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GENERAL NOTICE

NOTICE 97 OF 1995

MINISTRY OF LABOUR

DRAFT NEGOTIATING DOCUMENT IN THE FORM OF A LABOUR RELATIONS BILL

1. A Ministerial Legal Task Team was appointed on 9 August 1994 to draft a new Labour Relations Act.
2. The Team has produced a draft Labour Relations Bill, in the form of a negotiating document and an explanatory memorandum thereanent, which are hereby published by the Minister of Labour in the Schedule hereto for general information and comment.
3. (a) All interested parties are invited to submit **written** comment on the Draft Negotiating Document as soon as possible. Such comment should be forwarded to the **Acting Director-General: Labour, Private Bag X117, Pretoria, 0001,** for the attention of Mr J. H. C. Kastner [Fax number (012) 320-7816].

   (b) Comment should reach the Acting Director-General by ***not later than 30 April 1995.***

   (c) the name, telephone number or fax number and address of a person who may be contacted in regard to the comment should also be stated clearly.
4. It is the intention that the draft Bill will be reworked in the light of the comment received and will be considered by the National Economic, Development and Labour Council, the Public Service Bargaining Council and the Education Labour Relations Council with a view to reaching consensus.

SCHEDULE

DRAFT LABOUR RELATIONS BILL IN THE FORM OF A NEGOTIATING DOCUMENT

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CHAPTER I

APPLICATION AND INTERPRETATION OF ACT

Scope of Act

1. This Act shall apply to all employers and employees in the Republic, save for members of the National Defence Force established by section 224 of the Constitution, the agencies or services established by section 3 of the Intelligence Services Act, 1994 (Act No. 38 of 1994), and the South African Police Service contemplated in section 214 of the Constitution.

Primary objects of Act

2. The primary objects of this Act are—

(a) to give effect to and to regulate the fundamental rights contemplated in section 27 of the Constitution;

(b) to provide a framework for the determination, through collective bargaining, of wages and terms and conditions of employment or any other matter of mutual interest to employees and their trade unions, on the one hand, and employers and their employers' organizations, on the other hand;

(c) to promote orderly collective bargaining;

(d) to encourage collective bargaining at sector level;

(e) to promote consultation and joint decision making in the workplace;

(f) to promote the effective resolution of disputes, primarily by way of conciliation;

(g) to give effect to the Constitution of the International Labour Organization and those conventions of the International Labour Organization which are ratified by the Republic,

and thereby to promote economic development, social justice and labour peace.

Principles used in interpretation and application of Act

3. This Act shall be interpreted and applied—

(a) in conformity with the Constitution;

(b) with due regard to the primary objects and the prupose of this Act; and

(c) in such a way as most closely conforms with the Republic's obligations in public international law.

CHAPTER II

FREEDOM OF ASSOCIATION

Rights of employees

4. Every employee has the right—

(a) to take part in the formation of any trade union or federation of trade unions;

(b) subject only to the constitution of the trade union or federation of trade unions—

(i) to be a member of any trade union;

(ii) to take part in the lawful activities of any trade union or federation of trade unions;

(iii) to take part in the election of an office-bearer, official or trade union representative of any trade union or federation of trade unions;

(iv) to stand for election as an office-bearer, official or trade union representative of any trade union or federation of trade unions and, if elected, to hold such office and discharge the functions of such office;

(c) to exercise any right conferred or recognized by this Act and to assist any other employee, office-bearer, official, trade union representative, trade union or federation of trade unions to exercise such right.

Protection of employees

5. (1) Without derogating from the generality of the provisions of section 4, no person shall, in respect of any employee or any person seeking employment—

(a) require that he or she shall not be or not become a member of any trade union or workplace forum or require him or her to relinquish such membership;

(b) dismiss or prejudice any employee by reason of his or her membership of any trade union or workplace forum or participation in the formation or the lawful activities of any trade union or workplace forum;

(c) dismiss or prejudice any employee by reason of the fact that he or she has given information which in terms of this Act or any other law he or she is required or entitled to give;

(d) dismiss or prejudice any employee by reason of the fact that he or she has failed or refused to do any act which an employer may not require or permit an employee to do in terms of this Act or any other law;

(e) threaten any employee or any person that he or she will suffer any disadvantage for exercising any right conferred or recognized by this Act or for participating in any proceedings in terms of this Act;

(f) prevent or attempt to prevent any employee or any person from exercising any right conferred to recognized by this Act or from participating in any proceedings in terms of this Act;

(g) promise any employee or any person any benefit or advantage for not exercising any right conferred or recognized by this Act or for not participating in any proceedings in terms of this Act;

(h) otherwise discriminate against any employee or any person by reason of his or her membership or anticipated membership of any trade union or workplace forum, his or her actual or anticipated participation in the lawful activities of any trade union or workplace forum, his or her actual or anticipated exercise of any right conferred to recognized by this Act, or because of his or her actual or anticipated participation in any proceedings in terms of this Act.

(2) Any term or condition in a contract of employment, whether express or implied, which infringes the provisions of subsection (1), whether directly or indirectly, shall be null and void.

(3) In any proceedings concerning an alleged infringement of any right or protection conferred or recognized by this Chapter, the onus shall be on the applicant to prove the commission of an act of the nature contemplated in subsection (1) and thereupon the person who committed such act shall bear the onus of proving that it was not committed in breach of this section.

Rights of employers

6. Every employer has the right—

(a) to take part in the formation of any employers' organization or federation of employers' organizations;

(b) subject only to the constitution of the employers' organization or federation of employers' organizations—

(i) to be a member of any employers' organization or federation of employers' organizations;

(ii) to take part in the lawful activities of any employers' organizations or federation of employers' organizations;

(iii) to take part in the election of an office-bearer or official of any employers' organization or federation of employers' organizations;

(iv) to stand for election as an office-bearer or official of any employers' organization or federation of employers' organizations and, if elected, to hold such office and discharge the functions of such office;

(c) to exercise any right conferred or recognized by this Act and to assist any other employer, office-bearer, official, employers' organization or federation of employers' organizations to exercise such right.

Protection of employers

7. (1) Without derogating from the generality of the provisions of section 6, no person shall, in respect of any employer—

(a) require that the employer shall not be or not become a member of any employers' organization or require it to relinquish such membership;

(b) threaten any employer that it will suffer any disadvantage for exercising any right conferred or recognized by this Act or for participating in any proceedings in terms of this Act;

(c) prevent or attempt to prevent any employer from exercising any right conferred or recognized by this Act or from participating in any proceedings in terms of this Act;

(d) promise any employer any benefit or advantage for not exercising any right conferred or recognized by this Act or for not participating in any proceedings in terms of this Act;

(e) otherwise discriminate against any employer by reason of the latter's membership or anticipated membership of any employers' organization, its actual or anticipated participation in the lawful activities of any employers' organization, its actual or anticipated exercise of any right conferred or recognized by this Act, or because of its actual or anticipated participation in any proceedings in terms of this Act.

(2) Any contractual term or condition, whether express or implied, which infringes the provisions of subsection (1), whether directly or indirectly, shall be nul and void.

(3) In any proceedings concerning an alleged infringement of any right or protection conferred or recognized by this Chapter, the onus shall be on the applicant to prove the commission of an act of the nature contemplated in subsection (1) and thereupon the person who committed such act shall bear the onus of proving that it was not committed in breach of this section.

Rights of trade unions and employers' organizations

8. Every trade union and every employers' organization has the right—

(a) to draw up its constitution and rules, elect its office-bearers, officials and representatives in full freedom, organize its administration and activities and formulate its programmes;

(b) to take part in the formation, and become a member, of a federation of trade unions or a federation of employers' organizations and participate in its lawful activities;

(c) to affiliate to and participate in the affairs of international workers' or employers' organizations, to make financial and other contributions to such organizations, to participate in the affairs of the International Labour Organization and to receive financial and other assistance from them.

Disputes concerning this Chapter

9. (1) Whenever there is a dispute concerning the interpretation or application of the provisions of this Chapter or an alleged infringement of any right or protection conferred or recognized by this Chapter, and the parties to the dispute are one or more employees, persons seeking employment, trade unions, federations of trade unions, employers, employers' organizations, federations of employers' organizations or the state, any such party may refer the dispute in writing to the Commission.

(2) A party who refers a dispute to the Commission in terms of subsection (1) shall satisfy the Commission that a copy of the referral was served on all the parties to the dispute.

(3) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(4) Where the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

CHAPTER III

COLLECTIVE BARGAINING

PART A—ORGANIZATIONAL RIGHTS

Trade union access to workplace

10. (1) For the purposes of this section, a representative trade union shall be a registered trade union which has as its members at least x[1] per cent of the employees employed by an employer in a workplace.

(2) An office-bearer or official of a representative trade union shall be entitled to access to the employer's premises for the purpose of recruiting members or of communicating with, or otherwise serving the interest of, its members.

(3) This right shall be subject to such conditions as to time and place as are reasonable and necessary to safeguard life or property or prevent the undue disruption of work.

Trade union meetings in workplace

11. (1) For the purposes of this section, a representative trade union shall be a registered trade union which has as its members at least x per cent of the employees employed by an employer in a workplace.

(2) A representative trade union shall be entitled to hold meetings to be attended by employees outside their working hours at the employer's premises for the purpose of conducting lawful trade union activities.

(3) This right shall be subject to such conditions as to time and place as are reasonable and necessary to safeguard life or property or prevent the undue disruption of work.

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[1] **The task team has decided not to specify what the statutory thresholds for organizational or collective bargaining rights in this Chapter should be at this stage. This has been left for NEDLAC to determine.**

Deduction of trade union subscriptions or levies

12. (1) For the purposes of this section, a representative trade union shall be a registered trade union which has as its members at least x per cent of the employees employed by an employer in a workplace.

(2) An employee who is a member of a representative trade union may submit to his or her employer a written authorization for the periodic deduction from his or her wages of subscriptions or levies payable to such trade union.

(3) An employer who receives an authorization in terms of subsection (2) shall make the authorized deduction as soon as practicable and shall remit to the representative trade union the moneys so deducted on a monthly basis not later than by the 15th day of the month following the month in respect of which the deduction was made.

(4) An employee may revoke his or her authorization referred to in subsection (2) by giving one month's written notice to his or her employer and to the trade union in question, save that in the public service the period of notice shall be three months, and after expiry of the notice period, the employer shall cease to make any deduction.

(5) The employer may retain a collection fee not exceeding five per cent of the amount deducted in terms of subsection (3).

(6) With each remittance, the employer shall give the registered trade union in whose favour the deductions have been made—

(a) a schedule of the names of every member from whose wages deductions of subscriptions or levies have been made in favour of such trade union;

(b) details of the amounts deducted and remitted and the period to which the deductions relate; and

(c) a copy of every notice of revocation referred to in subsection (4).

Trade union representatives

13. (1) For the purposes of this section, a representative trade union shall be a registered trade union which has as its members the majority of the employees employed by an employer in a workplace.

(2) Where there is no collective agreement between a representative trade union and an employer regulating trade union representation in the workplace, the provisions of this section shall apply.

(3) In any workplace in which at least 10 members of a registered trade union are employed, those members of the trade union shall be entitled to elect from amongst themselves a trade union representative, and such number of additional trade union representatives to be determined as follows—

(a) one additional trade union representative where 11 to 50 members of a registered trade union are employed in the workplace;

(b) thereafter, the number of trade union representatives shall be increased by one representative for every additional 50 members of a registered trade union who are employed in the workplace, up to a maximum of seven trade union representatives; and

(c) thereafter, the number of trade union representatives shall be increased by one representative for every additional 100 members of a registered trade union who are employed in the workplace.

(4) The election of trade union representatives shall be in accordance with the constitution of the registered trade union in question.

(5) The members of the registered trade union shall be entitled to vote in the election of trade union representatives outside their working hours at the employers' premises.

(6) This right shall be subject to such conditions as to time and place as are reasonable and necessary to safeguard life or property or prevent the undue disruption of work.

(7) The period of office of a trade union representative, and whether or not he or she may be eligible for re-election, shall be determined by the constitution of the registered trade union.

(8) The removal from office of a trade union representative, and the filling of a vacancy in consequence thereof, shall be in accordance with the constitution of the registered trade union.

(9) The provisions of subsections (4) to (6) shall apply to all subsequent elections of trade union representatives.

(10) A trade union representative shall have the right to perform the following functions—

(a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;

(b) to monitor compliance by the employer with the provisions of this Act, any other law and any collective agreement which is binding on the employer in relation to the workplace;

(c) to report any alleged contravention of the provisions of this Act or any other law or any alleged breach of any collective agreement to the employer, to the trade union of which he or she is the representative, or to any authority or agency charged with the enforcement thereof;

(d) to perform any other function as agreed upon between the trade union of which he or she is the representative and the employer.

(11) Subject to section 16 (3), an employer shall disclose to a trade union representative all such information as may be necessary so as to enable a trade union representative to perform the functions referred to in subsection (10).

(12) A trade union representative shall be entitled to take reasonable time off during working hours with pay for the purpose of—

(a) performing his or her functions and duties as a trade union representative;

(b) undergoing training relevant to the performance of his or her functions and duties as a trade union representative.

(13) This right shall be subject to such conditions as are reasonable.

Trade union workplace ballots

14. (1) For the purposes of this section, a representative trade union shall be a registered trade union which has as its members at least x per cent of the employees employed by an employer in a workplace.

(2) The members of a representative trade union shall be entitled to vote in any election or any ballot contemplated by the trade union's constitution at the employer's premises.

(3) This right shall be subject to such conditions as to time and place as are reasonable and necessary to safeguard life or property or prevent the undue disruption of work.

Time off for trade union activities

15. (1) For the purposes of this section, a representative trade union shall be a registered trade union which has as its members at least x per cent of the employees employed by an employer in a workplace.

(2) An employee who is an office-bearer of a federation or a representative trade union shall be entitled to take reasonable time off during working hours without pay, subject to a minimum of x[2] days a year, for the purpose of performing the functions and duties of such office.

(3) This right shall be subject to such conditions as are reasonable.

Disclosure of information

16. (1) For the purposes of this section, a representative trade union shall be a registered trade union which has as its members the majority of the employees employed by an employer in a workplace.

(2) Subject to subsection (3), whenever an employer is engaged in consultation or collective bargaining with a representative trade union, the employer shall disclose to the representative trade union all relevant information so as to allow the representative trade union to engage effectively in such consultation or collective bargaining.

(3) An employer shall not be required to disclose information—

(a) which impinges on the privacy of an individual, unless that individual has consented to its being disclosed;

(b) which is legally privileged;

(c) which the employer could not disclose without contravening a prohibition imposed on the employer by any law or order of court or without breaching an agreement.

Right to establish different thresholds of representativeness

17. Notwithstanding the provisions of sections 10, 11, 12, 14 and 15—

(a) a registered trade union which has as its members the majority of the employees employed by an employer in a workplace may conclude a collective agreement with such employer;

(b) parties to a bargaining council may conclude a collective agreement,

which alters the threshold of representativeness specified in respect of one or more of the organizational or collective bargaining rights specified in any such sections, provided the thresholds of representativeness in such collective agreement are applied equally to all registered trade unions in any particular workplace.

Organizational rights in collective agreements

18. Nothing in this Part shall preclude the conclusion of a collective agreement which regulates organizational rights and the exercise thereof.

Exercise of rights conferred or recognized by this Chapter

19. (1) Any registered trade union may at any time notify an employer that by virtue of its representativeness in a specified workplace, it seeks to exercise one or more of the rights conferred or recognized by this Chapter.

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[2] **The statutory minimum number of days has been left for NEDLAC to determine.**

(2) Such notification shall be in writing and shall specify—

(a) the workplace in respect of which the registered trade union seeks to exercise the one or more rights;

(b) the representativeness of the registered trade union in such workplace and the facts upon which it relies to demonstrate its representativeness; and

(c) the rights which the registered trade union seeks to exercise and the manner in which it seeks to exercise those rights,

and shall be accompanied by a certified copy of the trade union's certificate of registration.

(3) The employer shall, within 30 days of receipt of such notification, meet with the registered trade union in an endeavour to conclude a collective agreement as to the manner in which the one or more rights specified in subsection (2) (c) shall be exercised by the trade union in respect of the workplace specified in subsection (2) (a).

(4) In the event that a collective agreement is not concluded, either the registered trade union or the employer may refer the dispute in writing to the Commission.

(5) A party who refers a dispute to the Commission in terms of subsection (4) shall satisfy the Commission that a copy of the referral was served on the other party to the dispute.

(6) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(7) Where the dispute remains unresolved in circumstances where—

(a) the dispute concerns the representativeness of the registered trade union, the commissioner shall, subject to the provisions of subsection (10), determine the representativeness of the trade union and issue a certificate of the representativeness of the trade union in relation to such workplace;

(b) the dispute concerns—

(i) the interpretation or appliation of the definition of "workplace" in relation to the workplace specified in subsection (2) (a);

(ii) the manner in which the rights specified in subsection (2) (c) shall be exercised by the trade union,

the commissioner shall resolve the dispute by way of arbitration in terms of section 135.

(8) In order to determine the representativeness of the registered trade union, the commissioner may—

(a) make such enquiries as he or she deems fit;

(b) conduct, where appropriate, a ballot of the relevant employees;

(c) take into account any further relevant information.

(9) The employer shall co-operate with the commissioner in respect of the provisions of subsection (8), and shall make available such information as is, and such facilities as are, reasonably necessary for the purposes of that subsection.

(10) Where the unresolved dispute concerns the representativeness of the registered trade union and one or both of the issues contemplated in subsection (7) (b) (i) and (ii), the commissioner shall be required—

(a) to determine the representativeness of the trade union and issue a certificate of the representativeness of the trade union in relation to such workplace, and the provisions of subsections (8) and (9) shall, subject to the necessary alterations, apply; and

(b) to resolve the dispute concerning one or both of the issues contemplated in subsection (7) (b) (i) and (ii) by way of arbitration in terms of section 135.

(11) If at any time an employer alleges that the representativeness of a representative trade union—

(a) as reflected in a collective agreement contemplated in subsection (3); or

(b) as stated in its certificate of representativeness,

has fallen below the percentage required for the trade union to exercise one or more of the rights regulated in a collective agreement contemplated in subsection (3) or an arbitration award contemplated in subsection (7), the employer may—

(i) in relation to paragraph (a), seek to amend the collective agreement;

(ii) where agreement on the amendment of the collective agreement cannot be reached, refer the dispute in writing to the Commission, in which event the provisions of subsections (5), (6), (7) (a), (8) and (9) shall, subject to the necessary alterations, apply;

(iii) in relation to paragraph (b), refer the dispute in writing to the Commission, in which event the provisions of subsections (5), (6), (7) (a), (8) and (9) shall, subject to the necessary alterations, apply, and the Commission shall either confirm the correctness of or amend the certificate of representativeness of the registered trade union.

(12) Where the Commission has—

(a) issued a certificate of representativeness of the registered trade union in terms of subsection (11) (ii); or

(b) amended the certificate of representativeness of the registered trade union in terms of subsection (11) (iii),

the collective agreement or the arbitration award, as the case may be, shall be deemed to have been amended accordingly.

Disputes concerning this Part

20. (1) Whenever there is a dispute, other than a dispute as contemplated in section 19, concerning the interpretation or application of this Part or of a determination made in terms of section 19 (7) (a) or an award made in terms of section 19 (7) (b) read with section 136, and the parties to the dispute are a representative trade union, a registered trade union or an employer, any party to the dispute may refer the dispute in writing to the Commission.

(2) A party who refers a dispute to the Commission in terms of subsection (1) shall satisfy the Commission that a copy of the referral was served on all the parties to the dispute.

(3) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(4) Where the dispute remains unresolved, the commissioner shall resolve it by way of expedited arbitration as contemplated in terms of section 135.

PART B—COLLECTIVE AGREEMENTS

Legal effect of collective agreement

21. (1) A collective agreement shall be binding—

(a) upon the parties to the agreement;

(b) between each party to the agreement and the members of every other party to the agreement, in so far as the provisions are applicable;

(c) upon the members of a trade union and the employers who are members of an employers' organization party to the agreement where the agreement regulates terms and conditions of employment or the conduct of such employers in relation to such of its employees or vice versa,

30 days after the signature of the agreement, unless the agreement provides otherwise.

(2) A collective agreement which is binding in terms of subsection (1) (c) shall be binding—

(a) upon every member of the trade union and every employer who is a member of the employers' organization, who was a member when the agreement became binding; and

(b) upon every member of a trade union and every employer who is a member of an employers' organization, who became a member after the agreement became binding,

for the whole period of the agreement, whether or not the member continues to be a member of such trade union or employers' organization.

(3) A collective agreement shall, where applicable, vary any contract of employment between an employee and his or her employer who are both bound by the agreement in terms of subsection (1) (c) or (2).

(4) A collective agreement which is concluded for an indefinite period may be terminated on reasonable notice by any party to the agreement, unless the collective agreement provides otherwise.

Disputes concerning collective agreement

22. (1) Every collective agreement, including an agency shop agreement as contemplated in section 23, shall provide a procedure for the resolution of any dispute concerning the interpretation or application of the agreement by way of conciliation and, where the dispute remains unresolved, by way of arbitration.

(2) In the event that a collective agreement does not provide such a procedure or the procedure is not operative or one or more of the parties to the agreement frustrate the resolution of such dispute, any party to the dispute may refer the dispute in writing to the Commission.

(3) A party who refers a dispute to the Commission in terms of subsection (2) shall satisfy the Commission that a copy of the referral was served on all the parties to the dispute.

(4) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(5) Where the dispute remains unresolved, the commissioner shall resolve it by way of arbitration as contemplated in terms of section 135.

Agency shop agreement

23. (1) For the purposes of this section, a representative trade union shall be a registered trade union which has as its members the majority of the employees employed—

(a) by an employer in a workplace; or

(b) by the members of an employers' organization in a sector and area in respect of which the agreement applies.

(2) A representative trade union may conclude a collective agreement with such employer or employers' organization requiring the periodic deduction by the employer from the wages of its employees who are not members of the trade union of an agreed agency fee, which agreement shall be known as an agency shop agreement.

(3) Notwithstanding the provisions of section 21 an agency shop agreement shall be binding only if it provides that—

(a) employees who are not members of the representative trade union are not compelled to become members of such trade union;

(b) the agreed agency fee shall not be more than the subscriptions payable by the members of such trade union;

(c) the moneys so deducted shall be paid into a fund established and jointly administered by the parties to the agreement; and

(d) the fund shall be used only to defray expenses incurred—

(i) by the trade union in respect of its collective bargaining activities or for training its trade union representatives employed in such workplace or sector and area;

(ii) for the employment of experts by, and the training of members of, a workplace forum which may have been established as contemplated in section 57 in such workplace or in workplaces in such sector and area;

(iii) in the resolution of disputes concerning the interpretation or application of any collective agreement between the parties;

(iv) for such other purposes for the benefit of employees in such workplace or sector and area as may be agreed between the representative trade union and the employer or the employers' organization and ratified by the Labour Court.

(4) Notwithstanding the provisions of any law or any contract, an employer may deduct an agency fee from the wages of an employee in terms of an agency shop agreement without the authorization of the employee.

(5) In the event that the trade union party to an agency shop agreement ceases to be representative, the employer or employers' organization shall give written notice thereof to the trade union.

(6) The trade union shall have 90 days from receipt of such notice to establish that it is representative.

(7) If the trade union fails to establish that it is representative within the 90 day period, the employer shall give to the trade union and the employees bound by the agreement 30 days' notice of the termination of the agreement, after which the agreement shall terminate.

(8) If an agency shop agreement ceases to be binding in terms of subsection (7) or for any other reason recognized by law, the fund established in terms of subsection (3) (c) shall continue to be administered by those persons who were party to the agreement and shall be used for the purposes referred to in subsection (3) (d) until the fund is liquidated.

(9) The Commission may at any time after the termination of an agency shop agreement give whatever directions it deems expedient as to the administration and utilization of the fund.

PART C—BARGAINING COUNCILS

Establishment of bargaining council

24. (1) One or more registered trade unions, on the one hand, and one or more registered employers' organizations or the state or one or more employers' organizations and the state, on the other hand, may form a bargaining council for a sector and area by signing a constitution agreed to by them for the governance of the bargaining council and obtaining the registration of the bargaining council in terms of section 27.

(2) The trade unions, employer's organizations and the state, as the case may be, by whom the constitution and the application for the registration of the bargaining council are signed, and any trade unions, employers' organizations and the state, as the case may be, which in terms of the constitution are from time to time admitted to participate in the bargaining council and which have not withdrawn from the bargaining council, are in this Act referred to as the parties to the bargaining council.

Bargaining council in education sector and public service

25. (1) There shall be a bargaining council for the education sector called the Education Labour Relations Council.[3]

(2) There shall be a bargaining council for the public service called the Public Service Bargaining Council.[4]

(3) The Public Service Bargaining Council may consist of such chambers as may be agreed upon by the Council from time to time, which chambers may be registered as separate bargaining councils.

Powers and functions of bargaining council

26. The functions and powers of a bargaining council in relation to its registered scope include—

(a) the conclusion of collective agreements as contemplated in section 34;

(b) the enforcement of such collective agreements;

(c) the prevention and resolution of labour disputes;

(d) the performance of the dispute resolution functions referred to in section 31;

(e) the establishment and administration of a fund to be used for the resolution of disputes;

(f) the promotion and establishment of training and education schemes;

(g) the establishment and administration of pension, provident, medical aid, sick pay, holiday, unemployment, training funds or any such other funds for the benefit of one or more of the parties to the bargaining council or their members;

(h) the development of proposals on policy and legislation that may affect the sector for submission to NEDLAC;

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[3] **This to entrench statutories the Education Labour Relations Council established in terms of the ELRA. For more details see Schedule 3 on Transitional Arrangements.**

[4] **This is to entrench statutorily the Public Service Bargaining Council established in terms of the PSLRA. For more details refer to Schedule 3 on Transitional Arrangements.**

(i) the determination, by collective agreement, of the matters which may not be an issue in dispute for the purposes of a strike or a lock-out at the workplace;

(j) the conferring on workplace forums of additional matters for consultation.

Registration of bargaining council

27. (1) The parties to a bargaining council shall apply in the prescribed form and manner to the registrar of registration.

(2) Such application shall be signed by the applicants and accompanies by three copies of the constitution of the bargaining council and the prescribed registration fee.

(3) The applicants shall furnish the registrar with any further information which he or she may require, within a period determined by the registrar.

(4) As soon as practicable after receipt of such application, the registrar shall cause to be published in the *Gazette* a notice containing the material particulars of the application and inviting any person who objects to the application to lodge such objection with the registrar in the prescribed manner within 30 days of such notice.

(5) The objections referred to in subsection (4) shall be on the grounds only that the requirements in subsection (11) have not been satisfied.

(6) Any person who lodges an objection pursuant to a notice in terms of subsection (4) shall satisfy the registrar that a copy of the objection was served on the applicants.

(7) Any person who lodges an objection shall furnish the registrar with any further information which he or she may require, within a period determined by the registrar.

(8) The applicants shall submit any further representations which they wish to make in response to such objection to the registrar within 14 days of the expiry of the period referred to in subsection (4), and shall satisfy the registrar that a copy of such further representations was served on the person who lodged the objection.

(9) The registrar shall, as soon as practicable thereafter, serve the application, the objections lodged and any further representations made within the prescribed periods and any further information furnished within the period determined by him or her on NEDLAC for its consideration.

(10) NEDLAC shall, within 90 days of receipt of the documentation contemplated in subsection (9)—

(a) consider the appropriateness of the sector and area in respect of which the application is made and the documentation contemplated in subsection (9) and, if it deems it necessary, consult interested parties;

(b) demarcate the appropriate sector and area in respect of which the bargaining council should be registered; and

(c) report to the registrar in writing thereon.

(11) If after having considered the application, the documentation contemplated in subsection (9) and the report referred to in subsection (10) (c), the registrar is satisfied that—

(a) there has been compliance with the provisions of this section;

(b) the constitution of the bargaining council complies with section 28;

(c) adequate provision is made in the constitution of the bargaining council for the representation of small and medium enterprises;

(d) the one or more registered trade unions, on the one hand, and the one or more registered employers' organizations or the state or one or more employers' organizations and the state, on the other hand, which are party to the bargaining council, are sufficiently representative in accordance with the provisions of section 29 of the sector and are determined by NEDLAC in terms of subsection (10) (b); and

(e) there is no other bargaining council which is registered for the sector and area in respect of which the application is made,

he or she shall register the bargaining council in respect of the sector and area referred to in paragraph (d) and enter its name in a register of bargaining councils.

(12) If the registrar is not satisfied that the applicants have complied with all of the provisions of subsection (11), he or she shall, by registered post, notify the applicants thereof, state the reasons therefor and give the applicants an opportunity to amend their application accordingly within 30 days of such notice.

(13) Upon the timeous receipt of an amended application, the registrar shall, if he or she is satisfied that the applicants have complied with all the provisions of subsection (11), register the bargaining council in accordance with the amended application.

(14) Whenever the registrar has decided not to register a bargaining council, he or she shall, by registered post, notify the applicants and any person who lodged an objection to the application of this decision.

(15) Whenever the registrar has registered a bargaining council, he or she shall issue and send by registered post to the bargaining council—

(a) a certificate of registration, which shall specify the registered scope of the bargaining council; and

(b) a certified copy of its registered constitution.

Constitution of bargaining council

28. The constitution of every bargaining council shall include provisions in respect of the following—

(a) the appointment of representatives of the parties to the bargaining council, of whom half shall be appointed by the one or more registered trade unions which are party to the bargaining council and the other half by the one or more registered employers' organizations or the state or one or more employers' organizations and the state which are party to the bargaining council, and the appointment of alternates to each or any of the said representatives;

(b) the representation of small and medium enterprises;

(c) the circumstances and manner in which representatives shall vacate their seats and the procedure for replacing such representatives;

(d) the convening and conduct of meetings of representatives, the quorum required at such meetings, and the keeping of minutes of such meetings;

(e) the appointment or election of office-bearers and officials, their powers, functions and duties, and the circumstances and manner in which they may be removed from office;

(f) the manner in which decisions shall be taken, subject to the provisions of section 35 (2);

(g) the establishment and functioning of committees;

(h) the determination by arbitration of any dispute arising between the parties to the bargaining council concerning the interpretation or application of the bargaining council's constitution;

(i) the procedure to be followed in the event of a dispute arising between the parties to the bargaining council;

(j) the procedure to be followed in the event of a dispute arising between a trade union which is a party to the bargaining council or its members, or both, on the one hand, and employers who belong to an employers' organization, or the state, which is a party to the bargaining council, on the other hand;

(k) the banking and investment of its funds, subject to the provisions of section 32 (4);

(l) the purposes for which its funds may be used;

(m) the delegation of its powers and functions;

(n) the admission of additional registered trade unions, registered employers' organizations or the state as parties to the bargaining council, subject to the provisions of section 38;

(o) the alteration of its constitution, subject to the provisions of section 39;

(p) its winding up, subject to the provisions of section 42.

Representativeness of bargaining council

29. (1) A bargaining council shall be representative if—

(a) a majority of the employees employed within its registered scope are members of the registered trade union or trade unions party to it; and

(b) the members of the one or more registered employers' organizations or the state or one or more registered employers' organizations and the state which are party to the bargaining council employ at least x[5] per cent of the employees employed within its registered scope.

(2) In determining the representativeness of the parties to the bargaining council, the registrar may, having regard to the nature of the sector and the situation of the area in respect of which registration is sought, regard the parties to the bargaining council as sufficiently representative in respect of the whole of such area, notwithstanding the fact that a trade union or employers' organization which is a party to the bargaining council may have no members in part of that area.

(3) The registrar shall, once every calendar year, by a date determined by him or her after consultation with a bargaining council, satisfy himself or herself of the representativeness of a bargaining council and, if the bargaining council is representative, issue a certificate of representativeness which shall be *prima facie* proof of the bargaining council's representativeness for that calendar year.

(4) If the course of any proceedings in terms of this Act, including arbitration proceedings or proceedings in the Labour Court, the representativeness of a bargaining council is disputed, the dispute shall be referred to the registrar by the commissioner or the Labour Court for determination and the registrar's decision shall be final and binding.

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[5] The statutory minimum percentage has been left for NEDLAC to determine.

Effect of registration of bargaining council

30. (1) Upon registration—

(a) every bargaining council shall be a body corporate;

(b) a bargaining council shall have all the powers, functions and duties which are conferred and imposed by or in terms of this Act on a bargaining council, and it shall have jurisdiction to exercise and perform these powers, functions and duties within its registered scope.

(2) Unless otherwise expressly provided in the constitution of a bargaining council, no party to the bargaining council nor any person shall, by reason only of the fact that it is a party to, or he or she is an office-bearer or official of, such bargaining council, be liable for any of the obligations and liabilities of such bargaining council.

Dispute resolution functions of bargaining council

31. (1) Whenever there is a dispute between two or more parties to a bargaining council, the dispute shall be resolved in accordance with the provisions of the constitution of the bargaining council.

(2) Whenever there is a dispute concerning a matter of mutual interest which arises within the registered scope of a bargaining council and the parties to the dispute are—

(a) one or more trade unions;

(b) one or more employees; or

(c) one or more trade unions and one or more employees,

on the one hand, and

(d) one or more employers' organizations;

(e) one or more employers; or

(f) one or more employers' organizations and one or more employers,

on the other hand, and in respect of which one or more of the parties to the dispute are not parties to the bargaining council, any such party may refer the dispute in writing to the bargaining council in question.

(3) A party who refers a dispute to a bargaining council in terms of subsection (2) shall satisfy the bargaining council that a copy of the referral was served on all the parties to the dispute.

(4) Whenever a dispute which arises within the registered scope of a bargaining council and in respect of which one or more parties to the dispute are not parties to the bargaining council and which dispute has been referred to the bargaining council in terms of this Act, the bargaining council shall attempt to resolve the dispute—

(a) by way of conciliation as contemplated in terms of section 134; and

(b) where the dispute remains unresolved—

(i) by way of compulsory arbitration as contemplated in terms of section 135; or

(ii) by way of voluntary arbitration as contemplated in terms of section 140.

(5) (a) In order to comply with the provisions of subsection (4), the bargaining council shall—

(i) apply to the governing body of the Commission for accreditation; or

(ii) appoint an accredited agency,

to perform one or more of the functions referred to in subsection (4).

(b) In the performance of the functions referred to in subsection (4), the bargaining council, if accredited, or the appointed accredited agency, or both, the provisions of sections 136 to 145 shall, subject to the necessary alterations, apply.

(c) The Commission may, at the request of a bargaining council, confer additional functions of the Commission on the bargaining council.

(6) A party to a dispute which arises within the registered scope of a bargaining council shall not refer such dispute to the Commission for resolution.

(7) Whenever a dispute which falls outside the registered scope of a bargaining council, has been referred to the bargaining council, the bargaining council shall refer the dispute to the Commission for resolution.

(8) For the purposes of subsection (7), the date on which the referral was received by the bargaining council shall be deemed to be the date on which the bargaining council referred the dispute to the Commission.

Duties of bargaining council concerning accounting and auditing

32. (1) Every bargaining council shall, in accordance with generally accepted accounting practice, principles and procedures—

(a) during each financial year cause books and records of account to be kept of its income, expenditure, assets and liabilities;

(b) at the end of each financial year prepare financial statements consisting of an income and expenditure statement for the financial year having ended and a balance sheet showing its assets, liabilities and financial position as at the end of that financial year; and

(c) cause its books and records of account and financial statements to be audited annually by a public accountant.

(2) The public accountant shall—

(a) conduct an audit in accordance with generally accepted auditing standards;

(b) furnish the bargaining council with an appropriate report; and

(c) state whether, in his or her opinion, the provisions of the constitution of the bargaining council, in so far as they relate to financial affairs, have been observed.

(3) Every bargaining council shall, immediately upon receipt of the public accountant's report referred to in subsection (2) (b), make available the financial statements referred to in subsection (1) (b) and the public accountant's report for inspection by the parties to the bargaining council or their representatives and submit these statements and the report to a meeting of the bargaining council in terms of its constitution.

(4) The moneys of a bargaining council and in any fund established by the bargaining council surplus to its requirements shall be invested in the following manner—

(a) a minimum of 10 per cent of the value of such moneys on call or short-term fixed deposit with any registered bank or financial institution;

(b) a minimum of 10 per cent of the value of such moneys in internal registered stock within the meaning of section 21 of the Exchequer and Audit Act, 1975 (Act No. 66 of 1975);

(c) a maximum of 65 per cent of the value of such moneys in a registered unit trust or unit trusts, or in any other manner approved by the registrar.

Duties of bargaining council to retain records and to furnish information to registrar

33. (1) Every bargaining council shall retain—

(a) all books of account, income and expenditure statements, balance sheets and public accountant's reports;

(b) all substantiating vouchers, correspondence and other documents relating to its affairs; and

(c) the minutes of all its meetings,

either in the original or in a reproduced form for a period of three years from the end of the financial year to which they relate.

(2) Every bargaining council shall—

(a) within 30 days of receipt of the public accountant's report, send by registered post to the registrar a certified copy of such report and of the income and expenditure statement and the balance sheet to which such report relates; and

(b) within 30 days of receipt of a written request by the registrar, furnish the latter with an explanation of any matter relating to a report, statement or balance sheet referred to in paragraph (a), as may be required by the registrar.

(3) (a) Every bargaining council shall, upon registration, furnish the registrar with an address within the Republic at which it will accept service of any notice or document in any proceedings in terms of this Act or any other law.

(b) Whenever there is to be any change to the address referred to in paragraph (a), the bargaining council shall, 30 days prior to such change, furnish the registrar with the new address.

(c) In the event that a bargaining council fails to comply timeously or at all with the provisions of paragraph (b), service on the address furnished to the registrar in terms of paragraph (a) shall be deemed to be service for the purposes of this Act.

(4) Every bargaining council shall furnish the Commission with certified copies of all collective agreements concluded by the parties to the bargaining council, within 30 days of the signature of the agreement.

(5) Every bargaining council shall furnish the Commission with the details of the admission and resignation of parties to the bargaining council, within 30 days of their admission or resignation.

Provisions concerning collective agreement concluded in bargaining council

34. (1) Subject to the provisions of section 35, a collective agreement concluded in a bargaining council shall not bind parties to the bargaining council who are not parties to the collective agreement.

(2) A collective agreement as contemplated in subsection (1) shall be binding in accordance with the provisions of section 21.

(3) In the event that an agency shop agreement is concluded by parties to a bargaining council, the fund referred to in section 23 (3) (c) shall be established and administered by the bargaining council.

Extension of collective agreement concluded in bargaining council

35. (1) A bargaining council may request the Minister to extend a collective agreement concluded in the bargaining council to such non-parties to the agreement within its registered scope as may be specified in the request.

(2) A decision by a bargaining council to request the Minister to extend a collective agreement shall only be valid—

(a) if, at a meeting of the bargaining council—

(i) one or more registered trade unions whose members constitute the majority of the members of the trade unions which are party to the bargaining council vote in favour of the decision; and

(ii) the state, where applicable, and one or more registered employers' organizations whose members employ the majority of the employees employed by the members of the employers' organizations which are party to the bargaining council vote in favour of the decision; or

(b) if, in a postal ballot—

(i) one or more registered trade unions whose members constitute the majority of the employees within the registered scope of the bargaining council, vote in favour of the decision, and

(ii) one or more registered employers' organizations whose members employ at least x[6] per cent of the employees employed within its registered scope vote in favour of the decision.

(3) Within 30 days of receipt of such request which shall be in writing, the Minister shall extend the collective agreement as requested by notice in the *Gazette* and declare that from a date and for a period determined by him or her, the collective agreement shall be binding in the non-parties as specified in that notice, if he or she is satisfied that—

(a) the decision by the bargaining council to request the collective agreement was in conformity with the provisions of subsection (2);

(b) the non-parties specified in the request fall within the bargaining council's registered scope;

(c) the one or more registered trade unions, on the one hand, and the one or more registered employers' organizations or the state or one or more employers' organizations and the state, on the other hand, which are party to the bargaining council, are sufficiently representative in accordance with the provisions of section 29 within the bargaining council's registered scope;

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[6] **The statutory minimum percentage has been left for NEDLAC to determine.**

(d) provision is made in the collective agreement for the expeditious granting of exemptions to non-parties from the provisions of the agreement by an independent body on grounds of undue hardship and the determination by such body of the terms and the period of such exemptions;

(e) the terms of the agreement do not discriminate against non-parties; and

(f) the failure to extend the agreement may undermine collective bargaining at sectoral level.

