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FOREWORD BY MINISTER OF LABOUR

It gives me pleasure to present in this Government Gazette, three draft amendment bills for public discussion and comment as well as negotiations at the National Economic Development and Labour Council (NEDLAC).

These draft amendment bills are in respect of the:

- Labour Relations Act
- Basic Conditions of Employment Act
- Insolvency Act in so far as this Act regulates the relationship between employers and employees in the event of insolvency.

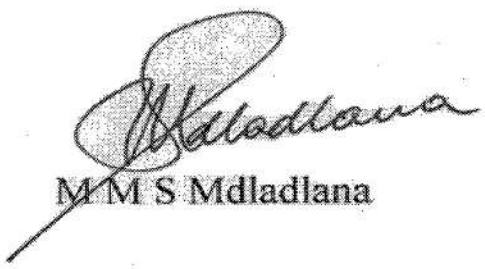
These draft amendments arise out of a process of labour law review that was conducted last year. They intend to improve the application of these laws, address unintended consequences which often have created negative perceptions about our labour market as well as ensure that the labour market regulatory framework is sensitive to the imperative of job creation.

Included in this document are detailed explanatory memorandums setting out the rationale for each proposed amendment.

We are publishing this document to encourage public debate and comment on the proposed amendments. Through informed debate and negotiation we seek to enrich the draft Bills and ensure that they have credibility and legitimacy in the eyes of all our social partners.

I would thus urge employer organisations and trade unions, labour lawyers and legal academics, non-governmental organisations and members of the public to participate in this process and send us your inputs.

Finally, I would like to thank all those who have contributed during the process to make these draft amendment bills possible.



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GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments

_____ Words underlined with a solid line indicate insertions in existing enactments.

GOVERNMENT NOTICE

DEPARTMENTS OF LABOUR AND OF JUSTICE

No. R. 756 **27 July 2000**

LABOUR RELATIONS AMENDMENT BILL, 2000

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2000

INSOLVENCY AMENDMENT BILL, 2000

1. The Ministers of Labour and of Justice hereby publish proposed amendments to the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997, and the Insolvency Act, 1936, for general information and comment.

2. The Ministers of Labour and of Justice will also be tabling these amendment bills at NEDLAC for consideration.

3. Submission of representations:

   (a) All interested parties are invited to submit written comments on the draft bills.

   (b) Such comments should be addressed to: **Mr Stephen Rathai,** Department of Labour, Private Bag X117, Pretoria, 0001, or faxed to **(012) 309 4709** or e-mailed to **stephen.rathai@labour.gov.za**

   (c) Comments should reach the Department of Labour not later than 08 September 2000.

LABOUR RELATIONS AMENDMENT BILL, 2000

BE IT ENACTED by the Parliament of the Republic of South Africa as follows:

Amendment of section 16 of Act 66 of 1995

1. Section 16 of the principal Act is hereby amended by the insertion after section 16(10) of the following subsection -

"16(10A) In any dispute in which the Commission is required to decide in terms of subsection (10) whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purpose for which it is sought."

Amendment of section 23 of Act 66 of 1995

2. Section 23 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection -

"(4) Unless the collective agreement provides otherwise, any party to a collective agreement that is concluded for an indefinite period may terminate the agreement by giving reasonable notice in writing to the other parties."

Amendment of section 24 of Act 66 of 1995

3. Section 24 of the principal Act is hereby amended by the insertion after subsection (7) of the following subsection -

"(8) This section does not apply to a collective agreement that may be made an order of the Labour Court in terms of section 158(1)(c)."

Amendment of section 25 of Act 66 of 1995, as amended by section 1 of Act 42 of 1996

4. Section 25 of the principal Act is hereby amended by –

(a) the substitution for subparagraph (iii) in subsection (3)(b) of the following subparagraph -

"(iii) if there are two or more registered trade unions party to the agreement, the **[highest amount]** weighted average of **[the subscription]** any subscriptions that would apply to an employee when the agreement is concluded."

(b) the insertion after subsection (3) of the following subsection –

"(3A) The weighted average referred to in subsection 3(b)(iii) must be calculated by dividing the total subscriptions paid to trade unions who are party to the agency shop agreement by their members covered by the agreement by the total number of such members

covered by the agreement at the time the agreement is concluded."

Amendment of section 28 of Act 66 of 1995, as amended by section 1 of Act 127 of 1998

5. Section 28 of the principal Act is hereby amended -

(a) by the deletion of subsection (2); and

(b) by the substitution for subsection (3) of the following subsection:

"(3) The laws relating to pension, provident or medical aid schemes or funds will apply in respect of any pension, provident or medical aid scheme or fund established in terms of subsection (1)(g) **[after the coming into operation of the Labour Relations Amendment Act, 1998]**."

Amendment of section 29 of Act 66 of 1995

6. Section 29 of the principal Act is hereby amended by the addition of the following subsections -

"(16) If a bargaining council is established in terms of section 37(3)(a) -

(a) the provisions of subsections (3) to (10) and (11)(b)(iii) and (iv) do not apply; and

(b) a resolution of the Public Service Bargaining Co-ordinating Bargaining Council to establish the bargaining council for a sector must be submitted with the application.

(17) The provisions of this section do not apply to a bargaining council established in terms of section 37(3)(b) or (4) and registered in terms of item 3(9) of Schedule 1."

Amendment of section 32 of Act 66 of 1995, as amended by section 7 of Act 42 of 1996

7. Section 32 of the principal Act is hereby amended -

(a) by the insertion in subsection (3) of the following paragraph:

"(h) employers who are not parties to the council have been given an opportunity to make representations to the council concerning any collective agreement that is submitted to the Minister for extension in terms of section 32;"

(b) by the substitution for paragraph (a) in subsection (5) of the following paragraph:

"(a) the parties to the bargaining council are sufficiently representative **[within the registered scope of the bargaining council in the area in respect of which the extension is sought]** of employers and employees who, upon extension of the agreement, will fall within its scope; " and

(c) by the substitution for subsection (9)(b) of the following subsection:

"(b) subsections (3) (c), (e) **[and]** , (f) and (h) and (4) of this section will not apply."

(d) by the insertion after subsection (9) of the following subsection:

"(10) If the parties to a collective agreement that has been extended in terms of this section terminate the agreement, they must notify the Minister in writing."

Amendment of section 33 of Act 66 of 1995

8. Section 33 of the principal Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) The Minister may at the request of a bargaining council appoint any person as a designated agent of that bargaining council to **[help it enforce]** promote, monitor and enforce compliance with any collective agreement concluded by that bargaining council.";

(b) by the insertion after subsection (1) of the following subsection:

"(1A) A designated agent may–

(a) advise employees, in particular those who are not members of trade unions, of their rights and obligations in terms of the council's collective agreements;

(b) advise employers, in particular small and medium employers and those who are not members of employers' organisations, of their rights and obligations in terms of the council's collective agreements;

(c) secure compliance with the council's collective agreements by conducting inspections, investigating complaints or by any other means the council may adopt; and

(d) perform any other functions that are prescribed by law or are agreed upon by the council.";

(c) by the substitution for subsection (3) of the following subsection:

"(3) Within the registered scope of a bargaining council, a designated agent of the bargaining council has all the powers set out in Part 1 of Schedule 11 to this Act **[conferred on a Commissioner by section 142, read with the changes required by the context, except the powers conferred by section 142(1)(c) and (d). Any reference in that section to the director for the purpose of this section, must be read as a reference to the secretary of the bargaining council.]**" and

(d) by the insertion of the following subsection:

"**33A Enforcement of collective agreements by bargaining councils**

(1) Despite any other provision in this Act, a bargaining council may monitor and enforce compliance with its collective agreements in terms of this section or a collective agreement concluded by the parties to the council.

(2) For the purposes of this section, a collective agreement is deemed to include -

(a) any basic condition of employment which constitutes a term of a contract of employment in terms of section 49(1) of the Basic

Conditions of Employment Act of any employee covered by the collective agreement;

(b) the rules of any fund or scheme established by the bargaining council.

(3) A collective agreement in terms of this section may authorise a designated agent appointed in terms of section 33 to issue a compliance order requiring any person bound by a collective agreement to comply with the collective agreement within a specified period.

(4) The council may refer any unresolved dispute concerning compliance with any provision of a collective agreement to arbitration by an arbitrator appointed by the Commission.

(5) An arbitrator conducting an arbitration in terms of this section has the powers of a commissioner in terms of section 142, read with the changes required by the context.

(6) The provisions of section 138 read with the changes required by the context apply to any arbitration conducted in terms of this section.

(7) A bargaining council may be represented in arbitration proceedings by a designated agent or an official of the council.

(8) An arbitrator acting in terms of this section may determine any dispute concerning the interpretation or application of a collective agreement.

(9) An arbitrator conducting an arbitration in terms of this section may make an appropriate award including -

(a) ordering any person to pay any amount owing in terms of a collective agreement;

(b) imposing a fine in accordance with Part 2 of Schedule 11 to this Act;

(c) charging a party an arbitration fee;

(d) ordering a party to pay the costs of an arbitration;

(e) confirming, varying or setting aside a compliance order issued by a designated agent in accordance with subsection (4);

(f) any award contemplated by section 138(9).

(10) Interest on any amount that a person is obliged to pay in terms of a collective agreement accrues from the date on which the amount was due and payable at the rate prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act 55 of 1975), unless the arbitration award provides otherwise.

(11) An award in an arbitration conducted in terms of this section is final and binding and may be enforced in terms of section 143 of this Act.

(12) Any reference in section 138 or 142 to the director must be read as a reference to the secretary of the bargaining council."

Amendment of section 34 of Act 66 of 1995

9. Section 34 of the principal Act is amended by the insertion of the following subsection after subsection (2) -

"(2A) If a bargaining council is in the public service:

(a) the provisions of subsection (2) do not apply; and

(b) the registrar must register the amalgamated bargaining council on receipt of -

(i) a resolution from the Public Service Co-ordinating Bargaining Council requesting the registration of the amalgamated bargaining council established in terms of section 37(3)(a); or

(ii) a notice by the President requesting the registration of the amalgamated bargaining council established in terms of section 37(3)(b) and (4)."

Amendment of section 37 of Act 66 of 1995, as amended by section 8 of Act 42 of 1996

10. Section 37 of the principal Act is hereby amended -

(a) by the addition of the following subsections:

"(6) Any designation of a sector for which a bargaining council is established may be varied or withdrawn by-

(a) the Public Service Co-ordinating Bargaining Council in terms of its constitution, if the bargaining council is designated in terms of section 37(1); or

(b) the President, if the bargaining council is designated in terms of section 37(2) or (4)(a).

(7) A bargaining council is deemed to be disestablished if its designation of the sector for which it was established is withdrawn."

Amendment of section 44 of Act 66 of 1995

11. Section 44 of the principal Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) A statutory council that is not sufficiently representative within its registered scope may submit a collective agreement on any of the matters mentioned in section 43(1)(a), (b) or (c) to the Minister. The Minister must treat the collective agreement as a recommendation made by the **[wage board]** Employment Conditions Commission in terms of section 54(4) of the **[Wage Act]** Basic Conditions of Employment Act."; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) The Minister may promulgate the statutory council's recommendations as a determination under the **[Wage Act]** Basic Conditions of Employment Act if satisfied that the statutory council has complied with **[sections 7 and 9]** section 54(3) of the **[Wage Act]** Basic Conditions of Employment Act **[For that purpose the provisions of sections 7 and 9 to 12 of the Wage Act]** read with the changes required by the context **[, apply to the statutory council as if it was the wage board]**".

Amendment of section 49 of Act 66 of 1995

12. Section 49 of the principal Act is hereby amended -

(a) by the deletion of subsections (2) and (3);

(b) by the insertion of the following subsections -

"(2) A bargaining council that has had a collective agreement extended by the Minister in terms of section 32 must inform the Registrar annually in writing on a date to be determined by the Registrar as to the number of employees who are -

(a) covered by the collective agreement;

(b) are members of the trade unions that are party to the agreement; and

(c) are employed by members of the employers' organisations that are party to the agreement.

(3) A bargaining council must on request by the Registrar inform the Registrar in writing within the period specified in the request as to the number of employees who are -

(a) employed within the registered scope of the council;

(b) members of the trade unions that are parties to the council;

(c) employed by members of the employers' organisations that are party to the council.

(4) A determination of the representativeness of a bargaining council in terms of this section is sufficient proof of the representativeness of the council for the following year, unless the registrar conducts a further review within that period.

(5) This section does not apply to the public service."

Amendment of section 51 of Act 66 of 1995 as amended by section 11 of Act 42 of 1996

13. Section 51 of the principal Act is hereby amended by the addition of the following subsection -

"(7) Unless otherwise required by this Act, a collective agreement concluded in a council may not provide for the referral of disputes to the Commission unless the council has entered into an agreement with the Commission in terms of subsection (6)."

Amendment of section 54 of Act 66 of 1995

14. Section 54 of the principal Act is hereby amended by the addition of the following subsection -

"(4) If a council fails to comply with any of the provisions of section 49(2) or (3), section 53 or subsections (1) or (2) of this section, the registrar may-

(a) conduct an enquiry about the representivity of the parties to the council in respect of any collective agreement that has been extended in terms of section 32 or in respect of the council's registered scope;

(b) conduct an enquiry about the affairs of that council;

(c) subpoena the council's financial records and any other relevant documents;

(d) deliver a notice to the council requiring the council to comply with the provisions concerned;

(e) compile a report on the affairs of the council; and

(f) submit the report to the Labour Court in support of any application made in terms of section 59(1)(b)."

Amendment of section 58 of Act 66 of 1995, as amended by section 15 of Act 42 of 1996

15. Section 58 of the principal Act is amended by the addition of the following subsection -

"(3) Despite subsection (2), if no material objection is lodged within the stipulated time period to any notice published by the Registrar in terms of section 29(3), the Registrar-

(i) may vary the registered scope of the council;

(ii) may issue a certificate specifying the scope of the council as varied; and

(iii) need not comply with the procedure prescribed by section 29."

Amendment of section 61 of Act 66 of 1995

16. Section 61 of the principal Act is hereby amended -

(a) by the addition of the following subsection after subsection (2):

"(2A) The registrar must cancel the registration of a bargaining council in the public service by removing its name from the register of councils when the registrar receives-

(a) a resolution from the Public Service Co-ordinating Bargaining Council requesting the cancellation of the registration of a bargaining council established in terms of section 37(3)(a); or

(b) a notice from the President requesting the cancellation of the registration of a bargaining council established in terms of section 37(3)(b) or (4); and

(b) by the addition of the following subsection after subsection(7):

"(7A) If the registrar cancels the registration of a bargaining council in the public service the provisions of subsections (3) to (7) do not apply."

Amendment of section 78 of Act 66 of 1995, as amended by section 23 of Act 42 of 1996

17. Section 78 of the principal Act is hereby amended by the addition of the following paragraph -

"(c) 'applicant' means any one of the following-

(i) a representative trade union; or

(ii) in the absence of a representative trade union, a registered union, or two or more registered trade unions acting jointly, that together with such number of employees who are not members of any trade union but support any application for the establishment of a workplace forum in writing, comprise a majority of the employees employed by an employer in a workplace; or

(iii) in the absence of a registered trade union, any number of employees employed in a workplace referred to in subsection (1) who comprise the majority of employees employed in that workplace."

Amendment to section 80 of Act 66 of 1995, as amended by section 24 of Act 42 of 1996

18. Section 80 of the principal Act is hereby amended as follows -

(a) by the deletion of section 80(1);

(b) by the substitution for subsection (2) of the following subsection:

"**(2)** **[Any representative trade union]** An applicant may apply to the Commission in the prescribed form for the establishment of a workplace forum";

(c) by the deletion of section 80(5)(b)(i);

(d) by the substitution for subsection (7) of the following subsection:

"(7) The Commissioner must convene a meeting with the applicant, the employer and any registered trade union that has members employed in the workplace, in order to facilitate the conclusion of a **[collective]** agreement between those parties, or at least between the applicant and the employer.";

(e) by the substitution for subsection (8) of the following subsection:

"(8) If **[a collective]** an agreement is concluded, the provisions of this Chapter do not apply."; and

(f) by the substitution for subsection (9) of the following subsection:

"(9) If **[collective]** an agreement is not concluded, the commissioner must meet the parties referred to in subsection (7) in order to facilitate agreement between them, or at least between the applicant and the employer, on the provisions of the constitution for a workplace forum in accordance with this Chapter, taking into account the guidelines in Schedule 2."

Amendment of section 95 of Act 66 of 1995

19. Section 95 of the principal Act is hereby amended by the addition of the following subsections -

"(7) The registrar must not register a trade union or an employers' organisation unless the registrar is satisfied that the applicant is a genuine trade union or a genuine employers' organisation.

(8) The Minister may, by notice in the Government Gazette, publish guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union or a genuine employers' organisation."

Amendment of section 103 of Act 66 of 1995, as amended by section 30 of Act 42 of 1996

20. Section 103 of the principal Act is hereby amended -

(a) by the substitution of the heading for the following:

"Winding-up of [registered] trade unions and [registered] employers' organisations."

(b) by the substitution for subsection (1) of the following subsection:

"(1) The Labour Court may order a **[registered]** trade union or **[registered]** employers' organisation to be wound up if -

(a) the trade union or employers' organisation has resolved to wind-up its affairs and has applied to the Court for an order giving effect to that resolution; or

(b) the registrar of labour relations or any member of the trade union or employers organisation has applied to the Court for its winding up and the Court is satisfied that the trade union or employers' organisation, for some reason that cannot be remedied is unable to continue to function.".

(c) by the insertion of the following subsection after subsection (1):

"(1A) If the registrar of labour relations has cancelled the registration of a trade union or employer's organisation in terms of section 106(2A), any person opposing its winding-up is required to prove that the trade union or employer's organisation is able to continue to function."

(d) by the substitution for subsection 5 of the following subsection:

"(5) If, after all the liabilities of the **[registered]** trade union or **[registered]** employers' organisation have been discharged, any assets remain that cannot be disposed of in accordance with the constitution of that trade union or employers' organisation, the liquidator must realise those assets and pay the proceeds to the Commission for its own use."

(e) by the insertion of the following subsection after subsection (5):

"(6)(a) The Labour Court may direct that the costs of the registrar of labour relations or any other person who has brought an application in terms of subsection 1(b) be paid from the assets of the trade union or employers' organisation.

