

REPORT OF THE COMPANY LAW REVIEW GROUP

**REVIEW OF EXISTING LEGISLATIVE PROVISIONS REGARDING
THE PROVISION OF INFORMATION TO CREDITORS GENERALLY
AND IN PARTICULAR TO EMPLOYEES**

5 MARCH 2021

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Chairperson's Letter to the Minister for Enterprise, Trade and Employment

Mr Leo Varadkar

Tánaiste and Minister for Enterprise, Trade and Employment

23 Kildare Street

Dublin 2 D02 TD30

5 March 2021

Dear Tánaiste,

I have pleasure in submitting the Company Law Review Group's report on strand 1 of Item 1 of its Work Programme for 2020-2022, on whether the provisions of the Companies Act surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers. The answer to this question is necessarily nuanced given that the Companies Act sits side-by-side with other bodies of law and tangible State supports that contribute to the protection of workers' rights.

The Review Group has identified and now proposes a number of practical improvements to the Companies Act liquidation process which we believe by improving the quality and circulation of information to employees and other creditors, will go to a material extent in protecting their rights.

The Review Group has, since its establishment, sought to arrive at a consensus in its reports. In this case, it has not been possible to arrive at a full consensus on all points, as the ICTU nominee to the Group dissents to varying degrees with the recommendations made, as set out in the minority report set out in Appendix 5.

I would like to acknowledge and thank the members of the CLRG's Corporate Insolvency Committee and in particular Professor Irene Lynch Fannon, Chair of the Committee. Members delivered in-depth submissions and attended 6 comprehensive meetings between October 2020 and February 2021, leading to the Committee's recommendations, which in turn have been adopted and approved by the Review Group.

I would also like to thank the Department of Enterprise Trade and Employment for their support, in particular, the new Secretary to the Group, Mr Stephen Walsh and his predecessor Ms. Tara Keane.

The Review Group will report on the second and third elements of Work Programme item 1 in the coming months.

Yours sincerely,

Paul Egan SC

Chairperson

Company Law Review Group

1. Introduction

1.1 The Company Law Review Group

The Company Law Review Group (“**CLRG**”) is a statutory advisory body charged with advising the Minister for Enterprise, Trade and Employment (“**the Minister**”) on the review and development of company law in Ireland. It was accorded statutory advisory status by the Company Law Enforcement Act 2001, which was continued under Section 958 of the Companies Act 2014. The CLRG operates on a two-year work programme which is determined by the Minister, in consultation with the CLRG.

The CLRG consists of members who have expertise and an interest in the development of company law, including practitioners (the legal profession and accountants), users (business and trade unions), regulators (implementation and enforcement bodies) and representatives from government departments including the Department of Enterprise, Trade and Employment (“the Department”) and Revenue. The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications. The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at E.U. level. This Report is the product of work by the Corporate Insolvency Committee, chaired by Professor Irene Lynch Fannon. The Secretariat to the CLRG is provided by the Company Law Development Unit of the Department of Enterprise, Trade and Employment.

1.2 The Role of the CLRG

The CLRG was established to “monitor, review and advise the Minister” on matters concerning company law. In so doing, it is required to “seek to promote enterprise, facilitate commerce, simplify the operation of the [Companies] Act, enhance corporate governance and encourage commercial probity” (section 959 of the Companies Act 2014).

1.3 Policy Development

The CLRG submits its recommendations on matters in its work programme to the Minister. The Minister, in turn, reviews the recommendations and determines the policy direction to be adopted.

1.4 Contact information

The CLRG maintains a website www.clr.org. In line with the requirements of the Regulation of Lobbying Act 2015 and accompanying Transparency Code, all CLRG reports and the minutes of its meetings are routinely published on the website. It also lists the members and the current work programme.

The CLRG’s Secretariat receives queries relating to the work of the Group and is happy to assist members of the public. Contact may be made either through the website or directly to:

Stephen Walsh
Secretary to the Company Law Review Group
Department of Enterprise, Trade and Employment
Earlsfort Centre
Lower Hatch Street
Dublin 2 D02 PW01 Email: stephen.walsh@enterprise.gov.ie

2. The Company Law Review Group Membership

2.1 Membership of the Company Law Review Group

The membership of the Company Law Review Group at the date of this report is provided below.

Paul Egan SC	Chairperson (Mason Hayes & Curran LLP)
Alan Carey	The Revenue Commissioners
Barry Conway	Ministerial Nominee (William Fry)
Bernice Evoy	Banking and Payments Federation Ireland CLG
Ciara O’Leary	Irish Funds Industry Association CLG (Maples and Calder LLP)
Dr. David McFadden	Ministerial Nominee (Companies Registration Office)
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)
Eadaoin Rock	Central Bank of Ireland
Emma Doherty	Ministerial Nominee (Matheson)
Fiona O’Dea	Ministerial Nominee (DETE)
Gillian Leeson	Euronext Dublin (The Irish Stock Exchange PLC)
Gillian O’Shaughnessy	Ministerial Nominee (ByrneWallace LLP)
Ian Drennan	Director of Corporate Enforcement
Prof. Irene Lynch Fannon	Ministerial Nominee (School of Law, University College Cork)
James Finn	The Courts Service
John Loughlin	Consultative Committee of Accountancy Bodies – Ireland (CCAB-I) (PricewaterhouseCoopers)
Kathryn Maybury	Small Firms Association Ltd (KomSec Limited)
Kevin Prendergast	Irish Auditing and Accounting Supervisory Authority
Máire Cunningham	Law Society of Ireland (Beauchamps)
Marie Daly	Irish Business and Employers’ Confederation (IBEC)

Maura Quinn	The Institute of Directors in Ireland
Maureen O'Sullivan	Ministerial Nominee (Registrar of Companies)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Richard Curran	Ministerial Nominee (LK Shields LLP)
Rosemary Hickey	Office of the Attorney General
Salvador Nash	The Chartered Governance Institute (KPMG)
Shelley Horan	Bar Council of Ireland
Tanya Holly	Ministerial Nominee (DETE)
Vincent Madigan	Ministerial Nominee

3. The Work Programme

3.1 Introduction to the Work Programme

In exercise of the powers under section 961(1) of the Companies Act 2014, the Minister, in consultation with the CLRG, determines the programme of work to be undertaken by the CLRG over the ensuing two-year period. The Minister may also add items of work to the programme as matters arise. The most recent work programme began in June 2020 and runs until May 2022. The work programme is focused on continuing to refine and modernise Irish company law, with a strong emphasis on the area of insolvency and Brexit-related matters.

3.2 Company Law Review Group Work Programme 2020-2022

The Review Group's current Work Programme is as follows:

1	Consider the Companies Act in the context of creditors' rights under the following headings:
1.1	<ul style="list-style-type: none">Review whether the legal provisions surrounding collective redundancies and the liquidation of companies effectively protect the rights of workers.
1.2	<ul style="list-style-type: none">Review the Companies Act with a view to addressing the practice of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business.
1.3	<ul style="list-style-type: none">Examine the legal provision that pertains to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection.
2	Provide ongoing advice to the Department of Enterprise, Trade and Employment on potential amendments to company law in light of the Covid-19 pandemic and the consequent effects on companies' administration, solvency and compliance with the Companies Act 2014.
3	Provide ongoing advice to the Department of Enterprise, Trade and Employment on the migration of participating securities in light of Brexit, and any consequential company law amendments arising.
4	Examine the possible impacts of the increased use of Artificial Intelligence in the context of the Companies Act 2014, with particular regard to corporate governance matters.
5	Provide ongoing advice to the Department of Enterprise, Trade and Employment on request in relation to EU and international proposals on company law.
6	Examine and make recommendations on whether it will be necessary or desirable to amend company law in line with recent case law and submissions received regarding the Companies Act 2014.
7	Review the enforcement of company law and, if appropriate, make recommendations for change.

8	Review the CLRG's recommendation from its 2017 Report on the Protection of Employees and Unsecured Creditors' in relation to "self-administered liquidation" and make further recommendation as to how this might be implemented.
9	Review the obligations outlined in relation to the directors' compliance statement in the Companies Act 2014, and, if appropriate, make recommendations as to how these might be enhanced in the interest of good corporate governance.

This Report is concerned with item 1.1 of the Work Programme.

3.3 Decision-making process of the Company Law Review Group

The CLRG meets in plenary session to discuss the progression of the work programme and to formally adopt its recommendations and publications.

3.4 Committees of the Company Law Review Group

The work of the CLRG is largely progressed by the work of its Committees. The Committees consider not only items determined by the work programme, but issues arising from the administration of the Companies Act 2014 and matters arising such as court judgements in relation to company law and developments at E.U. level. This Report is the product of work by the Corporate Insolvency Committee, Chaired by Professor Irene Lynch Fannon.

4. Background to the Report

4.1 Definitions

In this Report the following defined terms and expressions are used:

“**2014 Act**” or “**Companies Act**” means the Companies Act 2014 (as amended);

“**CLRG 2017 Report**” means the Report of the Company Law Review Group on the protection of employees and unsecured creditors, whose recommendations are summarised in section 4.3 of this Report:¹

“**Committee**” means the Corporate Insolvency Committee of the Company Law Review Group;

“**Court liquidation**” means a winding up which is commenced by order of the High Court;

“**CRO**” means the Companies Registration Office;

“**CVL**” or “**creditors’ voluntary liquidation**” means a winding up initiated by the directors of a company convening meetings of members and creditors;

“**Department**” means the Department of Enterprise Trade and Employment;

“**Duffy Cahill Report**” means the Expert Examination and Review of Laws on the Protection of Employee Interests when assets are separated from the operating entity of 26th April 2016;²

“**EU Insolvency Regulation**” means Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (EIR recast);³

“**ICTU**” means the Irish Congress of Trade Unions;

“**liquidation**” or “**winding up**” means the process whereby the end is put to the carrying on of the business of a company or other entity, regulated for companies by Part 11 of the 2014 Act;

“**members’ voluntary liquidation**” means a liquidation or winding up initiated by the directors of a company in anticipation of all the company’s creditors being paid in full within one year;

“**ODCE**” means the Office of the Director of Corporate Enforcement;

“**provisional liquidator**” means a person appointed as a liquidator to a company by a court before any winding up order is made, usually when the company’s assets are in danger.

¹ <http://www.clrg.org/publications/clrg%20adhoc%20committee%20report.pdf>

² <https://enterprise.gov.ie/en/Publications/Publication-files/Duffy-Cahill-Report.pdf>

³ OJ L 141, 5.6.2015, p. 19.

4.2 Policy Context

Item 1 on the Company Law Review Group's (CLRG) Work Programme 2020-2022 described on page 8 of this Report, arises from commitments contained in the Programme for Government, 'Our Shared Future',⁴ in relation to workers' rights when a company goes into liquidation.

The Tánaiste wrote to the Chair of the CLRG on 30 July 2020, requesting that Item 1 be considered a priority issue:

'The first item on the Work Programme deals with commitments from the Programme for Government. Issues surrounding workers' rights when a company goes into liquidation have come to the fore in light of COVID-19, in particular the alleged practice of a minority of trading entities splitting their operations between trading and property with the result being the trading business (including jobs) go into insolvency and assets are taken out of the original business. I ask that the CLRG report to me on this matter by 31st December 2020. It is time that these issues not only be reviewed but also dealt with. Government will be ready to act on the findings and propose legislation where this can achieve results.'

Item 1 on the Company Law Review Group's Work Programme 2020-2022 raises three distinct questions surrounding:

- first, the legal provisions which serve to protect workers as creditors in corporate liquidations;
- secondly the practice of restructuring corporate entities into trading operations and property holding companies which result in the removal of assets from the trading entity; and
- thirdly, the examination of legal provisions regarding sales to connected parties on insolvency.

4.3 CLRG Report on the Protection of Employees and Unsecured Creditors 2017

Some of these issues were considered by the CLRG in its Report on *The Protection of Employees and Unsecured Creditors 2017*, which entailed a root and branch review of all the provisions of the Companies Act 2014 relevant to the treatment of employees and unsecured creditors in an insolvency. The Review Group considered whether new provisions should be enacted in order to address the issues that were of concern at that time. Some of these issues continue to be relevant to the subject matter of this Report.

The proposals in the CLRG 2017 Report included the following:

- a requirement where it is the intention of a provisional liquidator to cease trading and/or terminate employees' contracts of employment, that the provisional liquidator must seek a specific power to do so from the High Court;⁵

⁴ [Programme for Government: Our Shared Future \(www.gov.ie\)](http://www.gov.ie), 29 October 2020.

⁵ CLRG 2017 Report, pp 56-58.

- a legislative change to allow for access to the Social Insurance Fund for employees whose employer has not entered into formal insolvency;⁶
- the imposition of a statutory obligation on company directors to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due;⁷
- the addition to the questionnaire used to compile the section 682 liquidator's report of a question as to the consideration given by the directors of the company to the interests of the company's employees in the period immediately prior to liquidation.⁸

4.4 Duffy Cahill Report

Some of these issues relevant to the position of employees in corporate insolvencies were considered by the Duffy Cahill Report.⁹ Its terms of reference recognised what it described as the “the complex interface between company law and employment rights law”, noting that the two codes have been devised for very different purposes.¹⁰ Its terms of reference also included a request that consideration be given to changes at this interface between these two codes of law. The Irish Congress of Trade Unions (ICTU) has highlighted that the Duffy Cahill Report's recommendations remain outstanding.

It was confirmed that responsibility for employment rights, redundancy and insolvency recently transferred to the Department from the Department of Social Protection and the recommendations made in the Duffy Cahill Report are currently being revisited.