(4) (a) Whenever the Minister has published a notice in terms of subsection (3), he or she may, at the request of the bargaining council in question, by notice in the *Gazette*—

(i) extend the period determined in such notice by such further period as he or she may determine in the new notice; or

(ii) if the period determined in such notice has expired, declare that the provisions of such notice shall be effective from a date and for a further period determined by him or her in the new notice.

(b) The provisions of subsection (3) shall, subject to the necessary alterations, apply in respect of the publication of any notice under this subsection.

(5) The Minister shall, at the request of the bargaining council in question, by notice in the *Gazette* and with effect from a date determined by him or her in such notice, cancel the whole or part of any notice published in terms of subsection (3) or (4), and the provisions of subsection (3) shall, subject to the necessary alterations, apply in respect of any notice in terms of this subsection.

(6) Whenever any collective agreement in respect of which a notice has been published in terms of subsection (3) or (4) is amended, amplified or replaced by a further collective agreement, the provisions of this section shall apply in respect of such further collective agreement.

Appointment and powers of designated agents of bargaining councils

36. (1) A bargaining council may appoint any person as a designated agent of the bargaining council to assist the bargaining council in the enforcement of any collective agreement concluded in the bargaining council.

(2) Every designated agent so appointed shall be furnished with a certificate signed by the secretary of the bargaining council stating that he or she has been appointed as a designated agent of that bargaining council in terms of this Act.

(3) A designated agent of a bargaining council shall in respect of the registered scope of the bargaining council have all the powers conferred upon a commissioner in terms of section 141 (1), save the powers conferred in section 141 (1) (c), and the provisions of section 141 (2) to (7) shall, subject to the necessary alterations, apply: Provided that any references in those subsections to the director shall be deemed to be a reference to the secretary of the bargaining council.

(4) (a) The bargaining council may at any time cancel the certificate furnished to a designated agent in terms of subsection (2).

(b) The person who was furnished with any certificate referred to in paragraph (a) shall thereupon cease to be a designated agent of the said bargaining council and shall forthwith return the said certificate to the secretary of the bargaining council.

Establishment and functions of committees of bargaining councils

37. (1) A bargaining council may at any time establish committees in terms of this section or in terms of its constitution and may, subject to such conditions as it may determine, delegate any of its functions to such committee, provided that any decision of any such committee may at any time be set aside or varied by the bargaining council.

(2) Any such committee shall consist of equal numbers of representatives of employees and employers and, if he or she is not chosen from amongst the members of the committee, a chairperson.

(3) (a) The chairperson of any such committee may be a person chosen by the bargaining council or the committee from amongst the members of the committee or otherwise, as the bargaining council may determine.

(b) If the chairperson of any such committee is not chosen from amongst the representatives of the employees or employers on the committee, he or she shall not be entitled to vote.

Admission of parties to bargaining council

38. (1) Subsequent to the establishment of a bargaining council, any registered trade union or registered employers' organization may apply to become admitted as a party to a bargaining council.

(2) The application shall be in writing and shall include—

(a) details of the applicant's membership within the registered scope of the bargaining council, and, where the applicant is a registered employers' organization, the number of employees which such members employ within such registered scope;

(b) the reasons why the applicant should be admitted as a party to the bargaining council; and

(c) any other information on which the applicant proposes to rely in support of its application for admission,

and shall be accompanied by a certified copy of the applicant's registered constitution and certificate of registration.

(3) A bargaining council shall, within 90 days of receipt of an application for admission, make a decision to grant or refuse an applicant admission and notify the applicant of its decision, failing which the bargaining council shall be deemed to have refused the applicant admission.

(4) If the bargaining council refuses to admit an applicant, it shall furnish the applicant with reasons for such refusal within 30 days of the date of the refusal.

(5) The applicant may apply to the Labour Court for an order admitting it as a party to the bargaining council.

(6) The Labour Court may on application admit the applicant as a party to the bargaining council and make such other order as it deems just and equitable.

Alteration of constitution or change of name of bargaining council

39. (1) Any bargaining council may, by resolution duly passed, alter or substitute its constitution.

(1) The bargaining council shall send by registered post to the registrar three copies of the resolution to alter or substitute its constitution, together with a certificate signed by its secretary, stating that there has been compliance with the provisions of its constitution regulating the alteration or substitution thereof.

(3) The registrar, if satisfied that the alteration or new constitution complies with the provisions of section 27 (11) (b) and (c), shall register the altered or new constitution, and send by registered post to the bargaining council one of the copies of the resolution, with a certificate thereon signed by the registrar stating that he or she has registered the altered or new constitution.

(4) The alteration or new constitution shall take effect from the date of such certificate.

(5) Any bargaining council may, by resolution duly passed, change the name under which it is registered.

(6) The bargaining council shall send by registered post to the registrar a copy of the resolution to change its name.

(7) The registrar shall issue and send by registered post to the bargaining council a new certificate of registration and make the necessary changes to the register of bargaining councils.

Variation of the registered scope of bargaining council

40. (1) Whenever the registrar is satisfied that the registered scope of a bargaining council is not the same as the sector and area within which it is sufficiently representative, the registrar may, on application of the bargaining council, or of his or her own motion, vary the registered scope of the bargaining council.

(2) NEDLAC may request the registrar to vary the registered scope of a bargaining council if NEDLAC is satisfied that the registered scope of the bargaining council is not the same as the sector and area within which it is sufficiently representative.

(3) The provisions of section 27 shall, subject to the necessary alterations, apply to such variation.

Amalgamation of bargaining councils

41. (1) Any bargaining council may, by resolution duly passed, amalgamate with one or more bargaining councils, whether or not these bargaining councils are registered.

(2) The bargaining councils which have amalgamated shall apply in the prescribed form and manner to the registrar for the registration of the amalgamated bargaining council.

(3) Such application shall be accompanied by—

(a) certified copies of their respective resolutions to amalgamate, together with a certificate signed by the secretary of each such bargaining council stating that there has been compliance with the provisions of their respective constitutions;

(b) three copies of the constitution of the amalgamated bargaining council;

(c) a written agreement of amalgamation specifying the terms, conditions and arrangements governing, and the principal consequences of, the amalgamation; and

(d) the prescribed registration fee.

(4) The bargaining councils which have amalgamated shall furnish the registrar with any further information which he or she may require, within a period determined by the registrar.

(5) The provisions of section 27 (4) to (13) shall, subject to the necessary alterations, apply to such application.

(6) The registrar shall simultaneously cancel the registration of all the bargaining councils which have amalgamated and remove their names from the register of bargaining councils.

(7) Upon registration of the amalgamated bargaining council—

(a) subject to the provisions of paragraph (c), all assets, rights, liabilities and obligations of the bargaining councils which have amalgamated shall devolve upon and vest in the amalgamated bargaining council: Provided that any claim against any one of the bargaining councils shall be a claim against the amalgamated bargaining council;

(b) all the collective agreements of the bargaining councils which have amalgamated, regardless of whether or not such agreements were extended in terms of section 35, shall remain in force for the duration of such agreements, unless amended or repealed by the amalgamated bargaining council;

(c) all funds of the bargaining councils which have amalgamated shall remain separate until the amalgamated bargaining council, having complied with the applicable laws, decides otherwise.

Winding-up of bargaining council

42. (1) A bargaining council shall be wound up—

(a) voluntarily, if a reslution for the winding-up of the bargaining council has been passed in accordance with its constitution; or

(b) on application, by order of the Labour Court, if the bargaining council is unable to continue to function as a bargaining council for any reason which cannot be remedied.

(2) When issuing an order for the winding-up of a bargaining council, the Labour Court may issue such directions as it deems necessary in order to ensure that such bargaining council is wound up with due regard to the interests of the parties in question, and may for that purpose and subject to such conditions as it may determine, appoint any suitable person as liquidator.

(3) (a) A liquidator appointed in terms of the constitution of a bargaining council or by order of the Labour Court in terms of subsection (2) shall be entitled to such fees as may be determined by the registrar: Provided that such determination may be reviewed by the Labour Court in chambers.

(b) Any fees payable to a liquidator shall be a first charge against the assets of the bargaining council.

(4) If, after all the liabilities and obligations of the bargaining council have been discharged, there remain assets which cannot be disposed of in accordance with the constitution of the bargaining council, the registrar shall direct that such assets be liquidated and that the moneys realized upon liquidation be paid to the Commission.

(5) The Commission shall use such moneys for the purpose of exercising and performing the powers, functions and duties conferred on it in terms of this Act.

Sequestration of bargaining council

43. Any person who seeks to sequestrate a bargaining council shall do so in accordance with the provisions of the Insolvency Act, 1936 (Act No. 24 of 1936), and any reference in that Act to the court shall be construed as a reference to the Labour Court.

Cancellation of registration of bargaining council

44. (1) Whenever the registrar has reason to believe that a bargaining council—

(a) has ceased to perform its functions in terms of this Act for a period longer than 90 days prior to the date of the notice referred to in this subsection;

(b) has been wound up or has otherwise ceased to exist; or

(c) if the one or more registered trade unions, on the one hand, and the registered employers' organizations, on the other hand, which are parties to the bargaining council have ceased to be representative as required in terms of section 27 (11) (d), for a period longer than 90 days prior to the date of the notice referred to below,

he or she shall, by registered post, notify the bargaining council and every party to the bargaining council, that he or she is considering the cancellation of the bargaining council's registration, state the reasons therefor, and shall give the bargaining council and every party to the bargaining council an opportunity to show cause why the bargaining council's registration should not be cancelled within 60 days of such notice.

(2) Upon the expiry of the 60 day period, the registrar shall, unless cause has been shown why registration should not be cancelled, cancel the registration of the bargaining council.

(3) The registrar shall, by registered post, notify the bargaining council and every party to the bargaining council as to whether or not he or she has cancelled its registration.

(4) Such cancellation shall take effect—

(a) where the bargaining council has failed, within the time contemplated in section 107 (3), to appeal to the Labour Court against such cancellation, or the expiry of that period; or

(b) where the bargaining council has so appealed and confirmation of the decision of the registrar has been confirmed by the Labour Court,

whichever event occurs first.

(5) Upon the cancellation of the registration of the bargaining council taking effect, the registrar shall remove the name of the bargaining council from the register of bargaining councils.

(6) Any collective agreement concluded by parties to the bargaining council, whether or not extended to non-parties by the Minister in terms of section 35, shall lapse within 60 days of the cancellation of the bargaining council: Provided that the provisions of the agreement which regulate terms and conditions of employment shall remain in force for one year after the publication of the notice of cancellation or until the expiry of the agreement, whichever is the earlier.

(7) Whenever there is a dispute concerning the interpretation or application of a collective agreement referred to in subsection (6) which regulates terms and conditions of employment, any party to the dispute may refer the dispute in writing to the Commission.

(8) A party who refers a dispute to the Commission in terms of subsection (7) shall satisfy the Commission that a copy of the referral was served on all the parties to the dispute.

(9) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(10) Where the dispute remains unresolved, the commissioner shall resolve it by way of arbitration as contemplated in terms of section 135.

Disputes concerning demarcation between sectors and areas

45. (1) Any registered trade union, employer, registered employers' organization or bargaining council which has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to—

(a) whether or not any employee or employer, or class of employees or employers is or was engaged or employed in a sector;

(b) whether or not any provision in any award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers, or is or was applicable to any sector.

(2) Whenever a dispute between two or more bargaining councils concerning a question as contemplated in subsection (1) (a) or (b) is settled by agreement between the bargaining councils, the provisions of such agreement shall be brought to the notice of the Minister and the Minister may, if he deems it necessary to do so, cause a notice to be published in the *Gazette* setting forth the particulars of the agreement.

(3) Whenever, in any proceedings in terms of this Act before the Labour Court, a question as contemplated in subsection (1) (a) or (b) is raised, and the Labour Court is satisfied that—

(a) the question raised—

(i) has not previously been determined by arbitration in terms of this section; or

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings,

it shall refer the question to the Commission for determination, and shall adjourn the proceedings in which the question was raised until the question has been so determined.

(4) Upon receipt of—

(a) an application in terms of subsection (1); or

(b) a referral in terms of subsection (3),

the Commission shall appoint a commissioner to hear the application or determine the question, and the provisions of section 135 shall, subject to the necessary alterations, apply.

(5) Whenever, in any proceedings in terms of this Act before a commissioner, a question as contemplated in subsection (1) (a) or (b) is raised, and the commissioner is satisfied that—

(a) the question raised—

(i) has not previously been determined by arbitration in terms of this section; or

(ii) is not the subject to an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings,

he or she shall adjourn the proceedings and consult with the director of the Commission who shall either direct the commissioner concerned to determine the question or appoint another commissioner to do so, and the provisions of section 135 shall, subject to the necessary alterations, apply.

(6) If the Commission is of the view that the question is of substantial importance, the Commission shall cause to be published in the *Gazette* a notice setting forth particulars of the application or referral and stating the period within which and the address at which any written representations shall be lodged.

(7) In the event that a notice contemplated in subsection (6) has been published, the commissioner shall not commence the arbitration prior to the expiry of the period stated in the said notice.

(8) Prior to making an award, the commissioner shall consider any written representations lodged in terms of subsection (6), and consult with NEDLAC.

(9) The commissioner shall furnish the award, togehter with brief reasons therefor, to the Labour Court and to the Commission.

(10) If the Commission is of the view that the nature of the award is of substantial importance, it may cause the award to be published by notice in the *Gazette*.

(11) The registrar shall amend the certificate of registration of a bargaining council in so far as this may be necessary in the light of the award.

Disputes concerning this Part

46. (1) Whenever there is a dispute concerning the interpretation or application of this Part, which arises other than in the course of arbitration proceedings or proceedings in the Labour Court, any party to the dispute may refer the dispute in writing to the Commission.

(2) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(3) Where the dispute remains unresolved, the commissioner shall resolve it by way of arbitration as contemplated in terms of section 135.

(4) Where the dispute remains unresolved, any party to the dispute may refer it to the Labour Court for adjudication.

CHAPTER IV

INDUSTRIAL ACTION

Right to strike and recourse to lock-out

47. (1) Every employee shall have the right to strike and every employer shall have recourse to lock-out—

(a) if the issue in dispute has been referred—

(i) (aa) to the Commission in terms of section 133 (1) and a certificate stating that the dispute remains unresolved has been issued; or

(bb) to a bargaining council in terms of section 31 (2) and a certificate stating that the dispute remains unresolved has been issued; or

(ii) a period of 30 days or such further period or periods as may be agreed to between the parties to the dispute, has elapsed since the referral was received, whichever event occurs first; and

(b) if the issue in dispute concerns a refusal to bargain, and an advisory award has been made in terms of section 136; and

(c) (i) in the case of a strike, the employer or the employers' organization party to the dispute has received written notice of the proposed strike at least 48 hours prior to its commencement; or

(ii) in the case of a lock-out, the employees or the trade union party to the dispute have received written notice of the proposed lock-out at least 48 hours prior to its commencement.

(2) For the purposes of subsection (1) (b), a refusal to bargain shall include—

(a) the refusal to recognize a trade union as a collective bargaining agent, the refusal to establish a bargaining council, the withdrawal of recognition of a collective bargaining agent or the resignation from a bargaining council;

(b) a dispute concerning appropriate bargaining units or bargaining subjects.

(3) The procedural requirements of this section shall not apply to a strike or a lock-out, as the case may be, where—

(a) the parties to the dispute are parties to a bargaining council, and the dispute has been dealt with by such bargaining council in terms of its constitution and remains unresolved;

(b) a strike or a lock-out is in conformity with a collective agreement which is binding on the parties to the dispute and which regulates the procedures relevant to a strike or a lock-out;

(c) employees strike in response to their employer having had recourse to a lock-out which is not in conformity with the provisions of this Chapter;

(d) an employer locks out in response to its employees taking part in a strike which is not in conformity with the provisions of this Chapter;

(e) the employer fails to comply with a requirement contemplated in subsection (4).

(4) Whenever employees or the trade union of which they are a member refer a dispute to the Commission or a bargaining council in terms of subsection (1) (a) concerning a unilateral change to terms and conditions of employment by their employer or the employer of its members, the employees or the trade union in question may, in the referral, require the employer—

(a) not to unilaterally implement the change to terms and conditions of employment; or

(b) where the employer has already unilaterally implemented the change to terms and conditions of employment, to restore the terms and conditions of employment which applied prior to such change,

for a period or periods contemplated in subsection (1) (a), and the employer shall, within 48 hours of receipt of such referral, comply with the requirement.

Limitations on right to strike or recourse to lock-out

48. (1) Subject to the provisions of a collective agreement, no person shall take part in a strike or a lock-out or in conduct in contemplation or furtherance of a strike or lock-out if such person—

(a) is bound by a provision in any award or collective agreement which regulates the issue in dispute; or

(b) is bound by a provision in any wage determination made in terms of the Wage Act which regulates the issue in dispute, during the first year of operation of such wage determination.

(2) No person shall take part in a strike or a lock-out or in conduct in contemplation or furtherance of a strike or a lock-out—

(a) if such person is bound by a provision in any collective agreement which prohibits any strike or lock-out in respect of the issue in dispute; or

(b) if such person is bound by any agreement in terms of which the issue in dispute is required to be referred to arbitration; or

(c) where the issue in dispute is one in respect of which an arbitration award may be made or an order of the Labour Court may be granted in terms of this Act;[7] or

(d) in an essential service as contemplated in section 53 (3).

(3) No person shall take part in a strike in breach of a collective agreement regulating the provision of a maintenance service as contemplated in section 53 (4) or in breach of a determination by the essential services committee in terms of section 53 (24).

(4) No person shall take part in a strike or in conduct in contemplation or furtherance of a strike which is in support of a strike between other employees and their employer unless—

(a) the other employees have complied with the provisions of this Chapter; and

(b) their own employer or, where appropriate, the employers' organization of which their own employer is a member has received written notice of the proposed strike at least 48 hours prior to its commencement.

Effect of strike or lock-out in conformity with Act

49. (1) Any person who takes part in—

(a) a strike or a lock-out which is in conformity with the provisions of this Chapter; or

(b) conduct in contemplation or in furtherance of such strike or lock-out,

does not thereby commit a delict or a breach of contract.

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[7] **Matters in respect of which an arbitration award may be made or an order of the Labour Court granted include those relating to the interpretation, or application or exercise of the right of freedom of association and organizational rights, the interpretation and application of collective agreements, matters which are the subject of joint decision making by a workplace forum, the dismissal of employees, disciplinary action short of dismissal and disputes relating to equality in the workplace.**

(2) Notwithstanding the provisions of subsection (1), an employer shall not be obliged to remunerate an employee in respect of services not rendered by the employee during a strike or a lock-out which is in conformity with the provisions of this Chapter: Provided that where the employee's remuneration includes payment in kind, such as accommodation, the provision of food and other basic amenities of life, the employer shall, at the request of the employee, not discontinue such payment in kind during such strike, save that the employer may, after the termination of the strike, recover the monetary value of such payment in kind from the employee by way of civil proceedings instituted in the Labour Court.

(3) An employer shall not dismiss an employee by virtue of his or her participation in a strike which is in conformity with the provisions of this Chapter or conduct in contemplation or furtherance of such strike.

(4) The provisions of subsection (3) shall not preclude an employer from dismissing an employee for a fair reason connected with the employee's conduct during the strike or for economic, technological, structural or similar reasons in compliance with the provisions of Chapter VI.

(5) No civil legal proceedings shall be brought in any court of law against any person—

(a) participating in a strike or a lock-out which is in conformity with the provisions of this Chapter;

(b) in respect of conduct in contemplation or furtherance of such strike or lock-out; or

(c) arising out of participation in such strike, lock-out or conduct, as the case may be.

(6) The indemnity in subsection (1) and (5) shall not apply to any act committed in contemplation or furtherance of a strike or a lock-out, the commission of which is a crime: Provided that a contravention of the provisions of the Basic Conditions of Employment Act or the provisions of the Wage Act shall not constitute an offence for the purposes of this section.

Strike or lock-out not in conformity with Act

50. (1) In respect of any strike or lock-out, which is not in conformity with the provisions of this Chapter, or conduct in contemplation or furtherance of such strike or lock-out, the Labour Court shall have the sole and exclusive jurisdiction—

(a) subject to subsection (2), to grant an interdict or order to restrain—

(i) any person from participating in such strike or conduct in contemplation or furtherance of such strike; or

(ii) any person from participating in such lock-out or conduct in contemplation or furtherance of such lock-out;

(b) to order the payment of compensation in respect of any loss attributable to the strike or lock-out, being such amount as the Labour Court considers just and equitable, having regard to—

(i) whether or not attempts were made and, if so, the extent of such attempts, to act in conformity with the provisions of this Act;

(ii) whether or not the strike or lock-out was premeditated;

(iii) whether or not the strike or lock-out was in response to unjustified conduct by another party to the dispute;

(iv) the interests of orderly collective bargaining;

(v) the duration of the strike or lock-out;

(vi) the financial position of the employer, trade union or employees respectively;

(vii) whether or not there was compliance with an order granted in terms of paragraph (a).

(2) No court of law shall grant an interdict or any other order to restrain any person as contemplated in subsection (1) (a) unless 48 hours' notice of the application for such interdict or other order has been given to the respondent and to the Commission: Provided that the court may permit a shorter period than the said period of 48 hours if—

(a) the applicant has given notice to the respondent in the prescribed manner of the applicant's intention to apply for the granting of an interdict or other order;

(b) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and

(c) the applicant has shown good cause why a shorter period than the said period of 48 hours should be permitted:

Provided further that if at least 10 days prior to the commencement of a proposed strike or lock-out notice of such proposed strike or lock-out has been given to the applicant in the prescribed manner, the applicant shall give at least five days' notice to the respondent of an application for an interdict or other order.

(3) Subsection (2) shall not apply to an employer or an employee engaged in an essential service.

Dismissal of employee for taking part in strike not in conformity with Act

51. (1) Participation in a strike which is not in conformity with the provisions of this Chapter, or conduct in contemplation or furtherance of such strike, may constitute a fair reason for dismissal.

(2) In determining whether or not a dismissal was effected for a fair reason connected with the employee's conduct as contemplated in subsection (1) and in compliance with a fair procedure, regard shall be had to the Code of Good Practice: Dismissal for Misconduct or Incapacity in Schedule 4.

(3) Any employee who disputes the fairness of his or her dismissal and who alleged that such dismissal was effected for a reason connected with his or her conduct as contemplated in subsection (1) may refer the dispute in writing to the Commission.

(4) An employee who refers a dispute to the Commission in terms of subsection (3) shall satisfy the Commission that a copy of the referral was served on the employer.

(5) Any dispute which is referred to the Commission in terms of subsection (3) shall be referred not later than 30 days from the date of dismissal, save that the Commission may condone the late referral of the dispute on good cause shown.

(6) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(7) Where the dispute remains unresolved and the commissioner has reserved a copy of a certificate to that effect on the employee, the employee may refer the dispute to the Labour Court for adjudication.

(8) Any dispute which is referred to the Labour Court in terms of subsection (7) shall be referred not later than 30 days from the date of service of the commissioner's certificate on the employee.

(9) In respect of any dispute referred to the Labour Court in terms of subsection (7), the provisions of section 89 shall apply.

Picketing

52. (1) Notwithstanding the provisions of any law regulating the right of assembly, a registered trade union may authorize a picket by its members and supporters in any place to which te public has access but outside the premises of an employer, or, with the permission of the employer, inside its premises, for the purposes of peacefully demonstrating in support of any strike in conformity with the Act or in opposition to any lock-out.

(2) Any alleged infringement of subsection (1) may be referred by the employer referred to in subsection (1) to the Commission for conciliation on an expedited basis and the Commission shall attempt to secure an agreement between such employer and the trade union to regulate the conduct of the picket for the duration of the strike or lock-out.

(3) In the event that no agreement is concluded, the Commission shall determine rules regulationing the right to picket for the duration of the strike or lock-out which shall be binding on the trade union, its members and supporters participating in the picket, the employer or the employers' organization of which the employer is a member provided that—

(a) the trade union and the employer or employers' organization may be agreement vary the determined rules;

(b) the Commission, upon representations from the employees, the trade union, the employer or employers' organization, may vary the rules, in which case he or she shall notify the trade union and the employer or the employers' organization in writing an give reasonable opportunity for the trade union to apprise its members and its supporters of the variation.

(4) In the event of a flagrant breach or material breach of the agreed or determined rules, the employer may make application to the Labour Court on an expedited basis for an order in respect of the misconduct and the court may grant an order which is just and equitable in the circumstances.

(5) A picket in compliance with subsection (1) shall constitute conduct in contemplation or in furtherance of a strike or a lock-out for the purposes of section 49.

Essential services

53. (1) The Minister, in consultation with the Minister for Public Service and Administration and NEDLAC, shall establish an essential services committee and shall appoint to such committee persons who have knowledge and experience of labour law and labour relations, on such terms and conditions as determined by the Minister.

(1) The functions of the essential services committee shall be—

(a) to conduct investigations as to whether or not one or more services, or a part thereof, are essential services, and thereafter to decide whether or not to designate one or more of the services, or a part thereof, which were the subject of such an investigation, as an essential service as contemplated in terms of subsection (3);

(b) to determine disputes as to whether or not a service is an essential service as contemplated in terms of subsection (3);

(c) to determine whether or not a service or a part thereof is a maintenance service as contemplated in terms of subsection (4).

(3) A service shall be an essential service if the interruption of that service endangers the life, personal safety or health of the whole or part of the population.

(4) A service shall be a maintenance service if the interruption of that service has the effect of material physical destruction of any working area, plant or machinery.

(5) The essential services committee shall give notice of its intention to conduct an investigation in terms of subsection (2) (a) by publication in the *Government Gazette* of a notice to that effect.

(6) Such notice shall indicate the one or more services which are to be the subject of the investigation and invite interested parties to—

(a) submit written representations; and

(b) indicate whether they require an opportunity to make oral representations to the essential services committee,

within the period specified in the notice.

(7) Written representations made pursuant to such notice shall be open to inspection by interested parties at a place specified in the notice during normal office hours.

(8) The Commission shall, at the request of any interested party and upon payment of the prescribed fee, furnish such person with a certified copy of or extract from the representations contemplated in subsection (7).

(9) The essential services committee shall advise parties referred to in subsection (6) of the place where and time when oral representations may be made.

(10) Oral representations referred to in subsection (6) (b) shall be made in public.

(11) Upon completion of the investigation, and after having considered any written and oral representations made, the essential services committee shall decide whether or not to designate one or more of the services, or a part thereof, which were the subject of the investigation, as an essential service.

(12) Where the essential services committee has designate one or more services, or a part thereof, as an essential service, the committee shall cause to be published in the *Gazette* a notice to that effect.

(13) The provisions of subsections (5) to (12) shall apply, subject to the necessary alterations, to any variation or cancellation of the designation of a service or a part thereof, as an essential service.

(14) The essential services committee may ratify any collective agreement which provides for the maintenance of minimum services in a service designated as an essential service in terms of subsection (11), in which case—

(a) the agreed minimum services shall be regarded as the essential service in respect of the employer and its employees; and

(b) the provisions of subsections (18) to (21) shall not apply.

(15) Whenever there is a dispute as to whether or not a service is an essential service, any party to the dispute may refer the dispute in writing to the essential services committee.

(16) A party who refers a dispute to the essential services committee in terms of subsection (15) shall satisfy the committee that a copy of the referral was served on all the parties to the dispute.

(17) The essential services committee shall determine, on an expedited basis, whether or not the service is an esential service as contemplated in subsection (3).

(18) Any party to a dispute in which one or more of the parties to the dispute are precluded from participating in a strike or a lock-out by virtue of their being engaged in an essential service may refer the dispute in writing to the Commission.

(19) A party who refers a dispute to the Commission in terms of subsection (18) shall satisfy the Commission that a copy of the referral was served on all the parties to the dispute.

(20) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(21) Where the dispute remains unresolved, the commissioner shall resolve it by way of arbitration as contemplated in terms of section 135 read with secton 137.

(22) In the absence of a collective agreement regulating the provisions of a maintenance service, an employer may apply in writing to the essential services committee for a determination that a service or part thereof relating to the employers' business is a maintenance service.

(23) The applicant shall satisfy the committee that a copy of the application was served on all interested parties.

(24) The essential services committee shall determine, on an expedited basis if necessary, whether or not a service is a maintenance service, as contemplated in subsection (4).

(25) An employer whose services or part thereof have been determined as a maintenance service shall not engage any emloyees to continue or maintain production during a strike.

Protest action to promote or defend socio-economic interests of workers

54. (1) Every employee shall have the right to take part in protest action—

(a) if the protest action has been authorized by a registered trade union or any federation of trade unions; and

(b) if the registered trade union or federation of trade unions has served notice on NEDLAC of its authorization, the reasons for, the date of, and the nature of, its intended action, which notice shall be given at least 14 days before commencement of the protest action; and

(c) until the Labour Court has granted an order in terms of subsection (3);

(d) if it is not in an essential service; and

(e) if it is not in a maintenance service.

(2) The provisions of section 49 shall, subject to the necessary alterations, apply to any person who participates in—

(a) protest action which is in conformity with this secton; or

(b) conduct in contemplated or furtherance of such protest action.

(3) The Labour Court shall have the sole and exclusive jurisdiction in respect of protest action—

(a) to grant an interdict or any other order to restrain any person from participating in protest action which is not in conformity with the provisions of this section or conduct in contemplation or furtherance of such protest action;

(b) after having regard to—

(i) the nature and duration of the protest action;

(ii) the steps taken by the registered trade union or federation of trade unions to minimize the harm caused by the protest action; and

(iii) the conduct of the participants in the protest action;

to grant a declaratory order that from a time specified in the order, the protection conferred in subsection (2) shall be lifted;

(c) in the event of any person not complying with an order referred to in paragraph (b), to grant any remedies that may be available to the applicant, including a common law remedy;

(d) to order the payment of compensation in respect of any loss attributable to the protest action, being such amount as the Labour Court considers just and equitable, having regard to—

(i) whether or not attempts were made and, if so, the extent of such attempts, to act in conformity with the provisions of this Act;

(ii) the nature and duration of the protest action;

(iii) the conduct of the participants in the protest action;

(iv) the financial position of the employer, trade union or employees respectively;

(v) whether or not there was compliance with an order granted in terms of paragraph (a); and

(vi) the steps taken by the registered trade union or federation of trade unions to minimize the harm caused by the protest action.

CHAPTER V

WORKPLACE FORUMS

Definitions

55. For the purposes of this Chapter—

(a) **"employee"** means any person who is employed in the workplace, but excludes a senior managerial employee who in terms of his or her contract of employment or by virtue of his or her status has the authority, within the workplace—

(i) to employ and dismiss employees on behalf of the employer;

(ii) to represent the employer in dealings with the workplace forum;

(iii) to determine policy and take decisions on behalf of the employer which may render his or her representation of employees to be in conflict with this authority;

(b) **"representative trade union"** means a registered trade union which has as its members the majority of the employees employed by an employer in a workplace.

General functions of workplace forum

56. The functions of a workplace forum shall include—

(a) representing the interests of all the employees in the workplace, whether or not they are trade union members;

(b) consulting with the employer, with a view to reaching concensus, concerning the matters specified in sections 63 and 64;

(c) providing for worker participation in decision making in the workplace;

(d) seeking to enhance efficiency in the workplace.

Establishment of workplace forum

57. (1) In any workplace in which an employer employs 100 or more employees, a representative trade union may apply to the Commission for the establishment of a workplace forum in such workplace.

(2) Such application shall be in the prescribed form and manner.

(3) The applicant shall satisfy the Commission that a copy of the application was served on the employer in question.

(4) The applicant and the employer shall furnish the Commission with any further information which it may require, within a period determined by the Commission.

(5) If, after having considered the application and any further information furnished within the period determined by it, the Commission is satisfied that—

(a) the employer employes 100 or more employees;

(b) the applicant is representative; and

(c) there is no functioning workplace forum established in terms of this Chapter or in terms of a collective agreement as contemplated in subsection (6),

in the workplace in respect of which such application has been made, the Commission shall appoint a suitably qualified person to convene and attend a meeting with the applicant, the employer and any registered trade union with members employed in the workplace to endeavour to conclude a collective agreement for the establishment and governance of a workplace forum.

(6) In the event that a collective agreement is concluded, the workplace forum shall be established in terms of such agreement and the remaining provisions of this Chapter shall not apply.

(7) In the event that a collective agreement is not concluded, the workplace forum shall be established in accordance with the remaining provisions of this Chapter.

(8) At the meeting contemplated in subsection (5), or at a subsequent meeting of the same parties convened by the person appointed by the Commission in terms of subsection (5)—

(a) the parties may agree upon a ratio of employees to members of the workplace forum different to that specified in section 58 (1);

(b) the parties may agree upon a composition of the workplace forum to give effect to the occupational structure of the workplace;

(c) in the event that the parties are unable to agree on a composition of the workplace forum different to that specified in section 58 (1) and in circumstances where the person appointed by the Commission in terms of subsection (5) is of the view that a different composition is necessary to give effect to the occupational structure in the workplace, he or she shall, after consultation with the parties at the meeting, determine such composition;

(d) the parties may agree on the appointment of an election officer, who may be from among the employees, to conduct the election of the workplace forum in accordance with the provisions of section 58, failing which the person appointed by the Commisson in terms of subsection (5) shall appoint such election officer;

(e) the representative trade union and the employer may agree upon a deadlock breaking mechanism to resolve differences which may arise in the process of consultation or joint decision making as contemplated in sections 65 and 66 respectively, which mechanism may include mediation, arbitration or a combination thereof.

Election and composition of workplace forum

58. (1) Subject to section 57 (8) (a), the number of members to be elected to the workplace forum shall be determined as follows—

(a) in a workplace in which 100 to 200 employees are employed, five members;

(b) in a workplace in which 201 to 600 employees are employed, eight members;

(c) in a workplace in which 601 to 1 000 employees are employed, 10 members,

and in a workplace in which more than 1 000 employees are employed, the number of members shall be increased by one member for every additional 500 employees, up to a maximum of 20 members.

(2) The employer shall take such steps as may be reasonably necessary to assist the election officer in the conduct of the elections of the workplace forum.

(3) In the event that an employee is appointed as the election officer, the employer shall grant such employee reasonable time off with pay to prepare for and conduct the elections.

(4) Subject to section 57 (8), any employee may be nominated as a candidate for election as a member of the workplace forum by—

(a) any registered trade union with members employed in the workplace; or

(b) a petition signed by not less than x[8] per cent of the employees in the workplace or 100 employees, whichever number of employees is the smaller.

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[8] **This statutory percentage has been left for NEDLAC to determine.**

(5) Subject to section 57 (8), the election officer shall prepare a list—

(a) of all employees; and

(b) of all nominated candidates.

(6) Employees shall be entitled to vote in the election of the workplace forum during working hours at the employer's premises.

(7) Voting for the purpose of such an election shall be by secret ballot and conducted in accordance with rules determined by the Commission.

(8) (a) Subject to section 57 (8), each employee in the workplace shall be entitled to a number of votes equal to the number of members to be elected to the workplace forum as determined in terms of subsection (1).

(b) An employee shall not be precluded from exercising one or more of his or her votes in favour of any such candidate.

Term of office, removal from office and vacancies

59. (1) There shall be a general election of a workplace forum every two years.

(2) Any employee who has served a term of office as a member of a workplace forum shall be eligible for re-election.

(3) A member of a workplace forum shall vacate his or her office—

(a) on promotion to senior managerial status as contemplated in section 55;

(b) on transfer from the workplace;

(c) on termination of employment;

(d) when his or her written resignation takes effect;

(e) by an award of a commissioner in terms of section 135 read with section 136.

(4) (a) The representative trade union, the employer or the workplace forum may apply to the Commission to have a member of the workplace forum removed from office on the grounds of gross dereliction of his or her duties of office.

(b) Twenty-five per cent of the employees in the workplace may submit a signed petition to the Commission applying for the removal from office of a member of the workplace forum on the grounds of gross dereliction of his or her duties of office.

(5) Upon receipt of an application in terms of subsection (4) (a) or (b), the Commission shall refer the application to arbitration in terms of section 135.

(6) A by-election to fill any vacancy in the workplace forum shall be conducted by an election officer appointed by agreement between the workplace forum and the employer: Provided that where there is no agreement, the workplace forum shall apply to the Commission to appoint an election officer.

(7) The Commission shall be required to appoint an election officer to conduct a by-election only if it is satisfied that the workplace forum cannot function adequately without such vacancy being filled.

(8) The provisions of section 58 (2) to (8), shall, subject to the necessary alterations, apply to a by-election.

Subsequent general elections of workplace forum

60. (1) Every subsequent election of a workplace forum shall be conducted by an election officer appointed by agreement between the workplace forum and the employer: Provided that where there is no agreement, the workplace forum shall apply to the Commission to appoint an election officer.

(2) The provisions of section 58 shall, subject to the necessary alterations, apply to every subsequent general election of a workplace forum.

(3) The members of a workplace forum shall remain in office until the first meeting of the newly elected members of the workplace forum.

Meetings of workplace forum

61. (1) The first meeting of a workplace forum elected in terms of section 58 or 60 shall be convened by the election officer as soon as practicable after the election and at that meeting the members of the workplace forum shall elect from among their number a chairperson and a deputy chairperson.

(2) The workplace forum shall meet whenever necessary, but at least once a month.

(3) A quorum of the workplace forum shall be a majority of the members of the workplace forum holding office at any time.

(4) A decision of the workplace forum shall be taken by the majority of the members of the workplace forum present at the meeting.

Monthly meeting of workplace forum with employer

62. There shall be a monthly meeting of the workplace forum with the employer, at which the employer shall present a report on the financial and employment situation of the employer, its performance since the last report and its anticipated performance in the short-term and in the long-term, and shall consult with the workplace forum on any matter arising from the report which may affect employees in the workplace.

Specific matters for consultation

63. (1) A workplace forum is entitled to be consulted by the employer concerning proposals in relation to any one or more of the following matters—

(a) [9]

(b)

(c)

(2) A representative trade union in a workplace and the employer may conclude a collective agreement removing the right to consultation concerning one or more of the matters specified in subsection (1).

Additional matters for consultation

64. (1) A bargaining council may confer the right to consultation concerning additional matters on workplace forums in workplaces which fall within its registered scope.

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[9] **The task team has decided not to specify what these issues should be, and has left it for NEDLAC to determine what will be in the final Bill. However, examples of issues which could be included in this section and in sections 63, 64 and 66 are: Restructuring in the workplace, including the introduction of new technologies or new work methods; changes in the organization of work; working time patterns; strategic business plans; production planning systems (such as just-in-time inventory, quality circles or quality assurance systems); investment decisions; corporate structures; product development plans; productivity quality and schedule levels; mergers; transfers; partial or total plant closures; the proposed dismissal of one or more employees in the workplace for economic, technological, structural or similar reasons; the proposed dismissal of one or more employees by virtue of the employee's refusal to accept changes to the terms and conditions of employment for economic, technological, structural or similar reasons; personnel policy, including personnel planning, guidelines for hiring, transfer, promotion, classification; disciplinary codes and procedures; the physical conditions of work; education and training; training schemes; job grading; measures designed to achieve the adequate protection and advancement of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment on all rights and freedoms in the workplace; social benefits, including pension funds, provident funds, medical aid schemes; the application for exemption from any law or collective agreement.**

For greater detail refer to the explanatory memorandum.

(2) A representative trade union in a workplace and the employer may conclude a collective agreement conferring the right to consultation concerning additional matters on the workplace forum in that workplace.

(3) Such additional matters may relate to proposals concerning—

(a) [10]

(b)

(c)

(4) A workplace forum and the employer may, subject to the provisions of applicable health and safety legislation, agree that a meeting of the workplace forum with the employer shall constitute a meeting of a health and safety committee and that one or more members of the workplace forum shall be representatives for the purpose of such legislation.