(b) Any costs in terms of sub-paragraph (a) rank concurrently with the liquidator's fees."

Amendment of section 105 of Act 66 of 1995

21. Section 105 of the principal Act is hereby amended by substituting for the heading the following:

"**[Cancellation of registration of]** **Declaration that a trade union [that] is no longer independent**"

Amendment of section 106 of Act 66 of 1995

22. Section 106 of the principal Act is hereby amended by –

(a) the substitution for subsection (1) of the following subsection -

"(1) The registrar of the Labour Court must notify the registrar of labour relations if the Court –

(a) in terms of section 103 or 104 has ordered a registered trade union or a registered employers' organisation to be wound up; or

(b) in terms of section 105 has declared that a registered trade union is not independent."

(b) the insertion after subsection (2) of the following subsections -

"(2A) The registrar may cancel the registration of a trade union or employers' organisation by removing its name from the appropriate register if the registrar is satisfied that the trade union or employers' organisation-

(a) is not, or has ceased to function as, a genuine trade union or employer's organisation, as the case may be; or

(b) has failed to comply with the provisions of sections 98, 99 and 100.

(2B) The registrar may not act in terms of subsection (3) unless a notice has been published in the Government Gazette at the least 60 days previously –

(a) giving notice of the Registrar's intention to cancel the registration of the trade union or employers' organisation;

(b) inviting the trade union or employers' organisation or any other interested persons to make written representations as to why the registration should not be cancelled, the intended cancellation within 60 days of the date of publication of the notice in the Gazette."

Amendment of section 115 of Act 66 of 1995

23. Section 115 of the principal Act is hereby amended by -

(a) the substitution of the following subsection for subsection (2)(cA)(iii)(bb):

"(bb) at arbitration proceedings;**[and]**"

(b) the addition of the following subsection after subsection (2)(cA)(iii)(bb) :

"(cc) permitting the joining of any person having an interest in the dispute at any time during conciliation or arbitration

proceedings, the intervention of any person as an applicant or respondent, the amendment of any citation and the substitution of any party for another;".

Amendment of section 118 of Act 66 of 1995, as amended by Act 127 of 1998

24. Section 118 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection -

"(6) The director, in consultation with the governing body, may delegate any of the functions of that office, except the functions mentioned in **[sections]** section 120 **[and 138(8)]**, to a commissioner."

Amendment of section 123 of Act 66 of 1995

25. Section 123 of the principal Act is hereby amended -

(a) by the insertion in subsection (1) of the following paragraph :

"(d) conducting an arbitration when this Act makes provision for payment of a fee by any party to that arbitration;" and

(b) by the insertion of the following subsections after subsection (2):

"(2A) (a) The Commission may charge a fee for any arbitration that it conducts in accordance with a tariff established by the governing body.

(b) The tariff of fees for arbitrations conducted by the Commission may provide for fees to be paid prior to the commencement of any arbitration proceedings, and may provide further for different rates to be payable depending on the number of employees or turnover of any employer party to the proceedings, and the remuneration of any employee party.

(2B) The governing body must establish a tariff of fees that may be charged by the Commission, a bargaining council or an accredited agency for conducting an enquiry in terms of section 188A."

Amendment of section 135 of Act 66 of 1995, as amended by section 8 of Act 27 of 1998

26. Section 135 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection -

"(4) In the conciliation proceedings a party to the dispute may appear in person or be represented only by -

(a) a director or employee of that party and in the case of a company, a director or employee of the party's holding or subsidiary company as defined in the Companies Act 1973, Act 61 of 1973; or

(b) any member, office bearer or official of that party's registered trade union or registered employers' organisation of which the party was a member of that trade union or employers' organisation prior to the date on which the dispute arose."

Amendment of section 138 of Act 66 of 1995

27. Section 138 of the principal Act is hereby amended -

(a) by the substitution for subsection (4) of the following subsection:

"(4) In any arbitration proceedings, a party to the dispute may appear in person or be represented only by-

(a) legal practitioner or candidate attorney;

(b) a director or employee of the party, and in the case of a company, a director or employee of the party's holding or subsidiary company as defined by the Companies Act 1973, Act 61 of 1973; or

(c) any member, office bearer or official of that party's registered trade union or registered employers' organisation : provided that the party to the dispute was a member of that trade union or employers' organisation prior to the date on which the dispute arose.";

(b) by the substitution for subsection (10) of the following subsection:

"(10) The commissioner may order a party to the dispute or any person who represented that party in the proceedings before that commissioner to pay the costs of the other party, having regard to the conduct of that party either in instituting or defending the proceedings, or during the proceedings, with particular regard to the following factors -

(a) any refusal to participate in a conciliation process;

(b) any refusal to accept a reasonable offer of settlement made on a with prejudice basis;

(c) any conduct amounting to an abuse of the arbitration process;

(d) the persistent institution of legal proceedings;

(e) the absence of any reasonable grounds for instituting or defending the arbitration proceedings; or

(f) the refusal to agree to any enquiry conducted in terms of section 188A.";

(c) by the insertion of the following subsection:

"(12) The commissioner must fix the amount of costs payable by a party in terms of subsection (10) as prescribed by the schedule of tariffs and fees promulgated for this purpose in terms of section 123."; and

(d) by the insertion of the following section:

"138A Establishment of Labour Advisers Board and accreditation of Labour Advisers

(1) For the purposes of this section, a labour adviser is any person who advises employers, employers' organisations, employees or trade unions in labour relations, but who is not a legal practitioner, or a candidate attorney.

(2) A labour adviser who remains accredited in terms of this section may represent any party in any joint conciliation and arbitration process conducted in terms of section 140.

(3) The Minister must establish a Labour Advisers Board under the auspices of the Commission and appoint to the Board on terms to be prescribed five persons who have knowledge and experience of labour law.

(4) The functions of the Labour Advisers' Board are to –

(a) determine the criteria for the accreditation of labour advisers;

(b) accredit labour advisers;

(c) establish a code of ethics for labour advisers;

(d) hear complaints against labour advisers;

(e) determine a disciplinary procedure for the disciplining of labour advisers;

(f) discipline labour advisers for breaches of the code of ethics, including the suspension and withdrawal of any rights accorded to labour advisers by this Act; and

(g) perform other functions to be prescribed by regulation.

(5) The Labour Advisers Board may –

(a) delegate its functions to one or more of its members;

(b) subpoena any person for questioning who may be able to give them information;

(c) subpoena any person who is believed to have possession or control over any book, document or object relevant to the performance of the Board's functions and to appear before the Board to be questioned or to produce that book, document or object; and

(d) administer an oath or accept an affirmation from any person called to give evidence or to be questioned."

Amendment of section 140 of Act 66 of 1995

28. Section 140 of the principal Act is hereby amended -

(a) by the substitution for the existing heading of the following -:

"140 Joint conciliation and arbitration of disputes about unfair dismissals";

(b) by the deletion of the existing subsection (1);

(c) by the insertion of the following subsections:

"(1) The council or the Commission must endeavour to resolve the dispute referred in terms of section 191(1) by a joint process of conciliation and arbitration.

(2) The council or Commission must enrol the dispute for a hearing within 30 days of the referral of the dispute in terms of section 191(1).

(3) The council or the Commission must notify the parties that if the dispute cannot be settled on the date on which it is enrolled, that the arbitration of the dispute will commence immediately.

(4) At the hearing, the council or the Commission must first attempt to conciliate the dispute.

(5) If the council or the Commission decides that no further purpose will be served by continuing with conciliation, the council or the Commission, as the case may be, must advise the parties accordingly and ask the employee whether the employee wishes to have the dispute arbitrated.

(6) If the employee requests the council or the Commission to arbitrate the dispute, the council or the Commission must commence the arbitration proceedings, unless -

(a) the dispute is withdrawn by the applicant party; or

(b) the arbitration is postponed, on application by any party to the dispute.

(7) The council or the Commission may decide to stand down or postpone any arbitration proceedings to any appropriate date.

(8) Despite subsection (7), the council or the Commission may decide to refer the dispute to the Labour Court if the council or commission, as the case may be, decides on application by any party to the dispute that to be appropriate after considering -

(a) the reason for dismissal;

(b) whether there are questions of law raised by the dispute;

(c) the complexity of the dispute;

(d) whether there are conflicting arbitration awards that need to be resolved; and

(e) the public interest.

(9) When considering whether the dispute should be referred to the Labour Court, the council or the director must give the parties to the dispute and person who attempted to conciliate the dispute, an opportunity to make representations.

(10) The council or commission must notify the parties of the decision and refer the dispute to the council or the Commission for arbitration or to the Labour Court for adjudication.

(11) The decision of the council or commission is final and binding, and no person may apply to any Court of law to review the decision until the dispute has been arbitrated or adjudicated as the case may be.

(12) In any joint process of conciliation and arbitration conducted in terms of this section, a party to the proceedings may appear in person, or may be represented by-

(a) a legal practitioner or candidate attorney;

(b) a director or employee of the party, and in the case of a company, a director or employee of the party's holding or subsidiary company as defined by the Companies Act 1973, Act 61 of 1973;

(c) any member, office bearer or official of that party's registered trade union or registered employers' organisation : provided that the party to the dispute was a member of that trade union or employers'

organisation prior to the date on which the dispute arose; or

(d) a labour adviser who is accredited in terms of section 138A by the Labour Advisers' Board ."; and

(d) by renumbering the existing subsection (2) as subsection (13).

Amendment of section 142 of Act 66 of 1995 as amended by section 40 of Act 42 of 1996

29. Section 142 of the principal Act is hereby amended -

(a) by the substitution for subsection (7) of the following subsection:

"(7)(a) The Commission must pay the prescribed witness fee to each person who appears before a commissioner in response to a subpoena issued by a commissioner.

(b) Any person who requests the Commission to issue a subpoena must pay the prescribed witness fee to each person who appears before a commissioner in response to the subpoena.";

(b) by the substitution for subsection (9) of the following subsection:

"(9) A commissioner may make a finding that a party is in contempt of the Commission for any of the reasons set out in subsection (8). The commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its decision in terms of subsection (11).."; and

(c) by the insertion of the following subsections:

"(10) Before making a decision in terms of subsection (11), the Labour Court -

(a) must subpoena any person cited for contempt to appear before it on a date determined by the Court;

(b) may subpoena any other person to appear before it on a date determined by the Court; and

(c) after hearing any person, may make any order that it deems appropriate, including an order in the case of a person who is not a legal practitioner that the persons rights of representation in the CCMA and the Labour Court be suspended, for either a definite or an indefinite period.

(11) The Labour Court may confirm, vary or set aside the decision of a commissioner.

(12) If any person fails to appear at the Labour Court pursuant to a subpoena issued in terms of subsection (11)(a), the Court may make any order that it deems appropriate in the absence of that person."

Amendment of section 143 of Act 66 of 1995

30. Section 143 of the principal Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection :

"(1) An arbitration award issued by a commissioner, an arbitrator appointed by a bargaining council or an arbitrator appointed by

an accredited agency, is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award;."; and

(b) by the addition of the following subsections:

"(3) An arbitration award may only be enforced in terms of the provisions of subsection (1) if the Director has certified that the arbitration award is an order contemplated by subsection (1).

(4) If a party fails to comply with an arbitration award, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court."

Amendment of section 144 of Act 66 of 1995

31. Section 144 of the principal Act is hereby amended by the substitution of the section with the following: -

"144 Variation and rescission of arbitration awards

Any commissioner who has issued an arbitration award, or any other commissioner appointed by the director for that purpose may on that **[acting of the]** commissioner's own accord or, on the application of any affected party, may vary or rescind an arbitration award

(a) **[erroneously sought or erroneously made]** in the absence of any party affected by that award;

(b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or

(c) which was erroneously sought or erroneously granted, or which was granted as a result of a mistake common to the parties to the proceeding; and

(d) which was void from the outset, or which was obtained by fraud."

Amendment of section 145 of Act 66 of 1995

32. Section 145 of the principal Act is hereby amended by the insertion of the following subsection -

"(2A) The Labour Court may condone any failure to comply with the time limits prescribed by subsection (1) at any time on good cause shown."

Amendment of section 152 of Act 66 of 1995

33. Section 152 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection -

"(1) The Labour Court consists of -

(a) a Judge President;

(b) a Deputy Judge President; and

(c) as many judges as the President may consider necessary." **[acting on the advice of NEDLAC and in consultation with the Minister of Justice and the Judge President of the Labour Court.]**

Amendment of section 153 of Act 66 of 1995 as amended by section 42 of Act 42 of 1996

34. Section 153 of the principal Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) The President acting on the advice of NEDLAC and the Judicial Service Commission provided for in the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), (in this Part and Part E called the Judicial Service Commission), and after consultation with the Minister of Justice and Constitutional Development -

(a) and the Chief Justice, must appoint a Judge President of the Labour Court.

(b) and the Judge President of the Labour Court, must appoint **[the]** a Deputy Judge President of the Labour Court and the judges of the Labour Court."

(b) by the deletion of subsection (2) and (4);

(c) by the substitution for subsection (5) of the following subsection:

"(5) (a) The Minister of Justice and Constitutional Development after consultation with the Judge President of the Labour court, may, subject to paragraph (b), appoint one or more persons **[who meet the requirements of subsection (6)]** to serve as acting judges of the Labour Court for such period as the Minister of Justice and Constitutional Development in each case may determine.

(b) No person may be appointed to serve as an acting judge of the Labour Court unless that person -

(i) is a judge of the High Court and has knowledge, experience and expertise in labour law; or

(ii) is a legal practitioner and has knowledge, experience and expertise in labour law." and

(d) by the deletion of subsection (6).

Amendment of section 154 of Act 66 of 1995 as amended by section 43 of Act 42 of 1996

35. Section 154 of the principal Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1) A Judge President of the Labour Court, a Deputy Judge President of the Labour Court and any judge of the Labour Court **[must be appointed]** hold office for a period determined by the President at the time of appointment, which may be extended or reduced: Provided that any of them may be appointed on more than one occasion.

(1A) Any judge of the Labour Court who is not reappointed to hold office in the Labour Court or the Labour Appeal Court must be appointed to any other division of the High Court";

(b) by the substitution for subsection (5) of the following subsection:

"(5) The remuneration and terms and conditions of appointment of a Judge President of the Labour Court, a Deputy Judge President of the Labour Court and any judge of the Labour Court must be

the same as those applicable to a Judge President, a Deputy Judge President and a judge respectively, of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, 1989 (Act 88 of 1989)."

(c) by the substitution for paragraph (a) of subsection (7) of the following paragraph:

"(7) (a) A judge of the Labour Court **[who is also a judge of the Supreme Court-**

(i) may be removed from the office of judge of the Labour Court only if that person has first been removed from the office of a judge of the Supreme Court; and

(ii)] upon having been removed as judge of the **[Supreme]** High Court must be removed from office as a Judge President of the Labour Court, a Deputy Judge President of the Labour Court or judge of the Labour Court, as the case may be." and

(d) by the deletion of paragraph (b) of subsection (7).

Amendment of section 158 of Act 66 of 1995 as amended by section 44 of Act 42 of 1996

36. Section 158 of the principal Act is hereby amended as follows -

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

"(c) make any arbitration award, or any **[settlement]** agreement, including **[other than]** a collective agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court in terms of this Act, an order of the Court.";

(b) by the substitution in subsection (1) for paragraph (g) of the following paragraph:

"(g) subject to **[despite]** section 145, review the performance or purported performance of any function provided for in this Act on any grounds as are permissible in law"; and

(c) by the insertion of the following subsection:

"(1)(A) The provisions of subsection (1)(c) do not apply to a collective agreement in settlement of a dispute contemplated by section 74(4) or 75(7)."

Amendment of section 161 of Act 66 of 1995 as amended by section 44 of Act 42 of 1996

37. Section 161 of the principal Act is hereby amended -

(a) by the substitution for paragraph (a) of the following paragraph:

"(a) a legal practitioner or candidate attorney";

(b) by the substitution of paragraph (b) of the following paragraph -

"(b) a director or employee of that party and in the case of a company, a director or employee of the party's holding or subsidiary company as defined in the Companies Act 1973, Act 61 of 1973"; and

(c) by the substitution of paragraph (c) of the following paragraph :

"(c) any member, office bearer or official of that party's registered trade union or registered employers' organisation of which the party was a member of that trade union or employers' organisation prior to the date on which the dispute arose."

Amendment to section 173 of Act 66 of 1995

38. Section 173 of the principal Act is hereby amended by the deletion of subsection (3).

Amendment to section 186 of Act 66 of 1995 as amended by section 95 of Act 75 of 1997

39. Section 186 of the principal Act is hereby amended by the substitution for paragraph (e) of the following paragraph -

"(e) an employee -

(i) terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee; or

(ii) the new employer after a transfer in terms of section 197 provided the employee with conditions of work that are substantially less favourable to the employee than those provided by the old employer."

Amendment to section 187 of Act 66 of 1995

40. Section 187 of the principal Act is hereby amended by the insertion in subsection (1) of the following paragraph -

"(g) a transfer contemplated by section 197 of this Act."

Amendment to section 188 of Act 66 of 1995

41. Section 188 of the principal Act is hereby amended -

(a) by the substitution of subsection (2) for the following-

"(2) (a) Despite subsection (1) and provided that the date of dismissal occurs within the first 6 months of employment or any lesser period agreed between the employer and the employee, if the reason for dismissal is incapacity in the form either of the employee's incompatibility or a failure to meet required performance standards, the employer need prove only that the dismissal was effected in accordance with a fair procedure.

(b) In the case of a dismissal related to the employee's conduct or capacity, fair procedure means that an employee should not be dismissed before that employee is provided an opportunity to state a case in response to any allegations made by the employer with the assistance if required of a trade union representative or co-employee, unless the employer cannot reasonably be

expected to provide this opportunity. The opportunity to state a case need not be a formal hearing.

(c) In the case of a dismissal based on the employer's operational requirements, fair procedure is regulated by section 189.";

(b) by renumbering the existing section 188(2) as subsection (3); and

(c) by the insertion after section 188 of the following section:

"Agreement for enquiry into allegations about an employee's conduct and capacity.

