel with rescue efforts in these circumstances would damage the rescue efforts, and therefore damage the employees' chances of a TUPE transfer. By contrast, if you wait until it is obvious that the rescue efforts will not succeed, so that collective redundancies cannot be avoided, funding arrangements and creditor interests almost always dictate an immediate shutdown, leaving no time for a lengthy consultation process.

- The requirement for consultation is imposed by a European directive, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of Member States relating to collective redundancies (the Directive); whilst the obligations imposed by it across member states may be uniform, the regimes, and political approach, in each of those individual states to insolvency differs; this has a key impact on the extent to which compliance is achieved, or achievable. In Germany for example, wages are paid from the public purse for an initial period in insolvency. A similar approach in the UK might produce very different outcomes in terms of employee consultation. Likewise in France for example, the obligation to consult may often be easier to comply with because there is a requirement for businesses over a certain threshold to have employee representatives already in place. We do not consider that imposing similar obligations on employers in the UK (especially in the context of the current desire to simplify business operations and reduce red tape) would be welcomed. This again illustrates the point that the obligations imposed by the Directive do not sit comfortably with the culture and practice in the UK, at a time when there is a focus on encouraging economic growth.
- The obligation to consult imposed by the Directive was implemented into UK law by s 188 TULRCA. There are divergences between the Directive and TULRCA, and debates as to whether s 188 is an accurate implementation of the Directive. The main textual divergence is about when the obligation is triggered: under the Directive, this is when redundancies are contemplated; under s 188, when they are proposed. Whilst the decision of the Employment Appeal Tribunal in *Kelly v The Hesley Group* ( [2013] UKEAT 0339 12 1904), that there is no obligation to consult until the employer *has formulated its proposals* [after the crucial operational decision], was thought to have resolved the issue, the Employment Tribunal in the more recent decision in *Akbar & ors v Comet Group Limited* (case no. 1102571/2012) held ([107]) that “the duty to consult arises when the proposal is still in its provisional stage; not when the decision has been taken. Once the decision has been taken, there is little to consult about”. Given that the Directive was implemented over 15 years ago, it is unhelpful for there to be lack of certainty over the key trigger, and greater clarity would assist all stakeholders, although as we comment above, we believe consideration should be given to refinement of the “special circumstance” exception. In particular, the policies underlining the obligation to consult need to be considered afresh in the context of a distressed or insolvent situation. The current obligations are premised on the basis that the process of consultation will either (i) avoid redundancies; (ii) reduce the number of redundancies; or (iii) mitigate the effect of redundancies on employees. Save in cases where a business may be rescued or disposed of to a third party purchaser, many insolvent situations will limit the insolvency practitioners ability to satisfy the purposes of the consultation and in most cases the only objective will be (iii) which is limited to mitigating the effects on employees. In this regard, in our experience most insolvency practitioners already engage with employees to provide them with information on the prospects of the business and its effect on their employment, in addition to providing them with advice as to the employment resources/services available to them.
- More generally, we would observe that the Call for Evidence is being conducted against the background of a number of other initiatives affecting insolvency law and practice: proposed wholesale amendments to the Insolvency Rules, added complexity in the pre-pack arena and pressures on IP fees. It is most desirable in our view that an holistic approach be adopted, to avoid creating/adding to tensions in other areas.

## Common themes

- (1) **Insolvency and directors' duties; employees and other creditors:** When a company is facing insolvency (which can be for a variety of reasons, and can happen suddenly or result from a gradual decline) the Companies Act requires directors to focus their attention on the interests of creditors (s 172(3)) and there is a risk of personal liability (under the Insolvency Act 1986) for wrongful trading which dictates that they act so as to avoid further harm to the interests of creditors as a whole. Although not wholly inconsistent with consultation with employees (whether under TULRCA or TUPE), these provisions in company and insolvency legislation are more specific in relation to directors and their behaviour. Whilst employees are not usually regarded as falling within the category of creditors as ordinarily understood (suppliers, customers, finance, landlords and tax/VAT), they can be creditors, but there is no separate requirement for directors to give them, as creditors, priority over others. In addition, the requirement for collective consultation, which is aimed solely at employees, creates a tension with obligations to the general body of creditors, and there is scope for a clash between the different duties. On a practical level, the legal duties owed to creditors generally mean that the directors' focus will be on crisis management, long term sustainability of the business, keeping staff motivated to preserve value and securing a going concern sale.
- (2) **The rescue culture imperative:** As set out in our previous responses to consultations, there is a tension between the collective consultation requirement and the outcome desired and promoted by the rescue culture. As noted above, we perceive a lack of an holistic approach to restructuring and insolvency regime review. We also note, at 6 below, funding issues; there is a danger that imposing punitive measures in an attempt to secure compliance where this is not possible, because no one is willing or able to fund trading during a consultation period, will see an increase in early liquidations, rather than efforts being made to secure a rescue. This would not be helpful for employees, the larger body of creditors, or the wider economy. It is also relevant to note here that, in the context of TUPE, the courts (see the *Key2Law* case in the Employment Appeal Tribunal and the Court of Appeal ([2011] EWCA Civ 1567)) have adopted an absolute approach that all administrations start out as a rescue of the company and its business as a going concern in line with the statutory purpose of administration, even if that can never be achieved and is discounted from the start of, or even before, the administration. If that is the view of the courts in considering reg 8(7) of TUPE, it is inconsistent for there to be a different treatment for administrations in the area of collective redundancies consultation, and for the consultation obligation to be capable of being triggered in the period prior to an administration. In each case, the starting point must be that the purpose of the administration is a full rescue, so that it cannot be said that any redundancies are "proposed" at a stage prior to administration, nor during the administration where there are interested purchasers.
- (3) **A restructuring and an insolvency process is fluid and fast-moving :** the issue (of the workforce generally, not limited to consultation) is, usually, one of several falling to be considered in the context of what can be a complex, and complicated, matrix of facts, involving both internal and external factors, and more often than not, without the luxury of time. By the time an insolvency practitioner is engaged, it is our experience that the decline curve is already quite steep and difficult to escape from; but even at that stage, there may be a range of possible outcomes under consideration, which may have

different consequences for employees, but which cannot be ruled out. In fact, given (1) above, it is vital that the directors pursue all possible options before embarking on a close down. Generally however, large scale redundancies will be the last resort option; only when other options have been exhausted will the reality of the need for redundancies arise. By that stage, a consultation exercise may be impossible, or serve no useful purpose, although there may have been informal discussions with, and information given to, staff during the process.

- (4) **Confidentiality** : A common feature of restructuring and planning for a potential formal insolvency process is the need to acknowledge that rumours of potential insolvency, or even some financial distress, can have an immediate, and potentially devastating, effect on the business, its employees and, as a knock on, its suppliers. Some employees might in any event choose not to wait for a consultation before walking away, were they to be informed that their employer was in financial difficulty. Confidentiality can be difficult at the best of times to maintain. It is acknowledged however that the scale of value destruction varies from case to case (as witnessed by a number of successful trading administrations), and that the importance of commercial confidentiality, and the effects of an information leak, can be overstated in some cases. This is not however to minimise the potentially serious and devastating effects. The directors or insolvency practitioner are best placed to determine that risk as it will differ on a case by case basis.
- (5) **Where efforts are focussed**: There is some overlap here with (3) above. It is key to appreciate that in a potential, or actual (especially administration) insolvency situation, the focus will be on stabilising the situation, arresting further decline, conserving cash and trying to preserve the business as a going concern (in the existing company or as a result of a sale, each of the latter having associated benefits for (all or a significant number of) employees.
- (6) **Funding**: Funding is a, if not the, key consideration for the company itself and insolvency practitioners alike, but even with some funding secured, the desired outcome (rescue or sale as a going concern) is never assumed. Funding is also likely to be provided for specific and limited purposes, i.e. for operational cash flow items, and, where the funder is (as is usual) the main lender and a secured creditor, to maximise recoveries.
- (7) **Achievability of full Consultation objectives in an insolvency and usefulness**: Sudden and overwhelming insolvency, coupled with funding issues and time constraints, can render compliance with the consultation requirements, including election of representatives, impossible before dismissals are unavoidable. Although the case law decides that it is irrelevant whether the consultation could have made any difference (in the *Comet* case, the tribunal suggested (at [130]) that even a futile attempt to consult ought to have been made) the entitlement to be consulted with a view to reaching agreement where there is no alternative to closure and redundancies is to place form over substance. Whilst in a solvent case, imposing a penalty upon an employer for failure to adhere to its obligation to consult may serve as an important deterrent against future behaviour, it has no similar impact in an insolvency situation, especially where there is no deliberate intention on the part of an insolvency practitioner to flout the rules.
- (8) **The wider economic implications of imposing a requirement to carry out full consultation in an insolvency**: the employees' remedy is a protective award, which is penal rather than compensatory. Given (i) a starting point in assessing an award which presumes a failure by the employer to comply (with limited grounds for the employer to rebut the presumption), (ii) no obligation on the employee to seek to mitigate, or show,



any loss, and (iii) the state underwrites the protective awards when the employer is insolvent, the consequence is to increase the deficiency for all creditors, including the Crown: this is contrary to the generally agreed outcome to which insolvency processes should be aimed at achieving and contrary to directors' duties in the period pre-insolvency.

**1) What are the considerations undertaken when deciding whether or not to start consultation? How is it decided in practice where an employer is facing, or has moved into, insolvency?**

Most of the common themes we identify above can be relevant. The circumstances and background to an "employer facing, or [moving] into insolvency" will differ from case to case. Common themes (1) (Insolvency and directors' duties), (3) (Insolvency process is fluid and fast moving), (4) (Confidentiality), (5) (Focus of efforts) and (6) (Funding), are likely to be relevant in each case, but some factors will weigh more heavily in the balance than others in any individual case.

**2) How does meaningful consultation with a "view to reaching agreement" work in practice? How does notification work in practice?**

In an insolvency situation, and in light of the factors we identify above, "reaching agreement" can simply be unachievable. We are aware however of cases where, although short of full consultation, there have been discussions with employees about possible outcomes. Ultimately however, a lack of funding or of buyer will force closure, on a fairly immediate basis.

**3) What do you understand the benefits of consultation and notification where an employer is facing, or has become, insolvent? What further benefits do you think we could encourage?**

If, as we believe it should be, the focus is on preserving the business as a going concern, redundancy consultation is a distraction; harmful to employers and as a result to employees and stakeholders. The risks (that a possible sale does not happen or that the employees cease being paid earlier) can outweigh any possible benefits.

**4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

**5) What factors, where present, best facilitate effective consultation where an employer is imminently facing or has become, insolvent?**

**6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing or has moved into insolvency?**

Our answer to question (1) is equally applicable here. We note the addition of the word “imminently” in this question in contrast to question 1. We are not sure, if “imminence” is considered a relevant factor, how this could be determined with certainty in any given case. See also our response to question 9 below.

**7) What factors, where present, negatively impact on the quality and effectiveness of consultation where an employer is facing insolvency, or has become insolvent?**

The issues identified above in relation to funding, and the reality that the business, or any part of it, cannot be preserved, for example because there is no purchaser, or the luxury of time to find a purchaser, can make the outcome (closure and liquidation) inevitable (and this can occur very rapidly), despite the best efforts both of the directors or the insolvency practitioner.

**8) Are advisors informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

**9) Are directors facing insolvency starting consultation and notifying the Secretary of State as soon as collective redundancies are proposed and at the latest when they first make contact with an IP? If not, how can this be encouraged?**

We would refer back here to our common theme (2) (Rescue culture imperative). As we also note above under common theme (3), the fact that an insolvency practitioner becomes involved with a business does not of itself mean that a large scale restructuring (or closure) and consequential significant redundancies are certain to occur. It would be artificial and potentially counter-productive for there to be any suggestion that directors must notify the Secretary of State as soon as they approach an insolvency professional for advice. There could at that time be nothing concrete to notify. We would also refer to the comments we make above in relation to the trigger for the consultation requirement and what is meant by “proposed”.

**10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

Whilst on the continent, as we note in our introductory general comments, one is more likely to find employee representatives in place already, in many UK businesses there are either no existing representatives or representatives are only in place for certain employee groups. The requirement for employee representatives to be appointed therefore presents an additional obstacle. It discourages more informal, but potentially equally fruitful, conversations. As we stress, the greater the degree of regulation, the less likely it is that full compliance can be achieved in insolvency.

**11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

**12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

**13) Could the process requirements for consultation be further clarified and improved?**

We refer to our comments on when the duty to consult is triggered and the meaning of when redundancies are “proposed”.

**14) Would further guidance be helpful, and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

We believe the scope of the legal requirement to consult is well understood by the profession. The issue is not one of further guidance but the fundamental difficulties in complying with the full letter of the law in the circumstances of insolvency. It might be helpful if it is made clear that a consultation under TUPE (about a potential transfer of the employer’s business) should count towards any consultation requirement under s 188 TULRCA, particularly in an insolvency context. All such TUPE consultations will mention the possibility of a failure to achieve a transfer, with the fall back being closure, and job losses.

**15) How can the Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

It is not in our view appropriate to adopt a carrot or stick approach here. As we stress above, a more pragmatic, flexible approach would be more likely to achieve the aim of a consultation exercise, which is to allow, where possible and likely to achieve tangible benefit, a forum to consider an alternative exit route.

**16) What would most encourage constructive engagement by employees when in this situation? How can employees be best supported?**

**17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

**18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become, insolvent? Is the situation different as it applies to directors and IPs respectively?**

We refer to (8) of our Common Themes (Wider economic implications). It is also in our view inappropriate to attribute any “dissuasive” aspect to protective awards in the context of insolvency, which is seldom a matter of choice, and the progress and outcome of which is

subject to external events and factors (i.e. there turns out despite best efforts to be no buyer for the business or any significant part of it). Ironically, it also appears that financially employees themselves are better off under the current regime if no efforts to consult are made, than if the insolvency practitioner is able to comply with the obligations. This gain is at the expense of the public purse and the general body of creditors. We also mention above (Common theme (1)) the other, wider, legal duties imposed on directors. Insolvency practitioners also have duties to the general body of creditors.

**19) How well is the MoU working?**

Technical Committee  
Insolvency Lawyers' Association

12 June 2015



The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015

## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

Insolvency Practitioners Association, Corporate Consultation Committee

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	
Business representative organisation/trade body	and regulatory body
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	
Individual	
Other (please describe):	

## 2.1. Employer's Understanding

### Current Practices

- 1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

The primary consideration for an advising Insolvency Practitioner is the likely impact on the realisable value of the business in the event that a consultation is commenced. The value of the business may be substantially diminished if the employee base is not stable and consultation risks key employees simply leaving.

Insolvency Practitioners are under a duty to maximise returns to the body of creditors generally, and to do so, they may need to preserve the value of the business, as well as its assets. The break-up value of the assets will generally be lower than their value within a functional business. Employees are one of a number of interested parties with potentially competing interests and the practitioner is required to balance these as best as circumstances permit. They may reasonably believe that commencing a consultation with employees will conflict with their responsibility to the creditors as a whole. It is by no means clear which, if any, of these obligations takes priority in circumstances where they conflict or how such conflicts should be resolved.

The level of available funding for ongoing trading and/or cash flow may impact upon the viability of retaining employees and may, therefore, be the determining factor in where redundancies are inevitable.

- 2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

Meaningful consultation may be possible in a long term restructuring plan. However, in a fast-paced insolvency scenario, it does not work.

Whilst the Insolvency Practitioner can be open, honest and transparent with employees, in many cases this dialogue will not have any impact upon the inevitable outcome. By the time that a formal insolvency process has started, the company has run out of alternatives and the eventual outcome is usually known – i.e. an immediate close-down, a short period of trading followed by a close-down or a quick sale of the business.

## Benefits

3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?

Where options other than the cessation of trading exist (namely, where there is the possibility of a rescue of all or part of the business), then consultation may be of benefit. It can assist in retaining employee loyalty. However, these situations are relatively rare.

Consultation is more relevant in the context of turnaround (e.g. Honda). In formal insolvency, consultation has little meaningful benefit once cessation is an inevitability. It can be counter-productive and create additional uncertainty.

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

Employees and employee representatives can provide useful information and may even be the source of introduction to possible buyers. Representatives can facilitate earlier consultation and mitigate the inherent risk of consulting to the value of the business. They can also assist with preparedness within the entity to accept the change that a major restructuring may necessitate.

However, late on in a process, once formal insolvency is inevitable, their involvement does not add significant value to the process and may be a hindrance.



## 2.2. Facilitators and Inhibitors

### Facilitators

5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

An existing representative structure within the organisation assists communication. However, for consultation to be meaningful, dialogue with representatives needs to commence much earlier on in the decline curve.

### Inhibitors

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

Where insolvency is a serious threat, but avoidable, consulting can make the difference in tipping the business towards insolvency, for instance, where key individuals leave (potentially taking customer relationships and know-how with them) or if employees seeking alternative employment opportunities make customers or suppliers aware of the insolvency risk.

Other inhibitors to starting consultation when an employer is imminently facing, or has moved into, an insolvency process are: a lack of options on which to consult, lack of time and a shortage of funds.

By this stage, other options for the company have been explored and exhausted. It is difficult to see how consultation can then consist of anything more than communication of information. Decisions have to be taken quickly and there may be no time to consult – particularly if there were no employee representatives in place before the insolvency and a nomination and election process has to be carried out before consultation can take place.

Finally, employees have to be paid while consultation takes place (between 30-45 days). This can be a significant expense, which is difficult to justify to the creditors who will ultimately bear the cost, particularly if consultation will not affect the outcome for the company.

7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

The lack of alternative outcomes is the primary factor in an insolvency context. "Consultation" implies there may be alternatives open for discussion, and there very often are no such alternatives to be considered, rendering the process artificial and of limited value.

Where job losses are unavoidable, relationships with employees will be strained and hostile and there are not always existing representatives with whom to liaise. Key staff will often have left the business in advance of its ultimate demise.

## 2.3. Role of Directors

8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?

Insolvency Practitioners certainly make directors aware of their obligations and the reaction of those directors will vary. We cannot comment in respect of other advisors.

However, there remains the need for directors to balance the requirements to consult with the detrimental effect that doing so may have on the prospects for the business' ultimate survival, and the other statutory duties directors have not to unnecessarily harm the creditors of the company more generally. These requirements potentially conflict in a similar manner as they do for Insolvency Practitioners.

9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

Anecdotally, directors have seldom commenced formal consultation prior to instructing an Insolvency Practitioner.

Having representative structures in place might facilitate an earlier and more meaningful dialogue.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

Again, anecdotally, experience suggests that many businesses do not have representative structures in place. Where such representation is in place in the form of Union representation, this is typically a complication factor as it necessitates determining who has been a part of the consultation and who hasn't (based on membership of the Union). Where representative structures are not already in place, a significant practical issue in appointing employee representatives is that employees often don't want to take on the role.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

This is entirely dependent on the circumstances of the case. Unless there is a need to dismiss employees on day 1, the Insolvency Practitioner will assume this function once formally appointed. Consultation has rarely, if ever, commenced prior to their appointment. The level of assistance requested / received from directors will be entirely variable.

## 2.4. Ensuring Effective Consultation and Notification

### **Process for Notification and Consultation**

12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?

We would suggest the following:

- A protocol for information sharing to facilitate a more open dialogue
- Named points of contact at the RPO
- Simplified forms
- Pre-submission advice

13) Could the process requirements for consultation be further clarified or improved?

Yes, particularly with a view to encouraging directors to commence consultation with representatives at an earlier stage. It would assist in managing the expectations of employees if the dialogue with them began at a point when there were still alternatives to be meaningfully considered. Once an IP is appointed, the concept of consultation is fictitious and flawed and fails to manage the expectations of employees as it implies a dialogue in circumstances when the outcome is inevitable.

In the context of Protective Awards, formal insolvency should be acknowledged in law as a special circumstance, particularly where there are no realistic prospects retaining employees.

### **Guidance**

14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

See questions 12 - 13.

## Incentives and disincentives

15) How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

We do not consider it possible in the majority of insolvency cases to incentivise compliance with a 30 (or 45) day consultation period on the part of the Insolvency Practitioner as there will simply not be funding available to trade for the prescribed period and/or to do so would be to the detriment of the general body of creditors. Practitioners are therefore placed in the invidious position of being obliged to comply with the impossible.

16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

Prior education and training for representatives and mandatory representative structures within organisations may assist. Additionally, employees need to be schooled away from the idea that many now have concerning protective awards; which are coming to be viewed as an automatic entitlement.

If the intention of these provisions is to adequately compensate employees affected by redundancy, then we would advocate an increase in the amounts and/or categories of preferential employee entitlement. This would be preferable to the uncertainty created by a consultation regime which is impossible to achieve with an insolvency context, given that there is little more that can be done once a company is in a formal insolvency process.

17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

No. The experiences reported are exclusively negative.

## Sanctions

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

Directors have seldom consulted in advance of instructing an Insolvency Practitioner, which would suggest that the sanctions are not effective and/or they are either not dissuaded by them or are unaware of them.

They equally ineffective once an Insolvency Practitioner has been appointed, as the outcome is inevitable and the consultation period often simply not capable of being met.

Furthermore, we have experienced an increasing culture of “entitlement” towards protective awards, often fuelled by claims handlers. There is an emerging assumption that a 90 day claim can be made in all cases.

We suggest increasing the preferential amounts paid to employees to limit the development of this culture.

19) Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

It is largely irrelevant what sanctions are applied when there is no funding with which to continue to trade, therefore, the sanctions are not capable of being either effective or dissuasive.

Equally, it is not appropriate to impose a sanction in circumstances which are unavoidable.

When considering sanctions, we believe that the Employment Appeals Tribunal would benefit from specialist knowledge and training in the field of insolvency (similar to the 2 year training requirement which applies to those panels considering discrimination cases). Insolvency practice is a specialist and highly regulated activity and it would seem appropriate that the reasonableness of the actions of a duly appointed insolvency office holders are scrutinised by parties with a suitable foundation in insolvency law and practice.

### **Memorandum of Understanding**

20) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?

We are not aware of any specific concerns being expressed by Insolvency Practitioners and are not aware of any breaches of confidentiality. The system would, therefore, appear to be working acceptably. Its existence does not, however, obviate the problems encountered by practitioners with the consultation process generally.



## **Collective redundancy consultation for employers facing insolvency response**

KPMG Restructuring response to the call for evidence paper prepared by the Insolvency Service on collective redundancy consultation for employees facing insolvency and issued on 23 March 2015.

### **Who we are**

This response is prepared on behalf of the KPMG Restructuring practice, which is made up of 37 formal appointment takers, a further 18 partners and directors who lead advisory work, and approximately 530 staff. We are a national practice with 13 offices within England, Wales and Scotland undertaking Restructuring work.

We have a strong presence on several of the Technical and Regulatory committees in existence for the insolvency profession, including representation on the Joint Insolvency Committee, the R3 General Technical Committee, the ICAEW Technical Committee, the ICAEW Professional Standards Board, the IPA Council and the ICAS Technical Committee. In addition we have representatives on the R3 Education, Courses and Conferences Committee. This demonstrates the commitment we have made and continue to make to the insolvency profession.

We have also contributed to the responses made by the ICAEW and R3 to this consultation.

### **Major issues and areas of concern**

We have provided comments on what we consider to be the main areas of concern: for this reason we have chosen not to respond to the specific questions raised by the Insolvency Service as part of the consultation. However, this consultation is overdue because flaws in, and conflicts between, the UK's legal regime present practical difficulties for responsible insolvency practitioners in completing their role.

We recognise that any amendment to the priorities of creditors is a matter for government and will require further, wider consultation, but we believe that the UK currently has an effective rescue and insolvency regime, albeit with some matters that need addressing.

We recognise the need to safeguard employees' positions in formal appointments, to engage with them as much as possible and actively to seek to do this wherever possible. The reality, however, is that an insolvent company, by definition, often does not have the cash or realisable assets available to retain employees on a fully paid basis whilst a full collective consultation process is undertaken. This leaves the insolvency practitioner in a very difficult position with, on one hand, a duty to employees as creditors of the company and, on the other, a duty to the wider body of creditors. As you will appreciate, these duties are often conflicting when it comes to full collective consultation.

Furthermore, an insolvency practitioner is appointed only when a business/company enters a formal insolvency procedure and once appointed his acts are governed by statute. Advice is often sought prior to that time, perhaps from a party or parties not qualified as an IP, under a contract.

### **Factors inhibiting consultation on insolvency**

#### ***Lack of funds and ability to trade***

The most inhibiting factor affecting collective consultation following an insolvency appointment is funding.

To comply fully with collective consultation, an insolvency practitioner is required to retain the workforce for at least 30 to 45 days (depending upon the number of employees at risk of redundancy). This assumes that there is a Trade Union in place or that an employee representative body ('ERB') already exists. If this is not the case, additional time would be required to elect an ERB.

There are four typical situations on insolvency:

1. Able to trade fully for the required consultation period

In cases where the insolvency practitioner has the required funding to trade the business for the relevant consultation period, and it is in the best interests of the general body of creditors to do so, collective consultation is possible and should be undertaken. However, in reality, few insolvency appointments have the funds available to enable such an extended period of trading and to do so would directly impact the wider body of creditors, with a reduction in the assets available to them. Even when there may be the ability to trade for the full prescribed period, retaining all of the staff to complete the consultation may have a detrimental impact on the general body of creditors and cause employee unrest as staff can become underutilised.

2. Ability to trade fully but for a restricted period

It may be possible to trade the business fully initially, but trading may have to cease sooner than expected should trading be loss making. In this scenario, whilst it would be possible to commence collective consultation, it would not be possible to complete full consultation for the required period without external funding for the losses that would be incurred to do so.

3. Ability to trade partially

It may only be possible to trade certain parts of the business, due to other parts being loss making, meaning it would not be in the best interest of creditors to trade the business in its entirety. In this scenario, redundancies will be required immediately for those employees working in the parts of the business that will cease trading. Whilst collective consultation is possible and should be undertaken for the retained employees during the trading period, it is not possible to complete any meaningful consultation for the employees working in the loss making parts of the business.

4. Unable to trade

It may not be possible to trade the business for a number of reasons, such as a lack of funding to support the initial cash requirement or forecast losses or licensing requirements (for example a transport business that requires an operating license).

In these situations it will simply not be possible to commence any meaningful consultation post-appointment. Furthermore, in some forms of insolvency process, such as compulsory liquidation, the IP's appointment leads to the automatic termination of employment, making any consultation impossible. This enhances the need to reconsider the conflict of law in this area and the need for legislative change.

It is also important to note that there are often charged assets; funds arising from their realisation are specifically designated and cannot be utilised for the purpose of meeting consultation requirements. Secured creditors are unlikely to release their security or its realisations for the benefit of *additional* consultation and have no duty so to do.

### ***Conflicting objectives***

#### *Minimising creditor claims v maximising realisations*

An insolvency practitioner has an overriding objective to maximise realisations for creditors as a whole. The consultation process conflicts with this. An insolvency practitioner utilising existing funds or obtaining new finance to fund trading losses, simply to ensure that staff are retained for the required period of consultation has had a clearly detrimental impact on the returns available for the wider body of creditors.

Similarly, the directors commencing consultation prior to appointment where there is an opportunity to sell the business as a going concern post-appointment by an office holder could very easily have a detrimental impact on the ability to complete such a sale. It is widely accepted that, in the vast majority of cases, asset realisations are enhanced by a going concern sale of the business and assets as opposed to a break-up sale. A going concern sale also protects the employees' jobs, further demonstrating how the consultation process has conflicting objectives in an insolvency scenario. Whilst the business continues to trade outside insolvency, the directors have control of that business, albeit that in the "twilight zone" they will be taking, in the majority of cases, extensive legal advice. Directors will often prefer to delay consultation to protect their commercial negotiation on enterprise value. By commencing a consultation they declare their hand.

Whilst engaging in effective collective consultation should mitigate Protective Awards thus minimising the level of unsecured claims against the insolvent company, doing this often also minimises net realisations available for creditors and therefore has conflicting results.

When the directors conclude that there is no longer a reasonable prospect of avoiding an insolvent liquidation they are required to take every step with a view to minimising the potential loss to the company's creditors. It is difficult to conceive that this would include delaying an insolvency process to enable the consultation periods to be met with consequent depletion of assets while employees are paid, which may impact upon either or both of the enterprise or asset realisations.

#### *Directors' responsibilities and the IP's role pre-appointment*

It is the employer's responsibility to consult with employees; making the duty to commence the collective consultation process prior to the appointment of an insolvency practitioner the responsibility of the company and, therefore, the directors, rather than the insolvency practitioner. Whilst the insolvency practitioner in waiting can advise directors of the company's obligation in this regard, they have no other jurisdiction to start the process and, indeed, it would present a significant risk to do so.

However, directors are entitled to make a claim for a Protective Award as an employee of the company post-appointment where no consultation has been undertaken. A director's obligation to consult on behalf of the employer (i.e. the company), when they become aware that more than 20 redundancies are likely, is in direct conflict to potential personal gain post-appointment if they do not.

## **Economic burden and sanctions**

We are concerned that passing the financial burden of consultation to IPs to fund the consultation period, which may become a personal liability where there are insufficient funds available within a case is likely to lead to more liquidations, fewer business rescues and may reduce the competition within the insolvency industry as the balance of risk and reward is altered. It is inappropriate, in our view that IPs are asked to rely upon guidance when laws are in direct conflict and require legislative action.

As failure to notify the Secretary of State is already subject to possible criminal sanctions and IPs are subject to appropriate regulatory review, and sanction where necessary, we believe that the current regime is sufficient. We recognise that issues may arise with the application of those sanctions.

## **Memorandum of understanding and information sharing**

Our contractual relationships and obligations on dealing with restricted and confidential information prior to our formal appointment need to be both recognised and understood. Insolvency appointments are often averted at the last moment, and disclosure of a possible appointment may destroy value. However, we value our relationship with the Redundancy Payments Office ('RPO') and Job Centre Plus, and recognise the work they perform. We are members of R3 but believe collective agreements of this nature are of limited value. Sharing information prior to formal appointment with either the Secretary of State or third parties is at best problematic.

## ***Other issues to consider***

### ***Inconsistent results from Employment Tribunals***

Our experience is that there are differing messages from the Employment Tribunals:

1. "some consultation is better than none" (reflected by a reduction in Protective Awards being awarded where some level of consultation can be demonstrated i.e. reducing an award from 90 days to 30 days for a short consultation period), and
2. "full consultation or none" (reflected by no reduction in Protective Awards being awarded unless it can be demonstrated that a full collective consultation period has been entered into).

