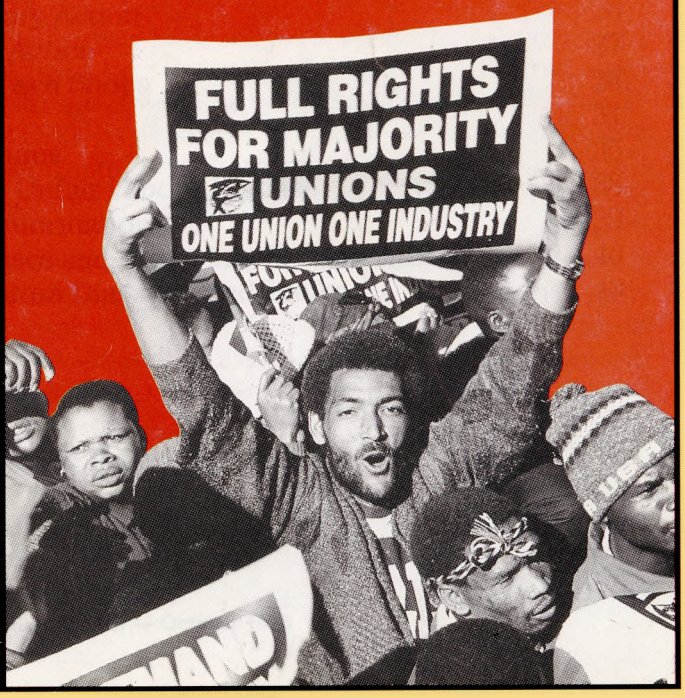
THE NEW LABOUR RELATIONS ACT

A summary of important features



Prepared for Cosatu by Robert Lagrange Centre for Applied Legal Studies (CALS)

Labour Legislation

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INTRODUCTION

Who is this summary intended for?

This summary is intended primarily for unionists who want to get an overview of key substantive features of the new Labour Relations Act (LRA) that will most probably take effect in April or May next year.

Background to the new Act

When the draft law was published in February it was already much more favourable to workers and unions than the present LRA.

Since then, further negotiations took place at NEDLAC between government, organised labour and organised employers. In these negotiations labour managed to secure further changes though not all labour's demands were won.

If it is properly implemented it should make a positive difference to the position of worker and unions.

The new LRA tries to:

- Simplify dispute procedures and reduce technical legal obstacles.
- Make it clear when a dismissal will be unfair.
- Provide mechanisms for building worker participation in the workplace.
- Improve protection for strikers who strike legally.
- Improve rights of workers supporting a legal strike.
- Make it easier for unions to recruit membership and obtain recognition.
- Encourage the growth of large financially stable unions.
- Make it easier to achieve centralised bargaining in industries ("sectors").
- Give private collective agreements the same status as the Act.
- Improve rights to information from employers.
- Reduce differences in rights between workers in different sectors.
- Encourage the use of professional dispute solving methods.
- Introduce the values of the Interim Constitution into Labour Law.

Main achievements of the negotiations for the organised labour movement were:

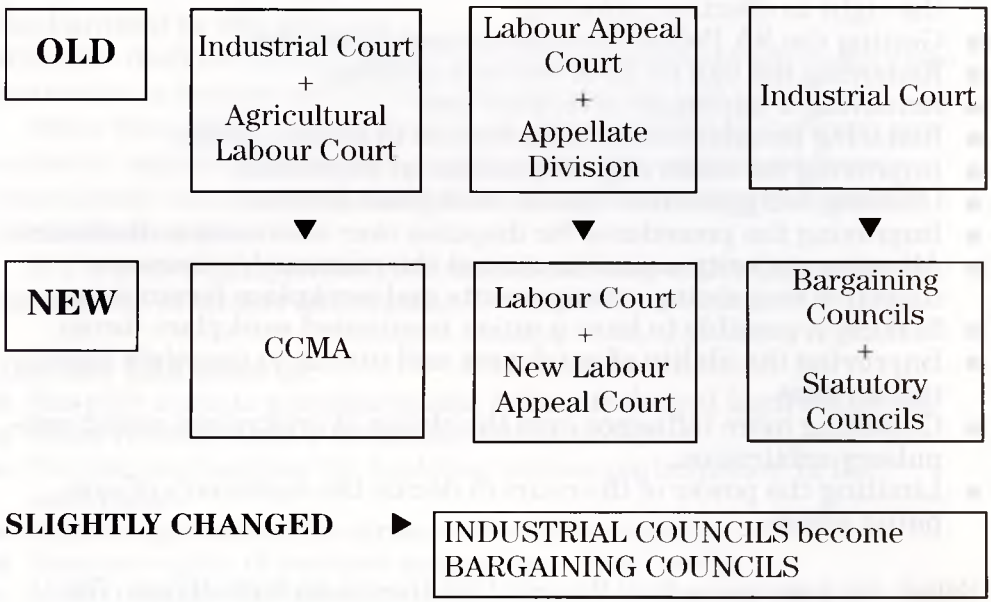
- Securing the right to establish Statutory Councils as a starting point for centralised bargaining.
- Achieving flexible thresholds for organisational rights.

- Reinforcing the importance of majority unions when organisational rights are awarded.
- Getting greater union control over agency shop moneys.
- Retaining and democratising the closed shop.
- Providing organisational rights to union members of a council.
- Achieving the presence of pickets on an employer's property and the right to effective picketing.
- Getting the SA Police Services covered by the Act.
- Removing the ban on farm workers striking.
- Achieving a minimum severance pay.
- Reducing possibilities for interference in protest action.
- Improving the codes of good practise on dismissals.
- Creating a bigger union role in workplace forums.
- Improving the procedures for disputes over information disclosure.
- Allowing majority unions to control the relationship between collective bargaining arrangements and workplace forum issues.
- Making it possible to have a union nominated workplace forum.
- Improving the ability of employers and unions to negotiate essential services.
- Obtaining more influence over the choice of arbitrators under compulsory arbitration.
- Limiting the power of the court to decide the legitimacy of sympathy action.

Below, we summarise how the new LRA tries to do these things. The LRA is nearly 300 pages long, so not every detail can be included in this guideline and we are only looking at major issues for unions and members.

WHAT'S WHAT IN THE NEW LRA

The institutions that dominate the industrial relations landscape will change. Some will disappear altogether.



Existing Industrial Councils will become bargaining councils (BC's). They will have to have independent exemption bodies and must show that they accommodate small and medium enterprises in their constitutions.

The powers of council agents have also been reduced for constitutional reasons, by depriving them of the right to question persons on an employer's premises. On the other hand Shop Stewards of a majority union in a company have rights to information for the purpose of monitoring agreements.

NEW ▶ STATUTORY COUNCILS

Statutory Councils (SC's) are a limited type of bargaining council. An SC can be established more easily than a BC because less representation is required. The main difference is that the parties to an SC can only negotiate wage agreements that bind the parties. Wage agreements of an SC cannot be extended to non-parties.

OUT ▶ CONCILIATION BOARDS + INDUSTRIAL COURT

The Industrial court (IC) and conciliation boards no longer exist in the new Act but some of the roles they performed have been given to the CCMA, councils and the Labour Court.

- The conciliation board will be replaced by the intervention of a trained mediator appointed by the CCMA or Council.

- Unfair dismissals:
  Individual cases will mainly be dealt with through arbitration by the Commission for Conciliation, Mediation and Arbitration (CCMA) or a Council (BC or SC).

  The Labour Court will deal with collective dismissals (strikes, retrenchments) and cases of alleged invalid dismissals (e.g. victimisation, sexual discrimination cases).

- Disputes that ONLY the CCMA may arbitrate:
  Disputes which the CCMA may be required to arbitrate include -
  — Statutory organisational rights
  — Picketing rules (where parties cannot agree)
  — Disclosure rights
  — Statutory organisational rights
  — Interpretation and application of collective agreements where the agreement itself does not provide for arbitration for such a dispute or where it is effectively inoperative

— Demarcation disputes over sectoral boundaries
— Determination of Workplace Forum Constitution (where parties cannot agree)
— Disputes over joint decision making in Workplace Forums

The CCMA also must conciliate the above disputes:

- Disputes the CCMA OR AN ACCREDITED COUNCIL can arbitrate on;
  — Minimum statutory severance pay due
  — Unfair individual dismissals for incapacity or misconduct
  — Advisory arbitration over a refusal to bargain

- There is no fee that has to be paid by the parties to compulsory arbitration proceedings, except in a few situations.

