REPUBLIC OF SOUTH AFRICA

LABOUR RELATIONS AMENDMENT BILL

(As amended by the Portfolio Committee on Labour (National Assembly))
(The English text is the official text of the Bill)

(MINISTER OF LABOUR)

[B 77D—2001]

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GENERAL EXPLANATORY NOTE:

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

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

BILL

To amend the Labour Relations Act, 1995, so as to provide for—

- **the enforcement of collective bargaining agreements;**
- **the extension of the functions of bargaining councils so as to enhance the effective enforcement of bargaining council agreements and to clarify the dispute resolution powers of bargaining councils;**
- **the rationalisation of the registration and amalgamation of bargaining councils in the public service and for the resolution of jurisdictional disputes between such bargaining councils;**
- **the extension of the information that bargaining councils must supply to the registrar and for the clarification of the registrar's powers in respect of bargaining councils and in respect of registration and winding-up of employers' organisations and trade unions;**
- **the extension of the powers of the Commission to make rules concerning procedures;**
- **the making of regulations by the Minister concerning representation at the Commission and the charging of fees by the Commission;**
- **the making of settlement agreements into arbitration awards or Labour Court orders;**
- **the exclusion of the application of the Arbitration Act, 1965, to bargaining council arbitrations;**
- **the concurrent appointment of Labour Court judges as High Court judges;**
- **the regulation of the right of employees not to be subjected to unfair labour practices;**
- **the regulation of the resolution of disputes concerning an occupational detriment in terms of the Protected Disclosures Act, 2000;**
- **the clarification and revision of procedures for resolving disputes in respect of dismissals based on the employer's operational requirements;**
- **the expediting of the resolution of disputes by the Commission by conciliation or arbitration;**
- **the clarification of the compensation that may be awarded in respect of unfair dismissals;**
- **the clarification of the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern;**
- **a rebuttable presumption as to who is an employee;**

and to provide for matters incidental thereto.

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

Amendment of section 23 of Act 66 of 1995

1. Section 23 of the Labour Relations Act, 1995 (hereinafter referred to as the principal Act), is amended by the substitution for subsection (4) of the following subsection:

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

Amendment of section 24 of Act 66 of 1995

2. Section 24 of the principal Act is amended by—

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

"(1) Every *collective agreement* excluding an agency shop agreement concluded in terms of section 25 or a closed shop agreement concluded in terms of section 26 or a settlement agreement contemplated in either section 142A or 158(1)*(c)*, must provide for a procedure to resolve any *dispute* about the interpretation or application of the *collective agreement*. The procedure must first require the parties to attempt to resolve the *dispute* through conciliation and, if the *dispute* remains unresolved, to resolve it through arbitration."; and

(b) the addition of the following subsection:

"(8) If there is a *dispute* about the interpretation or application of a settlement agreement contemplated in either section 142A or 158(1)*(c)*, a party may refer the *dispute* to a *council* or the Commission and subsections (3) to (5), with the necessary changes, apply to that *dispute*.".

Amendment of section 28 of Act 66 of 1995

3. Section 28 of the principal Act is amended by—

(a) the deletion in subsection (1) after paragraph *(i)* of the word "and"; and

(b) the addition to subsection (1) of the following paragraphs:

"*(k)* to provide industrial support services within the sector; and

(l) to extend the services and functions of the *bargaining council* to workers in the informal sector and home workers.".

Amendment of section 29 of Act 66 of 1995

4. Section 29 of the principal Act is amended by—

(a) the substitution for subsection (3) of the following subsection:

" (3) As soon as practicable after receiving the application, the *registrar* must publish a notice containing the material particulars of the application in the Government Gazette and send a copy of the notice to *NEDLAC*. The notice must inform the general public that they—

(a) may object to the application on any of the grounds referred to in subsection (4); and

(b) have 30 days from the date of the notice to *serve* any objection on the *registrar* and a copy on the applicant."; and

(b) the addition of the following subsection:

"(16) Subsections (3) to (10) and (11)*(b)*(iii) and (iv) do not apply to the registration or amalgamation of *bargaining councils* in the public service.".

