



**AN BILLE CAIDRIMH THIONSCAIL (LEASÚ) (UIMH. 3),
2011
INDUSTRIAL RELATIONS (AMENDMENT) (NO. 3) BILL 2011**

EXPLANATORY AND FINANCIAL MEMORANDUM

Introduction

The main purpose of the Bill is to reform the existing system for the making of both Employment Regulation Orders (ERO) and Registered Employment Agreements (REA) and to provide for their continued effective operation in the context of fairer procedures that are more responsive to changing economic circumstances.

The Bill also meets a number of the State's key commitments in the EU/IMF Programme of Financial Support for Ireland aimed at structural reforms to the labour market building on the recommendations of the Report of the Independent Review of the Employment Regulation Orders and Registered Employment Agreements Wage Setting Mechanisms.

The Bill sets out clear policies and principles that should guide, inform and direct the exercise of delegated power in the formulation and adoption of proposals for EROs and REAs. The Bill also provides that EROs and REAs will be given legal effect in future by Ministerial Order and for Oireachtas scrutiny of them.

PART 1

PRELIMINARY AND GENERAL

Section 1 is a standard provision in legislation providing for the short title, collective citation, construction and commencement provisions of the Bill.

Section 2 defines 2 Acts referred to frequently in the rest of the Bill.

Section 3 provides for the repeal of certain sections of the Industrial Relations Acts, 1946-1990, that are either anachronistic or are being replaced in the Bill.

PART 2

REGISTERED EMPLOYMENT AGREEMENTS

Section 4 amends *section 25* of the Act of 1946 by providing for a new definition of "registered employment agreement" (REAs) so as to differentiate between those made before the commencement of this Act (i.e. registered by the Labour Court) and those made after

the commencement of this Act (i.e. those registered agreements that have been confirmed by Ministerial order).

Section 5 amends *section 27* of the Act of 1946 laying down new procedures governing the registration of employment agreements by the Labour Court.

Section 5 also substitutes *section 27, subsection (2)* to provide that every application to register an employment agreement shall be accompanied by confirmation provided by the parties to the agreement that they are substantially representative of the employers and the workers to whom the agreement applies.

Section 5 inserts a new *section 27(3A)* in the Act of 1946 that sets out the principles and policies that the Labour Court must take into account when considering whether or not to register an agreement. The Labour Court will be required to have regard to:

- (a) whether the parties to the agreement are substantially representative of the workers and employers in the sector. In this context, the Court shall have particular regard to the number of workers represented by the trade union party and the number of workers employed by the employer or by employers represented by a trade union of employers;
- (b) whether the agreement will be binding on all workers and employers in the sector;
- (c) the desirability of maintaining established arrangements for collective bargaining;
- (d) the promotion of harmonious relations between workers and employers;
- (e) the desirability of the avoidance of industrial unrest;
- (f) the benefits of consultation between worker and employer representatives at enterprise and sector level;
- (g) the experience of registration and variation of employment agreements in the sector;
- (h) the potential impact on employment levels of registering an employment agreement in the sector;
- (i) the desirability of agreeing and maintaining fair and sustainable rates of remuneration in the sector;
- (j) the desirability of maintaining competitiveness in the sector;
- (k) the levels of employment and unemployment in the sector;
- (l) the terms of any relevant national agreement relating to pay and conditions for the time being in existence;
- (m) the general level of wages in comparable sectors, including where the sector in question is in competition with enterprises outside the State, the general level of wages in such comparable sectors in other relevant jurisdictions.

Section 5 also inserts a new *section 27(5)A* in the Act of 1946 to provide for the confirmation by order of a Registered Employment Agreement by the Minister.

Thus, after the commencement of *Part 2* of the *Industrial Relations (Amendment) Act 2011*, whenever the Labour Court registers an employment agreement it will provide the Minister with a copy of the agreement. Where the Minister is satisfied regarding compliance with the necessary procedural steps and where he or she considers it appropriate to do so, he or she shall make an order confirming the terms of the agreement. The standard legislative provision dealing with the laying of the order before the Houses of the Oireachtas by the Minister will apply. Where the Minister is not so satisfied or otherwise considers that it is not appropriate to make such order confirming the terms of the agreement, he or she shall refuse to do so and advise the Labour Court of the grounds for the refusal.

A new *section 27(5)A* also provides clarity by confirming that the introduction of the new procedure in the Bill will not affect the validity of an REA made and in force before the commencement of *Part 2* of this Bill when enacted.