Consultation

65. (1) The employer shall not implement a proposal in relation to any one or more of the matters specified in section 63 or any additional matters conferred upon the workplace forum in terms of section 64 until the employer has consulted the workplace forum concerning the proposal with a view to reaching consensus with the workplace forum and, where no consensus has been reached, has invoked the agreed deadlock breaking mechanism.

(2) In the course of such consultation, the employer shall give the workplace forum an opportunity to make representations, which may include alternative proposals and shall properly consider any representations or alternative proposals so made.

(3) The employer shall thereafter respond, and where it does not agree with these representations, the employer shall state the reasons therefor.

Joint decision making

66. (1) The employer shall not implement any proposals concerning the following matters until it has consulted with the workplace forum in terms of section 65 and consensus with the workplace forum has been reached—

(a) [11]

(b)

(c)

(2) In the event that consensus is not reached—

(a) the employer may invoke the deadlock breaking mechanism;

(b) where there is no deadlock breaking mechanism, or the deadlock breaking mechanism falls short of arbitration, the employer may refer the proposal to the Commission.

(3) Where the employer has referred the proposal to the Commission in terms of subsection (2) (b), the employer shall satisfy the Commission that a copy of the referral was served on the chairperson or deputy chairperson of the workplace forum.

(4) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

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[10] **See footnote [9].**

[11] **See footnote [9].**

(5) Where the dispute remains unresolved, the commissioner shall resolve it by way of arbitration as contemplated in terms of section 135.

(6) A representative trade union in a workplace and the employer may conclude a collective agreement—

(a) conferring joint decision making powers on the workplace forum in that workplace concerning matters additional to those specified in subsection (1);

(b) removing joint decision making powers from the workplace forum concerning one or more of the matters specified in subsection (1).

Disclosure of information

67. (1) The employer shall, at the earliest opportunity, disclose to the workplace forum all information relevant to a proposal concerning one or more the matters specified in section 63 or any additional matters conferred on the workplace forum in terms of section 64.

(2) An employer shall not be required to disclose information in terms of subsection (1)—

(a) which impinges on the privacy of an individual, unless that individual, has consented to its being disclosed;

(b) which is legally privileged;

(c) which the employer could not disclose without contravening a prohibition imposed on the employer by any law or order of court or without breaching an agreement.

Inspection and copies of documents

68. In so far as any of the information which is required to be disclosed in terms of section 67 is documented, the employer, if so requested by the workplace forum, shall—

(a) make such documentation available for inspection by the members of the workplace forum;

(b) furnish the workplace forum with copies of such documentation.

Quarterly meeting of workplace forum with employees

69. (1) The workplace forum shall meet the emloyees employed in the workplace at least four times a calendar year.

(2) At the meetings with the employees, the workplace forum shall report on—

(a) its activities generally;

(b) matters in respect of which it has been consulted by the employer; and

(c) matters in respect of which it has participated in joint decision making with the employer.

(3) Each year the employer shall present at one of these quarterly meetings an annual report on its financial and employment situation, its performance generally and its future prospect and plans.

(4) These quarterly meetings shall be held during working hours without loss of pay on the part of the employees, subject to a maximum limit of x[12] hours per year, at a time and place agreed upon by the workplace forum and the employer.

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[12] **The statutory maximum number of hours has been left for NEDLAC to determine.**

Experts

70. (1) The workplace forum may have recourse to exports to assist it in the performance of its functions.

(2) At the request of the workplace forum, such an expert may attend, and with the leave of the workplace forum, address any meetings of the workplace forum, including a meeting with the emloyer or the employees, and shall be entitled to any information, including the inspection and copies of any information which is documented, to which the workplace forum is entitled.

(3) An expert shall ensure that there is no conflict of interest between the assistance given to one workplace forum and the assistance given to another workplace forum.

Time off for members of workplace forum

71. (1) A member of a workplace forum shall be entitled to take reasonable time off during working hours with pay for the purpose of—

(a) performing his or her functions and duties as such a member;

(b) undergoing training relevant to the performance of such functions and duties.

(2) The right conferred by subsection (1) shall be subject to such conditions as may be reasonable so as to prevent the undue disruption of work.

(3) The costs of and associated with the training referred to in subsection (1) (b) shall be borne by the employer, provided the costs are reasonable having regard to the size and capabilities of the employer.

Full-time members of workplace forum

72. (1) In a workplace in which x[13] thousand or more employees are employed, the members of the workplace forum may designate from their number one full-time member for each x[14] thousand employees.

(2) (a) A full-time member of the workplace forum shall be paid the remuneration which he or she earned or would have earned had he or she continued in the position which he or she held immediately before being designated in terms of subsection (1).

(b) When a person ceases to be a full-time member of a workplace forum, the employer in question shall reinstate such person in the position which he or she held immediately prior to his or her election as a full-time member or appoint such person in any higher position to which he or she would have advanced had it not been for such election.

Facilities to be provided to workplace forum

73. (1) The employer shall provide, at its cost—

(a) such fees, facilities and materials as are necessary for the conduct of elections, including by-elections, of the workplace forum;

(b) such administrative and secretarial facilities as are appropriate so as to enable the members of the workplace forum to perform their functions and duties.

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[13] **This figure has been left for NEDLAC to determine.**

[14] **This figure has been left for NEDLAC to determine.**

(2) These facilities shall include, but shall not be limited to, a room in which the workplace forum may meet, and access to a telephone.

(3) The costs incurred by the employer in complying with the provisions of subsections (1) and (2) shall be reasonable having regard to the size and capabilities of the employer.

Disputes concerning this Chapter

74. (1) Whenever there is a dispute concerning the interpretation or application of the provisions of this Chapter or an alleged infringement of any right conferred or recognized by this Chapter, and the parties to the dispute are one or more employees employed in the workplace, a registered trade union with members employed in the workplace, the representative trade union or the employer, any such party may refer the dispute in writing to the Commission.

(2) A party who refers a dispute to the Commission in terms of subsection (1) shall satisfy the Commission that a copy of the referral was served on all the parties to the dispute.

(3) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(4) Where the dispute remains unresolved, the commissioner shall resolve it by way of arbitration as contemplated in terms of section 135.

CHAPTER VI

UNFAIR DISMISSAL

Right not to be unfairly dismissed

75. No employee shall be unfairly dismissed by his or her employer.

Definition of employee

76. For the purposes of this Chapter, "employee" shall include a person who has been dismissed and who disputes the fairness of the dismissal or his or her employer's failure or refusal to reinstate or re-employ him or her.

Meaning of dismissal

77. For the purposes of this Chapter, "dismissal" shall include—

(a) the termination of a contract of employment by the employer, with or without notice;

(b) the failure by an employer to renew a contract of employment for a fixed term on the same terms or on terms not less favourable to the employee in circumstances where the employee has a legitimate expectation that the contract will be renewed;

(c) the termination of a contract of employment by the employee, with or without notice, by reason of conduct on the part of the employer which has made continued employment intolerable;

(d) the refusal by an employer to allow an employee who—

(i) has exercised her right to take maternity leave in terms of any law, collective agreement or contract of employment; or

(ii) has been absent from work during the period commencing four weeks prior to the expected date of her confinement and ending eight weeks after the date of her confinement,

to resume work;

(e) the refusal by an employer to reinstate or re-employ the employee in circumstances where one or more employees who were employed by the same employer and who were dismissed for the same or a similar reason are offered reinstatement or re-employment or are reinstated or re-employed by such employer.

Date of dismissal

78. For the purposes of this Chapter, the date of dismissal, unless the contrary is stated, shall be deemed to be—

(a) the date on which the contract of employment terminates; or

(b) the date on which the employee leaves the service of the employer,

whichever is the earlier date, save that—

(i) in the case of the failure by an employer to renew a fixed-term contract, the date of dismissal shall be deemed to be the date on which the employer advised the employee of its intention not to renew such contract;

(ii) in the case of the refusal to allow the employee to resume work, the date of dismissal shall be deemed to be the date on which the employer refuses the employee the right to resume work; and

(iii) in the case of the refusal to reinstate or re-employ the employee, the date of dismissal shall be deemed to be the date on which the employer refuses to reinstate or re-employ the employee.

Criteria for unfair dismissal

79. (1) A dismissal shall be unfair for the purposes of this Chapter if—

(a) the dismissal was effected for any one or more of the reasons or for reasons including any one or more of the reasons specified in section 80;

(b) the employer fails to prove that the dismissal was effected for a fair reason—

(i) connected with the employee's conduct;

(ii) connected with the employee's capacity; or

(iii) based on the employer's economic, technological, structural or similar requirements,

and in compliance with a fair procedure.

(2) In determining whether or not a dismissal was effected for a fair reason connected with the employee's conduct or capacity and in compliance with a fair procedure, regard shall be had to the Code of Good Practice: Dismissal for Misconduct or Incapacity in Schedule 4.

(3) In determining whether or not a dismissal was effected for a fair reason based on the employer's economic, technological, structural or similar requirements and in compliance with a fair procedure, the provisions of section 81 shall apply.

Invalid reasons for dismissal

80. (1) A dismissal shall be unfair if it is for any one or more of the following reasons or for reasons including any one or more of the following reasons—

(a) the employee's exercise of any of the rights specified in section 4 or the breach by an employer of the protections specified in section 5;

(b) the filing of a complaint by the employee, or his or her recourse to competent administrative authorities, or his or her participation in proceedings, against an employer in terms of any law;

(c) the employee's race, gender, sex, ethnic or social origin, colour, sexual orientation, disability, religion, conscience, belief, political opinion, culture, language, marital status, family responsibility or any other arbitrary ground;

(d) the employee's age, except where the dismissal occurs due to an employee reaching the normal or agreed retirement age for persons employed in his or her capacity;

(e) the employee's pregnancy or any reason connected with her pregnancy;

(f) for the purpose of compelling the employee to accept a demand in respect of any matter of mutual interest between employer and employee;

(g) the employee's participation in a strike or protest action in conformity with the provisions of Chapter IV, or conduct contemplated in furtherance of such strike or protest action;

(h) the employee's refusal to do any work normally done by an employee who is on strike or is locked out in conformity with the provisions of Chapter IV, unless such work is necessary to prevent an actual danger to life, personal safety or health.

(2) The provisions of subsection (1) shall not preclude an employer from terminating the employment of an employee for a reason referred to in subsection (1) (c) or (d) if the reason is based on the inherent requirements of th particular position.

Dismissal for reasons based on econo ic, technological, structural or similar requirements

81. (1) For the purposes of this section, a repre sentative trade union shall be a registered trade union which has as its members the majority of the employees employed by an employer in a workplace.

(2) When an employer contemplates dismissing one or more employees for reasons based on economic, technological, structural or similar requirements, the employer shall consult—

(a) any workplace forum established in terms of Chapter V on which is conferred the right to consultation or to joint decision making concerning dismissals for reasons based on economic, technological, structural or similar requirements as contemplated in section 65 or 66 respectively;

(b) in the absence of such workplace forum, any representative trade union and any other registered trade union whose members are likely to be affected by the proposed dismissal;

(c) in the absence of any representative or registered trade union contemplated in paragraph (b), the trade union representatives elected in terms of section 13;

(d) in the absence of any elected trade union representatives, the employees themselves or representatives nominated by them for that purpose,

with a view to reaching consenses on—

(i) measures to avoid the dismissals, or to minimize the number of dismissals or to alter the timing thereof;

(ii) the method of selection of employees to be dismissed;

(iii) the amount of severance pay to be paid to dismissed employees; and

(iv) measures to mitigate the adverse effects of the dismissals.

(3) In the course of such consultation, the employer shall give the bodies or persons specified in subsection (2) an opportunity to make representations concerning the matters referred to therein.

(4) The employer, after having considered these representations, shall respond, and where the employer does not agree with these representations, the employer shall state the reasons therefor.

(5) For the purposes of subsections (2), (3) and (4), the employer shall disclose in writing to the bodies or persons specified in subsection (2) all relevant information which shall in any event include—

(a) the reasons for the proposed dismissals;

(b) the numbers of employees who are likely to affected and the job categories in which they are employed;

(c) the time when, or the period during which, the dismissals are likely to take effect;

(d) the proposed method of selecting employees for dismissal;

(e) proposals concerning severance pay;

(f) any possible assistance which may be rendered by the employer to the employees whom it proposes to dismiss; and

(g) the possibility of the future employment of the employees who are dismissed.

(6) An employer shall apply such selection criteria as have been agreed with the bodies or persons specified in subsection (2), and, in the absence of agreement, the employees to be dismissed shall be selected by the application of fair and objective criteria.

Severance pay

82. (1) An employee dismissed for reasons based on economic, technological, structural or similar requirements and who has completed one year or more of continuous employment with his or her employer shall be entitled to severance pay equivalent to x[15] weeks' remuneration for each completed year of continuous service with that employer: Provided that the Minister, in consultation with NEDLAC, the Education Labour Relations Council and the Public Service Bargaining Council, may increase the amount of severance pay by notice in the *Gazette*.

(2) The payment of severance pay in terms of subsection (1) shall not affect the employee's entitlement to any amount other than severance pay in terms of ay law, collective agreement or contract of employment.

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[15] **The statutory minimum number of weeks has been left for NEDLAC to determine.**

(3) Subsection (1) shall not apply where the employee refuses to accept an offer of reasonable alternative employment made by the employer.

Procedure for disputes concerning dismissal for invalid reasons

83. (1) Any employee who disputes the fairness of a dismissal which it is alleged was effected for one or more of the reasons or for reasons including any one or more of the reasons specified in section 80, may refer the dispute in writing to the Commission.

(2) An employee who refers a dispute to the Commission in terms of subsection (1) shall satisfy the Commission that a copy of the referral was served on the employer.

(3) Any dispute which is referred to the Commission in terms of subsection (1) shall be referred not later than 30 days from the date of dismissal, save that the Commission may condone the late referral of the dispute on good cause shown.

(4) The Commission shall appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

(5) Where the dispute remains unresolved and the commissioner has served a copy of a certificate to that effect on the employee, the employee may refer the dispute to the Labour Court for adjudication.

(6) Any dispute which is referred to the Labour Court in terms of subsection (5) shall be referred not later than 30 days from the date of service of the commissioner's certificate on the employee.

Procedure for disputes concerning dismissal for reasons connected with conduct or capacity

84. (1) Any employee who disputes the fairness of a dismissal which it is alleged was effected for reasons connected with the conduct or capacity of the employee may refer the dispute in writing to the Commission, and the provisions of section 83 (2) to (4) shall, subject to the necessary alterations, apply.

(2) Where the dispute remains unresolved, the commissioner shall resolve it by way of arbitration as contemplated in terms of section 135 read with section 138.

Procedure for disputes concerning dismissal for reasons connected with economic, technological, structural or similar requirements

85. Any employee who disputes the fairness of a dismissal which it is alleged was effected for reasons based on economic, technological, structural or similar requirements may refer the dispute in writing to the Commission, and the provisions of section 83 (2) to (6) shall, subject to the necessary alterations, apply.

Onus

86. In any dispute concerning a dismissal it shall be for the employee to prove the fact of the dismissal and for the employer to prove the reason for the dismissal and, save for dismissals contemplated in section 80 (1), to justify the fairness thereof, and if the employer fails to do so, the dismissal shall be unfair: Provided that in the case of a dispute concerning a dismissal referred to in section 77 (c), it shall be for the employee to prove the reason for the dismissal.

Procedures for disputes concerning severance pay

87. (1) Any party to a dispute concerning only the payment or non-payment of severance pay may refer the dispute in writing to the Commission, and the provisions of section 83 (2) and (4) shall, subject to the ncessary alterations, apply.

(2) Where the dispute remains unresolved, the commissioner shall resolve it by way of arbitration as contemplated in terms of section 135 read with section 138.

Remedies where dismissal for invalid reasons

88. (1) In the case of any dismissal found to have been effected for any reason specified in section 80, the Labour Court shall have the power—

(a) to order the employer to reinstate the employee from a date not earlier than the date of dismissal; or

(b) to order the employer to re-employ the employee, either in the work in which he or she was employed prior to dismissal or in other reasonably suitable work, from a date not earlier than the date of dismissal and on such terms as may be specified in the order; or

(c) to order the employer to pay compensation to the employee; or

(d) to grant any other appropriate remedy.

(2) The Labour Court shall require the employer to reinstate or re-employ the employee unless—

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable; or

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee.

(3) Where the Labour Court orders the payment of compensation to the employee, the amount of compensation shall be an amount that the Labour Court deems just and equitable in all the circumstances of the case, but which amount shall not exceed an amount equivalent to 24 months' remuneration, calculated at the monthly rate of remuneration to which the employee was entitled at the date of dismissal.

Remedies where dismissal for reasons connected with conduct or capacity unfair

89. (1) In determining whether a dismissal was effected for a fair reasons, the commissioner shal *inter alia* take into account—

(a) in regard to a dismissal for misconduct—

(i) whether or not a rule regulating conduct in the workplace or of relevance to the workplace was contravened; and

(ii) where such a rule was contravened, whether or not—

(aa) the rule was a reasonable or valid rule;

(bb) the employee was aware, or could reasonably be expected to have been aware, of the rule;

(cc) the rule was consistently applied by the employer;

(dd) dismissal was an appropriate sanction for the contravention of the rule;

(b) in regard to a dismissal for incapacity in the form of poor work performance—

(i) whether or not there was any material breach of the required work standards;

(ii) where there was a material breach of the required work standards, whether or not—

(aa) the employee was aware, or could reasonably be expected to have been aware, of the required work standards;

(bb) the employee was given a fair opportunity to meet the required work standards;

(cc) dismissal was an appropriate sanction for the material breach of the required work standards;

(c) in regard to a dismissal for incapacity arising from ill health or injury—

(i) whether or not the employee is capable of performing the work for which he or she was employed;

(ii) wherer the employee is not capable—

(aa) the extent to which he or she is able to perform that work;

(bb) the extent to which the employee's duties might be adapted;

(cc) the availability of any suitable alternative work.

(2) In the case of any unfair dismissal for reasons connected with the conduct or capacity of an employee, the commissioner shall have the power to make one of the following awards—

(a) requiring the employer to reinstate the employee from a date not earlier than the date of dismissal;

(b) requiring the employer to re-employ the employee, either in the work in which he or she was employed prior to dismissal or in other reasonably suitable work, from a date not earlier than the date of dismissal and on such terms as may be specified in the award; or

(c) requiring the employer to pay compensation to the employee.

(3) In making the award, the commissioner shall require reinstatement or re-employment unless—

(a) the employee does not wish to be reinstated or re-employed;

(b) the circumstances surrounding the dismissal are such that a continued employment relationship is inappropriate;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee;

(d) the dismissal is unfair solely on the grounds that it was effected other than in compliance with a fair procedure.

(4) Where an award of compensation is made—

(a) in the case of a dismissal which is found to be unfair by reason only of the fact that the employer failed to comply with a fair procedure, the commissioner shall award payment of an amount equivalent to the remuneration to which the employee would have been entitled from the date of dismissal to the date of the award, calculated at the rate of remuneration payable on the date of dismissal: Provided that the payment of compensation shall not be awarded in respect of any period of delay, either in initiating or prosecuting a claim, which is caused by the employee;

(b) in any other case, the amount of compensation shall be an amount not less than that specified in paragraph (a), and may exceed that amount where the commissoner deems it just and equitable in all the circumstances of the case, but which amount shall not, in the case of a failure to reinstate or re-employ by virtue of subsection (2) (a) and (b), exceed an amount equivalent to six months' remuneration, calculated at the rate of remuneration to which the employee was entitled at the date of dismissal, except in the case of a failure to reinstate or re-employ by virtue of subsection (2) (c), in which event the amount shall not exceed the remuneration of the employee for a period of 12 months from the date of the arbitration award, calculated at the rate to which he or she was entitled at the date of dismissal.

Remedies where dismissal for reasons connected with economic, technological, structural or similar requirements unfair

90. (1) In the case of any unfair dismissal for reasons connected with the employer's economic, technological, structural or similar requirements, the Labour Court shall have the power to make one of the orders referred to in section 88 (1).

(2) The Labour Court shall require the employer to reinstate or re-employ the employee unless—

(a) the employee does not wish to reinstated or re-employed;

(b) it is not reasonably practicable for the employer to reinstate or re-employ the employee.

(3) Where the Labour Court orders the payment of compensation, the provisions of section 89 (3) shall, subject to the necessary alterations, apply.

(4) In any proceedings brought in terms of this section, the Labour Court shall be entitled to enquire into and ascertain the amount of any severance pay to which the dismissed employee may be entitled in terms of section 82 and make an order which requires the employer to pay such amount.

Amount of compensation shall be in addition to any other entitlement

91. An order or award of compensation shall be in addition to, and not a substitution for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

Transfer of contract of employment

92. (1) Save as provided by subsection (2), no contract of employment shall be transferred from one employer to another without the consent of the employee.

(2) Where a trade, business or undertaking is transferred as a going concern, either in whole or in part, the contracts of employment of all employees employed at the date of the transfer shall automatically be transferred to the transferee.

(3) All the rights and obligations between each employee and the transferor at the date of the transfer shall continue to apply as if they had been rights and obligations between the employee and the transferee, and anything done before the transfer by or in relation to the transferor in respect of each employee shall be deemed to have been done by or in relation to the transferee.

(4) Where a trade, business or undertaking is transferred, either in whole or in part, in circumstances where the trade, business or undertaking is being wound up for reasons of insolvency, the contracts of all employees employed at the date of the transfer shall automatically be transferred to the transferee, but all the rights and obligations between each employee and the transferor at that date shall remain rights and obligations between each employee and the transferor, and anything done before the transfer by the transferor in respect of each employee shall be deemed to have been done by the transferor.

(5) A transfer such as is referred to in subsections (2) or (4) shall not interrupt the employee's continuity of employment, and such continuity shall continue with the transferee as if with the transferor.

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

CHAPTER VII

TRADE UNIONS AND EMPLOYERS' ORGANIZATIONS

PART A—REGISTRAR OF LABOUR RELATIONS

Registrar of labour relations

93. The Minister shall appoint a registrar of labour relations who shall excercise and perform the powers, functions and duties conferred on him or her by or in terms of this Act.

PART B—REGISTRATION OF TRADE UNIONS AND EMPLOYERS' ORGANIZATIONS

Definition

94. For the purposes of this Part, a trade union shall be independent if it—

(a) is not under the direct or indirect domination or control of one or more employers or employers' organizations; and

(b) is not subject to interference from or influence by any one or more employers or employers' organizations, whether through the provision of financial or material support or assistance or by any other means whatsoever tending towards such control.

Registration of trade unions or employers' organizations

95. (1) Any trade union or employers' organization may at any time apply in the prescribed form and manner to the registrar for registration.

(2) Such application shall be signed by its president and secretary and accompanied by three copies of its constitution and the prescribed registration fee.

(3) The applicant shall furnish the registrar with any further information which he or she may require, within a period determined by the registrar.

(4) If, after having considered the application and any further information furnished within the period determined by him or her, the registrar is satisfied that—

(a) there has been compliance with the provisions of this section;

(b) the applicant is a trade union or an employers' organization;

(c) the applicant's constitution complies with section 96;

(d) the applicant's constitution contains no provisions that unfairly discriminate against any person, whether directly or indirectly, on grounds of race or gender;

(e) no other trade union or employers' organization, as the case may be, has a name so closely resembling that of the applicant as to mislead or cause confusion; and

(f) the applicant, where it is a trade union, is independent,

he or she shall register the applicant by entering its name in a register of trade unions, or employers' organisations, as the case may be.

(5) If the registrar is not satisfied that the applicant has complied with the provisions of subsection (4), he or she shall, by registered post, notify the applicant accordingly, state the reasons therefor, and give the applicant an opportunity to remedy the relevant non-compliance within 30 days of such notice.

(6) If upon expiry of such 30 day periiod, the registrar shall, if he or she is satisfied that the applicant has remidied his or her non-compliance with subsection (4), register the applicant in accordance with that subsection.

(7) Whenever the registrar has decided not to register an applicant trade union or employers' organization, he or she shall, by registered post, notify the applicant thereof and state the reasons therefor.

(8) Whenever the registrar has registered a trade union or employers' organization, he or she shall issue a certificate of registration, in the name of the applicant and by registered post forward such certificate to the applicant together with a certified copy of its registered constitution.

Constitution of registered trade union or employers' organization

96. (1) The constitution of every registered trade union shall include provisions in respect of the following:

(a) The qualifications for, and admission to, membership;

(b) the termination of membership;

(c) the circumstances in which a member shall cease to be entitled to the benefits of membership;

(d) the body to which an appeal against a decision in respect of any matter referred to in paragraphs (b) or (c) shall be made and the manner in which such appeal shall be prosecuted and determined;

(e) the convening and conduct of meetings of members or representatives of members, the quorum required at such meetings, and the keeping of minutes of such meetings;

(f) the nomination of candidates for election as office-bearers or trade union representatives;

(g) the holding of a ballot for the election of office-bearers or trade union representatives whenever more than one candidate has been duly nominated for any office;

(h) the appointment or election of officials;

(i) the powers, functions and duties of office-bearers, officials and trade union representatives;

(j) the circumstances and manner in which office-bearers, officials and trade union representatives may be removed from office;

(k) the body to which an office-bearer, official or trade union representative who has been removed from office may appeal and the manner in which such appeal shall be prosecuted and determined;

(l) the manner in which decisions shall be taken;

(m) the circumstances and manner in which a ballot shall be conducted;

(n) the membership fees and other moneys, if any, to be paid by members and the method of determining such fees;

(o) the banking and investment of its funds;

(p) the purposes for which its funds may be used;

(q) the acquisition and control of property;

(r) the alteration of the constitution, subject to the provisions of section 100;

(s) its winding-up, subject to the provisions of section 102.

(2) The provisions of subsection (1) shall apply to the constitution of a registered employers' organization save that in paragraphs (f), (g), (i), (j) and (k), the reference to "trade union representative" shall be disregarded.

(3) The constitution of every registered trade union or registered employers' organization shall include a provision that membership shall not be terminated and no member shall be disciplined by virtue of the member's failure or refusal to participate in a strike or lock-out (as the case may be) in circumstances where no ballot was held in respect of the strike or lock-out or where a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out.

(4) The constitution of every registered trade union or registered employers' organization shall include a provision that it is an association not for gain.

Effect of registration of trade union or employers' organization

97. (1) Upon registration, every trade union or employers' organization shall be a body corporate.

(2) Unless otherwise expressly provided in the constitution of a registered trade union or employers' organization, no person shall, by reason only of the fact that he or she is a member, or official of such trade union or employers' organization, or an official of such union be liable for ay of the obligations and liabilities of such trade union or employers' organization.

Duties of registered trade union or employers' organization concerning accounting and auditing

98. (1) Every registered trade union or registered employers' organization shall, in accordance with generally accepted accounting practice, principles and procedures—

(a) during each financial year cause books and records of account to be kept of its income, expenditure, assets and liabilities;

(b) as soon as practicable and, in any event, within six months after the end of each financial year, prepare financial statements consisting of an income and expenditure statement for the financial year having ended and a balance sheet showing its assets, liabilities and financial position as at the end of that financial year; and

(c) cause its books and records of account and financial statements to be audited annually by a public accountant.

(2) The public accountant shall—

(a) conduct an audit in accordance with generally accepted auditing standards;

(b) furnish the registered trade union or registered employer's organization in question with an appropriate report; and

(c) state whether, in his or her opinion, the provisions of the constitution of the registered trade union or registered employers' organizatiion, in so far as they relate to financial affairs, have been observed.

(3) Every registered trade union or registered employers organization shall forthwith upon receipt of the public accountant's report referred to in subsection (2) (b) make to financial statements referred to in subsection (1) (b) and the public accountant's report available for inspection by its members or their representatives and submit those statements and that repot to a meeting or meetings of its members or representatives of its members in terms of its constitution.

Duties of registered trade union or employers' organization to retain record and to furnish information to registrar

99. (1) Every registered trade union or registered employers' organization shall—

(a) keep and maintain a record of its members;

(b) retain—

(i) all books of account, incime and expenditure statements, balance sheets and public accountant's report;

(ii) all records of the subscriptions or levies, if any, paid by its members, and such other details in relation thereto as may be prescribed;

(iii) all substantiating vouchers, correspondence and other documents relating to its affairs; and

(iv) the minutes of all its meetings,

either in the original or in a reproduced form for a period of three years from the end of the financial year to which they relate;

(c) retain al ballot papers for a period of three years from the date of the ballot.

(2) Every registered trade union or registered employers' organization shall—

(a) by the end of March in each year, send by registered post to the registrar a statement, certified by its president and secretary to be in accordance with its records, of the number of its members as at the end of December of the previous year and containing such other details as may be prescribed;

(b) within 30 days of receipt of the public accountant's report, send by registered post to the registrar a certified copy of such report and of the income and expenditure statement and the balance sheet to which such report relates; and

(c) within 30 days of receipt of a written request by the registrar, furnish the latter with an explanation of any matter relating to a statement referred to in paragraph (a) or a report, statement or balance sheet referred to in paragraph (b), as may be required by the registrar.

(3) Whenever any appointment or election of office-bearers or officials of any registered trade union or registered employers' organization takes place, the trade union or employers' organization in question shall, within 30 days of such appointment or election, furnish the registrar with the names and addresses of the persons appointed or elected, irrespective of whether or not there have been any changes amongst the office-bearers or officials of such trade union or employers' organization pursuant to such appointment or election.

(4) (a) Every registered trade union or registered employers' organization shall, upon registration, furnish the registrar with an address within the Republic at which it will accept service of any notice or document in any proceedings in terms of this Act or any other law.

(b) Whenever there is to be any change to the address referred to in paragraph (a), the registered trade union or registered employers' organization shall, 30 days prior to such change, furnish the registrar with the new address.

(c) In the event that a registered trade union or registered employers' organization fails to comply timeously or at all with the provisions of paragraph (b), service on the address furnished to the registrar in terms of paragraph (a) shall be deemed to be service for the purposes of this Act.

Alteration of constitution or change of name of registered trade union or employers' organization

100. (1) Any registered trade union or registered employers' organization may, by resolution duly passed, alter or substitute its constitution.

(2) The registered trade union or registered employers' organization shall send by registered post to the registrar three copies of the resolution to alter or substitute its constitution, together with a certificate signed by its president and secretary, stating that there has been compliance with the provisions of its constitution regulating the alteration or substitution thereof.

(3) The registrar, if satisfied that the alteration or new constitution complies with the provisions of section 95 (4) (c) and (d), shall register the altered or new constitution, and send by registered post to the registered trade union or registered employers' organization one of the copies of the resolution, with a certificate thereon signed by the registrar stating that he or she has registered the altered or new constitution.

(4) The alteration or new constitution shall only take effect from the date of such certificate.

(5) Any registered trade union or registered employers' organization may, by resolution duly passed, change the name under which it is registered.

(6) The registered trade union or registered employers' organization shall send by registered post to the registrar a copy of the resolution to change its name.

(7) The registrar, if satisfied that the new name complies with the provisions of section 95 (4) (e), shall issue and send by registered post to the registered trade union or registered employers' organization a new certificate of registration and make the necessary alterations to the appropriate register.

Amalgamation of trade unions or employers' organizations

101. (1) Any registered trade union may, by resolution duly passed, amalgamate with one or more trade unions, whether or not these trade unions are registered.

(2) The trade unions which have amalgamated shall send by registered post to the registrar—

(a) certified copies of their respective resolutions to amalgamage, together with a certificate signed by the president and secretary of each such trade union stating that there has been compliance with the provisions of their respective constituions;

(b) three copies of the constitution of the amalgamated trade union;

(c) a written agreement of amalgamation specifying the terms, conditions and arrangements regulating, and the principal consequences of, the amalgamation.

(3) The trade unions which have amalgamated shall furnish the registrar with the further information which he or she may require (if any), within a period determined by the registrar.

(4) If after having considered the documents submitted to him or her in terms of subsection (2) and, where applicable, any further information furnished by virtue of subsection (3) within the period determined by him or her, the registrar is satisfied that there has been compliance with the provisions of this section and section 95 (4) (b) to (f), he or she shall register the amalgamated trade union and make the necessary alterations to the register of trade unions, and the provisions of section 95 shall, subject to the necessary alterations, apply.

(5) In so far as it may be necessary, the registrar shall, upon registering an amalgamated trade union simultaneously cancel the registration of any of the trade unions which have amalgamated and remove their names fro the register of trade unions.

(6) Upon amalgamation—

(a) subject to the provisions of paragraph (c), all assets, rights, obligations and liabilities of the trade unions which have amalgamated shall devolve upon and vest in the amalgamated trade union: Provided that any claim against any one of the amalgamated trade unions shall be a claim against the amalgamated trade union;

(b) the amalgamated trade union shall be substituted for the trade unions which have amalgamated—

(i) in relation to any right which such trade unions were entitled to exercise by virtue of their representativeness in terms of the provisions of this Act prior to the amalgamation;

(ii) in any collective agreement or other agreement which such trade unions may have concluded prior to the amalgamation;

(iii) in respect of their membership of any bargaining council prior to the amalgamation; and

(iv) in respect of any written authorization by a member of any such trade unions for the periodic deduction from his or her wages of levies or subscriptions payable to any such trade unions;

(c) all funds of the trade unions which have amalgamated shall remain separate until the amalgamated trade union, having complied with the applicable laws, decides otherwise; and

(d) any arbitration award or order of court which was binding on the trade unions which have amalgamated shall be binding on the amalgamated trade union.

(7) The provisions of subsections (1) to (6) shall, subject to the necessary alterations, apply to an amalgamation of employers' organizations.

Winding-up of registered trade union or employer's organization

102. (1) A registered trade union or registered employers' organization shall be wound up—

(a) voluntarily, if a resolution for the winding-up of the trade union or employers' organization has been passed in accordance with its constitution; or

(b) on application, by order of the Labour Court, if the trade union or employers' organization is unable to continue to function as a trade union or employers' organization for any reason which cannot be remedied.

(2) When issuing an order for the winding-up of a registered trade union or employers' organization, the Labour Court may issue such directions as it deems necessary in order to ensure that such union or employers' organization is wound up with due regard to the interests of the parties in question, and may for that purpose and subject to such conditions as it may determine, appoint any suitable person as liquidator.

(3) (a) A liquidator appointed in terms of the constitution of a registered trade union or registered employers' organization or by order of the Labour Court in terms of subsection (2), shall be entitled to such fees as may be determined by the registrar: Provided that such determination may be reviewed by the Labour Court in chambers.

(b) Any fees payable to a liquidator shall be a first charge against the assets of the trade union or employers' organization.

(4) If, after all the liabilities and obligations of the registered trade union or registered employers' organization have been discharged, there remain assets which cannot be disposed of in accordance with the constitution of the trade union or employers' organization, the registrar shall direct that such assets be liquidated and that the moneys realized upon liquidation be paid to the Commission.

(5) The Commission shall use such moneys for the purpose of exercising and performing the powers, functions and duties conferred on it in terms of this Act.

Sequestration of registered trade union or employers' organization

103. Any person who seeks to sequestrate a registered trade union or registered employers' organization shall do so in accordance with the provisions of the Insolvency Act, 1936 (Act No. 24 of 1936), and any reference in that Act to the court shall be construed as a reference to the Labour Court.

Application for cancellation of registration of trade union on ground that it has ceased to be independent

104. (1) Any registered trade union may at any time apply in the prescribed form and manner to the registrar for the cancellation of registration of a trade union which it has reason to believe has ceased to be independent (hereinafter referred to as the respondent).

(2) The applicant shall satisfy the registrar that a copy of the application was served on the respondent.

(3) The respondent may, within 30 days of receipt of such application, submit any representations which it wishes to make in answer to such application, and shall satisfy the registrar that a copy of such representations was served on the applicant.

(4) The registrar shall, after having considered the application and any representations in response thereto, decide whether or not the respondent has ceased to be independent, and shall, by registered post, notify the applicant and the respondent of his or her decision.

(5) In the event that the registrar decides that the respondent has ceased to be independent, he or she shall cancel the respondent's registration, and thereupon the provisions of section 105 (4) and (5) shall apply in respect of the respondent.

(6) Any rights which the respondent acquired by virtue of it having been registered in terms of this Act, shall be forfeited upon cancellation of its registration.

(7) The registrar may of his or her own accord, where he or she has reason to believe that a registered trade union has ceased to be independent, by registered post, notify such trade union that he or she is considering the cancellation of its registration, and state the reasons therefor, and in this event, the provisions of subsections (3) to (6) shall, subject to the necessary alterations, apply.

Cancellation of registration of trade union or employers' organization

105. (1) Whenever the registrar has reason to believe that a registered trade union or registered employers' organization—

(a) is unable to continue to function as a trade union or employers' organization; or

(b) has been wound up or has otherwise ceased to exist,

he or she shall, by registered post, notify the trade union or employers' organization that he or she is considering the cancellation of its registration, state the reasons therefor, and give the trade union or employers' organization an opportunity to show cause why its registration should not be cancelled within 30 days of such notice.

(2) Upon the expiry of the 30 days period, the registrar shall, unless cause has been shown why registration should not be cancelled, cancel the registration of the trade union or employers' organization.

(3) The registrar shall, by registered post, notify the trade union or the employers' organization as to whether or not he or she has cancelled its registration.

(4) Such cancellation shall take effect—

(a) where the trade union or the employers' organization has failed, within the time contemplated in section 107 (3), to appeal to the Labour Court against such cancellation, on the expiry of that period; or

(b) where the trade union or employers' organization has so appealed, when the decision of the registrar has been confirmed by the Labour Court.

(5) Upon the cancellation of registration, the registrar shall remove the name of the trade union or employers' organization from the appropriate register.

Federations of trade unions or employers' organizations

106. (1) Any federation of trade unions which has as its object or as one of its principal objects the promotion of the interests of employees shall—

(a) within three months of its formation, and thereafter by the end of March in each year, send by registered post to the registrar the names and addresses of its members and the number of persons each member represents in the federation;

(b) within three months of its formation, and thereafter within 30 days of an appointment electioner of office-bearers or officials, funish the registrar with the names and addresses of the office-bearers and officials who have been elected or appointed, irrespective of whether or not there have been any changes amongst its office-bearers and officials pursuant to such most recent appointment;

(c) within three months of its formation, send by registered post to the registrar a certified copy of its constitution and particulars of the address within the Republic at which it will accept service of any notice or document in any proceedings in terms of this Act or any other law;

(d) whenever there is any change to its constitution or of the address referred to in paragraph (c), within 30 days of such change, notify the registrar thereof: Provided that where such a federation has failed to notify the registrar of any change of address or has failed to do so within 30 days serves such a notice or document at the address furnished to the registrar in terms of paragraph (c) shall be deemed to be service for the purposes of this Act; and

(e) when it is to be wound up or dissolved, advise the registrar thereof.

(2) The registrar shall keep a register of federations of trade unions in which shall be entered the names of the federations of trade unions whose constitutions have been submitted in accordance with the provisions of this section.

(3) The registrar shall remove from such register the name of a federation of trade unions which he or she has reason to believe has been wound up, dissolved or has ceased to exist.

(4) The provisions of subsections (1), (2) and (3) shall, subject to the necessary alterations, apply to any federation of employers' organizations which has as its object or as one of its principal objects the promotion of the interests of employers.

PART C—APPEALS AGAINST DECISION OF REGISTRAR OF LABOUR RELATIONS AND MISCELLANEOUS PROVISIONS

Appeals against decision of registrar.

107. (1) Any person who is aggrieved by any decision of the registrar made in terms of this Act may, within 30 days of the date of the written notification of such decision, apply in writing to the registrar for a statement of his or her reasons for the decision.

(2) The registrar shall, within 30 days of receipt of such application, furnish such person with a statement of his or her reasons.

(3) Any person who is aggrieved by any decision of the registrar may, within 60 days of the date on which the registrar furnished such reasons, or if such person has not applied for a statement of the registrar's reasons, within 60 days of the date of such decision, appeal to the Labour Court against such decision.

Access to information and records

108. (1) Any person may inspect any of the following documents in the office of the registrar during office hours namely—

(a) the registers of trade unions, employers' organizations, federations of trade unions, federations of employers' organizations and bargaining councils;

(b) the certificates of registration and the registered constitutions of registered trade unions, registered employers' organizations and bargaining councils, and the constitutions of federations of trade unions and federations of employers' organizations, and any alterations thereto.