The inconsistency in the levels of Protective Awards given by the Employment Tribunal does not give a clear message on best practice to enter appropriate collective consultation (however limited that may be) when you are aware that it is not financially possible to undertake a full collective consultation process. There is no incentive to incur costs in consulting for lesser periods if it will have no financial impact on the awards granted by the Employment Tribunals; this is clearly not encouraging to employers or insolvency practitioners trying to find a balance.

We are also aware of other cases where all employees of a company have been awarded full Protective Awards by the Employment Tribunal, rather than the specifically named employees bringing cases. This increases the level of unsecured claims in the insolvent company and the amount which the RPO has to meet. In some instances the office holder will take the correct view to neither contest a claim from an employee nor attend a hearing

because to do so will incur costs, but will not change the economics of the appointment, for instance with a secured creditor retaining full economic interest.

The insolvency profession would welcome consistency and guidance here. It would be helpful if clear criteria were set out and followed for granting awards at Employment Tribunals in at least three clear examples:

1. Directors' obligations to consult in the "twilight zone".
2. Office holders' obligations to consult when there are no funds available and there is no economic interest in the process (i.e. a Protective Award will have no impact on the insolvency process, albeit it is clear that there is an impact on the employees).
3. Office holders' obligations to consult where there are limited funds available to enable a level of meaningful consultation.

## **Conclusion**

Whilst we understand the importance of collective redundancy consultation legislation to protect employees, we are very aware of our duties, as insolvency practitioners, to protect the interests of the creditors as a whole and maximise funds available to all. It is important to be able to consider the individual facts of each case and we believe that there needs to be a degree of flexibility in an insolvency situation to enable us to do that and take into account the rights of the creditors as a whole.

We consider that changes to the current legislation are required to recognise that the objectives of consultation often conflict in an insolvency scenario. We also believe that clarity and consistency in the practices of the Employment Tribunals and the awards made is required to ensure best practice is understood and followed.



The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015

## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

Business Recovery Services, PricewaterhouseCoopers LLP

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	<input checked="" type="checkbox"/>
Business representative organisation/trade body	
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	
Individual	
Other (please describe):	Restructuring and insolvency practitioners

## 2.1. Employer's Understanding

### Current Practices

**1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.**

In our experience, when faced with a potential insolvency situation, directors often direct all of their energies into attempts to avoid insolvency which might include trying to agree a sale of all or part of the business or the shares in the company, negotiating with lenders to obtain sufficient funds to prevent insolvency in the short or long term, or securing funding to satisfy key creditors who threaten winding up proceedings. Whilst directors often consider communications with key stakeholders in the pre insolvency period this rarely extends to employees. The reasons for this are discussed later in this document (see response to question 9).

Where a company is listed, directors may need to consider the obligation to make a statement to the Stock Exchange, including the timing of any statement, and may not want to trigger that obligation sooner than would otherwise be required by commencing a collective redundancy consultation process.

Following an insolvency appointment the "people strategy" may depend on the circumstances at the time of the appointment. The considerations for an insolvency practitioner (IP) may therefore include

- whether any redundancies have already been made/communicated
- whether the business has already commenced a consultation process
- whether the business recognises a trade union or has other representatives in place
- whether the business is still trading and if so whether or not the whole or part of the business will carry on trading post insolvency
- what the prospects are for selling some or all of the business
- whether a distribution to the unsecured creditors is envisaged given that a protective award is an unsecured claim
- what funds are available for meeting the ongoing costs of trading, including wages and salary

The strategy frequently changes during the course of an insolvency as circumstances change.

There is a significant and unavoidable tension for IPs between complying with their duties under the insolvency legislation and complying with the obligation to consult in respect of collective redundancies, all against the background of the commercial realities of the company's financial position. IPs have legal duties to carry out their functions in the interests of the creditors as a whole and risk being in breach of this duty if they continue to pay employees for the full statutory consultation period when they would not otherwise be trading the business.

**2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.**

Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULCRA) requires consultation to include consultation about ways of avoiding the dismissals, reducing the number of employees to be dismissed and mitigating the consequences of the dismissal and case law has found that consultation must be "meaningful". In a formal insolvency that is often impossible as there is no alternative to redundancy.



In an insolvency scenario, an IP's options are extremely limited. It's very rare that there are any opportunities for re-deployment of individuals who are proposed to be made redundant and there is therefore little scope for meaningful consultation in the sense of affecting the outcome.

In practice, IPs will seek to comply with consultation requirements as far as possible but this will often be more in the nature of providing information, and support to attempt to mitigate the consequences of redundancy, rather than consulting in the strict sense.

When faced with a gradual closure programme an IP may however be able consult over the selection of individuals and the timing of their redundancy although this is often on larger cases with an extended trading period and it would not extend to the business decision itself. So, for example, in a retail case where individual shops are identified for closure over a period it's unlikely that an IP would consult on which shops are closed and when.

Full compliance therefore is rarely possible but where an IP tries to do whatever they can in the circumstances the company isn't given credit for that when it comes to a protective award. We find that an IP's defence to a claim is likely to be disregarded unless the IP is able to commit to the time and expense of entering into a full defence (providing documents, witness statements and attending a hearing). The complexity, inconsistency and time-consuming nature of the Tribunal claim system mean that the IP may simply be unable to justify the cost of a full defence and so leaves it to the Tribunal to use its discretion. In our experience, even where a response to the claim has been submitted to the Tribunal, this results in the making of a full 90 day award despite the IP's efforts to consult if this is less than full compliance with TULCRA.

However we have had examples of cases where an IP has done what was reasonably possible in the circumstances without being able to comply fully with TULCRA, and as a result of our engagement with employees no claims for protective awards were made.

## **Benefits**

### **3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

In our experience there are a number of benefits of consultation and notification once a business becomes insolvent.

When a communication channel with employees or their representatives is opened shortly after an insolvency, we find that the level of engagement is increased (even though as previously mentioned, the communication may be more in the nature of informing rather than consulting). The benefits of this include a better working relationship through a trading period and if the eventual outcome is redundancy, the impact can be "softened" for the employee. Very often this can help identify appropriate support for the employee at an early stage that they may otherwise not have appreciated was available to them.

Complying with the notification requirements allows an IP to engage with bodies who might be able to offer support to affected employees – such as Job Centre Plus (JCP). By giving employees access to information, the risk of negative reaction from those who are simply fearful of what the impact of possible redundancy might be is significantly reduced.

In our experience, engagement with training providers (either through JCP or by utilising our existing contact network) can provide real benefits. By offering an opportunity to seek an NVQ qualification or to give access to external training and upskilling opportunities, the impact of redundancy can be reduced. NVQ certification often requires workplace assessments to occur and we've been able to facilitate this and so reduce the impact of redundancy. In a recent insolvency in a specialised industry involving large scale redundancies, as part of the consultation process employees identified that

they'd require some specific training which JCP organised and funded. Feedback from the unionised workforce on the training provided was exceptional.

In our experience local authorities can be an integral part of delivering practical support to employees and in some high profile cases where the redundancies might have an effect on the local economy, the efforts made can be significant. Where job fairs have been organised these have been very successful.

Whilst IPs are aware of the employer's obligation to notify as early as possible, until an appointment occurs they have no standing to notify formally on an HR1. Whilst we are able to talk to JCP at an early stage, concerns over confidential information being disclosed to a third party may mean that this doesn't happen as early as it might.

#### **4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

Employees at director or senior manager level may be able to successfully deliver a management buyout (whether or not structured as a pre-pack), which may rescue the business, or part of it, and preserve some employment in the short or longer term.

Apart from this, given that rescue of a business facing insolvency will involve significant funding requirements, it's unlikely that employees or employee representatives will be in a position to raise adequate funds to mount or contribute to a rescue of the business or to reduce/mitigate the impact of redundancy.

In a formal insolvency IPs would not normally involve employees or unions in the business/strategic decisions for commercial and confidentiality reasons.

However, we have experience of distressed companies facing insolvency (but not yet in any insolvency process) which have engaged with their workforce to seek to agree ways of reducing the employee costs to the business (by taking pay cuts or removing enhanced sick pay and holiday entitlements) and so avoid redundancies or minimise the number of redundancies. But this was not done as part of a collective redundancy consultation process.

## **2.2. Facilitators and Inhibitors**

### **Facilitators**

#### **5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.**

The most important factor in an insolvency is whether the business is going to continue to trade in any event for the period in which the consultation would need to be carried out. As discussed in our response to question 1 an IP would risk being in breach of his duty to creditors as a whole if he continued to pay employees purely to enable a consultation to be carried out.

As previously described, in an insolvency it's not usually possible to comply fully with the consultation requirements but IPs will usually do as much as they reasonably can in the circumstances. It's helpful if employers already have elected representatives in place as this allows engagement with those representatives to take place without delay.

In a recent insolvency, the business had an existing consultative forum in place which consisted of representatives of unionised and non-unionised staff. This case was unusual in having such representatives in place and this, coupled with the fact that it was a large case where there was an extended period of trading in the insolvency, enabled us to conclude a 90 day consultation process before giving notice of redundancy. The forum was engaged throughout the insolvency and participated in open and meaningful debate over selection criteria, timing of redundancies and expectations around support/training for redundant staff.

In most cases where there is no union, there aren't elected employee representatives in place on appointment. An election process which complies with the legislation can be onerous and take time to complete and very often redundancies can't wait for that to happen.

Perhaps better compliance would be encouraged if Tribunals gave credit for what an IP has managed to do even if they have not fully complied, so that any protective award was reduced below the 90 day period.

## **Inhibitors**

**6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

Please see our responses to questions 5 and 9.

Not all insolvency processes provide any opportunity for consultation following appointment. In particular the making of a winding up order automatically terminates employment contracts so that consultation is impossible post insolvency.

When an insolvency occurs with minimal planning time, this often impacts on the ability to enter into consultation as quickly as IPs would like.

**7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.**

Please see our responses to other questions.

## **2.3. Role of Directors**

**8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

Please see our response to question 9.



**9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

Directors are usually focussed on trying to avoid insolvency and so secure jobs: in our experience most directors care deeply about the impact of their decisions on their workforce. If those efforts fail and an insolvency has to happen, the focus will move to a director's obligations to get an insolvency process underway.

Even if directors are advised of the legal obligation to enter into collective redundancy consultation they may decide not to do so. Notifying employees of potential redundancies is likely to demotivate staff and could destabilise an already precarious business, with implications for value eventually realised and on other creditors. Once employees know that their employer is in financial difficulties that knowledge is likely to spread quickly to the market, and key employees may leave, which may create a loss in value of the assets/business, impacting the potential recovery for the wider body of creditors and in the worst case scenario accelerating, or even making inevitable, an insolvency appointment.

As an example, a distressed business was put up for sale and the union notified that a buyer had been identified. At the due diligence stage, the buyer unexpectedly withdrew their offer and the company fell into insolvency. With no prospect of a sale and no cash to pay wages, the IP made all staff redundant. A claim for a protective award was made and the company responded with a special circumstances defence on the basis that it couldn't possibly have predicted that the buyer would withdraw. The Tribunal said that special circumstances didn't apply because although the company had told the union that the business was to be sold, it had not communicated that insolvency and redundancy would be the outcome if the attempts to sell the business failed. All staff received a 90 day protective award.

**10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

Often in the early days of an insolvency, the IP will be keen to address as many staff personally as is practically possible and holds town hall meetings to announce his appointment and its impact even if representatives are in place. Even when there are multiple locations, for example in a retail environment, IPs from this firm will try to have a town hall meeting although this may swiftly be followed by conference calls with staff in remote locations.

In our experience, it's rare for an employer to have an appropriately elected representative body in place which is elected for the purpose of redundancy and TUPE consultation.

Section 188A of TULCRA sets out the process that must be followed to elect representatives for the purposes of collective redundancy consultation. This can be an onerous and time-consuming process, and any deviation from the process could mean that even if an employer enters into consultation, their efforts may not be recognised by a Tribunal. In an insolvency redundancies often have to be made quickly, and so the election of representatives needs to happen quickly or it will be too late.

The factors making it difficult or even impossible to comply fully with the requirements for the election of representatives in an insolvency include:

- The requirement to ensure that all affected employees are entitled to vote (so having to contact employees who are on holiday, sickness absence, off shift, maternity or paternity leave);
- The requirement to determine the term of office of employee representatives;

- The nature of insolvency meaning that situations change quickly - and so there may need to be multiple elections if candidates are made redundant or additional employees are likely to be made redundant;
- Insufficient time to enable candidates to be identified;
- The requirement for voting in secret so far as reasonably practicable - where there are multiple locations, voting in secret may be difficult or even impossible.

Sometimes where a business has followed best practice and has taken steps to arrange election of representatives, events elsewhere in the business overtake the process meaning that redundancies have to be made before there is enough time to start or to conclude the election process.

## **11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

Pre insolvency planning, where that is possible, will incorporate a degree of managing expectations/drafting key messages/agreeing how and by whom messages will be delivered and how a clear handover from existing management to the IP will be effected. This may be different in every case. Directors and management are often involved in this planning process and will share their views on any strategies for communication with employees.

However, prior to an insolvency event, it is the directors who remain in control and whilst the IP can advise and give guidance to the directors, the process will not be “owned” by the IP until an insolvency appointment occurs.

## **2.4. Ensuring Effective Consultation and Notification**

### **Process for Notification and Consultation**

## **12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

Maintaining confidentiality is absolutely essential particularly in cases where an HR1 is submitted ahead of commencing discussions with unions and employees.

If notification is the best way for Government to ensure that resources are available to react quickly, it would be helpful if an HR1 could be submitted and accepted even if not all information is known, with a subsequent HR1 being filed as and when further information becomes available.

We have experienced a lack of consistency in the offering by JCP which has differed from region to region, but we understand that this may already be being addressed.

We've found that even if it's too early to identify affected employees, JCP like to receive a profile of staff who might be affected such as postcode, age, job title as this enables them to plan resources in case of redundancies.

## **13) Could the process requirements for consultation be further clarified or improved?**

See our previous response about the election of representatives.

An HR1 now includes insolvency as one of the possible reasons for redundancies. But notification of non-compliance is still often received if redundancies must occur before the end of the prescribed 30 or 45 day period because the employer is insolvent. The earliest date that an IP can file an HR1 is the date of insolvency and IPs in this firm will do that as quickly as they can.

## Guidance

### **14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

Offering training to those involved in the Tribunals process (such as ACAS conciliators, Tribunal staff and Chair) may have a greater impact than issuing formal written guidance which may be subject to interpretation.

Topics for training and guidance might include:

- An explanation of expectations around the requirement for consultation to be “meaningful” when an employer is in financial distress - this would be useful for IPs, Tribunals and employers.
- Some guidance/training to Tribunals setting out the role and responsibilities of an IP in the various insolvency processes and some of the challenges that an IP might face. This would enable Tribunals to make awards which recognise that what an IP has done may be as much as was possible under the circumstances.
- Guidance around completion of an HR1 in an insolvency scenario when some information may not be available or when subsequent HR1 reporting should occur.
- Some guidance on what might amount to special circumstances

Any guidance should be aimed at IPs, unions, Tribunals, ACAS, HR professionals and legal advisors.

## Incentives and disincentives

### **15) How can Government best incentivise or disincentive the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

As mentioned above, the costs for an IP of defending claims at a Tribunal (both in terms of an IP's time costs and legal costs) can't always be justified. A modified Tribunal claims process when an employer is insolvent may therefore be beneficial.

For example:

- Enabling an IP to file a statement of facts to set out what has happened and why, and allowing that to be considered as evidence as part of proceedings
- A review of the fee regime when an employer is insolvent, both in relation to fees for multiple claims and costs orders
- Less burden in terms of bundles of documents, witness statements and attendance at hearings
- Automatic consolidation of multiple claims and consistent application of the automatic stay on proceedings as a result of the moratorium in an administration.



- Ensuring that any steps taken by an IP are recognised and where they're not capable of reducing an award for a protective award, ensuring that the IP receives feedback on the reasons why the efforts weren't sufficient.
- Clear recognition that an IP's efforts or ability to enter into collective consultation are impacted by pre insolvency actions or inactions.

The RPS is currently unable to consider claims for payment of a protective award without a Tribunal's judgment. This means that a negotiated COT3 agreement isn't an option (unless a Tribunal ratifies the COT3). Even when the IP has made some efforts to comply with the requirements to consult over collective redundancies, unless the additional costs of attending Tribunal and explaining their actions in person can be justified, in our experience Tribunals will make an order for the full 90 days' pay. If IPs were able to negotiate a settlement this could reduce pressure on the Tribunal Service, the amount to be paid by the National Insurance Fund (NIF), and the value of the unsecured claims. Of course, there would need to be guidelines to prevent IPs making no effort at all to consult and then entering into a COT3 settlement.

**16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?**

Please refer to our response to previous questions.

Even if offering training to representatives was an option, because any representative body elected for the period that an employer is trading under the control of an IP is likely to be for a short term only, it's unlikely that there will be any benefit from the representatives having formal training. We would however expect that an IP would give a sufficient explanation to the representatives of the effect of the insolvency and the nature and extent of their role.

**17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

We'd be happy to discuss examples of our experience but regret that we're not in a position to share this information in a document which may become publicly available.

## **Sanctions**

**18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively? Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?**

A protective award is intended to penalise employers for failure to comply with the requirements for consultation, rather than to compensate employees. However, in practice employees and unions do see a protective award as compensation for being made redundant without sufficient consultation. This increases the number of claims, and contributes to the situation where an insolvent employer is not given credit for its efforts to consult so far as practicable when these are not fully compliant.

When an employer is insolvent, making a protective award increases the value of the unsecured creditors' claims and the amount required to be paid by the NIF. In those circumstances, the "penalty" doesn't punish the company or its directors for failure to comply with the legislation, but rather the other unsecured creditors and the taxpayer.

## **Memorandum of Understanding**

### **19) How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

IPs may be reluctant to engage with JCP or other agencies prior to an insolvency appointment for confidentiality reasons.

But apart from that, in our experience, the memorandum of understanding is working well. JCP now have a central point of contact and are responsive when contacted and proactive at looking to provide support using both their own resources and also third party providers. The JCP offering has varied depending on the region and more consistency in approach would have been beneficial, but we understand that this may already be being addressed.

PACE (Scotland) and REACT (Wales) are proactive at making contact and offering support.

This response has been prepared for the intended recipients only. To the extent permitted by law, PricewaterhouseCoopers LLP does not accept or assume any liability, responsibility or duty of care for any use of or reliance on this document by anyone, other than (i) the intended recipient to the extent agreed in the relevant contract for the matter to which this document relates (if any), or (ii) as expressly agreed by PricewaterhouseCoopers LLP at its sole discretion in writing in advance.





## **Collective Redundancy Consultation for Employers facing Insolvency**

Response by the Association of Business Recovery Professionals to the Call for Evidence issued by the Insolvency Service in March 2015

### **Introduction**

1. R3 represents insolvency practitioners authorised to practise in all jurisdictions of the UK. Its 3,000 members work in firms of all sizes, from global accountancy firms to high-street practices and sole practitioners. R3's membership also includes insolvency lawyers and other professionals who work in the field of insolvency and corporate recovery.

### **Executive Summary**

2. R3 welcomes the Call for Evidence. We hope that the evidence collected will allow government to then introduce positive changes. The challenges of employee consultation in insolvency have been highlighted by the insolvency profession and have been recognised by government and stakeholders, for some time. R3 wrote to the Department on this issue in October 2004 and January 2010, and responded to the Call for Evidence issued by The Insolvency Service in November 2011. A further paper was submitted to the Service in October 2013, and meetings held to discuss the issue from time to time, most recently in September 2014.
3. R3 remains concerned that there is a clear tension between employment law and insolvency law on this matter. However, the key point to note is that where there are breaches of the consultation requirements in insolvency situations, this is generally a result of the circumstances and exigencies of the individual case, and not a deliberate and unheeding neglect of that law. Even in cases where full compliance is not possible, Insolvency Office Holders will try to mitigate the effects of redundancies by providing as much information and support to employees as possible. Failure to consult is often a result of simply not having access to the necessary funds within the estate to facilitate a normal consultation process. Furthermore, the circumstances of the case will often mean that there are no realistic alternative courses of action on which it is possible to have meaningful consultation. We comment in more detail on the position faced by insolvency practitioners in our answer to Questions 1 and 7.
4. In addition, there is another side to the issue affecting insolvency practitioners which is not discussed in the Call for Evidence, and that is the approach taken by the Employment Tribunals. This is a major concern to practitioners, because Tribunals will often make substantial awards even in cases where they are made aware of the constraints caused by lack of funds. We comment further on this in our answer to Question 18.
5. R3 believes that the following steps should be taken.
  - (i) Practical guidance for insolvency office holders contemplating and undertaking collective redundancies which caters for the problems likely to be encountered in an insolvency (essentially no/insufficient funds and no viable alternatives) should be produced by government with the help of the insolvency profession, unions, the Employment Tribunals and other stakeholders.

- (ii) Government should engage with the Employment Tribunals and, with support from the insolvency profession, explain the challenges in employee consultation when businesses are insolvent in order to bring coherence and consistency to the length of the protective awards awarded by the Tribunals.
- (iii) The current HR1 form which provides information to government about the expected redundancies is not fit for purpose in the majority of insolvency situations. R3 has proposed (and drafted) a revised HR1 form for consideration by government and it is hoped that these changes can be introduced soon.
- (iv) The Memorandum of Understanding (MoU) between Job Centre Plus, the Insolvency Service and R3 representing the insolvency profession should be updated and re-signed under the new Government, in order to emphasise the importance of providing advice and support for those individuals facing redundancy. Government should consider replicating the MoU's non-regulatory 'approach', to address challenges in employee consultation in insolvent businesses.
- (v) The Government should reconsider the status of protective awards in insolvencies. Awards are currently treated as wages. This means that in the first instance the Government pays them out of the National Insurance Fund, and then claims the cost against the company's assets. The cost of the awards therefore ultimately comes out of the funds available for the general creditors. However, the tribunals have stated that awards are intended as a penalty, so treating them as wages in cases where the employees are already fully compensated is manifestly inappropriate.
- (vi) The Government should consider whether imposing penalties is appropriate in formal insolvencies where the previous management is no longer in control and penalties can serve no deterrent, or other, useful purpose.

## Responses to the questions

- 6. In this response our comments are concerned primarily with the position of insolvency practitioners (as insolvency office holders, unless otherwise stated), although we also comment on the position of directors where this is within the direct experience of our members.
- 7. Our answers to the questions posed in the Call for Evidence are set out below. Where the document asks for examples we have encouraged our individual firm members to respond with their experience from dealing with specific cases.

### **Q.1 What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency?**

#### Pre-insolvency

- 8. In cases where a company is in financial difficulties and management is considering the options available to resolve the situation, the focus of the directors will be on preserving the company/business as a going concern. Any redundancies made in these circumstances will usually be carried out with the full intention of complying with the consultation requirements.
- 9. Although insolvency practitioners are regularly consulted by distressed businesses, they are unable to direct or control the actions of the company at that stage. The role of the insolvency practitioner when advising in these situations will usually be closely circumscribed by the terms of the practitioner's engagement, and will be concerned primarily on advising on the financial position of the company and in contingency planning. In certain cases it may be appropriate to advise the directors to seek separate advice on employment issues. In these 'zone of insolvency' situations the directors are often also taking advice from lawyers; they too will be mindful of the employment laws and issues.

10. The decision by a board of directors to have their company enter a formal insolvency process is not taken lightly; the consequences are often a crystallisation of loss of value and additional costs (e.g. the costs of the formal process itself). Thus, it is usually a 'last resort' and only pursued when all other avenues to preserve the company as a going concern have been exhausted. Thus, the decision to enter an insolvency process is usually made relatively suddenly, typically when liquid cash resources are very limited or have been consumed.

#### Post-insolvency

11. It is only after the commencement of a formal insolvency process that insolvency practitioners are in a position to exercise control over a business. On appointment the practitioner can only deal with the situation as he or she finds it, which in all cases will be a business which is in extreme financial distress, often (as noted above) having little or no readily available funding.
12. Generally speaking, there will be broadly three types of situation inherited by insolvency practitioners:
  - The company will have completely run out of cash and means to generate more cash, meaning that ongoing trading will not be possible and an immediate shutdown will be necessary.
  - The company will have, or have access to, limited funds, but only sufficient to enable trading to continue for a limited period and to a limited extent.
  - The company will have sufficient funds to enable ongoing trading for a reasonable period.
13. The considerations affecting the ability of the insolvency officeholder to consult will depend on the circumstances of the case. In the first of the above situations the insolvency practitioner will be unable to consult meaningfully, because there will be no funds available to continue trading for the duration of the required consultation period. The workforce will be made redundant immediately.
14. In the second situation, whether trading requires all or only some of the staff for the entire expected trading period, it may be possible to consult to a limited extent, but perhaps not for the full statutory consultation period. Furthermore, there will probably be competing claims on those available funds. For example, there may be other statutory obligations which the company has to comply with under health and safety or environmental legislation, or other statutory or regulatory obligations to address. The insolvency practitioner will be faced with the question of how the available funds should be applied. This may shorten the time available for consultation, or require some redundancies to be made at an early stage.
15. In the third situation, it might be possible to consult for the full statutory period.
16. Even where it is not possible to consult for the full statutory period, insolvency practitioners will try to mitigate the effect on workforce by providing as much information and support as possible in the circumstances, including making contact with the various support agencies to begin a coordinated approach to dealing with the proposed redundancies and supporting those employees affected.
17. It needs to be borne in mind that the difficulty with consultation in insolvency is often not just a question of funds, but also that there is nothing meaningful to consult on. Consultation is more than providing information; it requires employers to seek the views of the representatives and to consider their proposals. In insolvency, the options have usually been exhausted before the appointment and the outcome is more or less determined: e.g. closedown, trade on for a limited period to realise value of certain assets, or seek a buyer as quickly as possible.
18. The insolvency legislation recognises that the interests of creditors, including employees, will be

harmed by an insolvency. This why there is generally only a potential cause of action against an office holder if the interests of creditors are unfairly harmed by the office holder's actions. The office holder has to balance the interests of many, including the employees, so as not to harm them unfairly. What the office holder cannot do is use available funds to favour one set of individuals (the employees in this case) to the unfair harm of creditors and others with a financial interest in the insolvent estate.

19. The difficulties faced by practitioners in formal insolvencies have been recognised by ministers in the past. In a letter to R3 in March 2009 the Minister for Employee Relations and Postal Affairs said:

‘Although I recognise that it will not always be practicable to consult in line with the statutory obligations where a company has entered an insolvency procedure, I would ask that you engage employees and their representatives as soon as is practicable in any process that is likely to result in redundancies with a view to minimising the impact on those individuals concerned. Even where it is not possible to consult in line with the statutory obligations, I would expect you to keep employees and their representatives informed of the situation regarding their employment as soon as is reasonably possible and on a regular basis thereafter.’

We believe that most insolvency practitioners act in accordance with this guidance.

**Q.2 How does meaningful consultation with a ‘view to reaching agreement’ work in practice? How does notification work in practice?**

20. In an insolvency the nature and extent of consultation will be dictated by the circumstances of the case, as indicated above. Where trading continues the objective will be to minimise losses (which may have been the cause of the insolvency in the first place) and limit the outflow of cash by reducing the cost base, including employee costs. The insolvency practitioner is under a duty to preserve assets and value for creditors as a whole. In doing so it may be necessary to discontinue some/all of the company's (loss-making) activities, which will involve redundancies. The only meaningful consultation possible in these circumstances is likely to be simply communicating to employees how these objectives are to be achieved.

**Q.3 What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

21. Generally, in an insolvency the main benefit is to provide clear information to the workforce about the insolvency and its possible outcome, and to provide employees with a timetable to help them plan to look for alternative employment and make personal decisions in light of the new circumstances. Depending on the situation there may be some opportunity to consult on the selection of staff for redundancy where for example the insolvency practitioner is seeking to restructure the business to make it potentially viable for sale. However, in many cases, consultation is unlikely to change the outcome of the insolvency and the inevitable redundancies that accompany that process.

**Q.4 In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

22. As noted above, there is usually limited scope for considering alternative courses of action in a formal insolvency (though there will, inevitably, be some exceptions). Where business rescue is an option and forms part of a formal process (usually only in administration) employees and employee representatives can have a role to play in assisting the insolvency practitioner to explore such options and identify aspects of the business and relevant employees that may be transferred. This in itself may reduce and mitigate the number of redundancies.

**Q.5 What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent?**

23. The ability to engage in effective consultation depends primarily on whether there is (i) a possibility of a rescue or (ii) a closedown. Without a continuing business consultation cannot have any practical effect on the outcome of the process (employment cannot continue), and the most that can be achieved is transparency in terms of communication with employees rather than ‘meaningful consultation’ resulting in a mitigation of the number of redundancies and costs. It is recognised however that from an employee's perspective this very communication can help mitigate the effects of the redundancy on their pursuit of future employment, which is the third statutory purpose of consultation<sup>1</sup>.

**Q.6 What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process?**

24. In the period preceding formal insolvency, the main inhibitory factors are likely to be management's desire to keep the fact of the company's financial difficulties confidential in order not to prejudice its position in the market, and to preserve employee morale in order to avoid losing key staff at a crucial time. These will be important considerations as long as a successful rescue remains a possible outcome. By the time formal insolvency proceedings are instituted the financial position of the company may have deteriorated to the point where the ability to continue trading will be severely constrained, if it is possible at all, and the eventual outcome of the process will be uncertain. This makes it difficult, if not impossible, to complete the form HR1 because the information required by the form will not be known at this stage – see further the comments in paragraphs 30 and 35 below. Furthermore, as noted above there is no scope for meaningful consultation at this stage because of the limited range of possible outcomes. The absence of employee representatives can also be a problem – see question 10.

**Q.7 What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent?**

25. In a formal insolvency the negative factors can be summarised as: lack of resources, lack of time, and lack of available options. We have already touched on these in answer to Question 1.
26. When an insolvency office holder is appointed, it will be because the business is already in serious financial difficulty. In many cases it will have run out of cash, or be in imminent danger of doing so. The insolvency practitioner must assess the situation and decide on the best strategy for dealing with the business within very tight time constraints. In many cases there will be some uncertainty whether a going concern sale is possible, and it is not unusual for the insolvency practitioner to keep trading to maximise the chances of this. This will be a commercial judgement which involves taking into account all the risks and liabilities against the prospects and benefits of a going concern sale. In these circumstances this strategy will usually be shared with the employees.
27. An administrator has a duty to carry out the statutory functions in the interests of the creditors as a whole. An administrator who continued to trade the business without good reason in a manner which diminishes the likely return to creditors would be at risk of being in breach of this duty. This may mean that it is often simply not possible to continue the business for the period of time required to comply with the statutory consultation requirements. However, this is a consequence of the circumstances in which insolvency practitioners are usually appointed: it does not mean that practitioners are acting out of wilful neglect.
28. The difficulties faced by practitioners in formal insolvencies have been recognised by government in the past. See the letter to R3 in March 2009 from the Minister for Employee

---

<sup>1</sup> s.188(2) Trade Unions and Labour Relations (Consolidation) Act 1992 (‘TULRCA 92’)

Relations and Postal Affairs referred to in to in our response to question 1 above.

