

**dti**

**INDUSTRIAL ACTION BALLOTS AND  
NOTICE TO EMPLOYERS**

**GOVERNMENT RESPONSE TO  
PUBLIC CONSULTATION ON THE  
REVISED CODE OF PRACTICE**

**JUNE 2005**



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REVISED CODE OF PRACTICE ON INDUSTRIAL ACTION BALLOTS AND  
NOTICE TO EMPLOYERS**

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## CHAPTER ONE: INTRODUCTION

### *Background*

1.1 The Employment Relations Act 2004 (“the 2004 Act”) contains provisions amending industrial action law. Some of these changes are relatively minor and technical. However, there are two sections which make more substantial changes. These provisions are:-

- Section 22 of the 2004 Act which re-defines the information contained in the notices that unions are required to give employers in advance of industrial action ballots. Briefly, the section requires unions to provide in the notice lists of the categories and workplaces of the employees they are going to ballot, and to provide figures on the number of employees in each category, the number of employees at each workplace and the total number of employees to be balloted (together with an explanation of the way the figures were arrived at). However, these lists and figures do not necessarily need to be provided in full in situations where the employees pay their union subscriptions by deductions from pay at source (through the so called “check-off” system); and
- Section 25 of the 2004 Act which similarly redefines the information contained in the other notices which unions are required to give employers in advance of any subsequent industrial action.

1.2 The statutory Code of Practice: Industrial Action Ballots and Notice to Employers (“the Code”) has been in place since 1990 and provides practical guidance to trade unions and employers in applying the law on industrial action ballots and notices. The Secretary of State for Trade

and Industry is empowered to revise the Code. That was last done in 2000 to reflect the changes to industrial action law in the Employment Relations Act 1999 (“the 1999 Act”).

1.3 As a result of the provisions introduced by the 2004 Act, the Government believes that significant changes are required to those parts of the Code which deal with ballot notices and industrial action notices (namely paragraphs 14-18 and 50-51 of the existing Code). The other provisions of the 2004 Act have relatively little effect on the Code.

1.4 The Government therefore decided to revise the Code to reflect the relevant changes in the 2004 Act and earlier this year it issued a draft of the revised Code for public consultation. This response document reports the outcome of those consultations.

### ***The Public Consultation***

1.5 The Government issued a consultation document containing a draft of the revised Code on 11 March 2005. It had previously held informal consultations with key stakeholders including the CBI, EEF and TUC. Around 270 copies of the consultation document were sent to individuals and organisations involved in previous consultations about trade union law. In addition, the document was posted on the DTI website.

### ***Responses to the Public Consultation***

1.6 The deadline for responses was 3 June 2005. A total of 24 responses were received. A summary of the respondents is set out in the table below.

Category	Number of Responses
Individual Employers	2
Employers' Organisations	4
Trade Unions	12
Legal Organisations	4
Others	2
Total	24

The Government would like to thank the respondents for their time and effort in providing their thoughtful and considered views.

1.7 Requests to view responses, except those made in confidence, may be made in writing to Nana Abadji, Bay 3124, Employment Relations Directorate, Department of Trade and Industry, 1 Victoria Street, London SW1H OET. A list of those respondents who were willing to have their names disclosed can be found at **Annex A**.

### ***Overall Response***

1.8 All respondents agreed that the Code should be revised. In general, respondents were content with the style and approach of the Code, though some unions considered that the Code was of marginal use to them and unnecessarily added to the requirements which the law imposed on them. Whilst most respondents, especially trade unions, had views on the way the Code had been revised, which will necessitate some consequential changes to the drafting, the comments did not suggest that substantial further revisions were required. The relatively small number of responses suggests that the revised Code is largely acceptable to those organisations affected.

## *Understanding this Document*

1.9 This response document follows the order of the March consultation document, which posed four questions for respondents to address. Chapter Two covers the first three questions, which centre on the revisions which the Government proposed making to the Code. Chapter Three covers the last question concerning those parts of the existing Code which the Government proposed should remain unchanged.

1.10 Each Chapter provides a summary of the views expressed by respondents on each question. Not every respondent is cited, not least because there is significant duplication in the views expressed. The Government's response to those points is presented towards the end of each section with the Government's conclusions set out in bold lettering.