Amendment of section 32 of Act 66 of 1995, as amended by section 7 of Act 42 of 1996 and substituted by section 2 of Act 127 of 1998

5. Section 32 of the principal Act is amended by—

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

"*(a)* the parties to the *bargaining council* are sufficiently representative within the *registered scope* of the *bargaining council* **[in the area in respect of which the extension is sought]**; and"; and

(b) the addition of the following subsection:

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

Amendment of section 33 of Act 66 of 1995

6. Section 33 of the principal Act is amended by—

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

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

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

"(1A) A designated agent may—

(a) secure compliance with the council's *collective agreements* by—

(i) publicising the contents of the agreements;

(ii) conducting inspections;

(iii) investigating complaints; or

(iv) any other means the council may adopt; and

(b) perform any other functions that are conferred or imposed on the agent by the council."; and

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

"(3) Within the *registered scope* of a *bargaining council*, a designated agent of the *bargaining council* has all the powers **[conferred on a commissioner by section 142, read with the changes required by the context, except the powers conferred by section 142(1)*(c)* and *(d)*. Any reference in that subsection to the director for the purpose of this section, must be read as a reference to the secretary of the *bargaining council.*]** set out in Schedule 10.".

Insertion of section 33A in Act 66 of 1995

7. The following section is inserted after section 33 of the principal Act:

"Enforcement of collective agreements by bargaining councils

33A. (1) Despite any other provision in this Act, a *bargaining council* may monitor and enforce compliance with its *collective agreements* in terms of this section or a *collective agreement* concluded by the parties to the council.

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

(a) any basic condition of employment which in terms of section 49(1) of the *Basic Conditions of Employment Act* constitutes a term of employment of any employee covered by the *collective agreement*; and

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

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

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

(b) If a party to an arbitration in terms of this section, that is not a party to the council, objects to the appointment of an arbitrator in terms of paragraph *(a)*, the Commission, on request by the council, must appoint an arbitrator.

(c) If an arbitrator is appointed in terms of subparagraph *(b)*—

(i) the Council remains liable for the payment of the arbitrator's fee; and

(ii) the arbitration is not conducted under the auspices of the Commission.

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

(6) Section 138, read with the changes required by the context, applies to any arbitration conducted in terms of this section.

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

(8) An arbitrator conducting an arbitration in terms of this section may make an appropriate award, including—

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

(b) imposing a fine for a failure to comply with a *collective agreement* in accordance with subsection (13);

(c) charging a party an arbitration fee;

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

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

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

(9) Interest on any amount that a person is obliged to pay in terms of a *collective agreement* accrues from the date on which the amount was due and payable at the rate prescribed in terms of section 1 of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), unless the arbitration award provides otherwise.

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

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

(12) If an employer upon whom a fine has been imposed in terms of this section files an application to review and set aside an award made in terms of subsection (8), any obligation to pay a fine is suspended pending the outcome of the application.

(13) *(a)* The Minister may, after consulting *NEDLAC*, publish in the Government Gazette a notice that sets out the maximum fines that may be imposed by an arbitrator acting in terms of this section.

(b) A notice in terms of paragraph *(a)* may specify the maximum fine that may be imposed—

(i) for a breach of a *collective agreement*—

(aa) not involving a failure to pay any amount of money;

(bb) involving a failure to pay any amount of money; and

(ii) for repeated breaches of the *collective agreement* contemplated in subparagraph (i).".

Substitution of section 37 of Act 66 of 1995, as substituted by section 8 of Act 42 of 1996

8. The following section is substituted for section 37 of the principal Act:

"Bargaining councils in sectors in public service

37. (1) The Public Service Co-ordinating Bargaining Council may, in terms of its constitution and by resolution—

(a) designate a *sector* of the *public service* for the establishment of a *bargaining council*; and

(b) vary the designation of, amalgamate or disestablish *bargaining councils* so established.

(2) A *bargaining council* for a *sector* designated in terms of subsection (1)*(a)* must be established in terms of the constitution of the Public Service Co-ordinating Bargaining Council.

(3) If the parties in the *sector* cannot agree to a constitution for the *bargaining council* for a *sector* designated in terms of subsection (1)*(a)*, the Registrar must determine its constitution.

(4) The relevant resolution made in terms of subsection (1) must accompany any application to register or vary the registration of a *bargaining council* or to register an amalgamated *bargaining council*.

(5) A *bargaining council* established in terms of subsection (2) has exclusive jurisdiction in respect of matters that are specific to that *sector* and in respect of which the State as employer in that *sector*, has the requisite authority to conclude *collective agreements* and resolve labour *disputes*.".