188A. (1) An employer may, with the consent of the employee, request a council, an accredited agency or the Commission to conduct an enquiry into allegations about the conduct or capacity of that employee.

(2) The request must be in the prescribed form.

(3) The council, accredited agency or the Commission must appoint an arbitrator on receipt of -

(a) payment by the employer of the prescribed fee; and

(b) the employee's consent in writing to the enquiry.

(4) In any enquiry a party to the dispute may appear in person or be represented by only -

(a) a co-employee;

(b) a director or employee, if the party is a juristic person; or

(c) any member, office bearer or official of that party's registered trade union or registered employers' organisation.

(5) The provisions of section 138, excluding subsection 138(4), 143, 145 and 146 read with the changes required by the context, apply to any enquiry conducted in terms of this section.

(6) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142, read with the changes required by the context.

(7) Any reference in that section to the director for the purpose of this section, must be read as a reference to -

(a) the secretary of the council, if the enquiry is held under the auspices of the council;

(b) the director of the accredited agency, if the enquiry is held under the auspices of an accredited agency."

Amendment to Section 189 of Act 66 of 1995

42. Section 189 of the principal Act is hereby amended by the insertion of the following section after section 189 -

"**Section 189A Notice of dismissal and appointment of facilitator for dismissals based on operational requirements**

1(a) An employer may not dismiss 500 or more employees in any twelve-month period on account of its operational requirements, unless the employer has given notice to the Minister in the prescribed form.

(b) The Minister may by notice in the Government Gazette extend the application of this section to dismissals based on operational requirements other than those contemplated in subsection (1). A notice in terms of paragraph (a) may set different thresholds for different sectors.

(2) The Commission must appoint a facilitator to assist the consulting parties in any consultations in terms of section 189 in respect of a dismissal contemplated by subsection (1), unless the consulting parties have agreed in writing to appoint a facilitator or that they will conduct the consultations without the assistance of a facilitator.

(3) The Commission must appoint a facilitator within five days of being requested to do so by the employer.

(4) If a facilitator is appointed in terms of subsection (4), the facilitator must-

(a) assist the consulting parties in consultations in terms of section 189(2) or any applicable collective agreement, in accordance with this section;

(b) draw the attention of the consulting parties to the provisions of the Social Plan as published in Government Gazette 20305 of 23 July 1999.

(5) Unless otherwise agreed by the consulting parties, the facilitator-

(a) must chair all meetings held in terms of section 189; and

(b) has the power to determine on an expedited basis, after allowing the consulting parties an adequate opportunity to make representation, any dispute concerning the disclosure of information in accordance with section 16.

(6) (a) Any dispute between the consulting parties over the disclosure of information must be resolved in accordance with section 16 read with the changes required by the context and excluding subsections (6) to (9).

(b) The facilitator must exercise the powers of a commissioner in terms of section 16.

(c) An order by the facilitator in terms of subsections (11) to (14) of section 16 has the effect of an arbitration award in terms of section 143.

(7) The consulting parties may determine by written agreement the functions of the facilitator.

(8) Without limiting the scope of any agreement that may be concluded in terms of subsection (8), the consulting parties may –

(a) refer an issue to the facilitator for an advisory arbitration award; or

(b) require the facilitator to make a final and binding arbitration award in respect of any matter.

(9) A facilitator may not –

(a) give evidence or in any way participate or assist in any conciliation or adjudication concerning any aspect of a matter in respect of which he or she acted as facilitator; or

(b) disclose any information obtained in the facilitation to any person other than a consulting party, unless the consulting parties agree in writing.

(10) For the purposes of this section, agreement by the consulting parties is an agreement between the employer and the parties contemplated by section 189(1) who represent the majority of employees likely to be affected by the proposed dismissal. "

Amendment to section 190 of Act 66 of 1995

43. Section 190 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection -

"(1) The date of dismissal is –

(a) the date on which the contract of employment terminated or the date on which the employee left the service of the employer, whichever is the earlier, or

(b) if the employer makes any final decision to dismiss or uphold the dismissal of the employee on any date later than that contemplated by paragraph (a), the date on which the final decision is made.

Amendment to section 191 of Act 66 of 1995 as amended by section 25 of Act 127 of 1998

44. Section 191 of the principal Act is hereby amended -

(a) by the substitution of the heading for the following :

"Disputes about unfair dismissals and unfair labour practices."

(b) by the substitution for subsection (1) of the following subsection-

(1) "If there is a dispute about the fairness of a dismissal, or a dispute about an unfair labour practice the dismissed employee or the employee alleging the unfair practice may refer the dispute in writing within 30 days of the date of dismissal or the date on which the unfair labour practice was committed to-

(a) a council ,if the parties to the dispute fall within the registered scope of that council; or

(b) the Commission, if no council has jurisdiction." and

(c) by the substitution for subsection (4) of the following subsection-

"(4) In the case of an unfair dismissal, the Commission must conduct a joint conciliation and arbitration in terms of section 140 if –

(a) the employee has alleged that the reason for dismissal is any of the following -

(i) a reason related to the employee's conduct or capacity;

(ii) that the employer made continued employment intolerable;

(iii) a reason related to the operational requirements of the employer, if the dismissal affected only one employee; or

(b) the employee does not know the reason for dismissal.

(d) by the deletion of paragraph (a) of subsection (5);

(e) by the deletion of subsection (6) to (10); and

(f) by the insertion after section 191 of the following section:

"Special provisions application to operational requirements dismissals

191A (1) In any dispute referred to the Labour Court in which the dismissed employees allege that the reason for the dismissal is based on the employer's operational requirements, the Labour Court may-

(a) on application by either party, or of its own motion, appoint a person from a list prepared by a bargaining council having jurisdiction or the Commission to investigate any aspect of the alleged dismissal and make a report to the court; or

(b) on application by either party permit the employer and trade union, or if there is no trade union the employees, that are parties to the dispute each to appoint an assessor to assist the court in an advisory capacity.

(2) The Court may not appoint in terms of subsection (1)(a) a person who has acted as a facilitator in terms of section 189A in respect of the dispute.

(3) If there is no trade union that is a party to the dispute, the assessor may be appointed by the majority of the dismissed employees who are a party to the case.

(4) The failure by one party to appoint an assessor in terms of subsection (1)(b) does not affect the right of the other party to appoint an assessor.

(5) A report prepared in terms of subsection (1)(a) must be made available to the parties at least one week prior to the commencement of the trial.

(6) Any person appointed in terms of this assessor in terms of subsection (1)(b)will be remunerated in terms of a tariff determined by the Minister of Justice.";

Amendment to section 193 of Act 66 of 1995

45. Section 193 of the principal Act is hereby amended -

(a) by the substitution of the heading for the following :

"Remedies for unfair dismissal and unfair labour practices."

(b) by the insertion of the following subsection -

"(4) An arbitrator appointed in terms of this Act has the power to determine any unfair labour practice disputes that has been referred to it on terms that it deems reasonable, including but not limited to ordering reinstatement or compensation.

Amendment to section 194 of Act 66 of 1995

46. Section 194 of the principal Act is hereby amended -

(a) by the substitution for subsection (1) of the following subsection:

"(1)(a) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation **[must be equal to]** may not exceed the remuneration that the employee would have been paid between the date of dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee's rate of remuneration on the date of dismissal. (b) Despite paragraph (a), compensation for procedural fairness may **[Compensation may however]** not be awarded in respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting a claim, nor may any amount of compensation exceed the amount of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal. "; and

(b) by the substitution for subsection (2) of the following subsection:

"(2) The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee's conduct, capacity or based on the employer's operational requirements, whether or not the dismissal was also procedurally unfair, must be just and equitable in all the circumstances, but not less than the amount specified in subsection (1), and not more than the equivalent of 12 months' remuneration on the date of dismissal."

Amendment to section 197 of Act 66 of 1995

47. Section 197 of the principal Act is hereby amended by –

(a) the substitution for that section of the following section:

"Transfer of contract of employment

197(1) In this section -

(a) 'business' includes the whole or a part of any business, trade or undertaking;

(b) 'transfer' means the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern.

(2) A transfer of a business is covered by this section if –

(a) an economic entity, consisting of an organised grouping of resources, that has the object of performing an economic activity is transferred; and

(b) the economic entity retains its identity after the transfer.

(3) If a transfer of a business takes place then unless otherwise agreed in terms of subsection (7) -

(a) the contracts of employment in existence immediately before the transfer of employees employed by the old employer in the business that is transferred transfer automatically to the new employer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt the employee's continuity of employment and their employment continues with the new employer as if with the old employer.

(4) The new employer complies with subsection (3) as the case may be if it employs a transferred employee on terms and conditions of employment that are –

(a) the same as those on which the employee was employed by the old employer;

(b) on the whole not less favourable to the employee than those on which they were employed by the old employer; or

(c) agreed to in terms of subsection (7).

(5) To determine whether the terms and conditions of employment on which an employee is employed by the new employer are the same or as favourable to an employee as those on which the employee was employed by the old employer, regard must be had to the employer's contribution to any retirement, medical or similar fund, but not to any benefits that the employee is entitled to from that fund.

(6) Unless otherwise agreed in terms of subsection (7), the new employer is bound by -

(a) any organisational right granted in terms of Chapter III binding on the old employer immediately before the transfer in respect of any workplace that is transferred; and

(b) any collective agreement binding on the old employer in terms of section 23 immediately before the transfer in terms of which a registered trade union is recognised by the old employer as representing employees in a workplace that is transferred.

(7) An agreement contemplated in subsections (3), (4) or (6) must be concluded between –

(a) either the old employer, or the new employer, or the old and new employers acting jointly, on the one hand; and

(b) the appropriate person or body referred to in section 189(1), on the other.

(8) (a) An employer may not dismiss an employee on account of a transfer covered by this section.[1]

(b) Paragraph (a) does not preclude –

(i) the old employer from dismissing an employee in accordance with the provisions of this Chapter for a reason based on the old employer or the new employer's operational requirements; or

(ii) the new employer from dismissing an employee in accordance with the provisions of this Chapter for a reason based on its operational requirements.

(9) The old and new employer are jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer.

(10) The provisions of this section do not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.

(b) by the insertion after section 197 of the following section -

"Transfer of contract of employment in terms of the Insolvency Act

197A(1) Despite section 197(3), if a transfer contemplated by section 197(2) takes place in accordance with section 38 of the Insolvency Act, 1936 (Act No. 24 of 1936) then unless otherwise agreed in terms of subsection (2) –

(a) the contracts of employees employed by the old employer in the business that is transferred that were in existence immediately before the old employer's provisional winding-up or sequestration transfer automatically to the new employer;

(b) all the rights and obligations between the old employer and each employee at the time of the transfer remain rights and obligations between the old employer and each employee;

(c) anything done before the transfer by the old employer in respect of each employee will be considered to have been done by the old employer;

(d) subject to any suspension of their contracts of employment in terms of section 38 of the Insolvency Act, the transfer does not interrupt the employee's continuity of employment and their employment continues with the new employer as if with the old employer.

(2) An agreement contemplated by subsection (1) means a scheme of arrangement or compromise referred to in section 311 of the Companies Act, 1973 (Act 69 of 1973) or other agreement contemplated by that section.

[1] PERMANENT FOOTNOTE : In terms of section 187(1)(g) a dismissal is automatically unfair if the reason for it is a transfer in terms of section 197.

(3) Section 197(4), (5), (8) and (10) apply to a transfer in accordance with section 38 of the Insolvency Act, except that any reference to an agreement in those sections must be read as a reference to an agreement contemplated by subsection (2).

(4) (Section 197(6) applies to a transfer in accordance with section 38 of the Insolvency Act in respect of an organisational right or collective agreement binding on the employer immediately before the employer's winding-up or sequestration.

(5) Section 197(3) and (9) do not apply to a transfer in accordance with section 38 of the Insolvency Act.

Amendment to section 200 of Act 66 of 1995

48. Section 200 of the principal Act is hereby amended by inserting a new section (200A) -

"(1) Until the contrary is proved, a person who works for, or provides services to, any other person is presumed to be an employee, if any one or more of the following factors are present –

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person forms part of that organisation;

(d) the person has worked for that person for an average of at least 40 hours per month over the last three months;

(e) that person is economically dependant on the person for whom he or she works or provides services;

(f) the person is provided with his or her tools of trade or work equipment by another person;

(g) the person only works or supplies services to one person."

Amendment to section 203 of Act 66 of 1995

49. Section 203 of the principal Act is hereby amended by the insertion of the following subsection -

"(4) A Code of Good Practice issued in terms of this section may provide that the Code must be taken into account in applying or interpreting any employment law."

Amendment to section 204 of Act 66 of 1995

50. Section 204 of the principal Act is hereby amended by the substitution for that section of the following section -

"**204 Collective agreement, arbitration award or wage determination to be kept by employer**

Unless a collective agreement, arbitration award or determination made in terms of the **[Wage Act]** Basic Conditions of Employment Act provides otherwise,

every employer on whom the collective agreement, arbitration award, or determination, is binding must -

(a) keep a copy of that collective agreement, arbitration award or determination available in the workplace at all times;

(b) make that copy available for inspection by any employee; and

(c) give a copy of that collective agreement, arbitration award or determination -

(i) to an employee who has paid the prescribed fee; and

(ii) free of charge, on request, to an employee who is a trade union representative or a member of a workplace forum."

Amendment to section 213 of Act 66 of 1995

51. Section 213 of the principal Act is hereby amended -

(a) by inserting the following definition:

"'**candidate attorney**' means - a person defined as a candidate attorney by the Attorneys Act 1979, Act 53 of 1979";

(b) by substituting the definition of "public service" for the following definition:

"'**public service**' means **[the public service referred to in section 1(1) of the Public Service Act, 1994 (promulgated by Proclamation 103 of 1994) and includes any organisational component contemplated in section 7(4) of that Act and specified in the first column of Schedule 2 to that Act]** the national departments, provincial administrations, provincial departments and organisational components contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), but excluding –

(a) the members of the South African National Defence Force;

(b) the National Intelligence Agency; and

(c) the South African Secret Service." ;

(c) by inserting the following definition:

"'**unfair labour practice**' means -

(a) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;

(c) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement."

(d) by the substitution for paragraph (a) of the definition of '**workplace**' of the following paragraph, and by the deletion of paragraph (b):

"(a) in relation to the public service-

(i) for the purposes of collective bargaining, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, as the case may be; or

(ii) for any other purpose, a department, as defined in section 1(1) of the Public Service Act, 1994, or any other place or places that the executing authority, as defined in that section, of that department may determine."

Amendment of Schedule 5 of Act 66 of 1995, as amended by section 55 of Act 42 of 1996 and section 27 of Act 127 of 1998

52. Schedule 5 of the principal Act is hereby amended by the deletion of items 3 and 4.

Amendment of Schedule 7 of Act 66 of 1995, as amended by section 56 of Act 42 of 1996 and section 28 of Act 127 of 1998

53. Schedule 7 is hereby amended by the addition of the following parts -

"PART H – TRANSFER OF PENSION AND PROVIDENT FUNDS

(26) Any pension or provident fund which prior to 1 February 1999 was established or continued in terms of a collective agreement concluded in a bargaining council in terms of the Labour Relations Act, 1956 (Act No. 28 of 1956) or in terms of the Labour Relations Act, 1995, (Act No. 66 of 1995) and which is not registered in terms of section 4 of the Pension Funds Act, 1956 (Act No. 24 of 1956) shall from the date on which the Labour Relations Amendment Act 2000, comes into operation, be deemed to be a pension or provident fund registered in terms of section 4 of the Pension Funds Act, 1956 (Act No. 24 of 1956).

(27) The Registrar of Pension Funds shall after consultation with a council fix a date by which a council must amend the rules of its pension or provident fund in order to comply with the provisions of the Pension Funds Act, 1956, and shall submit such rules to the Registrar in terms of section 12 of that Act.

(28) The Registrar of Pension Funds may on good cause shown grant an extension of time to a council in respect of a pension or provident fund to comply with the provisions of item 27.

(29) The Registrar of Pension Funds may on good cause shown grant a bargaining council a variation or exemption from any of the provisions of the Pension Funds Act, 1956 (Act No. 24 of 1956) and in respect thereof shall issue a licence of variation/exemption may only be effected in consultation with the council.

(30) Any approvals granted by the Industrial Registrar in terms of section 21(3) of the Labour Relations Act, 1956 (Act No. 28 of 1956), as amended or by the Registrar of Labour Relations in terms of section 53(5)(d) of the Labour Relations Act 66 of 1995, as amended, in respect of the investment of pension or provident fund moneys of a council shall remain in force until such time as they are either amended or withdrawn by the Registrar of Pension Funds in consultation with the council concerned.

(31) The Registrar of Labour Relations shall upon the request of the Registrar of Pension Funds in respect of a specific fund transfer the financial records of such pension and provident funds filed in his office to the Registrar of Pension Funds.

PART I - TRANSFER OF MEDICAL SCHEMES

(32) Any medical scheme which prior to 1 February 1999 was established as a medical scheme or was continued in terms of a collective agreement concluded in a bargaining council in terms of the Labour Relations Act, 1956 (Act No. 28 of 1956) or in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995) and which was not registered as a medical scheme under section 15 of the Medical Schemes Act, 1967, shall as from the date on which the Labour Relations Amendment Act 2000, comes in to operation be deemed to be a medical scheme registered in terms of section 24(1) read with sections 26 and 32 of the Medical Schemes Act, 1998, (Act No. 131 of 1998).

(33) The Registrar of Medical Schemes shall after consultation with a council fix a date by which a council must amend the rules of its medical scheme in order to comply with the provisions of the Medical Schemes Act, 1998, and the council shall submit such rules to the said Registrar in terms of section 31 of that Act.

(34) The Registrar of Medical Schemes, on good cause shown may grant an extension to a council in respect of its medical scheme to comply with the provisions of item (33).

(35) The Council for Medical Schemes may, on good cause shown grant a bargaining council on such terms and conditions and for such period as the Council may determine, a variation or exemption from any of the provisions of the Medical Schemes Act, 1998. The withdrawal or alteration of such variation/exemption may only be effected in consultation with the bargaining council.