1.11 An electronic version of this document can be accessed from the DTI Employment Relations website at: [www.dti.gov.uk/er/er\\_act\\_2004.htm](http://www.dti.gov.uk/er/er_act_2004.htm). Further copies of this document can be ordered from the DTI website at: <http://www.dti.gov.uk/publications> or from the DTI publications order line on 0845 015 0010.

## *Next Steps*

1.12 The Government will revise the draft Code of Practice again along the lines proposed in this response document. The revised draft Code will then be laid before Parliament for the approval of both Houses. Subject to this Parliamentary process, the Government intends to bring the Code into effect, together with sections 22 and 25 of the 2004 Act, on 1 October 2005.

## *Regulatory Impact Assessment*

1.13 Regulatory Impact Assessment (RIA) was not required for this particular Code. However, an RIA was carried out on the 2004 Act. This document can be found on the DTI website at:

[www.dti.gov.uk/er/emar/er\\_act\\_ria.doc](http://www.dti.gov.uk/er/emar/er_act_ria.doc).



## CHAPTER TWO : THE GOVERNMENT'S PROPOSED REVISIONS TO THE CODE

2.1 This Chapter covers the first three of the four questions which the Government asked respondents to address in the consultation exercise. It deals with each in turn.

***Question 1: What are your overall views on the style, content and approach of the revised Code? Is it broadly acceptable to you?***

2.2 20 responses were received to this question.

2.3 The majority of respondents supported the overall style and approach of the revised Code, finding it easy to read and consistent with the style of the existing Code. The Trades Union Congress (TUC) expressed the view, which was echoed by other unions such as AMICUS, Prospect and the GMB, that the Code is helpful in distinguishing clearly between those sections dealing with legal compliance and those promoting good practice. Employer organisations were generally satisfied with the style and approach of the proposed revised Code. The Employment Lawyers' Association (ELA) found that the revised Code provides some helpful explanation of relevant statutory provisions.

2.4 However, there were concerns expressed by some respondents, including the TUC, Unison and Thompsons Solicitors, that aspects of the revised Code go beyond the legislation, placing additional burdens on unions. The Law Society and others further argued that the Code should include desirable practices on the part of employers.

2.5 The Government is satisfied that the overall approach and style of the Code is broadly acceptable to most parties. Industrial action law centres mostly on the role of the trade union. It follows that the Code must inevitably focus on the role of the trade union, and it therefore

contains many fewer references to the role and behaviours of the employer. **The Government confirms its intention to maintain the proposed style and overall approach to the revised Code.**

*Question 2: What are your views on the proposed revisions to paragraphs 14 -18 and 50 – 51 of the Code, which deal with the new provisions on industrial action notices?*

2.6 The main changes to the Code proposed by the Government concerned those paragraphs dealing with industrial action notices. This question therefore asked for views on the acceptability of those revisions.

2.7 15 respondents replied to this question, and several detailed points of drafting were raised :

*Paragraphs 14 and 50 of the revised Code*

2.8 Several respondents commented on the description of the law in paragraphs 14 and 50 :

(a) The CBI, the TUC and several other unions felt that sub-paragraph 14 (b) (and similarly 50 (b) of the Code) were convoluted and not readily understandable. These sub-paragraphs refer to those circumstances where the employer deducted union subscriptions at source. Unions suggested that the widely used terms “check off “ and “DOCAS” (Deduction Of Contributions At Source) should be included in the text to increase understanding. The CBI considered that the sub-paragraph could also be re-structured to make it clear what were the options available to trade unions in these circumstances. **The Government agrees that the current text, though an accurate reflection of the law, could be made easier to understand and it intends that these sub-paragraphs should be re-drafted along the lines suggested.**

(b) Many respondents including the CBI, the TUC, GMB, Amicus, UCATT, the Law Society and Thompsons Solicitors stated that the description of the law in paragraphs 14 and 50 was incomplete because it did not draw attention to the new definition of “information in the union’s possession”. Unions pointed out that the text should explain that the definition excludes information which is held in “non-documentary form” or information held by a member of the union who is not an “officer” or an “employee”. They also called for paragraph 14 to point out that the definition refers to information in the union’s possession “at the time when it complies with section 226A(1)(a)” (and section 234A(1) in the case of paragraph 50 of the Code). **The Government agrees that a fuller description of the law on these points should be provided along the lines suggested by respondents.**