4.5 Economic Impact of Covid-19

The Review Group is particularly aware that, in addition to the concerns which gave rise to the 2017 CLRG Report, the consequences of the COVID-19 pandemic have revived and added to those concerns. There is a general anticipation of an increase in corporate insolvency figures, particularly in the retail sector. Given this predicted scenario the issue of creditors' rights and protections have come to the fore. Deloitte has identified 2021 as being a challenging year for insolvencies, given the introduction of a further higher level lockdown, which will have an impact on company survival

⁶ CLRG 2017 Report, pp 90-92. This will be considered in the second workstream report, as described below. This is also the subject matter of a decision of the Court of Appeal and the Supreme Court where the latter held that Ireland had failed to properly implement the relevant Directive because the applicant could not be paid out of the Employers Insolvency Fund where her employer had not gone into a formal liquidation process. *Glegola v Minister for Social Protection and Ors.* [2018] IESC 65

⁷ CLRG 2017 Report, pp 33-39. This involves the codification of existing principles as enunciated by the Supreme Court in *Re Frederick Inns Ltd.* 1994 ILRM 387 and reiterated by a judgement of Clarke J. (as he then was) in *Re Swanpool Ltd. McLoughlin v Lennon & anor.* [2005] IEHC 341

⁸ CLRG 2017 Report, p 65.

⁹ *Supra* n. 2 <https://enterprise.gov.ie/en/Publications/Duffy-Cahill-Report.html>

¹⁰ <https://enterprise.gov.ie/en/Consultations/Consultations-files/Appendix-1-Terms-of-Reference-for-Expert-Examination.pdf> This was recently discussed by the Joint Committee on Enterprise, Trade and Employment on 4 November 2020

https://www.oireachtas.ie/en/debates/debate/joint_committee_on_enterprise_trade_and_employment/2020

rates.¹¹ While current figures¹² do not show a marked increase in insolvencies, this is likely due to the continued availability of government supports to enterprises, together with banking, trade credit and landlord supports being provided to affected companies.

Notwithstanding such supports it is expected that the continued COVID-19 restrictions during 2021 will result in an increase in the number of businesses going into insolvency processes. If the Government seeks to unwind the level of business supports as the effects of the pandemic subside levels of insolvencies are expected to increase. Some commentators have suggested that this is likely to happen from Q2 onwards in 2021¹³.

The economic impact of COVID-19 makes the subject matter of this report a priority. The Central Bank¹⁴ has acknowledged the impact that the significant levels of Government supports have had on the enterprise sector and the broader economy. In reviewing the impact of COVID-19 on SMEs the Central Bank notes that SMEs are likely to be facing considerable financial strain during this time compared with larger corporations and households. The uneven nature of the impact of COVID-19 on different sectors of the economy is already apparent and it is expected that whilst insolvency is likely to occur across various sectors of the economy, a particular impact will be seen in the hospitality (bars, restaurants, hotels) and the retail sectors.¹⁵

4.6 The Review Group's Approach Work Programme Item 1

In his letter to the Tánaiste in late December, 2020, the CLRG Chairperson outlined the CLRG's planned approach to this Work Programme Item. The Committee has divided the work into three separate workstreams:-

- The first is a review of existing legislative provisions regarding the provision of information to creditors generally and to employees specifically. The specific question is whether these provisions provide sufficient protection to employees and creditors or whether some of the reforms which have either been suggested earlier by the CLRG in its 2017 Report ought to be implemented and/ or whether there are additional measures which ought to be put in place.

This Report addresses this issue.

- The second workstream involves a consideration of employees as corporate stakeholders, in particular in the context of alleged restructuring and splitting of corporate operations from asset holding entities in a minority of cases. This is a broader matter reflecting complex

¹¹ [Marginal increase for corporate insolvencies in 2020 despite economic challenges - Deloitte Ireland.](#)

¹² Deloitte's insolvency statistics show a marginal increase in corporate insolvencies in Ireland in 2020 (575) compared with 2019 (568), an increase of 1%. Some of the reasons they put forward for this include the broad range of enterprise supports currently provided by the Government to companies throughout the COVID 19 crisis, together with banking, trade credit and landlord supports being provided to affected companies. The continued support being provided by the ODCE to companies entering insolvency during this period is also a factor in terms of having due regard to the impact of the pandemic as it carries out its functions of examining and adjudicating upon liquidators reports

¹³ [Wave of insolvencies now looms large for bars and restaurants - Independent.ie](#)

¹⁴ <https://www.centralbank.ie/news/article/press-release-impact-of-covid-19-on-irish-enterprises-sudden-large-and-uneven-01-october-2020>

¹⁵ See Deloitte supra n 12.

policy issues. The Review Group's Corporate Insolvency Committee is setting about refining the issues which can be addressed by the CLRG, conscious that its remit concerns company law only. It is anticipated that this part of the Review Group's work will focus on corporate restructurings and will necessarily revisit some recommendations made by the CLRG in its 2017 Report. These include:

- Section 599 of the 2014 Act, under which a related company may be required to contribute to debts of a company being wound up;
- Section 600 of the 2014 Act, under which the assets of related companies in liquidation may be pooled; and
- a possible addition to the 2014 Act following the structure of section 224 (under which directors must have regard to the interests of employees) in order to impose on directors of companies a statutory obligation to consider the interests of creditors where it appears that a company is, or is likely to be, unable to pay its debts as they fall due. This proposal is reflective of statements in case law and has been the subject matter of a CLRG recommendation in 2017.¹⁶
- Additional provisions which are potentially relevant to both this and the following workstream include sections 602, 603 604, 605, 608, 609, 610, 612 & 613 of the Companies Act 2014. These provisions can be generally described as provisions which have the effect of ensuring assets are not removed from the reach of creditors.

- The third workstream will address:

- the legal provisions that pertain to any sale to a connected party following insolvency of a company including who can object and allowable grounds of an objection;
- transactions around insolvency which remove assets from the reach of creditors and, in particular involve the transfer of assets to connected parties.

Many of the provisions mentioned as being relevant to workstream 2 are also relevant to workstream 3.

¹⁶ See references at n. 8 *supra*. It is noted that Head 9 of the General Scheme of what became the Companies (Miscellaneous Provisions) (Covid-19) Act 2020 originally contained this measure as a proposed section 224 A of the 2014 Act, but it was not included in the Bill as enacted:

(1) The directors of a company who believe, or who have reasonable cause to believe, that a company is unable or likely to be unable to pay its debts as they fall due, shall—

(a) have regard to the interests of the company's creditors; and (b) preserve the company's property.

(2) The duty in subsection (1) shall be owed to the company (and the company alone) and shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.

(3) Where a director of a company acts in breach of his or her duty under subsection (1) and the company goes into insolvent liquidation then the director shall be liable to indemnify the company for any loss or damage resulting from that breach.

(4) For the purposes of subsection (3), a company shall be taken to have suffered loss or damage where, upon its insolvent liquidation, its creditors do not recover the sums which they would have received had there been no breach of the duty in subsection (1).

Although many of these legal issues are at the interface with employment rights law described in the Duffy Cahill Report terms of reference, the Review Group has been mindful of its own statutory mandate, which is concerned with company law and primarily the Companies Acts. This is consistent with the approach taken for the CLRG 2017 Report, where the Duffy Cahill Report addressed wider issues beyond the Companies Act.

Following on from this work the CLRG proposes to revisit the recommendations of the CLRG 2017 Report in the context of Item 8 on the work programme, namely to review the 2017 recommendation in relation to "self-administered liquidation" and to make further recommendation as to how this might be implemented. This is with a view to devising a "scheme to help directors of insolvent companies who want to wind up their company but cannot afford to pay a liquidator to do so." The self-administered liquidation would be formulated with a view to facilitating small companies with relatively minor amounts of debt.¹⁷

¹⁷ CLRG 2017 Report pp 66-67.

5.1 Review of Legislative Provisions

5.1.1 The general legislative framework within which Liquidators operate.

Before looking at areas which have been the subject matter of specific submissions indicating a need for reform, this section highlights existing provisions that are relevant to the conduct of liquidations generally and to the provision of information by liquidators to creditors including employees; and consequently, to the protection of creditors including employees, and provides a useful explanatory context to the Committee's subsequent deliberations.¹⁸ This list is not exhaustive.

A list of provisions relevant to the provision of information by liquidators to creditors generally is provided at Appendix 2.

5.1.2 Commencement of Liquidations.

Section 584 Duty of liquidator to call creditors' meeting if of opinion that company unable to pay its debts

There will be circumstances where a liquidation is commenced by a company as a members' voluntary liquidation where it is thought that the company is solvent. However, where a liquidator in a members' voluntary winding up forms the opinion that the company will not be in a position to discharge its debts within the period stated in the declaration concerned referred to in section 207 or section 580(2) then, under section 584 s/he must summon a meeting of creditors no later than 14 days after forming that opinion. The liquidator must send notices for the meeting 10 days in advance and publish the notice of the meeting in *Iris Oifigiúil*. During the period before the meeting the liquidator must provide creditors with any information requested by creditors on the affairs of the company, free of charge. From the date on which the creditors' meeting is held under this section, the winding up becomes a creditors' voluntary winding up and any appointment made, or committee established by the creditors' meeting is deemed to have been made or established by that meeting.

At the meeting the liquidator must make out a statement as to the affairs of the company, including a statement on the company's assets and liabilities, outstanding creditors and their claims.

Section 587 Meeting of creditors

In other situations, the liquidation will commence voluntarily but as a creditors' voluntary winding up where the company is already insolvent. This section obliges the company to call a meeting of its creditors at which a resolution for a creditors' voluntary winding up is to be proposed. The company is required to give creditors 10 days' notice in writing of the details of the meeting and attach a list of creditors of the company. Under this section the directors of the company are required to provide a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims, which is required to be laid before the creditors meeting.

¹⁸ The Committee also notes that the issue of information provision to creditors on receiverships is considered in its Report on the Regulation of Receivers, 2019.

Section 593 Statement of company's affairs

Generally, where the court has made a winding-up order or appointed a provisional liquidator in relation to a company, a statement on the company's affairs (assets, debts, liabilities and other information) must be made out and filed in court.

This statement must be filed and verified by the director or other person as the court may require within 21 days of appointment of a provisional liquidator, or from the date of a winding up order.

The Review Group notes that it has also addressed the matter of a Statement of Affairs in its *Report Advising on a Legal Structure for the Rescue of Small Companies* (October 2020).¹⁹ In that Report, the CLRG has recommended that additional obligations should be imposed on directors regarding the veracity of this information.²⁰

The content of the Statement of Affairs in both court liquidations and creditors' voluntary liquidations is further considered under Section 6 of this Report.

5.1.3 Role of Liquidator during Conduct of Liquidations and Oversight thereof

Section 629 Notice to be given with respect to exercise of powers, restrictions on self-dealing, etc.

This section places an obligation on the liquidator to give notice to a Committee of Inspection or Creditors where certain powers are exercised or where it is intended to dispose of assets to a connected party. The role of Committees of Inspection is considered in more detail in Section 5.2 of this Report.

Section 646 Liquidator's remuneration- procedure for fixing liquidator's entitlement thereto

This section sets out the procedure for fixing a liquidator's entitlement to remuneration. Subsection (2) states that the terms on which a liquidator has an entitlement to remuneration are set by the creditors or the committee of inspection (for court ordered windings-up or creditors' voluntary windings-up) or by members (for members voluntary windings-up). There is a residual power for the court to set remuneration or appoint a person to fix the amount of remuneration if it is not so set. Subsection (4) provides that liquidators must seek to have their entitlement to remuneration set as soon as possible after being appointed. Subsection (5) deals with the terms upon which a liquidator's entitlement to remuneration may be raised and subsection (6) provides that no variation may reduce the entitlement of the liquidator to remuneration for work that may have already been performed, without the liquidator's consent.

¹⁹ <http://www.clr.org/clrg/publications/the-company-law-review-group-s-special-report-on-the-rescue-of-small-business.pdf>

²⁰ See Para 4.5.9 on p. 21 in the context of the proposed summary rescue process that the 'Process Adviser-designate'"be furnished with a full statement of affairs of the company, prepared under a duty of utmost good faith and sworn by affidavit, by the directors of the company. Considerable emphasis on the duty of utmost good faith being imposed on directors in this context is stressed by the Review Group."

Section 651 Penalty for default of liquidator in making certain accounts and returns

This section provides that where a liquidator is in default in relation to the making or filing of a periodic account, abstract, statement or return in pursuance of any provision of this Act he or she is guilty of a category 4 offence.²¹

Section 652 Enforcement of duty of liquidator to make returns

A court may make an order directing the liquidator to make good any default in relation to filing, delivering, making or giving any notice which a liquidator is required to give within a timeframe as specified by the order.

Any contributory or creditor of the company, the Director of Corporate Enforcement or the Registrar of Companies may make such an application to the court.

Section 653 Director's power to examine books and records

This provision allows the Director of Corporate Enforcement (“the Director”) to request an appropriate person to produce the books and records for examination on the basis of a complaint by a member, contributory or creditor of the company or on the Director’s own motion. It also provides for a category 2 offence²² where an appropriate person fails to comply with a request from the Director, fails to answer the Director’s questions or fails to give the Director assistance or access to facilities. This section was considered by the Review Group in 2017 and was deemed fit for purpose.²³

Sections 666 to 668 Appointment of committee of inspection in court ordered winding up and creditors’ voluntary winding up and the constitution and proceedings of committee of inspection.