- Broadly speaking, disputes which require adjudication (a decision by the court) by the Labour Court are:
  — Disputes over Freedom of Association
  — Disputes over Organisational Rights and Collective Bargaining that are not provided for by compulsory Arbitration
  — Disputes over the application and interpretation of Chapter III (relating to Organisational and Collective Bargaining rights)
  — Strikes & Lock-outs including strike dismissals
  — Recovery of requested payment in kind during a strike
  — Enforcement of Picketing rights
  — Protest Action
  — Decisions by the Registrar on Registration questions
  — Review of Arbitration Awards
  — Disputes between registered unions and members about the compliance of a union or employers' association with its constitution
  — Disputes over compliance with the Act (not provided for otherwise)
  — Review of decisions of State in it's capacity as employer.
  — Retrenchment disputes
  — General review of acts done in the course of the performance of certain functions under the Act
  — Disputes over "residual" unfair labour practices (such as unfair discrimination for invalid reasons)

- Old disputes
  The IC will still remain in existence and continue to sit until all the cases arising from disputes out of the old LRA have been dealt with.

NEW ▶ CCMA

The success of the new LRA will depend a lot on the successful operation of this body.

The Commission for Conciliation, Mediation and Arbitration (CCMA) performs many different tasks under the Act. It is intended to operate independently of the Department of Labour under the direction of the NEDLAC parties and funded by the state.

- Appointments of Staff
  Commissioners appointed by the CCMA on a full-time or part-time basis will perform the dispute settlement tasks of the CCMA .

  Ordinary commissioners will undergo a probation. All commissioners will be appointed on fixed term contracts. They can be removed for serious misconduct, incapacity and a serious violation of the CCMA's code of conduct for commissioners.

  Appointments of commissioners must take into account the need to create a Commission that is independent, competent and representative in respect of race and gender.

- Tasks of the CCMA
  The tasks of the CCMA are to:
  — conciliate (mediate) any dispute that requires compulsory mediation under the Act if there is no Council having jurisdiction over the dispute.
  — arbitrate on any matter that requires compulsory arbitration under the Act if there is no Council having jurisdiction over the dispute, or if a party obstructs arbitration taking place under an agreement.
  — arbitrate on certain disputes that councils do not have arbitration powers over (e.g. organisational rights, picketing rights).

— arbitrate on disputes over the interpretation and application of agreements where those agreements do not provide for arbitration on this issue.
— accredit and subsidise councils and private agencies to perform compulsory conciliation and arbitration functions under the Act.
— offer to resolve disputes.
— conduct or oversee ballots of registered unions and employer organisations if so requested.
— publish guidelines.
— advise on procedures to be followed under the Act.
— conduct relevant research.

NEW ▶ LABOUR COURT + LABOUR APPEAL COURT

The Labour Court will only hear certain types of disputes. These are the collective dismissal cases and cases where important constitutional values are at stake, such as racial discrimination claims.

- Appointments
  Judges of the Labour Court will be appointed by the President acting on the advice of NEDLAC and the Judicial Service Commission after consultation with the Minister of Justice and Judge President of the Labour Court.

  The judges must have labour law expertise and be a Supreme Court judge or a legal practitioner of ten years experience.

  Three Labour Court judges will make up the Labour Appeal Court that can hear appeals from the Labour Court. The LAC comprises five judges in all including the President and Deputy President of the Labour Court.

  The Labour Court is given the same powers and status under the Act as the Supreme Court on Labour matters and decisions of the Labour Appeal Court are to be regarded as equivalent to decisions of the Appellate Division of the Supreme Court.

NEW ▶ ACCREDITED DISPUTE RESOLUTION AGENCIES

Private dispute resolution bodies (e.g.IDRASA, IMSSA , MCC , etc) could become Accredited Agencies which can perform the limited compulsory conciliation (mediation) and arbitration roles of Councils.

Councils must be accredited by the CCMA if they do not appoint an agency to perform the council dispute resolution functions.

An agency does not have to be accredited to in order to do private dispute resolution work.

REGISTERED UNIONS

Existing registered unions will remain registered, but must included a balloting provision in their constitutions for legal strikes, and may not discriminate on the basis of race. They must be independent organisations.
A union will be considered independent if it is free from the influence or control of an employer or employers' organisation.
The Labour Court may decide whether or not a union is independent.
Registered union will have more rights than un-registered ones, but it is now much easier to register.

WHO IS COVERED BY THE ACT ?

All workers are covered by the Act , except members of the:

- SA National Defence Force
- Intelligence and Secret Service Services.

"One size fits all" (with some adjustments)

For the first time, farm workers, government workers and domestic workers are now all covered by the same Act. With some difficulty government agreed to include the Police under the Act.

However, the conditions of employment and dispute procedures of government employees are still affected by other Acts, and changes in those sectors will be achieved by negotiation.

SIMPLIFIED DISPUTE PROCEDURES

Three basic changes are noticeable in the new dispute procedures:

- Bureaucratic procedures are simplified by the elimination of official forms and technicality.

- Private dispute procedures are given the same status as the dispute procedures in the Act.

- Professional mediation is encouraged.

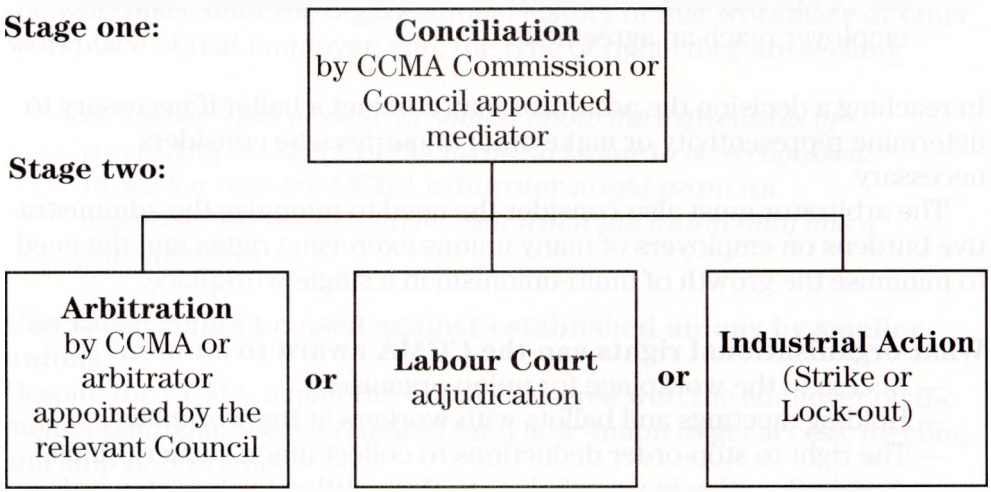
The basic procedure in the Act remains a two-stage procedure, with small variations for specialised type of disputes (e.g.picketing rights):

- Disputes fall into three main classes;
  — matters which can lead to a legal strike (e.g. wage disputes).
  — matters that party can require to go to arbitration (e.g.dismissals for misconduct) by the CCMA or a Council, or for adjudication by the Labour Court (e.g.unfair discrimination cases).
  — matters where there is a choice of arbitration or a legal strike (e.g. organisational rights).

- If there is a dispute procedure contained in a collective agreement (CA), you should follow it. If the dispute is not resolved, then;
  — the parties must follow the dispute procedures in the Act, or
  — if the CA contains a procedure for strikes and lock-outs that can be followed and legal industrial action can follow.
- The right to go to arbitration or to strike can be given up in a CA if the parties agree to do so.

The dispute procedures in the Act consist of two phases, like the old Act.

Schematic Representation of Basic Two Stage Dispute Procedure in the Act



See Diagram A on page 43 for a more detailed Dispute Chart.

☞ **NOTE:**

— There are no special forms needed to follow the above procedures
— The union does not have to draw up legal papers in order to go to arbitration.
— If the matter goes to arbitration, lawyers will not be allowed to represent parties at the arbitration hearing, unless the arbitrator believes one party would be at a disadvantage.

ORGANISATIONAL RIGHTS

Organisational rights make it possible for a union to operate more freely in a workplace and build up it's support amongst workers.

There are two ultimate ways to achieve organisational rights under the Act if attempts to negotiate fail:

- The union can organise a legal strike to pressurise the employer to agree to demands on organisational rights

OR

- The dispute can be sent to the CCMA for an arbitrator's decision. The arbitrator will determine if the union is a "representative" union after:
  — the employer has refused to grant the rights demanded; and
  — the CCMA has tried to mediate the dispute to help the union and employer reach an agreement.

