SACTWU

Southern African Clothing & Textile Workers Union

Education Department
Industria House
350 Victoria Rd
Salt River, 7925

P.O. Box 194
Salt River, 7925

Tel: (021) - 47 4570
Fax: (021) - 47 4593

MEMO

TO: ALL ORGANISERS
FM: EDUCATION DEPARTMENT
DATE: 2 FEBRUARY 1995

Dear comrades

RE: NEW LRA

The new draft LRA Bill is to be released today.

It will be in the form of a draft for further tri-partite negotations between government, business and labour. These negotiations will take place under the Labour Market Chamber of NEDLAC.

For your information, herewith a copy of the explanatory memorandum detailing the main contents of the draft LRA.

We will set up a briefing session for next week.

Regards

Andre Kriel
(National Education Officer)

Strictly Confidential

EXPLANATORY MEMORANDUM

ON

DRAFT NEGOTIATING DOCUMENT

(THE NEW LABOUR RELATIONS ACT)

Prepared by the Ministerial Legal Task Team

December 1994

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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 Organisation (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 is accessible, expeditious 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;

- provide for the decriminalization of labour legislation.

3. 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).

4. 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.

5. 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.

6. The Task Team has produced a negotiating document in Bill form and 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 INTENDED PROCESS FOR NEGOTIATING A NEW LABOUR RELATIONS DISPENSATION

1. The negotiating document will be presented to all stakeholders in January 1995. The stakeholders will include representatives from the following bodies: the NMC, the National Economic Forum, the Public Service Bargaining Council, the Education Labour Relations Council, the Agricultural Sub-committee of the NMC, as well as the Standing Committees on Labour, the Public Service and Education, and the press.

2. The document will be published in early February 1995, inviting comment. Comments will have to be submitted by the end of March 1995. The comments, in an edited form, will be submitted to the Labour Market Chamber of the National Economic Development and Labour Council (NEDLAC), the Public Service Bargaining Forum and the Education Labour Relations Council for their consideration.

3. The Labour Market Chamber of NEDLAC, the Public Service Bargaining Council and the Education Labour Relations Council will have until the end of May 1995 to reach consensus on a draft Bill to be submitted to Cabinet towards the end of May 1995.

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 in June 1995.

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 labour law;
- 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;
- the fact that the present LRA does not take into account the objects 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, namely, domestic workers, university teaching staff, parliamentary employees etc. A single statute that accommodates the unique features of the different sectors of the economy is thus imperative.

The need for an overall framework of labour law

There is no coherent integration of existing labour laws. The absence of an integrated approach is particularly problematic at the interface of collective and individual labour relations. The introduction of the wide definition of the unfair labour practice in 1979 spawned an individual employment law jurisprudence in a statute whose primary function is to regulate collective labour relations.

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 does regulate unfair dismissal. This is so because a detailed body of unfair dismissal law 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. Yet the Minister and registrar, by exercising the discretion conferred on them regarding the representativeness of councils for the purpose of registration and the extension of agreements in such a way as to make the requirements for registration more onerous, have encouraged a shift in policy to the decentralization of collective bargaining. Despite the strong textual commitment to representativeness as a precondition for bargaining, presiding officers of the Industrial Court have developed a jurisprudence requiring an employer to bargain with all unions irrespective of the degree of support they might command.

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 impossible 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.

The draft Bill seeks to achieve certainty 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 adopts, 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 increase 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 unnecessary 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 Mediation and Arbitration Commission (MAC), 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 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 matters which are more appropriately the subject of bargaining 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 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 mediation of disputes 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 explicitly 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 Constitution. The Task Team has ensured 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 avoids imposing rigidities in the labour market.

The draft Bill has been drawn up with due regard to the different circumstances and needs of small business. It seeks to accommodate its special needs 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;

- the simplified style of the draft Bill and the improved certainty of its provisions will make the law more accessible to users.

SUMMARY: THE MAIN FEATURES OF THE DRAFT BILL

- A single statute applying to all sectors, subject to the general retention of existing arrangements in the public sector, educational and agricultural sectors in the form of statutory bargaining councils or collective agreements.
- A simplified system of registration that conforms to international standards.
- The statutory recognition and regulation of rights of freedom of association.
- The establishment of workplace forums to promote co-operative relationships in the workplace by the recognition and regulation of rights to information, consultation and joint decision-making.
- The right to strike and recourse to the lock-out.
- The certification of unfair dismissal law and the provision of inexpensive and effective dispute resolution mechanisms.
- The establishment of an independent statutory agency with wide powers to promote and engage in conciliation and settlement of disputes.
- The recognition of mediation and arbitration as an effective means of dispute resolution.
- The reform of the labour courts to provide speedy access to the courts and a more certain jurisprudence.