(2) The registrar shall, at the request of any person, and upon payment of the prescribed fee, furnish such person with a certified copy of or extract from any of the documents referred to in subsection (1).

(3) Any member, office-bearer or official of a registered trade union may inspect any document lodged with or submitted or furnished to the registrar in terms of this Act by or on behalf of his or her trade union.

(4) The registrar shall, at the request of any member, office-bearer or official of a registered trade union, and upon payment of the prescribed fee, furnish such person with a certified copy of or extract from any document referred to in subsection (3).

(5) The provisions of subsections (3) and (4) shall, subject to the necessary alterations, apply to any member, office-bearer or official of a registered employers' organization in respect of any document lodged with or submitted or furnished to the registrar in terms of this Act by or on behalf of the employers' organization of which it, he or she is a member, office-bearer or official.

(6) The provisions of subsections (3) and (4) shall, subject to the necessary alterations, apply to any party to or office-bearer of a bargaining council in respect of any document lodged with or submitted or furnished to the registrar in terms of this Act by or on behalf of the bargaining council of which it is a party or he or she is an office-bearer.

(7) The registrar shall, at the request of any person, free of charge, furnish such person with—

(a) (i) the names and addresses of persons appointed or elected as office-bearers or officials;

(ii) the address at which any notice or document in any proceedings in terms of this Act or any other law may be served,

of any registered trade union, registered employers' organization, federation or bargaining council;

(b) any of the details of a federation of trade unions or a federation of employers' organizations referred to in section 106 (1) (a) and (c).

(8) (a) The registrar shall, within 14 days of the registration, change of name, amalgamation or cancellation of registration of any registered trade union, registered employers' organization or bargaining council, cause to be published in the *Gazette* a notice to that effect.

(b) The registration, change of name, amalgamation or cancellation of registration of any registered trade union, registered employers' organization or bargaining council shall take effect only on the date of publication in the *Gazette* of the notice referred to in paragraph (a).

CHAPTER VIII

DISPUTE RESOLUTION

PART A—COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

Establishment of Commission for Conciliation, Mediation and Arbitration

109. (1) There is hereby established a juristic person to be known as the Commission for Conciliation, Mediation and Arbitration.

(2) The Commission, in exercising and performing its powers, functions and duties, shall not be subject to any directions or interference, whether direct or indirect, from the state, any political party, trade union, federation of trade unions, employer, employer's organization or federation of employers' organizations.

Area of jurisdiction of Commission

110. (1) The Commission shall have jurisdiction in all the provinces of the Republic.

(2) The head office of the Commission shall be determined by the Minister, in consultation with the governing body.

(3) The Commission shall establish and maintain a provincial office in each province of the Republic and as many local offices as it deems fit for the purpose of performing and exercising its powers, functions and duties in terms of this Act.

Powers, functions and duties of Commission

111. (1) The Commission shall exercise and perform the powers, functions and duties conferred on it in terms of this Act and any other law.

(2) The Commission may, in addition, do all that is reasonably necessary or supplementary to the achievement and promotion of the primary objects of this Act.

(3) Without derogating from the generality of subsections (1) and (2), the Commission shall—

(a) attempt to resolve disputes which are referred to it in terms of this Act by way of conciliation as contemplated in terms of section 134;

(b) resolve disputes which remains unresolved by way of compulsory arbitration as contemplated in terms of section 135;

(c) resolve disputes which remain unresolved by way of voluntary arbitration as contemplated in terms of section 140;

(d) issue certificates in the circumstances contemplated in section 47 (1);

(e) assist in the establishment and determine rules for the election of workplace forums;

(f) where necessary, appoint election officers to conduct the election of workplace forums;

(g) compile and publish information and statistics on its activities and the exercise and performance of its powers, functions and duties in terms of this Act;

(h) do all that is reasonably necessary or supplementary to the exercise and performance of its powers, functions and duties in terms of this Act.

(6) Without derogating from the generality of subsections (1) and (2), the Commission may—

(a) provide advice as contemplated in section 147;

(b) provide assistance as contemplated in sections 148 and 149;

(c) accredit private agencies or bargaining councils as contemplated in terms of section 131;

(d) subsidize accredited agencies or accredited bargaining councils as contemplated in section 132;

(e) provide training for the proper functioning of workplace forums;

(f) conduct, scrutinize or oversee any election or ballot on behalf of a registered trade union at such organization's request;

(g) conduct, scrutinize or oversee any election or ballot on behalf of an employer or registered employers' organization at the request of such employer or employers' organization;

(h) publish Codes of Good Practice, as contemplated in section 161;

(i) conduct research which will assist it in exercising and performing its powers, functions and duties in terms of this Act.

(5) Without derogating from the generality of subsections (1) and (2), the Commission may, on request or of its own accord, provide advice or training to employees, employers, registered trade unions, registered employers' organizations or federations concerning—

(a) the establishment of collective bargaining structures;

(b) the design, establishment and election of workplace forums and the creation of deadlock breaking mechanisms;

(c) procedures for preventing and resolving disputes and employees' grievances;

(d) disciplinary procedures;

(e) procedures in relation to dismassals;

(f) the process of restructuring the workplace;

(g) affirmative action and equal opportunity programmes.

Governing body of Commission

112. (1) The Commission shall be governed by a governing body and all acts of such governing body shall in law be regarded as the acts of the Commisson.

(2) Subject to subsection (3), the governing body shall consist of—

(a) (i) a chairperson; and

(ii) six other members,

nominated by NEDLAC and appointed by the Minister; and

(b) the director of the Commission referred to in section 118.

(3) The nominations submitted by NEDLAC shall consist of—

(a) an independent person nominated by NEDLAC for the position of chairperson;

(b) two persons nominated by those voting members of NEDLAC who represent organized business;

(c) two persons nominated by those voting members of NEDLAC who represent organized labour; and

(d) two persons nominated by those voting members of NEDLAC who represent the state.

Term of office of members of governing body

113. (1) Subject to the provisions of section 115 and 116, a member of the governing body shall hold office for three years as from the date of his or her appointment.

(2) A member of the governing body may resign from office on written notice to the governing body.

(3) A member of the governing body shall upon the expiry of his or her term of office be eligible for re-appointment.

Remuneration and allowances of members of governing body

114. The Commission shall pay to the members of the governing body such remuneration and travelling and other allowances as determined by the Minister, in consultation with the Minister of Finance.

Removal of member of governing body from office

115. The Minister, acting on the advice of NEDLAC, shall remove a member of the governing body from office by reason of the member's—

(a) serious misconduct;

(b) incompetence or incapacity;

(c) absence from three consecutive meetings of the governing body without good cause or without prior permission of the chairperson.

Vacancies in governing body

116. (1) There shall be a vacancy in the governing body—

(a) when a member of the governing body resigns;

(b) if a member of the governing body is removed from office in terms of section 115; or

(c) upon the death of a member of the governing body.

(2) A vacancy in the governing body shall be filled by the appointment of a replacement member of the governing body by the Minister in accordance with the provisions of section 112 (2) and (3) as soon as practicable after the occurrence of such vacancy, and any member of the governing body so appointed shall hold office for the unexpired period of his or her predecessor's term of office.

Proceedings of governing body

117. (1) The governing body shall determine its own procedures necessary for its meetings.

(2) A quorum of the governing body shall be three members of the governing body, provided that the three members between them include—

(a) one member who was nominated by those voting members of NEDLAC who represent organized business;

(b) one member who was nominated by those voting members of NEDLAC who represent organized labour; and

(c) one member who was nominated by those voting members of NEDLAC who represent the state,

save where neither member nominated by those voting members of NEDLAC who represent one of the interests specified in paragraphs (a), (b) or (c) is able to attend a meeting of the governing body, and both those members agree to the meeting proceedings in their absence, or to specified issues being dealt with at a meeting in their absence.

(3) If the chairperson is absent from any meeting of the governming body, the members present shall elect from their number a person to preside at that meeting an who may at that meeting exercise or perform any power or function of the chairperson.

(4) A decision taken by the governing body or an act performed under the authority of such a decision shall not be invalid merely by reason of any irregularity in the appointment of a member of the governing body or a vacancy in the governing body.

Director of Commission

118. (1) The governing body shall appoint a director of the Commission who shall be a person—

(a) who has a special knowledge and experience of labour relations and of dispute resolution; and

(b) who, whether at any time prior to the date of commencement of this Act or at any time after such commencement, has never been convicted of an offence involving dishonesty.

(2) Subject to the directions of the governing body and the provisions of this Act, the director shall—

(a) exercise and perform the powers, functions and duties converred on this office in terms of this Act and any other law;

(b) exercise and perform the powers, functions and duties delegated to him or her by the governing body;

(c) seek to ensure the effective exercise and performance by the Commission of its powers, functions and duties in terms of this Act;

(d) exercise control and supervision over the staff of the Commission.

(3) The director shall be appointed on such terms and conditions as determined by the governing body.

(4) Upon appointment, the director shall become—

(a) a member of the panel of commissioners referred to in section 119, save that the provisions of section 119 (3) to (9) shall not apply in relation to the director; and

(b) a member of the governing body.

(5) The director shall not exercixe any vote at any meeting of the governing body.

(6) Whenever the director is absent or unable to perform his or her functions, or whenever the office of the director becomes vacant, the chairperson may, subject to such conditions as may be determined by him or her, appoint any person to act as director during such absence or inability, or until a director has been appointed to the vacant post.

(7) The governing body may remove the director from office by reason of the director's—

(a) serious misconduct;

(b) imcompetence or incapacity;

(c) a material breach of the Commission's code of conduct;

(d) absence from three consecutive meetings of the governming body without good cause or without prior permission of the chairperson.

(8) The provisions of section 116 (1) shall, subject to the necessary alterations, apply to the office of the director becoming vacant.

(9) Whenever the office of the director becomes vacant, the governing body shall appoint a director in accordance with the provisions of subsection (1) as soon as practicable after the occurrence of such vacancy.

Commissioners of Commission

119. (1) The governing body shall appoint a panel of commissioners consisting of such number of commissioners, whether full-time or part-time, as it may from time to time deem appropriate.

(2) A commissioner shall be competent to exercise the powers and to perform the functions conferred or imposed upon such office in terms of this Act.

(3) Subject to subsections (6) to (8), the commissioners shall be appointed on such terms and conditions as the governing body shall determine.

(4) The governing body shall prepare a code of conduct to govern the conduct of the commissioners in exercising and performing their powers and functions in terms of this Act.

(5) The governing body shall ensure that its commissioners subscribe and adhere to this code of conduct.

(6) The commissioners shall be accountable to the director in relation to their exercise and performance of their powers, functions and duties in terms of this Act;

(7) The exercise and performance by a commissioner of his or her powers and functions in terms of this Act shall be reviewed by the governing body at least twice during the first two years of his or her appointment.

(8) Upon the expiry of two years from the date of a commissioner's appointment the government body may appoint a commissioner on a permanent basis, subject to the provisions of subsection (9).

(9) A commissioner may at any time be removed from office by the governing body ed from office by the governing body on account of the commissioner's serious misconduct, incompetence or incapacity or a material breach of the Commission's code of conduct.

Staff of Commission

120. (1) The director, in consultation with the governing body, shall appoint such staff as he or she deems necessary.

(2) The staff of the Commission shall be appointed on such terms and conditions as determined by the governing body.

Establishment of committees

121. (1) The government body may establish such committees as it deems necessary with a view to assisting the Commission in the effective exercise and performance of its powers, functions and duties in terms of this Act and may at any time dissolve any such committee.

(2) Any such committee may consist of one or more members of the governing body, the director, commissioners or members of staff of the Commission, or one or more other persons co-opted as a member of the committee.

(3) A person who co-opted as a member of any such committee shall be paid such remuneration and travelling and other allowances as determined by the governing body.

Sub-contracting and working in association with any person

122. (1) The governing body, whenever it deems it necessary and with a view to assisting the Commission in the exercise and performance of its powers, functions and duties, may—

(a) enter into any contract for the performance of any particular act or work or the rendering of a particular service, with any person who is in the opinion of the governing body fit to perform such act or work or to render such service;

(b) enter into any arrangement with any person to perform any particular function or duty in association with such person.

(2) The term of any contract as contemplated in subsection (1) (a) or of any arrangement as contemplated in subsection (1) (b), in so far as these terms have financial implications for the Commission beyond those dealt with in the statement of the Commission's estimated income and expenditure as contemplated in section 123 (2) (a), shall be subject to the approval of the Minister, which approval shall require the concurrence of the Minister of Finance.

Financing of Commission

123. (1) The Commission shall be financed from—

(a) such moneys as, on the commencement of this Act, may be allocated from public funds to the Commission by the Minister with the concurrence of the Minister of Finance;

(b) such moneys as are from time to time appropriated to the Commission by Parliament;

(c) income derived by the Commission from its investment and deposit of surplus moneys in terms of section 125;

(d) subject to the provisions of section 126, fees payable to the Commission for exercising functions in terms of this Act;

(e) such moneys as may accrue to the Commission by virtue of the provisions of this Act.

(2) (a) The Commission shall in each financial year at a time determined by the Minister for that purpose, submit a statement of the Commission's estimated income and expenditure in respect of the next ensuing financial year to the Minister for approval, which approval shall require the concurrence of the Minister of Finance.

(b) The statement referred to in paragraph (a) shall specify as a separate item of estimated income the amount which, in respect of the financial year to which such statement relates, is to be appropriated to the Commission by Parliament within the contemplation of subsection (1) (b).

(3) For the purposes of this Chapter, "financial year" shall mean the financial year of the Commission commencing on 1 April in any year and ending on 31 March, first following, both days inclusive: Provided that the first financial year shall commence on the date of commencement of this Act.

Bank account

124. The governing body, in the name of the Commission, shall open and maintain with a bank registered as such in the Republic or with any other financial institution so registered and approved by the Minister of Finance, an account, in which there shall be deposited, subject to the provisions of section 125, the moneys received by the Commission as contemplated in section 123 and from which payments for it or on its behalf shall be made.

Investment of surplus moneys

125. The moneys of the Commission which are not immediately required for contingencies or to meet current expenditure may, upon a special resolution of the governing body having been adopted for that purpose—

(a) be invested on call or short-term fixed deposit with any bank or financial institution satisfying the requirements of section 124, which requirements shall apply for the purposes of this paragraph;

(b) be deposited with the Corporation for Public Deposits in an investment account in such manner and for such periods as the Minister, acting with the concurrence of the Minister of Finance, may in writing approve.

Fee for exercise of functions

126. (1) The Commission may charge a fee for exercising the following functions—

(a) the resolution of disputes which are referred to it in terms of this Act, where the provisions of this act authorize the Commission, or a commissioner acting on behalf of the Commission, to charge a fee;

(b) assisting in the establishment and election of workplace forums;

(c) providing training for the proper functioning of workplace forums;

(d) conducting, scrutinizing or overseeing any election referred to in section 111 (4) (f) and (g);

(e) providing advice or training as contemplated in section 111 (5), in circumstances where the Commission is requested to give such advice.

(2) The fees which the Commission may charge in terms of subsection (1) shall be in accordance with a tariff prepared by the Commission, which tariff may be revised or adjusted as the Commission deems appropriate.

Accounting and auditing

127. The Commission shall, in accordance with generally accepted accounting practice, principles and procedures—

(a) during each financial year cause books and records of account to be kept of its income, expenditure, assets and liabilities;

(b) as soon as practicable after the end of each financial year, prepare financial statements consisting of an income and expenditure statement for the financial year having ended and a balance sheet showing its assets, liabilities and financial position at the end of such financial year; and

(c) cause its books and records of account and financial statements to be audited annually by the Auditor-General.

Annual report

128. (1) As soon as practicable after the end of each financial year, the Commission shall furnish the Minister with a report concerning the activities and financial position of the Commission in respect of such financial year.

(2) An annual report submitted in terms of subsection (1) shall be tabled in the National Assembly by the Minister within 14 days of receipt thereof, if the National Assembly is then in session or, if the National assembly is not then in session, within 14 days after the commencement of its next insuing session.

Delegation of powers, functions and duties

129. (1) Subject to the provisions of subsection (4), the governing body may in writing delegate to any member of the governing body, the director or any of its committees any power, function or duty conferred or imposed upon the Commission by or in terms of this Act: Provided that a power, function or duty so delegated to the director may be exercised or performed by any member of staff orf the Commission who has been specially authorized by the director, except where the terms of such delegation preclude the director from doing so.

(2) Any delegation or authorization in terms of subsection (1) may be made subject to such conditions and restrictions as the governing body may determine, and may at any time be amended or revoked by the governing body.

(3) The governing body shall not be divested of any power, nor be relieved of any duty, which it may have delegated under this section, and may amend or rescind any decision made in terms of such a delegation.

(4) The governing body shall not delegate the following—

(a) the power to appoint the director in terms of section 118 (1);

(b) the appointment of commissioners in terms of section 119, their review, their permanent appointment and the removal of any person from the office of commissioner;

(c) the invesment of surplus moneys in terms of section 125;

(d) the accreditation of private agencies or bargaining councils in terms of section 131;

(e) the subsidy of accredited agencies and accredited bargaining councils in terms of section 132.

Limitation of liability and on disclosure of information

130. Neither the Commission, the governing body, the chairperson or any member of the governing body, the director, any commissioner nor any member of staff of the Commission or any member of a committee established by the governing body or any person with whom the governing body has entered into a contract or arrangement as contemplated in section 122 (1)—

(a) shall be liable for any damage or loss suffered by any person in consequence of any act or omission which in good faith was performed or omitted in the course of the exercise or performance or supposed exercise or performance of any power, function or duty in terms of this Act;

(b) shall—

(i) disclose, without prior agreement;

(ii) give evidence in any proceedings in terms of this Act or brought before any court of law concerning,

anything said or any information or documentation which was provided or which came to his, her or its knowledge on a confidential or without prejudice basis in the course of the exercise or performance of any power, function or duty in terms of this Act.

Accreditation of private agencies or of bargaining councils

131. (1) A private agency may apply in writing to the governing body for accreditation to perform one or more of the following functions—

(a) the resolution of disputes by way of conciliation;

(b) the resolution of disputes by way of arbitration;

(c) conducting the election of a workplace forum in accordance with the provisions of section 58.

(2) A bargaining council may apply in writing to the governing body for accreditation to perform one or more of the following functions—

(a) the resolution of disputes by way of conciliation as contemplated in terms of section 134;

(b) the resolution of disputes by way of arbitration as contemplated in terms of section 135;

(c) conducting the election of a workplace forum in accordance with the provisions of section 58,

which arise within its registered scope.

(3) The applicant shall furnish the governing body with any further information which it may require.

(4) The governing body may require the applicant to attend a meeting of the governing body convened for the purpose of considering the application.

(5) In considering an application, the governing body shall take into account—

(a) whether or not the services provided by the applicant are of an acceptable standard to the Commission;

(b) (i) the independence of the applicant in relation to the state or any political party;

(ii) where the applicant is a private agency, the independence of the applicant in relation to any trade union, federation of trade unions, employer, employers' organization or federation of employers' organizations;

(c) the capability of the applicant to conduct its activities in an orderly manner;

(d) whether or not the persons who are appointed by the applicant to perform the function referred to in subsections (1) or (2) are persons who are suitably qualified to perform these functions in terms of this Act;

(e) whether or not the applicant promotes a service that is broadly representative of the South African society;

(f) whether or not the applicant has a code of conduct to govern the conduct of persons who are appointed by it to perform the functions referred to in subsections (1) or (2), and whether this code is acceptable to the governing body;

(g) whether or not the applicant ensures that the persons who are appointed by it to perform the functions referred to in subsections (1) or (2) subscribe to and adhere to the applicant's code of conduct by means of the applicant's own disciplinary procedures;

(h) the cost to users of the services provided by the applicant.

(6) The governing body shall advise the applicant in writing of its decision as to whether or not to accredit the applicant.

(7) An accredited agency or bargaining council shall be competent to exercise the powers specified in section 141 in relation to the performance of the functions for which it is accredited.

(8) Whenever the governing body has decided to accredit the applicant, it shall cause to be published in the *Gazette* a notice thereof, including the terms and conditions of such accreditation.

(9) An accredited agency or accredited bargaining council, in so far as it exercises one or more of the functions referred to in subsections (1) or (2), shall be required to perform those functions in accordance with the provisions of the sections referred to in these respective subsections.

(10) The governing body may, after due notice to the accredited agency or accredited bargaining council, withdraw accreditation if it fails, to a material extent, to comply with the terms, conditions or obligations attached to its accreditation.

(11) An accredited agency or accredited bargaining council may apply for the renewal of its accreditation, and the provisions of subsections (3) to (7) shall apply to such application.

Grant of subsidy to accredited agency or bargaining council

132. (1) Any—

(a) accredited agency; or

(b) accredited bargaining council,

may apply in writing to the governing body for a subsidy.

(2) The subsidy shall be granted only for the performance of one or more of the functions for which the private agency or the bargaining council is accredited, and for the training of persons to perform or who are performing these functions.

(3) The applicant shall furnish the governing body with any further information which it may require.

(4) The governing body may require the applicant to attend a meeting of the governing body convened for the purpose of considering the application.

(5) In considering an application by an accredited agency or an accredited bargaining council, the governing body shall take into account—

(a) the extent to which the services of the applicant have been utilized;

(b) the need for the service provided by the applicant;

(c) the cost to users of the services provided by the applicant;

(d) the extent of and the grounds for the subsidy;

(e) the extent to which the applicant is able to exercise control over its financial affairs in accordance with established accounting practice, principles and procedures;

(f) details of the manner in which any subsidy which the governing body makes available is to be controlled.

(6) The governing body shall advise the applicant in writing of its decision as to whether or not to grant the applicant a subsidy.

(7) Whenever the governing body has decided to grant a subsidy to the applicant, it shall cause to be published in the *Gazette* a notice thereof, including the terms and conditions of such grant and the extent of the subsidy, if any, as determined by the governing body.

(8) The subsidization shall be for not longer than a year.

(9) A private agency or a bargaining council which applies to the governing body for accrediation, may, at the same time, apply for a subsidy.

PART B—RESOLUTION OF DISPUTES UNDER AUSPICES OF COMMISSION

Resolution of disputes under auspices of Commission

133. (1) Whenever there is a dispute concerning a matter of mutual interest and the parties to the dispute are—

(a) one or more trade unions;

(b) one or more employees; or

(c) one or more trade unions and one or more employees,

on the one hand, and

(d) one or more employers' organizations;

(e) one or more employers; or

(f) one or more employers' organizations and one or more employers,

on the other hand, any such party may refer the dispute in writing to the Commission.

(2) A party who refers a dispute to the Commission in terms of subsection (1) shall satisfy the Commission that a copy of the referral was served on all the parties to the dispute.

(3) Subject to the provisions of subsection (4), whenever a dispute has been referred to the Commission in terms of the provisions of this Act, the Commission shall appoint a commissioner from its panel of commissioners to attempt to resolve the dispute—

(a) by way of conciliation as contemplated in terms of section 134; and

(b) where the dispute remains unresolved—

(i) by way of compulsory arbitration as contemplated in terms of section 135; or

(ii) by way of voluntary arbitration as contemplated in terms of section 140.

(4) Whenever a dispute has been referred to the Commission in terms of Chapter IV and one or more of the parties to the dispute are precluded from participating in a strike or lock-out by virtue ot their being engaged in an essential service, the parties to the dispute shall, within seven days of the date of receipt of the referral by the Commission—

(a) appoint a commissioner from the Commission's panel of commissioners to attempt to resolve the dispute; and

(b) determine the commissioner's terms of reference,

failing which the Commission shall—

(i) appoint a commissioner from its panel of commissioners to attempt to resolve the dispute;

(ii) determine the commissioner's terms of reference.

(5) The Commission may appoint more than one commissioner to attempt to resolve the dispute.

(6) Where more than one commissioner is to be appointed, an uneven number of commissioners shall be appointed.

Resolution of disputes by way of conciliation

134. (1) A commissioner appointed in terms of section 133 shall attempt to resolve the dispute by way of conciliation within 30 days of the date on which the referral was received by the Commission or within such further period or periods as the parties to the dispute may agree.

(2) A commissioner acting in terms of subsection (1) may attempt to resolve the dispute in one or more of the following ways—

(a) by mediating the dispute;

(b) by fact-finding relevant to the resolution of the dispute;

(c) by making a recommendation to the parties to the dispute;

(d) in any other manner which he or she considers appropriate; or

(e) by any combination of the above.

(3) A party to the dispute may be assisted by one of his or her co-employees or by a member, office-bearer or official of a trade union or employers' organization of which he or she is a member.

(4) Where a party to the dispute is a corporate body, the party may be assisted by any director, member or employee of that corporate body or by any office-bearer or official of an employers' organization of which it is a member.

(5) A party to the dispute shall not be entitled to be assisted or represented in the conciliation proceedings by a legal practitioner.

(6) A commissioner acting in terms of subsection (1) shall, within the period or periods contemplated therein, issue a certificate stating that—

(a) the dispute has been resolved; or

(b) the dispute remains unresolved.

(7) The commissioner shall serve a copy of this certificate on each party to the dispute and shall file the original thereof with the Commission.

Resolution of disputes by way of compulsory arbitration

135. (1) Whenever—

(a) a dispute has been referred to the Commission in terms of the provisions of this Act; and

(b) a commissioner has been appointed in terms of section 133 to attempt to resolve the dispute; and

(c) the commissioner so appointed has issued a certificate in terms of section 134 (6) stating that the dispute remains unresolved; and

(d) this Act requires that the unresolved dispute be resolved by way of arbitration,

the commissioner shall, subject to subsection (2), resolve the dispute by way of arbitration.

(2) Any party to the dispute may object in writing to the Commission to the commissioner who attempted to resolve the dispute by way of conciliation, conducting the arbitration.

(3) A party who so objects shall satisfy the Commission that a copy of the objection was served on all the parties to the dispute.

(4) Upon receipt of an objection as contemplated in subsection (2), the Commission shall appoint another commissioner from its panel of commissioners to conduct the arbitration.

General provisions concerning arbitration

136. (1) Unless otherwise specifically stated in sections 137, 138, 139 or 140 the provisions of this section shall apply to an arbitration conducted in terms of sections 135 or 140.

(2) The arbitration shall be conducted in such manner as the commissioner considers appropriate to the fair determination of the dispute, and shall, whenever he or she considers this appropriate, seek to avoid formality in the arbitration proceedings.

(3) A party to the dispute shall be entitled to give evidence, to call witnesses, to question any witnesses and to address the commissioner.

(4) The commissioner shall take into account any Code of Good Practice promulgated in accordance with the provisions of this Act if it is relevant to a matter under consideration in the arbitration proceedings.

(5) A party to the dispute may appear in person or be assisted or represented by one of his or her co-employees or by a member, office-bearer or official of a trade union or employers' organization of which he or she is a member.

(6) Where a party to the dispute is a corporate body, the party may be assisted or represented by any director, member or employee of that corporate body or by any office-bearer or official of an employers' organization of which it is a member.

(7) A party to the dispute shall be entitled to be represented in the arbitration proceedings by a legal practitioner.

(8) If a party to the dispute fails to appear or to be represented at the arbitration proceedings, the commissioner may—

(a) if that party referred the dispute to the Commission, dismiss the matter; or

(b) in all other instances—

(i) continue with the arbitration proceedings in the absence of that party; or

(ii) adjourn the arbitration proceedings to a later date.

(9) The commissioner shall, within 14 (fourteen) days of the conclusion of the arbitration proceedings, serve a copy of his or her award, together with brief reasons therefor, on the Commission and on each party to the dispute (or the party's legal representative in the arbitration proceedings) and file the original thereof with the registrar of the Labour Court: Provided that the director may, at the request of the commissioner and on good cause shown, extend the period within which the award and the reasons therefor are to be served and lodged.

(10) The award shall be in writing and shall be signed by the commissioner.

(11) No order for costs shall be made by a commissioner concerning the arbitration proceedings, except where a party has acted in a frivolous or vexatious manner—

(a) in proceeding with or defending the matter in the arbitration proceedings;

(b) in its conduct in the course of the arbitration proceedings.

(12) Any order as to costs in terms of subsection (11) may be made against the party who has acted in a frivolous or vexatious manner, or against any trade union, employers' organization, office-bearer or official of either such organization assisting or representing the said party.

(13) If more than one commissioner has been appointed, the decision of the majority of the commissioners shall be the decision of the commissioners.

Specific provisions concerning arbitration in essential services

137. Whenever the provisions of section 135 (1) apply to a dispute and one or more of the parties to the dispute are precluded from participating in a strike or a lock-out by virtue of their being engaged in an essential service—

(a) the provisions of section 136 (9) shall not apply;

(b) the commissioner shall serve a copy of his or her award, together with brief reasons therefor, on the Commission and on each party to the dispute (or the party's legal representative in the arbitration proceedings) and file the original thereof with the registrar of the Labour Court within 30 days of the date on which he or she was appointed: Provided that this period may be extended by such further period or periods as the parties to the dispute may agree;

(c) the provisions of section 136 (11) (a) shall not apply.

Specific provisions relating to arbitration of disputes concerning dismissal for reasons connected with conduct or capacity

138. Whenever the provisions of section 135 (1) apply to a dispute concerning the fairness of a dismissal which it is alleged was effected for reasons connected with the conduct or capacity of the employee—

(a) the provisions of section 136 (7) shall not apply;

(b) a party to the dispute shall not be entitled to be represented in the arbitration proceedings by a legal practitioner;

(c) notwithstanding the provisions of paragraph (b), where one or more parties to an arbitration conducted in terms of this section are represented by a person who is not a legal practitioner but who possesses the qualifications necessary for admission to practice as such, any other party to the proceedings who is not so represented may apply to the commissioner to be represented in the arbitration proceedings by a legal practitioner, which application the commissioner, after consulting with the director, may only grant if he or she is satisfied that the ends of justice would be defeated if such application were to be refused;

(d) a commissioner shall order an employer to pay the costs of the arbitration in addition to any compensation awarded in terms of the provisions of Chapter VI where the dismissal is found to be procedurally unfair.

Specific provisions concerning compulsory arbitration of other disputes

139. Whenever the provisions of section 135 (1) apply to any dispute other than—

(a) a dispute which is required by this Act to be resolved by way of advisory arbitration; or

(b) a dispute as contemplated in sections 137 or 138,

the commissioner shall have the power to make an award on such terms as he or she deems reasonable, including but not limited to—

(i) an award which he or she is authorized to make in terms of the provisions of this Act or which the circumstances may require to give effect to the provisions and objects of this Act or any collective agreement;

(ii) an award in which a declaratory order is issued.

Resolution of disputes by way of voluntary arbitration

140. (1) Whenever the provisions of section 135 (1) (a) to (c) apply, the parties to the dispute may agree in writing to the resolution of the dispute by way of voluntary arbitration under the auspices of the Commission.

(2) Subject to subsection (3), such arbitration shall be conducted in accordance with the provisions of section 136 by the commissioner who attempted to resolve the dispute by way of conciliation.

(3) Any party to the arbitration agreement may object in writing to the commissioner who attempted to resolve the dispute by way of conciliation conducting the arbitration.

(4) Unless the arbitration agreement otherwise provides, the agreement shall not be capable of being terminated except by the consent of all the parties thereto.

(5) The Labour Court may at any time on application of any party to the arbitration agreement, on good cause shown, set aside or vary the agreement.

(6) If any party to an arbitration agreement institutes any legal proceedings in the Labour Court against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may apply to the Labour Court for a stay of such proceedings.

(7) If on any application as is contemplated in subsection (6) the Labour Court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the arbitration agreement, the Labour Court may make such an order staying such proceedings subject to such terms and conditions as it may consider just.

(8) Whenever the provisions of subsection (1) apply, the commissioner shall have the power to make an award which the Labour Court would be authorized to make in terms of sections 88 and 90.

Powers of commissioner when attempting to resolve a dispute

141. (1) A commissioner who has been appointed in terms of section 133 may for the purposes of attempting to resolve the dispute in question—

(a) subpoena any person who in his or her opinion may be able to give material information concerning the dispute, or who he or she suspects or believes has in his or her possession or custody or under his or her control any book, document or object which has any bearing upon the subject of the dispute, to appear before him or her at a time and place specified in the subpoena, to be questioned or to produce that book, document or object: Provided that if any person or body in question satisfies a commissioner that there is reasonable ground for supposing that any other person is able to give such information or has in his or her possession or custody or under his or her control any such book, document or object, the commissioner shall so subpoena that person;

(b) at all reasonable times enter upon and inspect any premises and demand and seize any book, document or object on such premises;

(c) call and administer an oath to or accept an affirmation from any person present at the conciliation or arbitration proceedings who was or might have been subpoenaed in terms of paragraph (a), and may question him or her and require him or her to produce any book, document or object in his possession or custody or under his or her control;

(d) inspect, and retain for such period as may be reasonable for the purposes of the proceedings, any book, document or object so produced or seized.

(2) A subpoena issued in terms of subsection (1) (a) shall be signed by the director.

(3) A commissioner may not enter nor inspect any premises in terms of subsection (1) (b) without the prior written authority of the director.

(4) The owner or occupier of any premises referred to in subsection (1) (b), and every person employed by him or her, shall at all times furnish such facilities as a commissioner may require for entering such premises and for making such inspection and seizure.

(5) The law relating to privilege, as applicable to a witness subpoenaed to give evidence or to produce any book, document or object before a court of law, shall apply in connection with the questioning of any person or the production or seizure of any book, document or object in terms of this section.

(6) Any person subpoenaed to appear before a commissioner shall be entitled to receive from moneys referred to in section 123 (1) (b), as witness fees, an amount equivalent to the amount which he or she would have received as witness fees had he or she been subpoenaed to attend proceedings in the Labour Court: Provided that if the person subpoenaed is in the full-time employment of the state, the amount payable to him or her shall be determined in accordance with the laws governing his or her employment.

(7) Any person who—

(a) has been subpoenaed in terms of subsection (1) (a) and without good cause fails to appear at the time and place specified in a subpoena; or

(b) having so appeared, fails to remain in attendance until excused from further attendance by the commissioner; or

(c) upon being required by a commissioner to be sworn or to affirm as a witness, refuses to do so; or

(d) refuses to answer fully and to the best of his or her knowledge and belief any question lawfully put to him or her during any conciliation or arbitration proceedings; or

(e) without good cause, fails to produce before a commissioner any book, document or object specified in a subpoena requiring him or her so to produce it; or

(f) wilfully hinders a commissioner in the exercise or performance of any of the powers, functions or duties conferred or imposed upon him or her by or under this Part; or

(g) insults, disparages or belittles a commissioner or prejudices, influences or anticipates the proceedings or his or her award;

(h) wilfully interrupts the conciliation or arbitration proceedings or misconducts himself or herself in any other manner during such proceedings;

(i) does anything in relation to the commissioner which if done in relation to a court of law would have constituted contempt of court,

shall be in contempt of the commissioner, who may refer the matter to the Labour Court for an order to compel compliance by such person.

(8) A commissioner may call, and if necessary subpoena, expert testimony or conduct a fact-finding exercise relevant to the resolution of the dispute, in which event the provisions of this section shall, subject to the necessary alterations, apply to such testimony or fact-finding exercise.

Effect of commissioner's arbitration awards

142. (1) Save in the case of advisory arbitration, the arbitration award of any commissioner appointed in terms of this Part shall be final and binding.

(2) Where an award orders the payment of a sum of money, such sum shall, unless the award provides otherwise, carry interest as from the date of the award and at the same rate as a judgment debt.

Power of commissioner to vary or rescind award

143. (1) A commissioner may of his or her own accord or upon the application of any party affected thereby—

(a) rescind or vary an arbitration award erroneously made in the absence of any party affected thereby;

(b) vary an arbitration award in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission.

Review of arbitration award

144. (1) Where in any arbitration conducted in terms of this Act—

(a) a commissioner has misconducted himself or herself in relation to his or her powers, functions or duties as commissioner;

(b) a commissioner has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded his or her powers; or

(c) an award has been improperly obtained,

the Labour Court may, on the application of any party to the dispute after due notice to the other parties to the dispute, make an order setting aside the award.

(2) An application pursuant to this section shall be made within six weeks after the service of the award on the parties: Provided that when the setting aside of the award is requested on the ground of corruption, such application shall be made within six weeks after the discovery of the corruption.

(3) The Labour Court may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

(4) If the award is set aside the dispute shall, at the request of either party, be submitted to a new commissioner appointed in the manner directed by the Labour Court.

Exclusion of Arbitration Act, 1965

145. The Arbitration Act, 1965 (Act No. 42 of 1965), shall not apply to any arbitration conducted under the auspices of the Commission.

Performance of dispute resolution functions by Commission in exceptional circumstances

146. (1) Whenever a dispute concerning the interpretation or application of a collective agreement which is binding on the parties to the dispute has been referred to the Commission, the Commission may either appoint a commissioner to resolve such dispute in terms of this Act or refer such duspute for resolution in terms of the procedure provided for in such collective agreement: Provided that in the event that the collective agreement does not provide such a procedure or the procedure is not operative or one or more of the parties to the agreement frustrate the resolution of such dispute, and the Commission, by virtue thereof, appoints a commissioner, the Commission may charge—

(a) the parties to the collective agreement where the agreement does not provide such procedure or the procedure is not operative;

(b) the one more parties who frustrated the resolution of such dispute,

a fee for the performance of these functions.

(2) Notwithstanding the provisions of section 31 (5), whenever a dispute between two or more parties to a bargaining council has been referred to the Commission, The Commission may either appoint a commissioner to attempt to resolve such dispute in terms of this Act or refer such dispute to such bargaining council: Provided that in the event that the bargaining council's procedures for the resolution of such dispute are not operative and the Commission, by virtue thereof, appoints a commissioner, the Commission may charge the bargaining council a fee for the performance of these functions.

(3) Notwithstanding the provisions of section 31 (6), whenever a dispute—

(a) which arises within the registered scope of a bargaining council; and

(b) in respect of which one or more parties to the dispute are not parties to the bargaining council,

has been referred to the Commission, the Commission may either appoint a commissioner to attempt to resolve such dispute in terms of this Act or refer such dispute to such bargaining council: Provided that in the event that the bargaining council's procedures for the resolution of such dispute are not operative and the Commission, by virtue thereof, appoints a commissioner, the Commission may charge the bargaining council a fee for the performance of these functions.

(4) Whenever a dispute has been referred to the Commission in circumstances where, in terms of an agreement between the parties to the dispute, the dispute ought to have been referred to an accredited agency, the Commission may either appoint a commissioner to attempt to resolve the dispute or refer such dispute to such accredited agency: Provided that in the event that the accredited agency is unable to attempt to resolve such dispute, and the Commission, by virtue thereof, appoints a commissioner, the Commission may charge the accredited agency a fee for the performance of these functions and shall review the accreditation of the agency in question.

(5) Whenever a dispute has been referred to the Commission in circumstances where, in terms of a private agreement which is binding the parties to the dispute, the dispute ought to have been processed by way of private dispute resolution procedures, the Commission may either appoint a commissioner to attempt to resolve the dispute or refer such dispute to the appropriate authority in terms of the private dispute resolution procedures.

(6) For the purposes of subsections (1) to (5), the date on which the referral of the dispute was received by the Commission shall be deemed to be the date on which the Commission referred the dispute for resolution in terms of that procedure.

Advice to be provided by Commission

147. (1) Any person may request the Commission for advice concerning the procedures to be followed in processing any dispute contemplated in this Act, regardless of whether the procedure is a procedure in terms of this Act or in terms of any private agreement.

(2) The Commission, after having considered the request, may provide whatever advice it deems fit.

Assistance to be provided by Commission

148. (1) Whenever there is an unresolved dispute, an individual employer or employee who is a party to the dispute may request the Commission for assistance.

(2) Assistance by the Commission in terms of this section may include—

(a) in conjunction with the Legal Aid Board established in terms of section 2 of the Legal Aid Act, 1969 (Act No. 22 of 1969), arranging for the giving of advice or assistance by an attorney;

(b) in conjunction with the Legal Aid Board, arranging for representation by a legal practitioner—

(i) in instituting any proceedings in terms of this Act;

(ii) in defending or opposing any proceedings instituted in terms of this Act against the applicant;

(iii) in attempting to avoid or settle any proceedings instituted in terms of this Act against the applicant;

(c) any other form of assistance which the Commission may consider appropriate.