(36) Any approvals granted by the Industrial Registrar in terms of section 21(3) of the Labour Relations Act, 1956 (Act No. 28 of 1956), as amended, or by the Registrar of Labour Relations in terms of section 53(5)(d) of the Labour Relations Act, 1995 (Act No. 66 of 1995) as amended, in respect of the investment of medical schemes moneys of a council shall remain in force until such time as they are either amended or withdrawn by the Registrar of Medical Schemes in consultation with the council concerned.

(37) The Registrar of Labour Relations shall upon the request of the Registrar of Medical Schemes in respect of a specific scheme transfer the financial records such medical scheme filed in his office to the Registrar of Medical Schemes."

PART J - TRANSITIONAL PROVISIONS IN RESPECT OF LABOUR COURT JUDGES WHO ARE NOT HIGH COURT JUDGES

(38) (a) Any person who was appointed as a judge of the Labour Court between the date of commencement of this Act and who is not a judge of the High Court, continues in office as a judge of the Labour Court, until that judge's terms of office, as determine by the President at the time of appointment of the Labour Court expires.

(b) The provisions of the principal Act, before amendment by this Act shall continue to apply to a judge referred to in paragraph (a) until that judge's term of office expires

(39) A judge referred to in item 38(a) may, before that judge's term of office expires, apply to be appointed as a judge of the High Court in terms of the Judges Remuneration and Conditions of Employment Act, 1989 (Act No. 88 of 1989)

Insertion of Schedule 11 to Act 66 of 1995

56. The principal Act is hereby amended by the insertion of the following schedule -

"SCHEDULE 11
PART I - POWERS OF DESIGNATED AGENTS OF BARGAINING COUNCILS

(1) In order to monitor or enforce compliance with a collective agreement concluded in the bargaining council, a designated agent may without warrant or notice at any reasonable time, enter any workplace or any other place where an employer carries on business or keeps employment records, that is not at home.

(2) A designated agent may only enter a home or any place other than a place referred to in subitem (1)-

(a) with the consent of the owner or occupier; or

(b) if authorised to do so in writing;

(3) The Labour Court may issue an authorisation contemplated in subitem (2) only on written application by a designated agent who states under oath or affirmation the reasons for the need to enter a place in order to monitor or enforce compliance with a collective agreement concluded in the bargaining council.

(4) If it is practicable to do so, the employer and a trade union representative must be notified that the designated agent is present at a workplace and of the reason for the inspection.

(5) In order to monitor or enforce compliance with a collective agreement a designated agent may-

(a) require a person to disclose information, either orally or in writing, and either alone or in the presence of witnesses, on a matter to which a collective agreement relates, and require that disclosure to be under oath or affirmation;

(b) inspect and question a person about any record or document to which a collective agreement relates;

(c) copy any record or document referred to in paragraph (b) or remove these to make copies or extracts;

(d) require a person to produce or deliver to a place specified by the designated agent any record or document referred to in paragraph (b) for inspection;

(e) inspect, question a person about, and if necessary remove, an article, substance or machinery present at a place referred to in subitems (1) and (2);

(f) inspect or question a person about any work performed; and

(g) perform any other prescribed function necessary for monitoring or enforcing compliance with a collective agreement.

(6) A designated agent may be accompanied by an interpreter and any other person reasonably required to assist in conducting an inspection.

(7) A designated agent must-

(a) produce on request the certificate referred to in subitem (2);

(b) produce on request a copy of the authorisation referred to in subitem (3);

(c) provide a receipt for any record or document removed in terms of subitem (5)(e); and

(d) return any removed record, document or item within a reasonable period of time.

(8) Any person who is questioned by a designated agent in terms of subitem (5) must answer all relevant questions lawfully put to that person truthfully and to the best of their ability.

(9) No answer by any person to a question by a person conducting an investigation in terms of this item may be used against that person in any criminal proceedings except proceedings in respect of a charge of perjury or making a false statement.

(10) Every employer and each employee must provide any facility at a workplace that is reasonably required by a designated agent to perform effectively the designated agent's functions.

(11) The bargaining council may apply to the Labour Court for an appropriate order against any person who-

(a) refuses or fails to answer all relevant questions lawfully put to that person truthfully and to the best of that persons ability;

(b) refuses or fails to comply with any requirement of the designated agent in terms of this item; or

(c) hinders the designated agent in the exercise of the agent's powers in terms of this item.

(12) For the purposes of this Schedule, a collective agreement is deemed to include any basic condition of employment which constitutes a term of a contract of employment in terms of section 49(1) of the Basic Conditions of Employment Act."

SCHEDULE 11

PART 2: MAXIMUM PERMISSIBLE FINES THAT MAY BE IMPOSED FOR FAILURE TO COMPLY WITH THIS ACT

1. This Schedule sets out the maximum fine that may be imposed by an arbitrator in terms of section 33A for a failure to comply with a provision of a collective agreement.

2. The maximum fine that may be imposed -

(a) for a failure to comply with a provision of a collective agreement not involving a failure to pay any amount of money, is the fine determined in terms of Table One;

(b) involving a failure to pay an amount due in terms of a collective agreement, is the greater of the amount determined in terms of Table One or Table Two.

TABLE ONE: MAXIMUM PERMISSIBLE FINE NOT INVOLVING AN UNDERPAYMENT

No previous failure to comply	R100 per employee in respect of whom the failure to comply occurs
A previous failure to comply in respect of the same provision	R200 per employee in respect of whom the failure to comply occurs
A previous failure to comply within the previous 12 months or two previous failures to comply in respect of the same provision within three years	R300 per employee in respect of whom the failure to comply occurs
Three previous failures to comply in respect of the same provision within three years	R400 per employee in respect of whom the failure to comply occurs
Four previous failures to comply in respect of the same provision within three years	R500 per employee in respect of whom the failure to comply occurs.

TABLE TWO: MAXIMUM PERMISSIBLE FINE INVOLVING AN UNDERPAYMENT

No previous failure to comply	25% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within three years	50% of the amount due, including any interest owing on the amount at the date of the order
A previous failure to comply in respect of the same provision within a year, or two previous failures to comply in respect of the same provision within three years	75% of the amount due, including any interest owing on the amount at the date of the order
Three previous failures to comply in respect of the same provision within three years	100% of the amount due, including any interest owing on the amount at the date of the order
Four or more previous failures to comply in respect of the same provision within three years	200% of the amount due, including any interest owing on the amount at the date of the order

57. Repeal of laws

Each of the laws referred to in the first two columns of Schedule 1 is hereby repealed to the extent specified opposite that law in the third column of that Schedule.

58. Short title and commencement

This Act is the Labour Relations Amendment Act, 2000, and will come into operation on a date determined by the President by proclamation in the *Gazette*.

SCHEDULE ONE: REPEAL OF LAWS

Number and year of law	Short Title	Extent of repeal
Act No 24 of 1956	The Pension Funds Act	Section 2(1)
Act No 25 of 1956	The Friendly Society Act	Section 3(1)(a)

LABOUR RELATIONS AMENDMENT BILL, 2000
EXPLANATORY MEMORANDUM

This memorandum sets out the rationale for amendments in the attached Labour Relations Amendment Bill, 2000.

1. Disputes concerning disclosure of information - Insertion of section 16(10A)

1.1 Section 189 requires employers to consult with workplace forums or trade unions if they are contemplating dismissing employees on account of their operational requirements. In terms of section 189(3) employers must provide trade unions (or any other representative of their workforce) with relevant information on the proposed dismissal.

1.2 Disputes concerning the disclosure of information in terms of section 189(3) are dealt with in terms of section 16 which regulates the disclosure of information to trade unions during collective bargaining and consultations. Unresolved disputes may be referred to conciliation and, if this is not successful, to arbitration.

1.3 Full and timely disclosure of relevant information is essential for meaningful consultation in terms of section 189 to take place. However, trade unions requesting documents are often placed in a difficult situation of having to justify the relevance of documents they have not had access to.

1.4 It is therefore proposed that section 16 be amended to require employers to prove that any information that the union has requested and they have declined to disclose is not relevant.

1.5 It is appropriate to place an onus on an employer to prove its assertion that information that it has refused to disclose on request is not relevant to the subject of the consultations. This information is peculiarly within the knowledge of the employer and it is therefore consistent with the general approach of the law of evidence that the employer should be required to show why requested documents are not relevant.

1.6 This approach is also consistent with sections 10 and 192 of the Act, which place evidential onuses on employers in disputes concerning freedom of association in terms of Chapter II of the LRA and in dismissal disputes.

1.7 This is one of a number of amendments aimed at ensuring there is a constructive and adequate process of consultations between employees and employers in the event of dismissals for operational requirements. It should be read in conjunction with the new section 189A and the amendments to section 191.

2. Termination of collective agreements - Amendment to section 23(4)

2.1 The LRA permits collective agreements that do not provide otherwise to be terminated on reasonable notice. The Act does not stipulate the form in which notice must be given. This can lead to disputes as to whether or not notice was in fact given.

2.2 It is proposed that notice to terminate a collective agreement must be given in writing.

3. **Disputes about collective agreements - Insertion of new section 24(8)**

3.1 In terms of section 24, any dispute about the interpretation or application of a collective agreement must be resolved by arbitration. On the other hand, settlement agreements, excluding collective agreements, can be made orders of the Labour Court in terms of section 158(1)(c) of the Labour Relations Act.

3.2 This has created the anomaly that an agreement concluded by an individual in settlement of a justiciable dispute can be enforced through the Labour Court, but an agreement settling a dispute of this type concluded by a trade union (because it falls within the definition of a collective agreement) must be enforced through arbitration.

3.3 It is proposed to resolve this anomaly by excluding collective agreements settling justiciable disputes from the procedures in section 24.

3.4 The proposed new section 24(8) must be read in conjunction with the amendments to section 158(1)(c) discussed below.

4. **Multi-union agency shops - Amendments to section 25**

4.1 Section 25(3)(b)(iii) provides that if more than one trade union is a party to an agency shop agreement, the agency fee that employees who are not members of the trade union must pay must be equivalent to or less than the highest amount of the subscription of the unions who are party to the agency shop.

4.2 In practice, this has resulted in situations in which employees are required to pay an agency fee based on the subscription of trade unions who represent professional or skilled workers and therefore charge a relatively high subscription fee.

4.3 It is proposed that in a multi-union agency shop, the maximum fee that could be charged as an agency fee should be equivalent to the average between the highest and lowest subscription of a trade union that is a party to the agency shop. The Bill sets out a formula for calculating the weighted average.

5. **Pension and provident funds and medical schemes - Amendments to section 28 and Schedule 7**

5.1 Prior to the enactment of the 1995 Labour Relations Act, provident and pension funds established in terms of a collective agreement of a bargaining council were excluded from the scope of the Pension Funds Act, 1956. Similarly, bargaining council medical aid schemes were excluded from the Medical Schemes Act, 1967. The 1998 LRA amendments provide that all funds and schemes set up on or after 1 February 1999 must register under the relevant laws.

5.2 The size of these funds and schemes has grown to such an extent that it is necessary to transfer regulatory oversight of existing funds and schemes to the Registrars of Pension Funds and

Medical Schemes respectively who have greater specialised capacity in respect of these funds than the Registrar appointed in terms of the Labour Relations Act.

5.3 These amendments will place all bargaining council pension, provident and medical funds under the supervision of the Registrars of Pension Funds and Medical Schemes respectively.

5.4 The amendments are accompanied by transitional provisions relating to investments of surplus moneys which remain in force until amended or withdrawn by the relevant Registrar.

6. Public service bargaining councils - Amendment to section 29

6.1 Special procedures were created to register bargaining councils established by the President for the public service. [Item 3(4) to (10) of Schedule 1]. The registration of all other bargaining councils, including those in respect of the public service, takes place in terms of section 29.

6.2 The whole of section 29 is not appropriate for the registration of bargaining councils in which the state is a party because:

(a) Demarcation disputes of the kind envisaged in the private sector do not arise as the scope of the bargaining councils is prescribed by legislation. NEDLAC therefore does not play a role in demarcating the sector and area of bargaining councils.

(b) There is also no need to publish the application for objections, as the principal parties having an interest in the bargaining council are the State and its employees. Bargaining councils established by the PSCBC will be by consensus, which will be clear from the resolution. When the President establishes a bargaining council it will be in the exercise of executive authority after consulting the PSCBC.

6.3 The purpose of the amendment therefore is to adapt section 29 to meet the special circumstances of bargaining councils in the public service by:

(a) allowing bargaining councils established by the PSCBC and the President to be registered by submitting a resolution or notice respectively to the Registrar;

(b) not making applicable to the public service councils, the provisions relating to the publication of an application for registration and the objection procedures.

7. Extension and termination of collective agreements - Amendments to section 32

7.1 <u>Extension of collective agreements to non-parties – Amendment to 32 (3)</u>

(a) Bargaining councils are entitled in terms of section 32 of the LRA to submit collective agreements to the Minister for extension within their registered scope. However, the Act does not formally regulate the right of employers, employers' organisations or trade unions who are not parties to councils, to make representations on the content of agreements.

(b) It is proposed that an obligation be placed on bargaining councils to include a provision in their constitutions allowing the making of representations by these employers, many of whom are small employers.

(c) This will enable the Minister of Labour to take into account in a structured manner the views of these employers before making a decision on extending the agreement in terms of section 32.

7.2 Extension of collective agreements – representativeness to be considered – Amendment to Section 32 (5)

(a) Section 32(5) regulates the extension of collective agreements concluded in bargaining councils if either the party trade unions do not represent the majority of affected employees or the party employers' organisations do not employ the majority of affected employees, but nevertheless the parties are sufficiently representative.

(b) Section 32(5) requires the Minister to assess the representativeness of the union and employers' organisations in respect of the registered scope of the bargaining council as a whole. However, in many cases the parties are only seeking to extend the agreement in respect of part of the registered scope of the Council. This may occur where a Council has several chambers, each of which concludes separate agreements.

(c) It is therefore proposed that the Minister should only take into account the representivity of the parties to the agreement in respect of the employers and the employees who would be covered by the agreement, if extended.

(d) This amendment must be read in conjunction with amendments to section 49 dealing with the Registrar's review of the representivity of bargaining councils.

7.3 Exclusion of public service – Amendment to section 32 (9)

Section 32(9) is to be amended to provide that the new section 32(3)(h) does not apply to bargaining councils in the public service.

7.4 Notice of termination of extended collective agreement – Insertion of new section 32 (10)

This new section introduces a requirement that where parties to a collective agreement that has been extended by the Minister agree to terminate the agreement, they must notify the Minister. This will enable the Minister to withdraw the notice extending the agreement.

8. Monitoring and enforcement of collective agreements by bargaining councils

8.1 Change of role of designated agents - Amendments to section 33 and insertion of Schedule 11 (Part 1)

(a) The Labour Relations Act of 1995 significantly altered the operation of bargaining councils, including the means by which they achieve compliance with their collective agreements. Bargaining councils have had to adapt their procedures in accordance with the Labour Relations Act.

(b) This process has revealed a need to refine the powers of officials in bargaining councils, called designated agents, who are responsible for the monitoring and enforcing of collective agreements.

(c) Presently the designated agents have the same powers as commissioners of the CCMA. These powers were designed to be utilised by commissioners when conducting conciliations and arbitrations. However, the role of the designated agents more closely resembles that of labour inspectors in terms of the Basic Conditions of Employment Act (BCEA).

(d) It is therefore proposed that designated agents should be given powers of inspection and inquiry similar to those of labour inspectors in terms of the (BCEA). These powers will be set out in Part 1 of Schedule 11 of the Labour Relations Act.

(e) Included in their revised powers is a duty to advise and assist small employers and workers who are not members of unions.

8.2 Disputes concerning bargaining council agreements - Insertion of new section 33A

(a) In terms of the 1956 Labour Relations Act, the failure to comply with industrial council agreements was a criminal offence. The 1995 Act decriminalised enforcement of collective agreements. Disputes concerning compliance with bargaining council agreements that cannot be resolved by conciliation are now referred to arbitration.

(b) The Act does not deal expressly with those disputes in which a bargaining council is a party (whether to claim payments on behalf of an employee or payments such as levies that are due to the council or contributions to funds established by councils).

(c) Many councils have provided for these arbitrations by collective agreement and the Labour Court has recently confirmed their validity. Nevertheless the status of these arbitrations requires clarification.

(d) A new section 33A is included to provide an explicit statutory basis for arbitrations dealing with the enforcement of bargaining council collective agreements. It is proposed that these arbitrations should be conducted by arbitrators appointed by the CCMA so as to ensure the independence of the arbitration process. The powers of arbitrators are modelled on those of the Labour Court in dealing with violations of the BCEA.

9. **Registration of bargaining councils in public service - Insertion of section 34(2A)**

9.1 This deals with the procedure for registering a bargaining council formed by the amalgamation of more than one existing council.

9.2 This amendment is related to the amendments discussed at point 5 above.

10. **Designation of sectors for bargaining councils in public service - Amendments to section 37**

10.1 Bargaining councils in which the State is a party are :
(a) deemed to be established by the Act (Item 3 of Schedule 1 or Part D of Schedule 7),
(b) established in terms of the constitution of the PSCBC; or
(c) established by the President [section 37(3)(b)].

10.2 Presently the Act does not provide clear powers and procedures for the disestablishment of a public service bargaining council. This situation is corrected by these amendments.

11. **Replacement of references to Wage Act – Amendments to section 44**

The Wage Act has been repealed and replaced by the BCEA. These amendments change references to the Wage Act to the relevant reference in the BCEA.

12. **Review of representivity of bargaining councils - Amendments to section 49**

12.1 Presently, the Registrar must conduct an annual representivity review of all bargaining councils. The major function of the review is to ensure that the Registrar is in possession of the information required to assess the representivity of bargaining councils for the purpose of exercising the discretion to extend collective agreements in terms of section 49. This places an unduly large administrative burden on the Registrar's office when evaluated in the light of the resources available to the Registrar and the relative significance of this function.

12.2 It is proposed that instead:

(a) The obligation will be on bargaining councils to provide the Registrar with the relevant information annually.

(b) The Registrar will be required to ascertain the representivity of parties to agreements that are extended by the Minister in terms of section 32. This will facilitate the Minister's exercise of his discretion in terms of section 32 whether or not to extend agreements.

(c) The Registrar will retain the discretion to assess the representibility of the parties to a council as a whole in appropriate cases.