CHAPTER I

APPLICATION AND SCOPE

PROBLEMS OF THE PRESENT SYSTEM

The definition of "employee" in the LRA is too broad – it has been argued that it may even include independent contractors.

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;

- 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 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 and is in keeping with international practice. A justifiable argument can be made for preventing members in these services from belonging to trade unions that have political affiliations or that comprise members of the services together with other employees.

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 Convention 87 of 1948 protecting 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.

Like the LRA, the ELRA, PSLRA and ALA all require amendment to give effect to the Constitution and the RDP and to comply with the ILO's standards.

The draft Bill accommodates the State's need for different treatment by–

- statutorily entrenching the existing Public Service Bargaining Council established in terms of the PSLRA and the Education Labour Relations Council established in terms of the ELRA;

- preserving the structures, constitutions and procedures of the PSLRA and ELRA until amended by the parties to the Public Service Bargaining Council and the Education Labour Relations Council. In other words, it is left to the State as employer and the relevant employee organizations to design, through the mechanism of collective agreements, their own framework to regulate their collective labour relations;

- making provision for the mediation and conciliation of disputes through a tripartite body that is independent of the State and accountable to Parliament. This independence is necessary for both the private and the public sectors. If the conciliation service is part of the State, its intervention in private sector disputes

politicizes disputes and its intervention in public sector disputes raises the problem of one department of State interfering in the affairs of another.

SUMMARY OF CHAPTER I PROVISIONS

- A revised definition of "employee" excludes independent contractors but includes all contracts of employment, whatever form they might assume.

- 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 and the RDP, in conformity with the Constitution and so as to conform most closely with the public international law obligations of the Republic.

CHAPTER II

REGISTRATION OF TRADE UNIONS AND EMPLOYERS' ORGANIZATIONS

PROBLEMS OF 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 not 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 the ILO's 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 SOLUTION: A SIMPLE REGISTRATION PROCEDURE AND CERTIFICATION OF REPRESENTATIVENESS

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; the 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. A registered trade union or employers' organization is a body corporate with limited liability for its members, office-bearers and officials. 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;
- may apply to MAC for the establishment of a workplace forum in terms of Chapter V.

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 II prescribes certain matters that must be dealt with in the constitution of a trade union should it wish to be registered. This list closely resembles that contained in the existing LRA and withstood the scrutiny of the FFCC on the basis that there was no infringement of a trade union's right to draw up its constitution and rules without interference from the authorities. The draft Bill introduces the requirement that a trade union's constitution must contain a provision 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 in circumstances where no ballot was held prior to the strike or where a ballot was held but a majority of the members who voted in the ballot did not vote in favour of the strike. This provision has been inserted here because the draft Bill no longer requires a trade union to hold a ballot prior to engaging in lawful, protected industrial action. In other words, the draft Bill protects a member from undemocratic practices.

The proposed system of registration is thus simple and quick and complies with the right to freedom of association as guaranteed in our 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.

Certification of representativeness

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 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 as representing a defined proportion of employees.

SUMMARY OF CHAPTER II PROVISIONS

- Registration is not compulsory.
- Registered trade unions and employers' organizations are bodies corporate with limited liability.
- Trade unions and employers' organizations are prohibited from discriminating on grounds of race or gender.
- The draft Bill prescribes a list of matters to be dealt with in the constitutions of trade unions and employers' organizations.
- Registered trade unions and employers' organizations have a duty to keep proper books of account and records and to furnish these to the registrar.
- In order to register, 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.
- In the absence of agreement on levels of representativeness, MAC will establish that level.
- 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 III

FREEDOM OF ASSOCIATION

PROBLEMS OF THE PRESENT SYSTEM

Although the current LRA protects freedom of association rights for employees, it does not do so in a way that it is sufficiently comprehensive. The fact that victimization is a criminal offence and punishable through the criminal courts is also undesirable.

THE BILL'S 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 Right to Organize Convention 87 of 1948. Employees, persons seeking employment, employers, trade unions and employers' organizations have the right to freedom of association as guaranteed in section 27(2) of the new Constitution. In this way the draft Bill gives effect to the constitutional right 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 to 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 MAC 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 and hold office in the organization. Protection against victimization is ensured by a provision more extensive than the existing section 78 of the 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, affiliate to and participate in the affairs of international organizations and to organize and bargain collectively are guaranteed.

The draft Bill provides that, after attempted mediation by MAC, the Labour Court has jurisdiction in the event of any dispute concerning the interpretation and application of any of the above rights or in the case where an infringement is alleged.

SUMMARY OF CHAPTER III 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.
- All forms of victimization are prohibited.
- Contracts in breach of these protections are null and void.
- Every employer has the right to form, join and take part in the activities of an employers' organization and to hold office.
- 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.
- The draft Bill provides for the resolution of disputes by the Labour Court after attempted mediation by MAC.
- The onus is on the defendant to show that his or her actions are not in breach of these rights.