Substitution of section 38 of Act 66 of 1995

9. The following section is substituted for section 38 of the principal Act:

"**Disputes between bargaining councils in public service**

38. (1) If there is a jurisdictional *dispute* between two or more *bargaining councils* in the *public service*, including the Public Service Co-ordinating Bargaining Council, any party to the *dispute* may refer the *dispute* in writing to the Commission.

(2) The party who refers the *dispute* to the Commission must satisfy the Commission that a copy of the referral has been served on all other *bargaining councils* that are parties to the *dispute*.

(3) The Commission must attempt to resolve the *dispute* as soon as possible through conciliation.

(4) If the *dispute* remains unresolved, any party to the *dispute* may request that the *dispute* be resolved through arbitration by the Commission.".

Amendment of section 44 of Act 66 of 1995

10. Section 44 of the principal Act is amended by—

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

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

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

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

Amendment of section 49 of Act 66 of 1995

11. Section 49 of the principal Act is amended by—

(a) the substitution for subsection (2) of the following subsection:

"(2) A *bargaining council* having a *collective agreement* that has been extended by the *Minister* in terms of section 32, must inform the *registrar* annually, in writing, on a date to be determined by the *registrar* as to the number of *employees* who are—

(a) covered by the *collective agreement*;

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

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

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

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

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

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

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

(c) the addition of the following subsections:

"(4) A determination of the representativeness of a *bargaining council* in terms of this section is sufficient proof of the representativeness of the *council* for the year following the determination.

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

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

12. Section 51 of the principal Act is amended by the addition of the following subsections:

"(7) Subject to this Act, a *council* may not provide in a *collective agreement* for the referral of *disputes* to the Commission, without prior consultation with the director.

(8) Unless otherwise agreed to in a collective agreement, sections 142A and 143 to 146 apply to any arbitration conducted under the auspices of a *bargaining council*.

(9) A *bargaining council* may by *collective agreement* establish procedures to resolve any *dispute* contemplated in this section.".

Amendment of section 53 of Act 66 of 1995, as amended by section 13 of Act 42 of 1996

13. Section 53 of the principal Act is amended by the addition of the following subsection:

"(6) A *council* must comply with subsections (1) to (5) in respect of all funds established by it, except funds referred to in section 28(3).".

Amendment of section 54 of Act 66 of 1995

14. Section 54 of the principal Act is amended by—

(a) the deletion in subsection (2) after paragraph *(d)* of the word "and" and the insertion after paragraph *(e)* of the word "and";

(b) the addition to subsection (2) of the following paragraph:

"*(f)* each year and on a date to be determined by the *registrar*, a report in the prescribed form specifying—

(i) the number of employees who are employed by small enterprises that fall within the *registered scope* of the *council* and the number of *employees* of those enterprises who are members of *trade unions*;

(ii) the number of *employees* employed by small enterprises that are covered by a *collective agreement* that was concluded by the *council* and extended by the *Minister* in terms of section 32;

(iii) the number of small enterprises that are members of the *employers' organisations* that are parties to the *council*; and

(iv) the number of applications for exemptions received from small enterprises and the number of applications that were granted and the number rejected."; and

(c) the addition of the following subsections:

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

(a) conduct an inquiry into the affairs of that council;

(b) order the production of the *council's* financial records and any other relevant documents;
(c) deliver a notice to the *council* requiring the council to comply with the provisions concerned;
(d) compile a report on the affairs of the *council*; or
(e) submit the report to the Labour Court in support of any application made in terms of section 59(1)*(b)*.

(5) The *registrar* may use the powers referred to in subsection (4) in respect of any fund established by a *council*, except a fund referred to in section 28(3).".

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

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

"(3) Despite subsection (2), if within the stipulated period no material objection is lodged to any notice published by the *registrar* in terms of section 29(3), the *registrar*—
(i) may vary the *registered scope* of the council;
(ii) may issue a certificate specifying the scope of the council as varied; and
(iii) need not comply with the procedure prescribed by section 29.".

Amendment of section 61 of Act 66 of 1995

16. Section 61 of the principal Act is amended by the addition of the following subsections:

"(14) The *registrar* must cancel the registration of a *bargaining council* in the *public service* by removing its name from the register of *councils* when the *registrar* receives a resolution from the Public Service Co-ordinating Bargaining Council disestablishing a *bargaining council* established in terms of section 37(2).

(15) The provisions of subsections (3) to (7) do not apply to *bargaining councils* in the *public service*."