**Q.8 Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

29. As noted in our response to question 1, insolvency practitioners acting in an advisory role are circumscribed by the terms of their engagement. While insolvency practitioners can and do advise directors of their duties and responsibilities they cannot compel directors to take any particular course of action. Sometimes HR advisers or specialist lawyers are engaged to advise on employment issues. However, in pre-insolvency or 'zone-of-insolvency' situations, directors are usually focused on pursuing options for recovery/turnaround and avoiding the need for collective redundancies, and the potential consequences in the event of failing in that strategy - of a formal insolvency process and the likely redundancies - are not going to take priority in their thinking or actions. It should be borne in mind that consultation at too early a stage could adversely affect the business, and hence the prospect of a rescue, by causing its difficulties to become public knowledge, and the insolvency becoming self-fulfilling as stakeholders withdraw their support for the company.

**Q.9 Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

30. In our experience notification rarely happens prior to the insolvency practitioner being approached; this may be for good reason if redundancies are not envisaged and rescue or sale options are being explored and are a reasonable prospect. In cases where the directors ought to have known that redundancies were inevitable, this will form part of the standard conduct report prepared by the office holder under the Company Directors Disqualification Act. It should be noted that in any case the present form HR1 is unsuitable for use in insolvencies, because even where it is possible to notify the Secretary of State that there are likely to be redundancies, it is often not possible to provide the degree of detail specified in the form in the required time frame. It is for this reason that R3 has been in discussions with the Redundancy Payments Service on the development of a simplified HR1 which could be used in the early stages of an insolvency.

**Q.10 Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

31. In most larger organisations union representation is already in place. Where this is not the case, the situation can be more difficult. Consultation with a non-unionised workforce can be very time-consuming. There has to be a nomination and election process and the office holder has to ensure that those employees away from work (for example holiday, sick leave or maternity/paternity leave) are included. The experience of our members is that the process can take several weeks and, in the meantime, key decisions have to be taken about the business.
32. It is also often difficult to find employees willing to stand as representatives and to ensure that all parts of the business are covered. Our understanding is that if all the parts of the business are not covered by representatives, it is necessary to consult with all of the employees.
33. Time constraints are also an issue. As an example, in one case reported to us by one of our members redundancies were made on the first day of the insolvency. At the same time, the office holders started an election process for employee representatives in case they had to make further redundancies. The business was then sold for best outcome with no time to consult with the new representatives on TUPE issues.

**Q.11 How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

34. There is rarely a formal hand-over in relation to engagement with employees, and as far as we are aware there has never been a hand-over of a consultation process already in progress. Generally, the approach will depend on the nature of the insolvency and the prior relationship between workforce and management. In many cases, especially in significant businesses, the insolvency practitioner will have a team of specialist employment staff who will attend from day one to ascertain the employee position and liaise with the workforce. They will not, however, necessarily have any substantial prior knowledge. Whatever the case insolvency practitioners take employee issues very seriously.

**Q.12 How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

**Q.13 Could the process requirements for consultation be further clarified or improved?**

**Q.14 Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

35. As mentioned above, the current HR1 procedure is unsuitable for use in insolvencies because the necessary information is not usually available at an early stage of the process. The hope is that this can be addressed through the simplified HR1 which is currently being discussed with the Redundancy Payments Service. It would be helpful to have some further clarification from the Service on what information they need and why.

36. With regard to the consultation itself, the main constraints are those referred to above, and no further clarification or guidance will change this.

**Q.15 How can Government best incentivise or disincentives the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

37. The conduct of consultation and notification are determined by circumstances; as far as insolvency practitioners are concerned it is not a matter of wilful disregard of the law. It is not a question of incentivisation. However, were public funds made available to the insolvency office holder to enable employees to be retained and paid, then that would in all likelihood facilitate compliance, but we anticipate that would not be an acceptable policy for government at this time.

**Q.16 What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?**

38. The key factors are access to information and support (e.g. from Job Centre Plus). Some training for employee representatives would be useful.

**Q.17 Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

39. We have encouraged our individual member firms to respond to this.

**Q.18 The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?**

40. It is arguable that in a formal insolvency the protective award regime ceases to serve any meaningful purpose, and acts only to create inflated claims to the detriment of the general body of creditors.

41. The leading case of *Susie Radin Ltd v GMB* set out the following principles governing protective awards:
- The purpose of a protective award is to provide a sanction for the failure to consult and not to compensate the employee for his loss;
  - The tribunal should focus upon the seriousness of the employer's default; and
  - The tribunal must assess the length of the protective award, but where there has been no consultation, it should start with the maximum period and reduce it only if there are mitigating circumstances.
42. While these principles may make sense in the context of a solvent trading company by encouraging management to abide by the law, they are less readily applicable in formal insolvency cases. First, a protective award serves no purpose from the point of view of correcting the conduct of an errant management and encouraging future compliance. Secondly, an award merely acts a drain on public resources (as it is initially paid out of the National Insurance Fund) and ultimately reduces the funds available for the general body of creditors.
43. Because of the principle that awards should first be awarded for the maximum period and only reduced if there are mitigating factors, the tribunals frequently use the same starting point for solvent situations, and often make 90 day awards in insolvency cases; this seems unreasonable in the circumstances. Furthermore, there appear to be inconsistencies in the approaches taken by individual tribunals. It would be helpful if some sort of guidance could be provided to tribunals so that the length of the award can be balanced against the effort made by the insolvency practitioner to conduct as meaningful a consultation as possible in the circumstances and awards reduced accordingly. In this regard, if tribunals applied more effectively the special circumstances exception to distressed and insolvent situations recognising that it was not reasonably practical to fully comply with the obligation to consult and that if all such steps towards compliance as were reasonably practical were taken, this would be an improvement on the current position.
44. One case, which is probably similar to many others, can serve as an example of the futility of protective awards in insolvencies. In this case there were no employee representatives in place when insolvency practitioners were appointed. It was clear that the only option for the company was to trade out its remaining work in progress and then close down. The office holders undertook a nomination and election process for employee representatives and traded the business for several months to realise the work in progress. The office holders provided the representatives with full information on what they were doing. However, there was nothing to consult on (in terms of seeking alternative solutions to avoid the redundancies) and so despite the efforts to engage, a full 90-day protective award was made.
45. There is a strong case for the Government to review the status of protective awards. If they are supposed to be penal in nature, treating them as wages is manifestly inappropriate. In insolvencies the employees already receive compensation in the form of pay in lieu of notice and redundancy pay, in addition to any arrears of pay and holiday pay, which they will also receive. The effect of treating protective awards as wages is merely to create inflated claims, which in the first instance have to be paid by government out of the National Insurance Fund, but which are seldom fully recovered, and which ultimately dilute the funds available for the other unsecured creditors. This is clearly an unsatisfactory situation. Furthermore, penalties are pointless in insolvencies because they neither deter nor punish bad behaviour.

**Q.19 How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

46. The Memorandum of Understanding (MoU), signed by R3, Job Centre Plus (JCP) and the Insolvency Service in 2009 and re-signed in 2011, has helped over 120,000 individuals affected



by redundancy. The initiative encourages insolvency practitioners to contact their local JCP in cases where 20 or more redundancies are likely to be made, so that JCP can provide information and support. R3 surveyed members in April 2015<sup>2</sup> and found that the initiative continues to work well. Headline figures include:

- Of those R3 members who work in corporate insolvency, 76% have not been appointed to a firm where 20 or more redundancies needed to be made in the last six months; 19% have been appointed to a firm where 20 or more redundancies needed to be made and did contact JCP; and 5% have been appointed to a firm with 20 or more employees but did not contact JCP.
- Of those R3 members who work in corporate insolvency and did not contact JCP, most say that they did not do so because all or the majority of jobs were transferred to a new employer. Some say that they had no time to get JCP involved.
- Of those who contacted JCP, 78% said that this contact was beneficial to employees.
- Of those who contacted JCP, 51% said that it was beneficial to them as an IP.

47. The anecdotal feedback from Insolvency Practitioners is that the initiative continues to work well, but it would benefit from a 'boost' from R3 and JCP at a local level. R3 would be keen to see this initiative updated and re-signed under the new Government. R3 feels that the success of the MoU as a non-regulatory solution to a problem first raised by Phil Wilson MP in an Early Day Motion (see R3 report for further information<sup>3</sup>), could be adopted in other areas, and could go a long way in addressing some of the challenges regarding employee consultation in an insolvent business.

Association of Business Recovery Professionals  
12 June 2015

---

<sup>2</sup> An on-line survey conducted by ComRes 26 March-6 April 2015 to all R3 members working in corporate insolvency: 239 responses

<sup>3</sup> [https://www.r3.org.uk/media/documents/working\\_in\\_parliament/MoU\\_Report\\_2012.pdf](https://www.r3.org.uk/media/documents/working_in_parliament/MoU_Report_2012.pdf)



**THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS' (R3)  
SCOTTISH TECHNICAL COMMITTEE**

**RESPONSE TO THE INSOLVENCY SERVICE CALL FOR EVIDENCE:  
COLLECTIVE REDUNDANCY CONSULTATION FOR EMPLOYERS FACING  
INSOLVENCY**

**11 June 2015**



## **RESPONSE FROM THE ASSOCIATION OF BUSINESS RECOVERY PROFESSIONALS' (R3) SCOTTISH TECHNICAL COMMITTEE**

### **INTRODUCTION**

1. R3, the Association of Business Recovery Professionals, is the leading professional association for insolvency, business recovery and turnaround specialists in the UK. It promotes best practice for professionals working with financially troubled individuals and businesses. It has UK-wide representation and debates key issues facing the profession. Most insolvency practitioners (IPs) operating in Scotland are members.
2. The Association's Scottish Technical Committee ("STC") welcomes the opportunity to respond to the Call for evidence consultation on employers facing insolvency.

### **EXECUTIVE SUMMARY**

3. Insolvency Practitioners are required to notify the Secretary of State in writing of proposed redundancies on Form HR1 in advance of any dismissals. However the information required to complete the form is not always readily available. This leads to IPs having to adopt necessary steps in order to balance compliance with competing legislation. We would ask for any changes to collective redundancy legislation to take account of other existing legislation with which it may conflict. The tension between the IP's duties under employment and insolvency legislation is highlighted on several occasions in the response.
4. The "Employment Rights Act 1996 (as amended) ("the Act")" requires consultation to take place prior to redundancies being made. The quality of and time available for consultation are dependent upon the circumstances of each case. Circumstances may include whether the employer is solvent or insolvent, whether there are licences, industry specific regulations and other issues out with the control of the insolvency practitioner which restrict the IP and require redundancies to be made immediately on appointment.
5. Where an employee representative structure is already in place consultation is more quickly and effectively facilitated. This is often the case where a recognised trade union is present. Pre-existing channels of communication can also improve the effectiveness of consultation particularly where the entity trades over numerous locations.
6. It is our view that best practice guidance is needed to address the issues specific to employers in insolvency processes; in particular guidance on how the requirement to consult can be fulfilled given the need to balance the interests of all parties together with guidance on the submission of form HR1. Guidance on insolvency legislation should also be provided for unions and employee representatives as well as judges and employment tribunals.
7. Directors have a fiduciary duty to promote the success of the entity for the benefit of shareholders. They also have a number of statutory obligations which include protecting the interests of the employees. Where an entity is insolvent or facing imminent insolvency

the Directors' fiduciary duty shifts from acting in the interest of shareholders to acting in the interest of all creditors which includes employees.

8. We would suggest that any proposed changes to legislation should consider what is expected of the "rescue culture" and whether the present law fulfils expectation. We would ask that any legislation which emerges is clear and workable and does not give rise to unnecessary extra cost.

## **CURRENT PRACTICES**

9. **Question 1 - What are the considerations undertaken when deciding whether or not to start consultations? How is this decided in practice where an employer is facing, or has moved into insolvency?**

Responsibility for employee consultation rests with the employer. In practice this responsibility is effectively discharged by the custodians of the Company in question.

In corporate entities, the Directors are under a fiduciary duty to promote the success of the entity for the benefit of its shareholders. Underlying this primary duty are a number of statutory obligations including those protecting the interests of the employees. In a normal solvent situation, Directors should act in accordance with employment legislation, whereby decisions impacting the employees must factor in appropriate consultation timescales.

However when an entity is insolvent (or facing imminent insolvency) the Directors' fiduciary duty shifts from acting in the interest of shareholders to acting in the interests of all creditors. Employees represent a class of creditor. However the Directors must act in a way that balances the interests of all classes of creditor. There may therefore be competing interests which the employer must manage.

When faced with insolvency, the employer must strive to ensure that they do not worsen the position for any creditors. At the same time, the employer will be seeking to deliver the optimal outcome for the creditors through some form of restructuring and / or sale transaction. In the event that a turnaround or sale is not achievable, trading could cease. Each of these options could involve redundancies; however, the employer will need to balance consultation obligations against the impact on the chosen strategy. The considerations with respect to consultation are likely to include:

- Impact on morale - consultation is inevitably going to create uncertainty and productivity is likely to diminish at a time when stability is crucial.
- Loss of key staff - employees could lose confidence in the employer / business leading to staff turnover.
- Confidence issues - confidential and sensitive information could leak into the market. As a result customers and key stakeholders could lose confidence in the business, which in turn could affect demand, profitability and investment.
- Value – each of the above factors may impact on the underlying value of the business in question which ultimately will drive the return to creditors.
- Timescale – the available timescale may be driven by economic issues such as creditor pressure or supplier issues. However a loss of productivity or key staff following the consultation process may reduce an already short timescale limiting the available options.
- An added complication and therefore, a consideration in an insolvent situation, is that entering into consultation with employees can lead to an increase in fraudulent activity and theft of moveable assets, and Intellectual Property in the informal sense as the employees perceive a higher risk of redundancy.

**10. Question 2 - How does meaningful consultation with a “view to reaching agreement” work in practice? How does notification work in practice?**

Meaningful consultation is not clearly defined in statute and as such there remains an element of subjectivity in relation to the interpretation of this term.

What is clear however is that the Act requires employers to consult with Trade Unions and other representatives of any employees at risk of redundancy, with a view to reaching agreement on matters including the following:

- ways to avoid redundancies;
- ways to reduce the number of redundancies; and
- ways to mitigate the impact of redundancies.

Meaningful consultation is likely to require full disclosure of the information underlying the decision to make redundancies and a timeframe that allows this information to be properly understood. The timeframe should afford sufficient time for the employee representatives to respond to the proposals and a conscientious consideration by the employer of that response. This is likely to be an iterative process as all responses are considered.

The considerations in relation to the disclosure of information in an insolvency scenario were highlighted in our response to Question 1. As referred to therein, the strategy in an insolvency scenario is likely to focus on maximising value for the benefit of creditors. The timescale will be governed by funding or other trading risks which are inherently uncertain. On this basis the proposed strategy is subject to change with little or no notice, having a material impact on the redundancy plans.

An employer would generally seek to meaningfully consult within the constraints of this timescale however adhering to the consultation requirements will not outweigh the other timescale drivers. Accordingly in practice, consultation is compromised in an insolvency situation.

In terms of formal notice requirements following an insolvency appointment, form HR1 must be submitted to the Secretary of State when redundancies are proposed. The HR1 requires a large amount of information, which is not always readily available. Failure to submit form HR1 carries a heavy penalty. To avoid this risk and due to the fact that the strategy in an insolvency situation is inherently uncertain, forms are often submitted immediately, despite the fact that the form could be incomplete.

## **BENEFITS**

**11. Question 3 - What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

In an insolvency situation, whilst it is possible theoretically, the time constraints do not generally afford meaningful mitigation strategies such as job sharing, temporary pay reductions, shut downs etc. to be implemented.

Consultation discussions tend to move quickly from mitigating redundancies to practical issues such as how long the employees will continue to be employed, what and when they will be paid, what they will be entitled to in terms of redundancy payments and how much notice of redundancy they will receive. Whilst this is less than ideal it is nonetheless a benefit to employees.

In addition, an open dialogue with employees whereby the constraints of insolvency are understood may reduce uncertainty and enable the employees to buy into the chosen turnaround or realisation strategy.

Submission of form HR1 is also of benefit as this allows the various support agencies to begin a coordinated approach to dealing with the proposed redundancies and supporting those employees affected.

**12. Question 4 - In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

There may be a willingness on the part of the employee representatives to contribute towards the chosen strategy by facilitating ongoing employee support and controlling the communication channels both internally and externally with the press and other stakeholders. This in turn could promote stability and potentially improve productivity.

In practice however, the role of employee representatives tends to be to act as a conduit of information to the wider employee base, voice queries and challenge the chosen strategy rather than suggesting mitigating strategies.

### **FACILITATORS**

**13. Question 5 - What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent?**

Consultation can be facilitated more quickly and effectively where an employee representative structure already exists. This is often the case when a recognised trade union is present.

Pre-existing communication channels can also improve the effectiveness of the consultation, particularly where the entity trades over numerous locations.

The quality of management information will also impact consultation both in terms of setting a turnaround or realisation strategy and being able to quantify the impact on the employee base.

Stability and co-operation within the management team will enable more information to be available on which to base restructuring decisions.

As referred to above, the available timescale has a significant bearing on the quality of consultation. Any factors which increase the likelihood of continued trading (in particular available funding) are likely to increase the time available for consultation and thereby, its effectiveness.

Professional advice will also improve the effectiveness of the consultation process. The earlier advice is taken, the more time will be available to look at alternative strategies. Advice will also assist the employer to adhere as much as possible to the employment legislation when consultation is required.

### **INHIBITORS**

**14. Question 6 - What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process?**

Whilst trade unions or existing employee representatives may improve the effectiveness of the consultation process, their existence can also present additional challenges.

To avoid falling foul of the consultation requirements, employers would need to ensure that all employees were represented. There have been instances where trade union

representatives have confirmed that they represent all employees of an insolvent business, and it has been later found that certain employees were not in fact represented.

Following an insolvency appointment, Insolvency Practitioners ("IPs") cannot always rely on the availability and reliability of information supplied by management and key personnel. IPs might have to undertake additional diligence such as instructing a legal review of any collective agreements and writing to all employees to obtain their confirmation that they are adequately represented. Any additional work can be time consuming and costly, in what is already a time constrained and financially restricted environment.

Where employee representatives or trade unions do not exist employers would need to enter into a process of electing employee representatives. This process can be time consuming. In addition, the time and costs incurred would be impacted by the availability of reliable employee information and the willingness of employees to participate in the process.

In any circumstance, poor quality management information and a lack of availability and co-operation of senior management will inhibit the consultation process.

Our comments in Question 1 are also relevant here.

**15. Question 7 - What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing, or has become insolvent?**

This has effectively been answered in all previous questions.

**DIRECTORS' ROLE**

**16. Question 8 - Are advisors (accountants, HR professionals, or where IPs are acting as advisors pre insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

The context of any advice will depend upon which point in the decline curve advisors have been engaged. In a distressed situation, advice is likely to include turnaround options, M&A options and contingency planning.

Advisors will typically outline the Directors' responsibilities to adhere to employment legislation at an early stage in the process but also outline the relative risks of doing so. Directors typically attempt to fully explore all options prior to commencing the consultation process given these risks.

When insolvency is recognised, advice will be given around the employer's fiduciary duties and in particular the duties to all creditors (including employees). All advice will be given in light of the uncertain and often unpredictable nature of a distressed environment.

In practice a number of strategies could be executed in parallel. This may include turnaround options (equity, new debt, forbearance etc.), whilst also considering sale strategies (partial or full) and contingency planning. Restructuring may be a feature of any or all of these options however not necessarily. Accordingly, until such time as the options are fully explored, the employer cannot assume that no redundancies will be required. The act of prematurely commencing the consultation process may in fact jeopardise the other more favourable options given the risks outlined in Question 1.

**17. Question 9 - Are directors facing insolvency starting consultation and notifying the Secretary of State as soon as collective redundancies are proposed and at the latest, when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

Experience shows that where businesses are facing insolvency, the directors are often in a period of denial, particularly in hostile appointment situations, although less likely in a voluntary or cooperative situation. There is also a period whereby all options are being explored as outlined previously.

This can prevent directors from committing themselves to proactively engaging and consulting with employees.

At the point of insolvency, the directors have a duty to consider all creditors, not just the employees, and therefore, the impact that consulting might have on any strategy to maximise the outcome for the creditors. When redundancies are considered inevitable, Directors will typically commence the consultation process. This point of inevitability typically corresponds with an acknowledgement of insolvency and employers would look to appoint IPs with the expectation that the IP will carry out any necessary consultation.

**18. Question 10 - Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

See details in Question 6.

**19. Question 11 - How does the handover from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

This is different for every business and can depend on a number of factors:

- Whether the appointment is hostile or voluntary / cooperative.
- The quality of the director / management group.
- The level of commitment of the directors to the business and the employees.
- The availability and reliability of financial and management information.

Even in voluntary / cooperative situations, it is easy for directors to assume a less active role, perceiving that matters are now under the control of IPs.

Where directors are co-operative, they will generally participate in the discussions around the options for the business in insolvency, including restructuring considerations. They will provide the necessary management information, if available, and confirm the current employee representative position and communication channels.

In addition, the Partnership Action for Continuing Employment (PACE) is the Scottish Government's initiative dedicated to providing support to people facing redundancy.

PACE has been active in consulting with IPs to ensure that PACE are engaged as early as possible when redundancies may form part of an insolvency appointment.

In particular, having PACE representatives present at the initial meeting of employees in an insolvency situation has been extremely valuable in assisting not only the employees, but the IPs themselves.

PACE also offers a service to employers facing redundancy issues so it is feasible that an employer facing an insolvency situation could have engaged PACE pre-insolvency which allows an informed handover to the IP when appointed.



## **PROCESS FOR NOTIFICATION AND CONSULTATION**

- 20. Question 12 - How might the process for notifying the Secretary of State and sharing information with third parties be improved?**
- 21. Question 13 - Could the process requirements for consultation be further clarified or improved?**

As detailed throughout this response, there are a number of key considerations that might have an impact on effective notification to the Secretary of State and other third parties. The overriding consideration is the impact of notification on the eventual outcome to all creditors.

Some thought has to be given to ways to allow for effective notification, whilst minimising the impact of such risks. Perhaps specific, modified guidelines for IPs to follow, with room to manoeuvre dependent on the type of insolvency and outcome sought (flow charts?). Allowances could be made to accommodate a degree of commercial decision making on the part of IPs, which would in turn determine the type and/or level of notification required.

Making the appointment of employee representatives mandatory for all business, where the requirement to consult exists, (premises with 20 employees or more) could improve the consultation process.

Whilst we believe that legislative reform would be the preferred solution, it is accepted that as an interim measure best practice guidance is needed to address the issues specific to employers in insolvency processes; in particular, guidance on how the requirement to consult can be fulfilled given the need to balance the interests of all parties, not just employees, together with guidance on the submission of HR1 to clarify when it should be submitted and with what information.

The fear of the breach of confidentiality and data leak (recognised as a deterrent in starting consultation by ACAS and BIS) could be alleviated by the introduction of mandatory employee representatives for qualifying employers, enabling employers to engage with a team of people familiar with the process, and subject to confidentiality agreements, if appropriate.

## **GUIDANCE**

- 22. Question 14 - Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

See details in Questions 12 and 13.

Guidance should be directed to employers, unions and employee representatives. Guidance should also be directed to judges / employment tribunals.

The rights of employees to seek compensation for non-consultation derive directly from employment law, with limited or no consideration in relation to the dynamics of an insolvency procedure. Guidance should be provided which outlines the definition of 'meaningful consultation' as it should be applied in an insolvency situation.

Employment Tribunal Judges are well versed in Employment Law and its application in a business, solvent or otherwise. However, they are less familiar with insolvency law and how an insolvency process can impact the application of employment law in an insolvent business, both from a legal and a commercial perspective. Given the complexities of both areas of law, it would be extremely beneficial for Employment Tribunal Judges to have insolvency law experience in respect of cases where the employer is insolvent.

As an example [REDACTED], pre-liquidation there had been formal and proper consultation as redundancy was identified as likely some time before insolvency. By the time liquidation could not be avoided, the consultation period had been running approximately 50% of the statutory required period. Evidence of this mitigation was submitted to the Employment Tribunal (ET), which decided to make a 70 day award (>75% of the maximum), without any reasoning as to why that was appropriate having regard to the extensive consultation and extensive efforts, and in circumstances where the liquidators were compelled by law to cease operations and could not therefore continue such employment. The ET decision merely said it was a reflection of "some consultation".

The decision would have been appealed as grossly unfair, but as there was no return available to unsecured creditors in this case, the costs of doing so would have outweighed any benefit.

This provides an example of excessive awards and penalties being granted, even where there has been pre-insolvency consultation and the IP can do nothing about it due to other regimes imposed upon him, resulting in a further cost to the public purse.

## **INCENTIVES AND DISINCENTIVES**

### **23. Question 15 - How can Government best incentivise or dis-incentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

The underlying objectives of the employer or IP in an insolvency situation are to maximise the return for creditors. Value is likely to be maximised from continuing to trade through restructuring or sale options. This is aligned with the interests of the employees.

The decision to defer consultation whilst other more favourable options are being explored is therefore often in the interests of employees. This decision is subjective and ultimately events could transpire whereby redundancies are made and consultation timescales are compromised. However the intention is not to compromise the consultation process but rather to attempt to balance the interests of all creditors.

We would suggest that rather than seeking to incentivise or dis-incentivise the behaviour of IPs and directors, the government should provide further guidance to all stakeholders around the impact of insolvency on the process.

Further, it should also be noted that IPs are bound by the statutory order of priority in which insolvency related costs are to be met. Other than in a trading scenario (as mentioned above) where the staffing costs of employees are met where their employment continues, the employee claims for balances due pre-insolvency rank as either preferential or unsecured claims dependent on the level of claim and subject to the statutory minimum preferential guidelines. The funds subsequently available for employee claims will be dependent on realisations during the insolvency and whether funds are available for these classes of creditor.

### **24. Question 16 - What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can be best supported.**

Training and modified, appropriate guidelines.

**25. Question 17 - Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation?**

There are numerous examples of situations where an IP has performed an effective consultation process under the circumstances. However, it is rare that the situation affords sufficient time for meaningful consultation to take place as envisaged by the legislation.

Indeed, there are additional barriers that make consulting with employees extremely difficult for an IP. Some examples are provided below.

Where an IP is appointed to a heavily regulated and licensed business, often the terms of the licence and / or the regulations surrounding them mean that trading in insolvency cannot continue due to the personal liability imposed by the regulations if the IP does so or, in certain cases, because the regulations automatically terminate or suspend licences.

Coal mining is an example industry, albeit very specific and not a common type of insolvency. In the case of [REDACTED] because the authority to carry out coal mining operations automatically terminate on the appointment of the IP, the provisional liquidator appointed was compelled to apply to Court for powers to cease the operations in order to avoid continuing operations without authority (a criminal offence). Accordingly, there was a loss through other statutory provisions of the trading operation, and a Court order requiring operations to cease. Cases such as this mean the IP cannot generate trading income to pay employees, so there is no option but to terminate their employment without consultation – by reason of other conflicting regulatory regimes.

Other examples include commercial goods transport operations – licences are not automatically suspended, but an IP must give personal undertakings and take on potential personal civil and criminal liability risks to continue operations under the licence, and that permission is still at the discretion and subject to conditions imposed by the Traffic Commissioner.

Further examples can be found in environmental regulations, such as controlled waste management licences, pollution prevention control permits, controlled water activities licences (SEPA licences e.g. in [REDACTED]). These conflicting regulatory regimes have to be balanced, so it is not just the insolvency versus employment regimes that impact on consultation opportunity, but also other conflicting regimes which fundamentally prohibit or raise substantial barriers (including personal civil and criminal liability risks for IPs) to trading and consulting in insolvency.

**26. Question 18 - The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?**

**27. Question 19 - Do you think the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?**

An IP's decision to make redundancies in an insolvency situation is governed by the specific circumstances of the case. The consultation process will be designed to adhere to employment legislation as far as possible albeit compromised by the circumstances of the insolvency. As previously stated all decisions are driven by the overriding objective to maximise the return to all creditors. Irrespective of the size of any penalty, IPs are often in a position where additional consultation is not possible.

Where protective awards are made in respect of an insolvent business, the amounts due to employees are treated as unsecured claims (from the Redundancy Payments Office ("RPO"), who will have paid up to a certain limit, and from the individual employees for any

residual not paid by the RPO) and rank alongside the other unsecured creditors for the purpose of paying dividends. This effectively reduces the potential dividend payment to the remaining unsecured creditors (where funds are available).

IPs have the option of defending or not defending claims and their decision would depend on whether there were sums available for the unsecured creditors. Where there were no funds available, then the decision would be clear cut and IPs would not incur costs to mount a defence where no benefit would be derived for the remaining unsecured creditors.

However, the decision not to defend is often interpreted as an indication of the IP's indifference to the position of the employees and their disregard for the relevant employment legislation. No consideration is given to the fact that IPs have exercised their duty of care to the creditors as a whole, by ensuring that the overall position is not made worse by incurring additional irrecoverable costs.

Where funds were available for the unsecured creditors, IPs would have to consider a defence. A "risk assessment" would need to be undertaken to identify the chances of success and to establish whether the benefits of successfully defending claims would outweigh the costs of defending them. This would involve legal opinion and some degree of speculation. Should a defence be unsuccessful IPs would be faced with meeting the costs of the defence from the limited funds available to the unsecured creditors. This would leave IPs open to criticism as to their overriding duty of care to all creditors.

The ranking of claims and the distribution of funds is governed by insolvency legislation.

Please refer to the example given at Question 14.

**28. Question 20 - How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

Not able to comment. Although, it should be noted that in Scotland PACE is the liaison with IPs, not Job Centre Plus.

Please see the response to Question 11 with further information regarding PACE.

