Annex D: Response form

TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 2006: CONSULTATION ON PROPOSED CHANGES TO THE REGULATIONS – response form

You can complete your response online through SurveyMonkey:

www.surveymonkey.com/s/7GSJ7ST

Alternatively, you can email, post or fax this completed response form to:

Email:

tupe.regulations@bis.gsi.gov.uk

Postal address:

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The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: 11 April 2013
Your details

Name: Insolvency Lawyers' Association

Organisation (if applicable):

Address: Valiant House, 4-10 Heneage Lane, London EC3A 5DQ

Telephone:

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Fax:

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

☒ Business representative Organisation/trade body
□ Central government
□ Charity or social enterprise
□ Individual
□ Large business (over 250 staff)
☒ Legal representative
□ Local government
□ Medium business (50 to 250 staff)
□ Micro business (up to 9 staff)
□ Small business (10 to 49 staff)
□ Trade union or staff association
□ Other (please describe)
Question 1: Do you agree with the Government’s proposal to repeal the 2006 amendments relating to service provision changes?

Yes ☐ No ❑

As these provisions appear to be gold-plating, and uniquely to the UK, the instinctive response is yes. However, in the insolvency context, the migration of a service provided by the incumbent insolvent to a new provider can be as part of a business transfer or as a result of the termination of the contract that the insolvent can no longer perform (and is often in repudiatory breach). It is not helpful to remove the provisions if the effect is to fragment the insolvent business, and render it more difficult to achieve a sale of an integrated whole as a going concern. By splitting the treatment, there are incentives for cherry picking outside of the operational business, which can hasten the cessation of an insolvent business and a loss of value for all concerned.

a) Are there any aspects of the pre-2006 domestic case law in the context of service provision change cases which might need to be considered with a view to helping to ensure that the test in such situations is aligned with that in the Directive (as interpreted by the Court of Justice of the European Union)?

Question 2: If the Government repeals the service provision changes, in your opinion, how long a lead in period would be required before any change takes effect?

(i) less than one year ☐ (ii) 1-2 years ☐ (iii) 3-5 years ☐ (iv) 5 years or more (v) ☐

Do you believe that removing the provisions may cause potential problems?

Yes ☐ No ☐

If yes, please explain your reasons.

Question 3: Do you agree that the employee liability information requirements should be repealed?

Yes ☐ No ☐

a) If yes, please explain your reasons.

b) Would your answer be different if the service provision changes were not repealed?

c) Do you agree, that there should be an amendment to regulation 13 to make clear that the transferor should disclose information to the transferee where it is necessary for the transferee and transferor to perform their duties under that regulation?

Question 4: Do you agree with the Government’s proposal to amend the restrictions in regulation 4 on changes to terms and conditions so that the restriction more closely reflects the wording of the Directive (article 4, which is in relation to dismissals) and the CJEU case law on the subject?

Yes ☑ No ☐
The ILA is in general in favour of the removal of gold-plating. If the restrictions on changes to terms and conditions were pared back to remove the "in connection with the transfer" wording (and replacing it with "by reason of the transfer" or similar wording), this might make it easier for purchasers of insolvent businesses to harmonise terms and conditions of transferred employees with those of its existing workforce, thereby removing a disincentive to enter into the transaction. This theme of linking the changes to the actual transfer, rather than any potential transfer, is repeated below. There ought to be a causative link, which is more than mere coincidence [see Q6 below].

a) Do you agree that the exception for economic, technical or organisational reasons entailing changes in the workforce should be retained?

Question 5: The Government is considering using article 3.3 of the Acquired Rights Directive to limit the future applicability of terms and conditions derived from collective agreements to one year from the transfer. After that point, variations to those terms and conditions where the reason was the transfer would be possible provided that overall the change was no less favourable to the employee. Is this desirable in your view?

Yes ☐ No ☐

a) Please explain your answer.

b) Do you agree that there should be a condition that any change after the one year period which is by reason of the transfer, should be no less favourable overall than the terms applicable before the transfer?

Yes ☐ No ☐

c) If the outcome of the Parkwood Leisure v Alemo-Herron litigation is that a static approach applies under TUPE, do you think that such an approach would provide useful additional flexibility for changing such terms and conditions?

Please explain your answer.

Do you think there any other changes that should be made regarding the continued applicability of terms and conditions from a collective agreement (bearing in mind the limitations of Article 3(3) of the Directive.