A new *section 27(7)* provides that an REA may provide that an employer may apply to the Labour Court for an exemption from the obligation to pay the rate of remuneration provided by the agreement. The mechanism for doing so is provided in a new *section 33* to be inserted in the 1946 Act [see under *section 9* below].

Section 6 substitutes a revised section for *section 28* of the Act of 1946 so as to reflect the recommendation of the Report of the Independent Review of the Employment Regulation Orders and Registered Employment Agreements Wage Setting Mechanisms concerning the introduction of a time-bound process by which the terms of an REA may be varied by the Labour Court in certain circumstances without obtaining the consent of all parties to the agreement.

Section 28, subsection (1) provides that any party to an REA may apply to the Labour Court to vary an REA. *Subsections (2) and (3)* provide that where all parties to an agreement agree to a variation, the Labour Court shall consider the applications for approval of the variation and may, as it thinks fit, refuse the application or make an order otherwise varying the REA.

Section 28, subsections (4), (5), (6), (7), (8) and (9) provide for a time-bound process to apply in the circumstances of a contested application for a variation of an REA. In such circumstances, the parties are required to proceed as follows:

- The proposed alteration in the terms of the agreement may be discussed by the parties using the dispute resolution procedures specified in the agreement, including referral of the dispute to the Labour Relations Commission [*subsections (4) and (5)*].
- If agreement is not reached the dispute may be referred by the Labour Relations Commission to the Labour Court for investigation [*subsection (6)*].
- Having heard all interested parties, the Labour Court shall issue a recommendation setting out the terms on which the dispute should be resolved [*subsection (7)*].
- If, following the lapse of a period of not less than six weeks from the date of the recommendation, the dispute remains unresolved, a party to the REA may apply to the Court to vary the agreement in the terms of the Court's recommendation [*subsection (8)*].

- Following a further hearing in the matter, the Court may refuse the application or make an order varying the agreement in such terms as it thinks fit [*subsection (9)*].

Section 28, subsection (10) provides that following receipt of a copy of a variation order, the Minister shall, where he or she is satisfied regarding compliance with the necessary procedural steps and where he or she considers it appropriate to do so, make an order confirming the terms of the variation. The standard legislative provision dealing with the laying of the order before the Houses of the Oireachtas by the Minister will apply. Where the Minister considers that it is not appropriate to make such order he or she shall refuse to make such order and advise the Labour Court in writing of the grounds of his refusal.

Section 7 amends *section 29* of the Act of 1946 governing the cancellation of a registered employment agreement to provide for clearer and more streamlined procedures for the cancellation of REAs.

Section 7 substitutes *section 29 subsection (2)*, and new *subsections (2A)* and *(2B)* so as to provide that the Labour Court may, from time to time, on its own initiative, and shall at the request of the Minister or on application in writing to it by an interested person conduct a review of the circumstances of a sector to which an REA applies and consider whether or not the continued registration of the REA is appropriate. For the purpose of such a review, the Labour Court may arrange for a report to be commissioned on the circumstances of the particular sector and the Court shall have regard to the findings of the report in reaching its decision.

New *subsection (6)* in *section 29* provides that the Labour Court may cancel an REA if either the trade union or employer parties have ceased to be substantially representative of workers or employers concerned. A new *subsection (7)* inserted in *section 29* provides that where the Labour Court cancels the registration of an REA, it shall forward a copy of the cancellation to the Minister who shall, if satisfied regarding compliance with the procedural steps and where he or she considers it appropriate, confirm the cancellation by order. Where the Minister is not so satisfied or otherwise considers that it is not appropriate to do so, he or she shall refuse to make such order and advise the Labour Court in writing of the grounds for the refusal. The standard legislative provision dealing with the laying of the order before the Houses of the Oireachtas by the Minister will apply.

Section 8 inserts a new *section 32(4)* of the Act of 1946 to provide a new straightforward enforcement mechanism to secure compliance with REAs instead of resorting to a criminal prosecution. A complaint about non-compliance by an employer with an order of the Labour Court for compliance with an REA may be brought before the Circuit Court by or on behalf of the worker concerned, or the Minister if he or she considers it appropriate to do so. The Circuit Court shall make an order directing the employer to comply with the terms of the Labour Court order.

Section 9 inserts a new *section 33* in the 1946 Act providing that, where an REA so provides, an employer in financial difficulty may apply to the Labour Court seeking temporary exemption from the requirement to pay the rates of remuneration in the agreement.

Section 33A, subsection (2) provides that the maximum period of

an exemption will be 24 months and must be for a minimum of 3 months.

An employer will not be entitled to seek an exemption if he or she has already been granted an exemption in respect of the same workers in the previous 5 years.