CHAPTER IV

COLLECTIVE BARGAINING

PROBLEMS OF 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 industry-level bargaining in the form of industrial councils. The shift in Ministerial policy in the 1980s towards decentralized bargaining and the unfair labour practice jurisprudence of the Industrial Court on collective bargaining undermined one of the principal purposes of the LRA. 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 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 separate tradition of bargaining at the level of the workplace – a development that the LRA did not address except through the resort to the unfair labour practice jurisdiction of the Industrial Court. The result of these developments is that there is no proper statutory framework which can accommodate and facilitate an 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;
- the enforcement of such agreements by criminal prosecution.

THE BILL'S SOLUTION: A MODEL FOR COLLECTIVE BARGAINING

Perhaps the most noticeable 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, from a position of strength, to determine their own arrangements.

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 bargaining topics. On other occasions, 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 power they are capable of exercising or their needs. A number of determinations by the Industrial Court has had what is perhaps a more pernicious effect: the court, in its wisdom, has intervened in order to undermine 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 those agreements. This consideration is similarly the main failing of the statutory compulsion model, which does not admit even the limited flexibility of judicial intervention.

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 employer organizations and by enacting a right to strike. These rights and the speedy and inexpensive remedy of arbitration by which they are to be enforced extend significant powers to trade unions. In addition, the draft Bill promotes the institutions of mediation and recommendatory arbitration. Parties in dispute will be able to call on the professional conciliatory skills provided by these institutions to help them reach their own agreements.

The Task Team considered a number of issues relating to the Constitution, in particular, the right to organize and bargain collectively guaranteed by section 27(3). The effect

of that provision, in the view of the Task Team, is that, except as against the State, it is not constitutionally required that Parliament create a legally enforceable right to bargain. The provisions of ILO Convention 98 on the Application of the Principles of the Right to Organize and to Bargain Collectively provide a useful reference. While the Convention explicitly refers to a "right to bargain", it requires only that measures be taken to promote and encourage voluntary negotiation between employers or employers' organizations and workers' organizations.

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 be best met by a co-ordinated response forged by agreement between organized business and labour.

Organizational Rights

A limited right to check-off aside, the LRA does not define or confer organizational rights on trade unions or employer organizations. 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;
- the right to information for collective bargaining purposes.

Not one of these rights is 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. All of the organizational rights guaranteed by the draft Bill are further qualified by thresholds relating to representativeness. The Task Team elected not to stipulate what these should be: this is a matter for the bargaining parties to determine. The fact that a threshold is indicated does not imply that it is necessary or appropriate for the exercise of the right concerned, nor should it be construed as an identical percentage to be applied in every case. The Team considered that some rights might require a lower threshold than others before they accrued to a union. It is for the social partners to decide whether a strictly majoritarian system ought to be adopted or whether any union should be entitled to the organizational 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. In other words, the choice is between the allcomers system and majoritarianism – a decision the Task Team has left to negotiations between the social partners.

The draft Bill does, however, provide for a mixture of both systems in 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 exercise of organizational rights are to be determined by speedy arbitration, after reference of the dispute to MAC for mediation. 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, 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 the reduction of costs in the enforcement of agreements. An analysis of the costs of criminal enforcement of labour legislation reveals that the State spends 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 interim Constitution, however, endorses freedom of association without resolving the vexed question of whether such a right includes the right not to associate. The difficulties of 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 insulated from constitutional review in terms of section 33(5) of the Constitution) and that the existing industrial council agreements that 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 many such union security arrangements in existence 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 proposes that agency shop agreements should 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;

- the employees who are not members of the trade union are not compelled to belong to the union;

- the deduction of an agency fee from non-members is not more than the membership fee deducted from the wages of members;

- the moneys collected from non-members is paid into a fund controlled jointly by the employer and the trade union to pay the union's collective bargaining expenses and for other non-political purposes.

These provisions are based on agreements between the National Union of Mineworkers and various mining houses and take into account the standard constitutional attacks on union security arrangements.

Bargaining Councils

The draft Bill gives effect to the RDP and the government's commitment to industry-level bargaining. This has meant that the draft Bill retains, in a broad 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 private sector. It does, however, introduce a number of important reforms. The most significant of these include–

- the capacity of councils to straddle the public and private sectors;

- the requirement that small business interests be represented on the councils;

- an annual review of representativeness;

- a new rule for the extension of bargaining council agreements 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.