(3) The Commission shall consider this request and may grant it—

(a) on the ground that the dispute raises a question of principle;

(b) on the ground that it is unreasonable, having regard to the complexity of the case, or to the applicant's position in relation to one or more other parties to the dispute, to expect the applicant to deal with the case unassisted;

(c) by reason of any other special consideration.

(4) As soon as practicable after receipt of a request in terms of subsection (1), but no later than within 30 days of the date on which the request was received by the Commission, the Commission shall consider whether or not to grant the request and notify the applicant in writing of its decision, stating whether assistance in terms of this section is to be provided by the Commission and, if so, what form it will take.

Assistance offered by Commission of its own accord

149. Notwithstanding the provisions of this Act or of any collective agreement which is binding on the parties to a dispute, the Commission may of its own accord in circumstances where it has become aware of the existence of a dispute which has not been referred to the Commission and the resolution of the dispute would be in the public interest, the Commission may appoint a commissioner to attempt to resolve the dispute by way of conciliation as contemplated in terms of section 134.

PART C—LABOUR COURT

Establishment of Labour Court

150. There is hereby established a Labour Court which shall be a court of law and which shall keep a record of its proceedings.

Area of jurisdiction of Labour Court

151. The Labour Court shall have jurisdiction in all the provinces of the Republic.

Seat of Labour Court

152. (1) The seat of the Labour Court shall be in x.[16]

(2) Notwithstanding the provisions of subsection (1), the functions of the Labour Court may be performed in any place in the Republic.

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[16] The one or more authorities/bodies who are to make this decision has been left for NEDLAC to determine.

Constitution of Labour Court, appointment and removal from office

153. (1) The Labour Court shall consist of a Judge President, a Deputy Judge President and judges appointed by the President, acting on the advice of NEDLAC.

(2) No person shall be qualified to be appointed Judge President, Deputy Judge President or a judge of the Labour Court unless he or she—

(a) is a judge of the Supreme Court or is a legal practitioner and has, for a cumulative period of at least 10 years, practised as an advocate or an attorney or lectured in law at a university; and

(b) is a person who, by reason of his or her training and experience, has expertise in the field of labour law.

(3) The Judge President, Deputy Judge President and judges of the Labour Court may be appointed on a full time or a part-time basis and for such periods as determined by the President, in consultation with NEDLAC, and their remuneration and conditions of appointment shall be as may be prescribed by or under law.

(4) The Deputy Judge President of the Labour Court shall act as Judge President of the Labour Court whenever the Judge President is for any reason unable so to act.

(5) Prior to commencing to perform the functions of his or her office, a judge of the Labour Court shall make and subscribe an oath or solemn affirmation in terms of section 10 (2) of the Supreme Court Act, 1959 (Act No. 59 of 1959).

(6) A judge may only be removed from office by the President on the grounds of serious misconduct or incapacity established by NEDLAC.

(7) A Labour Court shall be constituted by a single judge of the Labour Court.

Registrar of Labour Court

154. The registrar of the Labour Court shall be a senior official appointed by the Minister in consultation with the Minister of Justice by reason of such person's training and experience in labour law and in administration and shall be in charge of the administrative functions of the Labour Court.

Jurisdiction of Labour Court

155. (1) This section shall be subject to those provisions of the Constitution which confer exclusive jurisdiction on the Supreme Court and the Constitutional Court in respect of certain matters.

(2) The Labour Court shall have exclusive jurisdiction in respect of those powers and functions which are conferred upon by this Act and shall have sole and exclusive jurisdiction—

(a) to make an order to compel compliance with one or more of the provisions of this Act or in relation to the exercise or performance of any power, function or duty in terms of this Act;

(b) on application to the court by any party to a settlement agreement (other than a collective agreement) or upon whom an arbitration award is binding, by virtue of the provisions of this Act, to make such settlement agreement or arbitration award an order of the Labour Court;

(c) unless otherwise provided by this Act, to grant any order concerning the interpretation or application of the provisions of this Act, which unless otherwise expressly provided for, shall be by way of application, and may include—

(i) the granting of any urgent interim relief until a final order or award has been made;

(ii) any order which it is authorised to make under any provision of this Act or which the circumstances may require in order to give effect to the objects of this Act;

(iii) the using of any declaratory order;

(iv) an award of compensation;

(v) an award of damages;

(vi) any other relief that the court deems just and equitable in the circumstances;

(d) to determine a dispute between an applicant and a registered trade union or registered employers' organization of which the applicant is a member concerning such organization's alleged non-compliance with such organization's constitution;

(e) subject to the provisions of this Act, to condone the late filing of any document or late reference of any dispute to conciliation, arbitration or court proceedings by any party;

(f) to decide appeals in terms of section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993);

(g) generally to deal with all matters necessary or incidental to the performance of its functions in terms of this Act.

(3) The Labour Court shall also have jurisdiction with the Supreme Court—

(a) to hear and determine any review proceedings concerning the exercise or performance of or purported exercise or performance of powers, functions or duties in terms of this Act;

(b) in respect of any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3 of the Constitution or any dispute over the constitutionality of any executive or administrative act or conduct or threatened executive or administrative act or conduct of any organ of state in so far as it relates to the application or implementation of this Act.

(4) The Labour Court shall have no jurisdiction to adjudicate an unresolved dispute which this Act requires be resolved by way of arbitration.

Conciliation prerequisite to referral of dispute to Labour Court

156. (1) Save for any appeals or any review proceedings instituted in the Labour Court, the Labour Court may decline to hear any matter unless it is reasonably satisfied that an attempt has been made to resolve the dispute by way of conciliation.

(2) A certificate issued in terms of section 134, whether by a commissioner, a bargaining council, an accredited agency stating that the dispute remains unresolved shall constitute proof of compliance with the provisions of subsection (1).

Powers of Labour Court

157. (1) Subject to the provisions of this Part, the Labour Court shall in the performance of its functions have all the powers of a division of the Supreme Court of South Africa, including powers relating to contempt of court.

(2) In any proceedings before the Labour Court, where it appears that the dispute referred to the court ought to have been referred to arbitration proceedings in terms of section 135, the Labour Court shall be entitled—

(a) to stay the proceedings and refer the dispute to the Commission for the appointment of an arbitrator;

(b) with the consent of the parties, to continue the proceedings, in which event the Labour Court shall be entitled to make any order which has the effect of any award which the arbitrator would be entitled to make; or

(c) should it be expedient to do so, to order that the proceedings continue before the Labour Court, in which event the Labour Court shall be entitled to make any order which has the effect of any award which the arbitrator would be entitled to make.

(3) Where proceedings are continued before the Labour Court in terms of paragraph (b) or (c) of subsection (2) (b) or (c), the Labour Court shall be entitled to make any award as to costs which it deems just and equitable in the circumstances.

(4) (a) The Labour Court may, of its own motion, or at the request of any party to any proceedings before the Labour Court reserve for the decision of the Labour Appeal Court any question of law which arises in any such appeal or proceedings, and shall state such question in the form of a special case, as contemplated in rule 33 of the Rules of the Supreme Court made in terms of section 43 (2) of the Supreme Court Act, 1959 (Act No. 59 of 1959): Provided that such a question of law shall not be stated unless the settlement thereof is in the opinion of the Labour Court of sufficient importance to the proper adjudication or finalization of the dispute.

(b) Pending the decision of the Labour Appeal Court on any question of law reserved in terms of paragraph (a), the Labour Court may make such interim order as it deems reasonable.

Rules of Labour Court

158. (1) There shall be a Rules Board consisting of—

(a) the Judge President of the Labour Court, who shall be the chairperson of the Board; and

(b) the following persons, appointed by the Minister, in consultation with NEDLAC for a period of three years—

(i) an advocate with experience of labour law;

(ii) an attorney with experience of labour law;

(iii) one person to represent the interests of employers;

(iv) one person to represent the interests of employees; and

(v) one person to represent the interests of the state.

(2) Three members of the Board shall constitute a quorum at any meeting of the Board.

(3) The Board may make rules which shall regulate all matters relating to the proceedings of and before the Labour Court, which rules shall be published in the *Gazette*.

(4) The Board may repeal or alter any rule made in terms of subsection (3).

Proceedings to be carried on in open court

159. Save as is otherwise provided in any law, all proceedings in the Labour Court shall, except in so far as such court may in special cases otherwise direct, be carried on in open court.

Representation before Labour Court

160. (1) A party to any proceedings before the Labour Court may appear in person or be assisted or represented by one of his or her or co-employees or by a member, office-bearer or official of a trade union or employers' organization of which he or she is a member.

(2) Where a party to any proceedings before the Labour Court is a corporate body, the party may be assisted or represented by any director, member or employee of that corporate body or by any office-bearer or official of an employers' organization of which it is a member.

(3) A party to any proceedings before the Labour Court shall be entitled to be represented in those proceedings by a legal practitioner.

Evidence of Codes

161. Any Code of Practice promulgated in accordance with the provisions of this Act shall be admissible as evidence in the Labour Court on its mere production and the Labour Court shall take it into account if it is relevant to a matter under consideration.

Costs

162. (1) The Labour Court may in the performance of any of its functions, make an order as to costs according to the requirements of the law and fairness.

(2) In the exercise of the discretion conferred by subsection (1), the Labour Court may take into account the conduct of the parties both prior to and during the proceedings, and in particular, the failure by any party to attend, without good cause, any conciliation meeting convened in terms of this Act.

(3) Any order as to costs in terms of subsection (1) may be made against the party to the dispute or against any trade union, employer's organization, office-bearer or official of either such organization assisting or representing the said party.

Service and enforcement of orders

163. Any decision, judgment or order of the Labour Court may be served and executed as if it is a decision, judgment or order made by the Supreme Court.

Variation and rescission of orders of Labour Court

164. The Labour Court may, in addition to any other powers it may have, either of its own motion or upon the application of any party affected, rescind or vary—

(a) a judgment or order erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) a judgment or order in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) a judgment or order granted as the result of a mistake common to the parties.

Appeals against decisions of Labour Court

165. (1) An appeal from any judgment or order of the Labour Court shall be heard by the Labour Appeal Court.

(2) The noting of an appeal under subsection (1) shall not stay the execution of any judgment or order of the Labour Court, unless the Labour Court on application directs otherwise.

PART D—LABOUR APPEAL COURT

Constitution of Labour Appeal Court

166. The Labour Appeal Court shall be constituted by three judges of the Labour Court, provided that no judge shall sit at the hearing of an appeal against a judgment or order given in a case which was heard before him or her.

Jurisdiction of Labour Appeal Court

167. (1) The Labour Appeal Court shall have the power—

(a) to hear and determine any appeals from the Labour Court;

(b) to decide any question of law reserved in terms of section 157 (4) (a).

(2) An appeal referred to in subsection (1) (a) shall be noted and prosecuted as if it is an appeal in a civil action to the Appellate Division, except that the appeal shall be noted within 21 days after the date on which leave to appeal has been granted.

(3) After hearing an appeal, the Labour Appeal Court may confirm, amend or set aside the decision or order against which the appeal has been noted or make any other decision or order, including an order as to costs, according to the requirements of the law and fairness.

(4) Subject to subsection (5), the decision of the majority of the judges considering an appeal or an application as contemplated in subsection (1) shall be the decision of the Labour Appeal Court and shall be final.

(5) For the purposes of section 102 (1), (2) and (8) of the Constitution, the Labour Apeal Court shall be deemed to be a provincial or local division of the Supreme Court.

Labour Appeal Court as court of first instance

168. Notwithstanding the provisions of this Part, the Judge President may direct that any matter before the Labour Court be heard by the Labour Appeal Court as a court of first instance, in which event the Labour Appeal Court shall be entitled to make any order in terms of this Act which the Labour Court would have been entitled to make.

CHAPTER IX

GENERAL PROVISIONS

Labour brokers

169. (1) For the purposes of this section, "labour broker" means any person who for reward provides a client with persons to render services to or perform work for the client or procures such persons for the client and for which services or work such persons are remunerated by the labour broker.

(2) Any person whose services have been procured by a labour broker or provided to any client of a labour broker for the purpose of rendering a service to or performing work ng a service to or performing work for that client, shall be deemed to be an employee of the labour broker, and the labour broker shall be deemed to be the employer of such person.

(3) The labour broker and its client shall be jointly and severally liable for any contravention by the labour broker of the provisions of this Act, the Basic Conditions of Employment Act, and award, an order or a wage determination made in terms of the Wage Act, or for any breach of a collective agreement, in so far as the contravention or the breach is committed in respect of any person whose services have been provided to the client by the labour broker in question.

(4) Subject to the provisions of subsection (5), two or more bargaining councils may conclude an agreement—

(a) in terms of which—

(i) a labour broker; and

(ii) the persons whose services have been procured by a labour broker for the purpose of rendering a service to or performing work for the client; and

(iii) the client,

within the combined registered scope of the said bargaining councils are bound by a collective agreement concluded in one of the said bargaining councils; or

(b) which is binding on—

(i) a labour broker; and

(ii) the persons whose services have been procured by a labour broker for the purpose of rendering a service to or performing work for that client; and

(iii) the client,

within the combined registered scope of the said bargaining councils: Provided that the terms and conditions of the agreement are not substantially more onerous than those prevailing in the equivalent collective agreements concluded in the said bargaining councils.

(5) (a) An agreement concluded in terms of subsection (4) (a), shall only be binding if the collective agreement referred to has been extended to non-parties within the registered scope of the bargaining council.

(b) An agreement concluded in terms of subsection (4) (b) shall only be binding—

(i) if each of the bargaining councils has requested the Minister to extend the agreement to non-parties within its registered scope; and

(ii) the Minister has extended the agreement as requested by all the bargaining councils to the agreement by notice in the *Gazette*; and

(iii) the Minister is satisfied that the terms and conditions of the agreement are not substantially more onerous than those prevailing in the equivalent collective agreements concluded in the said bargaining councils.

Collective agreement, award or order to be kept by employer

170. Every employer upon whom a collective agreement, award, order or wage determination made in terms of the Wage Act is binding in terms of this Act shall at all times keep a copy thereof available at the workplace and shall—

(a) upon request of an employee make it available to such employee for inspection;

(b) upon request of an employee and upon payment of the prescribed fee, furnish the employee with a copy thereof;

(c) provide an employee who is a trade union representative or a member of a workplace forum, free of charge, with a copy thereof.

Records to be kept by employers

171. (1) Every employer upon whom in terms of this Act, there is binding any collective agreement, award, order or wage determination made in terms of the Wage Act which relates to remuneration to be paid, time to be worked or such other particulars as may be prescribed, shall at all times keep in the prescribed form and manner, in respect of all employees employed by it records of the remuneration paid, of the time worked and of those other particulars.

(2) Every person who in terms of subsection (1) is required to keep a record shall retain such record either in the original or in a reproduced form for a period of three years from the date to which they relate, and shall on demand by a commissioner or a designated agent of a bargaining council made at any time during the said period of three years produce the said record or such reproduction thereof for inspection.

Contract of employment cannot vary or waive collective agreement or award

172. No contract of employment, whether entered into before or after the coming into operation of any collective agreement or award, shall operate to permit the payment to any employee of remuneration less than that prescribed by that collective agreement or award, or of the application to any employee of any treatment, or the grant to him or her of any benefits, less favourable to him or her than the treatment or benefits so prescribed, nor shall it effect any waiver by any employee of the application to him or her of any provision of that agreement or award, and any contract purporting to permit of any such payment, application or grant or to effect any such waiver shall be null and void.

Confidentiality

173. (1) Except with the prior consent of the employer or the order of a competent court of law confidential information concerning the financial or business affairs of an employer's business, which is disclosed by the employer in terms of this Act, shall not be disclosed by the recipient to any third party where the employer has designated in writing such information as confidential.

(2) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a maximum fine of R5 000.

(3) Any party who suffers damages as a result of a contravention of the provisions of subsection (1) may institute a claim for damages in the Labour Court on the grounds of breach of a statutory duty.

Certain defects and irregularities not to invalidate constitution or registration of trade union, employers' organization or bargaining council, or agreements or awards, or acts of bargaining council or commissioner

174. Notwithstanding anything to the contrary contained in this Act or in any other law—

(a) any defect in or omission from a constitution of any trade union, employers' organization or bargaining council; or

(b) any irregularity in the appointment or election of any representative on a bargaining council, or of any alternate to any representative, or of any chairperson or deputy chairperson or any other person presiding over any meeting of a bargaining council or committee of a bargaining council, or of any commissioner; or

(c) the existence of any vacancy in the membership of any bargaining council,

shall not invalidate—

(i) the constitution or the registration of any trade union, employers' organization or bargaining council; or

(ii) any agreement or award which, but for that defect, omission, irregularity or vacancy, would be binding in terms of this Act; or

(iii) any act of any bargaining council or of any commissioner, respectively.

Representation of employees or employers

175. Whenever an employee who is a member of a registered trade union or an employer who is a member of a registered employers' organization is a party to any proceedings in terms of this Act, his or her trade union or employers' organization, as the case may be, shall be entitled to be a party to such proceedings, acting—

(a) on behalf of its member or members;

(b) in the interest of its member or members;

(c) in its own interest,

or in terms of any combination thereof.

Service on State as employer

176. When any document is, by virtue of this Act, required to be served on the State as employer, such document shall have been duly served—

(a) if served on the executing authority as defined in section 1 of the Public Service Act, 1994 (promulgated by Proclamation No. R. 103 of 1994); or

(b) where it is uncertain who the executing authority is, if served on the authority indicated by the Public Service Commission to be the executing authority.

Codes of Good Practice

177. (1) The governing body may at any time, by notice in the *Gazette*, publish Codes of Good Practice.

(2) The governing body may at any time alter, substitute or withdraw such a Code, including the Code of Good Practice: Dismissal for Misconduct or Incapacity in Schedule 4.

Regulations

178. The Minister may make regulations, after consultation with NEDLAC, and where appropriate, the Commission, prescribing—

(a) any matter which in terms of this Act shall or may be prescribed; and

(b) any matter which the Minister considers necessary or expedient to prescribe in order that the primary objects and the purpose of this Act may be achieved.

Application of Act in event of conflict with other laws

179. In the event of a conflict between the provisions of this Act and those of any other law, but excluding the Constitution, the provisions of this Act shall prevail.

Repeal of laws

180. The laws specified in Schedule 1 to this Act are hereby repealed.

Amendment of laws

181. The laws specified in Schedule 2 to this Act are amended to the extent indicated therein[17].

Transitional arrangements

182. The transitional arrangements contained in Schedule 3 to this Act shall be read as one with this Act.

Definitions

183. In this Act, unless the context otherwise indicates—

"accredited agency" means a private agency accredited by the Commission in terms of section 131;

"accredited bargaining council" means a bargaining council accredited by the Commission in terms of section 131;

"area" includes any number of areas, whether or not contiguous;

"bargaining council" means a bargaining council referred to in section 24;

"Basic Conditions of Employment Act" means the Basic Conditions of Employment Act, 1983 (Act No. 3 of 1983);

"collective agreement" means a written agreement concluded by—

(a) one or more registered trade unions,

on the one hand; and

(b) one or more employers;

(c) one ore more registered employers' organizations; or

(d) one or more employers and one or more registered employers' organizations,

on the other hand, concerning terms and conditions of employment or any other matter of mutual interest;

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[17] **These amendments are presently only stated in principle form. Once there is agreement in principle, they can be cast in legislative form.**

"**Commission**" means the Commission for Conciliation, Mediation and Arbitration established by section 109;

"**commissioner**" means a person who has been appointed to the Commission's panel of commissioners in terms of section 119;

"**Constitution**" means the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993);

"**director**" means the director of the Commissioner referred to in section 118;

"**education sector**" means the sector in which persons who teach, educate or train other persons are employed in any school, university, technikon, college, technical college, teachers' training college or other educational institution, or who assist in rendering professional services or educational auxiliary services provided by or in a department of education;

"**employee**" means any person, excluding an independent contractor, who works for another person, including the state (referred to as the employer), who receives or is entitled to receive any remuneration, and any other person who in any manner assists in carrying on or conducting the business of the employer; and "**employed**" and "**employment**" have corresponding meanings;

"**employers' organization**" means any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions;

"**essential service**" means a service whicch the essential services committee has designated or determined to be an essential service in terms of section 85;

"**governing body**" means the governing body of the Commission referred to and as constituted in terms of section 112;

"**issue in dispute**" means, for the purposes of a strike or lock-out, the demand, the grievance, or the dispute which forms the subject matter of the strike or lock-out;

"**Labour Appeal Court**" means the Labour Appeal Court contemplated in section 166;

"**Labour Court**" means the Labour Court established by section 150;

"**legal practitioner**" means any person who is admitted to practice as an advocate or an attorney in terms of the laws governing the profession and practice of advocate and attorneys, respectively;

"**lock-out**" means the exclusion by an employer of its employees from the work-place, irrespective of whether or not in the course of for the purpose of such exclusion the employer breaches the contracts of employment of its employees, for the purpose of compelling its employees to accept a demand in respect of any matter of mutual interest between employer and employee;

"**member of a workplace forum**" means an employee who is elected to be a member of a workplace forum in terms of section 58;

"**Minister**" means the Minister of Labour;

"**NEDLAC**" means the National Economic Development and Labour Council established in terms of the National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994);

"**office-bearer**" means a person, other than an official, who holds office in a trade union, employers' organization, federation of trade unions, federation of employers' organizations or bargaining council;

"**official**" in relation to a trade union, employers' organization, federation of trade unions of federation of employers' organizations, means an employee of such trade union, employers' organization of federation employed as secretary, assistant secretary or organizer of such trade union, employers' organisation or federation or in any other prescribed capacity, whether or not such employee is employed in a full-time capacity, and, in relation to a bargaining council, means an employee of a bargaining council employed as secretary or in any other prescribed capacity, whether or not such employee is employed in a full-time capcity;

"**order**" means an order of the Labour Court or the Labour Appeal Court;

"**prescribed**" means prescribed by regulation in terms of section 178;

"**protest action**" means the concerted refusal to work, whether or not the refusal is partial or complete, or the retardation or obstruction of work for the purpose (other than for a purpose referred to in the definition of "strike") of promoting or defending the socio-economic interests of workers;

"**province**" means a province established by section 124 (1) of the Constitution;

"**public accountant**" means a person registered and practising as a public accountant and auditor in terms of the laws governing the profession and practice of public accountants and auditors;

"**public service**" means the service referred to in section 1 (1) (xxii) of the Public Service Act, 1994 (promulgated by Proclamation No. R. 103 of 1994), and includes any organizational component contemplated in section 7 (4) of that Act and specified in the first column of Schedule 2 to that Act;

"**registered scope**" means the sector and area in respect of which a bargaining council is registered in terms of this Act or the statutory scope of the Education Labour Relations Council referred to in section 41 (3) or the Public Service Bargaining Council referred to in section 41 (1);

"**registrar**" means the registrar of labour relations appointed in terms of section 5;

"**regulation**" means a regulation made in terms of section 178;

"**remuneration**" means any payment in money or in kind or both in money and in kind, made or owing to any person, in return for that person working for another person, including the state; and "**remunerate**" has a corresponding meaning;

"**Republic**" means the Republic of South Africa as defined in section 1 of the Constitution and includes the continental shelf referred to in section 7 of the Territorial Waters Act, 1963 (Act No. 87 of 1963);

"**sector**" means an industry or a service;

"**serve**" means to send by registered post, telegram, telex or telefax or deliver by hand;

"**strike**" means the concerted refusal to work, whether or not the refusal is partial or complete, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "**work**" in this definition shall include overtime work, whether or not it is voluntary or compulsory;

"**this Act**" includes Schedules 1, 2 and 3 to this Act and any regulations made from time to time in terms of section 178;

"**trade union**" means an association of employees the principal purpose of which is the regulation of relations between employees and employers or employers' organizations;

"**trade union representative**" means a member of a trade union who is elected to represent employees in a workplace;

"**Wage Act**" means the Wage Act, 1957 (Act No. 5 of 1957);

"**working hours**" means those hours during which an employee is obliged to work;

"**workplace**"—

(a) in relation to the education sector shall have the meaning determined by the Education Labour Relations Council referred to in section 25 (1);

(b) in relation to the public service shall have the meaning determined by the Public Service Bargaining Council referred to in section 25 (2);

(c) in all other instances means the place or places where the employees of an employer work: Provided that where an employer carries on or conducts operations which are independent by reason of their size, function and organization, each such operation shall be regarded as a separate workplace; and

"**workplace forum**" means a workplace forum established in terms of section 57.

Short title and commencement

184. (1) This Act shall be called the Labour Relations Act, 1995, and shall, subject to the provisions of subsection (2), come into operation on a date to be determined by the President by notice in the *Gazette*.

(2) Different dates may in terms of subsection (1) be determined in respect of different provisions of this Act.

SCHEDULE 1

LAWS REPEALED

1. Labour Relations Act, No. 28 of 1956, as amended, except for section 24 (1) (x) and section 48 (1), (4), (6), (8), sections 53 and 54 in so far as they relate to agreements in force at the commencement of the Act in respect of provisions contemplated in section 24 (1) (x).
2. Education Labour Relations Act, No. 146 of 1993.
3. Chapter 1 of the Agricultural Labour Act, No. 147 of 1993, as amended.
4. Public Service Labour Relations Act, No. 105 of 1994.

SCHEDULE 2

LAWS AMENDED

Consequent on the provisions of the draft Bill, the following legislative amendments will be necessary:

1. Section 1 (3) of the Basic Conditions of Employment Act will require amendment so as to provide that the Act shall not apply in respect of the provision of any collective agreement which may be binding on an employee;

2. Section 35 of the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993) will require amendment so as to provide that the Labour Court shall hear appeals against a decision of the inspector.

SCHEDULE 3

TRANSITIONAL ARRANGEMENTS

Definitions

185. (1) For the purposes of this Schedule, unless the context otherwise indicates—

"Agricultural Labour Act" means the Agricultural Labour Act, 1993 (Act No. 147 of 1993);

"Education Labour Relations Act" means the Education Labour Relations Act, 1993 (Act No. 146 of 1993);

"Labour Relations Act" means the Labour Relations Act, 1956 (Act No. 28 of 1956);

"Labour relations laws" means the Education Labour Relations act, the Labour Relations Act and Public Service Labour Relations Act.

"Pending" means pending immediately prior to the commencement of this Act;

"Public Service Labour Relations Act" means the Public Service Labour Relations Act, 1994 (Act No. 105 of 1994).

"registrar" means the registrar of labour relations appointed in terms of section 93.

Residual unfair labour practice

186. (1) For the purposes of this section, an unfair labour practice means any unfair act or omission which arises between an employer and an employee, including—

(a) the unfair discrimination, either directly or indirectly, against an employee on the grounds of race, colour, sex, religion, political opinion, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture, language, family responsibility or marital status or any other arbitrary ground: Provided that any distinction, exclusion or preference based on the inherent requirements of the particular position shall not constitute unfair discrimination;

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

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

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

(2) For the purposes of subitem (1) (a), "employee" shall include an applicant for employment.

(3) The provisions of subitem (1) (a) shall not preclude any employer from adopting or implementing employment policies and practices which are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

Disputes concerning unfair labour practices

187. (1) Whenever there is a dispute concerning an alleged unfair labour practice, and the parties to the dispute are one or more employees, on the one hand, and one or more employers, on the other hand, any party to the dispute may refer it in writing to the Commission.

(2) A party who refers a dispute to the Commission in terms of subitem (1) shall satisfy the Commission that a copy of the referral was served on all parties to the dispute.

(3) The Commission shall attempt to resolve the dispute in accordance with the provisions of section 134.

(4) Where the Commission has failed to resolve the dispute—

(a) any party to an unresolved dispute concerning an act or omission referred to in item 2 (1) (a) may refer it to the Labour Court for adjudication;

(b) any party to an unresolved dispute concerning an act or omission referred to in items 2 (1) (b), (c) or (d) shall refer it to arbitration in terms of section 135.

Powers of Labour Court

188. The Labour Court shall have the power to determine any dispute referred to it in terms of item 3 on such terms as it may deem reasonable, including but not limited to, the ordering of reinstatement or compensation.

Trade unions and employers' organizations registered under labour relations laws

189. (1) For the purposes of this item a trade union includes an employee organization.

(2) A trade union or employers' organization registered as such immediately prior to the commencement of this Act in terms of the labour relations laws and continue to be a body corporate shall be deemed to be registered as a trade union or employers' organization under this Act, and as soon as practicable after the commencement of this Act, the registrar shall enter—

(a) into the registrar of trade unions, the name of such trade union;

(b) into the register of employers' organizations, the name of such employers' organization.

(3) An body whose name so has been entered in the register of trade unions or employers' organizations shall be issued with a certificate of registration.

(4) Where any provision of the constitution of such trade union or employers' organization does not comply with the requirements of section 6 or unfairly discriminates against persons on grounds of race or sex, the registrar may, notwithstanding subitem (2), direct such organization in writing to rectify its constitution and submit the amended constitution to him or her for scrutiny within such period (which shall not be shorter than six months) as may be specified in such direction.

(5) Upon failure by a trade union or employers' organization to comply with a direction issued to it in terms of subitem (4), the registrar shall, by registered post, notify the trade union or employers' organization that he or she is considering the cancellation of its registration for such failure to comply and give the trade union or employers' organization an opportunity to show cause why its registration should not be cancelled within 30 days of such notice.

(6) Upon the expiry of the 30 day period, the registrar shall, unless cause has been shown why the registration of the relevant trade union or employers' organization should not be cancelled, cancel such registration or take such other lesser steps as are appropriate in the circumstances and not inconsistent with the Act.

(7) The registrar shall, by registered post, notify the relevant trade union or the employers' organization as to whether or not he or she has cancelled its registration.

(8) Such cancellation shall take effect—

(a) where the trade union of the employers' organization has failed, within the time contemplated in section 107 (3), to appeal to the Labour Court against such cancellation, on the expirty of that period; or

(b) where the trade union or the employers' organization has so appealed, the decision of the registrar has been confirmed by the Labour Court,

whichever event occurs first.

(9) Upon the cancellation of registration, the registrar shall remove the name of the trade union or employers' organization from the appropriate register.

Pending applications for registration, variation of scope, alteration of constitution and alteration of name in terms of labour relations laws

190. (1) Any pending application for the registration, variation of the scope of registration or alteration of the constitution or name of a trade union or an employers' organization in terms of the labour relations laws shall be dealt with by the registrar as if the applications had been made in terms of this Act.

(2) The registrar appointed in terms of the Public Service Labour Relations Act and the secretary of the Education Labour Relations Council appointed in terms of the Education Labour Relations Act shall forward any pending application referred to in subsection (1) to the registrar.

(3) In any pending appeal in terms of section 16 of the Labour Relations Act or in terms of section 12 of the Education Labour Relations Act, the Minister or the registrar of the industrial court or the registrar of the Supreme Court, as the case may be, shall refer the matter back to the registrar and the registrar shall deal with the application as if it were an application made in terms of this Act.

(4) In dealing with the applications referred to in subitem (1) or (2), the registrar may—

(a) by registered post require the applicant to amend its application within 60 days of such requirement in order to comply with the provisions of this Act;

(b) condone technical non-compliance with the provisions of this Act.

Industrial councils

191. (1) An industrial council which immediately prior to the commencement of this act is registered or deemed to be registered as such in terms of the Labour Relations Act shall after such commencement be deemed to be a registered bargaining council under this Act and continue to be a body corporate.

(2) Where a provision of the constitution of a bargaining council deemed to be registered under this Act does not comply with the requirements of section 28, the registrar may, notwithstanding the provisions of subitem (1), direct the bargaining council in writing to rectify its constitution and to submit the rectified constitution to him or her for scrutiny within such period (which shall not be shorter than six months) as may be specified in such direction.

(3) Upon failure by a bargaining council to comply with a direction issued to it in terms of subitem (2), the registrar may remove its name from the relevant register, or in lieu thereof, take such other steps as are appropriate in the circumstances and are not inconsistent with this Act.

Pending applications for registration and variation of scope of industrial councils in terms of Labour Relations Act

192. (1) Any application for the registration or the variation of scope of registration of an industrial council which is pending immediately prior to the commencement of the Act, shall be dealt with as if it were an application made in terms of this Act.

(2) In any pending appeal in terms of section 16 of the Labour Relations Act, the Minister or the registrar of the Supreme Court, as the case may be, shall refer the matter to the registrar and the registrar shall consider the application as if it were an application made in terms of this Act.

(3) In dealing with the application referred to in subsection (1) or (2), the registrar may—

(a) by registered post require the applicant to amend its application within 60 days of such requirement, in order to comply with the provisions of this Act;

(b) condone technical non-compliance with the provisions of this Act.

Pending applications for alteration of constitution or name of industrial council in terms of Labour Relations Act

193. The provisions in item 6 shall, subject to the necessary alterations, apply to a pending application at the commencement of this Act for the alteration of a constitution or the name of an industrial council in terms of the Labour Relations Act.

Pending applications for admission of parties to industrial councils in terms of Labour Relations Act

194. (1) Any pending application for admission to an industrial council in terms of section 21A of the Labour Relations Act shall be dealt with by the industrial coundil as if it were an application made in terms of the provisions of this Act.

(2) Any pending appeal before the industrial court from a decision of an industrial council in terms of section 21A of the Labour Relations Act shall be dealt with as if the application had been made in terms of this Act.

(3) Any appeal against a decision of an industrial council in terms of section 21A of the Labour Relations Act may, notwithstanding the repeal of that Act, be instituted after the commencement of this Act and shall be heard by the Labour Court and dealt with, as if the application had been made in terms of this Act.

Pending applications for admission to Education Labour Relations Council in terms of section 10 of Education Labour Relations Act or to Public Service Bargaining Council in terms of section 10 of Public Service Labour Relations Act

195. (1) Any pending application at the commencement of this Act for admission to the Education Labour Relations Council in terms of section 10 of the Education Labour Relations Act or to the Public Service Bargaining Council in terms of section 10 of the Public Service Labour Relations Act shall be dealt with by those councils as if the application had been made in term of the provisions of this Act.

(2) Any pending appeal before the industrial court or arbitrator against such a decision of the Education Labour Relations Council or the Public Service Bargaining Council, as the case may be, shall be dealt with by the industrial court or arbitrator as if the application had been made, notwithstanding the repeal of any of the labour relations laws, in terms of the provisions of this Act.

(3) Any appeal against such a decision of the Education Labour Relations Council or the Public Service Bargaining Council, as the case may be, may, notwithstanding the repeal of the Education Labour Relations Act or the Public Service Labour Relations Act instituted after the commencement of this Act and shall be heard by the Labour Court and dealt with as if the application had been made in terms of this Act.

Applications to cancel registration and wind up trade unions, employer organizations and industrial councils

196. Any pending application to cancel the registration of or wind up a trade union, employers' organization or industrial council registered in terms of any labour relations law, shall be dealt with by the registrar as if the labour relations laws had not been repealed.

Industrial council and conciliation board agreement and awards

197. (1) An agreement promulgated in terms of section 48 and an award made in terms of section 50 of the Labour Relations Act and in force immediately prior to the commencement of this Act, shall remain in force for a period of one year after the commencement of this Act or until the expiry of the agreement, whichever is the shorter, as if the Labour Relations Act had not been repealed.

(2) An agreement promulgated in terms of section 12 of the Education Labour Relations Act and in force immediately prior to the commencement of this Act shall remain in force for a period of one year after the commencement of this Act or until the expiry of the agreement, whichever is the shorter, as if the provisions of that Act had not been repealed.

(3) Notwithstanding the provisions of subitem (1), the provisions of an agreement such as is referred to in section 24 (1) (x) of the Labour Relations Act and in force immediately prior to the commencement of this Act, shall remain in force until the expiry of the agreement unless—

(a) the Minister acting in terms of section 48 (4) (a) (i) of the Labour Relations Act extends the period of the agreement in respect of such provisions; or

(b) the Minister acting in terms of section 48 (4) (a) (ii) of the Labour Relations Act declares the agreement in respect of such provisions to be effective for a further period.

(4) Any pending request for the promulgation of an agreement in terms of section 48 of the Labour Relations Act shall be dealt with as if the Labour Relations Act had not been repealed.

(5) Any request made before the expiry of six months after the commencement of this Act for the promulgation of an agreement entered into before the commencement of this Act shall be dealt with as if the provisions of the Labour Relations Act had not been repealed.

(6) Any application for an exemption from an agreement promulgated in terms of section 48 of the Labour Relations Act shall be dealt with as if the Labour Relations Act had not been repealed.

Collective agreements, recognition agreements

198. (1) Any existing agreement, including a recognition agreement but excluding an agreement promulgated in terms of section 48 of the Labour Relations Act or section 12 of the Education Labour Relations Act, between registered trade unions on the one hand, and employers or registered employers' organizations on the other and in force immediately prior to the commencement of this Act, shall be deemed to be a collective agreement concluded in terms of this Act.

(2) Where such an agreement does not provide for the determination by arbitration of disputes arising out of its interpretation or application, the parties shall seek to agree to such a procedure, failing which such disputes may be referred to the Commission for determination and the Commission may charge the costs of the arbitration of such dispute to the parties to the agreement.

(3) An existing non-statutory closed shop or agency shop agreement shall not be binding unless such agreement complies with the provisions of section 23. This provision shall become effective 180 days from the commencement of this Act.

Disputes arising before the commencement of this Act

199. (1) Any dispute referred to an industrial council, the Public Service Bargaining Council, the Education Labour Relations Council or which forms the subject matter of an application for a conciliation board before the commencement of this Act, shall be dealt with as if the relevant provisions of the labour relations laws and the Agricultural Labour Act had not been repealed and in particular—

(a) a strike or lock-out in respect of such a dispute shall be subject to the provisions of the labour relations laws and the Agriculture Labour Act as if they had not been repealed and any dispute arising from such strike or lock-out shall be dealt with as if the labour relations laws and the Agricultural Labour Act had not been repealed, save only that an appeal from the decision of the industrial court shall be to the Labour Court;

(b) a referral to compulsory arbitration in respect of such a dispute shall be dealt with as if the provisions of the labour relations laws and the Agricultural Labour Act had not been repealed;

(c) a referral to voluntary abitration in respect of such a dispute shall be dealt with as if the provisions of the labour relations laws and the Agricultural Labour Act had not been repealed.

(2) Any dispute arising before the commencement of this Act and which has not been referred to an industrial council, the Public Service Bargaining Council, the Education Labour Relations Council and in respect of which no application for a conciliation board was made before the commencement of this Act shall be dealt with in terms of this Act except in respect of a dispute, which, but for the repeal of the labour relations laws and the Agricultural Labour Act, would have been referred to compulsory arbitration, in which case the dispute and the referral to compulsory arbitration shall be dealt with as if the relevant provisions of the labour relations laws and the Agricultural Labour Act had not been repealed.

Courts

200. (1) Any dispute which arose before the commencement of this Act and in respect of which—

(a) the industrial court or the agricultural labour court may exercise any of its functions in terms of the labour relations laws and the Agricultural Labour Act; and

(b) proceedings have not been instituted before such commencement,

shall be instituted in the industrial court or agricultural labour court, as the case may be, and dealt with as if the labour relations laws had not been repealed.

(2) Any dispute in respect of which proceedings, prior to such commencement have already been instituted in the industrial court or the agricultural labour court shall be proceeded with as if the labour relations laws and the Agricultural Labour Act had not been repealed.

(3) Any pending appeal before the Labour Appeal Court established in terms of section 17A of the Labour Relations Act shall be dealt with by the Labour Appeal Court as if the labour relations laws and the Agricultural Labour Act had not been repealed.

(4) Any pending appeal from a decision of the Labour Appeal court or any appeal to the Appellate Division from a decision of the Labour Appeal Court in terms of section 5 (3) shall be dealt with as if the labour relations laws and the Agricultural Labour Act had not been repealed.

(5) Any appeal from a decision of the industrial court or the agricultural labour court in terms of subitem (1) or (2), shall be made to the Labour Court established by section 50 of this Act and the Labour Court shall deal with the appeal in accordance with the labour relations laws or the Agricultural Labour Act (as the case may be) as if it has not been repealed.