11 June 2015



National Union of Rail, Maritime & Transport Workers

**Collective Redundancy Consultation for  
Employers facing Insolvency**

**Response to call for evidence**

RMT organises around 80,000 individuals in all sectors of the transport industry. The union is affiliated to the Trades Union Congress. We have seen their response to this call for evidence and endorse its contents. The following is intended to supplement and clarify the answers that the Trades Union Congress has provided, with reference to the experiences of our representatives and officials – especially the entering into insolvency in 2014 of the courier and logistics firm [REDACTED]. With regards to [REDACTED], the union endorses the findings of the Parliamentary BIS and Scottish Affairs committees and urges the government to implement their recommendations<sup>1</sup>.

#### Question 1:

**What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.**

Factors why an employer might not commence a consultation promptly or at all, include its ability and instinctive desire to conceal the true financial position of the company. Specifically, an employer might prefer to prevent its workforce from knowing that the company is facing restructuring and insolvency perhaps due to directors' pride, perhaps due to fear that key suppliers, clients and workers would start looking for alternative contracts, suppliers and work respectively.

Many simply choose to ignore their clear legal duty to consult - this is what appears to have happened in the 2014 collapse of the courier and logistics firm [REDACTED]. [REDACTED] (the entity which provided finance to [REDACTED]) stated to a joint session of the Parliamentary BIS and Scottish Affairs committees investigating the issues that:

“...if you really want to see a company fail very quickly, you can consult with your staff about redundancy well before the date.”<sup>2</sup>

And [REDACTED], former chief executive of [REDACTED] said:

“...given the outlook of the business, it was better for us not to start the consultation process...”<sup>3</sup>

This flagrant disregarding of the law may be especially likely to occur where a high proportion of the workforce are agency workers or categorised as self-employed (ie where a high number of staff may seek work elsewhere). Prior to facing insolvency, many businesses elect to increase the proportion of their workforce who are categorised as self-employed. With regards to [REDACTED], about 78% of the workforce were labelled as self-employed<sup>4</sup>.

Where an employer is facing insolvency, consultation is not high up the directors' list of priorities. Even where directors of a company facing insolvency, pay for external legal advice on the range of their duties, for a variety of reasons (such as lack of repercussions for them personally or for the finances of the company) they often either do not consult at all, or do not treat the consultation with much seriousness. In the case of [REDACTED], the directors received legal advice on the need to consult

---

<sup>2</sup> Q222 [REDACTED]

<sup>3</sup> Q835 [REDACTED]

<sup>4</sup> Q672 [REDACTED]

as early as October 2014<sup>5</sup>. However, they decided not to carry out a consultation ahead of the company ceasing trading on 24 December 2014.

Not only do directors sometimes opt not to consult, they expend some time and energy trying to conceal the company's situation including threatening proceedings for defamation against people who correctly suggest that the company is in difficulty. This happened in the case of [REDACTED] with legal action threatened<sup>6</sup> and with suppliers and workers encouraged to disbelieve rumours. (On 21 November 2014, [REDACTED] - wrote to senior managers who passed his message to suppliers in an attempt to quash "unfounded rumours")<sup>7</sup>.

Once a company has engaged an insolvency practitioner to take preparatory steps to appointment, a decision is often taken not to conduct a consultation with employees. In the case of [REDACTED], the company only formally entered administration on Christmas Eve, however, the legal trigger point for commencing consultation with employees (as soon as redundancies were contemplated<sup>8</sup>) was two to three months earlier. [REDACTED] director [REDACTED] said:

"That it was absolutely doomed to be the end [for [REDACTED] really became clear late in the autumn [of 2014]]."<sup>9</sup>

and he added:

"As a going concern and stand-alone business, I do not think we [REDACTED] had much faith in it [REDACTED] from some time in November [2014]"<sup>10</sup>

[REDACTED] chief executive [REDACTED] said:

"we [REDACTED] with advisors] started the review process [ie considered radical restructure including closing down] on 9 October [2014]"<sup>11</sup>

Even once active steps were taken anticipating insolvency and redundancies, still workers were not informed of their impending fate. On 9 December 2014, the decision was taken to set up a subsidiary "phoenix" company<sup>12</sup> and the insolvency practitioner decided to notify the Insolvency Service that

---

<sup>5</sup> Q191 [REDACTED]

<sup>6</sup> Qs 291 – 293 [REDACTED]  
and Qs 589 & 713 [REDACTED]

<sup>7</sup> Q588 [REDACTED]  
and Q24 [REDACTED]

<sup>8</sup> TULR(C)A 1992 provides that the employer must consult about its "*proposals*". The legal position is clear that a proposal is something less than a decision, therefore the employer must consult while its plans are still at a formative stage.

<sup>9</sup> Q162 [REDACTED]

<sup>10</sup> Q164 [REDACTED]

<sup>11</sup> Q579 [REDACTED]

<sup>12</sup> Q580 [REDACTED]

mass redundancies would take place.<sup>13</sup> (No warning was issued to workers<sup>14</sup> until the RMT publicised what was occurring).

Analysing the financial costs and benefits to the creditors, the employer/ insolvency practitioner often calculate that they need not consult at all. This is on the basis that the state National Insurance Fund<sup>15</sup> will take on responsibility for this failure to observe the well-known and straight-forward provisions to consult<sup>16</sup>.

Another reason, why directors do not consult is that they are deluding themselves that the business can continue as a going concern. In the case of [REDACTED], many of the indicators available to the directors were that the business was at risk of becoming insolvent. For example, the parent company (on which [REDACTED] was reliant) had refused to give a guarantee of solid support as early as 30 September 2014<sup>17</sup>.

Alternatively, it may be that some directors are not sufficiently experienced in the terminology used by their financial backers<sup>18</sup>. However, it is not credible that there are no directors on a board who have sufficient experience to correctly interpret terms used by their financial backers to understand how definite it is that that backing will be sustained. And in the case of [REDACTED], some of the directors on the board of [REDACTED] also sat on the board of the finance providing firm [REDACTED] (such as [REDACTED]).

---

<sup>13</sup> Q472 [REDACTED]

<sup>14</sup> Where the employer is required to give advance notification of redundancies to BIS pursuant to s.193 TULR(C)A 1992 they must supply a copy of that notification to each of the appropriate representatives (if there are any).

<sup>15</sup> Under the provisions of s.182 of the Employment Rights Act 1996

<sup>16</sup> Q193 [REDACTED]

<sup>17</sup> Q127 [REDACTED]

<sup>18</sup> Qs 623 - 628 [REDACTED]

<sup>19</sup> Q825 [REDACTED]



## Question 2:

**How does meaningful consultation with a ‘view to reaching agreement’ work in practice? How does notification work in practice? Please provide examples where possible.**

Experience from the economic downturn reveals that where genuine dialogue and co-operation takes place between employers, trade unions and the wider workforce, it is frequently possible to save jobs, retain skilled workforces and avoid the need for business or plant closures.

The key components of meaningful and effective consultation include:

- Consultation is more effective where it is based on high trust relations between employers and trade unions.
- Employers should engage in early consultation with trade unions, and should meet regularly with union reps and officials during the consultation period.
- Consultation should take place while it is still possible for unions to influence key decisions and well before formal insolvency processes are triggered<sup>20</sup>. Once a company has entered administration it is often difficult to achieve a business rescue and to save jobs<sup>21</sup>. These problems are amplified in cases of liquidation and receivership.
- Employers should supply union officials with full information and regular updates. Where necessary, due to commercial sensitivities, information can be provided on a confidential basis. However, management should recognise the benefits of open communication with the wider workforce.
- Trades unions should be provided with the opportunity and time to develop alternatives to business closure and mass redundancies. Directors and insolvency practitioners should respond to union proposals, demonstrating how proposals have been adjusted in response.
- The company or insolvency practitioner should work with trade unions and government departments to invite Jobcentre Plus’ Rapid Response Service (‘PACE’ in Scotland and ‘ReAct’ in Wales) to help the employees involved to retrain or find alternative work.
- Where appropriate, government departments should put together rescue packages and provide financing to cover the wages bill during the consultation period.
- Trade union representatives should be invited to attend and participate in creditors’ meetings.

However, often in insolvency situations, employers and insolvency practitioners fail to carry out any form of consultation. Where consultation does happen, it often takes place at the last minute when it is impossible for union officials to influence any decisions or outcomes. Consultation in such situations is often perfunctory, amounting to little more than a tick-box exercise.

With regards to notification, in the case of the entering into insolvency in 2014 of the courier and logistics firm [REDACTED], the insolvency practitioner planned to use the company’s managerial structure to cascade information down<sup>22</sup> plus visit almost all of the sites. Breaking with the usual practice of

---

<sup>20</sup> TULR(C)A 1992 provides that the employer must consult about its “*proposals*”. The legal position is clear that a proposal is something less than a decision, therefore the employer must consult while its plans are still at a formative stage.

<sup>21</sup> Q171 [REDACTED]

<sup>22</sup> Q496 [REDACTED]

addressing staff on the day of appointment<sup>23</sup>, the insolvency practitioner put off notification for a few days. The information eventually leaked out. The directors should have retained responsibility for consultation and notification rather than delegating it to the insolvency practitioner.

---

<sup>23</sup> Q503

### Question 3:

**What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

Employees have a stake in their employer's business. Where an organisation is struggling, employees should be given the chance to contribute their ideas on how to reduce waste and raise output. Workers are well-placed to see where there is inefficiency and missed opportunities, while managers can be somewhat remote from the "shop floor". In certain extreme circumstances, employees may also be willing to temporarily contribute by deferring certain aspects of their agreed terms and conditions. This requires a process of consultation.

In the event that some redundancies are to take place, further considerations apply. It takes time to find a new job. How long, obviously depends on factors such as the type of skills that an individual has and where they live. In our experience, six months is a realistic timetable for the average person, from the point at which they start looking for a job, to secure a new opportunity and completing pre-employment checks. For most people, in many regions, it is not a speedy process to start again in a new post.

Many people, especially with young families do not have a significant or any financial cushion enabling them to comfortably adjust to the loss of their work. This is one of the main reasons why consultation and notification are important. Consultation gives workers the confidence that if their employer is considering terminating their contract, that everything possible will be done to explore the full range of possible solutions which do not involve them losing their jobs.

Notification gives workers some warning of the final result of the consultation. Someone who is in work is usually better placed to find a new job, than someone who is unemployed. Remaining in the habit of work and practising one's skills is important and anything that can be done to preserve a job, even temporarily, is worthwhile.

If workers cannot rely on being consulted and notified in advance about changes to their employment, up to and including termination, that negatively impacts on their ability to plan for and invest in their own and their families' future. This has implications for workers' ability to reach milestones in their lives (such as buying a house and starting a family). Additionally, the lack of certainty suppresses those individuals' economic activity – with deferral of larger purchasing hitting the wider economy.

And it is not just people who are directly employed by the company who suffer. Workers who may be incorrectly termed self-employed and suppliers, deserve to have sufficient warning. The case of [REDACTED] demonstrates to what extent individuals and even entire families rely on fair warning of how their income earning potential may be harmed<sup>24</sup>.

Other benefits that meaningful consultation between employers, insolvency practitioners and trade unions can yield for businesses, workers, local communities and the taxpayer include:

- Unions will often develop alternatives to business closure and job cuts, such as workforce restructuring, short-term pay freezes and short-hours working.
- During the consultation period, Jobcentre Plus' Rapid Response Service ('PACE' in Scotland and 'ReAct' in Wales) can be invited into the workplace to provide employees with information about job vacancies in the local area and to assist them in accessing training. They can also advise individuals about benefit claims and how to recover unpaid wages from the Redundancy Payments Office.
- The workforce and local communities are more likely to be reassured that all options are being fully explored.
- The costs incurred by the taxpayer will be reduced.

#### Question 4:

#### **In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

There is often much that government can do, either at the time that a major employer is struggling or later for the broader sector (where a systemic issue has been identified).

Company directors are invariably not skilled at campaigning including using political contacts to access broader support. It is often not in the mindset of entrepreneurs. However, trade unions, once alerted by reps and officials, are skilled at mobilising support and assisting in accessing government finance or facilitating helpful legislative change.

Trade union reps and officials have experience of redundancy situations and can reassure employees about the process. Knowing what to expect and discussing one's concerns with a powerful and trusted body such as a trade union, helps employees plan and calibrate their response to the situation appropriately.

During the recent economic downturn, many private sector employers engaged in meaningful consultation with recognised trade unions. The negotiated agreements achieved positive outcomes, including business rescues, reduced job losses, the retention of skilled workforces and assistance provided to those facing redundancies.

The recent situation with rail manufacturer [REDACTED] is illustrative.

Following the loss of the [REDACTED] contract to [REDACTED] in 2011, the rail manufacturer [REDACTED] announced mass redundancies, including a review of their UK operations and the possible closure of their Derby site. Management met regularly, on at least a weekly basis, with recognised trade unions. The consultation period provided unions and management with the opportunity to identify and win new contracts, to review shift patterns and staffing structures. The company, unions and government departments (DWP, BIS etc) invited appropriate agencies to visit the site to assist in job search. As a result of the ongoing discussions, all compulsory redundancies were avoided.

The union mobilised political support to review what had happened. An effective campaign was run in the media and in Parliament challenging the terms of the tender and securing promises from the government for the future. This was something that the company was perhaps not best-equipped to do itself and is an example of how a constructive relationship with a union can assist a business facing difficulties.

Union learning reps (ULRs) also support people at the workplace during redundancy exercises by:

- Finding out learning and support needs and organising learning activities in the workplace (such as CV workshops, job search, Skills for Life, ICT, financial management etc)
- Providing advice and information on learning opportunities including by referring people to adult career advice such as Next Step (or providing this service themselves if they are qualified)
- Working with external stakeholders such as learning providers and Jobcentre Plus

Findings from the 2011 Workplace Employment Relations Study<sup>25</sup> confirm the effectiveness of consultation in redundancy situations. According to the study, 40% of workplaces that engaged in consultation on redundancies, manager's original proposals were altered as a result of consultation.

In 18% of workplaces multiple changes were made. In nearly a quarter of workplaces (22%) consultation led to the numbers of redundancies being reduced; in 14% of workplaces strategies for redeployment were identified or changed; redundancy payments were increased in 10% and additional assistance for individuals facing redundancy was introduced in 19% of workplaces.

**Question 5:**

**What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.**

For an employer to be willing to consult meaningfully, a relationship must usually first have been established. An employer obviously will not be confident about divulging sensitive information to all people. Founding such a relationship takes time. This is most likely to take place between an employer and a union official or rep.

Other factors that facilitate effective consultation include a clear statutory framework and personal penalties for directors and insolvency practitioners for non-compliance.

Our experience of the entering into insolvency in 2014 of the courier and logistics firm [REDACTED] suggests that directors place a high value on their own compliance with certain rules, breach of which might threaten their ability to keep or take up other directorships after their existing company's demise. However, they only seem willing to devote time and resource to ensure they are complying with rules on directors' conduct, breach of which may have personal repercussions for them (ie trading while insolvent). Specifically, directors are much less concerned about complying with rules on redundancy consultation.

It is odd that there are few personal ramifications for directors and insolvency practitioners arising from their failure to consult with the workforce, given the scale of the financial burden that is being transferred to the state. This needs to be corrected. Where directors unreasonably fail to inform and consult with the workforce, that should be a matter that is relevant to whether they are fit to continue to hold directorships.

**Question 6:**

**What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

Factors why an employer might not commence a consultation promptly or at all, include its ability and instinctive desire to conceal the true financial position of the company. Specifically, an employer might prefer to prevent its workforce from knowing that the company is facing restructuring and insolvency perhaps due to directors' pride, perhaps due to fear that key suppliers, clients and workers would start looking for alternative contracts, suppliers and work respectively.

Many simply choose to ignore their clear legal duty to consult - this is what appears to have happened in the 2014 collapse of the courier and logistics firm [REDACTED]. [REDACTED] (the entity which provided finance to [REDACTED]) stated to a joint session of the Parliamentary BIS and Scottish Affairs committees investigating the issues that:

"...if you really want to see a company fail very quickly, you can consult with your staff about redundancy well before the date."<sup>26</sup>

And [REDACTED], former chief executive of [REDACTED] said:

"...given the outlook of the business, it was better for us not to start the consultation process..."<sup>27</sup>

This flagrant disregarding of the law may be especially likely to occur where a high proportion of the workforce are agency workers or categorised as self-employed (ie where a high number of staff may seek work elsewhere). Prior to facing insolvency, many businesses elect to increase the proportion of their workforce who are categorised as self-employed. With regards to [REDACTED], about 78% of the workforce were labelled as self-employed<sup>28</sup>.

Where an employer is facing insolvency, consultation is not high up the directors' list of priorities. Even where directors of a company facing insolvency, pay for external legal advice on the range of their duties, for a variety of reasons (such as lack of repercussions for them personally or for the finances of the company) they often either do not consult at all, or do not treat the consultation with much seriousness. In the case of [REDACTED], the directors received legal advice on the need to consult as early as October 2014<sup>29</sup>. However, they decided not to carry out a consultation ahead of the company ceasing trading on 24 December 2014.

Not only do directors sometimes opt not to consult, they expend some time and energy trying to conceal the company's situation including threatening proceedings for defamation against people who correctly suggest that the company is in difficulty. This happened in the case of [REDACTED] with legal action threatened<sup>30</sup> and with suppliers and workers encouraged to disbelieve rumours. (On 21

---

<sup>26</sup> Q222 [REDACTED]

<sup>27</sup> Q835 [REDACTED]

<sup>28</sup> Q672 [REDACTED]

<sup>29</sup> Q191 [REDACTED]

<sup>30</sup> Qs 291 – 293 [REDACTED]

Qs 589 & 713 [REDACTED]

November 2014, [REDACTED] - the then Chief Executive of [REDACTED] - wrote to senior managers who passed his message to suppliers in an attempt to quash "unfounded rumours")<sup>31</sup>.

Once a company has engaged an insolvency practitioner to take preparatory steps to appointment, a decision is often taken not to conduct a consultation with employees. In the case of [REDACTED], the company only formally entered administration on Christmas Eve, however, the legal trigger point for commencing consultation with employees (as soon [REDACTED]) Capital director Jon Moulton said:

"That it was absolutely doomed to be the end [for [REDACTED]] really became clear late in the autumn [of 2014]."<sup>33</sup>

and he added:

"As a going concern and stand-alone business, I do not think we [REDACTED] had much faith in it [REDACTED] from some time in November [2014]"<sup>34</sup>

[REDACTED] said:

"we [REDACTED] with advisors] started the review process [ie considered radical restructure including closing down] on 9 October [2014]"<sup>35</sup>

Even once active steps were taken anticipating insolvency and redundancies, still workers were not informed of their impending fate. On 9 December 2014, the decision was taken to set up a subsidiary "phoenix" company<sup>36</sup> and the insolvency practitioner decided to notify the Insolvency Service that mass redundancies would take place.<sup>37</sup> (No warning was issued to workers<sup>38</sup> until the RMT publicised what was occurring).

Analysing the financial costs and benefits to the creditors, the employer/ insolvency practitioner often calculate that they need not consult at all. This is on the basis that the state National Insurance

---

<sup>31</sup> Q588 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/scottish-affairs-committee/impact-of-the-closure-of-city-link-on-employment/oral/18140.html> and Q24 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/scottish-affairs-committee/impact-of-the-closure-of-city-link-on-employment/oral/17495.html>

<sup>32</sup> TULR(C)A 1992 provides that the employer must consult about its "proposals". The legal position is clear that a proposal is something less than a decision, therefore the employer must consult while its plans are still at a formative stage.

<sup>33</sup> Q162 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/scottish-affairs-committee/impact-of-the-closure-of-city-link-on-employment/oral/17836.html>

<sup>34</sup> Q164 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/scottish-affairs-committee/impact-of-the-closure-of-city-link-on-employment/oral/17836.html>

<sup>35</sup> Q579 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/scottish-affairs-committee/impact-of-the-closure-of-city-link-on-employment/oral/18140.html>

<sup>36</sup> Q580 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/scottish-affairs-committee/impact-of-the-closure-of-city-link-on-employment/oral/18140.html>

<sup>37</sup> Q472 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/scottish-affairs-committee/impact-of-the-closure-of-city-link-on-employment/oral/17981.html>

<sup>38</sup> Where the employer is required to give advance notification of redundancies to BIS pursuant to s.193 TULR(C)A 1992 they must supply a copy of that notification to each of the appropriate representatives (if there are any).



Fund<sup>39</sup> will take on responsibility for this failure to observe the well-known and straight-forward provisions to consult<sup>40</sup>.

Another reason, why directors do not consult is that they are deluding themselves that the business can continue as a going concern. In the case of [REDACTED], many of the indicators available to the directors were that the business was at risk of becoming insolvent. For example, the parent company (on which [REDACTED] was reliant) had refused to give a guarantee of solid support as early as 30 September 2014<sup>41</sup>.

Alternatively, it may be that some directors are not sufficiently experienced in the terminology used by their financial backers<sup>42</sup>. However, it is not credible that there are no directors on a board who have sufficient experience to correctly interpret terms used by their financial backers to understand how definite it is that that backing will be sustained. And in the case of [REDACTED], some of the directors on the board of [REDACTED] also sat on the board of the finance providing firm [REDACTED] (such as [REDACTED]).

Other factors which inhibit effective consultation include:

- Insolvency practitioners face a conflict of interest. Their primary responsibility is to protect the interests of creditors, particularly those with secured debts. The interests of employees are treated as a secondary consideration.<sup>44</sup>
- The legal framework creates an incentive for employers and insolvency practitioners to avoid consultation. Many directors and insolvency practitioners conclude that as the financial penalties for failing to consult are less than the costs of continuing to run the business during the consultation period, they should ignore their legal obligations to consult. The absence of personal liabilities means that insolvency practitioners have no direct incentive to engage in consultation.
- The fees paid to insolvency practitioners, including the hourly charge out rate, are high<sup>45</sup>. Administration lasts for several months but just for the period between 24 December 2014 and 30 January 2015, [REDACTED] charged over £1.7m for its work on [REDACTED].<sup>46</sup>

And the figure of £1.7m does not include the amounts charged for work on [REDACTED] subsidiaries such as [REDACTED] or the insolvency practitioner's expenses. It is not just the total amount that insolvency practitioners charge, but also their hourly rates that are of concern. In the case of [REDACTED] this includes £250 per hour for support staff, plus IT support provided by (or perhaps to)

---

<sup>39</sup> Under the provisions of s.182 of the Employment Rights Act 1996

<sup>40</sup> Q193 [REDACTED]

<sup>41</sup> Q127 [REDACTED]

<sup>42</sup> Qs 623 - 628 [REDACTED]

<sup>43</sup> Q825 [REDACTED]

<sup>44</sup> Q835 [REDACTED]

<sup>45</sup> Q185 [REDACTED]

<sup>46</sup> Bottom right hand corner of page 32 (as labelled, but sequentially page 34) of Joint Administrator's Proposals [REDACTED]

Senior Executives at £365 per hour<sup>47</sup>. The lowest grade providing work had an average charge out rate of £176 per hour – that is for work as basic as stuffing envelopes.<sup>48</sup>

Such excessive charges limit the level of resource available to cover debts owed to employees and other workers. (The total unpaid redundancy bill from [REDACTED] was £4 million)<sup>49</sup>. Dismantling a business is not especially complex work requiring rare skills, meaning that the fees charged are out of all proportion. The union urges the government to take action to cap the total amount of fees and the hourly rates that insolvency practitioners (as well as other professional advisers such as lawyers) and their support teams can charge during an insolvency situation.

The union further urges the government to introduce a duty on insolvency practitioners to have as much of the work done as possible by members of staff paid at a somewhat lower set rate. With the introduction of a duty to also offer work arising from the insolvency practitioner's duties, to be offered to workers of the failed company who have had their contracts terminated.

---

<sup>47</sup> Middle of page 32 (as labelled, but sequentially page 34) of Joint Administrator's Proposals

<sup>48</sup> Q514 [REDACTED]

<sup>49</sup>

Q192 [REDACTED]

**Question 7:**

**What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.**

Factors which negatively impact on the quality and effectiveness of consultation include:

- Many workplaces lack the high-trust employment relationships and established procedures which facilitate effective consultation in insolvency situations. And unlike many EU counterparts, the UK also does not have an effective framework for information and consultation of employees. This is in part due to the inadequacies of the Information and Consultation of Employees Regulations 2004.
- Non-union workplace representatives frequently lack the expertise or necessary agency to engage in meaningful consultation on behalf of the wider workforce.
- Insolvency practitioners frequently lack the necessary awareness and experience of employment law obligations and industrial relations practices.
- Directors can be held personally liable if they continue to operate firms which are insolvent. The time available for consultation can also be severely curtailed because the company cannot afford to continue to pay the wages bill.
- Insolvency practitioners face pressures from creditors, including banks and financial institutions and private equity firms, to wind the company up and release financial assets.

**Question 8:**

**Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

Directors often receive plenty of professional advice. In the case of the entering into insolvency in 2014 of the courier and logistics firm [REDACTED], directors spent large sums of money on legal advice trying to ensure that their own ability to continue to subsequently practice as directors was not compromised. [REDACTED], director of Better Capital (the entity which provided finance to [REDACTED]) stated to a joint session of the Parliamentary BIS and Scottish Affairs committees investigating the issues that:

“We have taken very extensive legal advice throughout this process from first-class firms. The directors have had independent, expensive advice from a first-class firm.”<sup>50</sup>

[REDACTED] added:

“These guys [the directors of [REDACTED]] were taking advice from one of the best law firms there is, and they were making sure they were on the right side of it [the law].”<sup>51</sup>

Between 22 December and 26 December 2014, [REDACTED] £463,000 on lawyers and accountants.<sup>52</sup> The “vast majority” of this was on lawyers.<sup>53</sup>

[REDACTED], managing Director of [REDACTED] commented that:

“we could not act as directors without advice”<sup>54</sup>

What is not clear is whether directors are receiving advice to the effect that they need not worry about following the rules on consultation when the business is facing insolvency, or they are being advised to comply and are ignoring the advice. This advice is often legally privileged so it is hard to be certain in all cases. However, we have enough anecdotal evidence to suggest that some advisors are routinely flouting their professional codes of conduct by actively condoning the flouting of obligations to consult.

Certainly our experience of [REDACTED] suggests that directors place a high value on their own compliance with certain rules, breach of which might threaten their ability to keep or take up other directorships after their existing company’s demise. However, they only seem willing to spend money (ie from a company’s remaining cash) to ensure they are complying with rules on directors’ conduct, breach of which may have personal repercussions for them (ie trading while insolvent). Specifically, directors are much less concerned about complying with rules on redundancy consultation.

[REDACTED], director of [REDACTED] (the entity which provided finance to [REDACTED]) stated to a joint session of the Parliamentary BIS and Scottish Affairs committees investigating the issues that:

“...if you really want to see a company fail very quickly, you can consult with your staff about redundancy well before the date.”<sup>55</sup>

---

<sup>50</sup> Q191 [REDACTED]

<sup>51</sup> Q360 [REDACTED]

<sup>52</sup> Q784 [REDACTED]

<sup>53</sup> Q789 [REDACTED]

<sup>54</sup> Q788 [REDACTED]

And [REDACTED], former chief executive of [REDACTED] said:

“...given the outlook of the business, it was better for us not to start the consultation process...”<sup>56</sup>

It is odd that there are few personal ramifications for directors and insolvency practitioners arising from their failure to consult with the workforce, given the scale of the financial burden that is being transferred to the state. This needs to be corrected. Where directors unreasonably fail to inform and consult with the workforce, that should be a matter that is relevant to whether they are fit to continue to hold directorships.

---

<sup>55</sup> Q222 [REDACTED]  
[REDACTED]

<sup>56</sup> Q835 [REDACTED]  
[REDACTED]

**Question 9:**

**Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

No - factors why an employer might not commence a consultation promptly or at all, include its ability and instinctive desire to conceal the true financial position of the company. Specifically, an employer might prefer to prevent its workforce from knowing that the company is facing insolvency perhaps due to directors' pride, perhaps due to fear that key suppliers, clients and workers would start looking for alternative contracts, suppliers and work respectively.

Many simply choose to ignore their clear legal duty to consult - this is what appears to have happened in the December 2014 collapse of the courier and logistics firm [REDACTED], director of [REDACTED] (the entity which provided finance to [REDACTED]) stated to a joint session of the Parliamentary BIS and Scottish Affairs committees investigating the issues that:

"...if you really want to see a company fail very quickly, you can consult with your staff about redundancy well before the date."<sup>57</sup>

And [REDACTED], former chief executive of [REDACTED] said:

"...given the outlook of the business, it was better for us not to start the consultation process..."<sup>58</sup>

Where an employer is facing insolvency, consultation is often not high up their list of priorities. An employer likely takes legal advice on the range of their duties, but for a variety of reasons (such as lack of repercussions for them personally or for the finances of the company) does not treat the duty to consult with much seriousness. Drawing on our experience from the December 2014 collapse of [REDACTED], the directors received legal advice, at least as early as October 2014<sup>59</sup>, on the need to consult. However, they did not carry out a consultation ahead of the company ceasing trading on 24 December 2014.

Not only do directors sometimes opt not to consult, but further, they expend some time and energy trying to conceal the company's situation including threatening legal proceedings for defamation against people who correctly suggest that the company is in difficulty. In the case of [REDACTED] on 21 November 2014, [REDACTED] - the then Chief Executive - wrote to senior managers who passed his message to suppliers in an attempt to quash "unfounded rumours"<sup>60</sup>.

Once a company has engaged an insolvency practitioner to take preparatory steps to appointment, a decision is often taken not to conduct a consultation with employees. In the case of [REDACTED] the company only formally entered administration on Christmas Eve, however, the legal trigger point for commencing consultation with employees (as soon as redundancies were contemplated<sup>61</sup>) was two to three months earlier. [REDACTED] said:

---

<sup>57</sup> Q222 [REDACTED]

<sup>58</sup> Q835 [REDACTED]

<sup>59</sup> Q191 [REDACTED]

<sup>60</sup> Q588 [REDACTED]

and Q24 [REDACTED]

<sup>61</sup> TULR(C)A 1992 provides that the employer must consult about its "proposals". The legal position is clear that a proposal is something less than a decision, therefore the employer must consult while its plans are still at a formative stage.



not appropriate for insolvency practitioners to expect the taxpayer to pay for the cost of their failure to comply with employment law obligations. The government should have the ability to recover from the insolvency practitioner the full cost of any Protective Awards.