These provisions provide for the appointment of a Committee of Inspection in cases of winding up, creditors’ voluntary winding up and the constitution of the Committee of Inspection.

Section 666 provides for the Committee of Inspection in a court ordered winding up to be established on the initiative of the liquidator or a minimum proportion in value of the creditors without requiring court sanction.

Section 667 empowers creditors, without recourse to the court, to appoint a Committee of Inspection in the case of a creditors’ voluntary winding up.

Section 668 contains provisions relating to the composition and proceedings of Committees of Inspection.

These provisions are considered further in Section 5.2 below.

²¹ A person guilty of an offence under the Companies Act that is stated to be a Category 4 offence shall be liable, on summary conviction, to a class A fine, currently a maximum of €5,000.

²² A person guilty of an offence under the Act that is stated to be a Category 2 offence shall be liable: (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or (b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years or both.

²³ CLRG 2017 Report pp 77-79.

Section 680 Duty of liquidator to call meeting at end of each year

There is an obligation on the liquidator to convene an annual meeting of the company (in the case of a members voluntary winding up) or, (in the case of a court ordered winding up or creditors' voluntary winding up) of the Committee of Inspection or, if there is no Committee, a creditor's meeting and lay before that meeting an account of his/her acts and dealings and of the conduct of the winding up during the preceding year. There is also a requirement to make a return to the Registrar of Companies. Following discussion, views were expressed by a number of members that the information required from a liquidator could be refined leading to a suggestion for improvements in CRO form E3, which is the form providing a template for this reporting obligation. This reporting obligation is related to the reporting obligation described in the following paragraph and both the statutory provisions and the accompanying forms are discussed in more detail in Section 6 of this Report.

Section 681 Information about progress of liquidation

This section applies where the winding up of a company is not concluded within 12 months after the date of its commencement. The Committee examined this in the context of subsection (2) which requires the liquidator to send a statement to the Registrar of Companies, at set intervals, in the prescribed form and containing details of the winding up. A number of members expressed the view that the information required from a liquidator under this subsection could be refined and this led to a discussion on possible improvements to Form E4.

The issue of CRO forms are further discussed at Section 6 of this Report.

Section 706 Final meeting and dissolution in creditors' voluntary winding up

Under this provision there is a requirement to hold a final meeting and make a prescribed CRO form (E5).

As stated above, it became apparent during discussions that the Committee considered a review of relevant forms as an issue for due consideration and its deliberations are detailed at Section 6.

5.2 Committee Deliberations

This section provides an overview of the Committee’s deliberations on specific statutory provisions arising from submissions made by ICTU regarding the position of employees, and recommendations of the Committee following discussions.

5.2.1 Sections 571-572 - Provisions as to applications for winding up and powers of court on hearing petition.

Section 571 provides that an application to the court for the winding up of a company is to be by petition presented by the company, any creditor(s) of the company, any contributor(s) of the company, or by all these parties together or separately. A petitioner can be substituted by the court in the event that they do not proceed with the winding up petition.

Section 572 provides that, upon hearing a winding-up petition, the court may dismiss the petition or adjourn the hearing conditionally or unconditionally or make an interim order or any other order it sees fit. Section 572 was considered by the Review Group in 2017 and was at that time deemed fit for purpose.²⁴

The Committee considered the operation of section 571 with regard to the petitioning of the High Court for the liquidation of a company. The Committee was informed by ICTU of reports from trade unions that employees are not put on notice of the intention of the company to petition the court. The Committee was asked to consider a proposal from ICTU to amend section 571 so that the court would not hear a winding up petition unless:

- employee creditors have been put on notice and have the right to be heard; and
- the court has received details of employees, their rights, entitlements and interests including any enhanced redundancy terms.

In this context the differences between official or court liquidations on the one hand and, on the other, voluntary liquidations was emphasised. Within the former category, a second differentiation must also be made between debtor-initiated liquidations (i.e. where the company itself initiates the liquidation) and creditor-initiated liquidations.

In relation to court liquidations, whether debtor or creditor initiated, notice is provided in relation to a presentation of a petition and the impending hearing through a requirement to advertise in two national newspapers and in *Iris Oifigiúil*. The Committee was informed that in practice employees are made aware of an impending liquidation by the debtor petitioner (i.e. the company) in the case of a petition to wind up the company. This information would be provided in advance of any formal notice requirements. It was thought that it would be an exception rather than the rule that employees are not made aware of such matters. In keeping with the expressed concern regarding unintended impact on employment law provisions, it was noted that there are specific employment law obligations imposed on employers in terms of informing employees in a collective redundancy situation. Nevertheless, the Committee proceeded to consider the specific proposal from ICTU as described above.

²⁴ CLRG 2017 Report pp 72-73.

Overall, the prevailing view of the Committee did not support an amendment that would restrict the court's ability to proceed to hear a winding up petition and thus did not wish to recommend that a written notice to all employees (whether represented by a collective body or otherwise) would be included as a requirement before the Court could hear a winding up petition. In the latter part of its deliberations, and following further submissions from ICTU, the Committee took the view that generally the notice requirements relying on publication in national newspapers might be outdated. The Committee suggested that the possibility of publication of such notices on corporate websites and through other IT platforms could be explored *in addition* to maintaining these formal requirements. Reference was made to platforms for the provision of information on companies with which members of the committee were familiar.

In relation to the second part of the proposal from ICTU that the court would not hear a petition until it had received details of employees, their rights and entitlements the Committee took the view that again the distinction between a creditor-initiated petition to wind up a company and a debtor-initiated petition was of relevance. The Committee thought it would be impractical to require a creditor petitioner to determine all employment claims prior to a court hearing to order the winding up of a company. In relation to a debtor petitioner it could sometimes be the case that not all of the issues regarding employee entitlements could be resolved by the date of petition. Again, the prevailing view of the Committee was that it was not in favour of constraining a court hearing in these circumstances.

Recommendation

The prevailing view of the Review Group does not support an amendment to Section 571 or Section 572 that would restrict the court's ability to proceed to hear a winding up petition in the circumstances outlined in both parts of the ICTU proposal.

However, the Review Group considers that the notice requirements relying on publication in national newspapers might now be outdated. The Review Group suggests that further information requirements could be explored which rely on dissemination on various website platforms in addition to the current formal requirements.

5.2.2 Section 573 Appointment of provisional liquidator.

Section 573 provides that the court may appoint a liquidator provisionally any time after the presentation of a winding up petition and before the first appointment of a liquidator.

ICTU was expressly concerned with the process of the appointment of provisional liquidators and effects on employees who may not have notice of such appointment.

The Committee noted that under section 573 the appointment of provisional liquidators is exceptional, made on an *ex parte* basis once the petition process has begun and usually made to protect assets of the company. Such applications are rare and the law is clear in that they are only entertained in exceptional circumstances and where assets are at risk. The imposition of additional notice requirements would restrict the ability of the petitioner and the court to act urgently to protect the position of all creditors.

Accordingly, the Committee was not in favour of restricting the court’s ability to hear an application for the appointment of a provisional liquidator.

A second issue which was discussed concerned the specific power of a provisional liquidator to terminate the contracts of employees and/ or to cease trading. The Committee noted that generally any powers of a provisional liquidator must be expressly granted by the court. However, it recognised that in the 2017 CLRG Report²⁵ there was a recommendation that where it is the intention of the provisional liquidator to end contracts of employment and/or cease trading, the provisional liquidator must seek the specific power to terminate the employees’ contracts from the court.

Recommendation

The Review Group is not in favour of restricting the court’s ability to hear an application for the appointment of a provisional liquidator under Section 573.

The Review Group notes the 2017 CLRG Report recommendation described in the preceding paragraph which has not yet been implemented.

5.2.3. Section 621 - Preferential Payments in a Winding Up

Section 621(2)(b) gives preference to ‘all wages or salary’ arising during the period of 4 months prior to winding up.

ICTU made a submission to the Committee suggesting that problems have arisen with terms expressly or impliedly incorporated into the employee contract by collective agreement or award by the Labour Court such as enhanced redundancy terms and submitted that these recommendations should also attract preferential status. A proposal was put forward to amend section 621(2)(b) by the addition of the following type of employee claim:

“Any award made by the Labour Court pursuant to the Industrial Relations Acts 1946-2015 with regard to entitlements in the employment contract with express or implied by collective agreement or otherwise.”

The Committee expressed caution around amending existing provisions on preferential debts in accordance with this submission. There are four distinct policy matters which impact on this proposal described during the Committee deliberations:-

First, the fact that modern corporate insolvency policy is generally resistant to the extension of the class of preferential creditors on the basis that this reduces the pool of assets available to unsecured creditors who are often small business suppliers. This policy is reflected in the abolition of preferential status for all creditors other than employees in the UK under the Enterprise Act 2002. However, it is recognised that some preference was restored to government tax debts in the UK in early 2020.

²⁵ CLRG 2017 Report pp.57-58.

Second, a distinction is made in employment law between legally binding decisions of the Labour Court and recommendations of the Labour Court. The Committee were wary of unwittingly according a particular legal status to decisions of agencies operating in the employment law and labour law sphere when such decisions would not otherwise have this status.

Third, this second point ties in with an overarching concern of the Committee during its deliberations, namely the danger of creating unintended consequences for employment law provisions and the administration of the employment law framework.

The Committee was also cognisant of a case²⁶ currently before the Supreme Court which is considering issues of constitutionality of certain industrial relations/workplace relations matters and expressed concern that recommendations in this area might be premature.

Fourth, and finally, the Committee was cognisant of the fact that employees' claims which do have preferential status are often met from the Employers' Insolvency Fund which then steps into the preferential claim of employees outlined in section 621. Concern was expressed regarding the necessary interference with the operation of that Fund which such a recommendation would have, given the lack of clarity around the status of entitlements described in the proposal.²⁷

The prevailing view of the Committee was that this issue involved complex matters that were not amenable to resolution without further detailed debate conducted in the employment law context. It was proposed that such a consideration should be referred to the Workplace Regulation and Economic Migration Division of the Department. The Committee noted that in the 2017 CLRG Report, Section 621 was considered and at that time the provision was considered to be fit for purpose.²⁸

Recommendation

The Review Group is wary of unwittingly according a particular legal status to decisions of agencies operating in the employment law and labour law sphere when such decisions would not otherwise have this status.

The prevailing view of the Review Group is that this issue involves complex matters that are not amenable to resolution without reference to further consideration of the employment and labour law enforcement framework which should be referred to the appropriate Division of the Department.

5.2.4 Section 627 - Liquidator's Powers

It was suggested by ICTU that some liquidators considered that they did not have sufficient locus standi to bring or defend actions under the Industrial Relations Acts. Section 627 provides that a liquidator has the power to *“defend any action or legal proceeding in the name and on behalf of the*

²⁶ *Zalewski v Workplace Relations Commission, Ireland and The Attorney General* [2020 IEHC 178]

²⁷ See generally Lynch Fannon and Murphy *Corporate Insolvency and Rescue* (2012, Bloomsbury Professional).

²⁸ CLRG 2017 Report pp 73-77.

company". It was suggested that any uncertainty about the standing of the liquidator in relation to Workplace Relations Commission (WRC) or the Labour Court should be removed. The proposal was to amend section 627(1)(b) to include reference to proceedings and referrals concerning employee disputes and complaints before the WRC and the Labour Court.

Some members of the Committee thought that the current wording was sufficiently clear whilst other members of the Committee thought it might be worth clarifying further. On balance the Committee were not opposed to recommending further clarification in relation to this provision.

Recommendation

The Review Group recommends that further clarification be added to the wording of section 627 regarding the locus standi of a liquidator to bring or defend actions under the Industrial Relations Acts.

5.2.5 Section 666 to section 668 - Appointment of committee of inspection in court ordered winding up and creditors' voluntary winding up and the constitution and proceedings of committee of inspection.

A Committee of Inspection is a committee which represents the interests of all creditors of a company going into liquidation. Section 666 provides a mechanism for appointment of a Committee of Inspection in the case of a court ordered winding up. A similar provision is provided for under section 667 in the case of a Creditors' Voluntary Liquidation (CVL). Section 668 provides for the workings of the Committee of Inspection including the removal and filling of vacancies on committees. In practice, committees of inspection are rarely appointed in court ordered winding ups but are common in the case of CVLs.

The Committee considered a proposal from ICTU that, given the extent of their interest in the company, and the distribution of any available assets, employees should have an explicit entitlement to be represented on any Committee of Inspection. A proposal was made to amend section 666(1) to include a new paragraph (c) which would provide that where a committee is appointed, employees will be entitled to at least one representative should they so wish. Overall, the Committee was not in favour of this proposal. Employees are entitled to be nominated and appointed to the Committee of Inspection and often are. While the total number of persons on a Committee of Inspection is restricted to eight, the Committee's attention was not brought to any particular instances where an employee has been excluded from membership of the Committee of Inspection. Furthermore, it was noted that if membership of a Committee of Inspection was constrained in accordance with this proposal as to representation it might operate generally to the detriment of employees who could have better representation without such a provision.

Generally, the Committee considered that it might be appropriate to provide for a general obligation imposed on liquidators and/ or directors to ensure that creditors are made aware that they have the right to form and participate on a Committee of Inspection.

Recommendation

The Review Group recommends that consideration be given to providing for a general obligation to be imposed on liquidators and directors to ensure that creditors are made aware that they have the right to form and participate on a Committee of Inspection.