In reaching a decision the arbitrator may conduct a ballot if necessary to determine representivity or make other enquiries s/he considers necessary

The arbitrator must also consider the need to minimise the administrative burdens on employers of many unions exercising rights and the need to minimise the growth of multi-unionism in a single workplace.

What organisational rights can the CCMA award to a union?

— Access to the workplace for union organisers
— Holding meetings and ballots with workers at the workplace.
— The right to stop-order deductions to collect union subscriptions.
— A majority union in a workplace is also entitled to shop stewards ("trade union representatives") at the workplace and disclosure of information by the employer.

☞ **NOTE:** The majority requirement applies to the whole workforce not just a section of workers such as hourly paid employees.

— Shop-stewards of majority unions have the right to:
  • represent workers in grievance and disciplinary hearings
  • check that the employer is complying with employment laws and any collective agreement, and
  • to do anything else that is agreed with the employer.
  • They are also allowed "reasonable" time off on pay to perform union duties and to attend shop steward training programmes.
  • Office bearers of unions are entitled to reasonable leave during working hours for the purpose of performing the functions of that office.

How many members must a union recruit to qualify for the rights awarded by the CCMA?

The Act is deliberately unclear on this, except that union must represent a majority in the workplace if shop steward and information disclosure

rights are demanded.

When the CCMA arbitrator considers if the union is representative, s/he must consider the type of workplace and the industry into which the workplace falls, the organisational history of that workplace or other workplace of that employer; and, the type of rights they are seeking.

> *Example: This flexibility should allow the difficulties of recruiting workers in the farming sector to be recognised. In such a case the CCMA arbitrator might grant an organiser access to a farm even when the union only has a few members.*

Can these rights be used against established unions by smaller unions?

Despite the CCMA, a majority union can agree with the employer on the membership that will be required for a new union to get access, meeting and stop-order rights.

> *Example: A majority union may agree with an employer that a union must be a majority union (50% +1) in the workplace to get stop-order rights , even if the CCMA said that 30 % membership was enough.*

A bargaining council can also set membership requirements for bargaining rights.

Such requirements must apply equally to all unions.

What about a "duty to bargain" with a union?

A union will not be able to get a court order forcing an employer to bargain with it.

A union may get an opinion on this type of dispute called an "advisory arbitration".

> *Example: If an employer refuses to bargain with a union then the dispute must go to "advisory arbitration". This means the arbitrator only makes a recommendation to both parties. Any party can reject the recommendation. If the employer still refuses to bargain after the arbitrator's*

recommendation is made, then the union must consider strike action if it wishes to force the issue.

See also strike procedures dealt with below.

COLLECTIVE AGREEMENTS

Collective agreements (CA's) are agreements between a union and an employer, such as recognition or wage agreements.

- Existing CA's will remain in force unless they are cancelled by either party. A reasonable notice to the other party can be given to cancel the agreement if the collective agreement does not contain a cancellation clause.

- A dispute over the interpretation or application of a CA must be settled by arbitration if conciliation cannot solve it.

  Example A: An employer disputes the calculation of the payment of an annual holiday bonus contained in an agreement then this is a dispute about the interpretation of a CA.

  Example B: A union argues that the paid leave provisions for shop stewards in a collective agreement also include paid leave for attending union meetings and not only apply to leave for training.

- All CA's must provide for such arbitration. The dispute can be sent to the CCMA for conciliation and arbitration, if
  — the CA does not provide such a procedure; or
  — one party is blocking the procedure.

Who is bound by a CA?

A CA binds the following bodies and persons for as long as it still is in force:

— the parties and members of the parties to it;
— members who leave one of the parties to the agreement;
— new members of a party while the agreement is in force.

Example: If workers resign and join another union while an agreement on wages is still in force they are bound by that agreement until it has expired, unless their new union manages to renegotiate their wages. Also, an employer who resigns from an employer association at a bargaining council will still have to follow the agreement.

A CA signed by a majority union can bind employees in that workplace or industry who are not members of the union if this is stated in the agreement and if the union/s that signed the agreement represent a majority of employees.

A CA will be legally binding on members unless it is stated differently in the agreement.

CENTRALISED BARGAINING

Unions can bargain with employers at a centralised level in three different arrangements:

SITUATION 1

Collective agreement on Centralised bargaining

A union can reach a collective agreement with a group of employers to hold centralised negotiations on a regular basis and might contain dispute procedures and enforcement provisions. This agreement will be binding just like any other CA.

This means that a union can establish centralised bargaining arrangements with employers even if the sector covered by those negotiations would not be an appropriate sector as defined by NEDLAC.

However, even if the unions and employers in such an arrangement represent a majority of employees in that sector, because their negotiations are based purely on a voluntary agreement, they cannot extend their agreement to other workers and employers.

Secondly, the union does not gain access to all unorganised workplaces in the sector in which the agreement applies. This can only be achieved automatically through a statutory or bargaining council.

SITUATION 2
Statutory Council

> This type of council was made possible by the strenuous efforts of the Labour representatives to secure compulsory centralised collective bargaining. It falls short of this goal but may prove to be a useful device for building centralised bargaining nevertheless.

A statutory council (SC) is like a junior bargaining council. It is less representative than a BC and has more limited powers. Setting up an SC can depend quite heavily on the assistance of the Minister of Labour if parties in the sector are not co-operative.

Setting up an SC requires that:

- A union must have organised 30 % of the workers in a sector OR the employers who are willing to join must represent 30 % of the sector.
- The union or employers can apply to the Dept. of Labour to have a SC established in a sector.
- NEDLAC decides if the sector is appropriate.
- The Minister must attempt to get all registered unions and employer organisations in that sector to join such a council.
- If the unions and employers cannot agree amongst themselves on a constitution, the parties, and representation on the SC, the minister may settle these issues.
- The Minister may even appoint union and employer representatives on the SC if they cannot agree on who should sit on the SC.

A Statutory Council (SC) does not have many powers. Only agreements on training schemes, provident or pension funds, medical schemes and the like can be extended to all workers and employer in the sector. SC agreements on wages and conditions of employment cannot be extended to parties outside the SC.

A big advantage of an SC for union organisation is that it gives member unions organisational rights of access, meetings, ballots and stop orders in that sector even in workplaces where the union has no members.

SITUATION 3
Bargaining Council

Essentially this is the same as an Industrial Council at present with a few new features it must incorporate. Existing Industrial Councils will become BC's.

If a union or group of unions and members of employer organisations in that sector are "sufficiently representative" of the sector, then a bargaining council (BC) may be established. NEDLAC decides if the sector is appropriate.

What does "sufficiently representative" mean? In the original LRA bill it was believed that a fixed percentage for establishing BC's should be specified. To allow the flexibility that might be required to recognise different conditions of organisation in different sectors, it was agreed in NEDLAC to continue with the concept of "sufficiently representative".
"Sufficiently representative" is not defined as a fixed percentage, but:
— we can be sure the parties must be more representative than in a statutory council which means that the parties should represent or employ more than 30 % of workers in a sector.
Also,
— we know that if they employ and represent more than 50 % of the sector that they will be representative.

Between these two positions the parties to a council might be considered "sufficiently representative" within the scope of a council. The final determination will be decided by a flexible standard taking into account the nature of the sector, the geographical distribution of the workforce in the sector, employer and employee organisation, the existence of distinct opposing interests and their relative size and not only the proportion of the sector represented by the parties to the council.

☞ **NOTE:** The "sufficiently representative" standard has been used in the old LRA to determine registration of unions and extensions of agreements. Most of the interpretation of the term "sufficiently representative" under the old LRA arose out of cases about the registration

of rival unions or employer organisations in the same area and sector. Nevertheless, some of those principles may still be used to apply now. Those principles involved looking at how much the established organisation was capable of implementing the interests in a sector, how diverse the sector was, the extent to which some employers or employees had strong objections to being represented by particular unions or organisations, the viability of smaller organisations representing different geographical areas, the likelihood of the sector being fully represented given the obstacles to union organisation in that sector. These principles concern qualitative assessments not merely quantitative evaluations.

Unions on BC's have organisational rights in all workplaces in the sector.

Wage agreements reached by BC's (unlike those of SC's) can be extended by the minister to all employers and employees in the sector, in one of two situations:

— If the parties are representative in the majoritarian sense –
The agreement will be extended if the employer parties to the agreement employ more than half the employees employed by members of the council and union parties to the agreement have more than half the union membership belonging to unions on the council, and if the unions and employers on the council respectively have as members, and employ, half the workforce falling under the council.