An application for an exemption may be made by an employer:

- (a) where the employer has entered an agreement with the majority of the workforce or the representatives of the majority of the workers; and
- (b) where the employer has informed the workers concerned of the financial difficulties of the business and where, notwithstanding the absence of an agreement with the majority of the workforce, the Labour Court is satisfied that the employer cannot maintain the terms of the REA, and compliance with the terms of the REA would result in considerable lay-offs and adverse effects on the survival of the employer's business.

Subsection 8 of section 33A sets out the criteria that have to be considered by the Labour Court in the absence of an agreement with the majority of the workforce. In such circumstances the Labour Court must be satisfied that:

- the employer has informed the workers concerned of the financial difficulties of the business and has attempted to reach agreement with the workers concerned;
- the employer is unable to maintain the terms of the REA;
- requiring the employer to comply with the REA would result in a substantial risk that a significant number of the workers concerned would be laid off or made redundant or that the sustainability of the employer's business would be significantly adversely affected.

Subsection 9 of section 33A requires the Labour Court to consider whether granting an exemption would have an adverse effect on employment levels and distort competition in the sector to the detriment of employers not party to the particular application. In addition, the Labour Court must have regard to the implications of granting an exemption for the long term sustainability of the employer's business.

Subsection (11) of section 33A provides that an exemption shall not specify an hourly rate which is less than the hourly rate fixed under the National Minimum Wage and must not reduce the pension contributions paid by the employer.

Subsection (13) of section 33A provides that if a new worker replaces a worker to whom an exemption relates, the employer may pay the new worker the lower rate.

Subsection (13) of section 33A provides that where a contract between an employer and a worker specified in an exemption provides for the payment of remuneration at more than the rate provided by such exemption, the contract shall have effect as if the rate provided for by the exemption were substituted for the rate provided for by the contract.

PART 3

EMPLOYMENT REGULATION ORDERS

Section 10 provides for a new definition of “employment regulation order” to relate exclusively to those EROs made after the commencement of this Part of the Bill when enacted (i.e. by Ministerial order).

Section 11 inserts a new *section 41A* after *section 41* of the 1946 Act to provide that the Labour Court will, following the commencement of this Act and at regular 5 year intervals thereafter, conduct a review of all Establishment Orders in respect of existing Joint Labour Committees. Following such review the Labour Court may recommend that:

- (a) a JLC be abolished;
- (b) a JLC be amalgamated with another JLC; or
- (c) that the establishment order for a JLC be amended.

Section 41A, subsection (2) sets out clear guidance for the Labour Court in carrying out the periodic reviews of Joint Labour Committees. In this context the Labour Court should have regard to:

- the outcome of any review of a JLC by the Labour Relations Commission;
- the classes of workers to which the JLC applies and the extent to which they have been affected by changes in the trade or business;
- the types of enterprises to which the JLC applies and the extent to which they have been affected by changes in the trade or business;
- the experience of the enforcement of EROs within the sector;
- the experience of any adjustments made to these EROs;
- the impact of these EROs on employment levels, especially at entry level;
- whether the fixing of statutory minimum remuneration and of statutory conditions of employment by the joint labour committee has been prejudicial to the exercise of collective bargaining in the sector;
- whether, in the case of a JLC that represents workers and employers in a particular region in the State, the continuation of such regional representation is justified.

Following receipt of a recommendation from the Labour Court, the Minister may, if satisfied, make an order in the terms of the recommendation. The standard legislative provision dealing with the laying of an order before the Houses of the Oireachtas by the Minister will apply.

Section 12 provides for a number of amendments that are required to the legislative provisions relating to the operation of Joint Labour Committees in relation to the “principles and policies” that should guide the formulation by joint labour committees of proposals on the

fixing of remuneration and conditions of employment; the regulation of the Joint Labour Committee (JLC) decision-making process; and the making of an ERO by the Minister.

The High Court in *John Grace Fried Chicken Limited and Others -v- The Catering Joint Labour Committee and Others* declared Section 42 of the 1946 Act to be unconstitutional because it was invalid having regard to the provisions of Article 15.2.1 of the Constitution which provides that the sole and exclusive power of making laws for the State vests in the Oireachtas. The High Court judgment found that Section 42 of the Act of 1946 failed to prescribe sufficient principles and policies to govern the exercise of the powers conferred on JLCs under the Act.

Section 12 accordingly inserts a new *section 42A* into the Act of 1946 to establish the “principles and policies” to which a JLC must have regard when formulating proposals to submit to the Labour Court for Employment Regulation Orders.