- Insolvency practitioners should be required to pay a financial penalty where they fail to consult fully with unions or workplace representatives. The penalty could be equivalent to those which are payable by employers for failure to pay the national minimum wage on time or employment tribunal awards on time. The level of the financial penalty could be reduced according to how early consultation with trade unions is initiated by the employer and/ or the insolvency practitioner. The financial penalty should be paid to the workers affected by the failure to consult rather than to the Exchequer.
- The government should regularly publish a list of companies and insolvency practitioners who fail to carry out meaningful consultation with trade unions or workplace representatives.



**Question 10:**

**Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

In non-unionised workplaces, reps are rarely in place to deal with a major event such as an insolvency.

The need to elect employee representatives causes delays and involves an additional cost (eg having the ballot scrutinised) at a time when the employer's funds are limited.

Being a representative, unless properly supported, can be a thankless and onerous role that few people wish to fulfil. Unsurprisingly, employers often struggle to find people willing to stand for election as representatives. This can lead to employers encouraging someone to fill the role who is not necessarily wholly focused on best representing, or fully equipped to best represent, the workforce.

Additionally, rarely are there enough candidates to represent a fair spread of locations and grades. Also, elected reps generally have more in-demand skills and frequently leave to join another employer before the conclusion of the consultation. This results either in the necessity for a further election or a reduction in the number of reps.

In order to address this problem, the government should:

- Make it easier for unions to achieve recognition and provide incentives to employers which recognise trade unions for the purposes of collective bargaining
- Actively promote the benefits of continuous consultation and dialogue between employers, trade unions and workforce representatives at all times and not just in emergency situations or where restructuring is being considered.
- Encourage employers to establish information and consultation forums under the auspices of the Information and Consultation of Employee Regulations.

**Question 11:**

**How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

In the case of the entering into insolvency in 2014 of the courier and logistics firm [REDACTED], the insolvency practitioner planned to use the company's managerial structure to cascade information down<sup>69</sup> plus visit almost all of the sites. Breaking with the usual practice of addressing staff on the day of appointment<sup>70</sup>, the insolvency practitioner put off notification for a few days. The information eventually leaked out. The directors should have retained responsibility for consultation and notification rather than delegating it to the insolvency practitioner.

The information provided by the company to the insolvency practitioners is often flawed (either wrong or out of date).<sup>71</sup> If the company were candid with its workforce about an impending insolvency, there would be time to check contact details while the workforce is still at locations controlled by the employer.

Directors and insolvency practitioners do not focus sufficiently on employment relations issues. During the handover process, it is important for directors to inform the insolvency practitioner if they have recognition agreements with any trade unions and to provide them with contact details of union representatives and national officials.

Directors should also hand over any collective agreements, including those setting out redundancy policies and procedures, as well as contracts of employment and staff handbooks. This would help to ensure that insolvency practitioners are better positioned to deal with outstanding employment relations issues.

---

<sup>69</sup> Q496 [REDACTED]

<sup>70</sup> Q503 [REDACTED]

<sup>71</sup> Qs 519 - 520 [REDACTED]

**Question 12:**

**How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

In the case of the entering into insolvency in 2014 of the courier and logistics firm [REDACTED], a warning from the insolvency practitioner to the Insolvency Service on 9 December 2014 about the impending insolvency, was passed to BIS on 10 December 2014<sup>72</sup>. BIS was not formally contacted by [REDACTED] until 18 December 2014 (by phone) with written confirmation (by email on 19 December 2014) following.<sup>73</sup>

[REDACTED] directors were not aware that the Insolvency Service had been contacted and at no point did itself contact the Insolvency Service to warn about and discuss impending mass redundancies.<sup>74</sup>

In order for BIS to be better able to meaningfully assist and advise struggling companies, BIS and the Insolvency Service should issue an explanation to employers about when the department expects to be contacted about the risk of large scale redundancies. The union also urges BIS to establish a rapid response team empowered to intervene and inform workers itself.

Following hearing of the insolvency, the Scottish government wished to contact the workers direct in order to be able to assist them. However, the insolvency practitioner refused to pass the contact details of the employees at depots in Scotland to the Scottish government. The stated reason for declining the government's request was an overly-cautious approach to data protection, specifically that to have done so would have breached the Data Protection Act 1998.<sup>75</sup>

As a result of declining to pass workers details to the proper authorities, the task of contacting and handling enquiries from the workforce of around 5,000 people fell solely to the insolvency practitioner.

The fees paid to insolvency practitioners, including the hourly charged rate, are high<sup>76</sup>. Administration lasts for several months but just for the period between 24 December 2014 and 30 January 2015, Ernst & Young charged over £1.7m for its work on [REDACTED].<sup>77</sup>

And the figure of £1.7m does not include the amounts charged for work on [REDACTED] subsidiaries such as [REDACTED] or the insolvency practitioner's expenses. It is not just the total amount that insolvency practitioners charge, but also their hourly rates that are of concern. In the case of [REDACTED] this includes £250 per hour for support staff, plus IT support provided by (or perhaps to) Senior

---

<sup>72</sup> Q244 [REDACTED]

and Q472 [REDACTED]

<sup>73</sup> Q259 [REDACTED]

<sup>74</sup> Qs 591 – 592 [REDACTED]

<sup>75</sup> Qs 512 - 515 [REDACTED]

<sup>76</sup> Q185 [REDACTED]

<sup>77</sup> Bottom right hand corner of page 32 (as labelled, but sequentially page 34) of Joint Administrator's Proposals [REDACTED]

Executives at £365 per hour<sup>78</sup>. The lowest grade providing work had an average charge out rate of £176 per hour – that is for work as basic as stuffing envelopes.<sup>79</sup>

The data protection rules should be changed or clarified to avoid a repetition of such expense. This is what the BIS and Scottish Affairs Committees jointly recommended following their investigation into the collapse of [REDACTED].<sup>80</sup>

The government should encourage employers and insolvency practitioners to provide recognised unions with a copy of the completed HR1 form notifying the Secretary of State of proposed redundancies. And it would be helpful if BIS were to agree a memorandum between the Insolvency Service, insolvency practitioners and the TUC and unions agreeing that unions are provided with early notice of proposed redundancies, particularly in larger workplaces.

---

<sup>78</sup> Middle of page 32 (as labelled, but sequentially page 34) of Joint Administrator's Proposals

[REDACTED]

<sup>79</sup> Q514

[REDACTED]

<sup>80</sup> Recommendation 9

[REDACTED]

### Question 13:

#### Could the process requirements for consultation be further clarified or improved?

In the UK, employers usually put off commencing a consultation until they have decided on the course of action which they intend to take. This means that the majority of consultations fail *ab initio* on two counts – timing (the “consultation” commencing well after the risk of redundancies has arisen) plus a failure to take into account the workforce’s views (the decision on what action to take rarely being meaningfully amended).

Where a company anticipates that it may be at risk of insolvency, it or its finance providers will usually engage professional advisors, in order to explore all the options (such as restructuring/ selling off part of the business). At this point the employer should commence a consultation. Professional advisors should be required, on engagement, to issue a set notice to the employer advising them of the need to consult plus setting out what a consultation involves.

The law relating to collective redundancy consultation should be further clarified and improved as follows:

- The 90 day minimum period for consultation<sup>81</sup> in mass redundancies involving 100 or more employees should be restored.
- The right to have employee representatives consulted on collective redundancies should be extended to all ‘workers’ including the self-employed who provide services on a personal basis to the employer.
- The right for the representatives of fixed-term contract employees who are at the end of their contractual term to be consulted should be restored.
- The decision of the ECJ in *Usdaw v Ethel Austen* should be reversed to ensure that employers are required to consult where 20 or more employees are at risk of redundancy.
- It would be helpful if there was statutory recognition of when the duty to consult is triggered. Employers must start consultations when they first contemplate that redundancies may occur<sup>82</sup>.
- The limits on the forms and amount of remuneration which employees can recover from the Redundancy Payments Office should be removed. Individuals should be able to recover all payments which are legally owed to them by the insolvent employer, including contractual holiday and sick pay, enhanced redundancy payments and unpaid employment tribunal awards.
- The limit on preferential debts in insolvency should be removed. The limit is currently £800 and has not increased since 1976.
- Trade unions are currently unable to recover employment fees from the Redundancy Payments Office following a successful application for a Protective Award. Fees for lodging claims with the employment tribunal should be waived in cases where claims are brought against insolvent employers.

The government should also take active steps to encourage a culture of regular consultation between employers and employee representatives in the UK. In particular, the Information and Consultation of Employees (ICE) Regulations should be substantially revised. For proposals for reform of the ICE Regulations see the TUC’s report on *Democracy in the Workplace*.<sup>83</sup>

---

<sup>81</sup> i.e. the period between when the employer notifies the Secretary of State of potential redundancies and the date when the first dismissals can take place.

<sup>82</sup> TULR(C)A 1992 provides that the employer must consult about its “proposals”. The legal position is clear that a proposal is something less than a decision, therefore the employer must consult while its plans are still at a formative stage.

<sup>83</sup> <https://www.tuc.org.uk/economic-issues/corporate-governance/economic-analysis/democracy-workplace-strengthening-information>

**Question 14:**

**Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

Online information provided by the government on employment rights during insolvency has been reduced and made considerably less easy to navigate and understand, since the excellent “directgov” and “businesslink” websites (previously operated by Thomson Reuters) were discontinued.

The information on the Insolvency Service section of the “gov.uk” site is helpful (especially the information on what will be paid by the National Insurance Fund). However, the content is somewhat limited. The content that is presented there is aimed at the right level and a simple “Google” search returns the relevant page. However, the content is so brief that it encourages the reader to look elsewhere to less reliable sources or call the helpline (which is unlikely to be cost efficient to operate).

We find that, reflecting the increase in irregular work contracts, many insolvencies involve workers who though labelled as self-employed, may in fact be employees.

In the case of the entering into insolvency in 2014 of the courier and logistics firm [REDACTED] a very high proportion of the staff were treated as self-employed<sup>84</sup>, we believe incorrectly<sup>85</sup>.

A simple online flow-chart or tick-box questionnaire on employment status, such as the Employment Status Indicator<sup>86</sup>, should be linked to from the Insolvency Service pages.

Also, a list of the order of creditors, such as the one made available by the BIS and Scottish Affairs Parliamentary committees<sup>87</sup>, would be helpful.

Acas should be asked to develop guidance on the importance of collective redundancy consultation in insolvency situations. The guidance should be modelled on the existing *How to Manage Collective Redundancies* document.<sup>88</sup> Acas should also be asked and funded to provide employment relations training for insolvency practitioners.

Professional bodies with responsibility for regulating insolvency practitioners should also be encouraged by government to prepare Statements of Insolvency Practice (SIPs) covering the duty to consult on collective redundancies. Such SIPs could improve the consistency of practice amongst licensed insolvency practitioners.

---

<sup>84</sup> 78% of the workforce were categorised as self-employed

Q672 [REDACTED]

<sup>85</sup> Q111 [REDACTED]

<sup>86</sup> <https://www.gov.uk/employment-status-indicator>

<sup>87</sup> Page 24 <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmsscota/928/928.pdf>

<sup>88</sup> [http://www.acas.org.uk/media/pdf/p/s/How\\_to\\_manage\\_collective\\_redundanciesAPRIL\\_2013%28FINAL%29.pdf](http://www.acas.org.uk/media/pdf/p/s/How_to_manage_collective_redundanciesAPRIL_2013%28FINAL%29.pdf)

**Question 15:**

**How can Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

The government should adopt the following measures:

- Failure to engage in early consultation should be a factor in determining whether individuals should be considered not to be a fit and proper person to act as a Director.
- Insolvency practitioners should be required to report on whether Directors commenced consultation before the formal insolvency process started.
- The government should take a more proactive approach to business rescue by facilitating rescue packages and by funding the wages bill for insolvent firms during the consultation process.
- Rather than attacking trade union rights, the government should encourage employers to recognise trade unions and to establish information and consultation forums which operate continuously and not just in response to crises.
- Both directors and insolvency practitioners should be held to be individually liable where they fail to carry out meaningful consultation with trade unions and workplace representatives.

Where the failure lies with the insolvency practitioner, an employment tribunal should be given the power to join the insolvency practitioner as a party to proceedings either on the application of the claimants, or of its own motion. The tribunal should be given the power to make the insolvency practitioner as well as the company and directors jointly and severally liable for the Protective Award and/ or to impose a fine on the insolvency practitioner which would be payable to the relevant employees. This could be deducted from the insolvency practitioner's fees for handling the insolvency.

Many directors and insolvency practitioners simply choose to ignore their clear legal duty to consult - this is what appears to have happened in the 2014 collapse of the courier and logistics firm [REDACTED]. [REDACTED], director of [REDACTED] (the entity which provided finance to [REDACTED]) stated to a joint session of the Parliamentary BIS and Scottish Affairs committees investigating the issues that:

“...if you really want to see a company fail very quickly, you can consult with your staff about redundancy well before the date.”<sup>89</sup>

And [REDACTED], former chief executive of [REDACTED] said:

“...given the outlook of the business, it was better for us not to start the consultation process...”<sup>90</sup>

Where an employer is facing insolvency, consultation is often not high up their list of priorities. An employer likely takes legal advice on the range of their duties, but for a variety of reasons (such as lack of repercussions for them personally or for the finances of the company) does not treat the duty to consult with much seriousness. Drawing on our experience from the 2014 collapse of [REDACTED], the

---

<sup>89</sup> Q222 [REDACTED]

<sup>90</sup> Q835 [REDACTED]

directors received legal advice, at least as early as October 2014<sup>91</sup>, on the need to consult. However, they did not carry out a consultation ahead of the company ceasing trading on 24 December 2014.

Not only do directors sometimes opt not to consult, but further, they expend some time and energy trying to conceal the company's situation including threatening legal proceedings for defamation against people who correctly suggest that the company is in difficulty. In the case of [REDACTED] on 21 November 2014, [REDACTED] - the then Chief Executive - wrote to senior managers who passed his message to suppliers in an attempt to quash "unfounded rumours"<sup>92</sup>.

Once a company has engaged an insolvency practitioner to take preparatory steps to appointment, a decision is often taken not to conduct a consultation with employees. In the case of [REDACTED], the company only formally entered administration on Christmas Eve, however, the legal trigger point for commencing consultation with employees (as soon as redundancies were contemplated<sup>93</sup>) was two to three months earlier. [REDACTED] said:

"That it was absolutely doomed to be the end [REDACTED] really became clear late in the autumn [of 2014]."<sup>94</sup>

and he added:

"As a going concern and stand-alone business, I do not think we [REDACTED] had much faith in it [REDACTED] from some time in November [2014]"<sup>95</sup>

[REDACTED] chief executive [REDACTED] said:

"we [REDACTED] with advisors] started the review process [ie considered radical restructure including closing down] on 9 October [2014]"<sup>96</sup>

Even once active steps were taken anticipating insolvency and redundancies, still workers were not informed of their impending fate. On 9 December 2014, the decision was taken to set up a subsidiary "phoenix" company<sup>97</sup> and the insolvency practitioner decided to notify the Insolvency Service that mass redundancies would take place.<sup>98</sup> (No warning was issued to workers<sup>99</sup> until the RMT publicised what was occurring).

---

<sup>91</sup> Q191 [REDACTED]

<sup>92</sup> Q588 [REDACTED]

and Q24 [REDACTED]

<sup>93</sup> TULR(C)A 1992 provides that the employer must consult about its "proposals". The legal position is clear that a proposal is something less than a decision, therefore the employer must consult while its plans are still at a formative stage.

<sup>94</sup> Q162 [REDACTED]

<sup>95</sup> Q164 [REDACTED]

<sup>96</sup> Q579 [REDACTED]

<sup>97</sup> Q580 [REDACTED]

<sup>98</sup> Q472 [REDACTED]



However, [REDACTED] directors were not aware that the Insolvency Service had been contacted and at no point did [REDACTED] itself contact the Insolvency Service to warn about and discuss impending mass redundancies.<sup>100</sup>

Our experience of [REDACTED] suggests that directors place a high value on their own compliance with certain rules, breach of which might threaten their ability to keep or take up other directorships after their existing company's demise. It is odd that there are no personal ramifications for directors and insolvency practitioners arising from their failure to consult with the workforce, given the scale of the financial burden that is being transferred to the state. This needs to be corrected. Where directors unreasonably fail to inform and consult with the workforce, that should be a matter that is relevant to whether they are fit to continue to hold directorships.

---

<sup>99</sup> Where the employer is required to give advance notification of redundancies to BIS pursuant to s.193 TULR(C)A 1992 they must supply a copy of that notification to each of the appropriate representatives (if there are any).

<sup>100</sup> Qs 591 – 592 [REDACTED]

**Question 16:**

**What would most encourage constructive engagement by employees when in this situation?  
And do you have any suggestions for how employee representatives can best be supported?**

The introduction of a statutory right to a reasonable amount of time off from work for all workers at a company facing insolvency in order that they can meet together, discuss the issues and receive advice. Guidance on what factors to take into account when assessing what constitutes a reasonable amount of time off would also be welcome.

Some complaints to an employment tribunal concerning the failure of an employer to collectively consult can only be brought by a representative on behalf of the workforce (rather than by individual workers themselves).

It is neither fair nor realistic for such an onerous and expensive (following the introduction of tribunal fees) responsibility to be placed on a representative not supported by a trade union. Such a responsibility can only be discharged by an individual with sufficient experience and support.

Trade union representatives and officials stand ready and willing to engage in constructive consultation with directors and insolvency practitioners where businesses are facing insolvency.

The government should encourage employers to recognise trade unions. Trade union representatives and officials are able to draw on insights and solutions used in other workplaces facing insolvency.

**Question 17:**

**Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

Frequently in insolvency situations employers and insolvency practitioners fail to meaningfully consult with trade unions. Where consultation does take place, it often starts far too late and is perfunctory. Unions therefore do not have the time or opportunity to develop alternative proposals or influence decisions.

**Question 18:**

**The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?**

The current sanctions for failure to consult are ineffective in an insolvency situation. Many simply choose to ignore their clear legal duty to consult - this is what appears to have happened in the 2014 collapse of the courier and logistics firm [REDACTED]. [REDACTED], director of [REDACTED] (the entity which provided finance to [REDACTED]) stated to a joint session of the Parliamentary BIS and Scottish Affairs committees investigating the issues that:

“...if you really want to see a company fail very quickly, you can consult with your staff about redundancy well before the date.”<sup>101</sup>

And [REDACTED], former chief executive of [REDACTED] said:

“...given the outlook of the business, it was better for us not to start the consultation process...”<sup>102</sup>

The Protective Award due for this flouting of the law, is often not paid by the employer - instead the cost is picked up by the state National Insurance Fund<sup>103</sup>.

Employers of more than a certain size (for example 250 people) should be required to lodge a refundable deposit (reviewable annually following submitting annual accounts to Companies House). Specifically, larger companies with a credit rating below a certain level, should have a certain amount of capital temporarily held by the National Insurance Fund. This would be repayable where an insolvency has occurred but consultation requirements are complied with, or forfeited in part or in full where the requirements are ignored.

In the case of [REDACTED], directors spent large sums of money on legal advice making sure that their own ability to continue to subsequently practice as directors was not compromised. Jon Moulton, director of [REDACTED] (the entity which provided finance to [REDACTED]) stated to a joint session of the Parliamentary BIS and Scottish Affairs committees investigating the issues that:

“We have taken very extensive legal advice throughout this process from first-class firms. The directors have had independent, expensive advice from a first-class firm.”<sup>104</sup>

[REDACTED] added:

“These guys [the directors of [REDACTED]] were taking advice from one of the best law firms there is, and they were making sure they were on the right side of it [the law].”<sup>105</sup>

---

<sup>101</sup> Q222 [REDACTED]

<sup>102</sup> Q835 [REDACTED]

<sup>103</sup> Under the provisions of s.182 of the Employment Rights Act 1996

<sup>104</sup> Q191 [REDACTED]

<sup>105</sup> Q360 [REDACTED]

Between 22 December and 26 December 2014, ██████ spent £463,000 on lawyers and accountants.<sup>106</sup> The “vast majority” of this was on lawyers.<sup>107</sup>

██████████, managing Director of ██████████ commented that:

“we could not act as directors without advice”<sup>108</sup>

What is not clear is whether directors are receiving advice to the effect that they need not worry about following the rules on consultation when the business is facing insolvency, or they are being advised to comply and are ignoring the advice. This advice is often legally privileged so it is hard to be certain in all cases. However, we have enough anecdotal evidence to suggest that some advisors are routinely flouting their professional codes of conduct by actively condoning the flouting of obligations to consult.

Certainly our experience of [REDACTED] suggests that directors place a high value on their own compliance with certain rules, breach of which might threaten their ability to keep or take up other directorships after their existing company's demise. However, they only seem willing to spend money (ie from a company's remaining cash) to ensure they are complying with rules on directors' conduct, breach of which may have personal repercussions for them (ie trading while insolvent). Specifically, directors are much less concerned about complying with rules on redundancy consultation.

EU law makes clear that the duty to consult applies equally in insolvency situations. Insolvency does not amount to a special circumstance justifying no consultation. Employment Tribunals also have the discretion to reduce Protective Awards if justified by circumstances.

The existing sanctions could usefully be strengthened. For example:

- Where directors or insolvency practitioners fail to consult then any subsequent decision or action by the employer should be reversed or treated as void until meaningful consultation with trade unions or workplace representatives has taken place. Such penalties would mirror practices in other EU countries and would create an incentive on banks and other lenders to encourage directors to consult with unions at an early stage, as failure to consult would delay the release of any assets held in the firm.
- Insolvency practitioners should face a degree of personal liability for failing to consult.
- The fine for failing to notify the Secretary of State of proposed redundancies should be increased.

106 Q784

107 Q789

108 Q788

**Question 19:**

**How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

It is time for the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service to be reviewed and refreshed. The union is particularly concerned that some insolvency practitioners are not always aware that inviting the Job Centre Plus into the workplace to provide advice to individuals facing redundancy and to provide job search assistance is an important part of the consultation process and can amount to mitigation of the impact of redundancies.

Increasing resourcing is also required to ensure that Job Centre Plus and associate advice agencies are well-equipped to provide a rapid response service.

**National Union of Rail, Maritime and Transport Workers**  
39 Chalton Street  
London NW1 1JD

12 June 2015



# Collective redundancy consultation for employers facing insolvency

Insolvency Service Call for Evidence: TUC Response

## Introduction

The Trades Union Congress (TUC) welcomes the opportunity to respond to the Insolvency Service call for evidence on collective redundancy consultation. The TUC has 51 affiliated trade unions which represent nearly 6 million people working in a wide range of occupations in the private and public sectors. Trade union officials have extensive experience of representing members and engaging with employers in insolvency situations.

Whilst one of the main aims of the Enterprise Act 2002 was to assist business rescues, the TUC is concerned by the level of business insolvencies during the economic downturn, particularly in the retail sector. Large companies, such as [REDACTED] and [REDACTED], have closed leading to massive job losses, with devastating implications for employees and wider communities.

The TUC is concerned that directors and insolvency practitioners frequently fail to inform and consult with trade unions and worker representatives in insolvency situations. Too often employees hear that their company is closing over the radio or via local newspapers. This leads to increased anxiety and means employees are not given time to identify alternative employment opportunities. As a result there is an increased reliance on welfare benefits.

The absence of timely and meaningful information and consultation means that the workforce representatives lose out on the opportunity and time to explore alternatives to business closure and means of saving jobs. Too often, the costs associated with failure to consult are not met by the employers but instead transfer to the taxpayer.

Loopholes in employment law mean that many of the most vulnerable in society, including agency workers, zero-hours contract workers and the self-employed are unable to recover unpaid wages and compensation for lack of consultation, due to their employment status.

The TUC believes that urgent action is needed by government to ensure that early and meaningful consultation between employers, insolvency practitioners and trade unions becomes the norm in insolvency situations. This response sets out a range of policy recommendations which support this objective.

## Responses to consultation questions

### Employers' Understanding

#### **Question 1:**

**What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.**

The TUC is concerned that that employment law obligations and the requirement to consult are some of the last factors considered by employers and insolvency practitioners where a business or company is facing insolvency.



Where businesses are at risk of closing, insolvency practitioners face a conflict of interest. They consider that their primary responsibility is to protect the interests of creditors, particularly those with secured debts. The interests of employees are given secondary consideration. Indeed the TUC is concerned that the current legal framework creates a disincentive on directors and insolvency practitioners to consult with trade unions and worker representatives where businesses are at risk of insolvency.

Many directors and insolvency practitioners make a judgement call that the financial penalties for failing to consult are less than the costs of continuing to run the business during the consultation period. This was the view expressed by directors following the closure of [REDACTED]. The cost-benefit analysis is further weighted against consultation because the financial costs associated with employers' failure to consult are transferred to the taxpayer once the business enters insolvency. The absence of any personal liability also means that insolvency practitioners have no direct incentive to ensure that collective redundancies consultation takes place.

These calculations fail, however, to take into account the human costs associated with business closure, including the impact on employees, their families and the wider community. They also disregard the wider economic implications associated with business failure and the loss of high value, skilled employment.

## Question 2:

**How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.**

Experience from the economic downturn reveals that where genuine dialogue and co-operation takes place between employers, trade unions and the wider workforce, it is possible to avoid the need for business or plant closures, to save jobs and retain skilled workforces and to ensure that workers facing redundancy can access quality advice, training and job search support.

The key components of meaningful and effective consultation include:

- Consultation is more effective where it is based on **high trust relations between employers and trade unions**.
- **Employers should engage in early consultation with trade unions, and should meet regularly with union reps and officials during the consultation period.**
- **It is vital that consultation takes place whilst it is still possible for unions to influence key decisions** and well before of formal insolvency processes are triggered. Once a company has entered administration it is often difficult to achieve a business rescue and to save jobs. These problems are amplified in cases of liquidation and receivership.
- **Employers should supply union officials with full information and regular**

[REDACTED]

[REDACTED] London: The Stationary Office Ltd.

updates. Where necessary, due to commercial sensitivities, information can be provided on a confidential basis. However management should recognise the **benefits of open communication with the wider workforce.**

- Trades unions should be provided with the **opportunity and time to develop alternatives to business closure and mass redundancies.** Directors and insolvency practitioners should respond to union proposals, demonstrating how proposals have been adjusted in response.
- The company or insolvency practitioner should work with trade unions and government departments to invite **Jobcentre Plus' Rapid Response Service** ('PACE' in Scotland and 'ReAct' in Wales) to help the employees involved to retrain or find alternative work.
- Where appropriate, **government departments should put together rescue packages** and provide financing to cover the wages bill during the consultation period.
- Trade union representatives should be invited to **attend and participate in creditors' meetings.**

The TUC is concerned that too often in insolvency situations employers and insolvency practitioners fail to carry out any form of consultation with unions. Where consultation does happen, it often takes place at the last minute when it is impossible for union officials to influence any decisions or outcomes. Consultation is often a perfunctory, amounting to little more than a tick box exercise.

Recent high profile business closures illustrate the inadequacies of consultation practices in the UK:

- When the [REDACTED] collapsed in [REDACTED] the first the workforce heard about it was through the media: Administrators announced the redundancies without warning or consultation when it became clear that the government (ultimate owner of [REDACTED] which [REDACTED] was contracted to) would not step in to help fund a rescue. 1,200 jobs were lost but the taxpayer also lost out. The amount needed to keep the company afloat was reportedly less than the £3m finally awarded by the [REDACTED] in [REDACTED] and, as the company no longer existed, that bill had to be picked up by the government.
- Directors and insolvency practitioners seek to rely on confidentiality arguments to avoid engaging in any dialogue with the union. For example when [REDACTED] was in administration Usdaw officials were obliged to attend the court hearings to find out what was happening. Confidentiality agreements are a simple solution.
- [REDACTED], the RMT was made aware that the business was about to go into administration on [REDACTED]. The union advised their members, but no attempt was made by management to advise our members until an announcement was made on [REDACTED]. This was despite the union being advised by the administrators at a subsequent meeting on [REDACTED] that the company had been working with insolvency advisors since November without telling the staff or their union and also that the company was declared technically insolvent on the [REDACTED].

workers were clearly kept in the dark and worked up to the wire to ensure the deliveries were made. The RMT was told at the meeting with the administrators on that most of the redundancies would take place on

- went into administration on and by early the administrators had closed all of stores, offices and distribution centres making nearly 30,000 people redundant. Usdaw, which was recognised to represent retail staff, was made aware that the company was about to go in to administration through press reports. The union was not contacted by the company in advance of the announcement and received no response to repeated messages left for them.

The union approached the administrators directly to seek assurances and co-operation from them. However, the administrators then issued several briefings on the company's intranet to staff containing key information, which were not shared or discussed with the union. The union was not advised of any progress on the selling of stores, including the purchase of 51 stores by which they learned of through the media.

Despite the union making it clear that the duty to consult was not being fulfilled, the administrators continued to make no discernible effort to improve communications. In the only meeting that the union was invited to, just one hour was allocated for discussions. The union's National Officer attended this meeting in person and 50-60 other people participated by conference call. The administrators delivered a scripted message announcing 807 store closures, with no opportunity for the union to raise concerns in any detail. These store closures all took effect between eleven and eighteen days after the meeting.

In , Usdaw won a protective award amounting to nearly £70 million for over 24,000 former employees of after an Employment Tribunal found that had failed in its statutory duty to consult with Usdaw before making the redundancies.

- went into administration on It was already clear the company was in financial difficulty, and the Union, Usdaw, had recommended acceptance in a ballot of members of a number of contractual changes and a pay freeze, earlier in the year. The aim of this was to save jobs.

The union was informed by the HR Director that the company had gone into administration on 30 June 2011, and had been given no prior warning that this may happen. The union met with the administrators on 4 July and were assured that they would be consulted as the situation developed. However, the Administrators took absolutely no steps to do so, but merely informed the union of closures, store sales and Head Office redundancies after they had been announced. On every occasion the staff had already been given notice of dismissal before the union was informed.

Employers also exploit loopholes in employment legislation to avoid the duty to consult. For example:

- Employers break up undertakings into small establishments employing fewer than 20 employees. The recent decision of the European Court of Justice in *Ushaw v Ethel Austin* is likely to encourage such practices.

- Organisations employ individuals on a casual or self-employed basis to ensure that they do not qualify as employees. Such individuals often have many of the same characteristics as employees. However due to their employment status they lose out on the right to consultation and the ability to recover unpaid wages from the redundancy payments office. Recent events at [REDACTED] illustrate these issues:
  - Previously directly employed [REDACTED] drivers were made redundant and taken back under contract to [REDACTED] as owner drivers where they had to buy their own [REDACTED] uniform and lease / own their own [REDACTED] van. They were for all intents and purposes employed by the company. Yet these staff not received payment for work they have done but also as they are technically classified as self employed they not only missed out on redundancy payments.
- Employers and administrators sometimes dismiss the workforce before sale of the business take effect with a view to avoiding TUPE protections.