— If the parties are representative in the "sufficiently representative" sense –
The agreement will be extended, if the union and employer parties must at least be sufficiently representative of the sector and an extension is necessary to stop collective bargaining being undermined.

Example: Under the first test the agreement could be extended under situation A below but not B. In A the employers and unions on the council that support an extension represent "majoritarian" interests even if the number of employers supporting the agreement may be a minority of the employers. However in B the employers do not employ a majority of employees of the employer parties and so fail the "majoritarian" test.

In case C, the unions supporting the extension are not representative enough because they represent a minority of members of unions sitting on the council, even though they are more representative than the unions in situation B.

However, the Minister might still agree to extend the agreements in situations B and C under the "sufficiently representative" test.

SITUATION	Total Workforce under BC	Total Workforce employed by employers sitting on Council	Total membership of Unions sitting on Council	Total Workforce employed by employers on the Council that support extension of Council Agreement	Total membership of Unions on the Council that support extension of Council Agreement
A	20 000	12 000	10 500	7 000	9 000
B	20 000	16 000	17 000	7 500	8 500
C	20 000	18 000	19 000	10 000	8 500

Can employers still apply for exemptions from agreements?
Yes. BC's will now have to establish independent exemption committees to consider these applications. This means that exemptions will no longer be under the control of the council parties.

When the BC chooses persons to sit on the exemption committee, it must consider recommendations on the persons nominated institutions identified by the Minister of Labour. The Minister will identify these bodies in consultation with the Minister of Trade and Industry and after consulting NEDLAC.

PUBLIC SECTOR COUNCILS

The following will all be bargaining councils in the public sector under the Act:

— The departmental and provincial chambers of the Public Sector Bargaining Council;
— The Education Labour Relations Council; and
— The National Negotiating Forum for the police.

The last two bodies and the central chamber of the PSBC will also be the founding members of a new Public Service Co-ordinating Bargaining Council (PSCBC) that will be responsible for negotiating issues common to all public service workers and issues dealing with a public service sector that does not have it's own council.

New councils can be set up in any public service sector by the PSCBC or the President (if the PSCBC cannot agree on establishing one).

A special Dispute Resolution Committee will be set up by the Minister for Public Service and Administration in consultation with the PSCBC and NEDLAC to resolve disputes about demarcation between different public sector councils.

INDUSTRIAL ACTION

It will be much easier to strike legally under the new LRA.

Like the old LRA the new Act has absolute limitations on Strikes and Lock-outs:

- Essential Service workers may not strike
- Designated Maintenance workers may not strike
- No legal strikes may occur over matter that can be referred to compulsory arbitration.
- No strikes can take place over an issue in an agreement while that agreement is in force.
- No strike may occur during the first year of a wage determination on an issue in the determination.
- No strike may occur when a binding arbitration award has been

made or when there is a binding agreement to go to arbitration on the matter in question.

ESSENTIAL SERVICE WORKERS

Essential service workers may not strike legally.

What is an essential service?

The following are essential services:

— a service that can endanger the life, personal safety or health of part or all of the population if it is interrupted;
— the SA Police Services
— the Parliamentary service.

An essential service can be determined by a special committee.

There will be a special Essential Services Committee (ESC) set up by the Minister of Labour in consultation with NEDLAC and the Minister for the Public Service and Administration to decide which workers are essential service workers.

Workers can also agree with the employer which workers will be regarded as essential service workers.

> *Example: Nurses might agree with a hospital that only nurses in the intensive care unit will be considered essential service workers. If the ESC accepts this agreement then other workers at the hospital will be able to strike legally.*

What if there is a dispute about what is an essential service or who is an essential service worker?

The dispute must be referred to the ESC which must decide the issue as quickly as possible.

If essential service workers cannot strike how are their disputes to be settled?

Disputes involving essential service workers will be resolved by arbitration by the CCMA or the relevant Council. Where the state is the employer and Parliament wishes to request more conciliation, the award will not be binding and the CCMA must conciliate the dispute, but either party can still require a final settlement by arbitration.

MAINTENANCE WORKERS

An employer can also approach the ESC to declare thst part or all of his or her business is a maintenance service. If successful, those employees the ESC designates as maintenance workers will be unable to strike legally but the employer will also be unable to hire scab labour.

This provision will probably be revised however.

MATTERS FOR COMPULSORY ARBITRATION

Issues that can be referred to the Labour Court or for compulsory arbitration under the CCMA or a Council are detailed in Table A at page 46.

STRIKE PROCEDURES

You will be able to hold a legal strike after the following steps:

BASIC PROCEDURE FOR A LEGAL STRIKE IN THE ACT

STEP 1: REFER DISPUTE to BC or CCMA

STEP 2: CONCILIATE up to 30 days
(Go to advisory arbitration if the dispute concerns a refusal to bargain)

STEP 3: Give 48 hours notice of industrial action.

Other important aspects of the new strike law:

- The new definition of a strike includes an overtime ban . So, under the new ACT, unions will have to follow the normal procedures for strikes if they want to protect members from dismissal following an overtime ban.

- Even though registered unions should ballot members before striking, a BALLOT is NOT REQUIRED to make the strike legal. This means employers cannot use the ballot as a reason to get a court order to block a strike.

- A strike or lock-out may be interdicted if it does not comply with the above procedures , on 48 hours notice (or less in special circumstances). However, if 10 days notice is given of the strike or lock-out, then 5 days notice is required of the application for an interdict.

- Workers on a legal strike or facing a lock-out who receive payment in kind (e.g.accommodation, food, etc.) can request the employer not to stop such payments. The employer is then obliged to continue such payment in kind during the strike but may approach the Labour Court after the strike to recover the cash value of such payments that were made during the strike.

OTHER PROCEDURES FOR LEGAL INDUSTRIAL ACTION

There are three situations when a different procedure should be followed before a legal strike:

- If there is a strike procedure in collective agreement you follow that instead of the Act.

- If the dispute arose between parties to a council then it is not necessary to make a separate referral to the Council. The parties must just follow the dispute procedure in the Council Constitution.

- If an employer decides to impose a change in working conditions on workers. If a union refers the dispute to the CCMA or Council and gives the employer 48 hours notice, the affected workers can strike legally if the employer does not withdraw the change in 48 hours.

THE EFFECT OF A LEGAL STRIKE

Can workers be dismissed for striking?

If the correct procedure above has been followed, workers cannot be dismissed for striking. In the Act this is known as a "protected strike".

They can still be dismissed for other action amounting to misconduct during the strike (e.g assault, intimidation).

Employees on strike have no special protection against retrenchment, but the employer will have to go through a full retrenchment exercise be-

fore anyone can be dismissed and it should be difficult for an employer to employ new workers after "retrenching" strikers.

Can the employer hire replacement workers ("scab labour")?
Yes, but strikers can still return to their jobs if they end the strike. Replacements cannot be permanent .

However, if an employer embarks on a lock-out before workers start a legal strike s/he cannot hire replacement labour.

Also, if an employee refuses to perform the work of a person engaged in a protected strike the employer may not discriminate against or dismiss such an employee.

THE EFFECT OF A LEGAL LOCK-OUT

If an employer engages in a legal lock-out then s/he:

- can hire replacement labour (if a strike had already started), but
- cannot dismiss workers who do not accept the employer's demands.

This substantially reduces the power of employers in lock-outs when compared with the position under the old Act. Under the old Act an employer could dismiss workers in a legal lock-out if they did not accept the employer's demands.

EFFECT OF ILLEGAL STRIKES

Workers can be dismissed for an illegal strike. Even so, the Labour Court will still consider the following issues before it decides if the dismissals are fair:

— Was a proper ultimatum given?
— Was enough time given to workers to consider it ?
— Did the employer try and contact the union?
— What attempts were made to follow the procedures ?
— Did the employer provoke the strike?

☞ **NOTE:** Effectively these considerations are only a guideline for the Labour Court. In practise it might be even less sympathetic on illegal

strikers in future because the procedure for holding a legal strike has been made much easier to comply with.

PICKETING RIGHTS

Members of a registered union may participate in a picket in support of a legal strike or against a lock-out, if the union authorises the picket.

Participation in a picket is protected action provided the above conditions are met and picketing rules are followed.

How are picketing rules established?

- They can be negotiated with the employer.
- If no agreement can be reached the CCMA can be approached to try and achieve an agreement on picketing.
- If this fails the CCMA must establish rules for the picket taking into account the nature of the workplace and any codes of good practise on picketing which NEDLAC issues.
- Disputes over compliance with the rules of a picket can ultimately be referred to the Labour Court for a decision.