*Paragraph 15 of the revised Code*

2.9 On the whole respondents welcomed the proposed guidance on ‘categories of employees’ found in paragraph 15 of the revised Code. The TUC considered that the paragraph contains a clear and useful explanation of how to categorise employees, a view echoed by Prospect, Thompsons Solicitors and the Law Society, but the TUC also suggested that the availability of information should be the “decisive” factor in determining the union’s choice of categorisation. **The Government considers that the guidance in paragraph 15 has been well-received and it does not need any further amendment. It does not consider that the availability of information should be elevated to being the decisive factor in the union’s decision as this might be interpreted by unions as indicating that they should choose a categorisation where they held most information, even though that categorisation had virtually no relevance to the nature of the employees’ work.**

*Paragraph 16 of the revised Code*

2.10 Paragraph 16 of the revised Code provides guidance on the requirement to provide an explanation of the way the figures in the notices were arrived at. This paragraph, especially the second sentence within it which discussed the need for unions to disclose any major deficiencies in the information at its disposal, was criticised by many trade unions. They expressed concern that the proposed text goes beyond the statutory obligations, stating that the 2004 Act introduces no legislative requirement on unions to disclose to employers any potential deficiencies in the information being provided. They considered the additional requirement would therefore encourage litigation by employers. A number of union respondents, including the TUC, UCATT and RMT, considered that the advice was misplaced as the legislation places the onus on the employer to challenge a notice and demonstrate why the information provided by the union does not meet statutory requirements. In contrast, the Employment Lawyers' Association (ELA) favoured the paragraph's guidance and suggested that unions should be obliged to disclose not just the "main" deficiencies in the data, but any deficiencies which were "material".

2.11 On another point, several respondents including the TUC and the Law Society, considered that the use of the phrase 'manipulating the data' in the final paragraph of paragraph 16 was unfamiliar and might be construed as referring just to data processing by computer.

2.12 The Government understands the misgivings expressed about the advice to unions to disclose deficiencies in the information provided. It agrees that there is no express requirement in the statute that known deficiencies in the union's information must be disclosed to the employer. However, the guidance in the Code is designed "to promote what appears to the Secretary of State to be desirable practices in

relation to the conduct of trade unions of ballots ...” (section 203(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992). That wording means that the Code need not be limited just to those matters which are prescribed by law. There are plainly practical advantages to employers and their customers if employers have an understanding of the potential shortcomings in the information supplied in notices as this should affect the reliance that can be placed on them. In addition, most employer respondents discussed their concern about the accuracy of the information provided in notices. The Government does not accept that if trade unions admit there are deficiencies in the information supplied, then it is tantamount to admitting they are breaching the law because the legal requirement is that the information should be as accurate “as is reasonably practicable in the light of the information in the union’s possession”. **The Government believes that the text should still encourage unions to disclose information about the main shortcomings in the information of which they are aware. However, the Government will re-draft the text to indicate that such disclosures represent a desirable practice, rather than a legislative requirement. The Government will also substitute different wording for “manipulating the data”, as the phrase was not meant to encompass the electronic processing of information only.**

#### *Other Points*

2.13 Several respondents expressed the view that whilst paragraphs 15-18 contain detailed guidance in relation to pre-ballot notices, there was no corresponding guidance in paragraphs 50-51 of the Code which concern any subsequent notices concerning the taking of industrial action. RMT called for the wording in paragraphs 14 and 50 to be the same rather than referring to *‘workers (sic) concerned’* and *‘affected employees’*. **The Government considers that, by means of a cross-reference in paragraph 51 to paragraphs 15 – 18, it is very clear that the**

**guidance applies to both types of notice and that no further cross-references are needed. In response to the RMT point, the reason why different expressions are used in paragraphs 14 and 50 is because the statute itself uses these two expressions.**