SUMMARY OF CHAPTER IV PROVISIONS

Organizational Rights

- Representative trade unions have a right of access to employers' premises for recruiting and other trade union purposes.
- The draft Bill guarantees the right of representative trade unions to hold meetings at employers' premises outside of working hours.
- It also guarantees the right of representative trade unions to conduct a ballot at employers' premises.
- These rights are subject to reasonable and necessary conditions to safeguard life or property or to prevent undue disruption of work.
- The draft Bill guarantees the right of representative trade unions to stop-order facilities.
- It provides for the right to elect trade union representatives to represent employees in grievance and disciplinary proceedings and to monitor compliance with the law.
- It further provides for the right of trade union representatives to reasonable time off to take part in trade union activities.
- The right of representative trade unions to information for collective bargaining purposes is guaranteed subject to reasonable limitations on the duty to disclose such information.
- Statutory thresholds of representativeness can be varied by collective agreement.
- Disputes concerning infringement of these rights may be referred to MAC for attempted mediation.
- Unresolved disputes may be referred to speedy arbitration for final determination.

Collective Agreements

- A collective agreement binds the parties and their members insofar as the agreement regulates terms and conditions of employment.
- The agreement becomes binding 30 days after signature unless otherwise provided.

- An agreement for an indefinite period can be terminated on reasonable notice.
- Failure to comply with provisions of the agreement is not a criminal offence.
- Every collective agreement is required to provide for the determination by arbitration of disputes concerning its application and interpretation.
- In the absence of any such provision, disputes concerning interpretation and application of the agreement are resolved by arbitration by MAC.
- 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. Moneys received from non-members shall be placed in a joint fund and used only to defray collective bargaining, workplace forum and other agreed and authorized expenses.

Bargaining Councils

- Only 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.
- It also provides for a national bargaining council for the education sector.
- A bargaining council can apply for registration. 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.
- NEDLAC and other interested parties can object to registration on the basis that the council's scope is not in keeping with criteria and industries defined by NEDLAC.
- Objections to registration can be made on the basis that 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.
- It shall provide for the resolution of certain disputes by mediation and arbitration within the council's registered scope.
- The representativeness of a bargaining council shall be reviewed annually.
- Every registered bargaining council is a body corporate.
- Its functions include the conclusion 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 decisions on which matter 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 of Labour has the power to decide whether or not to extend an agreement.
- 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 appeal to the Labour Court.
- 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.

- A council's registration can be cancelled on stipulated grounds.
- Demarcation disputes are to be resolved by arbitration under the auspices of MAC.

CHAPTER V

WORKPLACE FORUMS

PROBLEMS OF 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 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 is 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.

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;
- 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. Today, in central and Eastern Europe, there is a general trend towards the creation of forums with rights to information and consultation.

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, or 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 of 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 certain proposals (similarly to be defined by the new Act) 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 and to which process they should be subject.

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. These exempted categories have been criticized by international experts as unduly limiting the right to information, but, in the context of low-trust labour relations, the Task Team considers them necessary. Recipients of the information are bound by the confidentiality provision in Chapter IX. Anyone who breaches the provision is guilty of a criminal offence carrying a serious sanction. 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 MAC for attempted mediation, and, if the dispute remains unresolved, it must be referred for final and binding arbitration. Arbitration of these disputes is preferred to their 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 mention–

- 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 MAC 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;

- 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 MAC.
- Applications for their establishment must be made by representative trade unions.
- 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.
- MAC shall conduct the first election for a workplace forum.
- Subsequent elections shall be conducted by an accredited agency.
- Candidates for election must be nominated by a registered trade union or in terms of a petition signed by a fixed percentage of employees.
- 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.
- 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 matters to be defined or agreed, 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 matters to be defined or agreed, parties are given the capacity to decide on matters which are to be the subject of joint decision-making. 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 MAC for mediation.
- Parties may refer such unresolved disputes to arbitration.

CHAPTER VI

INDUSTRIAL ACTION

PROBLEMS OF THE PRESENT SYSTEM

Our existing law does not reflect the new commitment to the right to strike and the guarantee of the recourse to lock-out in section 27 of our Constitution. Although it protects strikes that are in conformity with the LRA from civil legal proceedings, the byzantine procedures required by the Act render this protection largely theoretical. There is no specific 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 that ought to be relevant in deciding whether or not to protect strikers. Since the beginning, however, these factors have been uncertain and unclear, with the courts progressively developing a 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 facts 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 petition winds its way through the courts. Employers, at great cost, may have to reinstate a workforce years after its replacement by another. An example is the BWAWU v Prestige Hotels c.c t/a Blue Water Hotel case (1993) 14 ILJ 1993 (LAC) concerning the dismissal of approximately 70 strikers for engaging in a legal strike in 1989. Since then, they have "striven to be reinstated and the history of their legal process has been long, checkered and unfortunate, culminating in a hearing before this court". Thus, nearly five years later, the strikers were reinstated with approximately two-and-a-half years' back-pay. The employer might never have fired its workforce if it had had any idea as to 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 creation 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 right to strike, insofar as it is recognized and regulated by the LRA, the PSLRA and the ELRA, does not pass constitutional muster. It also offends the findings and recommendations of the FFCC of the ILO. Furthermore, it falls foul of the ILO Constitution and the manner in which the Constitution has been interpreted by the Committee on Freedom of Association. The major failures of the LRA 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.