Where can the picket take place?

The picket can take place:

- outside the employer's property where the public has access to the premises, and
- on the employer's property with the employer's permission. The employer is not allowed to refuse permission unreasonably and the CCMA can overrule the employer if it thinks the employer was not supposed to have refused permission.

What if the picketing rules are broken or the right to picket is undermined by the employer?

The purpose of a picket is to publicise workers' grievances to the general public, the employer, and persons who work for or trade with the employer. It is particularly important to persuade replacement labour not to work for the employer. If the picket is confined to an area far away from the public or scab workers then this could undermine the right to picket.

If this happens the union can complain to the CCMA. The CCMA will try and conciliate the dispute and refer the matter to the Labour Court for a decision if it is unsuccessful in settling the dispute.

SECONDARY STRIKES (Sympathy strikes)

This provision was a result of a compromise reached between all NEDLAC parties. Employers wanted only connected businesses to be hit by secondary action, government wanted some limitation on secondary action, and labour wanted to secondary action at unconnected businesses to be possible. This last goal was achieved but with a qualification on how serious the secondary action can be. The less of a connection there is between the type and extent of the secondary action and it's impact on the business of the primary employer, the more difficult it will be to justify the secondary action of that kind.

When can workers go on a sympathy strike?
Workers are protected against dismissal or disciplinary action if they participate in industrial action in support of other workers who are on a legal strike.

To ensure this protection, the workers must give their own employer 7 days written notice of the sympathy action.

The action they take against their own employer should not be more severe than what is required to make a particular impact on the main employer's business.

Example: Workers at an ice cream factory (the primary employer) go on strike and workers at a steel company next door (the secondary employer) want to support them. If the steel workers take it in turns to participate in the picket outside the ice cream factory this could have more impact on the ice cream factory than if the steel workers went on a

full strike at the steel company. In other words, a full strike at the steel company could be regarded as excessive sympathy action, because it causes much more damage to the secondary employer without causing any greater damage to the business of the ice cream company than the picketing did.

So the nature of the secondary action should not damage the secondary employer more than is necessary for the damaging impact that can be made on the business of the primary employer.

Limiting Sympathy Action:
If an employer wishes to stop a sympathy strike because s/he believes the effect on her/his business is too harsh, s/he can ask the Labour Court to interdict the sympathy action.

However, before the court can take this decision, the union can request a special investigation into the strike to see if the employer's claim is justified. The court cannot make a decision before this investigation is complete and must take the report into account when making it's decision on the strike.

PROTEST ACTION (Socio-economic Stay-aways)

What are "socio-economic" interests? The Act does not define the term. A wide interpretation should apply however. We can expect that it should include protest action against a VAT increase or for better housing policies. Nonetheless, an action to protest against the continued residence of certain political groups in a hostel would not fall within the protected aims of protest action. There will probably have to be a fairly direct and obvious connection between the issue and workers' socio-economic interests.

Stay-away action in support of workers' socio-economic interests enjoys limited protection.

How does protest action qualify as protected action?
To qualify as protected action the following conditions must apply:

- The socio-economic issue has been discussed at NEDLAC or some other forum on which employers, government, labour and the community are represented.
- The action has been authorised by a registered union or federation
- NEDLAC has 14 days notice from the union or federation of the action.

A protest strike that has a purely political aim does not qualify for protection as socio-economic protest action (see box above).

The Labour Court can interdict action which does not comply with these steps and if workers do not comply with such an order, they can lose the protection against dismissal.

AGENCY AND CLOSED SHOP AGREEMENTS

A significant change to the Draft LRA Bill was the inclusion of a new provision to permit Closed Shops to be established in future and not merely to maintain existing ones. This was achieved by democratising the Closed Shop so that it cannot be imposed on unwilling workers indefinitely. This measure together with accounting requirements for Closed Shop funds and restrictions on the use of such funds should provide some protection against attempts to attack Closed Shops using the Constitution. Even so, such attacks should be expected. The Agency Shop should be more difficult to attack constitutionally.

A second major change is that funds from Agency Shops will no longer be jointly administered with employers.

The New LRA makes it possible for unions to become financially strong and stable. The agency shop and Closed Shop are important instruments for achieving this and are subject to democratic limits.

They also provide a way of putting an end to "free riders" who benefit from the wage struggles of unions without contributing even financially.

AGENCY SHOPS

An Agency Shop is a system in which non-members must pay an amount equal to a member's fees into a special fund to pay for organising costs.

By forcing non-members to pay subscriptions they are encouraged to join the union to enjoy all it's benefits.

How is an agency shop established?

- A majority union (or unions) in a workplace or a sector can establish an Agency Shop by reaching an Agency Shop agreement with an employer or employer organisation.

- All workers covered by the agreement can be forced to pay a deduction which cannot be higher than the highest deduction that worker could pay as a union member.

The money deducted must be paid to a separate account administered by the union.

The money in that account cannot be used to make contributions to political parties or political candidates or used to pay affiliation fees to political parties.

However, it can be used to advance or protect "the socio-economic" interests of workers. Since most union campaigns are about socio-economic issues it should not be difficult to use the money in practise. Nevertheless, the separate accounting requirement will be an administrative burden on unions.

CLOSED SHOPS

Closed Shop agreements have similar aims to an Agency Shop, but provide a union with a more powerful way of strengthening it's bargaining position with employers.

The main difference is that under a Closed Shop agreement non-members can be required to join the union or face dismissal. If a union expels a member for a good reason under a Closed Shop, then the employer will have to dismiss the member.

How will Closed Shops be established?

- New Closed Shop agreements can be established under the Act by agreement with the relevant employer/s and a majority union (or group of unions).

- A new Closed Shop can be set up if an employer agrees to a Closed Shop and two-thirds (66 %) of the workers at a workplace who vote support a Closed Shop.

What about existing Closed Shop arrangements?

Existing Closed Shop arrangements will continue but they will have to comply with the requirements of new Closed Shops. They will be regarded as new Closed Shops that came into existence with the new Act.

Controls on the Closed Shop

Apart from the voting requirement to establish a Closed Shop, other provisions maintain the democratic character of the Closed Shop or protect individuals against abusing the purpose of the Closed Shop:

- Workers can hold a ballot once in three years if they wish to remove a Closed Shop, provided one third (33%) of the workers that it covers request a ballot.

- If the union abuses the power of a Closed Shop, to dismiss members for reasons related to irrelevant factors like their political beliefs, then the Labour Court can order the union to pay compensation to the dismissed worker.

- The money deducted from a Closed Shop agreement may not be used for political aims of the union and the auditor must be satisfied that the money has not been used for these purposes. However, it is not a requirement that the money be paid into a separate account.

- A union representing a significant grouping of workers covered by the Closed Shop can apply to join the agreement and can appeal to the Labour Court if refused.

- An employee who is unfairly dismissed for refusing to join a union or because of being expelled from a union can challenge the dismissal in the Labour Court. It is not unfair to expel or refuse ad-

mission to an employee to a union if that employee undermined the union's collective exercise of its rights. If the dismissal based on the application of the Closed Shop is unfair the union and not the employer will pay compensation to the dismissed employee.

DISMISSAL

The main changes to the law on dismissals are:

- No more industrial court cases – in most cases arbitration will replace this.
- Even under compulsory arbitration the CCMA will attempt to satisfy the parties choice of arbitrator.
- Principles of fairness are set out in the form of Codes of Good Practise which should be followed by employers. NEDLAC is to discuss this code further.
- Quick decisions because of quicker procedures.
- If a dismissal is unfair, reinstatement should be the first choice of remedy by the arbitrator and compensation the second choice.
- Lawyers and consultants should appear less often in arbitrations over misconduct and incapacity.
- If the dismissal is unfair only because of a procedural failure reinstatement will not be awarded, only compensation.

What counts as a dismissal?

Under the old LRA there was sometimes confusion about who could challenge unfair dismissal. For example, when a retrenched worker was refused re-employment when work became available was this an unfair dismissal. The new LRA tries to solve these problems by defining dismissal very widely.

A dismissal takes place when:

— The employee's service is terminated by the employer (with or without notice).

— The employee had a reasonable expectation that the employer. would renew a fixed term contract but the employer either did not

or would only do so on worse terms and conditions.
— The employer refuses to allow a woman to resume work after maternity leave.
— An employer selectively re-employs workers.
— A constructive dismissal takes place. Constructive dismissal takes place when an employer does not dismiss the employee directly, but makes that employee's working situation impossible to tolerate, so that the employee walks out or resigns because of the pressure.