Yes ☐ No ☐

Question 6: Do you agree with the Government’s proposal to amend the wording of regulation 7(1) and (2) (containing the protection against dismissal because of a transfer) so that it more closely reflects the wording of the Directive (article 4) and the CJEU case law on the subject?

Yes ☒ No ☐

The ILA would be in favour of any reform that might make it easier for administrators to make necessary changes to the workforce for the purpose of achieving the purpose of the administration. It is not clear that the proposed changes (to remove the "in connection with the transfer" wording and replace it with something like "by reason of the transfer") would solve the problem completely, but it would be a step in the right direction. In nearly all trading administrations it is the case that the administrator of an insolvent business (a) will need to dismiss certain non-essential employees early in the administration to minimise the running costs of the administration both to remain within the (usually limited) administration funding available and to preserve the company's assets for the benefit of its creditors as a whole and (b) intends to pursue a business sale with a view to achieving a better outcome for creditors as a whole than would be the case if the company were to go into liquidation, where its assets would be broken up and sold piecemeal, and its employees would all be dismissed.
As result of *Spaceright v Baillavoine* [2011] EWCA Civ 1565 and *Kavanagh v Crystal Palace (2000) Ltd* UKEAT 0354_12_2011, any type (a) dismissals made by the administrator while he is intending a type (b) sale of the business will necessarily be "in connection with the transfer" and cannot be for a valid ETO reason. They will therefore be automatically unfair. This is because it will almost never be the case that the administrator will have an "intention to change the workforce and to continue to conduct the business" [per Mummery LJ, para 47 *Spaceright*] without also intending to achieve a business sale. Consequently administrators will only extremely rarely be able to rely upon a valid ETO reason.

This means in practice that any early day dismissals made by an administrator, whether or not a proposed sale is under negotiation or a prospective purchaser indentified, will necessarily transfer the economic burden for unfair dismissal claims onto any future purchaser. This is a very clear barrier to achieving a business sale that will almost always represent the remaining employees’ best or only chance of retaining their current employment.

a) If you disagree, please explain your reasons.

b) Do you agree that the drafting of the restrictions to terms and conditions in regulation 4 and the drafting of the protection in relation to dismissal (regulation 7) should be aligned?

Yes ☐ No ☐

**Question 7:** Do you agree that TUPE should be amended so that regulations 4(9) and (10) are replaced by a provision which essentially copies out article 4(2) of the Directive?

Yes ☒ No ☐

a) Please explain your reasoning.

**Question 8:** Do you agree with the Government’s proposal that 'entailing changes in the workforce' should extend to changes in the location of the workforce, so that 'economic, technical or organisational reason entailing changes in the workforce' covers all the different types of redundancies for the purposes of the Employment Rights Act 1996?

Yes ☒ No ☐

a) If you disagree, please explain your reasons.

**Question 9:** Do you consider that the transferor should be able to rely upon the transferee’s economic, technical or organisational reason entailing changes in the workforce in respect of pre-transfer dismissals of employees?

Yes ☒ No ☐

Any measure that makes it easier for the purchaser to absorb the transferring employees into its own workforce and harmonise terms will improve the chances of making a sale either at all, or at a better price, for the benefit of the insolvent transferor's creditors. Any reformed provision would need to be clear and certain so as to enable both the administrator and the purchaser to take the benefit of it without the risk of uncertainty.

**Question 10:** Should there be an amendment to ensure that any actions of the transferee before the transfer takes place count for the purposes of the requirements to consult on collective redundancies (under the Trade Union and Labour Relations (Consolidation) Act 1992), therefore allowing consultations by the transferee with staff who are due to transfer to count for the purposes of the obligation to consult on collective redundancies?

Yes ☒ No ☐
The ILA sees no particular objection to this proposal. However, the timeframes in which insolvent business transfers usually take place may mean that it would be little used in practice. It is unlikely that the insolvent transferor would consent to consultations with the workforce by the prospective transferee unless and until the transaction was confirmed. Usually once this stage is reached, the transaction proceeds immediately, thereby not allowing any time for the proposed consultation. We would expect that to the extent that it is practicable within the confines and timeframes of the business deal, what consultation that can be carried out would normally be undertaken by the transferor. See also the answer given to Q15 below, and the ILA’s prior submissions referred to there.

**Question 11:** Rather than amending Regulation 13(11) to give clarity on what a 'reasonable time' is for the election of employee representatives do you think our proposal to provide guidance instead would be more useful?

Yes □  No □

a) Please explain your reasons.

b) If you disagree, what would you propose is a reasonable time period?