In this context, *section 42A subsection (6)* provides that a JLC must have regard to:

- the legitimate interests of employers and workers likely to be affected by the proposals, including:
 - the legitimate financial and commercial interests of the employers in the sector in question,
 - the desirability of agreeing and maintaining efficient and sustainable work practices appropriate to the sector in question,
 - the desirability of agreeing and maintaining fair and sustainable minimum rates of remuneration appropriate to the sector in question,
 - the desirability of maintaining harmonious industrial relations,
 - the desirability of maintaining competitiveness, and
 - the levels of employment and unemployment in the sector in question.
- the general level of wages in comparable sectors, including, where enterprises in the sector in question are in competition with enterprises outside the State, the general level of wages in such comparable sectors in other relevant jurisdictions;
- the current national minimum hourly rate of pay applicable under the National Minimum Wage Act 2000 (No. 5) and the appropriateness of fixing a higher statutory minimum hourly rate of pay;
- the terms of any relevant national agreement in force.

The new *section 42A, subsection (3)* provides that where an ERO has been in force for less than 6 months, a JLC may submit proposals for revoking or amending the order where it is satisfied that—

- (a) the order contains an error, or

- (b) exceptional circumstances exist which warrant the revocation or amendment.

Section 42A, subsection (4) provides that the JLC may make proposals to fix a minimum hourly rate of remuneration and not more than 2 higher hourly rates of remuneration based on length of service in the sector or enterprise concerned, for all or any such workers.

Section 42A, subsection (5) clarifies the relationship between the adult wage rates that may be proposed by a JLC and the sub-minimum rates under EROs expressed as the same fixed percentages of the minimum hourly rate of remuneration as set out in sections 14, 15 or 16 of the National Minimum Wage Act 2000 in respect of employees aged under 18 years, first time job entrants, and employees undergoing training.

Section 42A, subsection (7) provides for a new common-sense or straightforward definition of “remuneration” for the purposes of formulating proposals for EROs so that such proposals may no longer include;

- (a) pay or time-off from work in lieu of public holidays;
- (b) compensation pursuant to section 14 of the Organisation of Working Time Act 1997 resulting for required work on a Sunday (that section will continue to apply separately and should not be duplicated in an ERO);
- (c) payments in lieu of notice; or
- (d) payments referable to a worker’s redundancy.

Section 12 is also inserting a new *section 42B* as an amendment of the Act of 1946 providing for the regulation of the decision making procedures; the reception of representations by a Joint Labour Committee and also a requirement that the committee’s chairman shall have regard to a relevant Labour Court recommendation in the event of a casting vote being exercised.

Section 42B, subsections (3) and (4) provide that a chairman of a JLC will be responsible for facilitating the parties represented on a Joint Labour Committee in seeking to reach agreement and, where no further efforts are likely to advance the resolution of the difference between the parties, the outstanding matters may be referred to the Labour Court.

Section 42B, subsection (7) clarifies the factors to be taken into account by the Labour Court in making a recommendation in the circumstances of a reference made by a JLC that has failed to reach agreement upon specific proposals. The Labour Court shall have regard to:

- the representations made by the parties at the hearing,
- any relevant code of practice for the purposes of this Act,
- the economic and commercial circumstances of the employments to which the JLC relates,
- the rates of remuneration and conditions of employment of workers in similar employment sectors,

- the merits of the dispute and the terms upon which it should be settled.

Section 42B, subsection (9) provides that in the event that agreement is not reached within a Joint Labour Committee following their consideration of a Labour Court Recommendation, it will vote on the issues in dispute and if the votes are tied the chairman of the JLC shall exercise a casting vote having regard to the recommendation of the Court.

Section 12 is also inserting a new *section 42C* as an amendment of the Act of 1946 to provide for the making of an ERO by the Minister. Following adoption of a proposal for an ERO by the Labour Court, the proposals will be forwarded to the Minister who shall, where he or she is satisfied, make an order giving effect to the proposals. The standard legislative provision dealing with the laying of the order before the Houses of the Oireachtas by the Minister will apply. Where the Minister is not so satisfied or otherwise considers that it is not appropriate to make such EROs he or she shall refuse to do so and advise the Labour Court in writing of the grounds for the refusal.

Section 13 is inserting a new *section 45A* to provide for a number of amendments introducing an alternative enforcement mechanism to that formerly provided prior to the High Court judgment in *John Grace Fried Chicken Limited and Others -v- The Catering Joint Labour Committee and Others*. The new enforcement mechanism will offer an alternative to a criminal prosecution by enabling a complaint about non-enforcement to be brought before the Labour Court.

Section 45A establishes a new procedure to enable an employee or an employee's trade union to make a complaint to a Rights Commissioner that an employer has contravened an employment regulation order in relation to the worker.