2.14 Several trade unions including UCATT and Amicus argued that guidance should be more balanced and discuss the role of the employer. In keeping with this idea, the TUC, Prospect and other trade unions suggested that paragraph 18 of the revised Code should be amended to stress that the employer should seek to raise concerns with the trade union about any perceived deficiencies at the earliest opportunity, before the opening day of the ballot. Some trade unions also reported problems where employers have claimed that the information supplied in ballot notices is inaccurate because a relevant workplace had recently changed location. However, in some cases, it has later transpired that the new premises were very close to the old premises and many members would not see this as a change of workplace. Unions suggested that the Code should state that employers should treat the new and old premises as the same workplace for industrial action requirement purposes.

2.15 **The Government believes that employers should not unnecessarily delay raising their concerns with unions. Indeed, where unions provide information in notices about missing data or other sources of potential inaccuracy, then there is less reason for any delay to occur. That is why the existing Code urges employers to raise their concerns “promptly”. However, the Code should not state that they should always do so before the opening of the ballot, not least because a problem may not have come to light by then. But the Government will amend the text to mention that problems should wherever possible be raised before the opening date of the ballot. The Government does not consider it is appropriate to refer to the particular case of small**

relocations of a workplace. Moreover, if the trade union is not aware of the small change in question, then the information will not be in its “possession” and so there should be no difficulty in complying with the law in these situations.

2.16 Network Rail stated that paragraphs 14 and 15 should still refer to the need for the notices to allow for the employer to make contingency plans, arguing for paragraphs 17 and 18 of the existing Code should be reinstated. Royal Mail suggested that it would be useful if the Code stated that unions must use all available data in order to be as accurate as possible. Royal Mail also thought it would be helpful to mention that it is good practice for unions to liaise with the employer when auditing its records of members to ensure that those records are accurate and current. Dairy UK was also concerned about inaccuracies in union membership records and called for a validation process. **The Government does not consider that existing paragraphs 17 and 18 should be retained as they mainly provide guidance on the way aspects of the existing law, which are deleted by section 22 of the 2004 Act, will be applied in practice. The Government considers that there are major difficulties in advising unions to validate their membership records with employers, given that trade union membership constitutes “sensitive personal data” under the Data Protection Act 1998.**

*Question 3: What are your views on the other proposed revisions to the Code?*

2.17 The Government sought views on the other proposed revisions of the Code, which are found in parts of the Preamble, paragraphs 21, 23, 32, 44 and 46, and point 12 of the footnotes.

2.18 14 respondents replied to this question.

2.19 The majority of respondents stated that these minor changes to the Code were uncontroversial and reflected the legislation. Unions particularly found helpful the revisions which related to the 12 week period of protection against dismissal for those taking lawfully organised action. The TUC, Baker & McKenzie and others pointed out an oversight in paragraphs 32 and 46 of the Code which make reference to the period within which action must commence, highlighting that this period has not been extended by the 2004 Act as the text suggested.

2.20 Several unions considered that the definition in the Preamble to “unions” , “workplace” and “working days”, are mistaken as they all relate to the statutory trade recognition procedure, and therefore are not relevant to the revised Code. Echoing calls from the majority of unions for clarification that small accidental errors will be disregarded, Network Rail suggested that the final sentence of paragraph 23 could be extended to state that *“ will be disregarded if, taken together, they are on a scale which would not affect the ballot’s result”*

2.21 The Government acknowledges the typographical error pointed out by respondents and will remove the mistaken references to 12 weeks in paragraphs 32 and 46 . The Government also acknowledges that the definitions in the Preamble are inappropriate and should be removed. The Government considers that paragraph 23 of the Code provides accurate guidance, consistent with the legal wording, on the circumstances in which accidental failures to comply with voting requirements will be disregarded.

## CHAPTER THREE: OTHER PARTS OF THE CODE

*Question 4: Do you have any views on those other parts of the Code which remain unchanged?*

3.1 As explained in the previous Chapter, the proposed revisions to the Code are few and in the consultation document the Government proposed leaving most of the text unchanged. The Government therefore asked for views on those many parts of the Code where no changes were proposed

3.2 19 respondents responded to this question.