**Question 12:** Do you agree that regulation 13 should be amended so that micro businesses are able to inform and consult with affected employees directly in cases where there is not a recognised independent union, nor appropriate existing employee representatives (under regulation 13(3)(b)(i)), rather than have to invite employees to elect representatives?

Yes □  No □

a) If your answer to the above question is yes, would it be reasonable to limit this option so that it were only applicable to micro businesses (10 employees)?

Yes □  No □

**Question 13:** Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

a) If not, are there particular areas where micro businesses should be exempt? Please explain your answer.

Yes □  No □

b) Do you think that any of these proposed changes are likely to impose additional costs on micro businesses?

Yes □  No □

b) If so, please give details and suggestions where these costs could be decreased or avoided entirely.

**Question 14:** Do you agree that apart from the proposals in relation to service provision changes, there are no other proposals which give rise to the need for a significant lead-in period?

**Question 15:** Have you any further comments on the issues in this consultation?
We refer to our response to the Call for Evidence on the effectiveness of the TUPE Regulations (dated January 2011, a copy of which accompanies this response). As expressed in that response the way in which TUPE applies to insolvency business transfers undermines the rescue culture:

- The combined effect of TUPE and case law seems to be that early day dismissals by administrators in trading administrations, whether or not a prospective purchaser of the business has been identified, are automatically unfair, increasing the burden to be absorbed by any prospective purchaser, thereby creating at worst a disincentive to a purchaser, or at best a reduced price (see answer to Question 6 above).

- Whilst the Court of Appeal decision in *Key2Law (Surrey) Ltd v De'Antiquis* [2011] EWCA Civ 1567 clarifies that an administration will be 'relevant insolvency proceedings' for the purposes of reg 8(2) – (6)) and not 'bankruptcy or analogous proceedings which have been instituted with a view to the liquidation of the assets of the transferor...' for the purposes of reg 8(7), it remains the case that the verbatim adoption of the language of article 5.1 of the ARD into the TUPE Regulations is an anomaly (as to which see, eg, para 83 of that decision). What is required is a translation of the ARD language into domestic language, making it expressly clear that administration and voluntary arrangements are 'relevant insolvency proceedings' and liquidations are reg 8(7) type proceedings. The reference in para 6.27 of the consultation was something that had been flagged very clearly by IP’s, but was ignored, leading to the difficulties now said to have been clarified by *Key2Law*, albeit a decision which chose to adopt a legal fiction over commercial realities in order to produce the “certainty” now claimed in the consultation at 6.29. The certainty point has been echoed in para [20] of *Kavanagh v Crystal Palace*, without comment on the path to that position. As the certainty of *Key2Law* is dependent upon a legal fiction, it would be vulnerable if future reforms to the administration process (perhaps in relation to pre-pack administrations) undermined the basis of the legal fiction. To pass over the opportunity to make a relatively simple amendment to achieve certainty now, while reforming the TUPE Regulations generally, could prove to be a false economy.

- The third main respect in which the TUPE Regulations are generally unhelpful in insolvent business transfers is the inflexibility they impose with regard to consultation and information obligations. It is regularly the case that the window of opportunity for completing a transfer of an insolvent business is a vanishing one. The timeframe, confidentiality requirements and urgency frequently make it impossible to conduct TUPE compliant consultations without jeopardising the deal for breach of confidentiality, which is clearly not in the employees' interests. If the TUPE Regulations were amended to make compliance an achievable prospect in insolvency situations, it would remove what is currently perceived to be an impossible barrier to compliance, one which may even discourage any attempts. We refer to our response to the Call for Evidence dated January 2011 (copy accompanying this response) for more on this point.

There remains the continuing tension between the objectives of insolvency rescue and the ARD (we appreciate that the latter is not under review), in that the ARD as interpreted shields itself from the reality that going concern businesses provide employment, and that failure leading to cessation, extinguishes it. The unintended consequence of the ARD is, in many cases, to deter rescue, with the consequence that employment is prejudiced, not protected. This is not a new comment at all, but it is not any less true. This tension manifests itself in a clash of duties for insolvency practitioners (those to the creditors, and to comply with the ARD as implemented by the TUPE Regs).

**Question 16:** Do you feel that the Government’s proposals will have a positive or negative impact on equality and diversity within the workforce?

Yes □ No □

a) Please explain your reasons.
b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.
b) Question 17:

Do you agree with the analysis and evidence provided in the Impact Assessment? Please give details for any area of disagreement or if you can provide any further knowledge in an area.