Under *section 45A subsections (2) to (7)* a Rights Commissioner shall investigate the complaint and decide that the complaint was, or was not, well founded and, where appropriate, require the employer to comply with the ERO and pay compensation to the employee. The complaint must be presented before six months beginning on the date of the contravention, unless exceptional circumstances prevented this.

Section 13 is also inserting a new *section 45B* which enables a party to appeal a decision of a Rights Commissioner to the Labour Court which, following a hearing at which the parties may present evidence, may affirm, vary or set aside a decision of the Rights Commissioner. An appeal must be made within six weeks of the communication to the parties of the Rights Commissioner's decision. The Labour Court shall determine the proceedings for such appeals. Where a Rights Commissioner's decision has not been appealed by the employer and has not been implemented within six weeks, the Labour Court, without an investigation, may make a determination the same as the decision. The Labour Court may refer a question of law for determination by the High Court. Any party to proceedings before the Labour Court may appeal a determination of the Labour Court to the High Court on a point of law.

Section 13 is also inserting a new *section 45C* which provides that where an employer fails to carry out a determination of the Labour Court it can be enforced by the employee, the trade union or the Minister in the Circuit Court without hearing the employer or any

evidence in relation to the complaint. The court may order the employer to pay interest on the award. Under a new section 45D compensation payable to a worker by virtue of a Rights Commissioner's decision or a determination of the Labour Court shall be given priority in the distribution of the assets of a company being wound up or in bankruptcy.

Section 13 is also inserting a new section 45E strengthening the enforcement mechanisms by enabling the Minister to present a complaint to the Rights Commissioner in circumstances where a breach of the ERO has occurred and it is unreasonable to expect the employee to present a complaint. The complaint so presented by the Minister shall be treated in the same way as if it were a complaint from the employee.

Section 14 is inserting a new section 48A providing for an employer in financial difficulty to apply to the Labour Court seeking a temporary exemption from the requirement to pay the rates of remuneration in an ERO.

The provisions at Section 9 of the Bill in relation to exemptions from the requirement to pay the rates of remuneration in an REA are replicated in *Section 14*.

Section 15 provides that, in the context of the reconstitution of existing Joint Labour Committees, all current independent members of the JLCs would cease to hold office and new appointments would be made. Independent members shall hold office for a period not exceeding 5 years.

Section 16 provides for consequential amendments to the Employment Permits Act 2006 and the Organisation of Working Time Act 1997.

Section 17 amends the Protection of Employees (Employers' Insolvency) Act 1984, to ensure that payments due to a worker due to decisions of a Rights Commissioner or a determination of the Labour Court made under this act shall be treated as debts for the purposes of employees' rights on the insolvency of their employer.

Section 18 strengthens the provisions relating to informing workers of their statutory entitlements by requiring the employers of any worker to whom an ERO or REA applies to include the terms of that ERO in the Written Statement of Terms of Employment to be given to the worker under section 3 of the Terms of Employment (Information) Act 1994. The section also provides for prompt rectification of incomplete or incorrectly stated terms by allowing an inspector to give directions to the employer concerned. The present arrangements for effecting compliance with the obligation to provide employees with a written statement of their terms of employment have proved unsatisfactory as the only remedy for employees is to make a complaint to a Rights Commissioner and can entail delays pending the outcome of a hearing. The new approach will enable such matters to be rectified at workplace level thereby avoiding unnecessary recourse to Rights Commissioners and on appeal to the Employment Appeals Tribunal.

Exchequer and Financial Implications

There are no costs associated with the proposals at this stage.

Regulatory Impact Assessment

A Regulatory Impact Assessment (RIA) in relation to this Bill was undertaken and is in the Appendix to this Memorandum.

Appendix

Regulatory Impact Analysis

1. Policy Context/Background

The main purpose of the Industrial Relations (Amendment) (No. 3) Bill 2011 is to implement reform proposals in line with the commitment in the Government's Programme for National Recovery, 2011-2016, to reform the Joint Labour Committee (JLC) system and to provide for the more comprehensive measures required to strengthen the legal framework for the Employment Regulation Orders and Registered Employment Agreement sectoral wage setting mechanisms, under the Industrial Relations Acts 1946 to 2004 in the light of deficiencies in the original legislation identified in the High Court judgment in *John Grace Fried Chicken Limited and Others -v- The Catering Joint Labour Committee and Others* of 7 July 2011. The Bill gives effect to the Minister's Action Plan endorsed by the Government on 26 July 2011 and builds on the recommendations of the Independent Review of Employment Regulation Orders and Registered Employment Agreements Wage Setting Mechanisms, the terms of reference of which had been the subject of agreement with the European Commission Services under the terms of the EU/IMF Programme for Ireland.

