

Section 1 Executive Summary

Summary of Regulatory Impact Assessment (RIA)

Department: Enterprise, Jobs and Innovation				Title of Legislation: Industrial Relations (Amendment) Bill 2014			
Stage: Drafting				Date: October 2014			
Contact for enquiries: Liam Kelly/Michael Greene				Telephone: 01 6312610/6313289			
<p>Policy options considered</p> <ol style="list-style-type: none"> 1. Do nothing 2. Re-enact Part III of the 1946 Act, as amended by Industrial Relations (Amendment) Act, 2012. 3. Legislate for a revised framework. <p><u>Preferred option:</u> Option 3 is the preferred option. Option 1 would result in ongoing legal uncertainty and industrial unrest while there is Constitutional uncertainty surrounding Option 2.</p>							
Options							
	<i>Costs</i>		<i>Benefits</i>		<i>Impacts</i>		
3	No additional costs to the exchequer anticipated.		Certainty to employers and workers regarding pay and terms and conditions. Promotion of harmonious industrial relations. A mechanism - in line with the Posting of Workers Directive - that will protect Irish companies operating within the domestic market from unfair competition by ensuring foreign service providers cannot unfairly undercut nationally determined terms of employment		Will address the Supreme Court ruling in the McGowan case and introduce a revised framework ensuring a legally and constitutionally robust system of protection for workers and employers in the sectors concerned.		

INDUSTRIAL RELATIONS (AMENDMENT) BILL, 2014

Regulatory Impact Analysis

Section 2 – Description of policy context and objectives

2.1 Policy Context

In the judgement delivered on 9 May 2013 in McGowan and others v The Labour Court, Ireland and the Attorney General, the Supreme Court held that Part III of the Industrial Relations Act 1946 was invalid having regard to Article 15.2.1 of the Constitution. That Article provides, in effect, that the exclusive power to make laws is vested in the Oireachtas. The Supreme Court took the view that Registered Employment Agreements are instruments having the status of laws made by private individuals, subject only to a limited power of veto by a subordinate body. While the Constitution allows for the limited delegation of law making functions, the provisions of the 1946 Act went beyond what is permissible under the Constitution.

The effect of this decision was to invalidate the registration of employment agreements previously registered under Part III of the 1946 Act. In consequence the Labour Court no longer has jurisdiction to enforce, interpret or otherwise apply these agreements. As a result, all such agreements no longer have any application beyond the subscribing parties and are not enforceable in law.

However, existing contractual rights of workers in sectors covered by Registered Employment Agreements were unaffected by the ruling. Contractual rights can be altered only by agreement between the parties involved.

Prior to the 2013 Supreme Court ruling there were six sectoral REAs extant which had been registered or varied by the Labour Court in recent years: two in the Construction Sector and one each covering Electrical Contracting, Printing, Overhead Powerline Contractors and Dublin Drapery, Footwear and Allied Trades. It is

estimated that between 70,000 and 80,000 workers were covered by these sectoral agreements.

The striking down of the REAs means that, since May 2013, new employees in those sectors can be hired at a rate of remuneration agreeable between workers and their employers. This is subject only to the provisions of the National Minimum Wage Act, 2000.

While the Supreme Court ruling arose from a legal challenge by a group of electrical contractors to Part III of the 1946 Industrial Relations Act, the striking down of the totality of Part III also had the effect of rendering invalid all enterprise-level REAs that had been registered by the Court even though these were not the subject matter of the appeal to the Court. (There were over 50 such employment agreements registered by the Court under the 1946 Act).

Moreover, as a result of the striking down of the REAs, a not insignificant level of industrial unrest in relation to procurement contracts and appropriate rates of pay has developed recently, particularly in relation to construction-related projects.

2.2 General objective

The longer term objective of the legislative proposal is to provide a mechanism whereby the existence of legally-binding terms and conditions of employment relating to rates of remuneration and sick pay, pensions and mortality provision in a particular sector will contribute to

- the promotion of harmonious relations between workers and employers and assist in the avoidance of industrial unrest in the sector;
- the promotion and preservation of high standards of training and qualifications in the sector; and
- ensuring fair and sustainable rates of remuneration in the sector, in light of EU law on the transnational provision of services.

2.3 Immediate Objectives

The immediate objective of the legislative proposals is to put in place (1) a new mechanism for a revised framework for the setting of pay and pension and sick pay entitlements of workers in a particular sector and (2) for the registration of employment agreements to which are binding only on the parties to the agreement, i.e. employer and trade unions.

Section 3 – Identification and description of policy options

3.1 Do Nothing

The Supreme Court judgment of 9 May 2013 declared Part III of the Industrial Relations Act 1990 to be invalid having regard to the provisions of Article 15.2.1 of the Constitution. The effect of this decision was to invalidate the registration of employment agreements previously registered under Part III of the 1946 Act.