Public sector

201. (1) The Public Service Bargaining Council established in terms of section 5 (1) of the Public Service Labour Relations Act, 1993 (Act No. 102 of 1993) read with section 5 (1) of the Public Service Labour Relations Act shall continue to exist and shall be deemed to be the Public Service Bargaining Council for the purpose of section 25.

(2) The chambers established in terms of section 5 (2) of the Public Service Labour Relations Act, 1993 (Act No. 102 of 1993) read with section 5 (2) of the Public Service Labour Relations Act shall continue to exist and shall be deemed to be the chambers of the Public Service Bargaining Council referred to in section 25.

(3) The Public Service Bargaining Council and each chamber shall within 90 days from the commencement of this Act furnish the registrar with a copy of its constitution duly signed by its authorized representatives and any other information or documentation required in terms of section 27.

(4) The constitutions agreed to between the parties to the respective chambers of the Public Service Bargaining Council shall be deemed to be in compliance with this Act provided that where any provision of the constitution of a chamber does not comply with the requirements of section 28, the registrar may direct a chamber to rectify its constitution and to submit the rectified constitution to him or her within a period of six months from the date of such direction.

Education sector

202. (1) The Education Labour Relations Council established in terms of section 6 (1) of the Education Labour Relations Act shall continue to exist and shall be deemed to be the Education Labour Relations Council for the purposes of section 25: Provided that the scope of the council shall be amended to include the education sector as defined in section 184.

(2) The provisions of sections 6, 8, 9, 13 and 14 of the Education Labour Relations Act shall constitute a collective agreement in terms of this Act.

(3) The constitution agreed to between the parties to the Education Labour Relations Council shall be deemed to be in compliance with this Act provided that where a provision of the constitution does not comply with the requirements of section 28, the registrar may direct a chamber to rectify its constitution and to submit the rectified constitution to him or her within such period (which shall not be shorter than six months) as may be specified in such direction.

(4) The provisions concerning notice of the intention to call a strike or lock-out in section 15 (4) (b) and (5) of the Education Labour Relations Act shall constitute a collective agreement for the purposes of this Act.

Agricultural sector

203. (1) The provisions of section 2 (a) (iii) read with section 2 (f) and (h) of the Agricultural Labour Act shall have the status of a collective agreement binding in terms of this Act between all employees and employers engaged in farming activities.

(2) Such agreement may only be amended or terminated by NEDLAC.

(3) The definitions of "farm" and "farming activity" contained in section 1 of the Labour Relations Act shall be the definitions for the purposes of this item unless the context otherwise indicates.

Continuation of existing pension rights of staff members of Commission upon assuming employment

204. (1) Any staff member of the Commission who, immediately prior to assuming employment with the Commission, was a member of the Government Service Pension Fund, the Temporary Employees Pension Fund or any other pension fund or scheme administered by the Department of Finance, hereinafter referred to as an officer or employee, may upon assuming such employment—

(a) choose to remain a member of any such pension fund, and from the date of exercising such a choice, such an officer or employee shall, notwithstanding the provisions of any other law, be deemed to be a dormant member of the relevant pension fund within the contemplation of section 15 (1) (a) of the General Pensions Act, 1979 (Act No. 29 of 1979);

(b) request to become a member of the Associated Institutions Pension Fund established under the Associated Institutions Pension Fund Act, 1963 (Act No. 41 of 1963), as if the Commission had under section 4 of the lastmentioned Act been declared to be an associated institution; or

(c) request to become a member of any other pension fund registered as such under the Pension Funds Act, 1956 (Act No. 24 of 1956).

(2) In the case where an officer or employee becomes a member of a fund in accordance with a request in terms of subitem (1) (b) or (c)—

(a) the pension fund of which the officer or employee was a member (hereinafter referred to as the former fund) shall transfer to the pension fund of which he or she becomes a member (hereinafter referred to as the new fund) an amount equal to the funding level of the former fund multiplied by the actuarial liability of that fund in respect of that officer or employee as on the date of the commencement of the employment of the officer or employee with the Commission, increased by the amount of interest thereon calculated at the prime rate from the date of the said commencement of employment up to the date of transfer of the amount;

(b) his or her membership of the former fund shall lapse as from the date of the commencement of his or her employment with the Commission, and thereafter he or she shall cease to have any further claim against the former fund except as provided in paragraph (a); and

(c) the former fund shall transfer any claim it may have against such officer or employee to the new fund.

(3) In the case where an officer or employee becomes a member of a new fund pursuant to a request in terms of subitem (1) (c) the state shall pay to such new fund an amount equal to the difference between the actuarial liability of the former fund in respect of such an officer or employee as on the date of the commencement of his or her employment with the Commission, and the amount transferred in terms of subitem (2) (c) to the new fund, increased by the amount of interest thereon calculated at the prime rate from the date of the said commencement of employment up to the date of the transfer of the amount.

(4) The provisions of subitems (2) and (3) shall, subject to the necessary alterations, apply in respect of any officer or employee who, by virtue of a choice in terms of subsection (1) (a), has become a dormant member and thereafter requests that his or her accrued pension benefits be transferred in terms of section 15A (1) of the General Pensions Act, 1979, to a pension fund referred to in the said Act or a pension fund registered in terms of the Pension Funds Act, 1956.

(5) Where, in the case of any officer or employee referred to in subitem (1) who pursuant to a request in terms of paragraph (c) of that subitem has become a member of any other pension fund, any lump sum benefit has become payable by such pension fund in consequence of the death of such officer or employee or on his or her withdrawal or resignation from such pension fund or his or her retirement, or on the winding-up of such pension fund, such pension fund shall for the purposes of paragraph (e) of the definition of "gross income" in section 1 of the Income Tax Act, 1962 (Act No. 58 of 1962), be deemed, in relation to such officer or employee, to be a fund referred to in paragraph (a) of the definition of "pension fund" in the said section 1.

(6) For the purpose of this item—

"actuarial liability" of a pension fund in respect of a particular member or a group of members of such a fund, means such actuarial liability as determined by an actuary nominated for that purpose by the Minister;

"funding level of a pension fund" means the market value of the assets of the fund expressed as a percentage of the total actuarial liability of the fund, after such assets and liabilities have been reduced by the amount of the liabilities of the fund in respect of all its pensioners, as determined at the time of the most recent actuarial valuation of the fund or any review thereof carried out under direction of the responsible Minister of state; and

"prime rate" means the average prime rate of the three largest banks in the Republic.

SCHEDULE 4

CODE OF GOOD PRACTICE: DISMISSAL FOR MISCONDUCT OR INCAPACITY

Introduction

205. This Code of Good Practice deals with some of the key aspects of dismissals for reasons connected to conduct and capacity. It is general in its nature, and departures from the norms it establishes may be justified in proper circumstances, for example, the number of employees employed in the establishment.

The essence of the guidelines which are established in this Code is that employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of the business. Employees should be protected against arbitrary action. Employers are entitled to satisfactory conduct and work performance on the part of their employees.

Fair reasons for dismissal

206. (1) Notwithstanding compliance with any notice provision in a contract of employment or in legislation governing employment, a dismissal will be unfair if it is not effected for a fair reason and in accordance with a fair procedure. The substantive fairness of a dismissal will be determined by reference to the facts of the case and a determination of the appropriateness of dismissal as a penalty. Fair procedure will be determined by reference to the guidelines set out below.

(2) International standards recognize three grounds on which a termination of employment might be legitimate. These are the conduct of an employee, the capacity of the employee and the operational requirements of the employer's undertaking, establishment or service. A dismissal effected for reasons based on economic, technological, structural or similar requirements is dealt with in Chapter VI of this Act and is not the subject of any of the guidelines in this Code.

(3) Dismissals for reasons which are invalid are stipulated in the statute. These include dismissal for participation in a strike which complies with the provisions of this Act and the exercise of disciplinary action on discriminatory grounds or on grounds which infringe the fundamental rights of employees and trade unions.

Misconduct

207. (1) All employers should adopt disciplinary rules which establish the standard of conduct required of employees. The form and content of disciplinary rules will obviously vary according to the size and nature of the employer's business. Considerations of certainty and consistency require that the employer ensures that the standards of conduct with which employees are expected to comply are clearly formulated and made available to all employees. Some rules may be so well established that their communication would not be necessary.

(2) In the case of minor infringements of work discipline, the best and most effective way for the employer to deal with the situation will often be informal advice and correction. The existence of disciplinary procedure does not mean that the formal procedures have to be invoked in all cases where rules are broken.

(3) Employers should keep records specifying the nature of any disciplinary transgressions, the actions taken by the employer and the reasons for such actions.

(4) In deciding on the imposition of a disciplinary penalty, the employer should have regard to factors such as the circumstances of the employee (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances surrounding the infringement itself. The employer should apply all disciplinary penalties consistently with the way in which it has been applied to other employees in the past, and consistently as between two or more employees who participate in the misconduct under consideration.

(5) For a first infringement, an employee against whom it is decided to take disciplinary action should receive a written warning. More serious infringements may be penalized by a final warning or other action short of dismissal, including loss or privileges for a limited period. The penalty of dismissal should be reserved for cases of serious misconduct or repeated infringements of disciplinary rules. While the circumstances of the case will always be important in deciding on the proper penalty for particular acts, it will generally not be appropriate to dismiss an employee for a first infringement, except where the misconduct consists of—

(a) theft or wilful damage to the property of the employer;

(b) wilful endangering of the safety of the employer, a fellow employee or a member of the public;

(c) physical assault on the employer or a fellow employee;

(d) gross insubordination;

(e) other misconduct of similar gravity which makes a continued employment relationship intolerable.

(6) Disciplinary proceedings against a trade union representative or an employee who is an office bearer or official of a trade union should not be instituted without first informing and consulting the union.

(7) An employee should be given the opportunity to defend himself or herself against the allegations which are made by the employer, which need not assume the nature of a formal enquiry. This would normally mean that the employer should conduct an investigation into the facts relevant to the conduct of the employee. The employer should notify the employee of the allegations in a form and language which he or she can reasonably understand and allow the employee the opportunity to respond to the allegations and state his or her case. The employee should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or a fellow employee. The employer should thereafter communicate the results of the decision taken.

(8) Where the employee is dismissed, the employee should be reminded of his or her rights to refer the matter to the Commission or to any dispute resolution procedures established in terms of a collective agreement.

(9) In exceptional circumstances, where the employer cannot reasonably be expected to comply with these guidelines, pre-dismissal procedures may be dispensed with.

(10) Participation in a strike which does not conform with the requirements of Chapter IV, constitutes an act of misconduct, but, like any other act of misconduct, does not always warrant dismissal. The substantive fairness of any dismissal effected in these circumstances will be determined by reference to the facts of the case. Of particular importance in this instance is the seriousness of the breach of the provisions of the Act, attempts made to act in conformity with the Act and whether the strike was in response to

unjustified conduct by the employer. The employer should at the earliest opportunity contact union officials prior to dismissal to discuss the course of action it intends to adopt. Prior to dismissal, the employer should issue an ultimatum in clear and unambiguous terms, which should state what is required of the employees and what sanction will be imposed should they fail to comply with the ultimatum. Sufficient time should thereafter be permitted to enable the employees to reflect on the ultimatum and respond to it, either by compliance or rejection. These requirements may be dispensed with in exceptional circumstances where the employer cannot reasonably be expected to extend them to the employees in question.

Incapacity: Poor work performance

208. (1) A newly hired employee may be placed on probation for a period which is reasonable given the circumstances of the job but which should not exceed six months unless the nature of the job requires a longer period to determine the employee's suitability for continued employment. Where appropriate, an employer should give an employee sufficient instruction, training or counselling in order to enable him or her to render satisfactory service. If, notwithstanding the discharge of these obligations, the employee does not meet the requirements of the undertaking, the employer may, subject to the employee's other statutory and common law rights, dismiss such employee without a formal investigation at any time during the probationary period.

(1) The employment of an employee not on probation should not ordinarily be terminated for unsatisfactory performance unless the employer has given the employee appropriate instructions and warnings and the employee continues to perform his or her duties unsastisfactorily after a reasonable period of time for improvement has elapsed.

(2) The pre-dismissal procedure should take the form of an investigation to establish the reasons for the unsatisfactory performance and to consider ways, short of dismissal, of remedying the matter.

(3) The employee should have the right to be heard in any pre-dismissal process, normally with the assistance of a trade union representative or a fellow employee.

Incapacity: I11 health

209. (1) Where an employee is incapacitated on account of ill health, an employer should conduct an investigation to establish the extent of that incapacity and the prognosis. Where it is established that the employee is unable to perform the work for which he or she was employed, or that he or she is likely to be absent for an unreasonably long period, the employer should investigate possible alternatives to dismissal. Relevant factors include the nature of the job, the period of absence or seriousness of the illness and the possibility of securing a temporary replacement.

(1) The employee should have a right to be heard in this process, with assistance from a trade union representative or fellow employee, where appropriate.

(2) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity eg alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

EXPLANATORY MEMORANDUM

Prepared by the Ministerial Legal Task Team
January 1995

NOTE

THE AIM OF THIS EXPLANATORY MEMORANDUM IS TO HIGHLIGHT THE MAIN INNOVATIONS IN THE DRAFT BILL ON A CHAPTER BY CHAPTER BASIS, AND TO SET OUT BOTH THE CONTENT OF THESE INNOVATIONS AND THE THINKING UNDERLYING THEM. AS SUCH, THE MEMORANDUM DOES NOT PURPORT TO BE A COMPREHENSIVE DOCUMENT DETAILING EACH AND EVERY PROVISION OF THE DRAFT BILL. IT DOES, HOWEVER, AT THE END OF EACH THEMATIC EXPOSITION, SET OUT A SUMMARY OF THE MAIN PROVISIONS CONTAINED IN EACH CHAPTER IN ORDER TO PROVIDE THE READER WITH A BRIEF OVERVIEW OF THE CONTENT OF THE BILL.

CONTENTS

INTRODUCTION

MINISTERIAL LEGAL TASK TEAM

1. In July 1994 the Cabinet approved the appointment of a Ministerial Legal Task Team to overhaul the laws regulating labour relations and to prepare a negotiating document in draft Bill form to initiate a process of public discussion and negotiation by organized labour and business and other interested parties.

2. Its brief was to draft a Labour Relations Bill which would—

- ☞ give effect to government policy as reflected in the Reconstruction and Development Programme (RDP);
- ☞ give effect to public statements and decisions of the President and the Minister of Labour, which commit the government to International Labour Organization (ILO) Conventions 87, 98 and 111, among others, and the findings of the ILO's Fact Finding and Conciliation Commission (FFCC);

- ☞ comply with the Constitution;
- ☞ be simple and, wherever possible, written in a language that the users of the legislation, namely workers and employers, could understand, and provide procedures that workers and employers were able to use themselves;
- ☞ be certain and, wherever possible, spell out the rights and obligations of workers, trade unions, employers and employers' organizations so as to avoid a case-by-case determination of what constitutes fair labour practices;
- ☞ contain a recognition of fundamental organizational rights of trade unions;
- ☞ provide a simple procedure for the certification of trade unions and employers' organizations and for the regulation of specific aspects of these organizations in order to ensure democratic practices and proper financial control;
- ☞ promote and facilitate collective bargaining in the workplace;
- ☞ promote and facilitate collective bargaining at industry level;
- ☞ provide simple procedures for the resolution of disputes through statutory conciliation, mediation and arbitration and the licensing of independent alternative dispute resolution services;
- ☞ provide a system of labour courts to determine disputes of right in a way which would be accessible, speedy and inexpensive, with only one tier of appeal;
- ☞ entrench the constitutional right to strike subject to limitations which are reasonable and justifiable in an open and democratic society based on values of freedom and equality, and regulate lock-outs in a similar manner; and
- ☞ provide for the decriminalization of labour legislation.

1. On 8 August 1994 the Minister of Labour appointed a Ministerial Legal Task Team comprising the following members:

Professor H. Cheadle (Convenor);

Mr R. Zondo;

Ms A. Armstrong;

Ms D. Pillay;

Mr A. van Niekerk;

Associate Professor W. le Roux;

Professor A. Landman (President of the Industrial Court);

Mr D. van Zyl (State Law Adviser seconded to the team).

1. The Task Team was appointed by the Minister after consultation with employer and trade union representatives from the National Manpower Commission (NMC). The team comprised lawyers who represent trade unions and employers and who, in some instances, have a special knowledge of law in the public sector. The team was assisted by advocates M. J. D. Wallis, S.C., J. Gauntlett, S.C., Professor M. S. M. Brassey and S. Ngcobo; attorney Ms H. Seady; and a researcher, Ms C. Cooper.

2. The Task Team was assisted throughout by the ILO which not only provided resources for the Team's 10-day stay at the ILO in Geneva but also three world-class experts to help the Team: Dr B. Hepple, Master of Clare College, Cambridge; Professor A. Adiogun, University of Lagos, Nigeria; and Professor Manfred Weiss, University of Frankfurt, Germany. The Task Team also consulted internationally renowned experts within the ILO itself, including Mr W. Simpson, Mr E. Yemin and Mr F. Pankert. The Team is indebted to the ILO for its advice and the considerable resources made available to it at short notice.

3. The Task Team has produced a negotiating document in Bill form accompanied by this memorandum in order to assist the social partners to reach consensus on a new labour relations dispensation for South Africa. The draft Bill and the memorandum reflect the unanimous views of the Team.

THE PROCESS FOR NEGOTIATING A NEW LABOUR RELATIONS DISPENSATION

1. The negotiating document will be presented to stakeholders on 2 February 1995. Shortly thereafter it will be tabled before the National Economic Development and Labour Council (NEDLAC).

2. The document will be published in the *Government Gazette* in February 1995, inviting comment. The comments, in an edited form, will be submitted to NEDLAC for consideration.

3. The Labour Market Chamber of NEDLAC will have a good few months to reach consensus on a draft Bill to be submitted to Cabinet.

4. In the event that consensus is not reached, NEDLAC will prepare a report for submission to the Cabinet, stating which parts of the draft Bill have been agreed to and which parts have not. Minority reports will be included in the report. The Cabinet will then make a final decision on the content of the draft Bill.

5. The draft Bill will be tabled before Parliament during the 1995 session.

GENERAL OVERVIEW: THE NEED FOR A NEW LABOUR RELATIONS ACT

> *"I have on previous occasions, in relation to a variety of problems arising from the interpretation of various provisions in the Act, expressed dismay at the fact that the legislature, in 1979, saw fit to cut, trim, stretch, adapt and generally doctor the old Act in order to accommodate and give effect to the recommendations of the Wiehahn Commission instead of scrapping the old Act and producing an intelligible piece of legislation which clearly and unequivocably expressed its intentions."* (Justice Kriek in Natal Die Casting Company (Pty) Limited v President, Industrial Court and Others (1987) 8 ILJ 245 at 253J-254A).

South African labour law has long been in need of substantial reform. The Minister has initiated a five-year plan to modernize the legal framework and the institutions that regulate the labour market. The overhaul of the laws on labour relations is the first step in this process.

The problems with our existing law on labour relations are briefly as follows:

- The multiplicity of laws;
- the lack of an overall and integrated legislative framework for regulating labour relations;
- the contradictions in policy introduced by layer after layer of amendments, year after year;
- the reliance on after-the-event rule-making by the courts under the unfair labour practice jurisdiction;
- the extensive discretion given to administrators and adjudicators;
- the haphazard nature of collective bargaining institutions;
- the ineffectiveness of the conciliation machinery and procedures;
- the expense of dispute resolution;
- the criminal enforcement of labour law and collective agreements;
- the lack of compliance of our labour law with public international law;
- in certain respects, the lack of compliance of labour law with the new Constitution; and
- the fact that the present LRA does not take into account the objectives of the RDP.

The multiplicity of laws

For largely historical and political reasons, there are different laws on the statute book governing labour relations. The Labour Relations Act (LRA) applies to parts of the private sector and a part of the public sector. The Public Service Labour Relations Act (PSLRA), largely modelled on the LRA, governs parts of the public service. The Education Labour Relations Act (ELRA) applies to educators. The agricultural sector has its own dispensation under the Agricultural Labour Act (ALA). Labour relations for the police are dealt with by regulation. Some employees are not protected by legislation at all, such as, domestic workers, university teaching staff and parliamentary employees. Such a multiplicity of laws creates inconsistency, unnecessary complexity, duplication of resources and jurisdictional confusion. A single statute that applies to the whole economy but nevertheless accommodates the special features of its different sectors is far preferable.

The need for an overall framework of labour law

Existing labour laws make no orderly distinction between the regulation of collective labour relations and the individual employment relationship. This is the case both within particular statutes and as between statutes. The wide definition of the unfair labour practice, introduced into the LRA in 1979, spawned an individual employment law jurisprudence in a statute whose primary function is to regulate collective labour relations. Then, in 1983, the Basic Conditions of Employment Act was introduced in the absence of any proper articulation between it and the LRA.

The draft Bill's principal focus is the regulation of relations between trade unions and employers. For this reason, despite its obvious importance, there is no detailed regulation of equality in the workplace in the draft Bill. Equality is a complex area of the law requiring specialist monitoring and enforcement mechanisms. Until such mechanisms and institutions are introduced by a statute regulating equality and individual employment rights, the comprehensive regulation of these rights in the workplace is not appropriate. Pending the introduction of such legislation, employees, including applicants for employment, will be able to use the residual unfair labour practice definition in the Schedule on Transitional Provisions in the draft Bill to raise complaints about unequal treatment in the workplace and have disputes adjudicated through the labour courts.

Despite the draft Bill's focus on collective relations between trade unions and employers, it also regulates unfair dismissal. This is a consequence of the detailed body of unfair dismissal law that has grown out of the unfair labour practice definition in the LRA. In important respects this law remains uncertain. The draft Bill aims to resolve these uncertainties. It is envisaged that in future the chapter dealing with unfair dismissal will be removed from the new LRA and find its proper place in a statute dealing with individual employment law.

Conflict of policy

The LRA is the product of numerous *ad hoc* amendments over the years. This has resulted in a complex statute with an intricate web of cross-referencing. The PSLRA, ELRA and ALA have all drawn on the structure, form and language of the LRA. For this reason, they suffer from the same problems. The wide discretion given to the Minister, the registrar and the Industrial Court has meant that administrators and presiding officers have developed their own policies, some of which are at odds with the LRA's purpose. For example, the LRA clearly prefers collective bargaining through industrial councils. However, over the years the registrar and the Minister exercised the discretion conferred on them, regarding the representativeness of councils (concerning registration of industrial councils and the extension of their agreements) in such a way as to undermine collective bargaining at industry level. Likewise, the Industrial Court has developed a jurisprudence requiring an employer to bargain with all unions irrespective of the degree of support they might command despite the strong textual commitment of the LRA to representativeness as a precondition for bargaining.

Post hoc rule making

The broad discretion of the Industrial Court to determine unfair labour practices and the system of appeals from these decisions have made it difficult for parties, from a reading of the law, to ascertain and understand the extent of their mutual obligations. To leave the development of rules concerning the dismissal of illegal strikers to a three-tier process in which the employer's decision to dismiss, and the employees' decision not to respond to an ultimatum, winds its way through the Industrial Court, the Labour Appeal Court (LAC) and the Appellate Division, breeds uncertainty and costly litigation.

The draft Bill seeks to achieve certainly and to leave as little as possible to the discretion of administrators and adjudicators. It is hoped that this will benefit users of the legislation and encourage potential investors. In keeping with this object, the draft Bill attempts, as far as possible, straightforward and simple language. It represents a fresh start and a complete rewrite of the law regulating labour relations.

Statutory dispute resolution

The statutory dispute resolution procedures are ineffective. They are lengthy, complex and pitted with technicalities. Far from reducing the number of disputes, they create additional disputes and intensify industrial action. Undoubtedly, the low rate of disputes settled can also be attributed to the lack of resources and capacity of statutory bodies. Conciliation boards, in particular, are too often regarded by the parties as an unwelcome hurdle to litigation and have failed to play a meaningful role in the settlement of disputes.

The draft Bill fundamentally and dramatically overhauls the dispute resolution procedures, machinery and institutions. It seeks to create a legal framework in which employers, trade unions, and worker representatives or employees will be able to regulate their own relations and resolve their disputes. It proposes the establishment of a Commission for Conciliation, Mediation and Arbitration (the Commission), recognizes and actively promotes private procedures negotiated between the parties for the resolution of disputes and adopts a simple non-technical and non-jurisdictional approach to dispute resolution.

Haphazard collective bargaining

The institutions of collective bargaining in South Africa are haphazard and unintegrated. While bargaining at industry level is regulated by statute, bargaining at the workplace has been left to the parties and the courts. No orderly relationship exists between bargaining at these levels. The Industrial Court, under the banner of its unfair labour practice jurisdiction, has further fragmented the system by intervening in bargaining disputes.

The draft Bill provides for a voluntary system of collective bargaining with minimum intervention by statute and the courts. It promotes industry-level bargaining and gives to industry-level bargaining forums the power to determine the matters which can be bargained at plant level.

No statutory support for employee participation in decision-making

Currently, there is no statutory support or encouragement for employee participation in decision-making at the workplace.

The draft Bill provides for the establishment of workplace forums to deal with issues not suited to the adversarial bargaining process and to facilitate the successful adaptation to a new economic order.

Unacceptably high incidence of strikes

There is an unacceptably high incidence of unnecessary and unprocedural strikes. The absence of procedures for the independent and effective mediation of disputes in the LRA means that many disputes that could be resolved by consultation are instead resolved by industrial action. Strikes are often characterised by violence, a fact perhaps occasioned, or at least encouraged, by the uncertainty surrounding job security and the lack of protection from dismissal for strikers. The existing legislation fails dismally to provide alternative effective dispute resolution mechanisms for employees engaged in essential services. Express criminal prohibition of industrial action has not succeeded in preventing strikes within these services.

The draft Bill provides for the active conciliation of disputes, so as to reduce the incidence of industrial action. It protects strikers from dismissal in the case of lawful strikes. It provides final and binding arbitration to resolve disputes for employees engaged in services which are strictly speaking essential.

Cost of unfair dismissal law

International research shows that our system of adjudication of unfair dismissals is probably one of the most lengthy and most expensive in the world. And yet it fails to deliver meaningful results and does not enjoy the confidence of its users. Not surprisingly, dismissals trigger a significant number of strikes.

The draft Bill explicity regulates unfair dismissal and clearly states the permissible and impermissible grounds for dismissal. The procedural requirements for fair dismissal are clarified as are competent remedies. A speedy, cheap and non-legalistic procedure for the adjudication of unfair dismissal cases is provided.

Breaches of public international law

Existing statutes do not comply with South Africa's public international law obligations concerning freedom of association.

The draft Bill aims to bring South African labour law into line with international labour standards. This will allow the South African government to ratify the core Conventions of the ILO at the earliest opportunity, particularly those dealing with freedom of association and the right to organize and bargain collectively. At the same time, the draft Bill is designed with the realities of South African labour relations in mind and is intended to provide a framework for social partnership within which productivity can be increased, wages and living conditions can be improved, labour disputes can be avoided or resolved quickly and a climate of stability attractive to foreign investment can be fostered.

The draft Bill amends the law so as to comply with the findings and, where appropriate, to give effect to the recommendations of the FFCC as published in its report. Due regard has also been given to the report of the Committee on Freedom of Association dealing with measures taken by the South African government to implement the FFCC recommendations.

Compliance with the new Constitution

In certain respects, existing statutes do not comply with the provisions of the interim Consitution. The Task Team has sought to ensure that the draft Bill's provisions are not incompatible with the fundamental rights contained in the Constitution.

Giving effect to the Reconstruction and Development Programme

The draft Bill seeks to give effect to the stated goals and principles of the RDP endorsed by the government. It seeks to balance the demands of international competitiveness and the protection of the fundamental rights of workers. It recognizes that South Africa's return to the international economy demands that enterprises compete with countries whose labour standards and social costs of production vary considerably. For this reason, the draft Bill seeks to avoid the imposition of rigidities in the labour market.

Accommodating the needs of small business

The draft Bill has been drawn up with due regard to the different circumstances and needs of small business. It seeks to accommodate these in the following ways:

- The law of unfair dismissal has been significantly simplified and made accessible to the individual worker and small business by providing for a code of practice and a non-legalistic procedure for the resolution of most unfair dismissal disputes;

- the simple, non-legalistic and non-jurisdictional procedures for resolving disputes which have been introduced will help small businesses process disputes effectively, without their having to rely on lawyers and consultants;
- the constitutions of registered bargaining councils must make adequate provision for the representation of small business;
- industry-wide agreements must provide for an independent body promptly to consider applications for exemption from non-parties. The Minister cannot extend an agreement to non-parties unless the bargaining council provides for such an independent body;
- workplace forums may be established only in workplaces employing more than 100 employees; and
- the simplified style of the draft Bill and the improved certainty of its provisions will make the law more accessible to users.

CHAPTER I

APPLICATION AND SCOPE

PROBLEMS WITH THE PRESENT SYSTEM

The law governing collective relations between employers and trade unions is fragmented. The LRA regulates these matters for the private sector and local authorities, the PSLRA applies to employees appointed in terms of the Public Service Act but not to other public sector employees, the ELRA to teachers and educators at technical colleges and government schools, and the ALA to employers and employees in the agricultural sector. There is no legislation regulating collective labour relations for teachers and educators at universities, technikons and private schools, employees employed in private households (the domestic sector) and certain other state employees.

The multiplicity of laws regulating labour relations has had a number of consequences. These include—

- *inconsistency, uncertainty and complexity.* For example, each Act has a different unfair labour practice definition and the Industrial Court is required to determine disputes in terms of these different definitions;
- *inequality.* The state is charged by the constitution to treat all workers equally, yet the different Acts, either in their formulation or through judicial interpretation, result in unjustifiable inequality of treatment. This inequality will deepen over time because different institutions are charged with interpreting and giving effect to the different laws and different Ministries administer them. As things stand, public service employees and teachers are disadvantaged because the statutes applicable to them, while based on the LRA, abandon many of its checks and balances;
- *duplication of resources and administration.* Separate Acts and administrative structures place an unnecessary financial burden on taxpayers and the state;
- *overlap of private and public sector activities.* Certain of the state's activities place it in competition with the private sector. To have separate negotiating forums for what is essentially one industry is not logical; and

▷ *jurisdictional problems.* Given the constantly changing interface between the public and private sectors resulting from privatization, the expansion of the state's activities and other factors, it is difficult for parties to know which statute regulates their activities.

THE BILL'S PROPOSED SOLUTION: ONE ACT FOR ALL SECTORS

The draft Bill defines "employee" to include the various forms of atypical employment but to exclude independent contractors.

Furthermore, the draft Bill aims, in accordance with the terms of reference fixed by the Cabinet, to provide a comprehensive framework of law governing the collective relations between employers and trade unions in all sectors of the economy. The draft Bill applies to all sectors with the exception of **members** of the South African National Defence Force, agencies or services established in terms of the Intelligence Services Act, and the South African Police Service. Employees, other than members in these services, are included. The exclusion of members from the draft Bill and the consequent restriction of their rights flows from the unique functions they perform.

There is no theoretical justification for separate statutes for the public service, teachers and farm workers. The existence of separate statutes is due largely to historical and partly to political circumstances. Traditionally, public service employees were regarded as servants of the monarch to whom absolute loyalty was owed. The doctrine of state sovereignty, a more modern manifestation of this approach, regards the state as answerable only to the legislature. Any attempt to curtail its right to act unilaterally, through the impact of trade unions, collective bargaining or certain employment protections is eschewed. This approach is regarded as outdated and anachronistic, in South Africa and internationally. Firstly, the changing nature of the state and the extension of its activities into areas such as education, health care and welfare and commercial endeavours such as forestry, agriculture, etc. have undermined the notion that its employees are its servants. Secondly, developments at the international level have encouraged the erosion of the public/private labour law divide. ILO Convertion 87 of 1948 concerning Freedom of Association and Protection of the Right to Organize and the European Social Charter apply equally to the private and public sectors. These international requirements, together with Conventions 98 and 151 of 1978, guarantee to public and private sector employees (excluding the police and armed forces) the full range of freedom of association and collective bargaining rights.

The starting point must be that all workers should be treated equally and any deviation from this principle should be justified. The mere fact that employees are state employees is not sufficient justification. Restrictive treatment of employees must be justified on the basis of the service that they perform and, even then, it should not be narrower than necessary and should be accompanied by reciprocal guarantees. For instance, essential services must be restrictively defined and where the right to strike is denied it must be replaced with final and binding arbitration. The political dimension of the state as employer, more particularly the fact that its revenue is sourced from taxation and that it is accountable to the legislature, gives rise to unique and distinctive characteristics of state employment. For example, the state can invoke legislation to achieve its purposes as employer and its levels of staffing, remuneration and other matters are often the product of political and not commercial considerations. This uniqueness does not, however, justify a separate legal framework.

There is clear ILO jurisprudence to the effect that teachers are not to be treated differently from other workers. Neither can they be regarded as employees engaged in an essential service. The FFCC report echoes these sentiments. As for farm workers, the ILO permits no distinction between their rights to freedom of association and collective bargaining and those of other employees. Indeed, specific Conventions and Recommendations concerning these issues have been adopted by the ILO to complement its standards of more general application because of the difficulties experienced by farm workers in exercising their rights to freedom of association and collective bargaining.

There are also compelling practical reasons for merging the existing Acts into one law. When separate Acts were negotiated for public service employees, teachers and farmers, the LRA was used as the basis for the new legislation. The structure and procedures of these Acts closely follow those of the LRA and in many instances sections are reproduced in their entirety. That the parties negotiating their own legislation should have incorporated substantial provisions of the LRA demonstrates its applicability to these sectors. The fact that there are few real differences between the LRA and these other statutes simplifies the exercise of extending the draft Bill to these sectors.

To give effect to the Constitution and the RDP and to comply with the ILO's standards, the LRA, PSLRA, ELRA an ALA all require substantial amendment. This process is obviously more effectively managed by merging these Acts into one statute.

Nevertheless, the draft Bill seeks to accommodate the special interests and needs of these sectors through a mechanism contained in the transitional provisions, in terms of which certain key procedural provisions of their statutes are transmuted into collective agreements for the purposes of the draft Bill. This is set out more fully in the Chapter dealing with transitional provisions.

SUMMARY OF CHAPTER I PROVISIONS

- The draft Bill covers all employers and employees, excluding members of the South African National Defence Force and the South African Police Service and the agencies or services established in terms of the Intelligence Services Act.
- The primary objects of the draft Bill are to promote economic development, social justice and labour peace.
- The draft Bill is to be interpreted and applied with due regard to its primary objects, in conformity with the Constitution and so as to conform most closely with the public international law obligations of the Republic.

CHAPTER II

FREEDOM OF ASSOCIATION

PROBLEMS WITH THE PRESENT SYSTEM

Altough the current LRA protects freedom of association rights for employees, it does not do so in a way that it is sufficiently comprehensive or accessible. The fact that victimization is a criminal offence and punishable through the criminal courts is also undesirable.

THE BILL'S PROPOSED SOLUTION: A FREEDOM OF ASSOCIATION CHAPTER

The full spectrum of freedom of association rights finds expression in the draft Bill. The provisions of this chapter closely follow the ILO's Freedom of Association and Protection of the Rights to Organize Convention No. 87 of 1948. Employees, persons seeking employment, employers, trade unions and employers' organizations have the right to freedom of association as guaranteed in the new Constitution. In this way the draft Bill gives effect to the constitutional rights to freedom of association and complies with the ILO's Conventions protecting freedom of association. The extension of these protections to persons seeking employment and the employers is a significant advance on the existing law. By grouping all these rights and their protections in a separate chapter the fundamental importance of freedom of association is emphasized and users of the legislation are spared from having to sift through the whole statute to locate them. There is no longer any criminal sanction for the infringement of these rights, and disputes arising out of this chapter are referred to the Commission for attempted conciliation, failing which they may be referred to the Labour Court for determination.

The rights of employees to take part in the formation of trade unions and federations is guaranteed, as is the right, subject only to the constitution of the trade union or federation, to be a member and to take part in the activities of an hold office in the organization. Protection against victimization is ensured by provisions more extensive than those in the existing LRA.

Employers' rights are also regulated by the draft Bill. Rights to take part in the formation and activities of an employers' organization are guaranteed and protection is extended against victimization. The rights of trade unions and employers' organizations to draw up a constitution and rules, elect office-bearers and affiliate to and participate in the affairs of international organizations are guaranteed.

The draft Bill provided that, after attempted consiliation by the Commission, the Labour Court has jurisdiction over a dispute concerning the interpretation and application of the above rights or where an infringement of these rights is alleged.

SUMMARY OF CHAPTER II PROVISIONS

- Every employee has the right to form and join a trade union, to take part in its activities and to hold office.
- The right to freedom of association of employees and persons seeking employment is protected from interference by any employer, trade union or other person.
- Every employer has the right to form, join and take part in the activities of an employers' organization and to hold office.
- All forms of victimization are prohibited.
- Trade unions and employers' organizations have the right to draw up their constitutions and rules, elect their representatives, organize their administration and activities without interference, establish and join federations, and affiliate to and participate in the affairs of international organizations.
- Contracts infringing these rights and protections are null and void.
- The draft Bill provides for the resolution of disputes by the Labour Court after attempted conciliation by the Commission.
- The onus is on the defendant to show that his or her actions are not in breach of these rights.

CHAPTER III

COLLECTIVE BARGAINING

PROBLEMS WITH THE PRESENT SYSTEM

The fundamental problem with the existing law is the lack of conceptual clarity as to the structure and functions of collective bargaining. The LRA, since its inception as the Industrial Conciliation Act in 1924, has favoured a majoritarian system of industrial-level bargaining in the form of industrial councils. In the past this policy has been undermined by the exercise of the Minister's discretion and the Industrial Court's jurisprudence. The lack of commitment to an orderly system of industry-level bargaining is also reflected in the patchwork registration of industrial councils—there are councils that span more than one industry, others that cover only part of an in industry, and some a single employer. The exclusion of black workers from the industrial bargaining system for the first 55 years of this dispensation spawned a seperate tradition of bargaining at the level of the work-place—a development that the LRA dit not address except through the resort of the unfair labour practice jurisdiction of the Industrial Court. The result of these developments is that there is no existing statutory framework which can properly accommodate and facilitate and orderly relationship between bargaining at the level of industry and at the level of the workplace.

Other problems may be summarized as follows:

- ▷ The criteria for the representativeness of industrial councils;
- ▷ the bureaucratic structure of these councils;
- ▷ the regulation of the Minister's discretion to extend industrial council agreements to non-parties;
- ▷ the procedures for the granting of exemptions from industrial council agreements; and
- ▷ the enforcement of such agreements by criminal prosecution.

THE BILL'S PROPOSED SOLUTION: A MODEL FOR COLLECTIVE BARGAINING

A notable feature of the draft Bill is the absence of a statutory duty to bargain. In its deliberations on a revised system of collective bargaining, the Task Team gave consideration to three competing models. The first is a system of statutory compulsion, in which a duty to bargain is underpinned by a statutory determination of the levels at which bargaining should take place and the issues over which parties are compelled to bargain. The second model is not dissimilar though more flexible. It relies on intervention by the judiciary to determine appropriate levels of bargaining and bargaining topics. The third model, unanimously adopted by the Task Team, is one which allows the parties, through the exercise of power, to determine their own arrangements. The exercise of power, or indeed persuasion, is given statutory impetus by the draft Bill's provision for organizational rights and a protected right to strike.

In the course of debate on this issue, the Task Team noted that until the enactment of the unfair labour practice definition in 1979, collective bargaining structures were voluntarist in the sense that while the law encouraged collective bargaining on an industry-wide basis, a party could not be compelled to bargain other than by the exercise of economic power by the party seeking bargaining rights. During the 1980s, the Industrial Court, acting in terms of provisions at least ostensibly designed to protect individual rights, assumed the jurisdiction to intervene in collective disputes. The court has issued orders compelling

parties to engage in collective bargaining, it has determined appropriate bargaining partners and defined appropriate bargainings topics. On other accosations, however, it has consciously declined to do so — the result has been a confused jurisprudence in which neither party is certain of its rights and in which economic outcomes are imposed on parties which often bear little, if any, relation to the needs of the parties or the power they are capable of exercising. A number of determinations by the Industrial Court have had what is perhaps a more pernicious effect: The court, in its wisdom, has intervened in a way that has undermined existing collective bargaining relationships.