The terms of reference of the Independent Review had, inter alia, to address:

- The shared employment maintenance and creation objectives, of the Government, employers and trade unions, both within the regulated sectors and in the wider economy; and the possible renewal of the Private Sector Protocol by IBEC and ICTU.
- The common desire to see the continued orderly conduct of industrial relations across the economy and the relevant sectors; the continued protection of employee rights and interests;
- The current levels of domestic competition and international competitiveness of the sectors covered by EROs and REAs; price and wage movements in the economy and in major trading partners; and the impact of EROs and REAs on labour market flexibility and sustainable employment across the economy.
- Independent external economic and labour market evidence.

2. Statement of Objectives

2.1 General reform objective

The Programme for Government provides for a commitment to reform the JLC system, including the appointment of independent chairpersons to JLCs who will retain a casting vote. Other reform options requiring examination included the rate of pay for atypical hours, such as Sunday premia.

Together with the restoration of the National Minimum Wage to €8.65 per hour with effect from 1 July 2011, the reform of the statutory wage setting machinery operating at sector level, and putting the JLC and REA systems on a more secure legal and Constitutional footing, represents a significant commitment by the Government to protect the lowest paid and most vulnerable workers.

On 24 May 2011, the Government published the Report of the Independent Review of Employment Regulation Orders and

Registered Employment Agreements Wage Setting Mechanisms. The Report's overall finding is that the current JLC and REA systems require radical overhaul so as to make them fairer and more responsive to changing economic circumstances and labour market requirements.

2.2 Immediate Objectives of the Reform of the JLC and REA systems

The publication of the Bill before the end of 2011 is a requirement of the State's labour market structural reform commitments under the EU/IMF Programme of Financial Support for Ireland. The proposed reform of the legal framework for Employment Regulation Orders (EROs) and Registered Employment Agreements (REAs) is aimed at increasing employers' ability to retain and employ workers, in particular in sectors hard hit by the prevailing economic circumstances, and to facilitate necessary cross-sector adjustment. More specifically, the Bill has been framed to take account of the High Court judgment that found certain provisions of the Industrial Relations Acts in relation to EROs to be contrary to the Constitution. The proposed reforms involve

- Greatly streamlining the number of different minimum wage rates set under EROs that have to be applied by employers;
- Ensuring that JLCs and the Labour Court must have regard, in formulating and approving proposals for new EROs, to economic conditions such as employment and unemployment; and the general level of wages in comparable sectors, including wage trends in comparable competing sectors in other relevant jurisdictions;
- Providing for Oireachtas oversight of EROs and variations thereof;
- Allowing greater flexibility for employers facing financial difficulties to obtain temporary exemptions from EROs in certain circumstances;
- Precluding JLCs from setting Sunday premium rates, but allowing compensation for Sunday working to be assured under the Organisation of Working Time Act 1997;
- Introducing a time-bound process by which the terms of an REA may be varied by the Labour Court in certain circumstances without necessarily obtaining the consent of all parties to the REA;
- Putting REAs on a more legally and Constitutionally secure basis by clarifying "substantially representative parties" and providing for Oireachtas oversight of REAs.

3. Identification of Choices/Options

3.1 Option 1 Remove all statutory wage-fixing machinery at sector level

The significance of JLCs has undoubtedly altered since the introduction of the National Minimum Wage and the development of an extensive floor of statutory individual employment rights over recent decades. JLCs and REAs, however, continue to provide a mechanism for setting pay and certain working conditions for large numbers of workers in an orderly way for perhaps up to 250,000 people. In the light of the Government's commitment to reform the JLC system and the observance of international conventions and

collective bargaining norms, Option 1 would at this juncture be an unjustifiable reversal of Government policy. The absence of mechanisms such as EROs and REAs would result in more individualised claims on employers and grievances/disputes which would require to be adjudicated by the State's employment rights machinery.

3.2 Option 2 Do Nothing

The High Court judgment of 7 July 2011 declared sections 42, 43 and 45 of the Industrial Relations Act 1946 and section 48 of the Industrial Relations Act 1990 to be invalid having regard to the provisions of Article 15.2.1 of the Constitution. As a consequence, all of the 17 Employment Regulations Orders (EROs) in place on 7 July 2011 ceased to have statutory effect from that date.