JUSTIFIABLE DISMISSALS

The Act uses ILO standards to classify justifiable dismissals into three classes:

- No Dismissal for misconduct
- No Dismissal for incapacity (illness or poor work performance)
- No Dismissal for operational reasons (retrenchment)

The principles from better decisions in the industrial court on unfair dismissal have been built into codes of good practise which can be changed by NEDLAC.

INCAPACITY

Dismissal for misconduct will only be fair if:
— The worker broke a rule at work.
— The rule was a fair and valid rule.
— The worker knew of the rule or should have known of it
— The employer applied the rule consistently.
— Dismissal is an appropriate step for breaking the rule.

Dismissal for poor work performance is not the same as misconduct.

Before dismissing a worker for incapacity an employer should have given the worker appropriate training and evaluation and must investigate whether the problem cannot be solved without dismissing the worker.

Incapacity for illness may be temporary or permanent.

If illness causes temporary incapacity the employer must consider ways of avoiding a dismissal. If the incapacity is permanent, the employer should try and find alternative work for the worker or adapt the work situation to accommodate that worker's problem. More effort is expected of the employer if the worker was injured at work.

OPERATIONAL REASONS (Retrenchment)

An employer must try and reach agreement with workers in retrenchment discussions

Until recently, an employer was not expected to try to reach agreement with a union during retrenchment discussions. Now it is required that the employer must try to reach agreement with the union, or other body representing workers where there is no recognised union on:

— ways to avoid a retrenchment;
— reduce the number of retrenchees;
— limiting the harsh effects of retrenchment;
— ways of selecting workers;
— severance pay.

To make these discussions more meaningful an employer must provide unions with all relevant information relating to the proposed retrenchment, and must state reasons for not agreeing to alternative proposals for retrenchment.

Minimum severance pay is guaranteed and fair and objective selection methods must be used if these cannot be agreed upon.

Every employer must pay at least one week's wage for every year of completed service to retrenched workers.

This does not prevent unions negotiating for more than this.

UNJUSTIFIABLE DISMISSALS (Invalid reasons)

A dismissal can never be fair if the reason is invalid.

Some reasons for dismissal can never justify the dismissal. Such reasons are invalid reasons. If an employer dismisses a worker for an invalid reason the dismissal is automatically unfair.

Examples of invalid reasons for dismissals are:
— *participation in union activities*
— *participation in legal strike activity*
— *refusing to perform the work of a person engaged in a legal strike or protest action*
— *pregnancy and related reasons*
— *arbitrary grounds such as race, age,religion, sex, sexual orientation, family responsibility, etc.*
— *disability.*

Nevertheless
— It is not unfair to retire someone at the normal or agreed retirement age for a certain job
— It might not be unfair to dismiss a person on an arbitrary ground if that arbitrary ground is directly related to the requirements of the job.

Example: In a religious institution where religious practise is closely bound up with working practise, it might be considered important that the employee subscribes to the same faith as the religious order that runs the institution. A change or loss of that faith might be grounds for dismissal.

REMEDY FOR UNFAIR DISMISSAL

What happens if an arbitrator finds a dismissal unfair?

The employee must be reinstated unless:

- it would be intolerable for the worker to continue as an employee as far as reasonably possible (e.g. workplace relations are so severely affected by the events surrounding the dismissal that if the worker was to return that it would create serious personal conflict with other employees).

- it would not be reasonably practicable for the employer to do so (e.g. the company is being wound up).

- the worker does not want to return.

- there was a good reason to dismiss the worker and the dismissal

was only unfair for procedural grounds).

It is hoped that reinstatement will be the normal rule for unfair dismissal and compensation the exception.

If reinstatement is not feasible for the above reasons, the arbitrator or Labour Court can order:

- up to two year's wages for dismissal for invalid reasons.
- In the case of an employer not being able to justify the dismissal for valid reasons, up to one years' wage must be paid.

WORKPLACE FORUMS

A lot of misunderstanding exists about Workplace Forums. To establish a statutory Workplace Forum requires the initiative of the majority union. It cannot be established without this. The Workplace Forum described in the Act is not the only structure that can be established to handle issues of participation. Unions and employers can negotiate an agreement on worker participation which is quite independent of the Workplace Forum described in the Act. Even if a Workplace forum under the Act is established, it is done in such a way that the union/s and management are encouraged to negotiate a form of workplace participation that will suit them.

How is a statutory Workplace Forum established?

- Majority unions can demand the establishment of a workplace forum under the Act if there are 100 workers in a workplace. A majority union includes a group of unions acting jointly.

The Minister of the Public Service and Administration will decide on the designation of WF's in the public service and may change the requirement of a WF constitution for the public service.

- The CCMA will then assist the union and employer to try and reach agreement on the constitution of the WF. If they cannot agree the commissioner can decide these issues. The issues that should be covered by the constitution of a WF are listed in the Act.

- The WF is elected by all workers, even non-members, but the union can nominate candidates. In practise, if the union is stable at a company, the shop stewards are likely to be elected to the WF and will dominate it.

- In a workplace where the union is recognised for collective bargaining purposes for all employees, it may nominate the members of the WF. This is not likely to be the case very often for a single union, because the union will have to recruit all staff categories except management to achieve this threshold. However, two or more unions together could achieve this.

What is the relationship between the WF and the majority union?

- The union and employer finalise the constitution of the WF subject to the requirements of the Act.

- The union may nominate candidates for election to the WF.

- Union officials can attend meetings of the WF.

- The union may request a ballot to dissolve the WF.

- Fresh elections must be held at the request of a new majority union achieving majority status provided the WF elections are more than 3 months away.

- It may remove items for consultation from the workplace forum by collective agreement with the employer.

The forum provides workers a chance to limit unilateral decision making by management.

If there is a WF the employer must give that forum financial information about the business.

JOINT CONSULTATION

The employer cannot take a decision on any of the following issues before trying to reach agreement on it with the WF, if they are not dealt with in a collective agreement with the majority union:

— restructuring the workplace
— partial or total closures
— job grading
— exemptions from any law
— export promotion
— product development plans
— education and training
— mergers and transfers of the ownership of the business
— calculation of merit and discretionary bonuses

This requirement should at least put a brake on the tendency of management to try and implement decisions without wider employee input into the decision making process. It is not a guarantee of total transparency in the decision making process.

Joint Consultation does not ban industrial action

If there is no agreement on a decision on any of these issues, this does not stop the union calling a strike if the employer wants to go ahead with an unpopular decision, unless the parties have agreed to some other form of dispute procedure.

JOINT DECISION MAKING

In the case of joint decision making if the employer cannot get the agreement of the WF s/he must go to arbitration and cannot simply implement what s/he intended to do:

— disciplinary codes and procedures
— workplace rules unrelated to work performance
— affirmative action measures
— appointments of pension and benefit fund trustees.

The majority union and employer may add or remove issues for joint decision making.

THE REMAINS OF THE UNFAIR LABOUR PRACTISE

There is no longer a general definition of an unfair labour practise as there was under the old LRA. The effect of this is not easy to predict, but we can guess by looking at the type of cases that the court mostly dealt with under the old Unfair Labour Practise. The vast majority of these concerned dismissals. Other disputes dealt with under the unfair labour practise concerned recognition, duty to bargain, and a few cases of unfair bargaining practices. It is the bargaining disputes that have no compulsory third party determination under the new Act. Under the the new Act only advisory arbitration is required for such disputes as a step before striking. Dismissal disputes are all covered by the codification of unfair dismissal principles. Areas of dispute that previously were not raised often under the old unfair labour practise may become more common – e.g. discrimination type disputes.

Most of the principles of fair labour practises have been included under the different rights in the new Act.

But there are still some unfair labour practises which have been spelled out separately in the Act. Some of these could be regarded as new unfair labour practices, but in theory they could have been raised under the old definition. With the values in the interim constitution on issues like unfair discrimination awareness of these claims might increase.

The unfair labour practices which are specified in the new Act are:

— unfair discrimination on grounds of race, sex, ethnicity, disability, religion, culture, marital status,etc.
— unfair promotion policies
— unfair disciplinary action short of dismissal
— a failure to reinstate or re-employ an employee under an agreement.

Job applicants can also bring an unfair labour practise claim if they believe the employer has unfairly discriminated against them by not employing them for an arbitrary reason (e.g. religion, disability), or setting

conditions which have the effect of discriminating against them unfairly

Unfair discrimination claims may go to the Labour Court if unresolved by the conciliation phase.

All other unfair labour practise claims can be referred to arbitration if unresolved by conciliation.