5.2.6 Section 682 Liquidator to report on conduct of directors

Section 682 provides that a liquidator must ‘within 6 months after the date of his or her appointment and at intervals as required by the Director thereafter, provide to the Director a report in the prescribed form. There is an outstanding recommendation from the 2017 CLRG *Report on the Protections for Employees and Unsecured Creditors*, which proposed a new question on the liquidator’s report to address the treatment of employees immediately prior to liquidation.²⁹

‘If the company had employees, can you please confirm if the directors have demonstrated to you that they have had regard to the interests of their employees in accordance with the requirements of section 224 of the Companies Act, 2014?’

Yes [] No []

‘If not, please provide full details on a separate sheet’

This reform was proposed to ensure that the liquidator must specifically address the consideration given to employees by the directors of the company in the vicinity of insolvency.

The ODCE noted that it already expects liquidators to provide this information in all cases where it was relevant to consideration of the conduct of the directors and that, generally, the information supplied is adequate. This information helps inform the ODCE’s decision to relieve or not to relieve the liquidator from bringing restriction proceedings against the directors of the insolvent company. Notwithstanding the position as outlined by the ODCE, it was suggested by ICTU that this reform would be enacted to create an explicit requirement that the liquidator must specifically address the consideration given to employees by the directors of the company in the vicinity of insolvency. The Committee noted that this amendment did not require primary legislation and could be given effect by way of a Statutory Instrument.

Recommendation

There is an outstanding recommendation from the 2017 CLRG Report on the Protections for Employees and Unsecured Creditors, which proposed a new question on the liquidator’s report to address the treatment of employees immediately prior to liquidation. The Review Group supports this recommendation.

²⁹ CLRG 2017 report p 65 and Appendix 6.

5.2.7 Section 819 - Declaration by court restricting director of insolvent company being appointed or acting as director

Section 819 allows for restriction of directors for up to five years. Following submissions by ICTU, the Committee considered whether Section 819(1) should be amended to allow for the court to have the discretion to impose lengthier periods in more egregious cases. Overall, the view of the Committee was that they supported the current restriction regime. Concerns were raised in relation to interfering with the mandatory restriction period of 5 years as provided for in the legislation. The prevailing view of the Committee was that this would have unintended effects on the efficacy of the existing legislation.

The Committee considered a second submission from ICTU that section 819(2)(a) be reviewed with the possible inclusion of the following wording:

“The court shall make a declaration under subsection (1) unless it is satisfied that-

- (a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company; and*
- (b) the person concerned has fully complied with their obligations with regard to the rights and interests of employees generally, under employment law, their contract of employment, collective agreements, this Act or generally”.*

It should be noted that in fact the current section 819(2) requires that the court shall make a declaration under section 819(1) restricting the director unless it is satisfied of three distinct matters which must be proven cumulatively:-

- “(a) the person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company,*
- (b) he or she has, when requested to do so by the liquidator of the insolvent company, cooperated as far as could reasonably be expected in relation to the conduct of the winding up of the insolvent company, and*
- (c) there is no other reason why it would be just and equitable that he or she should be subject to the restrictions imposed by an order under subsection (1).”*

During the deliberations of the Committee there was some discussion of the relationship between these provisions, the disqualification of director provisions outlined in section 842, the provisions of section 224 which relates to the directors’ duty to have regard to the interests of the company’s employees and section 225 which relates to the director’s compliance statement. The Committee recognised that, in relation to this second part of ICTU’s proposal around the restriction provisions, s. 819(2)(a), which requires a director to show the court that ‘he or she has acted honestly and

responsibly in relation to the conduct of the affairs of the company' involves the question of whether the director has complied with all obligations under the Companies Acts.³⁰

The Committee recognised that there is a specific duty imposed on directors in s. 224 of the Companies Act 2014 to 'have regard in the performance of their functions' to the 'interests of the company's employees in general'. Compliance with this duty is part of the overall consideration of whether an individual director has acted honestly and responsibly in relation to the affairs of the company under s. 819(2)(a). As stated above the ODCE has affirmed that consideration of how the interests of employees are addressed is part of its decision making regarding the restriction process. Similarly, section 842(b) on disqualification allows for disqualification of a director or officer who is in breach of duties owed to the company which includes the duty outlined in s. 224.

Section 819 was also considered by the Committee in 2017. At that time ICTU put forward a similar proposal to increase the periods of restriction of directors. The Review Group (with the exception of ICTU) considered the section was fit for purpose.

Recommendation

The Review Group is not in favour of the proposal to amend Section 819 to provide for a judicial discretion to increase or otherwise alter the mandatory period of restriction.

In relation to the second proposal to include the specific mention of employees the Review Group is not in favour of this proposal noting that Section 224 of the Companies Act 2014 states

'The matters to which the directors of a company are to have regard in the performance of their functions shall include the interests of the company's employees in general, as well as the interests of its members.'

This duty is included in a consideration of whether a director has complied with his or her obligations under the Companies Acts pursuant to section 819(2)(a).

³⁰ See Shanley J. in *Re La Moisselle Clothing Ltd* [1998] 2ILRM 345 and Clarke J. in *Re Swanpool Ltd. McLaughlin v Lannen* [2006] 2 ILRM 217

6. Administrative Efficiency (Relevant Forms)

6.1 Principles

The Committee discussed the issue of relevant court forms and CRO forms, including the Statement of Affairs which is referred to above. All of these forms interface with provisions considered in Sections 4 and 5 which are relevant to liquidations and the Committee was of the view that these forms required review and update. In relation to court liquidations both practitioners and State agencies observed that the format of the Statement of Affairs as prescribed in the Rules of the Superior Courts led to unnecessary complexity. The Committee agreed that its approach to the issue of the provision of information in the relevant forms would be in the form of principled recommendations rather than a specific in-depth review of these forms, which was not within the purview of the Committee as such. Rather this would be done, following recommendations of the Committee, within the Department.

A number of overarching principles are relevant to this discussion:-

- First, a key determinative concern was that proposed reforms would be aimed at providing all relevant information that the various stakeholders might have a legitimate interest in having in a more transparent and more accessible manner.
- Second, that there would be a standardisation of forms across all types of liquidation where possible.
- Third, that the role of the company director would be emphasised in relation to the provision of information in the Statement of Affairs or otherwise in relation to the financial position of the company.
- Fourth, the cost of compliance ought to be borne in mind and thus duplication of informational requirements could be avoided if possible.
- Fifth, consolidation of reporting obligations to be achieved if possible.
- Sixth, the Committee acknowledged that some information available to liquidators would be of a confidential and/or commercially sensitive nature.

In this context the Committee reviewed the informational objectives contained in section 680 and section 681 and considered possible consolidation of these information requirements with a view to eliminating duplication and overlapping information.

6.2 Statement of Affairs

A Statement of Affairs is required in both court and voluntary liquidations. The current format of the Statement of Affairs for court liquidations is provided in Appendix 3A of this Report. In addition, a typical template for a Statement of Affairs in a creditors' voluntary liquidation is provided in Appendix 3B.

Section 593 requires that in the case of a court liquidation or in the case of the appointment of a provisional liquidator there is a general requirement that a statement as to the affairs of the

company is made out in the form prescribed in the Rules of the Superior Courts³¹ and verified by affidavit by the directors of the company, and in some cases other persons specified in s.593(4). Some of the information required in such a statement includes:

- Details of the company's assets, debts and liabilities,
- The names, residences and occupations of the company's creditors,
- The securities held by those creditors respectively,
- The dates when those securities were respectively given, and
- Such further or other information as may be prescribed or as the court may require.

Similarly section 587 requires a meeting of the creditors of a company to be held following the passing of a resolution to wind up the company in a creditors voluntary winding up. Section 587(7) requires the directors of a company to "provide a full statement of the position of the company's affairs, together with a list of the creditors of the company and the estimated amount of their claims, to be laid before the creditors meeting." There is no prescribed form to comply with these obligations under section 587 unlike the position in an official or court liquidation. However, a Statement of Affairs in this context usually follows a template, similar to that included at Appendix 3B.

In both types of liquidation, the content of a Statement of Affairs is prepared by the directors and should be, as far as is possible, an accurate reflection of the financial position of the company as at the date of preparation, though some components may need to be estimated. Directors complete the Statement of Affairs based on their own knowledge and information of the company. They will generally seek outside assistance, usually their accountant, in the preparation of the Statement.

The Committee considered that the Statement of Affairs is a critical element in the provision of information to creditors generally. The Committee took the view that the adoption of a standardised form Statement of Affairs in the case of both court or official liquidations and creditors' voluntary liquidations would greatly improve the quality of information available to creditors generally and employees specifically, and would reduce the administrative burden on the company and its directors as regards compliance with information requirements.

Accordingly, the Committee recommended that the Department should consider the introduction of a standardised Statement of Affairs template, (with due flexibility allowing for size and turnover of a particular company) which should be standardised around, and reflective of, current practice in creditors' voluntary liquidations. The Committee acknowledged that this would be included in the Rules of the Superior Courts in relation to official or court liquidations and proposed that the Department/ Minister would liaise with the Rules Committee of the Courts in this regard. The Committee proposed that other means of prescribing the form could be utilised in relation to creditors' voluntary liquidations which might include a Regulation made under the Companies Act.

³¹Superior Court Rules, Order 74, Rule 27 specifies that the Statement of Affairs shall be in the Form No. 13, set out in Appendix M to the Rules.

The Committee repeated its recommendations on the Statement of Affairs contained in the October 2020 CLRG *Report on the Rescue of Small Companies*³² recommendation that this document would be sworn by company directors. Again, the Committee placed particular emphasis on the directors' duty to act in utmost good faith and recommended that this approach should be replicated here.

Recommendation

The Review Group proposes that the Statement of Affairs for both court and creditors' voluntary liquidations be standardised in accordance with the principles outlined in Sections 6.1 and 6.2 of this Report.

It recognises that this would require amendment to the Rules of the Superior Courts in the case of court liquidations and proposes that the Department liaises with the Rules Committee of the Courts in this regard. It further proposes that other means of prescribing the form may be utilised in relation to creditors' voluntary liquidations, including a Regulation under the Companies Act.

The Review Group further proposes that the affirmation of the contents of the Statement of Affairs should take the form of a declaration as described (with the necessary adjustments) in section 202(1)(b) of the Companies Act and that directors should be placed under an obligation of utmost good faith in relation to the preparation of the Statement of Affairs.

6.3 Sections 680 and 681 (Forms E3, E4 and E5)

Section 680 establishes a duty on liquidators to call a meeting of the members in a members' voluntary winding up, a meeting of the Committee of Inspection in a court or creditors' voluntary liquidation, or if no Committee has been established, a meeting of the creditors of the company at the end of each year if a winding up (of any kind) continues for more than 12 months. The section also requires that an account of the liquidator's acts and dealings and of the conduct of the liquidation be laid before all such meetings and that a copy of that account be filed with the CRO (Form E3).

Section 681 establishes a separate requirement for liquidators, of any liquidation that is not concluded within 12 months of commencement, to file a statement with the Registrar of Companies in the prescribed form (Form E4) 12 months after the date of its commencement and every six months thereafter.

The Committee recognised that there is significant overlap between the requirements of both sections (and the related forms) and considered that there was merit in considering a consolidation of the reporting requirements

³² [the-company-law-review-group-s-special-report-on-the-rescue-of-small-business.pdf \(clrg.org\)](#) Page 20

This would deliver a reduction in the administrative burden on companies and liquidators in relation to these obligations and facilitate accessibility of information and compliance with information requirements.

In examining these sections and the related forms, the Committee suggested that the Department could also consider such issues as:

- ensuring that the details on receipts and payments are itemised in the form on both a periodic and cumulative basis; [This is inter-related with a requirement in Form E5]
- details being provided by the liquidator as to why a liquidation is taking longer to finalise including relevant documentation;
- ensuring that the costs or administrative burdens in completing any new form should be minimised;
- consider whether the information is in place based on a legislative basis or for administrative purposes only, without limiting the information that is currently available to relevant parties including creditors, the ODCE, the CRO and the Revenue Commissioners.

Despite the overlap between the statutory provisions and the underlying forms, the CRO raised concerns that if the forms were merged into one there may be a reduction in reporting by liquidators. The CRO is of the view that it is likely that in the event of the forms merging the reporting will be completed by liquidators on an annual basis rather than on a six month basis

Whilst the CRO acknowledges the considerable overlap between the two forms, it is important to note that they do cover different matters as per the relevant provisions (section 680 and section 681) in the Companies Act described above. Also, if the two forms were merged the CRO expressed concerns that interested parties would find it harder to obtain information that is currently easily available by checking the register for a company in liquidation and fear that such information might become lost in a single form.

Recommendation

The Review Group recommends that the Department should consider the reporting requirements under Sections 680 and 681 together with the structure of the related Forms E3 and E4 in light of the overarching principles outlined in Section 6.1 of this Report, and the views of the CRO and other key stakeholders on this issue.

