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Our ref: ICAEW Rep 58/13

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By email: tupe.regulations@bis.gsi.gov.uk

Dear Mr Young

**Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006:
consultation on proposed changes**

ICAEW is pleased to respond to your request for comments on *Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006: consultation on proposed changes*.

Please contact me should you wish to discuss any of the points raised in the attached response.

Yours sincerely

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ICAEW REPRESENTATION

TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS (TUPE) 2006: CONSULTATION ON PROPOSED CHANGES

Memorandum of comment submitted in April 2013 by ICAEW, in response to Department for Business, Innovation and Skills consultation paper Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006: consultation on proposed changes published in January 2013

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INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation paper *Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006: consultation on proposed changes* published by Department for Business, Innovation and Skills (BIS) on 17 January 2013, a copy of which is available from this [link](#).

WHO WE ARE

2. ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 140,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.
3. ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value.
4. This response reflects consultation with the ICAEW Business Law Committee which includes representatives from public practice and the business community. The Committee is responsible for ICAEW policy on business law issues and related submissions to legislators, regulators and other external bodies.
5. ICAEW's regulation of its members and affiliates in insolvency is overseen by the Insolvency Service, and ICAEW is the largest of the Recognised Professional Bodies under the Insolvency Act, currently licensing around 700 practitioners. ICAEW's Insolvency Committee is a technical committee made up of Insolvency Practitioners working within large, medium and small practices. The Committee represents the views of ICAEW licence holders.

GENERAL COMMENTS

6. While in theory the proposals in the consultation paper look sensible, as ever the 'devil is in the detail' and we have some concerns from an insolvency perspective and also (commercially) regarding how the proposed revised regulations will operate in practice, which we set out below. Please note we have not commented from an employment law perspective and therefore have not answered all the detailed questions.
7. We remain concerned that the 2006 TUPE regulations, which 'copy out' of the Directive's categories of insolvency proceedings, lead to a lack of clarity and we do not agree that the decision in *Key2law (Surrey) Ltd v De'Antiquis* has provided sufficient clarity. While this case provides certainty in relation to administration (that TUPE applies in all cases), other areas of uncertainty remain and we believe that certain insolvency proceedings, eg, fixed charge receiverships, should be excluded from the TUPE regulations (in our view, it is certainly not clear from the 2006 Regulations that administrative receiverships are excluded). We therefore do not agree with the Government's position set out in paragraphs 6.29 and 6.30 of the consultation document; in our view the TUPE 2006 Regulations should be amended to make it clear that certain insolvency proceedings, eg, administrative receiverships, are excluded.
8. We do not support the proposal to introduce joint and several liability as between the transferor and transferee for pre-transfer employment obligations, which we fear will lead to commercial issues in practice, and will cause particular problems for any transfers made within formal insolvency processes (see paragraphs 6.34 *et seq* in the consultation document). For instance, if these liabilities are deemed to be joint and several, the transferee will be very likely to

endeavour to make the transferor take them on, which (in insolvency cases) will cause the Insolvency Practitioner to incur expenses (time costs and legal fees) in defending such claims, depleting funds that would otherwise be payable to creditors. We therefore consider that this should instead be left between the parties and dealt with in the Sale and Purchase documentation.

9. We have a major concern regarding the Government's view that 'economic, technical or organisational reason entailing changes in the workforce' do not include insolvency, whereas in our view insolvency (and any associated lack of ability to pay employees) is *per se* an economic reason (see Q4b and Q8 below).
10. We support the proposal to allow micro businesses to inform and consult employees directly regarding transfers, rather than through representatives, in cases where there is neither a recognised union nor existing representatives (see paragraph 7.2 in the consultation paper). See also our comments at Q12.
11. Regarding pensions (page 45 of the consultation document), we consider that it would be detrimental to transfers if defined benefit pension liabilities transferred without the transferee expressly agreeing to take them on. It is unlikely that business sales from an insolvency (where a defined benefit scheme existed) would be possible if the liability for the defined benefit scheme would transfer to the buyer. In general, purchasers of insolvent businesses do not take on the liabilities of the insolvent seller, and if it is legally mandated or contractually agreed that they do so the price is reduced accordingly.
12. We would also like to draw your attention to our response to BIS's earlier [consultation](#), ICAEW Rep 12/12, which is available [here](#), including our recommendation that the regulations should be amended to restrict the consultation period following an insolvency event to a maximum period of 14 days (please see our reasoning at paragraph 2 *et seq* of that previous response).