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. Institutionally, our conciliation machinery settles 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 figures of over 70 per cent. Moreover, the present system of housing conciliation and mediation capacity within the Department of Labour means that what limited resources are available are not capable of being used in disputes in the public service. A major innovation proposed in the draft Bill is the establishment of an independent mediation and arbitration service, called MAC. 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 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, however, and go well beyond the terms of the ILO definition. The PSLRA, for instance, apart from specifying certain services as essential, also includes as essential support services. 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 or sabotage which endangers the safety of the population.

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 our law provides for compulsory arbitration, the procedures in both Acts for such arbitration are time consuming and cumbersome, thus detracting from the ILO requirement that arbitration should be "adequate" and "speedy".

THE BILL'S SOLUTION: MEDIATION OF DISPUTES, SIMPLE PROCEDURES, AND CERTAINTY

The draft Bill proposes a simple procedure for a protected strike or lock-out. In each case all that is required is that the dispute be referred to a bargaining council if there is one, or referred to mediation in terms of an agreement, or to MAC. In each case steps will be taken to settle the dispute within a period of 30 days. In the event that the mediator is unable to settle the dispute within the 30-day period or any further period that may be agreed to by the parties, the trade union is entitled to engage in a protected strike on 48 hours' written notice to the employer. The employer may institute a protected lock-out on giving the same amount of written notice.

There is a special procedure in respect of disputes over a refusal to bargain. As has been outlined in Chapter IV, the Task Team proposes that there should no longer be a 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 mediated and referred to arbitration for a recommendation before the resort to industrial action. The intervention of mediators has demonstrated, in a number of instances, that these kinds of disputes can be resolved without the resort to industrial action.

The limits on the right to strike and the recourse to lock-out are standard. Strikes and lock-outs are not protected 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 dealing with the inadequacy of our legislation regarding strikes in essential services, the Task Team has moved away from the current position in the LRA and the PSLRA which specifies the essential services in which strikes are prohibited. Instead, the Team proposes that an Essential Services Committee be established comprising persons with specialist knowledge of labour relations or labour law. The functions of the committee are to conduct investigations in public as to whether or not a service ought to be declared an essential service. After public hearings the committee will determine certain services to be essential. No strikes or lock-outs will be permitted in such services. Instead, the disputes that might arise in such services shall 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 the service is not essential at the commencement of a strike but may become so days or weeks into a strike or lock-out. A strike on the part of refuse collectors might not constitute a health hazard for the first week or two of a strike but may do so thereafter. Again, if an

employer seeks such an *ad hoc* determination and the service becomes an essential service, the strike will be prohibited and the issue in dispute will be referred to compulsory arbitration.

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 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 Effect of a Strike or a Lock-out in Conformity with the Act

A strike or a lock-out that complies with the requirements of the Act does not constitute a delict. Although there is authority in our law that a strike does not constitute a delict, the specific inclusion of this provision in the draft Bill is to put this question beyond doubt. The consequence is that an employer cannot interdict or institute a claim for damages against its employees or their trade union for participation in a strike.

Strikes and lock-outs which conform to the draft Bill do not constitute a breach of contract. Thus an employer cannot take any legal action against employees or a trade union for their participation in a strike. The converse is also true. Employees cannot sue their employer for wages during a lock-out in conformity with the draft Bill. Provision 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.

Following 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 in conformity with the Act, or who participates in conduct in furtherance of a strike or lock-out. This indemnity does not apply where the act committed is itself a crime.

Strikes and lock-outs that are not in conformity with the draft Bill are prohibited. 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 premeditated, 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 automatic, it still has to be for a fair reason and in compliance with a fair procedure.

Protest Action

The FFCC regarded the 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 Committee on Freedom of Association of the ILO 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 can be protected only if it is authorized by a registered trade union or federation, notice has been served on NEDLAC at least five 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, not to leave it open-ended.

SUMMARY OF CHAPTER VI PROVISIONS

- The draft Bill grants employees the right to strike and employers recourse to the lock-out provided the dispute has been referred to a bargaining council, mediation in terms of an agreement, or to MAC, and 48 hours' written notice has been given.

- Disputes over a refusal to bargain must be referred to arbitration for a recommendation before the resort to industrial action.

- Strikes and lock-outs are prohibited if the issue giving rise to the action is regulated by a collective agreement or wage determination, if such action is prohibited by a collective agreement, or if the issue must be referred to arbitration or the Labour Court.