There is also evidence of employers and insolvency practitioners failing to comply with the duties to notify the Secretary of State for Business, Innovation and Skills about expected redundancies. For example:

- During the closure of Comet, it was reported that the insolvency practitioner had signed a letter which failed to notify the Secretary of State about proposed redundancies.<sup>2</sup>

### Question 3:

**What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

Meaningful consultation between employers, insolvency practitioners and trade unions can yield substantial benefits for businesses, workers, local communities and the taxpayer. For example:

- Unions will often develop alternatives to business closure and job cuts, such as workforce restructuring, short-term pay freezes and short-hours working.
- The consultation period can provide companies with the time needed to restructure, refinance, identify new orders or identify potential buyers. It can also provide the necessary time to convince the workforce that changes are necessary and to achieve worker buy-in for restructuring exercises or changes to terms and conditions which are necessary for the business to continue operating.
- Employees retain employment until a potential buyer for the business is identified and their contracts can be transferred to a new employer. Such employees will also benefit from TUPE-related rights.
- Employees have the time to adjust and to identify new employment

<sup>2</sup> [REDACTED]  
[REDACTED]

opportunities.

- During the consultation period, Jobcentre Plus' Rapid Response Service ('PACE' in Scotland and 'ReAct' in Wales) can be invited into the workplace to provide employees with information about job vacancies in the local area and to assist them in accessing training. They can also advise individuals about benefit claims and how to recover unpaid wages from the Redundancy Payments Office.
- The workforce and local communities is more likely to be reassured that all options are being fully explored.
- The costs incurred by the taxpayer will be reduced.

#### **Question 4:**

**In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

Union officials are well-equipped to explore options for business rescue, including restructuring, changes to terms and conditions, identifying potential buyers and identifying new orders. They can often draw upon wide-ranging experience and solutions from other businesses which have faced financial crises.

During the economic downturn, many private sector employers engaged in meaningful consultation with recognised trade unions. The negotiated agreements achieved positive outcomes, including business rescues, reduced job losses, the retention of skilled workforces and assistance provided to those facing redundancies.

Examples include:

- At ██████████ following the loss of the ██████████ contract to ██████████ in 2011, the company announced mass redundancies, the closure of the ██████████ site and a review of their UK operations. Management met regularly, on at least a weekly basis, with recognised trade unions. The consultation period provided unions and management with the opportunity to identify and win new contracts, to review shift patterns and staffing structures. The company, unions and Government departments (DWP, BIS etc) invited appropriate agencies to visit the site to assist in job search. As a result of the ongoing discussions, there all compulsory redundancies were avoided.
- During the economic downturn, unions worked with employers at ██████████ ██████████ to avoid serious job losses and to protect the future of the company. Following lengthy consultation, unions and their members agreed a year pay freeze and a shorter working week. The unions also agreed to move labour between two plants to save jobs.

Union learning reps (ULRs) also support people at the workplace during redundancy exercises by:

- Finding out learning and support needs and organising learning activities in the workplace (such as CV workshops, job search, Skills for Life, ICT, financial management etc)

- Providing advice and information on learning opportunities including by referring people to adult career advice such as Next Step (or providing this service themselves if they are qualified)
- Working with external stakeholders such as learning providers and Jobcentre Plus

Findings from the 2011 WERS Survey confirm the effectiveness of consultation in redundancy situations. According to the survey, 40 per cent of workplaces that engaged in consultation on redundancies, manager's original proposals were altered as a result of consultation. In 18 per cent of workplaces multiple changes were made. In nearly a quarter of workplaces (22 per cent) consultation led to the numbers of redundancies being reduced; in 14 per cent of workplaces strategies for redeployment were identified or changed; redundancy payments were increased in 10 per cent and additional assistance for individuals facing redundancy was introduced in 19 per cent of workplace.

## Facilitators and Inhibitors

### Question 5:

**What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.**

A number of factors help to facilitate effective consultation in insolvency situations. These include:

- Consultation is more effective where it is based on **high trust relations between employers and recognised trade unions**. The examples cited in response to Question 4 came from workplaces where employers have longstanding recognition agreements and good industrial relations with trade unions.
- Employers who recognise trade unions or have well developed information and consultation forums are more likely start consultation and to share information relating to financial risks at an early stage.
- Access to government rescue packages or government loans which finance the wages bill during the consultation period can also be critical in supporting business rescues.

### Question 6:

**What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

There are a range of factors which inhibit effective consultation. These include:

- Insolvency practitioners face a conflict of interest. Their primary responsibility is to protect the interests of creditors, particularly those with secured debts. The interests of employees are treated as a secondary consideration.
- The legal framework creates an incentive for employers and insolvency practitioners to avoid consultation. Many directors and insolvency

practitioners conclude that as the financial penalties for failing to consult are less than the costs of continuing to run the business during the consultation period, they should ignore their legal obligations to consult. The absence of personal liabilities means that insolvency practitioners have no direct incentive to engage in consultation.

- The fees paid to insolvency practitioners, including the hourly charged rate, are high. This limits the level of resource available to cover debts owed to employees and creates an incentive to curtail the consultation period. The TUC believes that the current fees regime should be reviewed.

### **Question 7:**

**What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.**

There are a range of factors which negatively impact on the quality and effectiveness of consultation. These include:

- Many workplaces lack the high-trust employment relations systems which facilitate effective consultation in insolvency situations. Levels of trade union recognition remain low in the UK. Unlike many EU counterparts, the UK also does not have an effective framework for information and consultation of employees. This is in part due to the inadequacies of the Information and Consultation of Employees Regulations 2004.
- Non-union workplace representatives frequently lack the expertise or necessary agency to engage in meaningfully consultation on behalf of the wider workforce.
- Insolvency practitioners frequently lack the necessary awareness and experience of employment law obligations and industrial relations practices.
- Directors can be held personally liable if they continue to operate firms which are insolvent. The time available for consultation can also be severely curtailed because the company cannot afford to continue to pay the wages bill.
- Insolvency practitioners face pressures from creditors, including banks and financial institutions and private equity firms, to wind the company up and release financial assets.

## **The Role of Directors**

### **Question 8:**

**Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

There is no practical evidence that professional advisers inform directors of their duty to start consultation on potential redundancies well in advance of any formal insolvency procedure. If such advice is being provided, it is not heeded by employers.

Indeed the TUC is concerned that advice provided by professionals may focus on ways of avoiding consultation obligations rather than on effective engagement.

#### **Question 9:**

**Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

No. The TUC is concerned that directors and insolvency practitioners either decide not to engage in consultation at all or leave it until the very last minute when unions have limited or no prospect of influencing decisions or outcomes.

As outlined above, the TUC believes that the current legal framework creates an incentive on both directors and insolvency practitioners to avoid or ignore consultation requirements in insolvency situations. The TUC would encourage the government to adopt a range of measures to reverse this situation, including:

- Insolvency practitioners should face personal liability where consultation does not place. It is not appropriate for insolvency practitioners to expect the taxpayer to 'foot the bill' for their failure to comply with employment law obligations. Arguably the government should have the ability to recover from the insolvency practitioner the full cost of any protective awards.
- Failing this, insolvency practitioners should be required to pay a financial penalty where they fail to consult fully with unions or workplace representatives. The penalty could be equivalent to those which are payable by employers for failure to pay the national minimum wage on time or employment tribunal awards on time. The level of the financial penalty could be reduced according to how early consultation with trade unions is initiated by the employer and / or the insolvency practitioner. The financial penalty should be paid to the workers affected by the failure to consult rather than to the Exchequer.
- The government should regularly publish a list of companies and insolvency practitioners who fail to carry out meaningful consultation with trade unions or workplace representatives.

#### **Question 10:**

**Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

As noted above, union official stand ready to engage in consultation on collective redundancies.

The TUC however recognises that in non-unionised workplaces, the need to elect workplace reps can cause delays and creates a disincentive for directors and insolvency practitioners to avoid consultation on proposed redundancies.

In order to address this problem, the TUC believes that the government should:

- Actively encourage employers to recognise trade unions for the purposes of collective bargaining



- Actively promote the benefits of continuous consultation and dialogue between employers, trade unions and workforce representatives at all times and not just in emergency situations or where restructuring is being considered.
- Encourage employers to establish information and consultation forums under the auspices of the Information and Consultation of Employee Regulations.

#### **Question 11:**

##### **How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

The TUC is concerned that directors and insolvency practitioners do not focus sufficiently on employment relations issues. During the handover process, it is important for directors to inform the insolvency practitioner if they recognise any trade unions and to provide them with contact details of union representatives and national officials. Directors should also hand over any collective agreements, including those setting out redundancy policies and procedures, as well as contracts of employment and staff handbooks. This would help to ensure that insolvency practitioners are better positioned to deal with outstanding employment relation issues.

#### **Question 12:**

##### **How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

The government should encourage employers and insolvency practitioners to provide recognised unions with a copy of the completed HR1 form notifying the Secretary of State of proposed redundancies.

It would be helpful if BIS were to agree a memorandum between the insolvency services, insolvency practitioners and the TUC and unions agreeing that unions are provided with early notice of proposed redundancies, particularly in larger workplaces.

#### **Question 13:**

##### **Could the process requirements for consultation be further clarified or improved?**

There is a case for clarifying and strengthening the law relating to collective redundancy consultation. Proposals include:

- The 90 day minimum period for consultation<sup>1</sup> in mass redundancies involving 100 + employees should be restored.
- The right to have employee representatives consulted on collective redundancies should be extended to all 'workers' including the self-employed who provide services on a personal basis to the employer.
- The right for the representatives of fixed term contract employees who are at

<sup>1</sup> i.e. the period between when the employer notifies the Secretary of State of potential redundancies and the date when the first dismissals can take place.

the end of their contractual term to be consulted should be restored.

- The decision of the ECJ in *Usdaw v Ethel Austen* should be reversed to ensure that employers are required to consult where 20 or more employees are at risk of redundancy
- It would be helpful if the law was clarified on when the duty to consult is triggered. Employers should be encouraged to start consultations at an early stage when they first contemplate the need for redundancies.
- The limits on the forms and amount of remuneration which employees can recover from the Redundancy Payments Office should be removed. Individuals should be able to recover all payments which are legally owed to them by the insolvent employer, including contractual holiday and sick pay, enhanced redundancy payments and unpaid employment tribunal awards.
- The limit on preferential debts in insolvency should be removed. The limit is currently £800 and has not increased since 1976.
- Trade unions are unable to recover employment fees from the Redundancy Payments Office following a successful application for a protective award. The TUC believes that ET fees should be waived in cases where claims are brought against insolvent employers.

The government should also take active steps to encourage a culture of regular consultation between employers and employee representatives in the UK. In particular, the Information and Consultation of Employees (ICE) Regulations should be substantially revised. For our proposals for reform of the ICE Regulations see the TUC's report on *Democracy in the Workplace*.<sup>4</sup>

#### **Question 14:**

**Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

Acas should be asked to develop guidance on the importance of collective redundancy consultation in insolvency situations. The guidance should be modelled on the existing *How to Manage Collective Redundancies* document.<sup>5</sup> Acas should also be asked and funded to provide employment relations training for insolvency practitioners.

Professional bodies with responsibility for regulating insolvency practitioners should also be encouraged by government to prepare Statements of Insolvency Practice (SIPs) covering the duty to consult on collective redundancies. Such SIPs could improve the consistency of practice amongst licensed insolvency practitioners.

#### **Question 15:**

<sup>4</sup> <https://www.tuc.org.uk/economic-issues/corporate-governance/economic-analysis/democracy-workplace-strengthening-information>

<sup>5</sup> [http://www.acas.org.uk/media/pdf/p/s/How\\_to\\_manage\\_collective\\_redundanciesAPRIL\\_2013%28FINAL%29.pdf](http://www.acas.org.uk/media/pdf/p/s/How_to_manage_collective_redundanciesAPRIL_2013%28FINAL%29.pdf)

**How can Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

The government should adopt the following measures:

- Insolvency practitioners should be required to report on whether Directors commenced consultation before the formal insolvency process started. Failure to engage in early consultation should be a factor in determining whether managers should be considered not to be a fit and proper person to act as a Director.
- Insolvency practitioners should be held to be individually liable where they fail to carry out meaningful consultation with trade unions and workplace representatives (see the response to question 9 for more detail).
- The government should take a more proactive approach to business rescue by facilitating rescue packages and by funding the wages bill for insolvent firms during the consultation process.
- Rather than attacking trade union rights, the government should encourage employers to recognise trade unions and to establish information and consultation forums which operate continuously and not just in response to crises.

**Question 16:**

**What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?**

Trade union representatives and officials stand ready and willing to engage in constructive consultation with directors and insolvency practitioners were businesses are facing insolvency.

The government should encourage employers to recognise trade unions. Trade union representatives and officials are able to draw on insights and solutions used in other workplaces facing insolvency.

**Question 17:**

**Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

Unions are not aware of any examples of constructive engagement by insolvency practitioners.

As noted throughout this response, frequently in insolvency situations employers and practitioners actively avoid consultation with trade unions. Where consultation does take place it often starts far too late and is perfunctory. Unions therefore do not have the time or opportunity to develop alternative proposals or influence decisions.

### **Question 18:**

**The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?**

The TUC believes that the current sanctions for failure to consult are proportionate. EU law makes clear that duty to consult applies equally in insolvency situations. Insolvency does not amount to a special circumstance justifying no consultation. Employment Tribunals also have the discretion to reduce protective awards if justified by circumstances.

In our opinion, the existing sanctions could usefully be strengthened. For example:

- Where directors or insolvency practitioner fails to consult then any subsequent decision or action by the employer should be reversed or treated as void until meaningful consultation with trade unions or workplace representatives have taken place. Such penalties would mirror practices in other EU countries and would create an incentive on banks and other lenders to encourage Directors to consult with unions at an early stage, as failure to consult would delay the release of any assets held in the firm.
- Insolvency practitioners should face a degree of personal liability for failing to consult.
- The fine for failing to notify the Secretary of State of proposed redundancies should be increased.

### **Question 19:**

**How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

The TUC believes that it is time for the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service to be reviewed and refreshed. The TUC is particularly concerned that some insolvency practitioners are not always aware that inviting the Job Centre Plus into the workplace to provide advice to individuals facing redundancy and to provide job search assistance is an important part of the consultation process and can amount to mitigation of the impact of redundancies.

Increasing resourcing is also required to ensure that Job Centre Plus and associate advice agencies are well-equipped to provide a rapid response service.

**Contact:**

Hannah Reed

020 7467 1336

[hreed@tuc.org.uk](mailto:hreed@tuc.org.uk)



**The Insolvency Service Call for evidence**  
**Collective Redundancy Consultation for Employers facing Insolvency**  
**UNISON submission**  
**June 2015**

**Introduction**

UNISON is the UK's largest public services trade union with more than 1.3 million members. Our members are people working in the public services, for private contractors providing public services and in the essential utilities. They include frontline staff and managers working full or part time in local authorities, the NHS, the police service, universities, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.

We have extensive experience of employment relations in small and large organisations including dispute resolution and efficiently negotiating fair pay and conditions for all employees.

We welcome the opportunity to respond to the Insolvency Service call for evidence on collective redundancy consultation. UNISON's response shares the concerns highlighted in the TUC's response, which brings together the experience of trade unions across the labour market. UNISON endorses the recommendations made by the TUC.

**General points**

UNISON is concerned that directors and insolvency practitioners frequently fail to inform and consult with trade unions and worker representatives in insolvency situations. This leads to increased anxiety and means employees are not given time to identify alternative employment opportunities. As a result there is an increased reliance on welfare benefits.

The absence of timely and meaningful information and consultation means that the workforce representatives lose out on the opportunity and time to explore alternatives to closure and means of saving jobs. Too often, the costs associated with failure to consult are not met by the employers but instead transfer to the taxpayer.

Loopholes in employment law mean that many of the most vulnerable in society, including agency workers, zero-hours contract workers and the self-employed are unable to recover unpaid wages and compensation for lack of consultation, due to their employment status.

UNISON believes that urgent action is needed by government to ensure that early and meaningful consultation between employers, insolvency practitioners and trade unions becomes the norm in insolvency situations.

## **Consultation questions**

Employers' Understanding

### **Question 1:**

**What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.**

UNISON is concerned that that employment law obligations and the requirement to consult are some of the last factors considered by employers and insolvency practitioners where a business or company is facing insolvency.

Where businesses are at risk of closing, insolvency practitioners face a conflict of interest. They consider that their primary responsibility is to protect the interests of creditors, particularly those with secured debts. The interests of employees are given secondary consideration. The the current legal framework creates a disincentive on directors and insolvency practitioners to consult with trade unions and worker representatives where businesses are at risk of insolvency.

Many directors and insolvency practitioners make a judgement call that the financial penalties for failing to consult are less than the costs of continuing to run the business during the consultation period. This was the view expressed by directors following the closure of [REDACTED]<sup>1</sup> The cost-benefit analysis is further weighted against consultation because the financial costs associated with employers' failure to consult are transferred to the taxpayer once the business enters insolvency. The absence of any personal liability also means that insolvency practitioners have no direct incentive to ensure that collective redundancies consultation takes place.

These calculations fail, however, to take into account the human costs associated with business closure, including the impact on employees, their families and the

---

<sup>1</sup> House of Commons Committees Report on Impact of the closure of [REDACTED] on Employment. First Joint Report of the Business, Innovation and Skills and Scottish Affairs Committees of Session 2014-15. Published on 23 March 2015. London: The Stationary Office Ltd.

wider community. They also disregard the wider economic implications associated with business failure and the loss of high value, skilled employment.

## Question 2:

**How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.**

Experience from the economic downturn reveals that where genuine dialogue and co-operation takes place between employers, trade unions and the wider workforce, it is possible to avoid the need for business or plant closures, to save jobs and retain skilled workforces and to ensure that workers facing redundancy can access quality advice, training and job search support.

The key components of meaningful and effective consultation include:

- Consultation is more effective where it is based on **high trust relations between employers and trade unions.**
- **Employers should engage in early consultation with trade unions, and should meet regularly with union reps and officials during the consultation period.**
- It is vital that **consultation takes place whilst it is still possible for unions to influence key decisions** and well before of formal insolvency processes are triggered. Once a company has entered administration it is often difficult to achieve a business rescue and to save jobs. These problems are amplified in cases of liquidation and receivership.
- Employers should supply union officials with full information and regular updates. Where necessary, due to commercial sensitivities, information can be provided on a confidential basis. However management should recognise the **benefits of open communication with the wider workforce.**
- Trades unions should be provided with **the opportunity and time to develop alternatives to business closure and mass redundancies.** Directors and insolvency practitioners should respond to union proposals, demonstrating how proposals have been adjusted in response.
- The company or insolvency practitioner should work with trade unions and government departments to invite **Jobcentre Plus' Rapid Response Service** ('PACE' in Scotland and 'ReAct' in Wales) to help the employees involved to retrain or find alternative work.
- Where appropriate, **government departments should put together rescue packages** and provide financing to cover the wages bill during the consultation period.
- Trade union representatives should be invited to **attend and participate in creditors' meetings.**

UNISON shares the concerns of the TUC that too often in insolvency situations employers and insolvency practitioners fail to carry out any form of consultation with unions. Where consultation does happen, it often takes place at the last minute

when it is impossible for union officials to influence any decisions or outcomes. Consultation is often a perfunctory, amounting to little more than a tick box exercise.

Employers also exploit loopholes in employment legislation to avoid the duty to consult. For example:

- Employers break up undertakings into small establishments employing fewer than 20 employees. The recent decision of the European Court of Justice in *Usdaw v Ethel Austin* is likely to encourage such practices.
- Organisations employ individuals on a casual or self-employed basis to ensure that they do not qualify as employees. Such individuals often have many of the same characteristics as employees. However due to their employment status they lose out on the right to consultation and the ability to recover unpaid wages from the redundancy payments office. Recent events [REDACTED] illustrate these issues:
  - Previously directly employed [REDACTED] drivers were made redundant and taken back under contract to [REDACTED] as owner drivers where they had to buy their own [REDACTED] uniform and lease / own their own [REDACTED] van. They were for all intents and purposes employed by the company. Yet these staff not received payment for work they have done but also as they are technically classified as self employed they not only missed out on redundancy payments.
- Employers and administrators sometimes dismiss the workforce before sale of the business take effect with a view to avoiding TUPE protections.

There is also evidence of employers and insolvency practitioners failing to comply with the duties to notify the Secretary of State for Business, Innovation and Skills about expected redundancies. For example:

- During the closure of [REDACTED], it was reported that the insolvency practitioner had signed a letter which failed to notify the Secretary of State about proposed redundancies.<sup>2</sup>

### Question 3:

**What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

Meaningful consultation between employers, insolvency practitioners and trade unions can yield substantial benefits for employers, workers, local communities and the taxpayer. For example:

- Unions will often develop alternatives to closure and job cuts, such as workforce restructuring, short-term pay freezes and short-hours working.
- The consultation period can provide companies with the time needed to restructure, refinance, identify new orders or identify potential buyers. It can also provide the necessary time to convince the workforce that changes are necessary and to achieve worker buy-in for restructuring exercises or changes to terms and

---

<sup>2</sup> <http://www.theguardian.com/business/2014/jun/22/deloitte-could-face-prosecution-comet-redundancies>



conditions which are necessary for the business to continue operating.

- Employees retain employment until a potential buyer for the business is identified and their contracts can be transferred to a new employer. Such employees will also benefit from TUPE-related rights.
- Employees have the time to adjust and to identify new employment opportunities.
- During the consultation period, Jobcentre Plus' Rapid Response Service ('PACE' in Scotland and 'ReAct' in Wales) can be invited into the workplace to provide employees with information about job vacancies in the local area and to assist them in accessing training. They can also advise individuals about benefit claims and how to recover unpaid wages from the Redundancy Payments Office.
- The workforce and local communities is more likely to be reassured that all options are being fully explored.
- The costs incurred by the taxpayer will be reduced.

#### **Question 4:**

**In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

Union officials are well-equipped to explore options for business rescue, including restructuring, changes to terms and conditions, identifying potential buyers and identifying new orders. They can often draw upon wide-ranging experience and solutions from other businesses which have faced financial crises.

During the economic downturn, many private sector employers engaged in meaningful consultation with recognised trade unions. The negotiated agreements achieved positive outcomes, including business rescues, reduced job losses, the retention of skilled workforces and assistance provided to those facing redundancies.

Union learning reps (ULRs) also support people at the workplace during redundancy exercises by:

- Finding out learning and support needs and organising learning activities in the workplace (such as CV workshops, job search, Skills for Life, ICT, financial management etc)
- Providing advice and information on learning opportunities including by referring people to adult career advice such as Next Step (or providing this service themselves if they are qualified)
- Working with external stakeholders such as learning providers and Jobcentre Plus

Findings from the 2011 WERS Survey confirm the effectiveness of consultation in redundancy situations. According to the survey, 40 per cent of workplaces that engaged in consultation on redundancies, manager's original proposals were altered as a result of consultation. In 18 per cent of workplaces multiple changes were made. In nearly a quarter of workplaces (22 per cent) consultation led to the numbers of redundancies being reduced; in 14 per cent of workplaces strategies for redeployment were identified or changed; redundancy payments were increased in

10 per cent and additional assistance for individuals facing redundancy was introduced in 19 per cent of workplace.

## **Facilitators and Inhibitors**

### **Question 5:**

**What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.**

A number of factors help to facilitate effective consultation in insolvency situations. These include:

- Consultation is more effective where it is based on **high trust relations between employers and recognised trade unions.**
- Employers who recognise trade unions or have well developed information and consultation forums are more likely start consultation and to share information relating to financial risks at an early stage.
- Access to government rescue packages or government loans which finance the wages bill during the consultation period can also be critical in supporting rescues.

### **Question 6:**

**What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

There are a range of factors which inhibit effective consultation. These include:

- Insolvency practitioners face a conflict of interest. Their primary responsibility is to protect the interests of creditors, particularly those with secured debts. The interests of employees are treated as a secondary consideration.
- The legal framework creates an incentive for employers and insolvency practitioners to avoid consultation. Many directors and insolvency practitioners conclude that as the financial penalties for failing to consult are less than the costs of continuing to run the business during the consultation period, they should ignore their legal obligations to consult. The absence of personal liabilities means that insolvency practitioners have no direct incentive to engage in consultation.
- The fees paid to insolvency practitioners, including the hourly charged rate, are high. This limits the level of resource available to cover debts owed to employees and creates an incentive to curtail the consultation period. UNISON agrees with the TUC that the current fees regime should be reviewed.

### **Question 7:**

**What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.**

There are a range of factors which negatively impact on the quality and effectiveness of consultation. These include:

- Many workplaces lack the high-trust employment relations systems which facilitate effective consultation in insolvency situations. Levels of trade union recognition remain low in the UK. Unlike many EU counterparts, the UK also does not have an effective framework for information and consultation of employees. This is in part due to the inadequacies of the Information and Consultation of Employees Regulations 2004.
- Non-union workplace representatives frequently lack the expertise or necessary agency to engage in meaningful consultation on behalf of the wider workforce.
- Insolvency practitioners frequently lack the necessary awareness and experience of employment law obligations and industrial relations practices.
- Directors can be held personally liable if they continue to operate firms which are insolvent. The time available for consultation can also be severely curtailed because the company cannot afford to continue to pay the wages bill.
- Insolvency practitioners face pressures from creditors, including banks and financial institutions and private equity firms, to wind the company up and release financial assets.

## **The Role of Directors**

### **Question 8:**

**Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

There is no practical evidence that professional advisers inform directors of their duty to start consultation on potential redundancies well in advance of any formal insolvency procedure. If such advice is being provided, it is not heeded by employers.

UNISON is concerned that advice provided by professionals may focus on ways of avoiding consultation obligations rather than on effective engagement.

### **Question 9:**

**Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

No. UNISON shares the TUC's concern that directors and insolvency practitioners either decide not to engage in consultation at all or leave it until the very last minute when unions have limited or no prospect of influencing decisions or outcomes.

UNISON believes that the current legal framework creates an incentive on both directors and insolvency practitioners to avoid or ignore consultation requirements in

insolvency situations. UNISON would encourage the government to adopt a range of measures to reverse this situation, including:

- Insolvency practitioners should face personal liability where consultation does not place. It is not appropriate for insolvency practitioners to expect the taxpayer to 'foot the bill' for their failure to comply with employment law obligations. Arguably the government should have the ability to recover from the insolvency practitioner the full cost of any protective awards.
- Failing this, insolvency practitioners should be required to pay a financial penalty where they fail to consult fully with unions or workplace representatives. The penalty could be equivalent to those which are payable by employers for failure to pay the national minimum wage on time or employment tribunal awards on time. The level of the financial penalty could be reduced according to how early consultation with trade unions is initiated by the employer and / or the insolvency practitioner. The financial penalty should be paid to the workers affected by the failure to consult rather than to the Exchequer.
- The government should regularly publish a list of companies and insolvency practitioners who fail to carry out meaningful consultation with trade unions or workplace representatives.

#### **Question 10:**

**Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

As noted above, union officials stand ready to engage in consultation on collective redundancies.

UNISON recognises that in non-unionised workplaces, the need to elect workplace reps can cause delays and creates a disincentive for directors and insolvency practitioners to avoid consultation on proposed redundancies.

In order to address this problem, UNISON believes that the government should:

- Actively encourage employers to recognise trade unions for the purposes of collective bargaining
- Actively promote the benefits of continuous consultation and dialogue between employers, trade unions and workforce representatives at all times and not just in emergency situations or where restructuring is being considered.
- Encourage employers to establish information and consultation forums under the auspices of the Information and Consultation of Employee Regulations.

#### **Question 11:**

**How does the handover from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

UNISON is concerned that directors and insolvency practitioners do not focus sufficiently on employment relations issues. During the handover process, it is important for directors to inform the insolvency practitioner if they recognise any trade unions and to provide them with contact details of union representatives and national officials. Directors should also hand over any collective agreements, including those setting out redundancy policies and procedures, as well as contracts of employment and staff handbooks. This would help to ensure that insolvency practitioners are better positioned to deal with outstanding employment relation issues.

**Question 12:**

**How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

The government should encourage employers and insolvency practitioners to provide recognised unions with a copy of the completed HR1 form notifying the Secretary of State of proposed redundancies.

It would be helpful if BIS were to agree a memorandum between the insolvency services, insolvency practitioners and the TUC and unions agreeing that unions are provided with early notice of proposed redundancies, particularly in larger workplaces.

**Question 13:**

**Could the process requirements for consultation be further clarified or improved?**

There is a case for clarifying and strengthening the law relating to collective redundancy consultation. Proposals include:

- The 90 day minimum period for consultation<sup>3</sup> in mass redundancies involving 100 + employees should be restored.
- The right to have employee representatives consulted on collective redundancies should be extended to all 'workers' including the self-employed who provide services on a personal basis to the employer.
- The right for the representatives of fixed term contract employees who are at the end of their contractual term to be consulted should be restored.
- The decision of the ECJ in *Usdaw v Ethel Austen* should be reversed to ensure that employers are required to consult where 20 or more employees are at risk of redundancy
- It would be helpful if the law was clarified on when the duty to consult is triggered. Employers should be encouraged to start consultations at an early stage when they first contemplate the need for redundancies.

---

<sup>3</sup> i.e. the period between when the employer notifies the Secretary of State of potential redundancies and the date when the first dismissals can take place.

- The limits on the forms and amount of remuneration which employees can recover from the Redundancy Payments Office should be removed. Individuals should be able to recover all payments which are legally owed to them by the insolvent employer, including contractual holiday and sick pay, enhanced redundancy payments and unpaid employment tribunal awards.
- The limit on preferential debts in insolvency should be removed. The limit is currently £800 and has not increased since 1976.
- Trade unions are unable to recover employment fees from the Redundancy Payments Office following a successful application for a protective award. UNISON believes that ET fees should be waived in cases where claims are brought against insolvent employers.

The government should also take active steps to encourage a culture of regular consultation between employers and employee representatives in the UK. In particular, the Information and Consultation of Employees (ICE) Regulations should be substantially revised. UNISON supports the proposals for reform of the ICE Regulations contained within the TUC's report on *Democracy in the Workplace*.<sup>4</sup>

#### **Question 14:**

**Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

Acas should be asked to develop guidance on the importance of collective redundancy consultation in insolvency situations. The guidance should be modelled on the existing *How to Manage Collective Redundancies* document.<sup>5</sup> Acas should also be asked and funded to provide employment relations training for insolvency practitioners.