The “*do nothing*” option would permit an unacceptable legal vacuum to continue as regards the obligations of employers towards existing employees as compared with new employees. In the interest of legal clarity, harmonious industrial relations and establishing a less restrictive and more responsive regulatory framework, the Government resolved to end the legal vacuum by proceeding with comprehensive reform legislation as the implications of the High Court judgment of 7 July are not confined to the JLC system and EROs. Only a comprehensive reform Bill as proposed can address all of the recommendations for reform that were put forward by the Independent Review Report on these statutory wage-setting mechanisms.

3.3 Reform Agenda

The Programme for Government provides for a commitment to reform the JLC system, while maintaining the appointment of independent chairpersons to JLCs, who will retain a casting vote. Providing for the retention of the JLC and REA systems, subject to the necessary reforms to enable them to be placed on a more secure legal and Constitutional footing, is the preferred option as that will ensure that (i) all EROs will be revised using new criteria which better reflect ongoing economic circumstances and labour market requirements; and that (ii) the process for the confirmation, variation and cancellation of REAs will have regard to the relevance, fairness and the impact on employment of the REAs. The Bill also clarifies who are the “substantially representative parties” entitled to make and maintain REAs.

4. Other Impacts

4.1 National Competitiveness

The economic case for reform of the statutory wage fixing machinery is based on the following key factors:

1. Ireland has experienced a very sharp increase in unemployment in recent years, with little prospect of improvement in the short term;
2. Irish wage costs grew quickly and remain high in key sectors where sectoral agreements are prevalent, relative to those in competitor countries;
3. Wages account for a relatively high proportion of costs in key sectors where sectoral agreements apply.

In October 2010 the FORFÁS Review of Labour Cost Competitiveness estimated that between 170,000 and 300,000 workers were covered by either Employment Regulation Orders

(EROs) or Registered Employment Agreements (REAs) regarding the terms and conditions of their employment. In many cases, those covered by EROs and REAs overlap with those earning wage levels within 1.5 times the National Minimum Wage (NMW). The additional conditions of employment covered by EROs and REAs (such as travel to work costs, Sunday working rates etc.) can have a significant impact on employment costs. An examination of the hourly rates guaranteed by EROs suggests that these agreements are offering a premium of approximately nine percent over the NMW rate. REAs also provide for a wage rate in excess of the hourly minimum wage. REAs are predominantly related to the construction sector (others relate to the printing industry, for example) and guarantee hourly or weekly rates well in excess of the NMW.

4.2 Service Business Costs

The proposed reforms are expected to have a positive impact on costs for service businesses. The sectors where the greatest job losses have occurred (i.e. hospitality, retail, and construction) are the sectors where statutory sectoral wage-fixing continues to apply over and above the universally applicable National Minimum Wage. While demand in these sectors is clearly a key factor for survival and growth, their wage costs represent a relatively higher proportion of total costs than for other sectors generally.

4.3 Service Business Employment

The proposed reforms in the statutory wage-setting mechanisms would be expected to have a positive impact on employment in the sectors concerned. These are the very sectors that have experienced some of the greatest competitive pressures, including in the hospitality sector, which is central to the Government's aim to secure Ireland's position as a top tourist destination.

4.4 Socially excluded or vulnerable groups

Those persons most at risk of poverty are recognised as those who have just lost, or are just about to lose, a job. The risk of a person who is unemployed being in serious poverty is ten times greater than a person who has a job. Crucially, every worker who goes back to work in the sectors covered by JLCs — and especially in the retail and hospitality and other services that have been targeted under the measures in the Government's Jobs Initiative — will contribute approximately an additional €20,000 to the economy through decreased social welfare payments, increased tax receipts and increased consumer demand.

4.5 Gender Equality

It could be expected that any reduction in income for workers covered by the Joint Labour Committee system could impact more heavily on women than men, as women tend to be disproportionately represented in lower paid service employment where the JLC wage rates predominate. However, to the extent that existing jobs in struggling sectors can be retained through greater wage cost competitiveness, this will benefit women to a greater extent than men as will any increased employment opportunities arising from increased employment in tourism and catering. The majority of workers covered by REAs in the construction and electrical contracting sector are men.

4.6 Economic Markets/Consumers and Competition

The Bill does not involve a policy change in the economic market. It will require the parties involved in the determination of statutory minimum wages and conditions at sector level to have regard to economic conditions such as the levels of employment and unemployment and the general level of wages in comparable sectors,

including wage trends in comparable competing sectors in other relevant jurisdictions. Employers will be able to derogate from EROs in cases of financial difficulty if the Labour Court agrees to the application, but the Labour Court will be required to consider whether granting an exemption would have an adverse effect on employment levels and distort competition in the particular sector to the detriment of employers not party to the exemption sought.