Appendix 1

Corporate Insolvency Committee Membership

Prof. Irene Lynch Fannon	Chair School of Law, University College Cork
Marie Daly	IBEC (Irish Business and Employers' Confederation)
Michael Halpenny	Irish Congress of Trade Unions (ICTU)
David Hegarty	Office of the Director of Corporate Enforcement
Rosemary Hickey	Office of the Attorney General
Tanya Holly	Department of Enterprise, Trade and Employment
Tara Keane	Department of Enterprise, Trade and Employment
Neil McDonnell	Irish Small and Medium Enterprises Association CLG (ISME)
Dr. David Mc Fadden	Companies Registration Office
Vincent Madigan	Ministerial appointee. Formerly of the Department of Enterprise Trade and Employment
Conor O'Mahony	Office of the Director of Corporate Enforcement
Paddy Purtill	Revenue Commissioners
Doug Smith	Irish Society of Insolvency Practitioners (Eugene F Collins)

Appendix 2

Chart of Provisions in Part 11 of the Companies Act requiring the provision of Information

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
571.	Petition containing grounds for commencing Court liquidation	Petitioner	Court
	Affidavit supporting petition	Petitioner	Court
580.	Declaration of solvency commencing a members' voluntary winding up	Directors	Members 580(2) CRO 580(4)
	Accountant's "non-unreasonable" report	Directors	Members 580(2) CRO 580(4)
581.	Special resolution to wind up	Directors	CRO 581(1)
582.	Court order converting members voluntary winding up to CVL	If appointed, liquidator. If none appointed, directors.	CRO 582(5)
584.	Notice of a creditors' meeting	Liquidator in a members voluntary winding up convening a creditors meeting to convert to a CVL	Creditors 584(1)(b) Two newspapers and Iris Oifigiúil 584(1)(c)
	"Such information concerning the affairs of the company as [the creditors] may reasonably require"	Liquidator in a members voluntary winding up convening a creditors meeting to convert to a CVL	Creditors who ask 584(1)(d)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	“a statement in the prescribed form as to the affairs of the company, including a statement of the company’s assets and liabilities, a list of the outstanding creditors and the estimated amount of their claims”	Liquidator in a members voluntary winding up convening a creditors meeting to convert to a CVL	Creditors at the creditors meeting 584(2)(b)
586.	Resolution of the members to wind up the company	Directors and liquidator	Iris Oifigiúil 586(4)
587.	Notice of a creditors’ meeting, identity of proposed liquidator, list of creditors	Directors initiating a CVL	Creditors 587(2), (3)
	Notice of a creditors’ meeting	Directors initiating a CVL	Two newspapers 587(6)
	“a full statement of the position of the company’s affairs, together with a list of the creditors of the company and the estimated amount of their claims”	Directors initiating a CVL	Creditors at the creditors meeting 587(7)(a)
591.	“such particulars as may be prescribed of the [winding-up] order [by the Court]”	“such officer of the court as may be prescribed or directed by the court”	CRO 591(1)(a) Company 591(1)(b)
	A court order appointing a liquidator (other than a provisional liquidator)	“such officer of the court as may be prescribed or directed by the court”	CRO 591(2)
592.	Appointment of a liquidator in a members’ voluntary winding up or a CVL	Liquidator	CRO 592(1)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	Appointment of a liquidator in a members' voluntary winding up or a CVL	CRO	ODCE 592(1)
593.	Statement of company's affairs ⁵⁹³	Directors of a company wound up by the court or to which a provisional liquidator is appointed	Court 593(1), (2)
594.	Statement of company's affairs (as per s. 593)	Directors of a company wound up by the court or to which a provisional liquidator is appointed	Liquidator or Provisional liquidator 594(2)
	"such information in relation to the company as the liquidator may reasonably require"	Directors of a company wound up by the court or to which a provisional liquidator is appointed	Liquidator 594(3)(a)
	"such assistance, as they are in a position to give, to the liquidator during the course, and for the purpose, of the liquidator's examining (following his or her receipt of the statement) the company's affairs as [the liquidator] may reasonably require"	Directors of a company wound up by the court or to which a provisional liquidator is appointed	Liquidator 594(3)(b)
	Statement of company's affairs (as per s. 593)	[Court office] [Liquidator]	Creditor or contributory who asks 594(9)

⁵⁹³ Section 593(2) "The statement shall show— (a) particulars of the company's assets, debts and liabilities, (b) the names, residences and occupations of the company's creditors, (c) the securities held by those creditors respectively, (d) the dates when those securities were respectively given, and (e) such further or other information as may be prescribed or as the court may require."

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
595.	Fact of company being in liquidation	Liquidator	All documents on which the company name appears, website
615.	Liquidator's proposal to disclaim onerous property	Liquidator	"to such persons ... as the court thinks just" 615(6)
621.	Advertisement for claims of creditors	Liquidator	2 daily newspapers 621(6)
629.	Exercise of certain powers by liquidator in connection with Legal proceedings, carrying on company's business, etc. and payment of certain creditors, compromise of certain claims, etc. ⁶²⁹	Liquidator	Committee of inspection or, if none, the creditors. 629(1)(a) Members in members' voluntary winding up. 629(1)(b)

⁶²⁹ 1. Power to— (a) bring any action or other legal proceeding in the name and on behalf of the company;

(b) defend any action or other legal proceeding in the name and on behalf of the company;

(c) recommence and carry on the business of the company so far as may be necessary for the beneficial winding up thereof, where such business was not continuing at the date of the appointment of the liquidator or had ceased after such appointment;

(d) continue to carry on the business of a company so far as may be necessary for the beneficial winding up thereof, where such business was continuing at the date of the appointment of the liquidator and had not subsequently ceased;

(e) appoint a legal practitioner to assist the liquidator in the performance of his or her duties.

Payment of certain creditors, compromise of certain claims, etc.

2. Power to— (a) pay any classes of creditors in full;

(b) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(c) compromise—

(i) all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company; and

(ii) all questions in any way relating to or affecting the assets or winding up of the company,

on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	Intention to sell, by private contract, a non-cash asset of the requisite value to a person who is, or who, within 3 years prior to the date of commencement of the winding up, has been, an officer of the company	Liquidator	Creditors 629(3)
631	Order of the court determining any question arising in the winding up of a company (including any question in relation to any exercise or proposed exercise of any of the powers of the liquidator	Company (i.e. Liquidator)	CRO 631(3)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
634.	Vacating of office of liquidator by reason of ceasing to be qualified as required by s.633	Liquidator	<p>CRO 634(6)(a)(i)</p> <p>ODCE 634(6)(a)(ii)</p> <p>Where relevant, IAASA 634(6)(a)(iii)</p> <p>In a Court liquidation:</p> <ul style="list-style-type: none"> - the Court 634(6)(b)(i) - where there is a committee of inspection, the committee 634(6)(b)(i)(I) - where there is none, the creditors 634(6)(b)(i)(II) <p>In a CVL</p> <ul style="list-style-type: none"> - where there is a committee of inspection, the committee 634(6)(b)(ii)(I) where there is none, the creditors 634(6)(b)(ii)(II) <p>In a members' voluntary winding up the members 634(6)(b)(iii)</p>

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
635.	Vacating of office of liquidator by reason of ceasing to be qualified by reason of s.635(1)	Liquidator	<p>CRO 635(5)(a)(i)</p> <p>ODCE 635(5)(a)(ii)</p> <p>Where relevant, IAASA 635(5)(a)(iii)</p> <p>In a Court liquidation:</p> <ul style="list-style-type: none"> - the Court 635(5)(b)(i) - where there is a committee of inspection, the committee 635(5)(b)(i)(I) - where there is none, the creditors 635(5)(b)(i)(II) <p>In a CVL</p> <ul style="list-style-type: none"> - where there is a committee of inspection, the committee 635(5)(b)(ii)(I) where there is none, the creditors 635(5)(b)(ii)(II) <p>In a members' voluntary winding up the members 635(5)(b)(iii)</p>
636.	In a members' voluntary winding up, notice of a general meeting to (a) remove the liquidator, (b) appoint a liquidator to replace or act with the existing liquidator, or (c) appoint a liquidator to fill a vacancy in the office of liquidator.	Members holding 10% of shares or the Liquidator; in (c) any contributory also	Members

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
627.	In a CVL, notice of a general meeting to (a) remove the liquidator, (b) appoint a liquidator to replace or act with the existing liquidator, or (c) appoint a liquidator to fill a vacancy in the office of liquidator.	Creditors holding 10% of debt or the Liquidator	Creditors
639.	Consent to act, prior to appointment	Liquidator	Not specified
641.	Resignation of liquidator	Liquidator	<p>In a Court liquidation:</p> <ul style="list-style-type: none"> - the Court 641(2)(a) - where there is a committee of inspection, the committee 641(2)(a)(i) - where there is none, the creditors 641(2)(a)(ii) <p>In a CVL</p> <ul style="list-style-type: none"> - where there is a committee of inspection, the committee 641(2)(b)(i) where there is none, the creditors 641(2)(b)(ii) <p>In a members' voluntary winding up the members 641(2)(c)</p>
643.	Appointment or removal of liquidator	Chairperson of meeting at which it takes place, or if none, signatory (or first signatory) of notice of meeting	Liquidator 643(1)
	Removal of liquidator	Chairperson of meeting at which it takes place	CRO 643(3)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	(a) Appointment of a liquidator in a winding up other than the initial appointment of a liquidator in a winding up, and (b) a removal of a liquidator that the court orders in any winding up.	Liquidator	CRO 643(5)
	(a) Appointment of a liquidator in a winding up other than the initial appointment of a liquidator in a winding up, and (b) a removal of a liquidator that the court orders in any winding up.	CRO	ODCE 643(6)
	Appointment or removal of a liquidator that the court orders in any winding up.	Applicant for order	Liquidator 643 (7)
	Appointment or removal of a liquidator that the court orders in any winding up.	"such officer of the court as may be prescribed	CRO 643(8)
	Appointment or removal of a liquidator that the court orders in any winding up.	CRO	ODCE 643(9)
646.	Particulars of the terms upon which a liquidator seeks entitlement to remuneration, prior to its being agreed	Liquidator	Committee of inspection 646(3)(a)(i) If none, creditors 646(3)(a)(ii) In members' voluntary winding up, members 646(3)(a)(iii)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
647.	Prescribed particulars of remuneration claimed by the liquidator	Liquidator	Committee of inspection 647(3)(a)(i) If none, creditors 647(3)(a)(ii) In members' voluntary winding up, members 647(3)(a)(iii)
648.	Connection (family, employment) with a proposed liquidator	Connected creditor or Chairperson	The creditors' meeting 649(1), (3)
650.	Whether a director has been made personally responsible for company debts or is disqualified or restricted	Liquidator	Any account, a periodic abstract and a periodic statement made by the liquidator under the 2014 Act 650(2)
653.	(a) Answers to any questions of the Director concerning the content of the books and records of a company (b) answers any questions of the Director concerning the conduct of a particular winding up or all windings up or receiverships conducted by the appropriate person, as the case may be, and (c) such assistance in the matter as the appropriate person is reasonably able to give.	Liquidator Director or other officer Auditor Receiver	ODCE 653(5)
669.	Order of the Court annulling or staying winding up	The company (i.e. the Liquidator) or such other person as the Court orders	CRO 669(6)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
674.	Time or times fixed by the Liquidator within which creditors must prove their debts or claims or to be excluded from the benefit of any distribution made before those debts or claims are proved	Liquidator	Creditors 674(2)
680.	An account of the liquidator's acts and dealings and the conduct of the winding up during the preceding year (Annual report)	Liquidator	In a members' voluntary winding up - the members at an annual meeting 680(2)(b) - CRO 680(3) In a Court liquidation or CVL - the committee of inspection at an annual meeting 680(5)(b) - where there is none , the creditors 680(5)(b) - CRO 680(6)
681.	A statement in the prescribed form and containing the prescribed particulars about the proceedings in, and position of, the winding up (Half-yearly report)	Liquidator	CRO 681(2)
682.	Report in the prescribed form on the conduct of directors (within 6 months of appointment, and at intervals as required by ODCE)	Liquidator	ODCE 682(2)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
	<p>(a) Answers to any question that the ODCE reasonably puts to the liquidator concerning the contents of the conduct report, the affairs of the company or the conduct of any director and</p> <p>(b) assistance to the ODCE for the purpose of the Director's appraisal of the report or its examination of any fact or allegation contained in it or which comes to the ODCE's knowledge by reason of an answer given</p>	Liquidator	ODCE 682(3)
688.	<p>Finding by a disciplinary committee or tribunal of a prescribed professional body (a) that a member of that body who is conducting or has conducted a winding up has not maintained appropriate records in relation to that activity, or</p> <p>(b) has reasonable grounds for believing that such a member has committed a category 1 or 2 offence during the course of conducting a winding up,</p>	Professional body	ODCE 688(1)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
696.	A copy of every resolution of a meeting of creditors, contributories or members held in a winding up	Liquidator	CRO 696(1)
700.	(a) Minutes of any meeting held in a winding up (b) a list of creditors, contributories or members present at the meeting in such form as may be prescribed	Chairperson of the meeting	A book kept for that purpose 700(1)
704.	In a Court liquidation, an order that the company be dissolved	Liquidator	CRO 704(5)
705.	In a members' voluntary winding up, an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of.	Liquidator	Final meeting of the members 705(2) CRO 705(4)(a)
	Return of the holding of the final meeting and of its date	Liquidator	CRO 705(4)(b)
706.	In a CVL, an account of the winding up showing how the winding up has been conducted and the property of the company has been disposed of.	Liquidator	CRO 706(2)
	Return of the holding of the final meeting and of its date	Liquidator	CRO 706(4)(b)

Companies Act section	Information to be provided	Person responsible	To whom or where delivered
709.	After 20 years from dissolution, all documents filed in connection with the company	Registrar	National Archives
711.	<p>(a) Notice of the judgment opening EU Insolvency Regulation proceedings;</p> <p>(b) where appropriate, the decision appointing the liquidator in those proceedings;</p> <p>(c) the name and business address of the liquidator; and</p> <p>(d) the provision (either paragraph 1 or paragraph 2) of Article 3 of the Insolvency Regulation giving jurisdiction to open the proceedings;</p>	Liquidator	Iris Oifigiúil and 2 daily morning newspapers circulating in the State 711(1)
713.	<p>(a) A winding-up order, of a company under the Insolvency Regulation</p> <p>(b) the issue of a certificate by the Master of the High Court under section 712 in relation to the confirmation by the Master of a creditors' voluntary winding up of an Insolvency Regulation company</p>	"the proper officer of the Central Office of the High Court"	Liquidator
723.	Information as to a past or present officer or any member of the company being guilty of an offence	Liquidator	Director of Public Prosecutions

Appendix 3A-

Statement of Affairs Form in Court Liquidations.