12.3 The public sector bargaining councils will be excluded from this exercise.

13. **Referral of disputes by bargaining councils to CCMA - Amendment to section 51**

13.1 Certain bargaining councils have included provisions in their collective agreements providing that the CCMA must deal with all disputes of rights arising within the scope of the bargaining council. This has the result that the CCMA is required to conciliate and arbitrate disputes that the bargaining council is required to deal with in terms of the Act.

13.2 To avoid this problem, it is proposed to include a provision in the Act which requires councils to conclude an agreement with the CCMA concerning the referral of disputes to it before it can take effect. This will allow for the council and CCMA to regulate the referral of disputes in a structured manner and to reach agreement on matters such as the charging of arbitration fees.

14. **Investigation of affairs of bargaining council by Registrar - Amendments to section 54**

14.1 Presently, the Registrar does not have the power to investigate the affairs of a bargaining council that fails to comply with its statutory obligations including in respect of financial reporting.

14.2 The proposed amendment will empower the Registrar to investigate the affairs of a bargaining council that does not comply with its statutory obligations and to submit a report to the Labour Court.

15. Variation of scope of registered bargaining councils - Amendments to section 58

15.1 The Act presently requires NEDLAC to deliberate on all applications by bargaining councils to vary their registered scope. In practice, councils frequently make minor adjustments to their scope and it is inappropriate and unnecessary for NEDLAC to deliberate on these.

15.2 The proposed amendments require the Registrar to publish for comment all proposals by bargaining councils to vary their registered scope. If no objection is received, the Registrar may register the change in registered scope. Only variations which are objected to will be submitted to NEDLAC for deliberation.

16. Cancellation of registration of public service bargaining councils - Amendments to section 61

16.1 Section 61 which permits the Registrar to cancel the registration of councils is cumbersome and inadequate in its application to the public service. The Public Service Coordinating Bargaining Council (PSCBC) and the President are better placed to determine whether a council should be registered or deregistered than the Registrar.

16.2 The amendments permit the deregistration of bargaining councils established by the PSCBC, including the departmental and provincial bargaining councils that were deemed to be established in terms of the constitution of the PSCBC, by the submission of a resolution to the Registrar.

16.3 Bargaining councils established by the President will be deregistered by notice from the President to the Registrar.

16.4 There will be no need to notify parties of the Registrar's intention to cancel the registration. The need for an appeal against the decision of the Registrar will also fall away as the cancellation will be effected by consensus within the PSCBC.

16.5 The right to review the decision of the Registrar will remain available in accordance with section 158(1)(g) of the Act.

16.6 Similar consequences will follow if the President requested the cancellation of the registration of the council.

17. Establishment of workplace forums - Amendments to section 78

17.1 In terms of the 1995 Labour Relations Act workplace forums could only be set up in workplaces of over 100 employees where a registered trade union, or a group of trade unions, that represent the majority of employees in a workplace approves of its formation.

17.2 The majority of applications at the CCMA for workplace forums have come from workplaces which do not meet the above requirements. This has led to a dearth in the number of workplace forums set up in terms of the LRA. To date 78 applications for workplace forums have been made but in only 17 instances have the requirements of the Act been met and the workplace forums established.

17.3 It is proposed that the scope of application of the provisions is extended to other workplaces but be done in a manner that does not undermine the existing rights of representative trade unions.

17.4 The amendments propose workplace forums could be established in three additional situations –

(a) a registered trade union can apply to establish a workplace forum in a workplace in which the majority of employees are not trade union members, if the application is supported by non-union members and a majority of employees in the workplace as a whole support the application;

(b) the majority of employees in a workplace in which there is no registered trade union can apply to establish a workplace forum;

(c) in workplaces of less than 100 employees.

17.5 These amendments take cognisance of the existing requirement of majority support when a workplace forum is triggered by a trade union. This ensures that workplace forums cannot be used by employers as a basis for "sweet heart" arrangements with minority groups of employees to undermine trade unions or collective bargaining.

18. Establishment of workplace forums – Consequential amendments to section 80

These amendments are consequential arising out of the decision to increase the number of circumstances when a workplace forum can be established.

19. Registration of trade unions and employers' organisations - Amendments to section 95

19.1 The 1995 Labour Relations Act introduced a simplified registration procedure. The Registrar must register a trade union or employer's organisation that has applied for registration in the prescribed manner if he is satisfied that it is a trade union or employers' organisation as defined in the Act, that its constitution complies with the Act and that it is non-discriminatory and is appropriately named. In addition, trade unions must be independent of employer influence.

19.2 Significant benefits flow from registration of trade unions and employers' organisations, in particular, the right to refer disputes to the CCMA and the Labour Court and to represent their members in these disputes.

19.3 Since the enactment of the 1995 Labour Relations Act there has been a significant increase in the number of trade unions and employers' organisations. A significant number of these are no more than disguised labour consultancies that have registered for the sole purpose of gaining appearance rights at the CCMA and Labour Court.

19.4 It has also come to the attention of the Department that a number of these 'trade unions' adopt coercive practices that are indicative of the fact that they are not genuine trade unions:

(a) the trade unions coerce members to sign agreements which entitle the union to all benefits due to the member by the employer upon death of the member;

(b) if the trade union acts on behalf of a 'member' in a claim, excessive or disproportionate, the full amount of any payment received is not paid over to the member and often a service fee is charged;

(c) some unions require up to six months notice of resignation from members and levy heavy resignation fees on members.

19.5 There are also strong indications that some financial and insurance brokers have become active in the establishment and the affairs of trade unions and employers' organisations in order to market financial or insurance products. In one instance a Magistrate's Court ordered the transfer of a union's assets and all records (in effect the registration and management) to an insurance broker. This broker then attempted to continue by cloaking its activities under the banner of a union. The status quo was partially restored but only after a lengthy, resource-absorbing and time-consuming process.

19.6 The operation of certain labour consultancies that have registered as employers' organisations undermine effective dispute resolution. These organisations tend to recruit their members from small businesses that are inexperienced in respect of labour relation's matters. Once gullible employers have joined, they are frequently faced with exorbitant fees.

19.7 This creates a negative impression of the Labour Relations Act and its dispute resolution institutions and undermines the efforts of genuine organisations participating in collective bargaining structures to recruit such employers. This in turn negatively impacts on the participation by certain employers, including small employers in bargaining councils.

19.8 The proposed amendments to section 95 are intended to discourage the formation and registration of trade unions and employers' organisations that are not genuine, by introducing a requirement that they be genuine or bona fide and giving the registrar of labour relations the power to refuse to register organisations which are not. The Minister will have the power to issue guidelines concerning whether or not a trade union or employers' organisation is bona fide. Any refusal to register a trade union on these grounds will be subject to appeal to the Labour Court.

19.9 The International Labour Organisation has expressed the view that this is in keeping with its standards concerning the promotion of collective bargaining and freedom of association.

20.–22. **Winding up and cancellation of registration of trade unions and employers' organisations - Amendments to sections 103, 105 and 106**

20.1 The following problems have been identified with the provisions of the Labour Relations Act regulating the winding up and deregistration of employers' organisations and trade unions –

(a) there are a significant number of trade unions and employers' organisations that have ceased to function but have not been wound up or deregistered;

(b) many organisations do not resolve to wind up their affairs. If this is not done, the organisation can only be wound up if it is unable to continue to function for a reason that cannot be remedied or if it is insolvent;

(c) only the Labour Court has the power to wind up trade unions and employers' organisations. It is extremely time-consuming and expensive for the Registrar to apply to the Labour Court to have these trade unions or employers' organisations wound up. Further, the Registrar has no power to wind up unregistered organisations and any application in this regard would have to be made to the Labour Court;

(d) the Registrar's power to cancel registration in terms of section 106 is restricted. The Registrar may only cancel a trade union or employers' organisation's registration if it is wound up or, in the case of a trade union, if the Labour Court has declared that it is not independent.

20.2 The proposed amendments would have the following effect -

(a) the Labour Court's power to wind up organisations would be extended to cover unregistered trade unions and employers' organisations;

(b) the grounds on which an organisation could be wound up would be extended.

20.3 The amendments seek to make cancellation of registration a more effective remedy for the Registrar to deal with trade unions or employer's organisations which engage in the type of exploitative practice described in paragraph 19 above.

20.4 It will also enable the Registrar to regulate disguised labour consultancies and similar organisations. Cancellation of registration deprives these organisations of their rights of appearance in the CCMA and Labour Court.

20.5 The Registrar will only be able to withdraw the registration of a trade union or employer's organisation after allowing it a 60-day period to show cause why it should not be de-registered. Any decision by the Registrar will be subject to appeal to the Labour Court. The fact that the Registrar's decision is subject to appeal ensures that these amendments comply with the relevant international labour standards.

23. **Joinder of parties in arbitration proceedings – Amendment to section 115**

23.1 The CCMA rules do not explicitly regulate a range of procedural issues that may arise in arbitration proceedings such as joining parties to proceedings or changing the citation of parties. In contrast, the Labour Court rules deal with this expressly.

23.2 It is proposed to give the CCMA express powers to draft rules on these issues.

24. **Delegation of functions by directors of CCMA – Amendment to Section 138**

24.1 Presently, the director is not able to delegate the responsibility to make a decision concerning the extension of the period within which an arbitration award must be made.

24.2 It is proposed to give the director this power, after consulting the governing body of the CCMA.

25. **Charging of fees by commission – Amendments to section 123**

25.1 The powers of the Commission to charge fees are regulated by section 123. The CCMA cannot charge a fee for conducting an arbitration. It is proposed to amend section 123 to enable the CCMA to charge an arbitration fee.

25.2 An important consideration underlying this proposal is that a significant number of arbitrations conducted by the CCMA involve the dismissal of executives, managers and other highly-paid employees. These parties generally engage legal teams and the hearings are lengthy, often involving frequent postponements.

25.3 These disputes could be resolved by private arbitrations so that the resources of the CCMA are freed to assist more vulnerable workers. However, few employment contracts provide for the referral of these disputes to private arbitration.

25.4 It is believed that the CCMA should have the ability to charge arbitration fees to parties involved in disputes concerning employees earning in excess of a defined earning threshold. This would encourage these parties to provide for these disputes to be referred to private arbitrations.

26. **Representations of employers and employees - Amendment to section 135**

26.1 Representation by employers – Amendment to section 135 (4) (a)

(a) Presently, a company involved in proceedings before the CCMA may be represented by an employee or director of the company. However, frequently the structure of companies is such that the employees who perform human resources or industrial relations functions are employed by subsidiary or holding companies.

(b) It is proposed to amend the Act to allow companies to be represented by employees or directors of holding or subsidiary companies, as defined in terms of the Companies Act. This amendment will apply to the right of representation in conciliation (section 135), arbitration (section 138) and the Labour Court (section 161).

26.2 Membership of trade unions or employers' organisations - Amendments to section 135(4)(b)

(a) As has been pointed out above, there are a number of trade unions and employers' organisations that are no more than labour consultancies. Employees or employers who seek their advice are then signed up as members. A feature of trade unions and employers' organisations that are formed solely to gain access to the CCMA is that their members generally join after the date on which their dispute arose.

(b) The proposed amendment to section 135 limits the potential abuse of registration by requiring that the person must have been a member of any trade union or employers'

organisation before the date on which the dispute arose for that organisation to represent him or her in conciliation.

(c) It has been accepted in other jurisdictions that a restriction of this type does not impinge upon freedom of association.

(d) Amendments to section 138 and section 161 extend this principle to arbitrations and the Labour Court.

27. General provisions for arbitration proceedings – Amendments to section 138

27.1 Representation by lawyers - Amendment to section 138 (4)

Candidate attorneys appear in the Magistrate's Court, which is of equivalent status to that of the CCMA. The Act is amended to provide candidate attorneys with a right of appearance at the CCMA.

27.2 Awards of costs in arbitrations - Amendments to section 138 (10)

(a) The power of CCMA commissioners to award costs in arbitrations is extremely limited. A commissioner may only award costs against a party who is guilty of vexatious or frivolous conduct in bringing or conducting a case.

(b) Cases without merits are referred to the CCMA and inadequate attempts are made to resolve disputes before they reach the CCMA. This results in the CCMA having to devote its limited resources to cases that either have no merits or could easily have been resolved.

(c) It is proposed that the Act be amended to expand the power of commissioners to make costs orders in arbitration.

(d) This change is intended to discourage parties from behaviour, which unnecessarily increases the workload of the CCMA such as seeking arbitration in cases without merits, or not taking part in conciliation.

(e) However, it is not proposed to adopt the approach of the civil courts in which an unsuccessful party inevitably pay costs. Such an approach would have the effect of discouraging many parties from referring worthwhile cases because of a fear of a costs award. The factors that a commissioner must take into account in making an award of costs are set out in detail in section 138(10).

(f) It is envisaged that this change will force trade unions and employers to make a realistic assessment of cases before referring them and encourage dispute resolution.

27.3 Tariff for costs – Insertion of section 138 (12)

A tariff would be fixed, setting out the amounts payable which the commissioner could award. This would avoid the need for a separate taxation hearing to determine the amount of costs.

27.4 Regulation of labour advisers – Insertion of new section 138A

(a) A wide range of persons are active in advising employers, employees and their organisations on labour relations. These include labour consultants as well as paralegals working in advice offices and community law centres.

(b) The activities of advisers are not regulated by any professional body and there is no forum to which complaints can be directed. The CCMA has received complaints concerning the quality of services provided by and the fees charged by certain consultants. The Commission has no jurisdiction to take action on these complaints.

(c) On the other hand, many of these advisers are legally competent and professional persons who provide important advice on labour law to the public, often to indigent persons. They have no rights of appearance at the CCMA. As is pointed out elsewhere, certain consultants have sought to obtain rights of appearance by transforming their consultancies into trade unions or employers' organisations.

(d) To address these problems, it is proposed to establish a five-person Labour Advisers Board appointed by the Minister of Labour. The Board will determine the criteria for accrediting labour advisors and will decide on applications for accreditation. The Board will also be required to establish a code of ethics for labour advisers and hear complaints.

(e) Accredited labour advisers will be entitled to appear in joint conciliation – arbitration proceedings held in unfair dismissal cases. The Board will have the power to suspend or withdraw the rights of appearance of a labour adviser who is found to have violated the code of ethics.

28. **Promotion of joint conciliation-arbitration (Con-Arb) - Amendments to section 140**

28.1 The Labour Relations Act requires that all disputes must be referred to conciliation before they are referred to arbitration. As a high proportion of disputes are resolved in conciliation, it was anticipated that this would expedite dispute resolution and reduce the number of cases in which arbitration is required.

28.2 In practice, the processes of conciliation and arbitration have been separated so that arbitration takes place long after conciliation. In a significant number of circumstances, parties often refuse to participate in conciliation or do not even attend conciliation hearings. Figures maintained by the CCMA show that there have been no shows at conciliation in 9 634 cases since start up in November 1996; this represents 3,5% of all disputes. The requirement for a separate conciliation and arbitration hearing significantly increases the workload of the CCMA, increases the cost of resolving disputes and lengthens the period required to finalise arbitrations.

28.3 It is proposed to amend section 140 to enable the CCMA to resolve unfair dismissal cases by a joint process of conciliation and arbitration (what is commonly known as 'con-arb'). In practice, the matter would be enrolled for a particular date and the parties would be advised accordingly. In the notice, the parties would be advised that if the matter cannot be resolved by conciliation, the arbitration would commence immediately and that they must accordingly be prepared for the arbitration.

28.4 At the outset of the hearing, the Commissioner would attempt to resolve the dispute by conciliation. If this is not successful, the arbitration would then commence. The introduction of 'con-arb' is expected to have a number of significant advantages for the quality, efficiency and cost-effectiveness of dispute resolution by the CCMA.

28.5 The time lag between conciliation and arbitration will be removed resulting in the swifter settlement of disputes. It is envisaged that less complex cases could be resolved in a single hearing. Parties will no longer be able to ignore the conciliation process.

29. Powers of commissioners – Amendments to section 142

29.1 Payment of Witness Fees – Amendment to section 142(7)

Presently the CCMA is liable for the payment of witness fees, even where a party to proceedings has requested that a witness be sub-poened. This is not in line with normal practice in the civil courts and can lead to abuse. It is proposed to make a party who requests the CCMA to subpoena a witness liable for the payment of witness fees.

29.2 Contempt of the Commission - Amendment to section 142

(a) At present, CCMA Commissioners cannot make rulings on conduct, which is in contempt of the Commission. Contemptuous conduct includes failing to comply with a subpoena, and hindering or insulting a Commissioner. The CCMA has proposed that it be given the power to deal with contempt cases more efficiently.

(b) The proposed amendment gives a Commissioner power to make a finding of contempt. The Commissioner would then refer the findings and the relevant record of proceedings to the Labour Court for its consideration. The Labour Court will have the power, after an appropriate hearing, to confirm, set aside or vary the finding and to impose appropriate sanction for contempt.

30. Enforcement of arbitration awards - Amendment to section 143

30.1 An award made by an arbitrator in terms of the Labour Relations Act is final and binding. However, it can only be enforced after it has been made an order of the Labour Court. The process of making an arbitration award a Labour Court order is time-consuming and expensive for successful applicants and occupies valuable court-time.

30.2 This undermines many of the cost-savings introduced by expedited arbitration at the CCMA. It also imposes undue hardship on successful litigants who reside in areas in which there is no Labour Court. For instance, an employee in the Northern Province who obtains an arbitration award against his or her employer must, if the employer does not voluntarily comply with the award, bring an application in the Labour Court in Johannesburg.

30.3 It is proposed that the enforcement of awards be expedited by according arbitration awards the same status as orders of a civil court (such as the Labour Court, the High Court or the Magistrate's Court). If the award is for payment of an amount of money, a successful party will be able to issue warrants of execution through the Deputy-Sheriff without the need to obtain a Labour Court order.

30.4 This would apply to awards by CCMA arbitrators as well as awards made in terms of the Labour Relations Act by arbitrators appointed by bargaining councils or an accredited agency. Other awards, such as an award of reinstatement or specific performance, will be enforced through the Labour Court on the basis of contempt proceedings.

30.5 The amendment should increase the level of compliance with arbitration awards and will significantly reduce the roll of the Labour Court. It is estimated that the Labour Court deals with approximately 100 such cases per month.

30.6 As a mechanism of quality control, all awards will have to be certified by the director of the CCMA, or an official to whom this power has been delegated, before the award can be enforced in this manner.