Those considerations aside, the fundamental danger in the imposition of a legally enforceable duty to bargain and the consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment. The ability of the South African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the nature and structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements. The statutory compulsion model, which does not admit even the limited flexibility of judical intervention, fails even more dismally for the same reason.

While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing for a series of organizational rights for unions and by fully protecting the right to strike. These rights and the speedy and inexpensive remedies by which they are to be enforced extend significant powers to trade unions. In addition, the draft Bill promotes the institutions of mediation and advisory arbitration. Parties in dispute will be able to call on the professional conciliation skills provided by these institutions to help them reach their own agreements.

The Task Team is satisfied that the right to organize and bargain collectively in section 27 of the Constitution does not require Parliament to create a legally enforceable right to bargain in the statute. Nevertheless, the draft Bill honours the constitutional promise by adopting the proposed model which makes the duty to bargain organizationally enforceable. Parliament cannot, and does not in the draft Bill, remove the right of state employees to bargain collectively with their employer (the state). By statutorily entrenching the Public Service Bargaining Council and the Education Labour Relations Council, the constitutionally guaranteed right of those employees to bargain collectively is effected.

The draft Bill promotes, without prescription to this effect, bargaining at a central or industry level. Many of the challenges economic restructuring presents to major industries will best be met by a co-ordinated response forged by agreement between organized business and labour.

Organization rights

A limited right to stop-orders aside, the LRA does not define or confer organizational rights on trade unions or employer organizations. A limited recourse to these rights is available under the unfair labour practice jurisdiction of the Industrial Court. The draft Bill provides that the following organizational rights be conferred on representative trade-unions

- the right of access to premises for union-related purposes;
- the right to hold meetings;

- the right to conduct ballots;
- the right to stop-order facilities;
- the right to time off for union activities;
- the right to elect union representatives; and
- the right to information for collective bargaining purposes.

Not one of these rights if absolute. Each is qualified by what is reasonable in the circumstances: the right of access, for example, is granted subject to reasonable and necessary conditions to safeguard life and property and to prevent the undue disruption of work. A recipient of confidential information shall not disclose that information to a third party, except with the consent of the employer. This protection is articulated in Chapter IX since it pertains to all instances where disclosure is required by the draft Bill.

All of the organizational rights guaranteed by the draft Bill are further qualified by thresholds relating to representativeness. The Task Team has left it to NEDLAC to decide the statutory thresholds to be included in the final draft of the Bill. NEDLAC may decide that it is not necessary or appropriate to require a threshold for the excercise of any of the rights listed in the statute or it may designate different thresholds for different rights. The Team considered that same rights might require a lower threshold than others before they accrued to a union. It is for the social partners to decide whether only those unions representing 50% of employees or whether any union should be entitled to the orgnizational rights contained in the draft Bill. Low thresholds will assist in the organization of the unorganized, while the majoritarian criterion avoids a proliferation of unions and provides stability and a neutral and simple standard against which to test the competing claims of trade unions. There is a difference between using a 50% criterion as a limiting principle and strict majoritarianism. The former permits unions with less than 50% membership to acquire these rights, not as a consequence of the statute, but in terms of an agreement reached with the employer. Strict majoritarianism grants exlcusive rights. In other words, no other unions may be granted these rights where a majority union exists.

The draft Bill further provides that the parties to a collective agreement may vary the thresholds imposed by the statute. This is possible only where a union represents more than 50 per cent of employees in the workplace or where the agreement is concluded by a bargaining council. In both instances, whatever thresholds are agreed to, are to be applied equally to all registered unions seeking such rights in the workplace.

Disputes concerning the acquisition or the excercise or organizational rights are to be determined by speedy arbitration, after reference of the dispute to the Commission for conciliation. Speedy arbitration is regarded as appropriate given the urgency of the circumstances within which disputes concerning the exercise of organizational rights often arise and the diverse nature of the modern workplace.

Collective agreements

The draft Bill provides for registered trade unions, and employers and employers' organizations to conclude legally binding collective agreements, enforceable by arbitration rather than through the criminal or civil courts. This provision accords with the policy of self-regulation which underlies the draft Bill and reduces costs incurred in the criminal enforcement of agreements. Information available to the Task Team reveals that the state may spend approximately R3 000 to recover an average claim of R250. Trade unions, employers and employers' organizations are now required to be responsible for the enforcement of their own agreements, with trade union representatives in the workplace having the right to monitor and enforce these agreements without fear of victimization.

Special provision is made for union security arrangements. The LRA has, since 1924, recognized the closed shop as an institutional prop to orderly collective bargaining. Many industrial councils owe their stability and industrial peace to the closed shop. The Constitution, however, endorses freedom of association without resolving the vexed question of whether such a right includes the right not to associate. The difficulties with this question at the World Trade Centre led to it remaining unresolved, thereby exposing the closed shop to possible constitutional attack in the interim while a democratically elected constitutional assembly deliberates on the new Constitution. It is for this reason that the draft Bill provides that those provisions of the LRA that regulate closed shops should not be repealed [and therefore remain insulated from constitutional review in terms of section 33 (5) of the Constitution] and that the existing industrial council agreements in so far as they entrench the closed shop remain in force until the new Constitution is finalized. In the meantime, the draft Bill provides for the agency shop as a union security arrangement that should pass muster under the interim Constitution. Since there are in existence a large number of union security arrangements that are not promulgated in terms of the LRA, it was felt necessary to regulate such arrangements in a manner that accords with the spirit and purpose of the interim Constitution. The draft Bill provides that an agency shop agreement will be binding only if the following conditions are met—

- the trade union is representative of at least 50 per cent of the employees in the workplace. In the draft Bill the actual percentage over 50 per cent is left open for negotiation by the parties;
- employees who are not members of the trade union are not compelled to belong to the union;
- the agency fee deducted from non-members is not more than the membership fee deducted from the wages of members; and
- the moneys collected from non-members is paid into a fund controlled jointly by the employer and the trade union and is used to pay the union's collective bargaining expenses and for other non-political purposes.

Similar provisions are found in agreements between the National Union of Mineworkers and various mining houses.

Bargaining councils

The draft Bill gives effect to the RDP and the government's commitment to industry-level bargaining. This means that the draft Bill retains, in a broard sense, many of the existing provisions of the LRA relating to industrial councils. Such councils are renamed "Bargaining councils" because the draft Bill applies to all sectors of the economy, not just the industrial or private sector. However, a number of important reforms are introduced by the draft Bill. These include—

- the capacity of councils to straddle the public and private sectors;
- the requirements that small business interests be represented on the councils;
- an annual review of representativeness; and
- a new rule for the extension of bargaining council agreement to non-parties, in particular the requirement that agreements may be extended only if they provide for the speedy determination of exemptions by an independent body on the grounds of undue hardship.

In keeping with the emphasis placed on the primacy of collective agreements, the draft Bill provides that bargaining council agreements are obliged to contain a provision whereby all disputes relating to the application and interpretation of the agreement are to be determined by arbitration. Bargaining councils are required either to become accredited dispute resolution agencies for this purpose or to appoint such an agency to fulful that function.

Accredited bargaining councils are also empowered to resolve any dispute that arises within their registered scope. If not accredited by the Commission, the bargaining council must engage the services of an accredited private agency to conciliate and where appropriate determine the dispute by arbitration.

In an attempt to infuse greater coherence into sectoral level bargaining the Bill provides for NEDLAC to establish criteria for the demarcation of sectors. A bargaining council's registered scope must be in keeping with these demarcations and may be varied in order to achieve this objective. Additional provisions exist for resolving demarcation disputes without recourse to the courts.

SUMMARY OF CHAPTER III PROVISIONS

Organizational rights

- Representative trade unions have a right—
  - of access to employers' premises for recruiting and other trade union purposes;
  - to hold meetings at employers' premises outside of working hours;
  - to conduct a ballot at employers' premises; and
  - to information for collective bargaining purposes.
- These rights are subject to reasonable and necessary conditions to safeguard life or property or to prevent undue disruption of work.
- Representative trade unions have a right to stop-order facilities.
- The draft Bill provides for the right to elect trade union representatives to represent employees in grievance and disciplinary proceedings and to monitor compliance with the law.
- Trade union representatives have the right to reasonable time off to take part in trade union activities.
- Statutory thresholds of representativeness can be varied by collective agreement.
- Disputes concerning infringement of these rights may be referred to the Commission for conciliation.
- Unresolved disputes may be referred to speedy arbitration for final determination.

Collective agreements

- A collective agreement binds the parties and, in so far as the agreement regulates terms and conditions of employment, their members.
- A collective agreement becomes binding 30 days after signature unless otherwise provided.

- A collective agreement for an indefinite period can be terminated on reasonable notice.
- A failure to comply with the provisions of an agreement is not a criminal offence.
- Every collective agreement is required to provide for the determination by conciliation and arbitration of disputes concerning its application and interpretation.
- In the absence of any such provision, disputes about the interpretation and application of the agreement are resolved by arbitration under the auspices of the Commission.
- Only those agency shop agreements complying with the provisions of the draft Bill are binding.
- Agency shop agreements are binding provided they do not compel membership or payments by non-members in excess of members' subscriptions and provided monies received from non-members are placed in a joint fund and used only to defray collective bargaining, workplace forum and other agreed and ratified expenses.

Bargaining councils

- Employers' organizations and the state on the one hand and registered trade unions on the other can be parties to bargaining councils.
- A bargaining council can comprise parties drawn from the public and private sectors.
- The draft Bill provides for a national bargaining council for the public service and a national bargaining council for the education sector.
- A bargaining council is established in terms of the draft Bill only once it has been registered.
- Application for registration is made to the registrar. A copy of the application must be served on NEDLAC.
- The registrar must register the council if it complies with the provisions of the draft Bill, is sufficiently representative and its scope complies with NEDLAC's demarcation of industries.
- A bargaining council can be deregistered if its scope is not in keeping with criteria and industries defined by NEDLAC or if the council is not sufficiently representative.
- The constitution of the bargaining council shall provide for matters prescribed in the draft Bill.
- The constitution shall make adequate provision for the representation of interests of small enterprises.
- The representativeness of a bargaining council shall be reviewed annually.
- Every registered bargaining council is a body corporate.
- Its functions include the conclusion and enforcement of collective agreements, the prevention and resolution of labour disputes, the promotion and establishment of training and education schemes, the development of proposals on industrial policy and deciding which matters should be bargained at industry level and which at workplace level.

- The manner in which decisions are reached is determined by its constitution.
- The Minister is obliged to extend an agreement if the terms of the agreement do not discriminate against non-parties and if the failure to do so will undermine collective bargaining at industry level.
- The Minister may not extend an agreement unless provision is made for the speedy granting of exemptions by an independent body.
- An application for admission to a council shall be made in terms of the prescribed procedure.
- If a council fails or refuses to admit a new member, the applicant may apply to the Labour Court for admission and other appropriate relief.
- The registrar can vary the registered scope of a council.
- The draft Bill prescribes the procedures for and the consequences of the amalgamation of bargaining councils.
- It also provides for the winding-up and sequestration of councils in terms of their constitutions or, on application, by an order of the Labour Court exercising the powers of the Supreme Court in such applications.
- The constitution of a bargaining council must make provision for the resolution of disputes arising within its registered scope.
- A bargaining council that is accredited by the Commission can, itself, execute dispute resolution functions.
- Demarcation disputes by NEDLAC.

CHAPTER IV

INDUSTRIAL ACTION

PROBLEMS WITH THE PRESENT SYSTEM

The present legislation does not give effect to the right to strike and the recourse to lock-out as guaranteed in section 27 of our Constitution. Although strikes that are in conformity with the LRA are protected from civil and criminal legal proceedings, the byzantine procedures required by the Act render this protection largely theoretical. There is no explicit protection for strikers against dismissal. The courts have, however, intervened in some strikes and reinstated strikers on the grounds that the dismissals constituted an unfair labour practice. The courts initially sought to develop factors to be taken into account in deciding whether or not to protect strikers. These factors were always uncertain and unclear, and the courts progressively developed an ever more bewildering array of criteria. There is no coherence: one court will rely on a factor, another will discard it in its entirety, others again will eschew any reliance on factors at all. The problem relates not only to the uncertain exercise of discretion, but also to the fact that this discretion is always exercised after the event. Workers often have to wait years for relief as their case winds its way through the courts. Employers, at great cost, may have to reinstate a workforce years after its replacement by another. In a recent example, the Labour Appeal Court (LAC) ordered the reinstatement of 70 workers who had, five years previously, been dismissed for striking. The strikers were reinstated with approximately two-and-a-half years' back-pay. The employer might never have fired its workforce had it known the financial and labour relations consequences of doing so. The judgment was also cold comfort to the employees who had to wait some five years for relief. The uncertainty caused by the wide discretion given to the courts, the long and complicated system of appeals and the existence of separate divisions of the LAC, all conspire to make the giving of reliable advice to employers and trade unions impossible under the present LRA.

The regulation of the right to strike by the LRA, the PSLRA and the ELRA, does not pass constitutional muster. It also offends the findings and recommendations of the FFCC or the ILO and falls foul of the ILO's Constitution and Conventions concerning freedom of association, as interpreted by the ILO's expert committees. The major failures of the legislation in this regard are—

- ▷ complicated and technical pre-strike procedures;
- ▷ onerous ballot provisions;
- ▷ the criminalization of strikes and lock-outs;
- ▷ the prohibition of socio-economic strikes;
- ▷ the ready availability of interdicts and damages claims; and
- ▷ the absence of statutory protection from dismissal for striking employees.

It is generally accepted by trade unions and employers that many of the strikes that currently plague our labour relations system are unnecessary. They represent both an institutional and a legal failure. Our statutory conciliation institutions settle only 20 per cent (conciliation boards) to 30 per cent (industrial councils) of disputes. Mediation and conciliation services in the United Kingdom and Australia reflect a settlement of over 70 per cent. Moreover, the present system of housing the statutory conciliation and mediation capacity with the Department of labour means these resources are not capable of being used in disputes involving the public service. A major innovation proposed in the draft bill is the establishment of an independent mediation and arbitration service, called the commission for conciliation, Mediation and Arbitration (the Commission). The institution and its functioning is described more fully in Chapter VIII.

To date our labour law has failed dismally to meet one of its objects, and that is the prevention of strikes in essential services. Indeed,strikes in such services have increased dramatically over the last few years.

Our strike law on essential services suffers from being at the same time too broad and too narrow. It also fails when judged against the ILO's requirement that essential services should refer only to those "services whose interruption would endanger the life, personal safety or health of the whole or part of the population". Both the LRA and the PSLRA contain sections which prohibit the exercise of the right to strike in essential services. Such services are specified in the Acts. The lists of services in both Acts, but particularly in the PSLRA, are extremely broad and go well beyond the terms of the ILO definition. The PSLRA, for instance, apart from specifying certain services as essential, aslo includes support services as essential. Furthermore, it gives wide powers to the Industrial Court to declare any service as essential. While a specified list has the advantage of providing certainty as to which services are essential, the disadvantage is that it is rigid, and fails to take account of circumstances in which services not normally defined as essential could become so under certain conditions. For instance, this could occur where a strike continues for a long time, or where it is plagued by violence.

Our strike law on essential services fails to meet ILO requirements in another respect. The ILO recognizes that the right to strike may be limited in certain instances, but requires that "restrictions on the right to strike should be accompanied by adequate, impartial and speedy conciliation and arbitration proceedings in which the parties concerned can take part at every stage . . . and awards, once made, are fully and promptly implemented".

While the LRA provides for compulsory arbitration, the procedures in the Act for such arbitration are time consuming and cumbersome, thus detracting from the ILO requirement that arbitration should be "adequate" and "speedy". The PSLRA suffers from the same defect and a more serious impediment, being that the arbitrator's award is not binding if it involves a dispute at the central level of the public service and has financial implications for the state.

THE BILL'S PROPOSED SOLUTION: ACTIVE CONCILIATION OF DISPUTES, SIMPLE PROCEDURES AND CERTAINTY

Procedural requirements

The draft bill proposes a simple procedure for a protected strike or lock-out. All that is required is that the dispute be referred to a bargaining council if there is one, or to mediation in terms of a collective agreement, or to the Commission for conciliation. Steps will be taken to settle the dispute within a period of 30 days or any further period that may be agreed to by the parties. In the event that the dispute remains unresolved the trade union is entitled to engage in a protected strike on 48 hours' written notice to the employer. The employer may likewise institute a protected lock-out. Technicalities and bureaucratic interventions have as far as possible been removed.

There is a special procedure in respect of disputes over a refusal to bargain. As outlined in Chapter III, the Task Team proposes that there should be no legal duty to bargain enforced by the courts. It is accordingly proposed that disputes concerning the refusal to recognize a trade union or the withdrawal of recognition, or the refusal to establish a bargaining council or the resignation from a bargaining council should be thoroughly conciliated and referred to advisory arbitration before the resort to industrial action. The intervention of skilled mediators in these types of disputes has demonstrated that they can often be resolved without the resort to industrial action.

The draft Bill places a premium on active and effective conciliation of disputes with a view to reducing the number of disputes that depend on industrial action for their resolution. The Commission's role and functions and the powers of its commissioners are fully dealt with in Chapter VIII.

As in other parts of the draft Bill, provision is made for the parties to follow agreed procedures. In this event they are not obliged to comply with the statutory procedural requirements of the state prior to engaging in industrial action. The procedural requirements are also waived in circumstances where—

the parties to the dispute are parties to a bargaining council whose constitution prescribes a procedure to be followed prior to engaging in industrial action;

the strike is in response to an unprocedural lock-out and vice versa;

the employer refuses, despite a request from employees or their union, to maintain or restore the status quo pending the expiry of the statutory conciliation period.

Balloting has been removed as a statutory requirement for a protected strike. Ballots provide fertile soil for employers to interdict strikes and to justify the dismissal of strikers in strikes that are technically irregular but otherwise functional to collective bargaining. This has been a recurring feature of South African industrial relations and has prevented the proper conclusion of collective bargaining processes. There is also an anomaly because union members are prohibited from striking unless the union has held a ballot while non-union members are free to strike and an employer is free, on its own, to lock-out in the absence of a ballot. this may well offend the right to equal treatment under the law and

freedom of association in terms of the Constitution. Where the right to strike is vested in a registered trade union, a balloting requirement (provided that the employer may not contest the legality of the strike on this basis) may be appropriate. Where, however, the right to strike is an individual worker's right, such as is provided for in section 27 (4) of our Constitution, requiring a ballot as a precondition for the exercise of that right is inappropriate.

Nevertheless, the draft Bill seeks to ensure democratic practices for members of a union by requiring the constitution of every trade union to prohibit expulsion or discipline on grounds of non-participation in a strike unless a ballot has been held, and a majority vote passed in favour of the strike. This provides employees with the requisite democratic guarantees without allowing for abuse by third parties. Employer organizations are subject to the same constitutional requirement.

Limitations on the right to strike or lock-out

Many of the draft Bill's limits on the right to strike and the recourse to a lock-out are standard: Strikes and lock-outs are not permitted where the issue in dispute is regulated by a current agreement or a wage determination during its first year of operation, where they are in breach of the peace clause, where the issue in dispute has been referred to arbitration or the courts, and in an essential service. In addition, strikes over disputes of right are not permitted.

In dealing with the inadequacy of our legislation regarding strikes in essential services, there is a move away from the current position in the LRA and the PSLRA. Instead, the draft Bill proposes that an essential services committee be established comprising persons with specialist knowledge of labour relations or labour law. The committee is appointed by the Minister of Labour, in consultation with the Minister for the Public Service and Administration and NEDLAC. The functions of the committee are to conduct investigations in public and thereafter designate a service as an essential service. No strikes or lock-outs will be permitted in such services. Instead, disputes that arise in such services must be referred to compulsory arbitration. In deciding which services are essential the committee will use as its terms of reference the ILO definition: "Any service, the interruption of which threatens the health, safety or life of the population or a part thereof". Where the essential services committee has not yet designated a service to be an essential service, any person may approach the committee for an ad hoc determination before or during a strike or a lock-out. The draft bill also provides for circumstances in which a service is not essential at the commencement of a strike but may become so days or weeks into a strike or lock-out. For instance, a strike on the part of refuse collectors might not constitute a health hazard for the first week or two, but may do so thereafter. If an employer seeks and obtains an ad hoc determination that the service is an essential service, the strike will be prohibited and the issue in dispute will have to be referred to compulsory arbitration for resolution.

Provision is made, however, for registered trade unions and employers to include within their collective agreements provisions on the maintenance of a minimum service within an essential service. These agreements have to be ratified by the essential services committee because the interests at stake are not simply those of the employer and the trade union but also the public at large. If the collective agreement is ratified, then a strike or a lock-out can take place in an essential service provided the minimum service is maintained.

The process opted for in the draft Bill provides the flexibility necessary to regulate successfully the complex issue of dispute resolution in essential services. Listing essential services in a statute achieves certainty, but the product is rigidity. Extensive comparative research was undertaken in an effort to deliver workable provisions in this regard. What is clear is that the present statutory regulation of this issue is unworkable, discredited and fails to prevent industrial action in crucial services. The provisions establishing the essential services committee could be promulgated several months before the implementation of the statute as a whole in order to allow public hearings and the preparation of a core list of essential services before the rest of the Bill is implemented.

The draft Bill prohibits strike action in breach of a collective agreement or a determination by the essential services committee concerning maintenance services. Maintenance services are defined as those services the interruption of which would have the effect of a material physical destruction of a working area, plant or machinery. The justification for the limitation of the right to strike in these circumstances is the curtailment of industrial action which extends beyond the infliction of purely economic harm to the physical destruction of the wealth generating capacity of the working area, plant or machinery. Since this limitation permits continued maintenance in the affected are during a strike, the draft Bill seeks to balance this right by prohibiting the employment of replacement labour to continue or maintain production during the strike.

The effect of a strike or a lock-out in conformity with the draft Bill

The draft Bill expressly provides that a strike or lock-out in compliance with its requirements does not constitute a delict. Accordingly, an employer or third party cannot interdict the strike or institute a claim for damages against employees or their trade union for participation in such a strike.

A strike or lock-out which conforms to the draft Bill does not constitute a breach of contract. Accordingly, an employee cannot be dismissed for striking (see also Chapter VI which makes striking an invalid reason for dismissal). Where the strike conforms with the provisions of the draft Bill there is an absolute prohibition on the dismissal of strikers. Careful consideration was given to allowing an employer to dismiss where there may be irreparable harm caused by the strike. The difficulty with admitting an exception in respect of irreparable harm to the employer is the manner in which that exception may be broadened by the labour courts. The second difficulty is that the exemption will not comply with ILO standards in espect of which we are now bound. The problem has to be addressed, we think, in a different manner. First of all, a great deal of money and effort has to be spent on the successful mediation of disputes. Secondly, notwithstanding the existence of section 79 in the present LRA. which prohibits any form of interdict or damages action against a union or employees who participate in a legal strike even if they destroy the company, neither unions nor employees have engaged in such destruction. In any event, the dismissal of strikers does not prevent irreparable harm to an employer. It is through the resolution of the dispute or continued production, with the use of an alternative workforce, that the company's viability can best be maintained. The draft Bill offers the employer facing bankruptcy three options—

- ▷ resolve the dispute;
- ▷ employ alternative labour on a temporary basis;
- ▷ dismiss on grounds of operational requirements.

An alternative is to make provision that an employer, faced with bankruptcy, may apply to the court for the termination of the strike on that ground and that the court may grant such relief only if the employer submits itself to compulsory arbitration. On balance, such a procedure was considered more invasive both of the employee's right to strike and the employer's right to manage.

An employer cannot take any other legal action against employees or a trade union for their participation in a strike. Likewise, employees cannot sue their employer for wages during a lock-out in conformity with the draft Bill. Provisions is specifically made that the employer is not obliged to remunerate an employee during a protected lock-out. However, because remuneration also includes payment in kind, specific provision is made that where the employer also provides accommodation, food and the basic amenities of life as part of the employment contract, the employer is obliged to maintain these during a strike or a lock-out. The employer is permitted to recover their value from the employees concerned after the strike.

Along the lines of the indemnity in the LRA, provision is made that no civil legal proceedings may be brought in any court of law, including the Labour Court, against any person participating in a strike or lock-out or in conduct in furtherance of a strike or lock-out in conformity with the Act. This indemnity does not apply where the act commited is itself a crime. The draft Bill, however, provides that a breach of the Basic Conditions of Employment Act or the Wage Act is not a crime for the purposes of this section. This is to avoid the anomaly of an employer, who is engaged in a lawful lock-out, but who is guilty of an offence in terms of the BCEA or Wage Act, falling outside of the indemnity.

Consequence of non-compliance

Strikes and lock-outs that are not in conformity with the draft Bill attract various sanctions. The Labour Court has jurisdiction to interdict such strikes and to award compensation for any loss attributable to such strikes or lock-outs. In view of the very harsh consequences arising out of our law of delict, damages awards for strikes or lock-outs not in conformity with the draft Bill are tempered by a range of factors, namely, whether attempts were made to act in conformity with the provisions, whether or not the strike or lock-out was premediated, whether or not it was provoked, whether or not it was in the interests of orderly collective bargaining, the financial position of the employer and trade union, the duration of the strike or lock-out, and whether or not there was compliance with an interdict. Employees who take part in a strike that is not in conformity with the draft Bill may be dismissed. The dismissal, however, is not automatically fair; it still has to be for a fair reason and in compliance with a fair procedure as required by Chapter VI.

Secondary strikes and picketing

The draft Bill regulates secondary strikes. In so doing it does not extend any greater rights than those in the LRA, but initiates procedural requirements for the orderly regulation of this form of strike action. The primary strike must conform with the provisions of the draft Bill and the secondary employer must have been given notice of the proposed strike.

The draft Bill also provides a procedure for the orderly regulation of the right to picket during a strike. The provisions permit a trade union to authorize a picket for peaceful purposes. Alleged infringements of the provisions are referred to the Commission for conciliation. Where the parties are unable to reach agreement to regulate the conduct of the picket, the Commission will determine appropriate rules to govern the picket during the strike. Where the agreed or determined rules have been flagrantly breached, the Labour Court may issue an appropriate order in respect of the misconduct.

Protest action

The FFCC regarded the LRA's limitation of strikes to collective bargaining matters as one of the more flagrant breaches of the right of freedom of association. The FFCC and the ILO's Committee on Freedom of Association regard it as fundamental that workers have the right to strike in order to promote or defend their socio-economic interests. In order to achieve a balance between this fundamental right and the needs of the economy, the Task Team proposes that protest action should be protected only if it is authorized by a registered trade union or federation, notice has been served on NEDLAC at least 14 days before the start of the action and that it does not take place in an essential service. Parties may approach the Labour Court for a declaratory order for the lifting of the protection. The Court, in deciding whether or not to grant the order, must take into account the nature and duration of the protest, the steps taken by the registered trade union to minimize the harm caused by the protest action and the conduct of the participants. The object is to provide for this fundamental right, without leaving it open ended.

SUMMARY OF CHAPTER IV PROVISIONS

- Every employee has the right to strike and every employer has recourse to a lock-out provided—
  - the dispute has been referred to a bargaining council or the Commission; and
  - the dispute remains unresolved or 30 days have passed; and
  - if the dispute concerns a refusal to bargain, an advisory award has been made; and
  - 48 hours' written notice of the strike or lock-out has been given to the other party.
- The above procedural requirements do not apply where—
  - the parties to the dispute are bound by a collective agreement or a bargaining council constitution which requires procedures to be followed before a strike or lock-out;
  - the strike is in response to an unprocedural lock-out or the lock-out is in response to an unprocedural strike;
  - the employer fails, despite request, to maintain or restore existing terms and conditions of employment pending the expiry of the statutory conciliatory period.
- The draft Bill limits the right to strike and recourse to the lock-out in the following circumstances—
  - if the issue in dispute is regulated by a collective agreement or wage determination binding on the parties;
  - if there is a provision in a collective agreement which prohibits a strike or lock-out in respect of the issue in dispute;
  - where the issue in dispute must be referred to arbitration in terms of any agreement;

- in respect of a dispute of right (where the issue in dispute is one in respect of which an arbitration award may be made or an order by the Labour Court may be granted in terms of the draft Bill); and
- in an essential service.

- A strike in support of a strike between other employees and their employer is not permitted unless those other employees have complied with the provisions of this Chapter and the secondary strikers have given their own employer 48 hours' written notice of their proposed strike.
- A registered trade union may authorize a picket for purposes of a peaceful demonstration outside an employer's premises.
- Alleged infringements are referred to the Commission for conciliation, and if necessary, determination.
- The Labour Court may grant appropriate relief for flagrant breaches of the rules agreed to by the parties or determined by the Commission.
- A strike or a lock-out in conformity with the provisions of the draft Bill does not constitute a delict, or a breach of contract and participants are indemnified from civil proceedings.
- Employees who participate in a strike in conformity with the provisions of the draft Bill cannot be dismissed for striking.
- An employer is not precluded from dismissing an employee for a fair reason connected with the employee's conduct during the strike or for economic, technological, structural or similar reasons in compliance with the provisions of Chapter VI.
- If a strike or lock-out does not take place in conformity with the draft Bill—
  - it can be interdicted by the Labour Court;
  - the Labour Court can order the payment of compensation in respect of any loss attributable to the strike or lock-out;
  - striking employees may be dismissed (the fairness of their dismissal is determined by the Labour Court).
- The draft Bill provides for an essential services committee to be appointed by the Minister of Labour, in consultation with the Minister for Public Service and Administration and NEDLAC.
- The essential services committee shall conduct investigations and designate services as essential services for purposes of the draft Bill and determine disputes as to whether or not a service is an essential service.
- A service shall be considered essential if the interruption of that service endangers the life, personal safety or health of the whole or a part of the population.
- The essential services committe shall conduct its investigation in public.
- Collective agreements providing for the maintenance of a minimum service in an essential service during industrial action may be validated by the committee.

- Disputes in essential services shall be referred to compulsory and binding arbitration for resolution.

- The right of employees to engage in protest action to promote or defend their socio-economic interests is protected provided—

  - the protest action has been authorized by a registered trade union or any federation of trade unions; and

  - the union or federation has served notice on NEDLAC, at least 14 days before the commencement of the protest action, of its authorization, the reasons for, the date of, and the nature of, its intended action; and

  - the Labour Court has not granted an order lifting the protections from the protest action; and

  - it is not in an essential service.

CHAPTER V

WORKPLACE FORUMS

PROBLEMS WITH THE PRESENT SYSTEM

South Africa's re-entry into international markets and the imperatives of a more open international economy demand that we produce value-added products and improve productivity levels. To achieve this, a major restructuring process is required. Studies of how other countries have responded to restructuring warn that our system of adversarial industrial relations, designed in the 1920s, is not suited to this massive task. In those countries, such as the United Kingdom, where the adversarial labour relations system was not supplemented by workplace-based institutions for worker representation and labour/management communication—"a second channel" of industrial relations—this process fared badly. Workplace restructuring has been most successful in those countries where participatory structures exist, for example, Japan, Germany and Sweden. If we are to have any hope of successfully restructuring our industries and economy, then management and labour must find new ways of dealing with each other.

THE BILL'S PROPOSED SOLUTION: WORKPLACE FORUMS

Workplace forums are designed to facilitate a shift, at the workplace, from adversarial collective bargaining on all matters to joint problem-solving and participation on certain subjects. In creating a structure for ongoing dialogue between management and workers, statutory recognition is given to the realization that unless workers and managers work together more effectively they will fail adequately to improve productivity and living standards. Workplace forums are designed to perform functions that collective bargaining cannot easily achieve: the joint solution of problems and the resolution of conflicts over production. Their purpose is not to undermine collective bargaining but to supplement it. They achieve this purpose by relieving collective bargaining of functions to which it is not well suited. The forum's focus if qualitative—that is, it is on non-wage matters, such as restructuring, the introduction of new technologies and work methods, changes in the organization of work, physical conditions of work and health and safety, all issues best resolved at the level of the workplace. Workplace forums expand worker representation beyond the limits of collective bargaining by providing workers with an institutionalized voice in managerial decisions. Employers receive different benefits from the workplace forum: increased efficiency and performance.

Comprehensive research has shown that the financial performance of companies is enhanced where the following exist: profit-sharing with employees, information sharing and programmes for employees' involvement, flexible work design, training and development, and formal grievance procedures. It also found that companies that combined group economic participation, intellectual participation, flexible job design, and training and development got an added productivity boost from the combination.

The significance of these studies for the workplace forums proposed in the draft Bill is that most of the workplace practices isolated as progressive and as enhancing performance and profitability are matters over which the draft Bill envisages there will be consultation and/or joint decision-making by management and employees in the forums. In other words, the ability of workplace forums to participate meaningfully in workplace governance through a variety of measures, as proved for in the draft Bill, should lead to increased productivity and profitability.

In the United States, while collective bargaining structures at plant level have generated adversarial relationships, employee participation in decision-making in the enterprise has been found to improve the quality of working life and to raise productivity standards and product quality. Studies of similar structures in European countries indicate that representative consultation contributes to economic performance in a number of ways—

- the flow of communication between management and the workforce is improved;
- the quality of decisions is improved because proposals are carefully scrutinized, flaws are discovered early and the range of alternatives explored is enlarged;
- the implementation of decisions is facilitated where the decision is the result of informed input from the workforce; and
- the top level of the organization is provided with feedback on its middle management.

While the economic effects of workplace participation may be hard to determine statistically, it is evident that such participation contributes in a variety of ways to improved workplace governance and thereby raises the efficiency of firms in uncertain economic, technological and structural conditions.

In the 1970s, management across Europe recognized that what was needed to achieve the move from mass to flexible production was the consensus, involvement and commitment of its workforce. This recognition gave rise to a new system of workplace participation.

The draft Bill envisages a clear and strict institutional separation between workplace forums and collective bargaining. The rationale for this institutional separation is, in the first place, to keep distributive bargaining and co-operative relations apart, so as to allow the latter an opportunity to develop. In South Africa, a co-operative effort is needed now, as never before. As we enter new economic markets and face demands for restructuring, flexibility is crucial. To ensure that this flexibility is not achieved at the expense of workers' rights and job security, structures are necessary to facilitate communication and co-operation between management and labour on production-related matters, more or less free of distributive conflicts over wages. Management cannot expect to enjoy the flexibility to adapt the workplace to its unique circumstances unless employees have a voice in

designing these adaptations. The functions of the workplace forum require that it represent the entire workforce and not only union members. This will also infuse it with a range of skills and expertise that would be lacking if only certain grades of employee were represented. Workplace forums are a second channel, supplementary to collective bargaining. It is vital to ensure that they do not replace collective bargaining or undermine trade unionism in any way.

Workplace-based forums with rights to information, consultation and joint decision-making dovetail neatly with the draft Bill's promotion of collective bargaining at industry level. Distributional conflict is moved out of the workplace and into industry-level arenas. The forums supplement managerial prerogative at the workplace and distributional conflict at industry level with workplace-based consultation between management and labour. As such they are a counterbalance to institutionalized adversarialism.

A workplace forum can be established only at the request of a representative trade union. International experience demonstrates that the compulsory imposition or workplace forums is unsuccessful. Workplace forums must not be conceived, and must never be permitted to be used, as alternatives to trade unionism. For this reason, the draft Bill provides that a workplace forum can be established only at the request of a trade union. The trade union "trigger" also serves another purpose—it allows for the incremental adoption of workplace-forum structures across industry. Only those trade unions which feel ready for such a second channel will initiate it, others can retain a purely collective bargaining-based relationship with employers.

The draft Bill envisages three forms of participation by workplace forums. The first is one of information-sharing, in which the employer is required to present reports on past and anticipated performance and discuss issues arising from the reports. The second is consultation, in the form of the right of employees to be consulted in respect of proposals concerning defined matters. The third is joint decision-making, in which an employer is precluded from implementing proposals concerning defined matters in the absence of consensus between it and the workplace forum.

The Task Team considered at some length issues which might appropriately be the subject of consultation and joint decision-making. It was ultimately decided to leave for negotiation, by NEDLAC, what these matters should be. Whatever lists are agreed to by NEDLAC and approved by the Cabinet will be contained in the final draft Bill.

Where particular matters are the subject of consultation and/or joint decision-making, the draft Bill provides for the establishment of a deadlock-breaking mechanism, including arbitration, mediation or any combination of these processes, to resolve differences which may arise. The shift from adversarial to consensual relationships inherent in the successful functioning of a workplace forum has an impact on the right of employers and workers to exercise economic power. Where the deadlock-breaking mechanism assumes the form of a reference to arbitration (as it is obliged to do in the case of joint decision-making) the right to strike and lock-out is removed. Where the mechanism comprises a process other than arbitration, the right to strike and lock-out over the issue in dispute is retained.

In respect of those matters over which the employer is obliged to consult with the workplace forum, there is a duty on the employer to disclose all relevant information, unless it falls into an exempted category. In the context of low-trust labour relations, the Task Team considers these exempted categories necessary. Recipients of the infor-

mation are bound by the confidentiality provision in Chapter IX. Anyone who breaches the provision is guilty of a criminal offence carrying a serious sanction and can be sued for damages in the Labour Court. This is the only instance in which criminal provisions are invoked by the draft Bill and serves as an indication of the seriousness with which this matter is regarded.

Complaints concerning infringement of any of the rights described in the chapter must be referred to the Commission for conciliation, and, if the dispute remains unresolved, final and binding arbitration determines the dispute. Arbitration, in these instances, is preferred to adjudication by the Labour Court for a number of reasons. These include cost considerations given the lack of funds available to workplace forums and enhanced privacy for the parties given the intimate nature of the rights at stake.

Other aspects of the workplace forums justify mentioning—

- once a workplace forum has been established, it continues in existence until such time as the number of employees employed by the employer falls below the statutory minimum. It cannot be disestablished by the trade union nor can the employer withdraw from it;
- parties, other than those defined in the statute (namely an employer employing no fewer than 100 employees and a trade union representing no less than 50 per cent of employees), are free to establish a forum along the lines of statutory workplace forums. However, these forums will not have any statutory underpinning;
- even where parties qualify to establish a workplace forum, the draft Bill encourages them to design their own structures. When the Commission receives an application from a representative trade union to establish a workplace forum, it will convene a meeting between the applicant, the employer and any other registered trade union in an attempt to get the parties to reach agreement on the establishment and constitution of such a body. If an agreement is reached, then that body is governed by the agreement and not by the provisions of Chapter V;
- a strong training component is incorporated in the draft Bill. For workplace forums to succeed, training must be provided for management and workers so as to equip them with the necessary skills and understanding to participate constructively in these forums; and
- the draft Bill permits a workplace forum to have recourse to experts to assist it in its functions.

SUMMARY OF CHAPTER V PROVISIONS

- The draft Bill provides for workplace forums to be established by the Commission on application from a representative trade union.
- The employer must employ at least 100 employees in the workplace.
- A workplace forum will represent the interests of all employees in the workplace.
- Its functions include enhancing efficiency and providing for worker participation in decision-making.
- The Commission shall conduct the first election for a workplace forum.

- Subsequent elections shall be conducted by an election officer agreed to by the employer and the workplace forum.
- The number of members elected to workplace forums will be determined by the number of employees at the workplace. The minimum is five, the maximum 20.
- Candidates for election must be nominated by a registered trade union or in terms of a petition signed by a fixed percentage of employees.
- Members are elected for two years, but can be removed from office on specified grounds.
- The chairperson of a workplace forum shall be elected by its members.
- The forum must meet at least once a month.
- The employer shall meet the workplace forum monthly, present a report on its financial and employment situation and consult on any issue that may affect employees.
- In respect of specified matters (to be decided by NEDLAC in its deliberations) the employer shall consult the workplace forum with a view to reaching agreement.
- The employer is prohibited from implementing any proposal in respect of these matters until the relevant information has been disclosed and consultations with a view to reaching agreement have been held.
- In respect of specified matters (to be decided by NEDLAC) joint decision-making is required. An agreed deadlock-breaking mechanism resolves disputes over these matters.
- The workplace forum shall meet employees in the workplace at least four times a year to report on its activities and matters on which it has consulted with the employer.
- The workplace forum is entitled to the assistance of experts.
- The employer must provide the workplace forum with administrative and secretarial facilities.
- Members of a workplace forum are entitled to time off.
- Disputes concerning the infringement of any of the rights in this Chapter may be referred to the Commission for conciliation.
- Parties may refer any such unresolved dispute to arbitration.