3.3 Several unions including the CWU, Amicus and the GMB called for a comprehensive review of the legislation governing industrial action ballots, which they considered did not comply with ILO standards and other international obligations. Some employer organisations also expressed opposition to the additional protections for those taking industrial action. **The Government does not intend to conduct a formal review of the industrial action law, which has recently been reviewed by the Fairness at Work White Paper and the Review of the 1999 Act. Of course, the Government always follows developments in case law and will monitor how the new provisions introduced in the 2004 Act operate in practice.**

3.4 Popularis and CWU highlighted an error in footnote 6, page 8, which refers to an outdated list of organisations authorised to act as scrutineers in industrial action ballots. **The Government will change the Code to ensure that it refers to the current list of scrutineers.**

3.5 Several respondents commented on paragraphs 6 and 7 of the Code which discuss the observance of procedural agreements and explain that an industrial action ballot should not take place until any agreed procedures to resolve a dispute have been exhausted. Whilst recognising the importance of resolving disputes, unions felt that the responsibility to follow and exhaust procedures should apply equally to the employer and the union. Unions also called for the Code to clarify that the texts found in paragraphs 6 and 7 describe good practice as there is no statutory requirement to use dispute procedures. Royal Mail considered it would be helpful to state that a ballot, or threat of a ballot, should not occur until existing procedures have been completed. Acas suggested that the reference to its conciliation services in paragraph 6 could be expanded to make it clear that parties could use those services at later stages in an industrial dispute.

3.6 Unions also suggested that the text “at the time of the ballot”, found in paragraph 22 should be replaced with “on the opening day of the ballot” in order to reflect case law.

3.7 Thompsons Solicitors, the Law Society and several union respondents, including the TUC and USDAW, referred to the clarity of the Code’s guidance in respect of aggregated ballots across workplaces and across employers. They pointed out that paragraph 24 (and also paragraph 45) could easily be read as implying, even in aggregated ballots, that the union must give each employer the ballot result for each workplace and it would be unlawful to induce industrial action where the vote at that workplace had not been in favour of industrial action.

3.8 A few unions sought clarification of paragraph 46, arguing that where there is a “yes” vote for both action consisting of a strike and for action short of a strike, it is likely that both types of action have to be started within the 28 day period.

3.9 The CBI called for more guidance in Annex 1 about unofficial industrial action and the role of the union in repudiating that action. For example, they wanted more advice about the circumstances where the action might have been “authorised or endorsed” by the trade union.

3.10 Several trade unions referred to the example of a voting paper given by Annex 2 to the Code and they thought it used unnecessary and confusing language about the possible interference of the union in the voting process. Several unions, the Law Society and other respondents suggested revisions to other parts of the Code to remove what they regarded as unclear guidance or guidance which ran counter to case law.

3.11 **The Government considers that the low number of respondents indicates that the practical guidance provided in the existing Code is generally well regarded by practitioners. The main purpose in revising the Code is to ensure that it reflects changes to industrial action law introduced by the 2004 Act. The Government thus reaffirms its intention not to change significantly the practical guidance provided on those areas of the Code that have not been amended by the 2004 Act. However, it will look again at the references to Acas and the treatment of aggregated ballots with a view to making minor changes to the existing text which meet the main points raised.**



## **Annex A: Organisations that Responded to the Consultation**

The following respondents to consultation were willing for their details to be disclosed:

Advisory, Conciliation and Arbitration Service (Acas)

Association of Licensed Aircraft Engineers (ALAE)

Association of Train Operating Companies (ATOC)

AMICUS

Communication Workers Union (CWU)

Confederation of British Industry (CBI)

Confederation of UK Coal Producers (Coal Pro)

Dairy UK

The Educational Institute of Scotland

Employment Lawyers' Association (ELA)

GMB

Keoghs Solicitors

The Law Society

National Union of Rail, Maritime and Transport Workers (RMT)

Network Rail

Royal Mail Group

Secondary Heads Association (SHA)

Thompsons Solicitors

Trades Union Congress (TUC)

Union of Construction, Allied Trades & Technicians (UCATT)

Union of Shop, Distributive and Allied Workers (USDAW)

Unison

Popularis Ltd

Prospect

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