No. 13.

O.74, r. 27.

STATEMENT OF AFFAIRS.

[Title as in Form No. 1]

[Name of company]

Statement of affairs on the day of , 20 , the date of *the winding up order made in this matter*the appointment of a provisional liquidator to the company.

I, of make oath and say that the statement of affairs attached hereto, upon each page of which I have signed my name, and the several lists thereunto annexed, upon each of which said lists I have signed my name, are to the best of my knowledge and belief a full true and complete statement of the affairs of the above-named company on the said day of , 20 and that immediately prior to the said order the company carried on the following businesses at the following addresses

Sworn, &c.

STATEMENT OF AFFAIRS OF (INSERT FULL NAME OF COMPANY).

I. ASSETS.	Estimated realisable value
(1) ASSETS SPECIFICALLY CHARGED (as per List "A")	..
Freehold property	
Leasehold property	
Other property, viz.`	
TOTAL.... ..	€
(2) ASSETS NOT SPECIFICALLY CHARGED (as per List "B")	
Balance at bank	
Cash in hand	
Marketable securities	
Bills receivable	
Trade debtors	
Loans and advances	
Unpaid calls	
Stock in trade	

Work in progress	
Freehold property	
Leasehold property	
Lorries and motor vehicles	
Other plant and machinery	
Furniture, fittings, utensils, &c.	
Patents and trade marks	
Investments other than marketable securities ...	
Other property, viz.	
TOTAL ... ..	...
	=====
(3) GROSS ASSETS:	
specifically charged (as at (1) above)	€
not specifically charged (as at (2) above)	€ _____
TOTAL	€
	=====
II. LIABILITIES.	
(1) CREDITORS SECURED by assets specifically charged (as per List "A"):	
(Amounts claimed to be due: €):	
Extent to which claims are estimated to be covered by assets specifically charged	€
(2) PREFERENTIAL CREDITORS (as per List "C"):	
Amounts for which preference is claimed	€
(3) DEBENTURE HOLDERS secured by floating charge (as per List "D"):	
Amounts claimed to be due after deducting any sums estimated (at (1) above) to be covered by assets specifically charged	€
(4) UNSECURED CREDITORS (as per List "E"):	

Amounts claimed to be due including unsecured balance of claims of creditors secured by assets specifically charged	€ _____
GROSS LIABILITIES	€=====
(Signed)	
III. SUMMARY OF ASSETS ESTIMATED TO BE AVAILABLE TO MEET CREDITOR'S CLAIMS	
GROSS ASSETS— Total (as at I (3) above) ..	€
<i>deduct</i> amounts due to SECURED CREDITORS to extent to which claims are estimated (at II (1) above) to be covered by assets specifically charged	€ _____
Balance available for preferential creditors ..	€
<i>deduct</i> amounts claimed to be due to PREFERENTIAL CREDITORS (as at II (2) above)	€ _____
Balance available for debenture holders secured by a floating charge	€
<i>deduct</i> amounts due to such DEBENTURE HOLDERS (as at II (3) above)	€ _____
Balance available for unsecured creditors ..	€
<i>deduct</i> amounts claimed to be due to UNSECURED CREDITORS (as at II (4) above)	€ _____
ESTIMATED SURPLUS/DEFICIENCY	€=====

(i) The foregoing estimates are subject to the costs of winding up and to any surplus or deficiency on trading pending realisation of the assets.

(ii) There is no unpaid capital liable to be called up *or* The nominal amount of unpaid capital liable to be called up is € estimated to produce € , which is/is not charged in favour of debenture holders.

(Signed)

LIST "A"—ASSETS SPECIFICALLY CHARGED AND CREDITORS FULLY OR PARTLY SECURED (NOT INCLUDING DEBENTURE HOLDERS SECURED BY A FLOATING CHARGE).

Statement of affairs List "A"		The names of the secured creditors are to be shown against the assets on which their claims are secured, numbered consecutively, and arranged in alphabetical order as far as possible.								
Particulars of assets specifically charged	Date when security given	Estimated value of security	No.	Name of creditor	Addresses	Amount of debt	Date when contracted	Consideration	Balance of debt unsecured carried to List "E" or List "D"	Estimated surplus from security
...

LIST "B"—ASSETS NOT SPECIFICALLY CHARGED.

Statement of affairs List "B"	Full particulars of every description of property not specifically charged and not included in any other list are to be set forth in this list.		
	Full statement and nature of property	Book value €	Estimated to produce €
<i>State name of bankers</i>	Balance at Bank . . . . .	...	...
	Cash in hand . . . . .	...	...
	Marketable securities, viz. . . . .	...	...
	Bills receivable . . . . .	...	...
	Trade debtors (as per Schedule hereto) . . . . .	...	...
	Loans and advances, viz. . . . .	...	...
	Unpaid calls . . . . .	...	...
	
<i>State nature</i>	Stock in trade . . . . .	...	...
<i>State nature</i>	Work in progress . . . . .	...	...
	Freehold property, viz. . . . .	...	...
	Leasehold property, viz. . . . .	...	...
	Lorries and motor cars, viz. . . . .	...	...
	Other plant and machinery . . . . .	...	...
	Furniture, fittings, utensils, &c. . . . .	...	...
	Patents and trade marks . . . . .	...	...
	Investments other than marketable securities, viz. .. ..	...	...
	Other property and assets . . . . .	...	...

(Signed)

SCHEDULE OF TRADE DEBTORS.

Statement of affairs— Schedule I to List "B".			<p>The names to be arranged in alphabetical order and numbered consecutively.</p> <p>NOTE:—If the debtor to the company is also a creditor but for a less amount than his indebtedness, the gross amount due to the company and the amount of the contra account should be shown in the third column and the balance only be inserted under the heading "Amount of debt" thus:</p> <p>Due to company € Less: Contra account</p> <p>No such claim should be included in List "E".</p>						
No.	Name	Address	Amount of debt			Folio of ledger or other book where particulars to be found	When contracted month and year	Estimated to produce	Particulars of any securities
			Good	Doubtful	Bad				
...	€ .	€ .	€

(Signed)

LIST "C"—PREFERENTIAL CREDITORS FOR RATES, TAXES, SALARIES, WAGES, WORKMEN'S COMPENSATION, DAMAGES AND OTHERWISE.

Statement of affairs List "C".		The names to be arranged in alphabetical order and numbered consecutively. When the amount of the claim is unascertained write unascertained in column headed "Amount of claim".				
No.	Name of creditor	Address	Nature of claim	Amount of claim	Amount payable in full	Balance not preferential carried to List "E"
...

(Signed)

LIST "D"—DEBENTURE HOLDERS SECURED BY A FLOATING CHARGE,

Statement of affairs List "D"		The names to be arranged in alphabetical order and numbered consecutively. Separate lists should be furnished of holders of each issue of debentures, if more than one issue has been made.			
No.	Name of holder	Address	Amount		Description of assets over which security extends
...	€

(Signed)

LIST "E"—UNSECURED CREDITORS.

Statement of affairs List "E"	<p>The names to be arranged in alphabetical order and numbered consecutively.</p> <p>NOTE:—When there is a contra account against the creditor less than his claim against the company, the amount of the creditors claim and the amount of the contra account should be shown in the third column and the balance only inserted under the heading "Amount of debt", thus:—</p> <p>Total amount of claim ... €</p> <p>Less: Contra account</p> <p>No such set off should be included in the Schedule to trade debtors attached to List "B".</p>				
No.	Name	Address	Amount of debt	Date when contracted	Consideration
...
	Unsecured balance of creditors partly secured—brought from List "A"		...	...	...
	Balance not preferential of preferential creditors—brought from List "C".				
...

(Signed)

Substituted by SI 255 of 2015, effective 1 July 2015.

Appendix 3B

Statement of Affairs Template commonly used in Creditors' Voluntary Liquidations.

Statement of Affairs

Name of Company Limited

Estimated Statement of Affairs as at *Date, Month, Year*

	Book value	Estimated to realise
	€	€
Assets		
Debtors		
Prepayments		
Stocks and work in progress		
Cash		
Fixed assets		
- Plant and equipment		
- IT/Office equipment		
- Motor vehicles		
Less leasing obligations		
Surplus applicable to preferential creditors	<hr/> a	<hr/> a
Preferential creditors		
Employees		
Rates		
Revenue Commissioners		
- VAT		
- PAYE/PRSI		
- Corporation tax		
Total preferential creditors		<hr/> b
Surplus after preferential creditors		<hr/> c
Secured creditors		
Bank overdraft		
Bank loan		
		<hr/>

Total secured creditors	d
Surplus after secured creditors	<hr/> e
Unsecured creditors	
Total trade creditors (see attached listing)	<hr/> z
Deficit applicable unsecured creditors	

Notes

- 1 The Statement of Affairs is a statement of the directors of the company as to the estimated financial position of the company as at *Date, Month, Year*.
- 2 The Statement of Affairs does not take into account liquidation fees, costs and expenses.
- 3 The aforementioned creditors balances are based on available information and are subject to agreement and verification with the Liquidator.
- 4 Some of the company's stock may, pending verification with the Liquidator, be subject to Retention of Title claims.
- 5 Arrears of employee wages will be paid by the Department of Social Protection from their Insolvency Fund and reclaimed by the Department as a preferential creditor.

Signed: _____
Director

Dated:

Unsecured Creditors

Name of Company Limited

Estimated Statement of Affairs as at *Date, Month, Year*

Schedule of unsecured creditors

Name	Amount €
Total	<hr/> z

Appendix 4-
Forms E3, E4 and E5

**Liquidator's account of his/her
acts and dealings**

Section 680 Companies Act 2014

CRO receipt date stamp & barcode

Company number

--	--	--	--	--	--	--	--	--	--

Please complete using black typescript or BOLD CAPITALS, referring to explanatory notes

Company name

in full

Liquidator's name

--

Liquidator's address

Liquidator's statement

note one

note two

I/We refer to the statement of account hereunto and I/we say that the particulars therein contained were laid before a meeting of the members creditors, of the above named company on

Day	Month	Year

Period Covered

note three

from

Day	Month	Year

to

Day	Month	Year

Certification

note four

I/We hereby certify that the particulars contained in this form are correct and have been given in accordance with the Notes on Completion of Form E3.

Signature

--

Liquidator

Name *in block letters or typescript*

--

This _____ day of _____ 20__

Signature

--

Liquidator

Name *in block letters or typescript*

--

This _____ day of _____ 20__

Presenter details

note five

Name
Address

Telephone number
Email

Fax number

Contact Person

DX number/Exchange

--	--

Reference number

Nature of Proceedings

note one

- Members' Voluntary Winding Up
- Creditors' Voluntary Winding Up
- Court Winding Up

Disclosure Section 650 Companies Act 2014

note one

At the date of this return, **no past or present director or other officer or any member of the company, is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

I have provided below details of, **a past or present director or other officer, or any member of the company that is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

Details of person(s) referenced:

note six

<i>NAME</i>	<i>ADDRESS</i>	<i>SECTION OF ACT</i>

Report of the Liquidator

Report of the acts & dealings of the Liquidator in the Winding Up.

Nature of Proceedings

note one

- Members' Voluntary Winding Up
- Creditors' Voluntary Winding Up
- Court Winding Up

Realisations

Date	From Whom received	Nature of assets realised	Amount
		Brought forward from last statement	€
Carried Forward			

Disbursements

Date	To whom paid	Nature of assets disbursed	Amount
		Brought forward from last statement	€
Carried Forward			

NOTES ON COMPLETION OF FORM E3

These notes should be read in conjunction with the relevant legislation.

- General** This form must be completed correctly, in full and in accordance with the following notes. Every section of the form must be completed. Where the space provided on Form E3 is considered inadequate, the information should be presented on a continuation sheet in the same format as the relevant section in the form. The use of a continuation sheet must be so indicated in the relevant section and also noted on the relevant continuation sheet.
- note one** Tick the relevant box(es).
- note two** The date of the meeting(s) must be entered.
- note three** Form E3 covers twelve month periods from the date of the resolution to wind up. Form E3 covers an exact period of twelve months only, any lesser period need not be covered. (Court liquidations using the creditors voluntary winding up procedure should start twelve months from the date of petition to wind up (s.589 Companies Act 2014)).
- note four** This form **must** be certified by the liquidator of the company or by each liquidator if more than one is appointed.
- note five** This section must be completed by the person who is presenting Form E3 to the CRO. This may be either the applicant or a person on his/her behalf.
- note six** Include details of any person(s) referenced under the disclosure requirement of section 650 Companies Act 2014

Further information

- CRO address** When you have completed and signed the form, please file with the CRO. The Public Office is at Bloom House, Gloucester Place Lower, Dublin 1.
- If submitting by post, please send with the prescribed fee to the Registrar of Companies at
- The Companies Registration Office, O'Brien Road, Carlow
- DX number: 271004 DX Exchange: Carlow 2.
- Payment** If paying by cheque, postal order or bank draft, please make the fee payable to the Companies Registration Office. Cheques or bank drafts must be drawn on a bank in the Republic of Ireland.