4.7 Rights of Citizens protected

The proposed reform of the JLC and REA wage-fixing systems will reinstate a legally and Constitutionally robust system of protection for workers and employers in these sectors concerned in the aftermath of the High Court judgement of 7 July 2011 in *John Grace Fried Chicken Ltd and Others v. The Catering Joint Labour Committee, The Labour Court, Ireland and the Attorney General*.

4.8 Compliance Burden

The reform of the JLC and REA systems will bring about a significant simplification of compliance requirements as follows:

- The number of JLCs will be reduced from 13 to 6;
- All remaining JLCs will be comprehensively reviewed to ensure their ongoing validity in terms of the type establishments to which they apply and the workers covered by their scope;
- JLCs will set only a basic adult rate and two higher increments to reflect longer periods of service;
- Record-keeping requirements for employers in these sectors will be reduced;
- Replacing the burdensome requirement for the posting of notices in workplaces by simply obliging employers to provide employees with clearer details of employment terms and conditions;
- JLCs will no longer set Sunday premium rates, but compensation for Sunday working will continue to be assured through the Organisation of Working Time Act 1977;
- EROs will in future reflect a standardised approach to the determination of benefits in the nature of pay — including overtime — across all sectors;
- Sub-minimum rates for employees aged under 18 years, first time job entrants, and employees undergoing training will follow the standardised fixed percentages of the adult basic rate, as in the case of the National Minimum Wage;
- Companies will be able to derogate from EROs in cases of financial difficulty;

5. Consultation

5.1 An Independent Review of the JLC and REA wage setting mechanisms was initiated on 8 February 2011 and was undertaken jointly by Kevin Duffy, Chairman of the Labour Court acting in an *ad hoc* capacity and Dr. Frank Walsh, School of Economics, UCD, under specific terms of reference. The

conduct of the review was a commitment under the EU/IMF programme, which provided not only for agreement on the terms of reference but also the programme of actions arising. The report of the Independent Review Team was published on 24th May, 2011. The terms of reference of the Independent Review, as agreed between the Government and the European Commission Services in February 2011 required the review to take account of the views of Members of the Houses of the Oireachtas and of stakeholders including IBEC, ICTU and the CIF, and of all of the parties directly involved in the current mechanisms in the context of evolving private sector pay policy. The Independent Review invited interested parties to make written submission to the review. Over 360 submissions were received from a variety of bodies and individuals. The Independent Review Team met with many of the organisations that made submissions and afforded them the opportunity to make additional oral submissions. The Report of the Independent Review provides details of all of the organisations and individuals that made submissions as well as those who met with the Review Team.

5.2 Subsequent to the publication of the Report, the Minister for Jobs, Enterprise and Innovation entered into consultations with the national representatives of employers and trade unions to hear their views on the Report and to outline the Minister's preliminary proposals to address the Report's recommendations and other issues raised in the report. Consultations were also held with the employers involved in the service sectors covered by statutory wage-fixing mechanisms. As required by the EU/IMF programme, there have been detailed discussions on the preparation of the Bill with representatives of the troika.

6. Enforcement and Compliance

6.1 Up until the High Court judgment of 7 July 2011, the National Employment Rights Authority (NERA) conducted inspections of employers' records in sectors governed by EROs or REAs in relation to the provisions stipulated in these industry-specific orders and agreements. The High Court judgment of 7 July 2011 precludes NERA inspectors from enforcing the minimum pay and conditions of employment prescribed in EROs which that judgment invalidated.

6.2 The Bill provides for the retention of the JLC and REA systems, subject to the detailed reforms designed to place them on a more secure legal and Constitutional footing and so will allow NERA inspectors to inspect employers' records to establish whether or not the new EROs to be made under the Bill when enacted are being complied with by employers and if not to take appropriate action. The Bill (Section 13) provides for the straightforward enforcement of EROs by civil proceedings in the Circuit Court, as for REAs, in lieu of the power to bring criminal proceedings which the High Court judgment of 7 July 2011 invalidated.

6.3 Additionally, Section 18 of the Bill strengthens the obligation on employers under section 3 of the Minimum Notice and Terms of Employment (Information) Act 1994 (No. 5) to provide details of any applicable ERO or REA in the Written Statement of the

Terms of Employment to be given to each worker. Also, NERA inspectors will be empowered to secure prompt rectification of any errors or omissions in such Statements at workplace level, thus avoiding resort to Rights Commissioners or, on appeal, to the Employment Appeals Tribunal, with attendant delays unnecessarily burdening those bodies.

*Department of Jobs, Enterprise and Innovation,
December, 2011.*