Professional bodies with responsibility for regulating insolvency practitioners should also be encouraged by government to prepare Statements of Insolvency Practice (SIPs) covering the duty to consult on collective redundancies. Such SIPs could improve the consistency of practice amongst licensed insolvency practitioners.

#### **Question 15:**

**How can Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

UNISON agrees with the TUC that the government should adopt the following measures:

---

<sup>4</sup> <https://www.tuc.org.uk/economic-issues/corporate-governance/economic-analysis/democracy-workplace-strengthening-information>

<sup>5</sup> [http://www.acas.org.uk/media/pdf/p/s/How\\_to\\_manage\\_collective\\_redundanciesAPRIL\\_2013%28FINAL%29.pdf](http://www.acas.org.uk/media/pdf/p/s/How_to_manage_collective_redundanciesAPRIL_2013%28FINAL%29.pdf)

- Insolvency practitioners should be required to report on whether Directors commenced consultation before the formal insolvency process started. Failure to engage in early consultation should be a factor in determining whether managers should be considered not to be a fit and proper person to act as a Director.
- Insolvency practitioners should be held to be individually liable where they fail to carry out meaningful consultation with trade unions and workplace representatives (see the response to question 9 for more detail).
- The government should take a more proactive approach to business rescue by facilitating rescue packages and by funding the wages bill for insolvent firms during the consultation process.
- Rather than attacking trade union rights, the government should encourage employers to recognise trade unions and to establish information and consultation forums which operate continuously and not just in response to crises.

**Question 16:**

**What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?**

Trade union representatives and officials stand ready and willing to engage in constructive consultation with directors and insolvency practitioners were businesses are facing insolvency.

The government should encourage employers to recognise trade unions. Trade union representatives and officials are able to draw on insights and solutions used in other workplaces facing insolvency.

**Question 17:**

**Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

As noted throughout this response, UNISON is concerned that frequently in insolvency situations employers and practitioners actively avoid consultation with trade unions. Where consultation does take place it often starts far too late and is perfunctory. Unions therefore do not have the time or opportunity to develop alternative proposals or influence decisions.

**Question 18:**

**The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and**

### **insolvency practitioners respectively?**

UNISON believes that the current sanctions for failure to consult are proportionate. EU law makes clear that duty to consult applies equally in insolvency situations. Insolvency does not amount to a special circumstance justifying no consultation. Employment Tribunals also have the discretion to reduce protective awards if justified by circumstances.

UNISON agrees with the TUC that the existing sanctions could usefully be strengthened. For example:

- Where directors or insolvency practitioner fails to consult then any subsequent decision or action by the employer should be reversed or treated as void until meaningful consultation with trade unions or workplace representatives have taken place. Such penalties would mirror practices in other EU countries and would create an incentive on banks and other lenders to encourage Directors to consult with unions at an early stage, as failure to consult would delay the release of any assets held in the firm.
- Insolvency practitioners should face a degree of personal liability for failing to consult.
- The fine for failing to notify the Secretary of State of proposed redundancies should be increased.

### **Question 19:**

#### **How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

UNISON agrees with the TUC that it is time for the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service to be reviewed and refreshed. Trade unions are particularly concerned that some insolvency practitioners are not always aware that inviting the Job Centre Plus into the workplace to provide advice to individuals facing redundancy and to provide job search assistance is an important part of the consultation process and can amount to mitigation of the impact of redundancies.

Increasing resourcing is also required to ensure that Job Centre Plus and associate advice agencies are well-equipped to provide a rapid response service.





**Response from Unite the Union to  
Insolvency Service Call for Evidence – Collective Redundancy Consultation  
for Employers Facing Insolvency**

To: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk)

By: 12 June 2015 12am

**This evidence is submitted by Unite the Union. Unite is the UK's largest trade union with 1.5 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local government, education, health and not for profit sectors.**

**Unite has previously conducted a survey of officers to provide evidence on collective redundancies including potential or actual insolvency situations. Specific case examples are included at the end of this document.**

**1. Introduction**

1.1 Unite notes the declared purpose of this exercise is to consider “how consultation works where employers are facing insolvency, or have become insolvent, examples of good practice and we are inviting suggestions for improvement.”

1.2 Unite has split its response into two sections: a response to the issues covered in the consultation questions and an appendix with real case studies provided by Unite negotiating

officials, with obvious conclusions that can be drawn and including positive examples that have undoubtedly saved thousands of jobs, and tax payers millions as well as helping the economy as a whole.

1.3 In spite of this fact, there are only 5 references to trade unions in the consultation document. One is the use of the word in the title of the 1992 Act, three are together included in a reference to the obligation under the Act<sup>1</sup> and one in a question asking about the practicalities in the absence of a recognised union. There is no reference to role that Unite and other unions have played and continue to play in saving thousands of jobs, tax payer millions and helping the UK economy when employers face insolvency, as well as helping people stay in work and allowing companies to remain solvent.

1.4 In addition it should be noted that governments and agencies like the Insolvency Service have an obligation to promote effective collective bargaining (see DEMİR AND BAYKARA v. TURKEY 12 November 2008 Grand Chamber European Court of Human Rights (*Application no. 34503/97*)). This includes promoting the involvement of independent, resourced, skilled and experienced representatives and encouraging union recognition.

1.5 In response to this exercise the Insolvency Service should exhort the benefits of union involvement and encourage employers always to engage with unions whether there is formal recognition or not.

1.6 Unite also notes (from the foreword) the assertion that:  
“In this country we have clear levels of protection for employees, which set out employers’ duty to consult with employee representatives and notify the Secretary of State when proposing collective redundancies. The intention of this legislation is to ensure that unnecessary redundancies are avoided and to mitigate the effects of redundancies where they do unfortunately need to occur.

“Consultation helps ensure employees are appropriately informed and enables them to

---

<sup>1</sup> “Where there is an employer recognised trade union consultation must occur with trade union representatives. Otherwise, if no union is recognised...”

contribute to decisions that affect them. This in turn allows employers to make better business choices; to ensure that all possible options for rescuing the business, preserving jobs and supporting employees are explored.”

1.7 Unite takes issue with that assessment of the impact of the legislation in practice in many instances, including by reference to inadequate remedies, which undermine what legislation there is. Unite also decries the watering down of the legislation from 2010<sup>2</sup>, as well as the absence of a will on the part of government to strengthen the legislation, for example, by removing the trigger requirement under the Information and Consultation legislation as it applies in the UK<sup>3</sup>

1.8 Unite also commends the TUC response to the call for evidence, except in relation to the adequacy of the protective award remedy at ensuring that meaningful consultation takes place at a sufficiently early stage.

#### **Responses to consultation questions<sup>4</sup>**

##### **Employers’ Understanding**

###### **Question 1:**

**What are the considerations undertaken when deciding whether or not to start consultation?**

**How is this decided in practice where an employer is facing, or has moved into, insolvency?**

**Please provide examples where possible.**

2.1 In Unite’s experience, insolvency practitioners rarely consult over collective redundancies, even though they have a legal duty to do so. This is in large part due to the lack of any personal liability for failing to consult and that claims for protected awards can be made to the National Insurance Fund or against the remaining assets of the business. There are also no mechanisms for preventing the insolvency practitioner from acting where consultation has failed to take place. The obligations on insolvency practitioners should be strengthened and the

---

<sup>2</sup> For example reducing the statutory period of consultation, which also sends the wrong message to employers generally about the benefits of consultation to workers, the tax payer and the UK economy.

<sup>3</sup> And which Unite believes is contrary to the relevant EU Directive.

<sup>4</sup> It is noted that the questions are directed to employers.

consequences of failure made effective.

2.2 A recent case of this was the collapse of [REDACTED]<sup>3</sup>. Unite and the other unions representing the 1,200 workers who lost their jobs had to go to industrial tribunal to argue that the company should have given 90 days' notice of compulsory redundancy. The result of this process was that workers only received statutory minimum redundancy from the government as the company had no money. Many of these workers not only lost their jobs but also lost their pay for the last month.

2.3 Unite believes that provisions in relation to collective redundancies should be strengthened particularly in insolvency situations to ensure that insolvency practitioners comply with their legal duty to consult. As our evidence demonstrates collective redundancy consultation can make a major contribution to rescuing businesses and protecting the interests of employees. Unite has been in opposition to any amendments to the special circumstances test with a view to exempting insolvency situations from the requirement to consult.

2.4 Where businesses are at risk of closing, insolvency practitioners face a conflict of interest. They consider that their primary responsibility is to protect the interests of creditors, particularly those with secured debts. The interests of employees are given secondary consideration.

2.5 Generally Unite's experience is that the consequences for the employer who fails to consult in good time are such that directors and insolvency practitioners often make a judgement call that the financial penalties for failing to consult are less than the costs of continuing to run the business during the consultation period, when the financial costs associated with employers' failure to consult are transferred to the taxpayer once the business enters insolvency. Unite notes this was expressed by directors following the closure of [REDACTED] [REDACTED]<sup>5</sup>. There the decision was taken to keep the workers in the dark until the 11<sup>th</sup> hour to ensure income was maximised in relation to Christmas deliveries.

---

<sup>5</sup> House of Commons Committees Report on Impact of the closure of [REDACTED] on Employment. First Joint Report of the Business, Innovation and Skills and Scottish Affairs Committees of Session 2014–15. Published on 23 March 2015. London: The Stationary Office Ltd.

2.6 Directors and insolvency practitioners do not take account of the impact on communities, the tax payer or the UK economy. Government needs to ensure that they do.

**Question 2:**

**How does meaningful consultation with a ‘view to reaching agreement’ work in practice? How does notification work in practice? Please provide examples where possible.**

3.1 “Meaningful consultation with a view to reaching agreement” is the exception rather than the rule. The remedies for failure are inadequate. However, as the examples in the appendix show, there are considerable benefits for all when employers engage with unions.

3.2 Please note the examples below and provided by other unions. Where genuine dialogue and co-operation takes place between employers, trade unions and the wider workforce, it is possible to avoid the need for business or plant closures, to save jobs and retain skilled workforces and to ensure that workers facing redundancy can access quality advice, training and job search support. The Insolvency Service and government should encourage such meaningful consultation.

3.3 Unite endorses the TUC list of key components of meaningful and effective consultation that:

- Consultation is more effective where it is based on **high trust relations between employers and trade unions.**
- **Employers should engage in early consultation with trade unions, and should meet regularly with union reps and officials during the consultation period.**
- It is vital that **consultation takes place whilst it is still possible for unions to influence key decisions** and well before of formal insolvency processes are triggered. Once a company has entered administration it is often difficult to achieve a business rescue and to save jobs. These problems are amplified in cases of liquidation and receivership.
- Employers should supply union officials with full information and regular updates. Where necessary, due to commercial sensitivities, information can be provided on a confidential basis. However management should recognise the **benefits of open communication with the wider workforce.**

- Trades unions should be provided with **the opportunity and time to develop alternatives to business closure and mass redundancies**. Directors and insolvency practitioners should respond to union proposals, demonstrating how proposals have been adjusted in response.
- The company or insolvency practitioner should work with trade unions and government departments to invite **Jobcentre Plus' Rapid Response Service** ('PACE' in Scotland and 'ReAct' in Wales) to help the employees involved to retrain or find alternative work.
- Where appropriate, **government departments should put together rescue packages** and provide financing to cover the wages bill during the consultation period.
- Trade union representatives should be invited to **attend and participate in creditors' meetings**.

3.4 In reality consultation is often a perfunctory, amounting to little more than a tick box exercise.

#### **Question 3:**

**What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?**

4.1 Notification and consultation with Unite has provided substantial benefits for the UK economy businesses, workers, local communities and the taxpayer. See appendix.

4.2 Unite has:

- developed alternatives to business closure and job cuts, such as workforce restructuring, short-term pay freezes and short-hours working.
- helped identify new orders or had positive dialogue with potential buyers.
- given the opportunity, convinced the workforce that changes are necessary for restructuring or changes to terms and conditions necessary for businesses to continue operating.
- kept employees in employment until a buyer for the business has come forward Employees have the time to adjust and to identify new employment opportunities.
- worked alongside Jobcentre Plus' Rapid Response Service ('PACE' in Scotland and 'ReAct' in Wales) to provide employees with information about job vacancies in the local area and to assist

them in accessing training.

- reduced costs incurred by the taxpayer will be reduced.

#### **Question 4:**

**In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?**

5.1 See appendix and answers above. Unite has staff and officials experienced and trained to explore options for business rescue, including restructuring, changes to terms and conditions, identifying potential buyers and identifying new orders.

5.2 Agreements negotiated with Unite have had positive outcomes, including business rescues, reduced job losses, the retention of skilled workforces and assistance provided to those facing redundancies.

5.3 Union learning reps (ULRs) have also been able to support people at the workplace during redundancy situations, including by assisting with training and effective job search.

5.4 Unite notes the government's Workplace Employment Relations Survey in 2011<sup>6</sup> discovered that 40 per cent of workplaces that engaged in consultation on redundancies, resulted in management's original proposals being altered (for the benefit of all) as a result of consultation. In 18 per cent of workplaces multiple changes were made. In nearly a quarter of workplaces (22 per cent) consultation led to the numbers of redundancies being reduced. In 14 per cent of workplaces strategies for redeployment were identified or changed. Redundancy payments were increased in 10 per cent of cases and additional assistance for individuals facing redundancy was introduced in 19 per cent of workplace.

#### **Facilitators and Inhibitors**

#### **Question 5:**

---

<sup>6</sup> <https://www.gov.uk/government/publications/the-2011-workplace-employment-relations-study-wers>

**What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.**

6.1 Please see case examples in the appendix and answers to questions above.

6.2 A number of factors help to facilitate effective consultation in insolvency situations. These include:

- Consultation is more effective where it is based on **high trust relations between employers and recognised trade unions**. The examples cited in response to Question 4 came from workplaces where employers have longstanding recognition agreements and good industrial relations with trade unions.
- Employers who recognise trade unions or have well developed information and consultation forums are more likely start consultation and to share information relating to financial risks at an early stage.
- Access to government rescue packages or government loans, which finance the wages bill during the consultation period can also be critical in supporting business rescues.

**Question 6:**

**What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.**

7.1 The factors which inhibit effective consultation include:-

- Insolvency practitioners face a conflict of interest. Their primary responsibility is to protect the interests of creditors, particularly those with secured debts. The interests of employees are treated as a secondary consideration.
- The legal framework creates an incentive for employers and insolvency practitioners to avoid consultation. Many directors and insolvency practitioners conclude that as the financial penalties for failing to consult are less than the costs of continuing to run the business during the consultation period, they should ignore their legal obligations to consult. The absence of personal liabilities means that insolvency practitioners have no direct incentive to engage in



consultation.

- The fees paid to insolvency practitioners, including the hourly charged rate, are too high. This limits the level of resource available to cover debts owed to employees and creates an incentive to curtail the consultation period.

**Question 7:**

**What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.**

8.1 The factors which negatively impact on the quality and effectiveness of consultation include the following:-

- Many workplaces lack the high-trust employment relations systems, which facilitate effective consultation in insolvency situations. Levels of trade union recognition are too low in the UK. Unlike many EU counterparts, the UK also does not have an effective framework for information and consultation of employees. This is in part due to the inadequacies of the Information and Consultation of Employees Regulations 2004.
- Non-union workplace representatives frequently lack the expertise or necessary agency to engage in meaningfully consultation on behalf of the wider workforce.
- Insolvency practitioners frequently lack the necessary awareness and experience of employment law obligations and industrial relations practices.
- Directors can be held personally liable if they continue to operate firms, which are insolvent.

8.2 The time available for consultation can also be severely curtailed because the company cannot afford to continue to pay the wages bill.

- Insolvency practitioners face pressures from creditors, including banks and financial institutions and private equity firms, to wind the company up and release financial assets.

**Question 8:**

**Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?**

9.1 We have no evidence that professional advisers inform directors of their duty to start consultation on potential redundancies well in advance of any formal insolvency procedure.

9.2 Advice provided by professionals, such as lawyers writing articles in professional journals, can be seen looking at ways of avoiding consultation and will consider only the legal extent of obligations and the inadequate consequences of failure rather than on how to engage effectively.

**Question 9:**

**Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?**

10.1 No. Directors and insolvency practitioners often either decide not to engage in consultation at all or leave it until the very last minute when unions have limited or no prospect of influencing decisions or outcomes.

10.2 Unite knows that the current legal framework creates an incentive on both directors and insolvency practitioners to avoid or ignore consultation requirements in insolvency situations.

10.3 Unite calls for government to adopt a range of measures to reverse this situation, including:

- Insolvency practitioners should face personal liability where consultation does not place. It is not appropriate for insolvency practitioners to expect the taxpayer to 'foot the bill' for their failure to comply with employment law obligations. Arguably the government should have the ability to recover from the insolvency practitioner the full cost of any protective awards.
- Failing this, insolvency practitioners should be required to pay a financial penalty where they fail to consult fully with unions or workplace representatives. The penalty could be equivalent to those which are payable by employers for failure to pay the national minimum wage on time or employment tribunal awards on time. The level of the financial penalty could be reduced according to how early consultation with trade unions is initiated by the employer and / or the

insolvency practitioner. The financial penalty should be paid to the workers affected by the failure to consult rather than to the Exchequer.

- The government should regularly publish a list of companies and insolvency practitioners who fail to carry out meaningful consultation with trade unions or workplace representatives.

**Question 10:**

**Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?**

11.1 Not in a sufficient number of workplaces. Appointed employee representatives are inevitably far less effective than union representatives. The government (and insolvency service in so far as it can) should encourage union involvement at every level to comply with its international convention obligations and to reap the benefits referred to in the introduction to this document and elsewhere.

**Question 11:**

**How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?**

12.1 Directors and insolvency practitioners do not focus sufficiently on employment relations issues. Insolvency practitioners in particular often do not have enough incentive or experience to engage effectively with the workforce.

**Question 12:**

**How might the process for notifying the Secretary of State and sharing information with third parties be improved?**

13.1 The consequences of failing to notify the Secretary of State should be made effective. The government should encourage, if not require, employers and insolvency practitioners to provide recognised unions with a copy of the completed HR1 form notifying the Secretary of State of proposed redundancies.

13.2 It would be helpful if BIS were to agree a memorandum between the insolvency services, insolvency practitioners and the TUC and unions agreeing that unions are provided with early notice of proposed redundancies, particularly in larger workplaces.

**Question 13:**

**Could the process requirements for consultation be further clarified or improved?**

14.1 Yes, clearly. As well as properly promoting engagement between employers and unions generally the law relating to collective redundancy consultation can be improved. The least that should be done now includes:

- The 90 day minimum period for consultation<sup>7</sup> in mass redundancies involving 100 + employees should be restored.
- The right to have employee representatives consulted on collective redundancies should be extended to all 'workers' including the self-employed who provide services on a personal basis to the employer.
- The right for the representatives of fixed term contract employees who are at the end of their contractual term to be consulted should be restored.
- The decision of the ECJ in *Usdaw v Ethel Austen* should be reversed to ensure that employers are required to consult where 20 or more employees are at risk of redundancy.
- It would be helpful if the law was clarified on when the duty to consult is triggered. Employers should be encouraged to start consultations at an early stage when they first contemplate the need for redundancies.
- The limits on the forms and amount of remuneration, which employees can recover from the Redundancy Payments Office, should be removed. Individuals should be able to recover all payments that are legally owed to them by the insolvent employer, including contractual holiday and sick pay, enhanced redundancy payments and unpaid employment tribunal awards.
- The limit on preferential debts in insolvency should be removed. The limit is currently £800 and has not increased since 1976.
- Trade unions are unable to recover employment fees from the Redundancy Payments Office following a successful application for a protective award.

---

<sup>7</sup> This refers to the period between when the employer notifies the Secretary of State of potential redundancies and the date when the first dismissals can take place.

- As long as ET fees remain, they should not apply in cases where claims are brought against insolvent employers.

14.2 The government should also take active steps to encourage a culture of regular consultation between employers and employee representatives in the UK. In particular, the Information and Consultation of Employees (ICE) Regulations should be substantially revised. For more detailed proposals for reform of the ICE Regulations see the TUC's report on *Democracy in the Workplace*.<sup>8</sup>

**Question 14:**

**Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?**

15.1 Yes. The government (and the Insolvency Service in so far as it can) must promote the benefits of involving trade unions (see above and the appendix).

15.2 Acas should be asked to develop guidance on the importance of collective redundancy consultation in insolvency situations. The guidance should be modelled on the existing *How to Manage Collective Redundancies* document.<sup>9</sup> Acas should also be asked and funded to provide employment relations training for insolvency practitioners, until a high standard of employment relations training is effectively covered as part of the qualification to become an insolvency practitioner.

15.3 Professional bodies with responsibility for regulating insolvency practitioners should also be encouraged by government to prepare Statements of Insolvency Practice (SIPs) covering the duty to consult on collective redundancies. Such SIPs could improve the consistency of practice amongst licensed insolvency practitioners.

**Question 15:**

---

<sup>8</sup> <https://www.tuc.org.uk/economic-issues/corporate-governance/economic-analysis/democracy-workplace-strengthening-information>

<sup>9</sup> [http://www.acas.org.uk/media/pdf/p/s/How\\_to\\_manage\\_collective\\_redundanciesAPRIL\\_2013%28FINAL%29.pdf](http://www.acas.org.uk/media/pdf/p/s/How_to_manage_collective_redundanciesAPRIL_2013%28FINAL%29.pdf)

**How can Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?**

16.1 The government should adopt the following measures:

- Insolvency practitioners should be required to report on whether Directors commenced consultation before the formal insolvency process started. Failure to engage in early consultation should be a factor in determining whether managers should be considered not to be a fit and proper person to act as a Director.
- Insolvency practitioners should be held to be individually liable where they fail to carry out meaningful consultation with trade unions and workplace representatives.
- The government should take a more proactive approach to business rescue by facilitating rescue packages and by funding the wages bill for insolvent firms during the consultation process.
- Rather than attacking trade union rights, the government should encourage employers to recognise trade unions and to establish information and consultation forums which operate continuously and not just in response to crises.

**Question 16:**

**What would most encourage constructive engagement by employees when in this situation?  
And do you have any suggestions for how employee representatives can best be supported?**

17.1 Unite representatives, officials and staff are on hand to engage in constructive consultation with directors and insolvency practitioners where businesses are facing insolvency with likely benefits referred to above and in the context of the examples in the appendix to this document. The government should promote engagement between employers and trade unions, including promoting recognition and collective bargaining.

**Question 17:**

**Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?**

18.1 Yes. See the appendix. The potential is great, if government complies with its obligations to promote collective bargaining. Far too often the opportunity to reap the benefits is lost as frequently in insolvency situations employers and practitioners actively avoid consultation with trade unions, or fail to understand the potential and do not engage properly.

**Question 18:**

**The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?**

19.1 Unite believes that the current sanctions for failure to consult are insufficient particularly in the context of insolvency. EU law makes clear that duty to consult applies equally in insolvency situations. Insolvency does not amount to a special circumstance justifying no consultation.

19.2 In our opinion, the existing sanctions could usefully be strengthened. For example:

- Where directors or insolvency practitioner fails to consult then any subsequent decision or action by the employer should be reversed or treated as void until meaningful consultation with trade unions or workplace representatives have taken place. Such penalties would mirror practices in other EU countries and would create an incentive on banks and other lenders to encourage Directors to consult with unions at an early stage, as failure to consult would delay the release of any assets held in the firm.
- Insolvency practitioners should face a degree of personal liability for failing to consult.
- The fine for failing to notify the Secretary of State of proposed redundancies should be increased.

**Question 19:**

**How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?**

20.1 Unite believes that some insolvency practitioners are not aware that inviting the Job Centre Plus into the workplace to provide advice to individuals facing redundancy and to provide job search assistance is an important part of the consultation process and can amount to mitigation of the impact of redundancies. This should be addressed – in part – by reinvigorating the memorandum of understanding.

20.2 Increasing resourcing would also ensure that Job Centre Plus and associate advice agencies are better able to provide a rapid response service.

This response has been submitted on behalf of Unite the Union by:

**Howard Beckett**

**Director of Legal and Affiliated Services Unite the Union**

For further information or clarifications please contact: John Usher  
[John.Usher@unitetheunion.org](mailto:John.Usher@unitetheunion.org)

Unite House, 128 Theobalds Road, Holborn, London, WC1X 8TN



## **Appendix: Collective Redundancy Insolvency Cases**

These examples are extracts from evidence supplied to BIS in 2012. Examples that do not relate to a situation where insolvency was not on the cards have been excluded, although arguably perhaps lessons can be learned to inform good practice from instances involving site closures.

### **15. Aluminum manufacturer**

**Date of consultation:** October 2010

**Region:** West Midlands

**Number of workers involved:** 320

**Why were people being made redundant? (e.g. market collapse, poor management, take over and asset stripping, funding cuts)**

Closure of and moving work to save jobs in France and Germany.

**Did three months consultation make a difference in any of the following ways? (please describe):**

- a better deal for those people being made redundant
- more time for people to find new jobs
- alternatives to those redundancies
- All 3 of above

**Would 30 days have been enough time to consult workers about this redundancy?**

No. The longer period enabled us to get the company to agree to sell part of the work and work with interested parties to put in a bid, saving 120 jobs.

**Did consultation start before decisions to dismiss workers have taken place?**

No. Decision to close had been made.

### **17. Train manufacturer**

**Date of consultation:** June to October 2011

**Region:** East Midlands

**Number of workers involved:** 446

**Why were people being made redundant? (e.g. market collapse, poor management, take over and asset stripping, funding cuts)**

Loss of major contract to another company for building trains

**Did three months consultation make a difference in any of the following ways? (please describe):**

- **a better deal for those people being made redundant** – Yes
- **more time for people to find new jobs** - Yes
- **alternatives to those redundancies** – Yes (Please see below)

**Would 30 days have been enough time to consult workers about this redundancy?** - No

**Did consultation start before decisions to dismiss workers have taken place?** - Yes

**Further Information** Following the announcement of the loss of a huge Government contract, the company announced 446 redundancies, the closure of one of its sites and a review of their UK presence. We agreed a series of meetings with the company on an at least weekly basis throughout the summer and autumn. This gave us the opportunity to look at bringing in new work, reviewing shift patterns to maximise workloads, review staffing structures. We were also able to agree a robust selection criteria (the company had work for approximately 200 going forward to 2013/14). The whole process allowed the company, unions and Government departments (Work & Pensions, BIS etc) to bring in appropriate agencies to assist in job search etc. As a result of the ongoing discussions there have been NO compulsory redundancies amongst our bargaining unit, from an original proposal for 446 redundancies. This could not have been achieved with only 30 days or even 60 days consultation period.

## **19. Telecoms company**

**Date of consultation:** 2010

**Why were people being made redundant? (e.g. market collapse, poor management, take over and asset stripping, funding cuts)**

The company was trying to move from the UK to Italy and China. This would have led to the closure of several sites and the loss of 1100 UK jobs. It would also have led to the loss of a large amount of R&D capacity and knowledge from the UK.

**Did three months consultation make a difference in any of the following ways? (please describe):**

- a better deal for those people being made redundant
- more time for people to find new jobs?
- alternatives to those redundancies

The 90 days consultation period was crucial in this case as the company needed to bring people from across the globe to the meetings.

**Would 30 days have been enough time to consult workers about this redundancy?**

No

**Any other comments?** The negotiations were positive and led to a major decrease in redundancies (in the end to around 400) with a UK site retained, including the substantial R&D capacity. Many of the workers were offered relocation opportunities, voluntary redundancy and enhanced terms. None of this would have been happened without union involvement and the 90 days.

## **20. Drinks distributor**

**Date of consultation:** 2010

**Region:** North East, Yorkshire & Humberside

**Number of workers involved:** 100+ on site but only 60 in our agreement

**Why were people being made redundant? (e.g. market collapse, poor management, take over and asset stripping, funding cuts)**

Closure of brewery.

**Did three months consultation make a difference in any of the following ways? (please describe):**

- a better deal for those people being made redundant
- more time for people to find new jobs
- alternatives to those redundancies

- Consultation took place after 12 months due to the early announcement – it gave us the opportunity to consult properly and gain enhanced payments for our members of up to £1,500. Also employment was extended on the initial period due to change of plans. If shorter consultation period was in place this would have happened. Also gave us time to send in the learning/skills team. ☐

**Would 30 days have been enough time to consult workers about this redundancy?**☐

No, it never is. ☐

**Did consultation start before decisions to dismiss workers have taken place? (please describe)**☐

No, as the closure was announced nationally. I was representing members at the third party transport and distribution provider. ☐

### **23. Car manufacturer**

**Date of consultation:** 2008-2009☐

**Number of workers affected:**☐1700 jobs negotiated on voluntary process – over 2008-9. 3000 remaining. In 2012 - the company has begun recruiting 500 new workers

**Why were redundancies needed?**

In 2008 when the recession kicked in no one was buying cars and the bottom dropped out of the market. The company did not expect this and had set its business plans accordingly. The company had for several years refused to enter into negotiations with the union over a lay off agreement claiming that they “did not plan for failure”. This meant that when the crisis hit they had no policies in place. The company hence came back to the union and asked for help.

**Did three months consultation make a difference in any of the following ways? (please describe):**

- a better deal for those people being made redundant
- more time for people to find new jobs
- alternatives to those redundancies ☐

Proposed to lay off everyone in four months with no pay. This meant a potential loss of skills,

especially of maintenance, technicians, and others. ¶Once the union was involved solutions started to be found. They agreed a banking of hours arrangement – where workers owed hours but got to keep jobs and continuity of pay. The negotiations also came up with a traditional working time agreement. ¶The company decided to close down for 2 months, but then the situation got worse and this extended 4 months. ¶

The union managed to agree a 50% pay for hours over the 250 hours cap. **Without this proposal workers would have been entitled to statutory redundancy and all the jobs would have been lost.** ¶After this agreement this was expanded to get full pay for 3 quarters of time and holiday. In the end average 80% pay so members were happy – and this agreement allowed members to find other jobs during the close downs. ¶

The company agreed to come up with an “associate release programme” (basically a voluntary redundancy scheme). They got over subscribed: 500 - 600 accepted. This was done over two phases – second phase was more generous than the first. These redundancies happened concurrently with the lay off.

**Would 30 days have been enough time to consult workers about this redundancy?** The process worked because the Union was engaged early and in good faith. In the end no formal redundancy consultation was needed as negotiations went on continuously for several years allowing for voluntary redundancy packages and other protection for workers who stayed on.

**Did consultation start before decisions to dismiss workers have taken place? (please describe)**

No

**Any other comments?**

This allowed the company to save its UK manufacturing plants and it is now in the process of recruiting again.