31. Variation and rescission of awards - Amendment to section 144

31.1 Courts and other tribunals generally have the power to vary or rescind awards that contain obvious errors or were improperly obtained. However at present only the CCMA commissioner who issued an award may rescind or vary it. This provision can lead to delays where the commissioner has resigned or is unavailable for some other reason.

31.2 In addition, the grounds on which a commissioner can vary or rescind an award are narrower than those applicable to civil courts such as the Labour Court.

31.3 The amendment allows another commissioner to vary or rescind an award. The director of the CCMA will be able to appoint another commissioner to deal with an application for variation or rescission where the original commissioner is unavailable. In addition, the grounds on which orders can be varied or rescinded are expanded.

32. Condoning late review applications - Amendment to section 145

32.1 The Labour Court does not have an explicit power to condone review applications of arbitration awards lodged more than six weeks after the arbitration award.

32.2 It is proposed that the court should have the power to condone late applications if good cause is shown.

33.-35. Appointment of Labour Court Judges - Amendments to sections 152 – 154

33.1 Presently, Labour Court judges do not have the same status as judges of the High Court. They are appointed for a term of office determined by the President. Current appointees have been appointed for terms of office of variable years. Their status impacts adversely on their terms of employment and their security of tenure. This effects the capacity of the court to attract or retain judges of the appropriate calibre.

33.2 It is therefore proposed that judges of the Labour Court should also be judges of the High Court. New judges of the Labour Court would simultaneously be appointed as judges of the High Court and would be able to transfer to appointments in the High Court without loss of

benefits. It is envisaged that these amendments will make an appointment to the Labour Court a more attractive option.

33.3 Transitional provisions have also been included for current judges who chose not to become High Court judges. They will accrue benefits equivalent to judges of the Land Claims Court at the expiry of their term of office as contemplated in Section 26 of the Restitution of Land Rights Act, 1994.

36. **Labour Court power to make orders - Amendment to section 158**

36.1 Section 158(1)(c) provides that settlement agreements (excluding collective agreements) may be made orders of the Labour Court. The effect of this is that settlement agreements concluded by trade unions cannot be made orders of the Labour Court as these agreements fall within the Act's definition of a collective agreement.

36.2 It is proposed to amend the Act to provide that all agreements settling justiciable disputes (i.e. disputes that a party has a right to refer to arbitration or to the Labour Court), including collective agreements, can be made orders of the Labour Court.

37. **Representation before Labour Court – Amendments to section 161**

See notes at point 26 and 27.

38. **Noting of appeals to the Labour Appeal Court - Repeal of section 173**

38.1 The time period for noting an appeal to the Labour Appeal Court is regulated in a contradictory manner by both section 173(3) and by the Labour Appeal Court Rules. The need to resolve this anomaly has been noted by the Labour Appeal court.

38.2 Accordingly, it is proposed to repeal section 173(3).

39.&40. **Amendments to sections 186 and 187**

This is discussed under point 45 with reference to Section 197.

41. **Regulation of unfair dismissals - Amendment to section 188**

41.1 <u>Probationary periods of employment – Amendment to section 188(2)</u>

(a) The existing Code of Practice in Schedule 8 to the LRA entitles an employer to place an employee on probation for an appropriate period to evaluate whether they are suitable to perform the job for which they are hired. However, in practice the Labour Court and CCMA have drawn no distinction on any consequence between employees on probation and those who have completed a period of probation.

(b) As a consequence, there is considerable uncertainty about the procedural and substantive requirements for a fair dismissal during probationary periods.

(c) Amendments are proposed to section 188(2)(a) to regulate the making of a decision on an employee's capacity or suitability during probation. When read in conjunction with changes to the Code of Good Practice, this should provide more specific guidance to persons making decisions about dismissals during probationary periods.

(d) Probationary periods of a reasonable duration are permitted by ILO Convention 158. The purpose of a probationary clause is to prevent an employer being saddled indefinitely with workers who fail to perform satisfactorily.

41.2 Procedural fairness – Insertion of new subsection (2)(b) in Section 188(2)

(a) Presently, the obligation for procedural fairness is established by section 188 of the Act and expanded upon in the Code of Good Practice: Dismissals. The Code of Good Practice provides that the essential aspect of the right to procedural fairness is the right for an employee to state his or her case, assisted by a fellow employee.

(b) The intention of the Code was to ensure procedural fairness without requiring employers to hold a formal inquiry in the style of a court case. In practice, CCMA arbitrators have tended to require employers to hold formalised disciplinary inquiries. This can impose an unrealistic obligation upon employers, particularly small employers. The evidence presented at the internal inquiry is subsequently repeated at the arbitration hearing resulting in an unnecessary duplication of hearings.

(c) The amendment seeks to better define the requirement of procedural fairness so as to avoid the duplication between disciplinary procedures and arbitrations, and to allow for simplified internal procedures. It will allow for greater flexibility in the form that disciplinary inquiries take without sacrificing the essential aspects of an employee's right to a fair hearing. The employee has the right, with appropriate assistance, to state his or her case to the employer and if this does not succeed to have the case arbitrated on the merits by the CCMA.

41.3 Inquiries conducted by an arbitrator - Insertion of new section 188A

(a) As is mentioned in the previous point, there is extensive duplication between internal hearings and arbitrations. For instance, the same witnesses give evidence on the same topics in both hearings and are cross-examined on both occasions. This is time-consuming for managers, trade union representatives and the CCMA without necessarily improving the quality of the outcome.

(b) The proposed new section 188A allows employers and employees to agree that an arbitrator will conduct an inquiry concerning an employee's conduct or capacity. The decision of the arbitrator will be final and subject to review by the Labour Court.

(c) The advantage of this approach is that it avoids, by agreement between the parties, the need to have both an internal inquiry and an arbitration. It also imposes the financial costs of this inquiry on the employer rather than the CCMA.

(d) It will have significant benefits for employers, especially small employers. Managers and witnesses will only need to be absent from work to participate in a single inquiry. The fact that the employee must agree to the arbitrator conducting the hearing and that the decision will be made by an independent arbitrator means that the employee's right to a fair hearing is not compromised.

(e) It will have personnel and financial benefits for the CCMA and will offer the very significant benefit of swifter resolution of these cases to employers and employees.

42. **Notification of and facilitation in large-scale retrenchments - new section 189A**

42.1 Trade unions are critical of the manner in which employers conduct retrenchment consultations. They argue that these meetings are often formalities because the decision to retrench has already been taken. In addition, these proceedings often become highly adversarial and the parties fail to explore options that could avoid or reduce the size of the retrenchment. The parties often become pre-occupied with disputes about the disclosure of information rather than seek to avoid or minimise dismissals. This has particularly severe consequences in large-scale retrenchments where thousands of jobs are at stake.

42.2 The purpose of the proposed new section 189A is to enhance the effectiveness of consultations in large-scale retrenchments. The section provides for the appointment of a facilitator with the brief of assisting the parties to endeavour to reach consensus. This will be applicable to retrenchments in which more than 500 employees may be dismissed.

42.3 It is envisaged that the facilitator's role will be primarily conciliatory. However, the facilitator will have the power to resolve disputes over the disclosure of information on an expedited basis. The facilitator will also be required to assist the parties to explore options in terms of the Social Plan. The consulting parties will be able to agree on conferring additional powers on the facilitator.

42.4 The purpose of the amendment is to seek to resolve these disputes through consultation in a manner that promotes job retention and job creation, rather than by adjudication.

42.5 A further amendment is made requiring employers to report large-scale retrenchments to the Minister of Labour. This is in accordance with the Social Plan agreement finalised at the 1998 Presidential Job Summit.

43. **Date of dismissal – Amendment to section 190**

An amendment has been made to clarify the date of dismissal as being the date on which a final decision to dismiss an employee was made. This clarifies the position when employers have internal appeal procedures.

44. **Dispute about unfair dismissal and unfair labour practices - Amendments to section 191**

44.1 Incorporation of unfair labour practice – Amendment to section 191(1)

See discussion of section 193.

44.2 Jurisdiction of CCMA to arbitrate individual retrenchment disputes - Amendment to section 191(a-c)

(a) All operational requirement dismissal cases must now be dealt with by the Labour Court. This includes relatively simple cases involving the dismissal of an individual who may not be able to afford the costs of Labour Court litigation.

(b) It is accordingly proposed that section 191 be amended to allow an individual employee to have his/her retrenchment dispute arbitrated by the CCMA. The CCMA is of the view that its arbitrators have the expertise to handle these cases and that this will not unduly burden its caseload.

(c) This amendment will significantly reduce the caseload of the Labour Court. About 50% of cases that go to trial deal with individual retrenchments.

44.3 Use of experts and assessors in operational requirements dismissal cases - Insertion of section 191A

(a) Many operational requirements cases require the court to evaluate complex economic issues. Courts often feel unable to grapple with these issues. One consequence of this is that courts seldom rule that a dismissal for operational requirements is procedurally unfair unless the employer has been guilty of bad faith or has an ulterior motive such as union-bashing.

(b) The purpose of this amendment is to assist the Labour Court in dealing with the economic issues that underlie many operational requirements dismissals. The amendments propose two mechanisms that can here be used to assist the court in its deliberations on these issues.

(c) Firstly, an application can be made to the Labour Court for the court to obtain expert assistance by appointing a person to prepare a report on the issues underlying the case. The Labour Court currently only has the power to request the CCMA to prepare a report.

(d) Secondly, it is proposed that the parties to an operational requirements case should be able to apply to appoint assessors (wing persons) to advise the court. The assessors would not have deliberative votes. Their role would be advisory.

(e) This is based on the approach used in essential service arbitrations under the old Labour Relations Act. In practice, the parties are able to appoint persons with expertise in the relevant sector to advise the judge informally.

(f) It is believed that these amendments will promote more effective decision-making in operational requirements cases.

45. **Unfair labour practices - Amendment to section 193**

45.1 The 'residual' unfair labour practice is regulated by items 2 and 3 of Schedule 7 which contains transitional provisions. Those portions of item 2 which dealt with discrimination have been repealed and moved to the Employment Equity Act.

45.2 It is proposed to incorporate the remaining provisions at 193. This will then allow the procedures in Chapter VIII to apply to both unfair dismissals and unfair labour practices. This amendment involves no substantive change to the law.

46. Procedurally unfair dismissals - Amendments to section 194

46.1 Section 194(1) provides that if a dismissal is procedurally unfair, the arbitrator must award the employee compensation equivalent to what his or her earning would have been in the period between the dismissal and the arbitration. In addition, no cap was placed on the compensation that could be awarded, although the maximum compensation for a substantively unfair dismissal is 12 months.

46.2 This approach was predicated on an efficient statutory dispute resolution mechanism. The Explanatory Memorandum to the 1994 draft Bill notes that "within a matter of weeks after a dismissal there will be a final and binding award." In practice, the premise on which the formula for compensation was based has not been realised.

46.3 It is proposed to introduce a greater degree of discretion for arbitrators, in the awarding of compensation for procedurally unfair dismissals. The amendment also clarifies rights to compensation by setting the maximum compensation at 12 months in the case of both substantively and procedurally unfair dismissals.

47. Transfer of contracts of employment - Amendment to section 197

47.1 At common law, a contract of employment cannot be transferred from one employer to another, unless the employee consents. Section 197 restates the rule and creates two statutory exceptions. In terms of these, a contract may be transferred between employers without the consent of employees if –

(a) the whole part of a business, undertaking or trade is being transferred as a going concern ("going concern transfer") [section 197(1)(a)];

(b) a going concern transfer occurs in circumstances in which an employer is insolvent and is either wound up, sequestrated or a scheme of arrangement of compromise is entered into; ("insolvency transfer") [section 197(1)(b)].

47.2 As the Labour Court has noted, this has significant benefits for employers. They are able to conclude complex transfer arrangements without the cost of retrenching employees who might (in the absence of such a provision) not consent to the transfer of their contracts. The section seeks to balance these flexibility benefits with the protection of the employee's conditions of service in a transfer.

47.3 In practice, the manner of drafting has created considerable uncertainty. The major areas of uncertainty are –

(a) whether the transfer of employees in terms of section 197(1)(a) and (1)(b) is permissive (i.e. transfer at the employers' discretion) or mandatory (i.e. section 197 applies to all going concern transfers);

(b) what the key phrase 'whole or any part of a business, trade or undertaking' means?;

(c) the relationship between section 197 and the provisions concerning dismissal for operational requirements (section 189) - for instance, when does a transfer justify a dismissal?

47.4 The social partners have all made representations calling for greater clarity to be introduced. The need to clarify the meaning of portions of section 197 has been stressed by the Labour Court and the Labour Appeal Court.

47.5 The automatic transfer of contracts has also had some unintended consequences. Employees have in at least one case obstructed a company merger by insisting on an exact duplication of their old terms and conditions with the new employer.

Features of the revised section 197

47.6 The revised section 197 seeks to address the problems raised by the social partners and to clarify the meaning of the section. The section has been significantly redrafted in a manner that should clarify its operation. The most significant features of the revised draft are set out in the following paragraphs –

(a) Gives the parties greater guidance as to when a transfer will be covered by section 197. The definition stresses that two elements must be present: a clearly defined economic entity consisting of an organised grouping of economic resources must be transferred and it must retain its identity after the transfer.

(b) Clarifies that there is an automatic transfer of contracts in the case of all transfers that fall within the section. This gives effect to the intention of the original legislation. (subsection 3)

(c) Clarifies the application of the transfer rules to transfers that take place when an employer is insolvent. Again, this seeks to give effect to the intention of the original legislation. A transfer of contracts occurs but obligations incurred before the insolvency rest with the estate of the insolvent (old) employer. These amendments are included in a new section 197A. This amendment has been drafted to achieve consistency with the proposed draft Insolvency Amendment Bill.

(d) Allows an employer to employ transferred employees on different terms and conditions provided they are on the whole as favourable to the employee as the conditions provided by the old employer. This will allow greater flexibility in transfers as the old conditions do not need to be replicated in every detail. (subsection 4)

(e) Clarifies the application of transfer provisions to pension and medical funds that are conditions of employment. The value of these conditions must be valued by reference to the employer's contribution to the relevant fund and not the benefit to which the employee is entitled. This will facilitate transfer where companies belong to different funds. (subsection 5)

(f) Provides that the old employer's obligations in respect of trade union organisational rights or recognition agreements are transferred to the new employer. This will facilitate the continuity of collective bargaining. (subsection 6)

(g) Allows the old or new employer to negotiate with trade unions, or other employee representatives, on any aspect of the transfer, including whether an employee's service will be transferred to the new employer. This increases the scope for agreements in terms of a transfer. (subsection 7)

(h) Clarifies the relationship between section 197 and the law regulating unfair dismissal. An employee may not be dismissed merely because a transfer occurs. However, if the transfer creates operational requirements that justify a dismissal, an employee may be dismissed. (subsection 8) This would be the case where the new employer rearranges work in such a manner that it requires fewer employees than the old employer. In terms of the amendment to section 187(1), a dismissal due to a transfer which cannot be justified in terms of operational requirements is automatically unfair. It is further provided that where an employee resigns because the new employer has failed to provide employment conditions equivalent to those provided by the old employer, this constitutes a constructive dismissal [section 186(e)]

(i) Makes the old employer and the new employer jointly and severally liable for claims arising prior to the transfer. (subsection 9) This does not apply to transfer in accordance with the Insolvency Act.

48. **Proof as to who is an employee – Insertion of new section 200A**

48.1 The same amendment has been made to section 83 of the BCEA. For discussion please refer to explanatory memorandum of Basic Conditions of Employment Amendment Bill.

49. **Codes of Good Practice – Amendments to Section 203**

49.1 Presently, a Code of Good Practice issued under the Labour Relations Act can only be taken into account when interpreting or applying that Act. This creates anomalous situations where a Code of Good Practice is applicable to more than one Act. An example of this is the Code of Good Practice on Sexual Harassment which is relevant to both the LRA and the Employment Equity Act.

49.2 It is proposed to amend Section 203 to allow a Code of Good Practice to be taken into account in interpreting or applying employment law.

50. **Section 204**

Technical amendment replacing reference to Wage Act with BCEA.

51. <u>Definitions – Amendments to Section 213</u>

51.1 <u>Definition of candidate attorney</u>

(a) The amendment Bill gives candidate attorneys the same right of representation as lawyers at the CCMA. A definition of candidate attorney is thus required.

(b) Candidate attorneys are defined with reference to the Attorneys Act, 1979.

51.2 Definition of public service and definition of workplace in the public service
The definitions are updated and aligned with the current definitions in the Public Service Act.

51.3 Definition of 'unfair labour practice'
See amendment to 193. This is a consequential amendment and to align the LRA with the Employment Equity Act.

52.-54. **Pension and provident funds – and Labour Court Judges – Inclusion of transitional arrangement in Schedule 7**

See point 4 and point 33.

55 **Code of Good Practice on Unfair dismissal – Amendment to Schedule 8**

55.1 Probationary employment – Amendment to Schedule 8

See point 39.1. The Code of Good Practice is revised to compliment the changes to Section 188(2).

55.2 Fair procedure – Amendment to item 4

See point 39.2. The Code of Good Practice is revised to compliment the changes to Section 188(2).

56. Powers of designated agents – Insertion of new Schedule 11

See point 7.

57. Repeal of laws

See point 4.

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2000

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

Amendment to section 1 of Act 75 of 1997

1. Section 1 of the principal Act is hereby amended by amending the definition of 'employment law' as follows –

'employment law' includes this Act, any other Act the administration of which has been assigned to the Minister, and any of the following Acts:

(a) the Unemployment Insurance Act, 1966 (Act 30 of 1966);

(b) **[the Manpower Training Act, 1981 (Act 56 of 1981)]** the Skills Development Act 97 of 1998;

(c) **[the Guidance and Placement Act, 1981 (Act 62 of 1981)]** the Employment Equity Act 55 of 1998;

(d) the Occupational Health and Safety Act, 1993 (Act 85 of 1993);

(e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act 130 of 1993);'

Amendment to section 10 of Act 75 of 1997

2. Section 10 of the principal Act is hereby amended –

(a) by the deletion of sub-paragraph (1)(b)(ii) -

"(1) Subject to this Chapter, an employer may not require or permit an employee –

(a) to work overtime except in accordance with an agreement;

(b) to work more than **[-**

(i) three hours' overtime a day; or

(ii)] ten hours' overtime a week."