- Strikes and lock-outs in conformity with the draft Bill's provisions are not in breach of contract and do not constitute a delict.

- The indemnity against civil legal proceedings does not apply in the case of the commission of a crime.

- Where a strike or lock-out does not comply with the provisions of the draft Bill, the Labour Court has exclusive jurisdiction to interdict such action or to order compensation for any loss arising from the action.

- Employees participating in a strike in conformity with the draft Bill's provisions may not be dismissed. This protection falls away where the procedures are not followed.

- An employee who disputes the fairness of a dismissal may refer the matter to MAC. If MAC fails to resolve the dispute, the employee may refer it to the Labour Court.

- The draft Bill prohibits strikes and lock-outs in essential services.

- An Essential Service Committee appointed by MAC shall, after hearing representations, determine which services are essential. It will also determine disputes on whether or not a service is essential.

- The committee may validate collective agreements providing for the maintenance of a minimum service in an essential service during industrial action.

- Disputes in essential services shall be referred to compulsory arbitration. arbitration.

- The draft Bill protects the right of employees to engage in protest action in

defence of their socio-economic interests provided this is in conformity with specified requirements.

- Employees engaging in protest action in conformity with the draft Bill's provisions do not commit a delict or breach of contract.

- The Labour Court, which has exclusive jurisdiction in respect of protest action, may grant an interdict preventing such action where it fails to conform to the draft Bill's provisions.

- After taking into account specified criteria, the Court may grant a declaratory order lifting the protection attaching to protest action.

CHAPTER VII

THE REGULATION AND ADJUDICATION OF UNFAIR DISMISSAL

PROBLEMS OF THE PRESENT SYSTEM

The LRA does not explicitly deal with unfair dismissal. The South African 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, the 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 resources to deal effectively with the several thousand dismissal cases referred to it annually. In the Pretoria-Witwatersrand-Vereeniging (PWV) area, 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 has been 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 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 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;

- 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;

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 VII 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 may be referred to MAC for attempted mediation.
- Unresolved disputes concerning dismissal for misconduct or incapacity 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, if the employee's conduct contributed materially to the dismissal and/or if the reinstatement or re-employment will render the employment relationship inappropriate or 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 must 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, a maximum of 24 months' wages shall be awarded.

Prior to taking a decision to dismiss an employee 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 MAC for attempted mediation.

Unresolved disputes 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 VIII

DISPUTE SETTLEMENT

PROBLEMS OF THE PRESENT SYSTEM

Under the LRA, all disputes must be processed through an industrial council that has jurisdiction over the dispute, or where there is no council, through a conciliation board established by the Department of Labour. Statistics published by the Department demonstrate, as users well know, that the system does not work. Less than 30 per cent of all disputes referred to industrial councils are settled and only some 20 per cent of established conciliation boards result in settlement. The failure of the statutory structures to resolve a majority of disputes accounts for the excessive workload of the Industrial Court which is required to determine in excess of 6 000 dismissal cases annually. These figures compare poorly with those of many other countries where approximately two-thirds of disputes of right are settled during the conciliation phase.

The statutory conciliation procedures are lengthy and result in unacceptable delays for parties in dispute. The procedures are also complex and technical. Successful navigation through them requires a sophistication and expertise beyond the reach of most individuals and small business. Errors made in initiating the conciliation procedures are often fatal to an applicant's claim for relief in the Industrial Court. Although the scope for legal and technical objections has been reduced in recent years, it has not been entirely eradicated. Particular problems relate to the issue of the terms of reference of a conciliation board, the signature of application forms, the submission of forms to the wrong Department of Labour office and the like. These jurisdictional concerns make parties reliant on lawyers, which is unnecessary, expensive and often detrimental to the conciliation process.

Another problem arises because of the failure of the LRA to accord any role to dispute procedures negotiated in terms of private agreements – many disputes are thus the subject of both private and statutory conciliation, which causes a duplication of activities and expense.

The reasons for the poor settlement rate of the statutory institutions of conciliation relate, in many instances, to a lack of resources and training within these institutions. Persons appointed to chair conciliation boards have neither the skills nor the status actively to pursue conciliation. The Department's staff are required to spend a disproportionate amount of time in bureaucratic administration of the system.

The Labour Courts

Problems experienced with the backlog of cases in the Industrial Court and delays occasioned by a system of appeals to the LAC and ultimately the Appellate Division are

fully dealt with in the chapter dealing with the adjudication of unfair dismissal disputes.

There are additional problems concerning the structure and composition of our courts.