CHAPTER VI

THE REGULATION AND ADJUDICATION OF UNFAIR DISMISSAL

PROBLEMS WITH THE PRESENT SYSTEM

The LRA does not explicitly deal with unfair dismissal. Our law of unfair dismissal was developed entirely by the courts, drawing on international standards, English law and management practice. While the guidelines which emerged provided workers with substantive rights against unfair dismissal, statutory procedures have effectively denied them these rights. For employers, the requirement that lengthy, court-like procedures be followed prior to dismissal has imposed a considerable cost on the termination of employment.

The system of dispute resolution is complex and inefficient. Where the fairness of a dismissal is disputed, cases are heard in the first instance in the Industrial Court, with appeals to the LAC and from there to the Appellate Division. The Industrial Court does not have the necessary resoures to deal effectively with the several thousand dismissal cases referred to it annually. In Gauteng, there is a backlog of five months in the Industrial Court. Further lengthy delays arise after the hearing and before the reasons for judgment are handed down. If a matter is taken on appeal, as is increasingly the case (the LAC's workload doubled from 1991 to 1993), it can take anything up to three years before an unfair dismissal case is finally determined by the Appellate Division. This has serious consequences for the employees concerned and creates problems for a management wishing to resume and continue production.

There are also problems concerning the courts' decisions regarding remedies. The courts have on numerous occasions shown a reluctance to reinstate workers who have been unfairly dismissed because of the period of time that has passed between the date of dismissal and the date of the court order. This is a cause of dissatisfaction among workers and undermines the legitimacy of the adjudication process as an alternative to industrial action. It also creates problems for employers. Reinstatement orders have on occasion been granted years after the dismissals occurred. For the employer, who in the interim has engaged an alternative labour force in an endeavour to maintain production, the consequences of such an order, particularly in the case of mass dismissals, are self evident. The alternative of compensatory awards presents its own difficulties. In the absence of statutory guidelines or caps on compensation, which are the norm in other countries, the courts have used tests applied in personal injury claims to assess losses. Awards have become open-ended and, in the case of the dismissal of executives, sometimes amount to hundreds of thousands of rands.

Our system of adjudicating unfair dismissal disputes is, contrary to original intentions, highly legalistic and expensive. The Industrial Court conducts its proceedings in a formal manner, along the lines of a court of law, and adopts a strictly adversarial approach to the hearing of cases. Judgments are lengthy, fairness is determined by reference to established legal principles and, within an essentially adversarial system, the lawyer's presentation of a case has inevitably emphasized legal precedent. Legalism undermines the goals of the system, namely cheapness, speed, accessibility and informality. Common law perceptions of natural justice, rather than industrial relations-based equity, have become the standard by which fairness is assessed. The existence of an appeal requires keeping a record of the proceedings, confines the court to operating out of fixed premises and increases costs enormously. These problems are particularly acute for small business.

THE BILL'S PROPOSED SOLUTION: AN UNFAIR DISMISSAL CHAPTER AND ARBITRATION

The draft Bill attempts to accommodate a number of diverse, but not necessarily competing, interests. Firstly, dismissals which amount to an infringement of the fundamental rights of workers are proscribed. Secondly, the draft Bill recognizes the reality of long-term reciprocal commitments between workers and employers and, in particular, encourages employers and employee representatives, in consultation, to seek alternatives to dismissal in cases where retrenchment is proposed by the employer. Finally, the efficiency of the enterprise should not be compromised by unduly onerous work-security laws, since these will inhibit job creation and discourage investors.

In cases concerning the alleged misconduct of workers, the courts have generally required an employer to follow an elaborate pre-dismissal procedure and have thereafter conducted a fresh, full hearing into the merits of the case. Apart from its duplication and lengthiness, this approach has obvious cost implications for the parties and the state. The draft Bill requires a fair, but brief, pre-dismissal procedure, and quick arbitration on the merits of the case.

The draft Bill opts for this more flexible, less onerous, approach to procedural fairness for various reasons—

- small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and
- not all procedural defects result in substantial prejudice to the employee.

The draft Bill specifically provides consultation rights for trade unions and employee representatives where the termination is for economic, technological, structural or similar reasons. In this regard, the draft Bill closely follows existing South African jurisprudence, ILO Convention 158 and the European Community Directive on collective redundancies.

The obligation to pay severance pay in circumstances of redundancy is a topic that has been the subject of conflicting decisions by our courts. In the case of dismissal for economic reasons, the draft Bill requires the payment of severance pay. The proposed rate of one week's wages per year of service accords with current industry norms. Where a dispute over severance pay forms part of a dispute over unfair dismissal for economic reasons it is determined as part of that dispute by the Labour Court. Otherwise, disputes concerning the payment of severance pay are determined by arbitration.

The draft Bill explicitly deals with the employer's rights and obligations in the event of a transfer of an undertaking. This resolves the common law requirement that existing contracts must be terminated and new ones entered into, which leads to the retrenching of employees, the paying of severance benefits etc and escalates costs in a way that inhibits these commercial transactions. Provision is made in the draft Bill for the automatic transfer of contracts of employment to the transferee provided the employees consent to the transfer. All rights and obligations arising from the contract of employment are transferred. In the case of insolvency, however, the transferee does not take over the accrued entitlements of the employees and the transferor will be responsible for settling claims arising from the employment contracts up until the date of the transfer. The transferee takes over the contracts of employment, but is only responsible for wages and claims arising from date of transfer. The purpose of this proviso is to avoid what might otherwise be an adverse effect on the liquidator's ability to dispose of the undertaking.

A major change introduced by the draft Bill concerns adjudicative structures. In the absence of private agreements, a system of compulsory arbitration is introduced for the determination of disputes concerning dismissal for misconduct and incapacity. By providing for the determination of dismissal disputes by final and binding arbitration, the draft Bill adopts a simple, quick, cheap and non-legalistic approach to the adjudication of unfair dismissal. The main objective of the revised system is to achieve reinstatement as the primary remedy. This objective is based on the desire not only to protect the rights of the individual worker, but to achieve the objects of industrial peace and reduce exorbitant costs. It is premised on the assumption that unless a credible, legitimate alternative process is provided for determining unfair dismissal disputes, workers will resort to industrial action in response to dismissal.

In order for this alternative process to be credible and legitimate and to achieve the purposes of the legislation, it must be cheap, accessible, quick and informal. These are the characteristics of arbitration, whose benefits over court adjudication have been shown in a number of international studies. The absence of an appeal from the arbitrator's award speeds up the process and frees it from the legalism that accompanies appeal proceedings. It is tempting to provide for appeals because dismissal is a very serious matter, particularly given the lack of prospects of alternative employment in the present economic climate. However, this temptation must be resisted as appeals lead to records, lengthy proceedings, lawyers, legalism, inordinate delays and high costs. Appeals have a negative impact on reinstatement as a remedy, they undermine the basic purpose of the legislation and they make the system too expensive for individuals and small business. Without reinstatement as a primary remedy, the draft Bill's prohibition of strikes in support of dismissal disputes loses its legitimacy.

Prior to the establishment of the present LAC, it was argued that an appeal structure would provide the consistency required to develop coherent guidelines on what constitutes acceptable industrial relations practice. This has not been the case. The LAC's judgments lack consistency and have had little impact in ensuring consistency in judgments of the Industrial Court. The draft Bill now regulates unfair dismissal in express and detailed terms and provides a Code of Good Practice to be taken into account by adjudicators. This will go a long way towards generating a consistent jurisprudence concerning unfair dismissal, despite the absence of appeals.

Legal representation is not permitted during arbitration except with the consent of the parties. Lawyers make the process legalistic and expensive. They are also often responsible for delaying the proceedings due to their unavailability and the approach they adopt. Allowing legal representation places individual employees and small business at a disadvantage because of the cost.

By providing for statutory arbitration for dismissal disputes, there may be an increase in the use of private arbitration. Given the primacy accorded to private agreements throughout the draft Bill, this development should be encouraged.

Serious consideration was given to having all the "simple" dismissal cases and those that do not raise issues of principle determined by arbitration and "complex" cases or those that do raise issues of principle or policy determined by the Labour Court. The problem in this regard concerns the basis for making the distinction and finding an acceptable procedure for giving effect to it. These problems should not be underestimated. In Germany, where there is provision for "complex cases" to be determined by a different forum, a large number of cases are heard each year to determine whether or not the matter is "complex". This obviously clogs the system and creates backlogs. It also has enormous implications for the speed and cost of adjudicating dismissal disputes. Given the kind of inquiry to be made, pleadings, a record, and reliance on legal representatives is necessary. This has an adverse impact on the objectives of speed, cheapness and informality. In Australia, this distinction is also drawn but the decision whether to refer a matter to the Labour Court or a judicial registrar is taken by a judge of the Labour Court. This system has only recently been introduced and it is not possible to assess its effectiveness at this stage. In any event, it was felt that to have a judge determining this issue was problematic and would have all the cost and other undesirable consequences set out above.

The draft Bill gives statutory support for reinstatement as a primary remedy where the dismissal is found to be unfair. This is appropriate when adjudication takes place shortly after the dismissal. There are a number of benefits in providing for reinstatement as a primary remedy—

- strikes over dismissal are less likely;
- it allows for legislative capping of compensation awards. Without reinstatement, compensation must be open-ended and calculated on a delictual damages basis. Because the draft Bill offers reinstatement as a primary remedy, it caps compensation awards and allows for a maximum amount equivalent to six months' pay to be awarded as compensation for unfair dismissal. Where the dismissal was for a prohibited reason the maximum is 24 months and where reinstatement is not ordered because the employer demonstrates that it would not be practical to reinstate, the maximum is increased from six to 12 months. This is to ensure that employers do not abuse this provision; and
- it will improve the quality of decisions to dismiss taken at the workplace. The knowledge that within a matter of weeks after a dismissal there will be a final and binding award with the real prospect of reinstatement will serve to focus the mind of the employer at the moment of dismissal.

Where the employer fails to follow a fair procedure, but there are good grounds for dismissal, the employee will not be reinstated. He or she will receive compensation equivalent to the amount of wages from the date of dismissal to the date of the award. Where the procedural irregularity is gross, the employer will, in addition, be required to pay the full costs of the arbitration.

SUMMARY OF CHAPTER VI PROVISIONS

- No employee shall be unfairly dismissed.
- "Employee" includes a person who has been dismissed and who disputes the fairness of the dismissal or the employer's refusal to reinstate or re-employ.
- "Dismissal" means the termination of an employment contract, the failure to renew a fixed-term contract, the refusal to allow an employee to return to work after absence due to pregnancy, and selective non-re-employment and constructive dismissal.
- The dismissal occurs on the date on which the contract terminates or when the employee leaves the service of the employer, whichever is later.
- The dismissal is automatically unfair if it is for an invalid reason (a list of invalid reasons is provided).
- The dismissal is unfair unless it is for a fair reason connected with the employee's capacity or conduct or with the employer's economic, technological, structural or similar requirements and in compliance with fair procedure.
- The onus is on the employer to prove the reason for dismissal and to justify the fairness of the reason.
- Disputes concerning dismissal for reasons related to conduct or capacity are referred to the Commission for conciliation.
- If conciliation fails to resolve the dispute concerning dismissal for misconduct or incapacity it may be determined by arbitration.

- If an arbitrator finds that the dismissal is unfair, reinstatement or re-employment is the primary remedy.
- Reinstatement or re-employment shall not be required if the employee does not wish it, or if a future employment relationship would be intolerable or if it is not reasonably practicable for the employer.
- Compensation awarded in respect of dismissal shall not be less than the remuneration the employee would have received from the date of dismissal to the date of the award.
- Compensation awarded shall not exceed six months' wages, unless reinstatement is not ordered because it is not reasonably practicable, in which case the maximum amount of compensation is 12 months' wages, or where dismissal is for an invalid reason, in which case a maximum of 24 months' wages shall be awarded.
- When an employer contemplates dismissing one or more employees for economic, technological, structural or similar reasons, the employer is obliged to consult with a view to reaching agreement.
- The employer shall disclose all relevant information for the purpose of consultation.
- The employer shall apply agreed selection criteria or fair and objective criteria when selecting employees for dismissal.
- The employer's failure to comply with these procedural requirements renders dismissal unfair.
- An employee dismissed for an economic or related reason is entitled to severance pay of one week per year of service.
- An employee who disputes the fairness of the dismissal for an economic or related reason may refer the dispute to the Commission for conciliation.
- Unresolved disputes concerning dismissals for invalid reasons and for operational requirements may be referred to the Labour Court for determination.
- The Labour Court may order re-employment, payment of compensation or any other appropriate remedy.
- Disputes concerning only non-payment or payment of severance pay may be referred to arbitration.
- No contract of employment shall be transferred from one employer to another without an employee's consent.
- Where a business is transferred as a going concern, employment contracts shall be transferred and rights and obligations must continue.
- Where a business is transferred for reasons of insolvency, contracts of employment must be transferred but rights and obligations shall remain with the transferor.

CHAPTER VII

REGISTRATION OF TRADE UNIONS AND EMPLOYERS' ORGANIZATIONS

PROBLEMS WITH THE PRESENT SYSTEM

The existing system of registration is cumbersome, lengthy and outmoded.

The wide discretionary powers given to the registrar and the prohibition of registration where an existing union is considered to be sufficiently representative have been found by the FFCC to contravene ILO standards, in particular article 2 of Convention 87 which guarantees to all workers the right to form and join trade unions of their choice without previous authorization from the authorities.

The current LRA provides for a total prohibition on political affiliation and funding of political parties or candidates by trade unions. This is in contravention of the ILO's standards protecting freedom of association. The registration of trade unions by reference to a racial group and permitting trade unions with racially-based constitutions to be registered similarly conflicts with ILO standards.

This system has given rise to a form of dualism in that certain trade unions operate as non-registered organizations. The Task Team considers it preferable to bring unions and employer organizations into the ambit of the prevailing labour legislation so as to maximize the legislation's impact on the peaceful resolution of industrial conflict.

THE BILL'S PROPOSED SOLUTION: A SIMPLE REGISTRATION PROCEDURE

Registration

The draft Bill provides for a simple registration procedure. In so doing, it gives effect to the recommendation of the FFCC that the authorities should merely verify the fulfilment of certain formalities. The registrar is obliged to register the trade union or employers' organization provided the application for registration is in the prescribed form and manner and the registrar is satisfied that the applicant is a trade union or an employers' organization as defined; its constitution complies with the draft Bill's requirements and, in particular, that it contains no provisions that unfairly discriminate against any person on the grounds of race or gender; the name of the applicant is not the same as or too similar to the name of another trade union or employers' organization; and, where the applicant is a trade union, that it is independent. A trade union will be regarded as independent if it is not under the domination or control of an employer and is not subject to interference or influence by an employer through financial assistance or by any other means.

Although registration is not compulsory, it has important consequences. Only a registered trade union—

- ► may qualify for the organizational rights described in Chapter IV;
- ► is eligible for membership of a bargaining council;
- ► may enter into a collective agreement that is binding in terms of the draft Bill; and
- ► may apply to the Commission for the establishment of a workplace forum in terms of Chapter VI.

A registered trade union or employers' organization is a body corporate with limited liability for its members, office-bearers and officials.

Conferring these advantages on registered trade unions is not incompatible with ILO standards protecting freedom of association since the registration procedure is a simple one in which the registrar does not have a wide discretion to refuse registration.

Chapter VII prescribes certain matters that must be dealt with in the constitution of a trade union or any employers' organization should it wish to be registered. This list closely resembles that contained in the existing LRA and withstood the scrutiny of the FFCC. The draft Bill introduces the requirement that a trade union or employers' organization must provide in its constitution that no member shall have his or her membership terminated or be disciplined by virtue of such member's failure or refusal to participate in a strike or lock-out unless a ballot was held prior to the strike or lock-out and a majority of the members who voted in the ballot voted in favour of the strike or lock-out. This provision has been inserted here because the draft Bill no longer requires a trade union or employers' organization to hold a ballot prior to engaging in lawful, protected industrial action. In this way, the draft Bill seeks to protect a member from undemocratic practices.

The proposed system of registration is simple and quick and complies with the right to freedom of association as guaranteed in the Constitution and by international labour standards. It is reasonable and justifiable to require of unions that they be registered and independent before qualifying for a wide range of rights in terms of the legislation.

The provisions of the draft Bill are designed to promote the observance of democratic principles in the internal operation and governance of unions and to ensure proper financial control over funds in line with public policy. It is also desirable that there be a centralized and systematic process for amassing essential information concerning trade unions, details of their constitutions, the addresses of their head offices and branch officials and the names and addresses of persons elected or appointed as office-bearers or officials. The draft Bill makes provision for this and provides further that such information should be made accessible to members and the public at large.

The draft Bill does not provide for the registration of federations, but requires a federation to furnish the registrar with its constitution and information concerning its address and basic details of its members and office-bearers. This requirement ensures public access to information regarding these organizations and provides statistical data.

While the draft Bill does not require a trade union seeking registration to demonstrate its representativeness, this test becomes relevant at the moment at which a trade union seeks to exercise certain rights in terms of the draft Bill. For instance, only trade unions representing a defined proportion of employees in the workplace are entitled, as of right, to exercise organizational rights. The draft Bill provides for a procedure whereby, in the absence of agreement, a trade union can be certified, by the Commission, as representing a defined proportion of employees (this procedure is described in further detail in Chapter III).

SUMMARY OF CHAPTER VII PROVISIONS

- Registration is not compulsory.
- Registered trade unions and employers' organizations are bodies corporate with limited liability.
- Trade unions and employers' organizations whose constitutions discriminate on grounds of race or gender cannot be registered.
- The draft Bill prescribes a list of matters to be dealt with in the constitutions of trade unions and employers' organizations.
- The constitution of every registered trade union and employers' organization must provide that no member shall be disciplined or expelled for failing to take part in a strike or lock-out, as the case may be, unless a ballot was held and a majority of those balloted voted in favour of the strike or lock-out.

- Registered trade uions and employers' organizations have a duty to keep proper books of account and records and to furnish these to the registrar.
- Federations of trade unions or employers' organizations must furnish the registrar with a copy of their constitution and certain other information.
- Resolutions to alter the name or constitution of a trade union or employers' organization must be sent to the registrar.
- The draft Bill sets out the procedure for and the consequences of the amalgamation of registered trade unions or employers' organizations.
- It also provides for the winding-up and sequestration of these bodies through the Labour Court.
- The registrar is empowered to cancel the registration of these bodies after hearing representations.
- The draft Bill provides for a right of appeal to the Labour Court from all decisions of the registrar.
- It also provides for public access to documents and the records of the registrar.

CHAPTER VIII

DISPUTE RESOLUTION

PROBLEMS WITH THE PRESENT SYSTEM

It is widely acknowledged that the dispute resolution processes in the existing laws do not function effectively. The high incidence of unnecessary strikes and the manifest failure to resolve strikes over issues that do not have major cost implications or involve matters of principle all point to a breakdown in the statutory system of dispute resolution. On the other hand, independent mediation services are hi ghly successful. A careful examination of the statutory structure reveals that the proced ures in the LRA and the PSLRA are complex, technical and time consuming. Statistics produced by the Department of Labour demonstrate that less than 30% of all disputes referred to industrial councils are settled and only some 20% of established conciliation boards result in settlement. The failure of these statutory structures to resolve disputes accounts for the excessive workload of the Industrial Court and the unnecessarily high incidence of strikes and lock-outs. Independent mediation services inside South Africa have a success rate of over 70%. Comparative research shows that independent conciliation, mediation and arbitration services can have a high success rate in resolving disputes. ACAS in the United Kingdom has a 75% rate of success, and the Federal Conciliation Commission in Australia a success rate of over 90%.

The existing statutory conciliation procedures are not user friendly. Successful navigation through them requires a sophistication and expertise beyond the reach of most individuals and small business. Errors made in the initiation of conciliation procedures are often fatal to an applicant's claim for relief. The merits of the dispute often get lost in a thicket of procedural technicalities. In order for conciliation and alternative dispute resolution to function effectively it is essential that the primary thrust of procedures is to address the merits. A failure to do so leads workers and employers to resort to other methods to resolve disputes.

It is not only the procedures that block the effective resolution of disputes: a lack of resources, poor remuneration and a lack of training all conspire to render the statutory conciliation services ineffective.

There are fundamental problems with the court system for the adjudication of labour relations. The Industrial Court is positioned outside the hierarchy of the judiciary. It lacks status. It does not provide a career path for its members or its administrative staff. They have no security of tenure and their remuneration bears no relation to either market related or judicially related packages.

The processes within the Industrial Court and appeals from this court to the LAC and then to the Appellate Division all result in lengthy delays in the resolution of disputes in an area where speedy determination of disputes is at a premium.

The overlapping and competing jurisdictions and the use of different courts prevent the development of a coherent and developing jurisprudence on labour relations. Neither the Industrial Court nor the LAC has exclusive jurisdiction over labour matters: the Supreme Court retains its jurisdiction to review proceedings of the Industrial Court. Strikes and lock-outs may be interdicted in either the Industrial Court or the Supreme Court. Proceedings may be brought in respect of breach of contract, breach of statutory duty or delict in relation to unlawful industrial action in the civil courts. Decisions of the registrar are decided by the Supreme Court. The criminal courts enforce industrial agreements, arbitration awards and a multitude of offences in the LRA.

THE BILL'S PROPOSED SOLUTION: A CONCILIATION, MEDIATION AND ARBITRATION COMMISSION, THE USE OF PRIVATE PROCEDURES, AND A NEW LABOUR COURT

Commission for Conciliation, Mediation and Arbitration (the Commission)

The draft Bill proposes the establishment of an independent Commission for conciliation mediation and arbitration which is state funded and governed by a tripartite board appointed by NEDLAC. The Commission, headed by a director and a panel of commissioners, will actively seek to resolve disputes by conciliation and, in certain respects, arbitration. Its role in the draft Bill is pervasive. In almost every instance it is a requirement that a dispute is lodged with the Commission before the institution of proceedings in the Labour Court. Disputes in respect of organizational rights are handled by the Commission. It is a procedural requirement, where there is no bargaining council, for a party to refer a dispute to the Commission before embarking on a legal strike or lock-out. The Commission is resonsible for the operation of the essential services committee which determines essential services. It is the Commission that seeks to secure agreements on the conduct of picketing. Disputes concerning dismissal for misconduct or incapacity are not only concilliated by the Commission but determined by arbitration. It performs the role of midwife to one of the major innovations proposed by the draft Bill—the workplace forum. The Commission is the centrepiece of the system proposed by the draft Bill.

Conciliation and mediation

The Commission is designed as a one-stop shop for resolving disputes. Its commissioners will attempt in the first place to resolve disputes by conciliation, mediating where appropriate. A commissioner will be empowered to attempt other means of resolving the dispute, such as fact-finding, making recommendations and commissioning expert reports. Only where these attempts fail will the commissioner determine certain disputes by arbitration. Where disputes are to be adjudicated by the Labour Court, the Commission will first seek actively to engage the parties in an attempt to resolve disputes to avoid unnecessary litigation.

The commissioners will be well-trained, professional, and subject to a code of conduct. They may be full-time or part-time appointees. This will significantly increase the number of available commissioners. Provision is made for periodic reviews of their performance and removal from office on grounds of serious misconduct, material breach of the code or incapacity. By this mechanism, the draft Bill ensures that a certain standard of professionalism is maintained.

Commissioners are armed with a number of powers to enable them to conciliate effectively—

- they can subpoena parties to attend conciliation meetings and to produce relevant documentation. Non-compliance with such a request may give rise to contempt proceedings in the Labour Court;
- they can arbitrate and make a binding determination if conciliation attempts fail.

Providing a professional, expert and effective conciliation service may well require a budgetary allocation exceeding the present one, but the Task Team is persuaded that the investment will have a multiplier effect in savings to government and the economy. The service is designed to promote labour peace which, in turn, will reduce the incidence of industrial action and promote a favourable climate for investment.

Promptness is built into the draft Bill's model of dispute settlement. Although there is a statutory requirement to refer certain disputes to the Commission within a stipulated period of time, the parties are not required to wait for the lapse of a prescribed period before proceeding from the Commission to arbitration or the Labour Court.

The draft Bill is designed to ensure that no legal impediment attaches to a party's mistakes in invoking the conciliation procedures. The statutory conciliation procedures have been streamlined and simplified.

Arbitration

The draft Bill provides for a broad range of disputes to be determined by arbitration where conciliation has left the dispute unresolved. These include disputes concerning—

- the interpretation and application of certain of its provisions;
- unfair dismissal for misconduct or incapacity;
- severance pay;
- essential services; and
- workplace forums.

Arbitration proceedings have deliberately been severed from the structures of the courts. The Commission is an independent body, financed by the state, but not part of the public service or any state department. This enhances the independence of the arbitration panel and ensures its legitimacy in relation to both public and private sector disputes. It also frees the panel from the constraints concerning status and remuneration experienced by the Industrial Court in relation to its presiding officers.

There is another important reason for separating arbitration from court processes. It constitutes a clear signal that a new and different process from the prevailing one is intended. The arbitrator is statutorily to avoid formality and to give a written award, briefly stating reasons, within 14 days. Arbitration proceedings in respect of essential services are more formal and somewhat differently regulated by the draft Bill.

Concerns about the workload of commissioners and the consequent size of the panel should not be exaggerated. Private arbitration proceedings are well established and it is likely that the organized sector will continue to use arbitration facilities offered by private agencies. Moreover, there is inexistence a trained body of arbitrators that is under utilized who could ideally be appointed to the Commission. The proposed system of conciliation by the Commission prior to arbitration will also act as an effective filter and should significantly reduce the number of disputes referred to arbitration.

Private procedures

One of the draft Bill's central themes is its recognition of privately agreed procedures. Where these exist, the parties are not required to follow the statutory procedures. A dispute will proceed through the mechanisms agreed to by the parties. This will prevent time consuming and costly duplication of procedures for the parties and relieve the Commission of a significant percentage of disputes.

Of particular significance is the provision in Chapter III of the draft Bill which permits bargaining councils, accredited by the Commission, to conciliate and arbitrate disputes arising within the council's scope. If an industrial council is not accredited by the Commission it is required, in respect of disputes arising within its jurisdiction, to engage the services of an accredited agency to conciliate and where necessary arbitrate to resolve disputes. By this process all parties, whether within the jurisdiction of a council or otherwise, have access to conciliation and arbitration proceedings of an equivalent standard. The Commission may grant a subsidy to an accredited bargaining council or agency.

In summary, the following parallel options will be open to parties in a dispute—

- a private dispute procedure, which may involve the use of the services of a non-accredited private agency: that is, the procedure is voluntary, the parties have a choice as regards the mediator/arbitrator, the parties determine the terms of reference (which could be as specified in the statute) and they pay for the entire procedure;

- a private dispute procedure which involves the use of the services of an accredited agency: that is, the procedure is voluntary, the parties have a choice as regards the mediator/arbitrator, the parties determine the terms of refrence (which could be as specified in the statute) and a portion of the costs of the procedure may be subsidized by the Commission;

- a dispute procedure of a bargaining council, which may itself be an accredited agency for the purposes of concilation and arbitration as contemplated by the draft Bill, but within its registered scope, or which may invoke the services of an accredited private agency: that is, the procedure is voluntary, the parties have a choice as regards the mediator/arbitrator, the parties determine the terms of reference (which could be as specified in the statute) and a portion of the costs of the procedure may be subsidized by the Commission; and

- a dispute procedure under the auspices of the Commission: that is, the procedure is compulsory the parties have no choice as regards the commissioner, the terms of reference are as specified in the statute and the procedure is provided free of charge to the parties to the dispute.

The Labour Court

The draft Bill proposes the establishment of a Labour Court with national jurisdiction. A judge of the Labour Court must be legally qualified but need not be a judge of the Supreme Court. Experienced advocates, attorneys and academics will be eligible for appointments. The appointments will be made by the Judge President of the Labour Court in consultation with NEDLAC.

The Labour court will perform a variety of functions, both as a court of appeal and a court of first instance.

The emphasis in the draft Bill on conciliation as the primary means of dispute resolution is echoed in this section. The Labour Court is entitled to decline to hear a matter unless it is reasonably satisfied that the dispute has been referred to concilation and that the parties have attempted to resolve the dispute.

Labour Appeal Court

The LAC comprises the Judge President of the Labour Court and two other judges of that court. The main function of the LAC is to hear appeals from the Labour Court. The LAC is entitled to confirm, amend or set aside any decision of the Labour Court. No appeal lies to the Appellate Division.

SUMMARY OF CHAPTER VIII PROVISIONS

- The chapter provides for the establishment of the Conciliation, Mediation and Arbitration Commission (the Commission), an independent statutory body.
- The Commission's man function is actively to attempt to resolve disputes by conciliation so as to reduce the incidence of industrial action and litigation.
- Other functions of the Commission include—
  - providing advice;
  - providing assistance;
  - training;
  - accrediting private agencies and bargaining councils;
  - assisting in the establishment and election of workplace forums;
  - publishing codes of good practice; and
  - conducting and initiating research.
- The governing body of the Commission is tripartite.
- Conciliation under the auspices of the Commission will be conducted by a commissioner from a panel comprising full-time and part-time members.
- Arbitrations under the auspices of the Commission will be conducted by a commissioner. Arbitrations to be conducted by the Commission include—
  - advisory arbitration;
  - arbitration of unfair dismissal disputes;
  - interest arbitrations in essential services;

- arbitration concerning organizational and other rights conferred by the Act; and
- voluntary arbitrations.

- The commissioners are granted extensive powers to enable them to fulfil their functions. Where the draft Bill provides for compulsory arbitration, the commissioner entrusted with the conciliation of the dispute conducts the arbitration in the absence of an objection by either party.
- The chapter provides for the establishment of a Labour Court as a specialist court with national jurisdiction.
- Judges of the Labour Court will be appointed by the President, acting on the advice of NEDLAC.
- Judges of the Labour Court need not be existing judges of the Supreme Court, but may be drawn from the ranks of academics and practitioners.
- The Labour Court exercises jurisdiction as a court of first instance and a court of appeal and review.
- Decisions of the Labour Court are served and executed as if they were decisions of the Supreme Court.
- Appeals from the Labour Court will be heard by the Labour Appeal Court, comprising the Judge President of the Labour Court and two other judges.

SUMMARY OF CHAPTER IX PROVISIONS

- A definition of labour broker is provided and—
  - a person whose services have been procured by a labour broker is deemed to be an employee of the labour broker;
  - the labour broker is deemed to be the employer of such person;
  - the labour broker and his or her client are jointly and severally liable for any contraventions of this Act, the Basic Conditions of Employment Act, an arbitration award, court order or a wage determination or for any breach of a collective agreement; and
  - provision is made for the regulation of labour brokers operating within the registered scope of two or more bargaining councils by the conclusion of agreements between councils within whose combined scope the broker operates.
- An employer is obliged to keep a copy of a collective agreement, arbitration award or court order at the workplace.
- Upon request, the employer shall allow an employee, a trade union representative or a member of a workplace forum to inspect and make a copy of the agreement, award or order.
- The parties cannot, by means of a contract of employment, agree to lesser payment or treatment than that prescribed in a collective agreement or arbitration award.

- A contract of employment permitting lesser payment or treatment or the waiver of benefits shall be null and void.
- Confidential information disclosed to an employee shall not be disclosed to any third party, except on the order of a competent court of law.
- Any person who breaches the confidentiality provision shall be guilty of an offence, punishable by a maximum fine of R5 000, and liable to be sued for damages in the Labour Court.
- Technical defects do not invalidate the constitution or registration of a trade union, an employers' organization, or a bargaining council nor any collective agreement, or arbitration award, nor any act of a bargaining council, a conciliator or an arbitrator.
- A registered trade union is entitled to institute or defend proceedings on behalf of a member who is a party to the proceedings, in the interests of that member or in its own interests.
- A registered employers' organization is entitled to institute or defend proceedings on behalf of a member who is a party to the proceedings, in the interests of that member or in its own interests.
- The Governing Body of the Commission may publish, alter, substitute or withdraw a code of good practice by notice in the *Gazette*.
- The Minister is empowered, after consultation with NEDLAC, to make regulations for this Act.
- In the event of a conflict between the provisions of this Act and those of any other law, the provisions of this Act shall prevail.
- The following laws are repealed—
  - Labour Relations Act No. 28 of 1956 [except for section 24 (1) (x) and sections 48 (1), (4), (6), (8), 53 and 54 in so far as they relate to section 24 (1) (x)];
  - Educational Labour Relations Act No. 146 of 1993;
  - Chapter I of the Agricultural Labour Act No. 147 of 1993; and
  - Public Service Labour Relations Act No. 105 of 1994.
- The following laws are amended—
  - Section 16 (3) of the Basic Conditions of Employment Act; and
  - Section 35 of the Occupational Health and Safety Act.

TRANSITIONAL ARRANGEMENTS

The transitional provisions are contained in Schedule 2 of the draft Bill. With the passing of time, the introduction of new laws and the conclusion of agreements, these provisions will fall away, leaving the main body of the draft Bill intact.

Because the content of the transitional provisions are so dependent upon the decisions that are made in respect of the content of the draft Bill itself, the Task Team has provided no more than a broad overview of the kind of matters that ought to go into a Schedule of Transitional Arrangements. The following provisions proposed in Schedule 2 warrant particular mention.

Residual unfair labour practice definition

The residual unfair labour practice definition is confined to individual unfair labour practices. It does not include dismissal disputes since these are extensively regulated in Chapter VI. The definition covers unfair promotion, suspension or other disciplinary action short of dismissal. It also includes protection against discrimination and extends the remedy to applicants for employment. The residual unfair labour practice definition is regarded as an interim measure pending the introduction of more comprehensive legislation regulating equal opportunity in employment in the near future.

Disputes concerning residual unfair labour practices must be referred to the Commission for attempted conciliation, and if this fails, to the Labour Court for determination.

Existing trade unions, employers' organizations and industrial councils

Any trade union, employers' organization or industrial council registered under existing legislation is deemed to be registered as such a body under the draft Bill (except that a registered industrial council is deemed to be a bargaining council).

The registrar may issue such directions as may be necessary in order for the trade union, employers' organization or industrial council to comply with the new provisions introduced by the draft Bill. If these directions are not complied with the registrar may cancel registration.

Existing industrial council agreements, conciliation board agreements and arbitration awards

Whether promulgated in terms of the LRA or the ELRA, these agreements will remain in force for a period of one year after the commencement of this Act, or until their expiry, whichever is the shorter. An existing statutory closed shop agreement shall remain in force until the expiry of the agreement unless further extended by the Minister. This is to preserve existing rights until such time as the new Constitution has been passed. It is the view of the Task Team that under the present Constitution, the existing system of statutory closed shops may be challenged as unconstitutional. Accordingly, it is proposed that the relevant provisions of the LRA relating to closed shops are not repealed or amended. In this way, the insertion under section 33 (5) of the Constitution remains in place until the new Constitution is finalized.

Collective agreements and recognition agreements

Existing collective agreements and recognition agreements are deemed to be binding collective agreements in terms of this draft Bill. Existing statutory closed shop or agency shop agreements shall cease to be binding unless they comply with the relevant provisions of this Bill.

Pending proceedings and disputes arising before the commencement of the Act

Should there be agreement on the proposal to establish the Labour Court and an independent Commission with the function, amongst others, to arbitrate on disputes concerning dismissal for misconduct and incapacity, provisions have been drafted on a proposed approach to pending proceedings and disputes that arise before the commencement of the draft Bill. In brief the proposals are—

- pending proceedings should be dealt with by the Industrial Court, LAC and the Appellate Division under the present law;

- disputes concerning matters in respect of which the Industrial Court and the Agricultural Labour Court exercise functions in respect of which proceedings have not been instituted prior to the commencement of the draft Bill shall be dealt with under the present law; and
- disputes of interests which arose prior to the commencement of the Act which have been referred to an industrial council or in respect of which application for a conciliation board has been made should be processed under the present law, provided that any compulsory arbitration or voluntary arbitration or any strike or lock-out arising therefrom should be regulated by the draft Bill.

Public sector

Provision is made for the Public Service Bargaining Council established in terms of the 1993 Public Service Labour Relations Act (subsequently repealed and re-enacted in the 1994 Public Service Labour Relations Act) to constitute the Public Service Bargaining Council in the draft Bill. The chambers established in terms of the 1993 and 1994 Acts are deemed to be chambers of the council entrenched in the draft Bill.

The constitutions of the council and the chambers have to be forwarded to the registrar of labour relations and must comply with the provisions of the draft Bill. In the event that they do not, the registrar has the power to direct the council and the chambers to rectify their constitutions within a period of six months. Given the nature of the relevant provisions it is unlikely that the constitutions of this council and the chambers will conflict with the requirements of the draft Bill.

In order to respect the agreements reached by the parties to the public service bargaining forum concerning the provisions of the PSLRA, certain provisions of that Act were conveyed into the transitional provisions in the form of a collective agreement. The Task Team proposed to include the procedures contained in the PSLRA as collective agreements despite its reservations over the efficacy and the equity of those procedures. This, the Task Team believed, gave effect to a fundamental principle underlying the draft Bill: That the special needs of particular sectors could be accommodated by collectively agreed procedures. Representations made on behalf of the Ministry of the Public Service and Administration, however, were to the effect that carrying over the procedures in the PSLRA into a collective agreement in the draft Bill would serve no useful purpose. Accordingly the Task Team has excised these proposals from the draft transitional provisions.

Education sector

The Education Labour Relations Council established in terms of the 1993 Act constitutes the Education Labour Relations Council entrenched in the draft Bill. The jurisdiction of that council has, however, been extended to include private schools, universities and technikons. This, however, constitutes a proposal that the Education Labour Relations Council must consider in its deliberations over the draft Bill.

In order to respect the agreements which underlie the 1993 ELRA various provisions of that Act have been conveyed into the transitional provisions as collective agreements. The conveyance not only serves the purpose of providing the basis upon which the parties can agree to new or better procedures but also to illustrate the fact that the draft Bill, although setting a minimum framework applicable to the economy as a whole, still accommodates the diversity of sectors through the mechanism of collective agreements.

Agricultural sector

The ALA was a statute giving effect to an agreement between the representatives of the agricultural industry and trade unions. It reflected a compromise that permitted the extension of the LRA, with amendments, to the farming sector. In order to respect that agreement, the relevant provisions of the ALA have been conveyed into the draft Bill as a collective agreement, binding on all employees and employers engaged in farming activities. That agreement, it is proposed, should only be amended or terminated by NEDLAC, the successor to the National Manpower Commission that gave rise to the ALA and which, through its agricultural sub-committee, initially brokered the agreement.

IMPORTANT!!

Placing of languages:

Government Gazettes

1. Notice is hereby given that the interchange of languages in the *Government Gazette* will be effected annually from the first issue in October.

2. For the period 1 October 1994 to 30 September 1995, English is to be placed FIRST.

3. This arrangement is in conformity with Gazettes containing Act of Parliament etc. where the language sequence remains constant throughout the sitting of Parliament.

4. ***It is therefore expected of you, the advertiser, to see that your copy is in accordance with the above-mentioned arrangement in order to avoid unnecessary style changes and editing to correspond with the correct style.***

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1. Hiermee word bekendgemaak dat die omruil van tale in die *Staatskoerant* jaarliks geskied met die eerste uitgawe in Oktober.

2. Vir die tydperk 1 Oktober 1994 tot 30 September 1995 word Engels EERSTE geplaas.

3. Hierdie reëling is in ooreenstemming met dié van die Parlement waarby koerante met Wette ens. die taalvolgorde deurgaans behou vir die duur van die sitting.

4. ***Dit word dus van u, as adverteerder, verwag om u kopie met bogenoemde reëling te laat strook om onnodige omskakeling en stylredigering in ooreenstemming te bring.***

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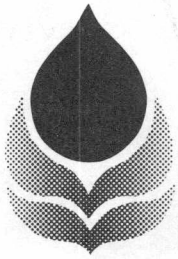
Don't abuse  it

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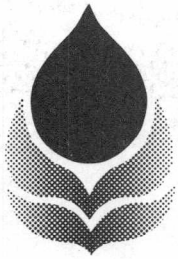
Ons leef  daarvan

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