(b) by inserting a new subsection (1A) -

"(1A) An agreement in terms of subsection (1) may not require or permit an employee to work more than 12 hours on any day."

(c) by inserting a new subsection (6) –

"(6) A collective agreement may increase the maximum permitted overtime to fifteen hours a week."

Amendment of section 16 of Act 75 of 1997

3. Section 16 of the principal Act is hereby deleted in its entirety.

[16 Pay for work on Sundays

(1) An employer must pay an employee who works on a Sunday at double the employee's wage for each hour worked, unless the employee ordinarily works

on a Sunday, in which case the employer must pay the employee at one and one-half times the employee's wage for each hour worked.

(2) If an employee works less than the employee's ordinary shift on a Sunday and the payment that the employee is entitled to in terms of subsection (1) is less than the employee's ordinary daily wage, the employer must pay the employee's ordinary daily wage.

(3) Despite subsections (1) and (2), an agreement may permit an employer to grant an employee who works on a Sunday paid time off equivalent to the difference in value between the pay received by the employee for working on the Sunday and the pay that the employee is entitled to in terms of subsections (1) and (2).

(4) Any time worked on a Sunday by an employee who does not ordinarily work on a Sunday is not taken into account in calculating an employee's ordinary hours of work in terms of section 9(1) and (2), but is taken into account in calculating the overtime worked by the employee in terms of section 10(1) (*b*).

(5) If a shift worked by an employee falls on a Sunday and another day, the whole shift is deemed to have been worked on the Sunday, unless the greater portion of the shift was worked on the other day, in which case the whole shift is deemed to have been worked on the other day.

(6)(*a*) An employer must grant paid time off in terms of subsection (3) within one month of the employee becoming entitled to it.

(b) **An agreement in writing may increase the period contemplated by paragraph (*a*) to 12 months.]**

Amendment of section 15 of Act 75 of 1997

4. Section 15 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection -

(1) An employer must allow an employee –

(a) a daily rest period of at least twelve consecutive hours between ending and recommencing work; and

(b) a weekly rest period of at least 36 consecutive hours **[which, unless otherwise agreed, must include Sunday]**.

Amendment of section 27 of Act 75 of 1997

5. Section 27 of the principal Act is hereby amended by the substitution of subsection (5) with the following subsection -

(5) Before paying an employee for leave in terms of this section, an employer may require proof of an event contemplated in subsection (2) **[1]** for which the leave was required.

Amendment of section 35 of Act 75 of 1997

6. Section 35 of the principal Act is hereby amended by the deletion of subsection (5) and its substitution with the following subsection -

"(5) (a) The Minister, after consulting the Commission, may by notice in the Gazette determine whether a particular category of payment, whether in money or in kind, forms part of employees' remuneration for the purpose of any calculation made in terms of this Act.

(b) Without limiting the Minister's powers in terms of paragraph (a), the Minister may –

(i) determine the value, or a formula for determining the value, of any payment that forms part of remuneration;

(ii) place a maximum or minimum value on any payment that forms part of remuneration;

(iii) for the purposes of any calculation, differentiate between different categories of payment and different sectors.

(c) Before the Minister issues a notice in terms of paragraph (a), the Minister must –

(i) publish in the Gazette a draft of the proposed notice; and

(ii) invite interested parties to submit written representations on the draft notice within a reasonable period."

Amendment of section 37 of Act 75 of 1997

7. Section 37 of the principal Act is hereby amended by the substitution of subsection (1) with the following subsection -

"(1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than -

(a) one week, if the employee has been employed for six months **[four weeks]** or less;

(b) two weeks, if the employee has been employed for more than six months **[four weeks]** but not more than one year;

(c) four weeks, if the employee -

(i) has been employed for one year or more; or

(ii) is a farm or domestic worker who has been employed for more than six months **[four weeks]**."

Amendment of section 49 of Act 75 of 1997

8. Section 49 of the principal Act is hereby amended by the substitution of subsection (1) with the following subsection -

"(1) A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not: -

(a) reduce the protection afforded to employees by section**[s]** 7 **[,] [9]** and any regulation made in terms of section 13;"

Amendment of section 83 of Act 75 of 1997

16. Section 83 of the principal Act is hereby amended by the addition of the following section –

"(83A) Until the contrary is proved, a person who works for, or provides services to, any other person is presumed to be an employee, if any one or more of the following factors are present –

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person's hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person forms part of that organisation;

(d) the person has worked for that person for an average of at least 40 hours per month over the last three months;

(e) that person is economically dependant on the person for whom he or she works or provides services;

(f) the person is provided with his or her tools of trade or work equipment by another person;

(g) the person only works or supplies services to one person."

Amendment of section 87 of Act 75 of 1997

17. Section 87 of the principal Act is hereby amended by inserting a new subsection (4) –

"(4) A Code of Good Practice issued in terms of this section may provide that the Code must be taken into account in applying or interpreting any employment law."

Amendment of Schedule 3 of Act 75 of 1997

18. Schedule 3 of the principal Act is hereby amended by the substitution of items 9 and 10 thereof with the following items –

"9 **Wage determinations**

(1) Any wage determination and any amendment to a wage determination made in terms of section 15 of the Wage Act, 1957, in force immediately before the commencement of **[this Act]** the Amendment Act (hereafter referred to as a 'wage determination') is deemed to be a sectoral determination made in accordance with section 55 of this Act **[remains in force for the period of its operation in terms of section 18 of that Act, and may be extended or amended as if that Act has not been repealed]**.

(2) Any provision in a wage determination stipulating a minimum term or condition of employment is deemed to be a basic condition of employment as defined in section 1 of this Act.

(3) Despite section 57 of this Act, if a matter regulated in terms of this Act is also regulated in terms of a wage determination, the provision in the Act prevails.

(4) A wage determination is deemed to be varied by Ministerial Determination No. 1: Small Business Sector of 5 November 1999 in respect of employers who conduct businesses employing less than ten employees and their employees.

(5) The Minister may amend, cancel, suspend, clarify or correct any wage determination in accordance with Chapter Eight of the Act.

(6) The provisions of a wage determination may be enforced in accordance with Chapter Ten of the Act.

(7) Any prosecution concerning a contravention of, or failure to comply with, a binding wage determination or licence of exemption during the period from 1 November 1998 until the commencement of the Amendment Act commenced prior to, or within three months of, the commencement date of the Amendment Act must be dealt with in terms of the Wage Act as if that Act had not been repealed.

(9) The Director of Public Prosecutions having jurisdiction is deemed to have issued a certificate in terms of section 23(3)(a) of the Wage Act in respect of any contravention or failure contemplated in sub-item (7) in respect of which no prosecution is commenced within three months of the commencement date of the Amendment Act.

10 Exemptions to wage determination

Any licence of exemption granted to a wage determination in terms of section 19 of the Wage Act, 1957 in force immediately before the commencement of this Act is deemed to be withdrawn three months after the commencement date of the Amendment Act **[remains in force for the period of the determination, or until withdrawn in terms of section 19(5) of that Act, as if that Act had not been repealed.]"**

Short title and commencement

19. This Act will be called the Basic Conditions of Employment Amendment Act, 2000, and will come into operation on a date determined by the President by proclamation in the *Gazette*.

BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL, 2000
EXPLANATORY MEMORANDUM

This memorandum sets out the rationale for amendments in the attached Basic Conditions of Employment Amendment Bill, 2000.

1. Definition of employment law - Amendment to section 1

The definition of the term 'employment law' is amended to reflect the enactment of new labour legislation since the BCEA came into effect.

2. Regulation of overtime - Amendments to section 10

2.1 Section 10 regulates overtime work by setting the maximum overtime hours that may be worked daily or weekly. In terms of section 10(1) an employee may agree to work up to three hours overtime a day and ten hours overtime a week.

2.2 The daily limit of three hours is intended to limit the maximum overtime an employee can work on an ordinary working day. However, it has the unintended consequence of preventing an employee working for more than three hours on days that the employee does not normally work. The effect is that an employee who normally works from Monday to Friday cannot work longer than three hours on a Saturday or Sunday as overtime.

2.3 It is proposed to remedy this by removing the daily limit on overtime in section 10(1). A new subsection 10(1A) will provide that an agreement to work overtime may not result in an employee working more than a total of twelve hours (both ordinary and overtime) on any day.

2.4 The weekly limit on the working of overtime is ten hours. 68% of applications for variation determinations made by employers to the Department of Labour in terms of section 50(1) of the BCEA are to extend the weekly limits on overtime. In the majority of cases, these applications are supported by the trade union representing the employees concerned.

2.5 It is therefore proposed that an employer and a trade union should be able to conclude a collective agreement extending the weekly limit on permissible overtime to 15 hours. This amendment will create greater capacity at plant-level for regulating hours of work by collective agreement and will reduce the administrative burden on the Department of Labour.

3. Weekly rest period - Amendment to section 15

3.1 Section 15 provides that employees must have a 36-hour rest period which must be on a Sunday unless otherwise agreed. A significant portion of the workforce in sectors such as retail, hotel and catering, transport and public services are required to work on Sundays.

3.2 Accordingly, it is proposed to repeal the qualification that the rest period must be on a Sunday unless otherwise agreed. This amendment will not reduce the entitlement of employees to a

36-hour weekly rest period. The day on which the rest period will fall will be determined by collective or individual agreement.

3.3 This amendment should be considered together with the following amendment to section 16 which regulates payment for work on Sundays.

4. **Payment for work on Sundays - Amendments to section 16**

4.1 Currently work on Sunday is remunerated at premium rates. The rate is time and a half if the employee ordinarily works on a Sunday and double time if the employee works occasionally.

4.2 The proposed amendments seek to remove the legal right to a premium for three reasons. Firstly, these premium rates place a considerable economic cost on public services such as health care which operate around the clock and business in service sectors such as retail, tourism and catering as well as continuous operations that are required to provide full services on Sundays.

4.3 Secondly, in many sectors such as nursing, mining and retail employees and employers have already agreed through collective agreement or by approaching the Minister for a determination to forfeit the premium for work on Sunday. Our law needs to be aligned to the current reality.

4.4 Thirdly, the proposed amendment strengthens the constitutional position of the BCEA. It could be argued that both the requirement that a worker's rest period fall on a Sunday unless otherwise agreed and that premium rates be paid for Sunday work could raise constitutional issues in the light of the Constitution's recognition of freedom of religion.

4.5 It is proposed to regularise work on Sundays by removing the legal requirement for a premium. However, workers who work on Sunday can still agree through an individual or collective agreement to receive a premium or additional time off for working on a Sunday.

5. **Family responsibility leave - Amendment to section 27**

This is a technical amendment to rectify the incorrect reference in section 27(5) to subsection (1) instead of subsection (2).

6. **Calculation of remuneration in BCEA - Amendment to section 35**

6.1 The Basic Conditions of Employment Act (BCEA) sets rules for calculating benefits such as overtime pay, leave pay, sick leave pay, notice pay and severance pay. The calculation of leave pay, notice pay and severance pay is based on the statutory definition of 'remuneration'.

6.2 The concern has been raised that the application of the term 'remuneration' can give rise to uncertainty in its practical application when calculating payments. The Department accepts that there are always borderline cases which give rise to differences of interpretation. For instance, does a travel or car allowance form part of an employee's remuneration. The value to

be placed on benefits such as accommodation or food supplied by an employer to an employee is also a frequent cause of dispute.

6.3 It is proposed that the Minister should have the power to make an administrative determination as to whether particular types of payment should be included in or excluded from the calculation of remuneration. The Minister will only be able to issue the notice after advice from the Employment Conditions Commission and after receiving public comment.

6.4 In the proposed notice, the following kinds of items are most likely to be included in the definition of remuneration:

- Service increment;
- Merit increment;
- Car allowance;
- Housing allowance, housing subsidy or housing received as a benefit in kind;
- Shift work allowance if worked regularly;
- Standby allowance if received regularly;
- Acting allowance if received regularly;
- Overtime pay if overtime is worked regularly;
- Food and accommodation allowance or value of food and accommodation provided
- Discretionary payments related to an employee's hours of work if received regularly e.g. an attendance bonus;
- Discretionary payments related to an employee's work performance if received regularly e.g. production bonus based on the employee's output;
- Employer's contributions to medical and provident fund scheme;
- Employer's contributions to death benefit scheme;
- Employer's contributions to UIF and any other statutory insurance cover;
- Employer's contributions to personal accident insurance cover;
- Transport/bus to enable employee to travel to and from work provided as an in kind benefit or as an allowance;
- Long service allowance if received regularly; and
- Thirteenth cheque if not discretionary.

6.5 In the proposed notice, the following items are likely to be excluded from the definition of remuneration:

- Relocation allowance;
- Gratuities e.g. a gold watch given as a long service award, or a farewell gift on termination of employment;
- Discretionary payments not related to an employee's hours of work or work performance e.g. profit-sharing scheme;
- Entertainment allowance;
- Phone allowance;
- Danger pay;
- Underground allowance;
- Inconvenience allowance;
- Dog allowance; and
- Education and schooling allowance

6.6 The proposed amendments will make the calculation of remuneration benefits more certain. It will be quicker and cheaper for all concerned than resolving those disputes by litigation. The composition of remuneration packages change regularly and the Minister will have the ability to revise the relevant notice in line with changing circumstances.

7. **Notice of termination of employment - Amendment to section 37**

7.1 Currently, a contract of employment may be terminated on one week's notice during the first four weeks of employment and on two weeks notice for the remainder of the first year of employment.

7.2 The Labour Relations Amendment Bill, 2000, proposes that there should be a probationary period of six months during which time if a dismissal takes place, the employer only has to prove that the dismissal was effected in accordance with a fair procedure.

7.3 To align the BCEA with the proposed amendments to the LRA, it is proposed to set the notice period at one week during the first six months of employment. In all other respects, the required notice periods remain the same.

8. **Variation by agreement - Amendment to section 49**

8.1 The BCEA seeks to achieve a balance between reducing the long hours, particularly overtime hours, that many workers in South Africa work and increasing the ability of employers and employees to negotiate working time arrangements appropriate to their circumstances.

8.2 One of the provisions introduced to limit hours of work was the entrenchment in section 49 of the limits on working time in section 9 as 'core' rights. This means that collective agreements, whether concluded at plant level or at a bargaining council established for a particular sector, cannot permit employees to work more than 45 hours a week or to exceed the limits on the length of an ordinary working week set in section 9.

8.3 The Department is concerned that this provision has led to a number of unintended consequences. For example, employers and trade unions in the maritime sector have indicated their support for the establishment of a bargaining council. However, such a council could not operate effectively at present because the 45-hour weekly limit and other limits on working time in section 9 are inappropriate for work at sea. The ILO Convention in respect of this sector allows for a 72-hour week.

8.4 It is proposed to remove section 9 from the list of 'core' rights that cannot be varied by bargaining council collective agreements. This amendment will not effect the limitation on other collective agreements (i.e. those not concluded in a bargaining council) that cannot vary these rights without a ministerial variation order. It is unlikely that this amendment will lead bargaining councils to negotiate inappropriate increases in working hours. There are several other mechanisms in the Act to prevent unreasonable increases in hours of work being introduced. These include the duty on employers to arrange working time with due regard to the health, safety and welfare of employees and the Minister of Labour's powers to make a determination limiting working hours in the interests of health and safety.

9. **Variation of 'core' rights by Ministerial determination - Amendments to section 50 and section 55(6)**

9.1 The basic conditions of employment set out in the BCEA can be varied by the Minister of Labour in two circumstances: a variation determination in terms of section 50 of the BCEA and a sectoral determination in terms of section 55.

9.2 The BCEA limits the extent to which these variations can vary basic conditions of employment. Presently, the Minister may not vary certain of the 'core' rights set out in section 49 by either a variation determination [section 50(2)] or a sectoral determination [section 55(6)]. The 'core' rights that cannot be varied include the limits on ordinary working time set in section 9.

9.3 The consequences of the limitation on the Minister having the power to vary 'core' rights is best illustrated by the limits on ordinary hours of work set in section 9. There are many circumstances in which either the circumstances of a sector or the public interest requires that these limits be varied. These include a sector such as maritime discussed previously, as well as emergency and other public service such as fire-fighting and emergency medical services which have to be provided on a round-the-clock basis. It is essential that the Minister should have the power to consider applications to vary the application of 'core' rights to these sectors and to grant variations in appropriate cases.

9.4 Parliament recently had to make an amendment to the Transitional Schedule to the BCEA dealing with the reduction of hours for security guards in the private security sector. This was required because the Minister did not have the power to vary the 45-hour week in terms of section 50.

9.5 Sectoral determinations are designed to set conditions that differ from those in the BCEA but are appropriate to the circumstances of a particular sector. The limitation of varying hours of work prevents sectoral determinations from being able to accommodate sectoral diversity in respect of hours of work.

9.6 It is therefore proposed to repeal section 50(2) and 55(6) which limit the capacity of the Minister to vary core rights by variation and sectoral determinations respectively. There are sufficient safeguards in the Act to prevent a variation or sectoral determination resulting in an inappropriate reduction of 'core' rights. These include the fact that the Minister must consult with the Employment Conditions Commission before issuing a sectoral determination or a variation determination applicable in a category of employees as well as the fact that all determinations are subject to review by the Labour Court.

9.7 The proposed amendment enables the Minister to vary all the conditions of employment in the Act by sectoral determinations or variation determinations.

10. **Variation of 'core' rights by sectoral determination - Amendment to section 55(6)**

This amendment is discussed in paragraph 9 above.

11. **Issue of compliance orders - Amendment to section 70(d)**

11.1 The BCEA envisages that a compliance order may only be issued for claims arising in the preceding year. Questions have been raised as to how that period is calculated.

11.2 Section 70(d) is amended to clarify how the period is calculated.

12. **Status of compliance order - Deletion of section 73(3)**

12.1 Section 73(3) provides that a compliance order issued in terms of the BCEA has the same status as an arbitration award issued in terms of the LRA.

12.2 The Labour Relations Amendment Bill, 2000, proposes that arbitration awards should have the same status as orders of the Labour Court. If this amendment is made, the cross-reference created by section 73(3) will be inappropriate.