The Industrial Court is positioned outside the hierarchy of judicial courts. Given its lack of status, it does not offer a respected career path for its members or administrative staff. Its members have no security of tenure and no statutory protection, and yet are required to operate independently. The remuneration of members bears no relation to market-related packages. Not surprisingly, it has failed to attract to its ranks the necessary number of persons of calibre. Being attached to the Department of Manpower (now Labour), the Industrial Court has previously been susceptible to manipulation and domination by the Department, whether by way of financial constraints, denial of facilities or otherwise.

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 can be interdicted in either the Industrial Court or the Supreme Court;
- civil proceedings may be brought in respect of any breach of contract, breach of statutory duty or delict in relation to unlawful industrial action in the civil courts;
- appeals from decisions of the registrar are ultimately decided by the Supreme Court;
- compliance with any binding collective agreement, court order, etc is compelled by the institution of criminal proceedings;
- the Appellate Division is empowered, by way of a special case, to interpret the LRA for the future guidance of all courts;
- failure to comply with the LRA often constitutes a criminal offence, which in almost all instances would be prosecuted in the Magistrates' Courts.

THE BILL'S SOLUTION: A MEDIATION AND ARBITRATION COMMISSION, PRIVATE PROCEDURES, ARBITRATION, AND A NEW LABOUR COURT

Mediation and Arbitration Commission

The draft Bill establishes MAC to promote collective bargaining, the prevention and resolution of disputes, the conclusion of privately agreed dispute procedures and the improvement of labour relations. Its functions include providing mediation and arbitration

facilities, training to persons appointed to statutory dispute-resolution structures and the compilation and publication of information and statistics on its activities. It may also, of its own accord or in response to a request, give advice to parties concerning disciplinary procedures, procedures in relation to dismissals and for preventing and resolving disputes and grievances and other matters dealt with in the draft Bill. Another important feature of MAC is that it is empowered to accredit private agencies for the purpose of conducting mediation and arbitration in terms of the statute.

The draft Bill provides for MAC to be financed by moneys allocated from public funds by the Minister of Labour, moneys appropriated by Parliament, income derived by MAC from its investment and deposit of surplus moneys and fees received by it for certain functions exercised in terms of the draft Bill. Since many of MAC's functions were previously dealt with by the Department of Labour, it is envisaged that the funds allocated to the Department for these purposes will be re-allocated to MAC.

Although funded by the State, MAC is independent of it. Its structure and operations are similar to the United Kingdom's Advisory, Conciliation and Arbitration Service (ACAS) which has an excellent track record for resolving disputes speedily and effectively.

MAC is designed as a one-stop shop for resolving disputes. It will attempt to resolve the dispute by conciliation, mediating where appropriate. But MAC is not obliged to provide mediation facilities for the parties and will not impose mediation on unwilling parties. However, it is envisaged that it will seek actively to engage the parties in an attempt to resolve disputes so as to avoid litigation or industrial action.

The draft Bill provides that all discussions and disclosures concerning mediation are confidential and off the record. MAC's mediators will be well-trained, professional, and subject to a code of conduct. The mediation panel will be made up of full- and part-time members. This will significantly increase the number of mediators available to MAC. Provision is made for review of mediators' performance and the removal from office of a mediator 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. The mediation process is further bolstered by a procedure in terms of which agreements concluded after mediation can be enforced through the Labour Court.

Promptness is built into the draft Bill's model of dispute settlement. Although there is a statutory requirement to refer certain disputes to MAC within a stipulated period of time, the parties are not required to wait for the lapse of a prescribed period before proceeding from MAC to arbitration, the Labour Court or industrial action.

The draft Bill is designed in a way so as to ensure that no legal impediment attaches to a party's mistakes in invoking the conciliation procedures. The statutory pre-strike procedures have also been streamlined and simplified. (These are dealt with in further detail in the chapter dealing with industrial action).

MAC's administrators will be drawn from the Department of Labour's conciliation branch

and other sources. Training of MAC's staff is given priority to ensure they are able to direct parties to the correct processes and forums. They will have a career path into MAC's arbitration and mediation panels.

Arbitration

The draft Bill provides for arbitration to resolve disputes concerning the interpretation and application of certain of its provisions and disputes concerning unfair dismissal and severance pay. Disputes concerning essential services are also resolved by arbitration. Arbitration is conducted under the auspices of MAC. A panel of full- and part-time arbitrators will be appointed on the basis of their knowledge and experience of labour law and industrial relations. The arbitrator is statutorily required to avoid formality and to give an award within 14 days. The award must be recorded in writing, but the arbitrator is not obliged to give reasons for his or her decision unless these are specifically requested by either party. Arbitration proceedings in respect of essential services are more formal and regulated in a more detailed fashion by the draft Bill.