The “*do nothing*” option would allow the current vacuum to continue as regards the obligations of employers towards existing employees as compared with new employees which is a contributory element of the unrest mentioned in 2.1. It would mean that the State has not provided the legal framework for the setting of statutorily recognised terms and conditions which is a central element of the Posted Workers Directive. This is of importance for employers and their employees, particularly in relation to rates of pay and tendering for contracts. This is not seen as a viable or prudent policy option and the Government has decided to legislate to address the ruling and to provide for a revised framework that would be fully informed by the Supreme Court judgment and be expected to withstand constitutional challenge to the greatest extent possible.

3.2 Re-enact Part III of the 1946 Act, as amended by 2012 Act

The Industrial Relations (Amendment) Act 2012 included a number of provisions amending and inserting new provisions in Part III of the 1946 relating to the REA mechanism. The aim of these provisions was to make the mechanism more responsive to changing economic and labour market conditions, as well as making the legislative framework more constitutionally robust, in the light of the 2011 High Court ruling in the John Grace Fried Chicken case which struck down the system of making Employment Regulation Orders on similar constitutional grounds. As mentioned

earlier the effect of the 2013 Supreme Court ruling was to make Part III of the 1946 Act void *ab initio* and it also comprehended the amendments and additional provisions inserted in the 1946 Act by the 2012 Act albeit these elements were not before the Court.

However, while the Supreme Court ruling only addressed Part III of the 1946 Act in its unamended form, there is legal uncertainty as to whether the new provisions of the 1946 Act as amended would withstand constitutional scrutiny based on the approach taken to Article 15.2.1 in the McGowan judgment. As such, the advice is that such a policy response, if enacted, would not withstand legal scrutiny were it to be tested in the Courts subsequently.

3.3 Legislate for a revised framework.

Given that many employers and their employees/employee representatives have indicated the importance they attach to a framework that will allow for the setting of sectoral terms and conditions, particularly in relation to rates of pay and tendering for contracts, as well as the importance of ensuring harmonious industrial relations in the State, the Government wishes to develop a revised framework to remedy the deficiencies found in the 1946 Industrial Relations Act by the *McGowan* judgment and to provide for a legislative framework which will be fully informed by the Supreme Court judgment and will be constitutionally robust to the greatest extent possible.

3.4 Conclusion

For the reasons set out above, Option 3 - creating a new comprehensive legislative framework can only be considered.

Section 4 –Analysis of costs and benefits

4.1 Benefits

From employer and worker perspective, the primary objective of legally-binding sectoral terms and conditions is to provide them with a sense of certainty around terms and conditions that would apply when the employer is tendering for and working through contracts. In this regard, also, Registered Employment Agreements

have been recognised by all relevant actors as key contributors to business and industrial relations stability.

Enterprise-level Registered Employment Agreements provide certainty and industrial harmony for the employer and workers in terms of rates of pay and other terms and conditions over the period of the agreement. In this regard, all such agreements are required to contain a provision that, if a trade dispute occurs between workers and their employer, a strike or lock-out shall not take place until the dispute has been submitted for settlement by negotiation in the manner specified in the agreement, thereby contributing to industrial peace in the enterprise.

Sectoral rates also have the effect of ensuring that industry terms and conditions would be recognised and maintained and that no industrial action by either party will be undertaken on the terms of the Order without first following internal dispute procedures and fully utilising the State dispute resolution machinery.

In addition, the existence of such legally backed agreements is recognised under European Union law and ensures, in accordance with the Posted Workers Directive, that contractors from outside the jurisdiction, who may be using employees from lower wage economies, do not obtain an advantage over local contractors in terms of wage costs.

4.2 Costs

It is not anticipated that any additional costs will arise to the Exchequer from the proposed Bill. Enforcement of legislation will be undertaken as part of the compliance and enforcement functions of the Workplace Relations Commission.

It is not anticipated that the re-instatement of the framework for enterprise-level REAs will result in an increase in compliance costs for employers, given that, in line with our voluntary system of industrial relations, it is a matter for the employer to decide whether, in the first place, they wish to conclude an employment agreement with a trade union and, secondly, whether they wish to have that agreement registered with the Labour Court. With regard to sectoral orders, such orders will be informed by considerations such as specific principles and policies (such as potential impact on

competitiveness, employment, etc.) that the Labour Court will be obliged to take into account when considering whether to make and, if so, what recommendation to make to the Minister in relation to pay and pension/sick pay terms in a particular sector. In addition, provision is also made to allow firms in financial difficulty to apply for a time-bound derogation from the obligation to pay the rate of remuneration provided for in an order.