RESPONSES TO SPECIFIC QUESTIONS/POINTS

Q1: Do you agree with the Government's proposal to repeal the 2006 amendments relating to service provision changes? Please explain your reasons.

- ☒ yes
☐ no

a) Please explain your reasons:

13. We think the Government's concern that the 2006 service provision changes actually introduced a disincentive to bid (by imposing employment liabilities on successful bidders) is valid, and we are strongly of the view that these provisions should be repealed in respect of re-tenders (ie, 'second generation outsourcing'), given the requirement to transfer staff is likely to conflict with other commercial objectives (eg, a desire to change the staff on the contract). However, if these provisions are not repealed, we are concerned about the Government's proposal not to exclude professional services. Inclusion could result in confusion over whether services such as statutory audit were covered. If they were, this would impact upon the proposals being considered by, among others, the Competition Commission and the European Union in relation to the audit market. If mandatory rotation of audit firms or change following mandatory tendering resulted in the same personnel being required to remain on the post-tender audit, the objective of those proposals would be defeated. Therefore, unless these provisions are repealed, we would suggest that statutory audit is specifically excluded from these provisions (which we believe should be relatively easy to carve out).

b) 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)?

14. No comment.

Q2: 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

15. No comment.

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

- ☐ yes
- ☐ no

16. No comment.

c) If yes, please explain your reasons.

17. No comment.

Q3: Do you agree that the employee liability information requirements should be repealed?

18. We support the repeal of these provisions, but we further note that it is important for any guidance produced by the Government that deals with the provision of information at the tender stage should take a sensible view of insolvency. For example, such guidance needs to recognise that different timescales will apply (for example, 8 weeks' notice is not appropriate where there is a likelihood that the insolvent business will cease trading in days, if not immediately, rather than weeks).

a) If yes, please explain your reasons.

19. No comment.

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

20. No comment.

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?

21. No comment.

Q4: 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

22. We support the Government's proposal to remove the gold plating and permit changes in employment terms where such changes either could have been agreed in the absence of the transfer and/or where the reason for the changes is an economic, technical or organisational

reason entailing changes in the workforce. We agree the Directive and relevant EU case law is sufficiently clear and we therefore support the Government's proposed 'copy out' approach in paragraph 7.46.

- 23.** We also note the Government recognises that the current lack of provision for post-transfer harmonisation of terms and conditions causes significant problems, but is concerned that any provision allowing parties to agree to variations to terms and conditions for the purpose of harmonising terms and conditions would be incompatible with the Directive. We agree with the principle that there should be an ability to harmonise post transfer and we therefore urge the Government to lobby for appropriate changes at EU level to enable provisions to be implemented that would make it easier to renegotiate employment contracts to achieve greater harmonisation of terms and conditions after a transfer (provided no less favourable).

a) If you disagree, please explain your reasons.

- 24.** No comment.

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

- 25.** Yes. Please also note our major concern regarding the Government's view that 'economic, technical or organisational reason entailing changes in the workforce' do not include insolvency. In our view insolvency, and any associated lack of ability to pay employees, is *per se* an economic reason. It would be very helpful if the TUPE provisions could recognise and cater for the fact that, where a transfer is made within a formal insolvency process, there is no money available to provide these worker protections and that there is a balance to be struck between the need for such protections and the need for a rescue culture. This point is also relevant to the Government's views as set out in paragraphs 7.65 to 7.81 in the consultation document (and we therefore reiterate this point at Q8 below).

Q5: 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?

- 26.** No comment.

a) Please explain your answer.

- 27.** No comment.

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?

- 28.** No comment.

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.

- 29.** We note that the CJEU case of *Parkwood Leisure v Alemo-Herron* will establish whether the Directive allows (or even requires) Member States to provide that employees are entitled to the benefit of future collective agreements relating to their original employer (a 'dynamic' approach), or whether employees can only be entitled to the terms of collective agreements applicable at the time of the transfer (a 'static' approach). We strongly agree with the Government that a static approach should apply, as the dynamic approach is not commercially viable in our view (we do not believe that a transferor who renegotiates terms with their employees a number of years following a transfer of a different tranche of

employees should be required to inform the transferee employer of those transferred employees).

d) 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)?

30. No comment.

Q6: 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

31. We support the proposal to remove the current gold plating and bring regulation 7 back in line with the Directive.

a) If you disagree, please explain your reasons.

32. No comment.

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?

33. No comment.

Q7: 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?

34. We have not answered this question as it raises technical employment law issues.

a) Please explain your reasoning.