Arbitration proceedings have been deliberately severed from the structures of the courts. MAC 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 both in relation to 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 also an important psychological reason for clearly separating arbitration from court processes. This constitutes a clear signal that a different and new process is contemplated and intended. If there is any price to be paid for this separation, then it is in the area of a career path for arbitrators. This, however, must be a secondary objective to those set out above. To the extent that parties can choose their arbitrator, the system provides incentives for arbitrators to perform professionally. Although there may not be a career path into the Labour Court for arbitrators, there will most certainly be a career path for them into the private agencies.

Concerns about the workload of MAC's arbitration panel and the consequent size of the panel should not be exaggerated. Private arbitration proceedings are well established. It is likely that the organized sector will continue to use arbitration facilities offered by private agencies. Moreover, there is in existence a trained body of arbitrators that is under utilized. These people could ideally be appointed to MAC's panel of arbitrators. The proposed system of conciliation by MAC prior to arbitration will also act as an effective filter and reduce dramatically 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 MAC of a significant percentage of disputes.

Of particular significance is the provision in Chapter IV of the draft Bill which encourages bargaining councils to establish agencies accredited by MAC to conciliate and arbitrate disputes arising within the council's scope. The concept of "industrial council courts" is one pioneered by Professor Adolph Landman (President of the Industrial Court) and one which the Task Team considers to be an integral part of the system of self-regulation in industry and encouraged by the draft Bill.

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 reference (which could be as specified in the statute) and a portion of the costs of the procedure may be subsidized by MAC;

- a dispute procedure of a bargaining council, which may itself be an accredited agency for the purposes of dispute resolution and arbitrations in disputes concerning dismissal for misconduct or incapacity, or which may involve 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 MAC;

- a dispute procedure under the auspices of MAC, that is, the procedure is compulsory, the parties have no choice as regards the mediator/arbitrator, 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 State President in consultation with NEDLAC.

The Labour Court performs a variety of functions, both as a court of appeal and a court of first instance.

The emphasis in the draft Bill on mediation as a 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 mediation 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.

SUMMARY OF CHAPTER VIII PROVISIONS

- The chapter provides for the establishment of MAC, an independent statutory body.
- MAC's main function is to engage actively in the resolution of industrial disputes so as to avoid litigation and industrial action.
- Other functions of MAC include–
  - providing advice;
  - providing assistance;
  - training;
  - accrediting private agencies and bargaining councils;
  - assisting in the establishment and election of workplace forums;
  - publishing of codes of good practice;
  - conducting and initiating research.
- The governing body of MAC will be tripartite in nature.
- Mediation under the auspices of MAC will be conducted by a mediator from a mediation panel comprising trained and professional mediators.
- Arbitrations under the auspices of MAC will be conducted by a member of an arbitration panel comprising trained and professional arbitrators. Arbitrations to be conducted by MAC include–
  - recommendatory arbitration;
  - arbitration of unfair dismissal disputes;
  - interest arbitrations in essential services;
  - arbitration concerning organizational and other rights conferred by the Act.
- By agreement, parties to a dispute may refer a dispute to the Labour Court for adjudication.
- 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.
- The Labour Court has powers to exercise jurisdiction as both a court of first instance and a court of review.
- Decisions of the Labour Court may be served and executed as if they were decisions of the Supreme Court.
- Appeals from the Labour Court will be heard by the LAC, which is to be a specialist appeal court.
- The Judge-President of the Labour Court has the discretion to refer important matters directly to the LAC.

SCHEDULE II

TRANSITIONAL PROVISIONS

The transitional provisions are contained in Schedule 2 of the draft Bill. The intention is that as new laws are introduced or particular agreements are concluded, the provisions will ultimately fall away.

Two issues warrant particular mention. The first is the enactment of a residual unfair labour practice definition, intended to apply only to unfair acts or omissions as between employers and individual employees.

This section is intended to deal with disputes, other than dismissal disputes (separately regulated by Chapter VII), which individual employees may have been entitled to raise under the definition of unfair labour practice contained in the LRA.

The equality provision enacted here is intended as no more than an interim measure pending more comprehensive legislation. The Labour Court is given powers to determine unfair labour practice disputes.

The second important issue regulated in the transitional provisions is the status of the bargaining councils and chambers established under the PSLRA and the ELRA.

The Task Team gave serious consideration to the future of these councils given the collective bargaining structures established in Chapter IV. It was decided that the existing councils should be accommodated by providing that they should continue to exist as the Public Service Bargaining Council and Education Labour Relations Council for the purpose of the draft Bill. Much of the PSLRA and ELRA, and in particular the dispute resolution procedures and provisions relating to strikes and lock-outs, have been retained in the form of collective agreements. This formulation permits the repeal of the PSLRA and ELRA as the basis for the regulation of the collective bargaining relationships in these sectors.

Similarly, those provisions of the ALA regulating interest disputes and industrial action in the agricultural sector have been retained in the form of collective agreement, to be amended or terminated by NEDLAC.