Neither is it anticipated that compliance with sectoral orders will result in an increased administrative burden for employers. Employers are already required to keep adequate records to ensure compliance with relevant employment rights legislation (as well as Tax and Social Welfare legislation), and the proposed new regulatory framework will not place any additional requirements on employers in this regard.

5. Impacts

5.1 National Competitiveness

Not all sectors are likely to witness orders governing minimum rates of remuneration or sick pay, pensions and mortality provisions. Where they do arise they are expected to have a stabilising effect on labour costs. The sectors and occupations most concerned are Construction, Electrical Contracting, Security and Contract Cleaning. (Although it is possible that actors in other sectors may see some advantage in seeking to register local agreements or to ask the Labour Court to carry out an examination of the benefits of a Registered Employment Order for that sector).

Labour costs represent a relatively high proportion of total output costs in these locally traded sectors. In this context, there is evidence of an increase in construction and related industry activity at present and the absence of an REA for those sectors in particular has led to a challenging industrial relations environment. This is exacerbated by the diversity of those industries and their competitive nature.

5.2 Socially excluded or vulnerable groups

While no impacts are envisaged for people experiencing or at risk of poverty or social exclusion, the proposed legislation provides a framework within which the Labour Court can undertake a review of the pay and other terms and conditions of workers in

a particular sector and make a recommendation to the Minister for appropriate rates of remuneration. Such reviews could be undertaken in sectors in which low paid or otherwise venerable groups predominate.

5.3 Gender Equality

It is not expected that the legislation will have an impact on gender equality. For example, the majority of workers covered in the construction and electrical contracting sector are men. However, in the event that traditional low pay sectors become the subject of an order in relation to remuneration, this will benefit women to the same if not to a greater extent than men.

4.6 Economic Markets/Consumers and Competition

The proposed legislation does not involve a policy change in the economic market. As regards enterprise-level REAs, the legislation re-introduces a mechanism that had been in existence since 1946, before being struck down by the Supreme Court in the context of the challenge to the sectoral REAs.

The new sectoral mechanism governing terms and conditions replaces the former sectoral REAs that were struck down by the McGowan judgment. The proposed framework provides for a mechanism whereby the Labour Court will initiate a review of the pay and pension and sick pay entitlements of workers in a particular sector and, if it deems it appropriate, make a recommendation to the Minister on the matter. The legislation will provide the Labour Court with specific principles and policies that it will be obliged to take into account when considering whether to make and, if so, what recommendation to make to the Minister in a particular sector. 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

The proposed legislation will address the Supreme Court ruling in the McGowan case and will introduce a revised framework ensuring a legally and constitutionally robust system of protection for workers and employers in these sectors concerned.

4.8 Other impacts

There are no impacts are anticipated the Environment or North South and East West relations.

5. Consultation

There has been extensive consultation with stakeholders on the proposals underpinning the Bill. In early 2014, a framework document setting out draft proposals on the issue was circulated by the Department to relevant employer and worker representative organisations and was the subject of subsequent discussion. The input from those stakeholders in the context of the consultation process has informed the approach proposed in this Bill.

6. Enforcement and Compliance

It is proposed that the Bill will provide for enforcement measures to deal with breaches and enforcement of the provisions of the Act.

Separately, the Minister is currently undertaking a major reform programme of all of the Workplace relations bodies and it is expected that these reforms will deliver a "fit for purpose" workplace relations system that will be supported by proportionate, effective and efficient compliance and enforcement measures. The Minister made provision in the Workplace Relations Bill 2014 for a range of enhanced compliance measures, including the use of Compliance Notices, Fixed Charge Notices and a new mechanism for enforcing awards of the WRC Adjudicators and Labour Court Determinations.

The Workplace Relations Bill also provides for sanctions to be imposed personally on directors, officers or managers for certain offences under employment law committed by a company if it is proven in the course of the prosecution that any such offences were committed with the consent or connivance etc. of any director, manager

secretary or other officer of the company. Such offences will include, for example, failure to comply with an enforcement order of the District Court in respect of a determination of the Labour Court or a decision of an adjudication officer. The Minister is confident that the introduction of these measures will provide for more appropriate, efficient and effective enforcement of employment law.

The enforcement and compliance measure to be provided for in relation to Part III of this Bill will be drafted to ensure consistency with the measures proposed by the Minister in relation to employment rights compliance and enforcement provisions under the Workplace Relations Bill.

7. *Review*

The effect and impact of the new legislation will be kept under review by the Department of Jobs, Enterprise and Innovation in co-operation with the State's industrial relations institutions.

8. *Publication*

This RIA is being published on the website of the Department of Jobs, Enterprise and Innovation.

Department of Jobs, Enterprise and Innovation,
10 October, 2014