DISCLOSURE OF INFORMATION BY AN EMPLOYER

> This is an important change in the law. Up till now it was unclear when and how much information an employer had to provide a union. The purpose of providing information is to enable unions and other actors to fulfill their functions properly. Only certain information can be withheld and there is a special mechanism created under the CCMA to make it possible to obtain information if an employer refuses to disclose information that should be disclosed.

When must information be disclosed?

Information must be disclosed in the following situations:

- to a majority union in a workplace for the purpose of collective bargaining and consultation

- to a shop steward of a majority union for the purpose of;
  — assisting members with grievances and disciplinary proceedings
  — to monitor the employer's compliance with any workplace related law or agreement
  — to report on an employer's contraventions of any binding workplace related law or agreement.
  — to perform other agreed functions

- to a workplace forum for the purpose of joint decision making and consultation

In addition, an employer must report on it's performance, expected per-

formance and its financial and employment situation at regular meetings with a workplace forum.

Once a year the employer must present a yearly report on the same issues to the workplace forum.

What are the limits on disclosure?

An employer is not obliged to disclose information that:

- — is not relevant to the purpose it is needed for
- — s/he is prevented by any law or court order from revealing
- — is confidential communications with the employer's lawyers
- — is confidential, and would cause substantial harm to the employer or an employee if it was disclosed
- — is private personal information relating to an employee, unless that employee consents.

Clearly there will still be conflicts over what is "relevant", "confidential" and "private personal information". A mechanism is provided to try and sort these conflicts out.

What can be done if a dispute exists about disclosure?

- — The matter can be referred to the CCMA which will try and conciliate an agreement on the matter.
- — If no agreement is reached any party may request arbitration of the dispute.
- — The arbitrator will then decide if the information should be disclosed based on the above factors. Even if the information is confidential but relevant , but may cause substantial harm to an employer or employee, the arbitrator can still decide that the information should nevertheless be disclosed.
- — If information has previously been disclosed to outside parties the arbitrator may refuse to grant disclosure of information for a specified period, as a penalty.

SALE OF BUSINESSES AND INSOLVENCIES — TRANSFERRING CONTRACTS OF EMPLOYMENT

Without the Unfair Labour Practise

Without the unfair labour practise the position of employees would be

very weak when a new owner takes over a business or part of a business without buying the shares in the company.

If the shares in a company are sold, the employees rights against the company are unchanged, even though the owner is completely different. However, sometimes part of a business will be sold to another employer and the part of the business which was sold continues to run as before. In this case the employees are working for a new employer because it was the assets of the first employer or company that were sold , not the shares of the company. In this situation employees can lose the benefits and conditions of service that they had with the first employer.

It is not legally possible to transfer contract of employment without employees agreeing to the transfer so in law the contract of employment with the first employer ended and a new contract was entered into with the new employer.

The unfair labour practise provided some protection against this break in the employment relationship and the cutting of obligations by the new employer

Transfers of "going concerns" under the new LRA

The new Act changes the position.

- Under the new Act, if an employer sells all or part of the business as a working business operation, under normal circumstances, then:
  — the contracts of employees in that operation are automatically transferred to the new owner of that business, and
  — the new owner assumes all the obligations and rights of the old owner in relation to those employees.

This means that the employee's service is unbroken, conditions of employment are unchanged and procedures of the old employer will continue to apply and any outstanding claims against the old employer can be brought against the new one.

- However, if the same business or part of the business is sold in conditions of insolvency or to avoid insolvency, then;
  — the contracts of employees in that operation are automatically transferred to the new owner of that business, but

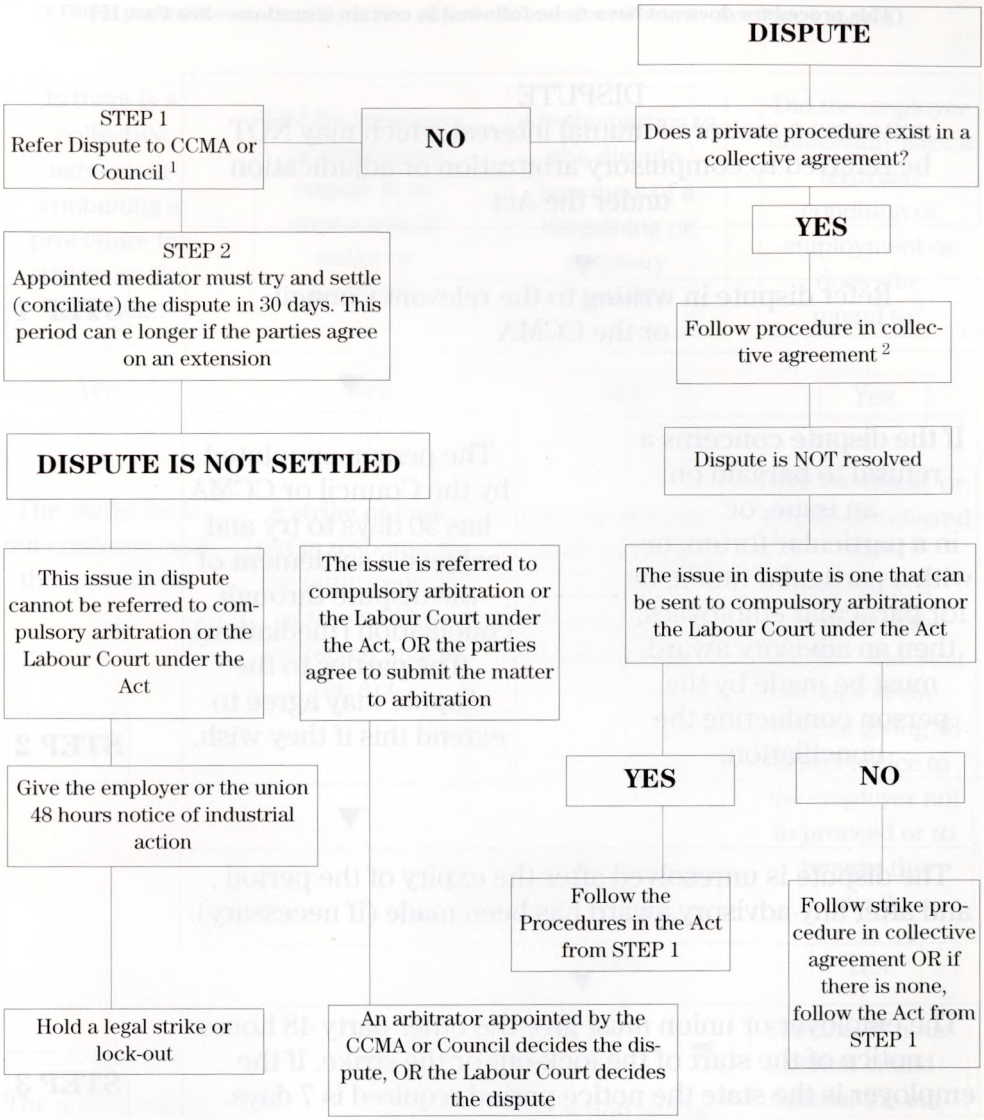
— the new owner does not assume all the obligations and rights of the old owner in relation to those employees that existed at the time of the transfer.

In this case this seems intended to mean that conditions of work should remain the same, but any outstanding claims for things done or not done by the previous employer cannot be raised against the new employer.

- The rules above can be altered by agreement. So, for example, it might be necessary to prevent an insolvency to negotiate changed working conditions with the potential new owner in order to ensure the business and employment continue.

DIAGRAM A

GENERAL OUTLINE OF DISPUTE PROCEDURES IN THE NEW LRA



1 If the dispute arose between parties to a Council then they must follow the procedures of the Council and do not have to comply with the procedures in the Act.

2 If the dispute concerns an unfair dismissal it has to be referred to arbitration in 30 days, so if the internal dispute procedure does not guarantee arbitration is advisable to refer the dispute even while you are waiting for the internal procedures to be completed

PART I

THE ORDINARY PROCEDURE FOR STRIKES AND LOCK-OUTS IN THE NEW LRA

(This procedure does not have to be followed in certain situations - See Part II)

DISPUTE
concerns a matter of mutual interest which may NOT be referred to compulsory arbitration or adjudication under the Act

▼

Refer dispute in writing to the relevant Council or the CCMA — **STEP 1**

▼

If the dispute concerns a refusal to bargain on:
an issue, or
in a particular forum, or
with a particular union, or
for particular employees,
then an advisory award must be made by the person conducting the conciliation.