## **24. Car manufacturer**

**Date of consultation:** 2008-2009

**Number of workers involved:** 12,000

**Why were people being made redundant?**

In the 2008-9 crisis the Union agreed a pay freeze with the company in order to save jobs at the factory. There were 12,000 jobs at risk.

**Did three months consultation make a difference in any of the following ways? (please describe):**

- a better deal for those people being made redundant
- more time for people to find new jobs
- alternatives to those redundancies <sup>2</sup>

An agreement was reached to reduce of hours for manual workers with a loss of pay, while some office staff increased hours with no increase pay.<sup>2</sup> There were also other changes agreed such as with shift patterns <sup>2</sup>The result was that all jobs were saved. <sup>2</sup>

**Would 30 days have been enough time to consult workers about this redundancy?**<sup>2</sup>As soon as the crisis hit the union and management began talks that lasted months. This was done outside of formal consultation limits as the view from both sides was that consultation should last as long as it took to get solutions. <sup>2</sup>It therefore took longer than 90 days. In the car industry the statutory is always treated as the minimum. Both sides recognised this and they used the time they need. <sup>2</sup>The time was not just needed to discuss options it also required discussing the issues with thousands of workers and convincing them that the solutions proposed were the right thing to do. This couldn't have happened without positive relationships with the Union and the result would have meant thousands of job losses. <sup>2</sup>

There is also an agreement on agency workers where after working for 2 years they become full time. The company has since put on 4000 new jobs since then and this is still rising.



**RESPONSE TO BIS CALL FOR EVIDENCE ON  
COLLECTIVE REDUNDANCY CONSULTATION  
FOR EMPLOYERS FACING INSOLVENCY**

**JUNE 2015**

## Introduction

Usdaw is the UK's fourth biggest union, with almost 430,000 members. Our members work predominantly in the retail sector, and we have agreements with major retailers including [REDACTED] and the [REDACTED]. We also have a growing membership in the non-food sector, [REDACTED] and [REDACTED]. Beyond the retail sector, we have a well-established presence in a number of other sectors including road transport and distribution, food and drink manufacturing, home shopping, chemical processing and pharmaceuticals.

Usdaw welcomes the opportunity to provide evidence on collective redundancies in insolvency situations. Unfortunately, we have a significant amount of experience in this area, having represented members in several major companies which have faced collapse in recent years, including [REDACTED], [REDACTED] and [REDACTED]. We have pursued protective award claims at tribunal for lack of consultation in each of these cases. Due to our direct experience of dealing with these cases, Usdaw is particularly well placed to report on the impact of insolvency on workers, and the potential benefits of consultation for employers, employees and communities, as well as taxpayers, who currently pick up the bill for the cost of protective awards.

<b>Q1</b>	<b>What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency?</b>
-----------	---

It is our view, borne out by experience, that when insolvency situations arise, consultation is not a priority for employers and more particularly for administrators. The repeated failure of administrators to engage in meaningful consultation has led us to conclude that they are focussed solely on the interests of creditors and potential buyers, and not on employees. It is telling that within its 23 pages of ethical and professional guidance, the Insolvency Practitioners' Code of Practice on Ethics makes absolutely no mention of administrators' responsibilities to employees and their representatives.

In the cases we have dealt with, it has consistently appeared that administrators either did not understand, or wilfully ignored, the need for meaningful consultation with employee representatives. It is our understanding that in some cases administrators specifically instructed the existing management team that they were no longer to continue their relationship or engage in discussions with the recognised trade union, bizarrely, on the grounds of preserving confidentiality.

In the case of [REDACTED] where 27,000 workers lost their jobs, Usdaw had held a long-standing and positive relationship with the business for many years, with regular consultative meetings, collective bargaining and frequent contact with their Employee Relations function. This relationship was discarded when the company went into administration, and we found that the administrators repeatedly made announcements without any prior notification, and did not give us any opportunity to raise concerns in any detail.

The lack of accountability for administrators must bear some influence here. When protective awards are granted by tribunals, the administrators do not have to pay those awards, as they are met by the taxpayer. We do not believe that insolvency practitioners have any motivation or desire to consult with employees or their representatives, as there are no real consequences for failing to do so.



Q2	<p><b>How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice?</b></p> <p>Outside of insolvency situations, in redundancies relating to site closures or restructuring, employers are far more likely to engage with the Union in meaningful consultation, because there is a shared interest in maintaining good employee relations into the future. In these cases we find that the sooner an employer consults with us, the smoother the process tends to be. Agreement is then more likely to be reached as both parties have the opportunity to hear and understand the other's viewpoints, and to offer alternative solutions.</p> <p>In most of the companies where Usdaw has agreements, we attend regular consultation meetings throughout the year. At these meetings, Union representatives have the opportunity to listen to updates on the business, ask questions and raise issues of concern on behalf of our members. We are also, crucially, able to make members' views heard early on in the decision-making process.</p> <p>Restructuring proposals are generally brought to the Union by the company with a business case outlining their proposals. In [REDACTED], there is an agreed outline for business cases which sets out the information which must be presented and timescales for consultation at collective and individual level. Similarly, in [REDACTED] we have an agreed set of consultation principles, which state that all restructure proposals need to be brought to the consultative committee, who will decide how to deal with the proposals and put out an agreed joint statement to workers.</p> <p>In [REDACTED], the forum structure provides a mechanism for consultations at local and national level, and this has been invaluable during periods of change. The Union has been able to help the business to design and develop consultation plans and to support staff through changes including restructuring, closures and changes to working practices.</p> <p>The important factor is that the Union has the opportunity to influence the outcome, otherwise consultation becomes meaningless. In insolvency situations, this has not happened, due to either a failure to consult at all, or consultation being undertaken as a 'box ticking' exercise. For example, in [REDACTED], while there were a number of consultation meetings, the content and outcome of those meetings was not meaningful. Questions raised were answered, in the words of the employment tribunal judge, with 'bland generality'. In this case, as in others, it is clear that the quantity of consultation did not provide quality.</p>
Q3	<p><b>What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent?</b></p> <p><b>What further benefits do you think we could encourage?</b></p> <p>Where an administrator is appointed, their primary purpose is usually to secure the future of the business by finding a buyer and selling it as a going concern. Meaningful consultation could help to ensure this, as a recognised trade union will have detailed knowledge of the business and can help to present alternative strategies to closure. The Union could help to identify potential TUPE transfers to other businesses, and to facilitate the process for this. Redeploying staff in this way would avoid redundancies, with the added benefit of reducing the burden of statutory redundancy payments on the public purse.</p>

	<p>When a business is threatened with closure, particularly if it has large sites which are key employers in the area, this will have a wider impact on the community. Adequate consultation can give the employer and the Union an opportunity to work together, involving local agencies, to prepare workers for the labour market.</p> <p>The more time that employees have between notification of potential redundancy and the end of their employment, the more opportunity they have to seek alternative employment.</p> <p>The Union can be helpful in maintaining morale and productivity when workers are understandably feeling anxious. There is no relationship of trust and confidence between the workers and the administrators, and given the opportunity, the Union could provide a useful channel of communication, as a trusted voice. At the outset of ██████████ going into administration, Usdaw played an important role in allaying our members' concerns about issues such as payment of wages. The administrators acknowledged at the time that this had been helpful to them. This made it all the more frustrating when they refused to give us advance notification of their employee announcements after that point.</p>
<b>Q4</b>	<p><b>In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?</b></p> <p>In practice, in the insolvency cases we have dealt with, Usdaw and our members have not had the opportunity to put forward options to rescue the business and to help reduce and mitigate the impact of redundancies. Decisions on closures and redundancies have been presented as a fait accompli and there has not been any attempt to look at alternative solutions or to seek the expertise and experience of the Union and its members. Given the opportunity, we would always be willing to consider and offer alternatives to closure, for example by looking at alternative staffing structures.</p>
<b>Q5</b>	<p><b>What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent?</b></p> <p>As previously noted, we have seen very little good practice in insolvency cases. Ideally, we would like to see employers' existing consultative structures being used effectively when there is a threat of insolvency, or the company has been made insolvent. This would be helpful as it would provide continuity and would use the experience and training of representatives effectively.</p> <p>We would like to see employers begin the consultation process much earlier, and share information at the earliest opportunity. We appreciate that there may be confidentiality issues and are prepared to keep commercially sensitive information confidential if necessary, as this is already a feature of our relationships with employers. We are well used to dealing appropriately with commercial sensitivities.</p>

Q6 &	<b>What factors, where present, act as inhibitors to starting consultation or notifying the Secretary of State when an employer is imminently facing, or has moved into an insolvency process?</b>
Q7	<p><b>What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent?</b></p> <p>The major inhibitor to consultation is the attitude of the administrators. Some of this may be down to a lack of understanding, but given the highly publicised protective award cases of recent years this can no longer realistically be held up as an excuse. It is clear that administrators are not minded to consult because they are not financially held to account when they fail to do so. Their priority is dealing with the interests of creditors and finding a buyer.</p> <p>It is possible that administrators are concerned about keeping employee representatives updated in case there is negative news which could decrease their chances of finding a buyer for the business. However, this can be easily dealt with by the use of confidentiality agreements. Union representatives are frequently asked to respect embargoes and keep information confidential in our 'business as usual' consultations.</p> <p>We do not accept that the conflict of interests for administrators between safeguarding creditors' interests and consulting with employees is a valid excuse for lack of consultation. Any employer has to face different and conflicting priorities, but they are rightly expected to fulfil their obligations to their employees, and insolvency practitioners should be no exception. Considering the extremely high fees charged by administrators, it is not unreasonable to expect them to make at least some effort to communicate with the workers in the companies they are taking those fees from, who are going through one of the most stressful experiences of their working lives.</p>
Q8	<p><b>Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?</b></p> <p>We are not aware of whether professional advisors are advising directors of their duties. However, if they are doing so, it is clear that this advice is frequently ignored.</p>
Q9	<p><b>Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?</b></p> <p>In our experience, directors and insolvency practitioners are not engaging in consultation at the appropriate time. In [REDACTED], the Union's National Officer approached the company in mid-November 2008, when he had heard that the company's credit insurance had been withdrawn. He raised concerns with the HR Director, who said that she could not confirm whether or not this was true. The company then went in to administration on 26 November; the Union was made aware of this through the media. We then were notified of redundancies in the Head Office at the same time as they were being announced to staff, and received notification of a 'closing down sale' through the [REDACTED] Intranet, when we were still under the impression that the administrators were looking for a buyer.</p>

	<p>In the case of [REDACTED], Usdaw was informed by the HR Director that the company had gone into administration after it had happened, and we had been given no prior warning that this might happen, despite being recognised by the company for consultation and collective bargaining purposes. Although we made it very clear to the administrators that they had a duty to consult with us, they announced store closures, sales and Head Office redundancies without any prior notification or discussion with us. On a number of occasions the press were informed before the Union and on every occasion the staff had already been given notice of dismissal before the Union was informed.</p> <p>It is difficult enough for trade unions to get information about possible redundancies from employers and insolvency practitioners, but it is near impossible when there is no recognised trade union. The timeline of events leading up to the closure of [REDACTED] demonstrates this:</p> <ul style="list-style-type: none"> <li>• Venture capitalists took over the company in February 2012. The Head of Finance had concerns about the financial arrangements of the company at this point, which he expressed in writing internally.</li> <li>• In August 2012, the company had appointed consultants to look at selling parts of the business.</li> <li>• The Head of Finance said he attended a meeting to look at budgets for store closures on 26 October 2012.</li> <li>• The company went into administration on 31 October 2012.</li> <li>• An HR1 form was submitted on 5 November 2012 stating that no redundancies were expected. The HR Department had already been asked to start planning the redundancy consultation process at this point.</li> <li>• The administrators announced 99 redundancies on 9 November 2012; when they wrote to the affected employees they stated that 'this will come as no surprise'.</li> <li>• On 20 November 2012, an update to staff stated that the administrators were still trying to find a buyer.</li> <li>• On 22 November 2012, the administrators announced complete closure of the business and 6,889 people received notice of redundancy.</li> </ul> <p>It is clear from the timescales listed above that redundancies were not notified to employees in advance of the announcements at all in this case. Without a consultation framework in place, the directors were not pushed for information about the financial situation of the company, and there was certainly no opportunity for meaningful consultation, even after employee representatives were appointed once the company had gone into administration.</p>
Q10	<p><b>Normally are employee representatives already in place? What are the practicalities of appointing representatives when no trade union representation is in place?</b></p> <p>In unionised workplaces, employee representatives are generally already in place. However, in a number of cases, where there is not a recognised union in place, workplace reps need to be elected. In the [REDACTED] case, we were told by members that workplace reps were not elected, but hand-picked by the company. It is unsurprising that this sort of approach is taken, and further evidence of the importance of having independent union representation in the workplace.</p>

Q11	<p><b>How does the handover from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?</b></p> <p>Directors should be informing administrators of the contact details for any recognised trade unions, along with details of all relevant agreements, and terms and conditions of employment. We do not have any evidence that this is not happening. However, the information that is being passed to administrators is not being acted on, as is clearly demonstrated by the numerous failures to consult with employee representatives and ensuing successful protective award cases.</p>
Q12	<p><b>How might the process for notifying the Secretary of State and sharing information with third parties be improved?</b></p> <p>Insolvency practitioners should be reminded of their legal responsibilities to notify the Secretary of State of any potential redundancies through the provision of HR1 forms. This should also be enforced more effectively, with any failure to provide notification followed up by a full investigation. HR1 forms should also be provided to trade unions as a matter of course.</p> <p>Insolvency practitioners should be encouraged to recognise the value of consultation with employee representatives. A joint memorandum of understanding between insolvency practitioners, the insolvency services and trade unions would be a useful step forward, as suggested by the TUC.</p>
Q13 & Q14	<p><b>Could the process requirements for consultation be further clarified or improved?</b></p> <p><b>Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?</b></p> <p>Usdaw believes that there is a wider need for reform of the consultation framework, not only in insolvency cases, but in all redundancy situations. The 90 day minimum period for consultation should be restored for 100 or more proposed redundancies, and all workers should have the right to be consulted over proposed redundancies, irrespective of the size of the establishment.</p> <p>The current threshold of 20 employees per establishment needs to be removed, or the definition of 'establishment' changed to reflect the fact that decisions are nearly always made at national level and not at site level (and this is always the case with insolvency, without exception). As we argued in [REDACTED] and [REDACTED] cases, no single store has the autonomy to seriously review redundancies that have been decided at national level, so to consider them an 'establishment' for the purposes of collective redundancy consultation does not make any logical sense.</p> <p>In insolvency cases, employees receive some of the monies they are due through the Insolvency Service, but these protected payments are limited. They therefore have to claim as creditors for extra payments such as banked holidays, enhanced redundancy pay and contractual notice pay. These payments are capped at £800, and the limit has not increased since 1976. The cap on preferential debts needs to be increased, so that employees can claim back the payments to which they are entitled in full.</p> <p>Usdaw is of the view that employees should be given priority over other creditors, as they are in the unique position of having given their time and commitment to the employer. Workers and their families, particularly those who are low paid and without savings, suffer hardship at the time of redundancy and there is often a long wait to recover even their statutory payments from the Insolvency Office.</p>

	<p>We also believe that the fees charged by administrators need to be reviewed. There needs to be more transparency from insolvency practitioners about the time spent on cases and the charges incurred. There are no statutory or commonly accepted limits or guides to the amount of remuneration an insolvency practitioner may charge. The ability of creditors to scrutinise administrators' fees is limited, and there needs to be some form of independent adjudication of fees, with consideration given to a statutory limit being placed on their levels.</p>
<b>Q15</b>	<p><b>How can Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?</b></p> <p>As previously stated, we believe that the only effective incentive for insolvency practitioners would be to make them financially liable for protective awards. When administrators take over, they take on the role of the employer and therefore should be liable in the same way that any other employer would be. Currently, they can act, or fail to act, with impunity and there is no motivation for them to meet their obligations.</p>
<b>Q16</b>	<p><b>What would more encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?</b></p> <p>Union representatives are fully prepared and willing to engage with employers and administrators in this situation. Unfortunately, we find that this is not reciprocated by insolvency practitioners.</p> <p>It is important to remember that Union representatives are for the most part not full-time officials, but lay representatives who are employed within the business. They will be going through a very stressful time themselves and are doing their best to help and advise their colleagues while little information is forthcoming. Better communication from the administrators, and a commitment to ensure that representatives are briefed prior to press or staff announcements, would go some way to mitigate this.</p> <p>In non-unionised companies, the difficulties are even greater, as employee representatives do not have the training and support of a union to assist them. In these cases, it is important that employee representatives are properly elected and given all of the information that they need on their role, as well as regular updates. Where a union is not formally recognised but has a number of members in the company, in circumstances such as insolvency it would be advisable to engage with the union(s) so that they can help to communicate with employees, and to facilitate consultation.</p>
<b>Q17</b>	<p><b>Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?</b></p> <p>Unfortunately, we do not have any examples of this.</p>

<b>Q18</b>	<p><b>The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?</b></p> <p>We believe that the current sanctions are proportionate. However, we do not believe that Protective Awards are dissuasive to insolvency practitioners, as they do not have to pay them. As previously stated, we believe that insolvency practitioners should pay the Protective Award when they fail to consult, rather than the taxpayer.</p>
<b>Q19</b>	<p><b>How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?</b></p> <p>We echo the TUC's request that the memorandum of understanding be reviewed and refreshed.</p>

**JOHN HANNETT**

General Secretary  
 Usdaw  
 188 Wilmslow Road  
 Manchester M14 6LJ

**For further information please contact:**

Fiona Wilson  
 Head of Research and Economics  
 Usdaw  
 188 Wilmslow Road  
 Manchester M14 6LJ

Tel No: 0161 249 2450  
 Email: [fiona.wilson@usdaw.org.uk](mailto:fiona.wilson@usdaw.org.uk)



The Insolvency  
Service

# Response Form

Collective Redundancy Consultation for  
Employers facing Insolvency

Deadline for Responses: 12 June 2015



## How to respond

This is a template response form. If you would like to use an alternative format please do so in writing.

Please send completed short form responses to: [policy.unit@insolvency.gsi.gov.uk](mailto:policy.unit@insolvency.gsi.gov.uk), or post to:

Pabitar Powar  
The Insolvency Service  
4 Abbey Orchard Street  
London  
SW1P 2HT

## General Information

What is your name, or the name of the organisation you represent?

Wragge Lawrence Graham & Co LLP – comments from the Employment & Equalities Team alone.

Please tick the boxes below that best describes you as a respondent to this consultation:

Description	
Micro business (0-9 employees)	
Small business (10-49 employees)	
Medium business (50-249 employees)	
Large business (250+ employees)	
Business representative organisation/trade body	
Trade union or staff association	
Central government	
Local government	
Charity or social enterprise	
Legal representative	✓
Individual	
Other (please describe):	

## 2.1. Employer's Understanding

### Current Practices

1) What are the considerations undertaken when deciding whether or not to start consultation? How is this decided in practice where an employer is facing, or has moved into, insolvency? Please provide examples where possible.

2) How does meaningful consultation with a 'view to reaching agreement' work in practice? How does notification work in practice? Please provide examples where possible.

Where there is an immediate need to reduce costs, as is likely to be the case in an insolvency or potential insolvency situation, the need to conduct meaningful consultation may well take a back seat to the need to drive the process forward with as little financial risk as possible. In this case, in our experience, opportunities for 'meaningful' consultation, as envisaged by the legislation, are often limited in practice. Even if possible, the minimum time frames for the consultation become the 'actual' timescales, given the immediate need to reduce costs. There is little to be gained by either the employer or the employees in prolonging what is essentially inevitable in the circumstances.

### Benefits

3) What do you understand to be the benefits of consultation and notification where an employer is facing, or has become insolvent? Please provide examples where possible. What further benefits do you think we could encourage?

There is a distinction to be made between different types of insolvency procedures. So, whilst the provision of the prescribed information is likely to be beneficial to employees in all cases, there are, in our experience, limited benefits of consultation unless the business is to be sold as a going concern. A full consultation process on the prescribed matters, with a view to reaching agreement, is unlikely to change the outcome of the process in terminal insolvency proceedings.

Where there is the ability to trade and conduct a consultation process, the main benefits for employees are continued employment and income during this period and an opportunity to seek alternative employment before being served notice of dismissal. There is a small potential that some changes to the proposal may result from consultation. For a business that may be sold, there may be benefits such as maintaining morale and employee relations and minimising liabilities.

4) In practice, what role do employees and employee representatives play in considering options to rescue the business and to help reduce and mitigate the impact of redundancies?

In our experience, ad hoc employee representatives are more interested in the potential termination package on offer, than in putting forward meaningful and sensible ideas as to how the business could continue more effectively and reducing the needs for redundancies. Existing employees representatives are more likely to get involved in considering viable options, mainly because, in our opinion, these type of representatives have been privy to business information on a more ongoing basis; and / or have been trained or have experience of what the role means in practice.

## 2.2. Facilitators and Inhibitors

### Facilitators

5) What factors, where present, best facilitate effective consultation when an employer is imminently facing, or has become insolvent? Please provide examples to illustrate this where possible.

Consultation is most effective with pre-existing, experienced and trained representatives, whether this be trade union or employee representatives. Such representatives are more skilled and effective and can narrow issues and liaise effectively with employees, resulting in a speedier process, greater certainty and pragmatic suggestions. However, current employee- relations will impact on the nature of any consultation process and so ongoing good relations is vital. Correct and timely information for employees helps with uncertainty and immediate concerns.

### Inhibitors

6) What factors, where present, act as inhibitors to starting consultation or notifying the Secretary when an employer is imminently facing, or has moved into an insolvency process? Please provide examples to illustrate this where possible.

In some cases, the company does not have the funds to pay the employees and there is no possibility of retaining the employees throughout a consultation period as immediate savings are needed. In other cases, the costs of continuing to trade are prohibitive, for example due to the extent of the losses being made by trading.

The viability of the company to continue to trade as a going concern and the likelihood of their being any funds for the unsecured creditors also impact on willingness to consult and/or minimise potential liabilities so as to protect the creditors' funds. If there will be a fund for unsecured creditors, the administrator will be more concerned with consultation as it is an obligation to act in the best interests of the body of creditors of a company as a whole.

7) What factors, where present, negatively impact upon the quality and effectiveness of consultation when an employer is facing insolvency, or has become insolvent? Please provide examples to illustrate this where possible.

Inexperienced representatives who lack an understanding of the nature of their role, the process and the organisation hinder effective consultation. This can lead to frustrations, delays and a deadlock on both sides. Equally, the management representatives must have a sufficient

understanding of the process and the business situation and authority to engage in the process, including agreeing proposals made by the representatives.

However, in an insolvency situation, many of the factors which contribute to an effective consultation process (e.g. the selection criterion, the package, the timescales and other mitigating factors) are often non-negotiable given the financial situation of the company. Even in a non-insolvency situation, it is rare, in our experience, for a consultation process to result in redundancies being avoided or significantly reduced.

In addition, there are practical difficulties sometimes faced by administrators in identifying and contacting the employees or their representatives.

## 2.3. Role of Directors

8) Are advisors (accountants, HR professionals, or where an insolvency practitioner is acting as an advisor pre-insolvency) informing directors of their need to start consultation when there is the prospect of collective redundancies? How do directors respond to such advice?

9) Are directors facing insolvency starting consultation, and notifying the Secretary of State, as soon as collective redundancies are proposed and at the latest when they first make contact with an insolvency practitioner? If not, how can this be encouraged?

Directors are normally looking to avoid an insolvency situation arising right up to the point when it becomes clear there is no alternative. In many cases, to consult with employees about potential redundancy in the event of insolvency could be counter-productive if trying to avoid insolvency occurring.

Directors are only obliged to notify of redundancies once these are 'proposed'. Whilst the legislation and case law makes this clear, there may be uncertainty around when the proposal is made and the duty is triggered (for example, if appointment of an administrator is inevitably going to lead to redundancies, or if the loss of a contract will inevitably result in administration). Better Guidance on such issues would be helpful.

The rules regarding the commencement of the process are not clear, particularly for businesses which are not seeking independent legal advice. In addition, because of the collation of numbers of redundancies from 3 months prior to the current exercise, there is a risk that directors will not realise that they are in a collective redundancy situation, so may not be aware that the rules apply. This could be encouraged by making these two aspects of the process clearer.

10) Normally are employee representatives already in place? What are the practicalities of appointing employee representatives when no trade union representation is in place?

Where employee representatives need to be elected, this represents a further administrative burden on the business. The process is much more difficult where the numbers of employees affected are large and disparate and, in some cases, identifying the employees is a challenge in itself.

11) How does the hand over from directors to insolvency practitioners work when a company becomes insolvent in relation to engagement with employees?

## 2.4. Ensuring Effective Consultation and Notification

### Process for Notification and Consultation

12) How might the process for notifying the Secretary of State and sharing information with third parties be improved?

It may be that less information is required initially to comply with notification to the Secretary of State in an insolvency situation. For example, the method of selection for redundancy and the representatives' details could be excluded from the HR1 form in an insolvency situation, potentially to be provided at a later stage. This would facilitate the speed for notification and reduce the initial burden on the insolvency practitioner and allow the government agencies to provide the appropriate support to the employees as soon as possible.

A clear starting point for the process with clear guidance as to when the need to consult collectively is triggered in terms of qualifying numbers would help.

13) Could the process requirements for consultation be further clarified or improved?

There may be some merit in treating different insolvency situation differently, as is the case under TUPE. Where the aim is to liquidate the business, there is no real merit in going through a long process aimed at giving the employees an effective voice in how the process is managed or what the end result is. A long process may not be the best outcome for either the business or the employees, so an ability to allow redundancies to be effected prior to the end of the consultation period may be helpful in this case.

In an insolvency situation, there may be merit in distinguishing between terminal and non-terminal proceedings and the process required. If so, we suggest that it is preferable to set out exactly which procedure falls into which category.

We note the recommendation in the BIS report on [REDACTED] to develop best practice guidance for sharing information with employees and unions when an administration order is likely. There is also a recommendation that insolvency professionals agree a format for a short initial statement, to be made publicly available no later than 1 week after an administration order has been made, which sets out a high-level summary of the events leading up to an administration including details of i) who to contact with concerns over the conduct of company directors and evidence to support those concerns, ii) when the last payment to staff and suppliers was made and the period it covered and iii) an early assessment of whether there would be any funds available to make a payment to unsecured creditors (excluding the prescribed part). We think that the input of insolvency professionals on the feasibility of these suggestions is required.

## **Guidance**

14) Would further guidance be helpful and if so, what should this cover, who should it be aimed at and how could it be marketed most effectively?

Any guidance will need to be monitored and reflect any amendments to the legislation which ultimately arise from the current consultation by the European Commission with the Social Partners on the consolidation of three Directives (collective redundancies, transfers of undertakings and general framework for information and consultation) at national level.

## **Incentives and disincentives**

15) How can Government best incentivise or disincentivise the behaviour of directors and insolvency practitioners to ensure that consultation and notification are conducted in a timely and effective way in insolvency situations?

Some consider that some form of direct incentive/disincentive for insolvency practitioners would be required for better compliance with the information and consultation obligations. However, it is our view that this would not be effective, necessary or desirable in many cases. In most cases, it is the insolvency situation itself which causes the difficulties with compliance and further incentives are unlikely to change the practical realities or be effective bearing in mind the broader duties of the insolvency practitioner. We also do not consider that it would be appropriate that the Insolvency Practitioner should face personal liabilities for any breaches as this would be an anomaly and may result in a conflict of duties for the insolvency practitioner. (In addition, Directors also have duties which can put them inevitably in conflict with a full consultation process).

Whilst improved levels of compliance would benefit employees (in the sense of receiving information and time to look for a new job) and the taxpayer (through reduced claims on the National Insurance Fund), in many cases the economic necessities mean that compliance with an information and consultation process is not an option and, even if it were, the outcome would not change in any event.

We consider it may be better and more effective to consider non legal methods of ensuring the right information and support is provided to employees at the right time.

16) What would most encourage constructive engagement by employees when in this situation? And do you have any suggestions for how employee representatives can best be supported?

17) Do you have any examples of where constructive consultation and engagement has happened in an insolvency situation? If so, what was done and how?

## Sanctions

18) The current sanctions against employers who fail to consult take the form of Protective Awards. Do you think these are proportionate, effective and dissuasive in the context of employers who are imminently facing, or have become insolvent? Is the situation different as it applies to directors and insolvency practitioners respectively?

We are concerned by the recommendation in the BIS report on [REDACTED] that the current order of priority does not reflect modern working practices (by excluding self-employed and suppliers or contractors) and that preference should be given to all of the company workers not just employees. Whilst the BIS recommendation does recognise that any change to the priority order for creditor repayments under the Insolvency Act should be carefully considered to avoid unintended consequences and to balance protection for workers with the need for companies to attract credit and investors, we think that this avoids the real problem which is bogus self-employment. This issue is already adequately addressed in employment legislation and a change in order of priority is not necessary.

19) Do you think that the current sanctions for failing to meet the notification requirements are proportionate, dissuasive and effective?

The 'special circumstances' defence under s.188(7) TULRCA 1992 has been interpreted very narrowly and so there is uncertainty about how or when this defence may apply in an insolvency situation. Perhaps the defence circumstances could be widened given that all steps towards compliance must be taken that are reasonably practicable in any event.

The BIS report on the Impact of closure of [REDACTED] on Employment highlights that it can be in the financial interests of the Company to break the law (where it costs more to keep the business going for the consultation period than the level of awards) and there is no financial punishment because the protective award is paid by the taxpayer from the National Insurance Fund. However, in some insolvency cases, the Insolvency Practitioner may be under a duty to cease trading and in others there may simply be no money to pay employees for the consultation period and so breach of the

consultation duties is unavoidable and inevitable. The report acknowledges the former situation (at para 10) as where a company has gone into administration, it is likely that it will be, or will be about to become, insolvent and the administrator will not have the option to allow the company to continue to trade for the consultation period.

It is important to note that for an employee to claim from the National Insurance Fund, certain conditions must be met for the relevant payment and that caps are applicable to certain payments, with the excess being an unsecured debt and so can be claimed from the insolvent estate in priority to most employment debts. The employee's claims are then subrogated to the Secretary of State. Protective awards do not qualify for super priority in an administration and so are not paid in priority to an administrator's expenses and only protective awards in relation to the period prior to the insolvency are preferential debts.

### **Memorandum of Understanding**

20) [How well is the memorandum of understanding between R3, Job Centre Plus and the Insolvency Service working?](#)