FURTHER INFORMATION ON THE COMPLETION OF FORM E3, INCLUDING THE PRESCRIBED FEE, IS AVAILABLE FROM WWW.CRO.IE OR BY EMAIL AT INFO@CRO.IE

**Liquidator's Statement of Proceedings
and Position of Winding Up**
Section 681(2) Companies Act 2014

CRO receipt date stamp & barcode

Company number

--	--	--	--	--	--	--	--

Please complete using black typescript or BOLD CAPITALS, referring to explanatory notes

Company name
in full

Liquidator's name

--

Liquidator's address

Liquidator's statement

I refer to the statement of account hereunto "Part A" and I say that the particulars therein contained about the proceedings in and position of the liquidation of the said company are true and correct to the best of my knowledge and belief.

The said statement of account (including the trading account annexed, if any) contains a true and full account of all moneys received and payments made by me in the winding up of the said company, inclusive

note one

note two from Day Month Year to Day Month Year

--	--	--	--	--	--	--	--	--	--

note three and I have not, nor has any other person by my order or for my use, during that period received or paid any moneys for or on account of the said company other than as disclosed in the said statement.

note three and I have not, nor has any other person by my order or for my use, received or paid any moneys whatsoever for or on account of the said company.

And I make this declaration conscientiously believing the same to be true.

note four _____ This _____ day of _____ 20 _____
Signature of Liquidator

note four _____ This _____ day of _____ 20 _____
Signature of Liquidator

Presenter details
note five

Name			
Address			
Telephone number		Fax number	
Email		Contact Person	
DX number/Exchange		Reference number	

Declared before me *name of witness in capitals*

[]

- Commissioner for oaths Peace commissioner Notary public
- Person authorised by _____ to take and receive
 statutory declarations *insert authorising statutory provision*

Practising solicitors are authorised under section 72 Solicitors (Amendment) Act 1994 to take declarations

BY *Declarants name in bold capitals or typescript*

[]

[]

who is/are personally known to me

or

who is/are identified to me by []

who is personally known to me

or

whose identity has been established to me before the taking of this Declaration by the production to me of:

Passport no. [] issued on []

by the authorities of []

which is an authority recognised by the Irish Government

or National identity card no. [] issued on []

by the authorities of []

which is an EU Member State, the Swiss Confederation or a Contracting Party to the EEA Agreement

or Aliens Passport no. [] issued on []

(document equivalent to a passport)

by the authorities of []

which is an authority recognised by the Irish Government

or Refugee travel document no. []

issued on [] by the Minister for Justice and Equality

or Travel document *(other than refugee travel document)* []

issued on [] by the Minister for Justice and Equality

At

[]
[]
[]

This _____ day of _____ 20 _____

Signature of witness

[]

NOTE: ANY IDENTIFICATION INFORMATION SUPPLIED BY DECLARANT FOR THE PURPOSES OF MAKING THIS DECLARATION WILL BECOME A MATTER OF PUBLIC RECORD ON ITS RECEIPT IN THE CRO PURSUANT TO SECTION 891 OF THE COMPANIES ACT 2014.

Part "A"

Nature of proceedings

note three

Members' Voluntary Winding Up
 Creditors' Voluntary Winding Up
 Winding Up by Court

Date of commencement of winding up
 Day
 Month
 Year

Date to which last statement (if any) was brought down
 Day
 Month
 Year

Date to which this statement is brought down
 Day
 Month
 Year

Realisations

General statement of account

note six
note seven

Date	From whom received	Nature of assets realised	Amount
		Brought forward from last statement	€
Carried Forward			

Disbursements

note six

Date	To whom paid	Nature of assets disbursed	Amount
		Brought forward from last statement	€
Carried Forward			

**Analysis of
balance**

note eight & nine

€

Total Realisations	<input type="text"/>
Total Disbursements	<input type="text"/>
	<hr/>
Balance	<input type="text"/>

The balance is made up as follows:-

€

1. Cash in hands of Liquidator	<input type="text"/>
2. Total payments into bank including balance at date of commencement of winding up (as per bank sheets)	<input type="text"/>
Total withdrawals from bank	<input type="text"/>
Balance at bank:	<input type="text"/>
3. Amounts invested by Liquidator	<input type="text"/>
Less amount realised from same	<input type="text"/>
Balance	<input type="text"/>
Total balance as shown above	<input type="text"/>

note ten

NOTE: The Liquidator should also state:-

(1) The amount of the estimated assets and liabilities at the date of the commencement of the winding up.	Assets (after deducting amounts charged to secured creditors & debenture holders).	<input type="text"/>
	Liabilities	
	Secured creditors	<input type="text"/>
	Debenture holders	<input type="text"/>
	Unsecured creditors	<input type="text"/>
(2) The total amount of capital paid up at the date of the commencement of the winding up.	Paid up in cash	<input type="text"/>
	Issued as paid otherwise than for cash	<input type="text"/>
(3) The general description and estimated value of outstanding assets (if any).	<input type="text"/>	
(4) The causes which delay the termination of the winding up.	<input type="text"/>	
(5) The period within which the winding up may probably be completed.	<input type="text"/>	

Signature of Liquidator

This _____ day of _____ 20 ____

NOTES ON COMPLETION OF FORM E4

These notes should be read in conjunction with the relevant legislation.

- General** This form must be completed correctly, in full and in accordance with the following notes. Every section of the form must be completed. Where the space provided on Form E4 is considered inadequate, the information should be presented on a continuation sheet in the same format as the relevant section in the form. The use of a continuation sheet must be so indicated in the relevant section and also noted on the relevant continuation sheet.
- note one** The Trading account should be completed when the Liquidator carries on a business and should be forwarded as a distinct account.
- note two** In a voluntary winding up, the initial Form E4 is completed to cover the first twelve month period of the liquidation. Subsequent Forms E4 cover six-month periods, or any greater period as may be prescribed, following on from that first anniversary. Dependent on the court instruction, the end date of a court liquidation is either the date of the final creditors meeting, the date of the final court order to dissolve the company or if specified in the order, the date of the final Examiners Certificate.
- note three** Tick the relevant box(es).
- note four** This form **must** be certified by the liquidator of the company or by each liquidator if more than one is appointed. This form is a sworn declaration of compliance with all the legal requirements relating to a liquidator's account under section 681 of the Companies Act 2014. It is a criminal offence pursuant to section 876 of the Companies Act 2014 for a person to knowingly or recklessly deliver a document to the CRO which is false in a material particular.
- note five** This section must be completed by the person who is presenting Form E4 to the CRO. This may be either the applicant or a person on his/her behalf.
- note six** No balance should be shown on this account but the total realisations and disbursements only, which should be carried forward to the next account. These figures are also the amounts used on the Analysis of Balance page.
- note seven** The totals of receipts and payments on the trading account should alone be set out in the general statement of account.
- The Statement should contain a detailed account of all the Liquidator's realisations and disbursements in respect of the Company. The statement of realisations should contain a record of all receipts derived from assets existing at the date of the winding up order or realisation and subsequently realised, including balance in bank, book debts and calls collected, property sold etc. and the account of disbursements should contain all payments for costs and charges to creditors or contributories. Where property has been realised, the gross proceeds of sale should be entered under realisations, and the necessary payments incidental to sales should be entered as disbursements. These accounts should not contain payments into or out of bank or temporary investments by the Liquidator or the proceeds of such investments when realised which should be shown separately by a separate detailed statement of monies invested by the Liquidator and investments realised. Interest allowed or charged by the bank, bank charges and commission, and profit or loss upon the realisation or temporary investments, should, however, be inserted in the accounts of realisations or disbursements, as the case may be. Each receipt and payment should be entered in the account in such a manner as to sufficiently explain its nature. The receipts and payments should severally be added up at the foot of each sheet **and the totals carried forward from one account to another without any intermediate balance**, so that the gross totals represent the total amounts received and paid by the Liquidator respectively.
- When dividends or instalments of compositions are paid to creditors, or a return of surplus assets is made to contributories, the total amount of each dividend, or instalment of composition or return to contributories actually paid, should be entered in the statement of disbursements as one sum; and the Liquidator should forward separate accounts showing in lists the amounts of the claim of each creditor, and the amount of dividend or composition payable to each creditor, and of surplus assets payable to each contributory, distinguishing in each list the dividends or instalments of composition and shares of surplus assets actually paid and those remaining unclaimed. Each list should be on sheets 13 inches by 8 inches.

When unclaimed dividends, instalments of composition or returns of surplus assets are paid into the Account prescribed under section 623(1) of the Companies Act 2014, the total amount so paid in should be entered in the statement of disbursements as one sum.

Credit should not be taken in the statement of disbursements for any amount in respect of the Liquidator's remuneration unless it has been duly allowed by resolution of the committee of inspection or of the creditors or of the Company in general meeting or by order of Court as the case may require.

- note eight** The figures for Total Realisations and Total Disbursements are the figures carried forward on the General Statement of Account.
- note nine** Full details of stocks purchased for investment and realisation thereof should be given in a separate statement.
- note ten** The investment of deposit of money by the Liquidator does not withdraw it from the operation of Section 623 Companies Act 2014.
- note eleven** Include details of any person(s) referenced under the disclosure requirement of section 650 Companies Act 2014

Further information

CRO address When you have completed and signed the form, please file with the CRO. The Public Office is at Bloom House, Gloucester Place Lower, Dublin 1.

If submitting by post, please send with the prescribed fee to the Registrar of Companies at

The Companies Registration Office, O'Brien Road, Carlow
DX number: 271004 DX Exchange: Carlow 2.

Payment If paying by cheque, postal order or bank draft, please make the fee payable to the Companies Registration Office. Cheques or bank drafts must be drawn on a bank in the Republic of Ireland.

FURTHER INFORMATION ON THE COMPLETION OF FORM E4, INCLUDING THE PRESCRIBED FEE, IS AVAILABLE FROM WWW.CRO.IE OR BY EMAIL AT INFO@CRO.IE

**Liquidator's final
statement of account**

Section 705(4)(a)/706(4)(a) Companies Act 2014

CRO receipt date stamp & barcode

Company number

--	--	--	--	--	--	--	--

Please complete using black typescript or BOLD CAPITALS, referring to explanatory notes

Company name

in full

Liquidator's name

--

**Liquidator's
address**

This statement shows how the winding up has been conducted and how the property of the company has been disposed of, from:

Day Month Year

Commencement of winding up

Day Month Year

Close of winding up

**Disclosure
Section 650
Companies Act 2014**

note one

At the date of this return, **no past or present director or other officer or any member of the company, is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

I have provided below details of, **a past or present director or other officer, or any member of the company that is a person** in respect of whom a declaration has been made under any provision of the Companies Act that he or she should be personally liable for all or any part of the debts of a company or who is deemed to be subject to a disqualification order under Part 14 of the Companies Act 2014 or a declaration of restriction under Chapter 3 of Part 14 Companies Act 2014.

Details of person(s) referenced:

note two

NAME	ADDRESS	SECTION OF ACT

Presenter details

note three

Name

Address

Telephone number

Email

DX number/Exchange

	Fax number
	Contact Person
	Reference number

Liquidator's final statement of account

Statement showing how the winding up has been conducted and the property of the company has been disposed of

	Statement of assets and liabilities	Receipts
	€	€
Receipts		
Cash at bank		
Cash in hand		
Marketable securities		
Sundry debtors		
Stock in trade		
Work in progress		
Freehold property		
Leasehold property		
Motor cars and lorries		
Plant and machinery		
Furniture fittings and utensils		
Patents and trade marks		
Investments other than marketable securities		
Surplus from securities		
Unpaid calls at commencement of winding up		
Amounts received from calls on contributions made in the winding up		
Receipts per trading account		
Other property, viz		
Less:		
Payment to redeem securities		
Cost of execution		
Payments per trading account		
Net realisations		

Unrealisable assets

Assets including shown in the statement of assets and liabilities and estimated to be of the values of € have proved to be unrealisable.

Amount paid into the Account prescribed under section 623(1) of the Companies Act 2014 in respect of:

unclaimed dividends payable to creditors in the winding up €

other unclaimed distributions in the winding up €

other unclaimed balances €

Liquidator's final statement of account

Statement showing how the winding up has been conducted and the property of the company has been disposed of

	€	Payments €
Costs of solicitor to Liquidator		
Other law costs		
Liquidator's remuneration		
% on € realised		
% on € distributed		
By whom fixed		
Auctioneers and valuers charges		
Cost of possession and maintenance of estate		
Cost of notices in Iris Oifigiúil and newspapers		
Incidental outlay		
Total cost and charges		
Debenture holders		
Payment of €		
Per € debenture		
Payment of €		
Per € debenture		
Creditors		
Preferential		
Unsecured		
Dividend(s) of cent per €		
On €		
(The estimate of amount expected to rank for dividend was €)		
Return to contributories		
cent per € share		
cent per € share		
<i>note four</i>	Balance	

Liquidator's remarks (if any)

Certification
note five

I hereby certify that the particulars contained in this form are correct and have been given in accordance with the Notes on Completion of Form E5.

Signature _____
 Liquidator

Name *in block letters or typescript* _____
Date _____

Signature _____
 Liquidator

_____ Date _____

NOTES ON COMPLETION OF FORM E5

These notes should be read in conjunction with the relevant legislation.