The person appointed by the Council or CCMA has 30 days to try and achieve a settlement of the dispute through conciliation (mediation). The parties to the dispute may agree to extend this if they wish. — **STEP 2**

▼

The dispute is unresolved after the expiry of the period , and after any advisory award has been made (if necessary).

▼

The employer or union must give the other party 48 hours notice of the start of the lock-out or the strike. If the employer is the state the notice period required is 7 days. — **STEP 3**

▼

Protected Strike or Lock-out may commence after notice expires. — **STEP 4**

PART II

SPECIAL PROCEDURES FOR STRIKES & LOCK-OUTS IN THE NEW LRA

(These procedures only apply in the situations mentioned below - See Part I above)

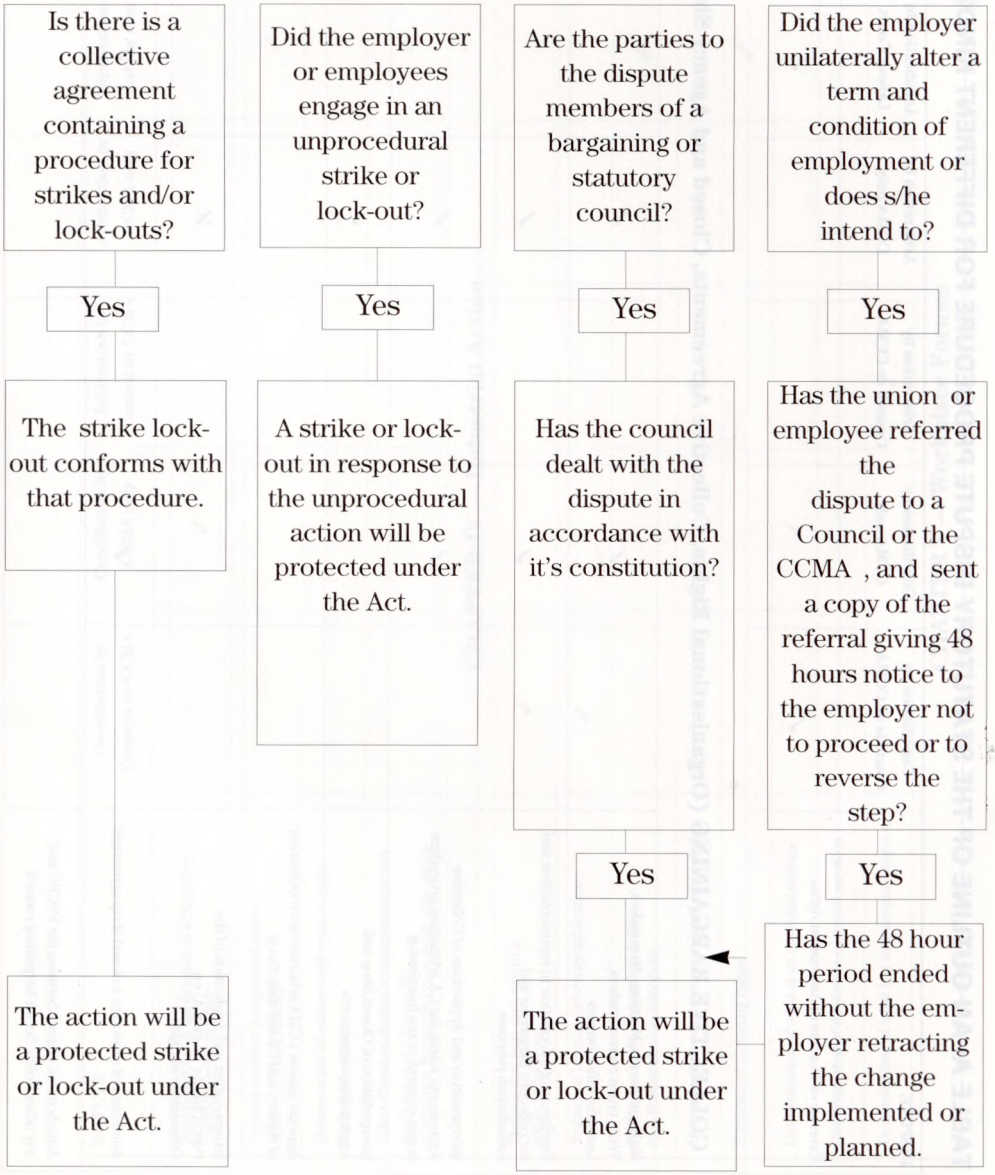


TABLE A: AN OUTLINE OF THE STATUTORY DISPUTE PROCEDURE FOR DIFFERENT KINDS OF DISPUTE

DISPUTE	Conciliation by Councils or CCMA	Conciliation by CCMA only	Arbitration by Council or CCMA	Arbitration by CCMA only	Adjudication by Labour Court	Adjudication by another boy
Exercise of freedom of Association rights	✓				✓	
COLLECTIVE BARGAINING (Organisational Rights, Collective Agreements, Closed and Agency Shops, Councils)						
Rights of Access, Meetings, Stop orders, Trade union representatives, Leave for office bearers		✓		✓		
Disclosure of information to representatives and for collective bargaining and consultation purposes		✓		✓		
Interpretation and Application of Collective Agreements where the CA arbitration procedure is non-existent or not functioning		✓		✓		
Interpretation of Closed Shop and Agency shop agreements				✓		
Appeals against CCMA arbitrations on utilisation of Agency and Closed shop funds						✓
Interpretation and Application of the Part (Chapter III. part A) on Organisational rights				✓		✓
Admission of a union to a closed shop agreement		✓			✓	
Jurisdictional dispute between the PSCBC and any other Public Sector bargaining council						Special Dispute Resolution Committee performs conciliation and arbitration roles

DISPUTE	Conciliation by Councils or CCMA	Conciliation by CCMA only	Arbitration by Council or CCMA	Arbitration by CCMA only	Adjudication by Labour Court	Adjudication by another body
Interpretation or application of a Statutory Council Determination		✓		✓		
Refusal to admit a registered union employer's to a council					✓	
Demarcation of sectors and areas outside the public sector				✓		
Other disputes about the interpretation and application of Chapter III (Collective Bargaining) not dealt with above		✓			✓	
CHAPTER IV — Industrial Action						
Matters that may give rise to a strike or lock-out	✓					
Refusal to bargain (advisory arbitration)	✓					
Strike, Lock-out, Secondary Action and Protest Action interdicts					✓	
Determination of picketting rules if requested				✓		
Exercise of picketing rights					✓	
Determination of what is an essential service		✓				Essential Service Committee
Determination of dispute in essential services						
Determination of what is a maintenance service	✓		✓			ESC
CHAPTER V — Workplace Forums						

DISPUTE	Conciliation by Councils or CCMA	Conciliation by CCMA only	Arbitration by Council or CCMA	Arbitration by CCMA only	Adjudication by Labour Court	Adjudication by another body
If no agreement is achieved on the Workplace Forum constitution		✓ Facilitate agreement		✓		
If no agreement arbitration procedure exists for Joint Decision Making disputes		✓		✓		
Breach of fiduciary duty arising from change in rules of social benefit schemes					✓	
Disclosure of information to Workplace Forum		✓		✓		
Interpretation and application of Chapter not dealt with elsewhere		✓		✓		
CHAPTER VI — Registration of Unions and Employer Organisations						
Appeals against decisions of Registrar					✓	
CHAPTER VII — Dispute Resolution						
Review of arbitration awards of Commission					✓	
Failure to comply with a provision of the Act					✓	
Dispute between a member and registered union organisation over compliance with its constitution					✓	
CHAPTER VIII — Unfair Dismissal						
Automatically unfair dismissals (victimisation, unfair discrimination, etc)	✓				✓	

DISPUTE	Conciliation by Councils or CCMA	Conciliation by CCMA only	Arbitration by Council or CCMA	Arbitration by CCMA only	Adjudication by Labour Court	Adjudication by another body
Dismissals for Misconduct, Incapacity, Constructive Dismissal or unknown reason	✓		✓			
Operational Reasons, strikes etc	✓				✓	
Entitlement to Minimum statutory Severance pay	✓		✓			
RESIDUAL UNFAIR LABOUR PRACTICES						
Unfair suspension or disciplinary action	✓		✓			
Unfair conduct of employer relating to promotion, training or provision of benefits to employee	✓		✓			
Failure to re-employ or reinstate an employee in terms of an agreement	✓		✓			
Unfair discrimination on arbitrary grounds whether direct or indirect	✓				✓	