35. No comment.

Q8: 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?

36. We have not answered this specific question, but would like to reiterate our major concern (see Q4b above) regarding the Government's view that 'economic, technical or organisational reason entailing changes in the workforce' do not include insolvency, whereas in our view insolvency (and any associated lack of ability to pay employees) is *per se* an economic reason. It would be very helpful if the TUPE provisions could recognise and cater for the fact that, where a transfer is made within a formal insolvency process, there is no money available to provide these worker protections and that there is a balance to be struck between the need for such protections and the need for a rescue culture. This point is relevant to the Government's views as set out in paragraphs 7.65 to 7.81 in the consultation document.

a) If you disagree, please explain your reasons.

37. No comment.

Q9: 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?

38. We have not answered this specific question, but we do have some comments on this section of the consultation document.

39. At paragraph 7.77, in our view the *Hynd v Armstrong* approach deters business rescues, meaning there is either a much lower purchase price or potential bidders are put off completely, which not only worsens the position for creditors but also means there is no transfer and all the employees may be redundant (rather than some being kept on by virtue of a sale of the business). We note that the administrator of a company will retain all staff that are needed to run the business in order to maximise its value (and potential return for the creditors), so will not unnecessarily dismiss employees.

40. At paragraph 7.79, the Government suggest a possible amendment that 'where the reason is **solely** to get an enhanced sale price, this would not normally qualify as an ETO' (our emphasis), but we are concerned about how reasons 'solely' to get an enhanced sale price would be interpreted. We note that an administrator's duty is to maximise value for the creditors as a whole, whereas these proposals would appear to go against this general duty and a balance needs to be struck between these various objectives. Please also see our comments in paragraphs 4 and 5 from ICAEW Rep 12/12 mentioned at paragraph 12 above, reproduced below:

4 When a purchaser makes an offer for a business ... the price is normally discounted to take into account the likely costs of dealing with and settling TUPE liabilities, including unfair dismissal and/or protective award claims, which might fall on the purchaser. If this discounted offer is less than the price that could be obtained for the assets on a break-up basis, the officeholder will normally be obliged to reject the offer, close the business down and sell the assets piecemeal, thus fulfilling the statutory obligation to obtain the best outcome for creditors. Of course, the business and all the associated jobs will be lost.

*5 There should not, in principle, be a penalty (the above reduction in price, which leads to closure being preferable to a going concern sale) for taking the commercial decisions required to preserve **some** employment, which effectively leads to **no** employment. However, decisions on who is dismissed must be justifiable and discrimination on sex, race or age grounds is not acceptable.*

41. Please also see our comments at Q8 above that insolvency should be included as an 'economic, technical or organisational reason entailing changes in the workforce'.

a) Please explain your reasons.

42. See above.

Q10: 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?

43. Yes, we support the Government proposals as set out in paragraphs 7.84 to 7.91 in the consultation document, which would allow (but do not require) consultation by the transferee with staff who are due to transfer as we consider such joint consultation will reduce bureaucracy.

a) If you disagree, please explain your reasons.

44. No comment.

Q11: Rather than amending 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?

45. No comment.

a) Please explain your reasons.

46. No comment.

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

47. No comment.

Q12: 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

48. As mentioned in our general comments, we support the proposal to allow micro businesses to inform and consult employees directly regarding transfers, rather than through representatives, in cases where there is neither a recognised union nor existing representatives. However, we query whether this easement should be restricted to micro-businesses (ie, businesses with 10 or fewer employees) as we believe it may be appropriate for this threshold to be set higher (eg, 20 or possibly more), and that the Government should reconsider the cost/benefit of setting the threshold so low.

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

49. See paragraph 48 above.

Q13: Do you agree that micro businesses should be included under all the proposed amendments to the TUPE regulations?

☐ yes
☐ no

50. No comment.

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

51. No comment.

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

52. No comment.

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

53. No comment.

Q14: 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?

54. No comment, except to agree that there will need to be transitional provisions to ensure that transfers which take place before the legislation is amendment are not retrospectively adjusted (as mentioned in paragraph 7.107 of the consultation document).

Q15: Have you any further comments on the issues in this consultation?

55. No comment.

Q16: Do you feel that the Government's proposals will have a positive or negative impact on equality and diversity within the workforce?

56. No comment.

a) Please explain your reasons.

57. No comment.

b) Do you have any evidence indicating how the proposed changes might impact upon groups sharing protected characteristics? If so please provide them.

58. No comment.

Q17: 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.

59. No comment.

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