13. **Claims for amounts owing in terms of the Act - Amendment to section 74(1)(b)**

13.1 Section 74 regulates the circumstances in which a claim under the BCEA can be brought jointly with a claim for unfair dismissal.

13.2 In line with the proposed amendment to section 70(d), section 74(1)(b) is to be amended to clarify that a claim may only be instituted in such proceedings in respect of claims arising in the year before the dismissal.

14. **Payment of interest - Amendment to section 75**

This is a technical amendment to clarify the meaning of this section as originally drafted.

15. **Power of Labour Court to issue fines - New section 77A**

15.1 Section 77 regulates the jurisdiction of the Labour Court in terms of the BCEA but does not confer specific powers on the court in the same manner as, for example, section 58 of the LRA or section 50 of the Employment Equity Act. The proposed amendment addresses this shortcoming.

15.2 The proposed amendment to the BCEA clarifies the Labour Court's power in terms of the BCEA, including an express power to issue fines for failure to comply with the Act. The proposed draft follows the formulation of section 50 of the Employment Equity Act and seeks to give greater substance to the jurisdiction of the Labour Court as set out in section 77 of the BCEA.

16. **Presumption as to who is an employee - insertion of a new section 83A**

16.1 The BCEA, like the LRA, defines an employee as any person, excluding an independent contractor, who is in paid employment and who in any manner assists in carrying on or conducting the business of an employer. The term 'independent contractor' is not defined. The distinction between an 'employee' and an 'independent contractor' reflected in the definition of an employee has its origins in Roman law which distinguished between the contract of service (employee) and the contract for services (independent contractor).

16.2 The definition of an 'employee' does not specify criteria that should be used to distinguish employees from independent contractors. This is left for the courts to determine. The court's approach is that a contract must be classified on the basis of the 'dominant impression' gained from examining its terms. This approach has been criticised for offering little guidance in practice to employers and employees. The view has also been expressed that the court's approach involves a formalistic consideration of the differences between a contract of service and a contract for services rather than examining whether it is appropriate that the worker should be protected by labour legislation.

16.3 It is possible to distinguish two categories of workers who do not receive the protection of labour law –

(a) those who fall within the definition of an employee but who are in practice unable to assert their rights as employees;

(b) those who the courts classify as independent contractors but are nevertheless in a position of dependence on the organisations or the persons to whom they provide services.

16.4 Many vulnerable workers employed in forms of employment such as part-time work, homework or casual work fall into the former category. They are in fact excluded from the protection of labour legislation even though the courts regard them as employees. Both the lack of guidance in the definition of 'employee' and the manner of its interpretation by the courts undermine the effectiveness of protection offered to these vulnerable workers.

16.5 Often their employers advise these employees that they are independent contractors. Organisations such as Confederation of Employers of South Africa (COFESA) advise employers that they can avoid labour legislation merely by stipulating in contracts that the workers are independent contractors without any fundamental change in the employment relationship. The consequences of this approach are not limited to excluding these workers from legislation such as the LRA and the BCEA. These employers do not register with or contribute to the unemployment insurance and worker's compensation funds or meet their obligations in terms of health and safety legislation. This weakens these funds and imposes the costs of ill health and occupational accidents on the workers, their families and the state.

16.6 It is also important to note that there is a constitutional dimension to clarifying which workers are protected by statutes such as the LRA and the BCEA. Section 23 of the Constitution extends the right to fair labour practices to all persons and basic labour rights such as the right to join trade unions to all workers. It is conceivable that the Constitutional Court might accept that the language used in the Constitution is broader than the statutory definition of an

'employee' and that the failure to extend protection to certain categories of workers constitutes an unreasonable and unjustifiable limitation of their constitutional rights.

16.7 The need to review definitions of employment and adapt these is an international phenomenon and the proposal to adjust the BCEA and the LRA in this regard are in line with international trends to clarify or adapt the scope of the regulation of the employment relationship in the country's legislation in line with current employment realities.

16.8 It is proposed to include a series of rebuttable presumptions in the BCEA as a new section 83A and new section 200A in the LRA. These presumptions concern proof of whether an employment relationship exists. The effect of these is to provide that where a particular factor is present in the relationship between a worker and the person for whom he or she works, the worker is presumed to be an employee unless the contrary is proven.

16.9 The factors listed are those commonly present in an employment relationship. They include –

- if the manner in which the worker works is subject to supervision by another;
- if the worker's hours of work are subject to control by another person;
- the worker forms part of the employer's organisation or is economically dependent on the employer.

16.10. Where an employer adopts the attitude that, despite the presence of one of these factors, there is no employment relationship, they will be required to prove this. The employer has full knowledge of the working relationship and will therefore be in a position to present evidence to discharge the onus in appropriate cases.

16.11. A set of rebuttable presumptions will create greater certainty containing the existence of employment relationship while allowing for the fact that employment relationships are in practice extremely varied.

16.12. This proposed amendment should go together with guidelines clarifying the distinction between independent contractors and employees and determining when an employment relationship exists. Such guidelines can be in the form of a Code of Good Practice. Both the BCRA and LRA provide provisions for NEDLAC or the Minister to issue such Codes.

16.13. Guidelines would promote greater certainty concerning this distinction and assist employees to assert their rights and would also assist officials such as Department of Labour officials and bargaining council agents evaluate borderline cases for the purposes of enforcement.

17. Minister's power to make Codes of Good Practice - Amendments to section 87

17.1 Presently, Codes of Good Practice issued in terms of labour legislation can only be taken into account for the purposes of that Act. Often, however Codes of Good Practice are relevant to several Acts. For instance, it is proposed to issue the Code of Good Practice on HIV/AIDS in the Workplace in terms of both the LRA and the Employment Equity Act.

17.2 It is proposed to introduce a new section 87(5) which will permit the Minister to stipulate in a Code of Good Practice, issued in terms of the BCEA, that the code should be taken into account when interpreting or applying other legislation administered by the Department of Labour.

17.3 A similar amendment is included in the Labour Relations Amendment Bill, 2000.

18 Wage determination - Amendment to Schedule 3

18.1 The transitional provisions in terms of the BCEA have created uncertainty concerning the status of wage determinations issued in terms of the Wage Act, and which remain in effect.

18.2 The provision has been redrafted so that wage determinations remaining in effect on the date that the Amendment Act takes effect are deemed to be sectoral determinations made under the BCEA.

18.3 The Minister will be able to amend, cancel or suspend a wage determination as if it were a sectoral determination in terms of section 56 of the BCEA. Likewise, the surviving wage determinations will be enforced in the same manner as sectoral determinations made under the BCEA.

INSOLVENCY AMENDMENT BILL, 2000

To amend the Insolvency Act, 1936, so as to further regulate the sequestration of employers; and to provide for matters incidental thereto.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 4 of Act 24 of 1936, as amended by section 3 of Act 16 of 1943, section 5 of Act 62 of 1955 and section 1 of Act 49 of 1996

1. Section 4 of the Insolvency Act, 1936 (hereafter referred to as the principal Act), is hereby amended by the substitution for subsection (2) of the following subsection:

"(2)(a) Within a period of seven days as from the date of publication of the said notice in the *Gazette*, the petitioner **[shall]** must deliver or post a copy of the said notice to every one of the creditors of the debtor in question whose address he or she knows or can ascertain.

(b) The petitioner must further, within the period referred to in paragraph (a), furnish a copy of the notice to -

(i) any registered trade union that, to the petitioner's knowledge, represents any of the debtor's employees; and

(ii) the employees themselves by affixing a copy of the notice to any notice board inside the debtor's premises used for that purpose, or by affixing a copy to the front door of the premises from which the debtor conducted any business immediately prior to the surrender.".

Amendment of section 9 of Act 24 of 1936, as amended by section 6 of Act 16 of 1943, section 2 of Act 99 of 1965 and section 1 of Act 122 of 1993

2. Section 9 of the principal Act is hereby amended by the insertion of the following subsection after subsection (4):

"(4A)(a) A debtor in respect of whom a petition in terms of this section is presented to court must, within five days of receiving notice of the petition, furnish a copy thereof-

(i) to any registered trade union that, to the debtor's knowledge, represents any of the debtor's employees; and

(ii) to the employees themselves by affixing a copy of such petition to the notice board inside the debtor's business premises, or if there is no access to the premises by the employees, by affixing a copy to the front door or gate of any business premises.

(b) A debtor who brings an application that a petition for the sequestration of that debtor's estate is malicious or vexatious is not required to comply with the provisions of paragraph (a) until such time as that application has been determined.

(c) If a debtor's application referred to in paragraph (b) is unsuccessful, the debtor must comply with the provisions of paragraph (a) within five days of the date of the order dismissing the application.".

Substitution of section 11 of Act 24 of 1936

3. The following section is hereby substituted for section 11 of the principal Act:

"Service of rule nisi

11. (1) If the court sequestrates the estate of a debtor provisionally it **[shall]** must simultaneously grant a rule *nisi* calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his or her estate should not be sequestrated finally.

(2) If the debtor has been absent during a period of twenty-one days from his or her usual place of residence and of his or her business (if any) within the Republic, the court may direct that it **[shall be]** is sufficient service of that rule if a copy thereof is affixed to or near the outer door of the buildings where the court sits and published in the *Gazette*, or may direct some other mode of service.

(2A) A copy of the rule must be served -

(a) on any trade union contemplated in section 4(2) or 9(4A); and

(b) on the debtor's employees in the manner contemplated in section 4(2).

(3) Upon the application of the debtor the court may anticipate the return day for the purpose of discharging the order of provisional sequestration if twenty-four hours' notice of such application has been given to the petitioning creditor.

(4) For the purposes of serving the rule *nisi* referred to in subsection (2A), the sheriff must establish from the debtor whether the employees are represented by a registered trade union and determine whether there is a notice board inside the employer's premises for notice to employees.".

Substitution of section 38 of Act 24 of 1936

4. The following section is hereby substituted for section 38 of the principal Act:

"Contract of employment suspended on insolvency of employer

38.(1) The contracts of service of employees whose employer has been sequestrated are suspended with effect from the date of the granting of a sequestration order.

(2) Without limiting subsection (1), during the period of suspension of a contract of service referred to in subsection (1)-

(a) an employee whose contract is suspended is not required to tender services in terms of the contract and is not entitled to any remuneration in terms of the contract;

(b) no benefit in terms of the Basic Conditions of Employment Act, 1997, (Act No. 75 of 1997), accrues to an employee arising out of any contract of service that is suspended.

(3) For purposes of the Unemployment Insurance Act, 1966 (Act No. 30 of 1966), an employee whose contract of service is suspended is deemed to be unemployed from the date of such suspension and, subject to the provisions of that Act, is entitled to receive unemployment benefits in terms of section 35 of that Act.

(4) Nothing in this section shall be construed as precluding -

(a) a trustee from engaging the services of any employee whose contract of service has been suspended in terms of subsection (1);

(b) a trustee from concluding an agreement with an employee whose contract of service has been suspended in terms of subsection (1) to terminate that contract;

(c) an employee whose contract of service has been suspended from terminating that contract;

(d) an employee whose contract of service has been suspended or terminated in terms of this section from claiming compensation from the insolvent estate of his or her former employer for loss suffered by reason of the suspension or termination of a contact of service prior to its expiry.

(5) A trustee appointed in terms of this Act may terminate the contracts of service of employees of the insolvent employer.

(6) A trustee may not terminate a contract of service in terms of subsection (5) unless the trustee has consulted with -

(a) any person who, immediately before the sequestration, the insolvent employer was required to consult with in terms of a collective agreement as defined in section 213 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

(b) if there was no such collective agreement, a workplace forum as defined in section 213 of the Labour Relations Act, 1995, that existed immediately prior to the sequestration;

(c) if there was no such workplace forum, any registered trade union having members whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the proposed dismissal;

(d) if there is no such trade union, the employees whose contracts of service were suspended in terms of subsection (1) and who are likely to be affected by the proposed dismissal or their representatives nominated for that purpose.

(7) The purpose of the consultations referred to in subsection (6) is to seek to reach consensus on appropriate measures to save or rescue the whole or part of the business of the insolvent employer, whether by the sale of the whole or part of the business, a transfer as contemplated in section 197A of the Labour Relations Act, 1995, a scheme or compromise referred to in section 311 of the Companies Act, 1973 (Act No. 69 of 1973), or in any other manner.

(8) A trustee must consult with any party that has a right to be consulted with in terms of subsection (6) if -

(a) that party submits written proposals to the trustee concerning any matter contemplated in subsection (7);

(b) the trustee receives those proposals within 21 days of the appointment of a trustee in terms of section 55; and

(c) the trustee has not already initiated consultations in terms of subsection (6).

(9) A creditor of the insolvent employer may, with the consent of the trustee, participate in any consultation contemplated in this section.

(10) Unless otherwise agreed between a trustee and an employee, all contracts of service of employees of the insolvent employer suspended in terms of subsection (1) that have not already been terminated in terms of this section, subject to section 197A of the Labour Relations Act, 1995, terminate 21 days after the date of the appointment of a trustee in terms of section 55.

(11) An employee whose contract of service has been terminated in terms of this section is entitled to claim severance benefits from the estate of the insolvent employer in accordance with section 41 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997).".

Amendment of section 98A of Act 24 of 1936

5. Section 98A of the principal Act is hereby amended by the substitution for paragraph (iv) of subsection (1) of the following paragraph:

"(iv) any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, **[or]** wage-regulating measure, or as a result of termination in terms of section 38; and".

Amendment of section 136 of Act 24 of 1936

6. Section 136 of the principal Act is hereby amended by the addition after paragraph (c) of the following paragraph:

"(d) if he or she fails to comply with the provisions of section 9(4A).".

Short title and commencement

7. This Act shall be called the Insolvency Amendment Act, 2000, and shall come into operation on a date determined by the President by proclamation in the *Gazette*.

INSOLVENCY AMENDMENT BILL, 2000
EXPLANATORY MEMORANDUM

1. Introduction

1.1 Section 38 of the Insolvency Act, 1936, provides that the sequestration of an insolvent employer terminates all contracts of employment between that employer and the employer's employees. As a result, the failure of an employer's business leading to insolvency has drastic consequences for employees. In addition, employees are deprived of benefits such as severance pay in terms of the Basic Conditions of Employment Act, 1997 (Act 75 of 1997).

1.2 Despite the extreme consequences of an insolvency for employees, neither employees nor their trade unions have any rights to be notified of legal proceedings brought to sequestrate their employer.

1.3 The Insolvency Amendment Bill, 2000, addresses these shortcomings by -

(a) giving procedural rights to employees of insolvent employers, or their representatives such as trade unions, to be notified of the institution of legal proceedings to sequestrate an employer;

(b) regulating the substantive consequences of insolvency for employees in a more equitable manner.

2. Service of petitions and rules in sequestration proceedings (amendments to sections 4, 9 and 11 of the Insolvency Act, 1936)

2.1 A series of amendments are made to sections 4, 9 and 11 of the Act. These changes create a right for employees (and their trade unions) of employers who are subject to voluntary or compulsory sequestration proceedings to receive notice of the proceedings and to be served with any orders issued by the court.

2.2 A person who voluntarily surrenders his or her estate for the benefit of creditors must serve a copy of the notice of surrender on any registered trade union that represents the employees of that employer and must also display a copy thereof at the employer's premises in a place to which employees will have access (Proposed new section 4(2) of the Act).

2.3 Since a person instituting "compulsory" sequestration proceedings against a debtor may often not be aware of the trade unions concerned, an obligation is placed on the employer (the debtor) to furnish a copy of any petition for such sequestration, within 5 days of receiving notice of the petition, to all registered trade unions that represent the employer's employees and to display it to the employees as well (Proposed new section 9(4A)). Likewise, a copy of the rule *nisi* granting a provisional sequestration order must be served on any relevant trade union and employees (Proposed new section 11(2A)).

2.4 The combined effect of these provisions is to give employees and their trade unions advance notice of any sequestration proceedings (voluntary surrender or compulsory sequestration).

3. Consequences of sequestration on contracts of employment

3.1. Section 38 of the Insolvency Act, 1936, presently provides that the sequestration of the estate of an employer terminates all contracts of employment between the employer and employees. (In contrast, section 37 of the Act provides that leases entered into by the employer continue in force for three months from the date of sequestration unless they are terminated earlier by the trustee).

3.2 Section 38 applies to both the insolvency of individual employers who trade in their personal name as well as to companies that are wound up because of insolvency.

3.3 The termination of a contract of employment in terms of section 38 does not constitute a dismissal for purposes of labour law. It is classified as a termination of a contract by operation of law. Employees are consequently deprived of a range of protections such as the right not to be unfairly dismissed in terms of the Labour Relations Act, 1995, and the right to severance pay in terms of the Basic Conditions of Employment Act, 1997.

3.4 It is proposed that the insolvency of an employer should only suspend obligations between employers and employees in terms of their contracts of employment. (Proposed new section 38(1).) The effect of this would be that employees would not be required to tender their services in terms of their contracts and employers would not be obliged to remunerate them. (Proposed new section 38(2).) Despite the fact that contracts of employees are suspended, employees will be deemed to be unemployed for purposes of the Unemployment Insurance Act, 1966, and will therefore be entitled to register for unemployment benefits as if they had been dismissed. (Proposed new section 38(3).) A trustee may also engage the services of certain of the employees of the insolvent employer in order to continue running a business; this is provided for in the proposed new section 38(4)(a).

3.5 The trustee is given the power to terminate the contracts of service of the employer in terms of the proposed new section 38(5). The trustee may, however, not exercise this power unless the trustee has entered into consultations regarding measures that could be adopted to save a whole or part of the business with the employees, their trade unions or any other representatives of the employees. If the trustee does not elect to initiate these consultations, the trustee must, if required to do so by the employees or their representatives, enter into such consultations. A creditor of the insolvent employer may also participate in these consultations with the consent of the trustee. (See proposed new section 38(9).)

3.6 It is generally accepted that employees whose services are terminated as a result of insolvency are currently not entitled to the statutory severance benefits set out in section 41 of the Basic Conditions of Employment Act, 1997. Section 38(11) provides that, for purposes of severance benefits, these employees will be treated as employees who have been dismissed because of the employer's operational requirements. The claim for severance benefits will be against the estate of the insolvent employer, which is regulated in terms of the new section 98A, which is also being amended to reflect this change.

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