- General** This form must be completed correctly, in full and in accordance with the following notes. Every section of the form must be completed. Where the space provided on Form E5 is considered inadequate, the information should be presented on a continuation sheet in the same format as the relevant section in the form. The use of a continuation sheet must be so indicated in the relevant section and also noted on the relevant continuation sheet.
- note one** Tick the relevant box(es).
- note two** Include details of any person(s) referenced under the disclosure requirement of section 650 Companies Act 2014
- note three** This section must be completed by the person who is presenting Form E5 to the CRO. This may be either the applicant or a person on his/her behalf.
- note four** The balance should be a nil balance. If funds were not distributed the unrealisable assets section should be completed.
- note five** This form **must** be certified by the liquidator of the company or by each liquidator if more than one is appointed.

Further information

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- DX number: 271004 DX Exchange: Carlow 2.
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Appendix 5

Irish Congress of Trade Unions (ICTU)

Minority Report

ICTU MINORITY REPORT: Review of existing legislative provisions regarding the provision of information to employees specifically and creditors generally

INTRODUCTION

(a) The following constitutes the “Minority Report” of ICTU, given that it has not been possible to make substantial progress on the proposals listed below which generated most of the agenda of Workstream 1 and the consequent deliberations of the CLRG Insolvency Sub Committee. (for the original Congress submission of October 2020, please link to the ICTU website as follows:

<https://www.ictu.ie/publications/fulllist/ictu-proposals-for-protection-for-employees-in-ins/>

(b) Notwithstanding that I want to acknowledge the work of the committee, in particular the sub-committee chair and the CLRG chair as well as the secretariat in the many meetings over which the following was discussed

(c) In this connection it is important to recognise that the position of workers is always adversely affected in an insolvent liquidation and their rights, such as they currently are, and their interests, are sometimes not always respected. It is also important to also bear in mind that the 2016 Duffy/Cahill and 2017 parallel CLRG reports which propose measures to address protections for workers (and unsecured creditors) remain to be implemented. The responsibility for that state of affairs lies elsewhere and certainly not with the CLRG or Duffy/Cahill and this minority report by ICTU is formulated not only to assist in enhancing the protections for employees in insolvent liquidations but to highlight the failure to date to implement the two outstanding reports cited above.

(d) The approach taken by this paper is to answer the question posed with regard to the adequacy of existing protections for employees in insolvent liquidations, recognising also that under section 224 of the Companies Act 2014 there is a particular duty to have regard to the interests of employees. Our report is also directed to formalising what are said to be some existing practices.

(e) Finally, for ease of the reader, we have cited below the original under each relevant heading of the majority report the original Congress proposal discussed by the CLRG, followed by the enumerated reasons why ICTU dissents or agrees.

(A) RECOMMENDATIONS ON WHICH ICTU DISSENTS

5.1. S 571- Petition for winding up and appointment of provisional liquidator and the powers of the court (S572 and S573 also discussed)

ICTU Proposal

Amend S 571 as follows:

The court shall not give a hearing to a winding up petition unless:

- (i) Prima facie case for winding up has been established to the satisfaction of the court**
- (ii) Employee creditors have been put on notice of such a petition and have the opportunity to be heard by the court in respect of such a petition**
- (iii) The court has received full details with regard to the employees and their rights, entitlements and interests including any enhanced redundancy terms.**

While a number of arguments have been advanced against our proposal in this regard, we would like the following to be considered:

- (a) If, as is asserted, employees are generally made aware in advance of an application to wind up by a debtor applicant, there should be no difficulty whatsoever in formalising the practice into an obligation in law which is clearly, on the basis of above assertion, capable of being complied with.
- (b) With regard to the current requirement to give notice in two national newspapers and Iris Oifigiúil, we have argued that there is an air of complete unreality in expecting workers and especially, vulnerable low paid workers, to be avid readers of Iris Oifigiúil in a society where, young people in particular, get their news from a multiplicity of alternative sources on social media rather than national dailies. However, while we appreciate the recommendation of the majority of the sub-committee to look at updating notice requirements, it doesn't go far enough and is no substitute for direct notice to employee creditors.
- (c) A second argument has been advanced that employment law places obligations on employers regarding informing employees in a collective redundancy situation. In 2016 the Workplace Relations Commission awarded Clery's workers for the breach by the company of its obligations under EU law to consult at least 30 days in advance of termination by reason of redundancy. Some commentators noted an incompatibility between Irish insolvency law, practice and procedure and EU law in this respect
- (d) While it is accepted that creditor applicants may not have full details of all employees, it still does not necessarily mean that they are not in a position to notify employees in general in such circumstances.
- (e) In any event the ICTU proposal does not require claims to be determined or resolved if those terms are used in the sense of claims being satisfied. Rather, it is by way of information to the

court .Further, even were there difficulty in determining all employee claims, this still does not negate the other parts of the Congress proposal dealing with the issue of notice and the right of attendance at the initial application, particularly when application is being made for the appointment of a Provisional Liquidator..(section 573 refers)

- (f) In this connection the argument that employees have a right to be heard anyway falls down completely when it is acknowledged that application for appointment of a Provisional Liquidator is “ex parte” and that the right to attend arises after the appointment at the next stage and after the horse has bolted.
- (g) Further, it has been admitted that liquidators sometimes put “major creditors” on notice of such applications, which means that substantial organisations can be put on notice, while such applications remain ex parte for employees, many of whom may have invested their life’s work in the company-, all of whom depend on the company for their livelihood and all that goes with it.
- (h) It is accepted that Provisional Liquidator applications are infrequent, but they are not by any means exceptional. For example, in 2020 alone it was reported that Provisional Liquidators were appointed at the rate of at least one a month for Laura Ashley, Debenhams, Spicers Ireland, Monsoon Accessorize, Caritas Home, St Monicas Home, Wirecard and Arcadia..

While they may often be in situations where assets need to be protected, equally they can be sometimes viewed as controversial, not least in the appointment of a Provisional Liquidator to Clery’s in 2015.

The court can only go on what’s before and if there is no contradictor present, the options for the court can be very narrow and the outcome for employees possibly more detrimental than it might otherwise be.

- (i) If the real purpose is to protect assets, then any such application should be confined solely to assets and no order should be made regarding the termination of employment contracts which should rather be the subject of a separate application, which is what we understood one of the CLRG recommendations in its 2017 Report was intended to address.
- (j) In summary the Congress proposal is not intended to undermine bona fide moves to protect assets against possible predators but rather to balance up the rights of workers and to give the court as much information about the employees as possible when considering applications.

5.2 S621- Preferential Payments in a Winding Up

ICTU Proposal

Amend S 621(2) (b) by the addition of a new sub, sub section as follows:

(h) Any award made by the Labour Court pursuant to the Industrial Relations Acts 1946-2015 with regard to entitlements in the employment contract whether express or implied by collective agreement or otherwise.

- (a) The recommendation of the majority report is that because the matters concerned here are complex and not amenable to resolution without further detailed debate conducted in the employment law context, such consideration be referred to the relevant Division in the Department. While this is no doubt intended to be helpful it goes nowhere near enough nor does it convey the requisite sense of urgency required, particularly when there are apparently pressures on the Department which militate against it being given the priority status it deserves. This is particularly so given the assessment, for example of Deloitte as to the likely pace of insolvent liquidations commencing Q2. We are also mindful of the fact that recommendations of the Duffy/Cahill 2016 Report and the CLRG Report 2017 remain to be implemented 5 and 4 years on. It will no doubt be pointed out that this stands in stark contrast to the speed with which the Department has moved to a Public Consultation on the CLRG report on Rescue for Small Business
- (b) The purpose of the Congress proposal is to provide for contractual entitlements express or implied by collective agreement or otherwise. An example already given is enhanced redundancy terms ,which , to be frank, has been at the core of a number of high profile liquidation disputes, the rationale for which rests on collective agreements and the benefits of which in enhanced redundancy terms are held by the workers to be implied in to their contracts of employment.
- (c) Accordingly if there is some concern as to how this would be applied in practice it should be possible to circumscribe the application of the Congress amendment to specified benefits, including enhanced redundancy terms.
- (d) Concern has also been expressed regarding the legal standing of Labour Court recommendations generally. The proposal should not disturb the existing voluntarist jurisdiction of the Labour Court under the Industrial Relations Act. Equally, it has no bearing on the Court's legal jurisdiction under statute. Rather ,what would come into play would be the fact that the terms agreed by the parties by virtue of the Recommendation would be expressed or implied into the individual employment contract and it is this which would trigger the preferential treatment.
- (e) Finally, concern was expressed that importing mention of the Labour Court into the Companies Act would, in the broad sense, impact on its constitutionality.

However,

(i) The enactments of the Labour Court in its “legal” jurisdiction are already captured by S 621 (3). (“any other enactments”)

(ii) S678 makes specific mention of the WRC (and impliedly the Labour Court), in that case, in providing there shall be no stay on proceedings before them.

5.4 S666/S667/S668 – Committee of Inspection

ICTU Proposal

Section 666(1) should be amended by the inclusion of a new sub section as follows:

(c) provided always that where a committee of inspection is appointed it shall include not less than one employee creditor member to represent employee creditors, should they so elect.

- (a) While again the recommendation of the majority is undoubtedly intended to be helpful in providing for a general obligation to inform creditors in general of their rights to establish/participate in a committee of inspection, it does not go far enough and does not engage specifically with the position of employees who are often the most adversely affected.
- (b) While it is argued that employees as creditors are entitled to be nominated and approved to sit on the Committee of Inspection, there is no express right for them to do so.
- (c) Employees may not be aware (particularly if non-union) and having an express right will ensure their awareness and encourage involvement. In this connection it should be noted that the majority of private companies are non-union and SME's
- (d) With regard to employee representation there are analogous provisions in employment law, for example with regard to consultation, which could provide templates for the fair representation of employees or employee groups.
- (e) If, as has been argued, that there is no known difficulty in employee creditors sitting on the committee, then there shouldn't be a problem to formalise this, particularly in the context of examining the rights and protections of workers in a liquidation setting. A seat as of right, should workers so decide, should assist in enhancing protection.
- (f) Employees having a seat of right on the Committee of Inspection does not in any way dilute the flow of information generally, any more or less than any other aspect of representative democracy in the workplace. Nor should it dilute in any way the obligations of liquidators or others with a responsibility to inform.
- (g) Finally, this proposal is not intended to nor should disturb normal bilateral relationships between liquidators and workers organised by trade unions or excepted bodies recognised in law.

5.4 S819 – Declaration by court restricting director of insolvent company being appointed or acting as director

ICTU Proposal:

Amend section 819 (1) as follows (underlined)

- (1) On the application of a person referred to in section 820(1) and subject to subsection (2), the court shall declare that a person who was director of an insolvent company shall not, for a period of 5 years, or such further period as the court decides as just and equitable in the circumstances....**

Amend section 819 (2) (a) as follows (underlined)

The court shall make a declaration under subsection (1) unless it is satisfied that-

- (a) The person concerned has acted honestly and responsibly in relation to the conduct of the affairs of the company in question, whether before or after it became an insolvent company.**
- (b) And the person concerned has fully complied with their obligations with regard to the rights and interests of employees generally, under employment law, their contracts of employment , collective agreements , this Act or generally.**
- (a) With regard to the first limb of the ICTU proposal , the majority declined to make a recommendation because of concern as to unintended consequences on the efficacy of the legislation
- (b) We acknowledge that concern and respectfully disagree on the grounds that it is clear that this would apply in only the more egregious cases and that the court can be relied upon to use its discretion in penalising and or dissuading such corporate misbehaviour.
- (c) The Congress further proposal under the second limb of this proposal is to amend S819 (2) to include in the grounds for restriction, consideration of a director’s full compliance “with their obligations with regard to the rights and interests of employees generally, under employment law, their contract of employment, collective agreements, this Act or generally”.
- (d) The thrust of this is to assist in ensuring that directors comply with their obligations in law towards employees , including their obligations in S 224 of the Act of 2014 to have regard to the interests of employees (as noted by the majority report)
- (e) However , while the majority report recognises that the obligations of directors under S224 is part of the overall consideration of directors’ general compliance , there is no express reference in the Act ,despite the terms of section 224 or other obligations in law towards employees.

- (f) We respectfully believe that directors' duties in this regard require to be underpinned further in line with our proposal .While we acknowledge the undoubted bona fides of ODCE in taking treatment of employees into account in decision making on the question of restriction, more express reference such as in our proposal would not only assist workers but would support their work in this regard.

(B) RECOMMENDATIONS ON WHICH ICTU DOES NOT DISSENT LARGELY OR AT ALL

S 627 – Powers of the Liquidator

- (a) Our proposal under this heading is designed to ensure absolute clarity that the obligation of the liquidator to defend any action legal proceeding in the name and on behalf of the company includes any referrals and complaints to the WRC/Labour Court. This is particularly so since S 678 provides there shall be no stay against proceedings in the WRC.
- (b) We note that on balance the committee is not opposed to seeking further clarification.

S682 – Liquidator to report on conduct of directors

- (a) Our proposal under this heading merely sought to amplify the 2017 recommendation to include compliance with S244 and S225, including any amendment thereto under these discussions (see our proposals in this regard). With regard to the statutory vehicle, it just needs to be demonstrated that even if enacted by SI that it carries the same legislative force as if by primary legislation.
- (b) One observation on the earlier draft of a suggested compliance form: it should not only be about non-compliance, but should also seek explanation of how and where company/directors complied with their obligations to the interests of their employees under S224.

S 593 Statement of the company's affairs

- (a) We propose in addition that any revised form for CVL or otherwise should provide information re employees, remuneration, claims, unpaid awards and any unresolved disputes/proceedings.
- (b) We also agree that the statement of affairs should be sworn by affidavit and be prepared under a duty of utmost good faith by the directors of the company.

Michael Halpenny, ICTU Nominee to CLRG , March 2021