Amendment of section 68 of Act 66 of 1995

17. Section 68 of the principal Act is amended by the substitution in subsection (1) for paragraph *(b)* of the following paragraph:

"*(b)* to order the payment of just and equitable compensation for any loss attributable to the *strike* or *lock-out*, or conduct, having regard to—
(i) whether—
(aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
(bb) the *strike* or *lock-out* or conduct was premeditated;
(cc) the *strike* or *lock-out* or conduct was in response to unjustified conduct by another party to the *dispute*; and
(dd) there was compliance with an order granted in terms of paragraph *(a)*;
(ii) the interests of orderly collective bargaining;
(iii) the duration of the *strike* or *lock-out* or conduct; and
(iv) the financial position of the employer, *trade union* or *employees* respectively.".

Amendment of section 95 of Act 66 of 1995

18. Section 95 of the principal Act is amended by the addition of the following subsections:

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

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

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

19. Section 103 of the principal Act is amended by—

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

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

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

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

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

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

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

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

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

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

(e) the addition of the following subsection:

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

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

Amendment of section 105 of Act 66 of 1995

20. Section 105 of the principal Act is amended by the substitution for the heading of the following heading:

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

Amendment of section 106 of Act 66 of 1995

21. Section 106 of the principal Act is amended by—

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

"(1) The registrar of the Labour Court must notify the *registrar* **[of labour relations]** if the Court—

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

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

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

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

(a) is satisfied that the *trade union* or *employers' organisation* is not, or has ceased to function as, a genuine *trade union* or *employers' organisation*, as the case may be; or

(b) has issued a written notice requiring the *trade union* or *employers' organisation* to comply with sections 98, 99 and 100 within a period of 60 days of the notice and the *trade union* or *employers' organisation* has, despite the notice, not complied with those sections.

(2B) The *registrar* may not act in terms of subsection (2A) unless the *registrar* has published a notice in the Government Gazette at least 60 days prior to such action—

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

(b) inviting the *trade union* or *employers' organisation* or any other interested parties to make written representations as to why the registration should not be cancelled.".

Amendment of section 115 of Act 66 of 1995, as amended by section 31 of Act 42 of 1996 and section 6 of Act 127 of 1998

22. Section 115 of the principal Act is amended by—

(a) the insertion after subsection (2) of the following subsection:

"(2A) The Commission may make rules regulating—

(a) the practice and procedure in connection with the resolution of a *dispute* through conciliation or arbitration;

(b) the process by which conciliation is initiated, and the form, content and use of that process;

(c) the process by which arbitration or arbitration proceedings are initiated, and the form, content and use of that process;

(d) the joinder of any person having an interest in the *dispute* in any conciliation and arbitration proceedings;

(e) the intervention of any person as an applicant or respondent in conciliation or arbitration proceedings;

(f) the amendment of any citation and the substitution of any party for another in conciliation or arbitration proceedings;

(g) the hours during which offices of the Commission will be open to receive any process;

(h) any period that is not to be counted for the purpose of calculating time or periods for delivering any process or notice relating to any proceedings;

(i) the forms to be used by parties and the Commission;

(j) the basis on which a commissioner may make any order as to costs in any arbitration;

(k) the right of any person or category of persons to represent any party in any conciliation or arbitration proceedings;

(l) the circumstances in which the Commission may charge a fee in relation to any conciliation or arbitration proceedings or for any services the Commission provides; and

(m) all other matters incidental to performing the functions of the Commission."; and

(b) the substitution for subsection (6) of the following subsection:

"(6) *(a)* A rule made under subsection (2)*(c*A*)* or (2A) must be published in the Government Gazette. The Commission will be responsible to ensure that the publication occurs.

(b) A rule so made will not have any legal force or effect unless it has been so published.

(c) A rule so made takes effect from the date of publication unless a later date is stipulated.".

Amendment of section 127 of Act 66 of 1995, as amended by section 33 of Act 42 of 1996

23. Section 127 of the principal Act is amended by—

(a) the deletion in subsection (5)*(a)* of subparagraph (iv);

(b) the insertion after subsection (5) of the following subsection: and

"(5A) The governing body must annually publish a list of accredited councils and accredited agencies.".

Amendment of section 128 of Act 66 of 1995, as amended by section 34 of Act 42 of 1996

24. Section 128 of the principal Act is amended by—

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

"*(a)* An accredited *council* or accredited agency may charge a fee for performing any of the functions for which it is accredited in circumstances in which **[section 140(2)]** this Act allows a commissioner to charge a fee."; and

(b) the addition of the following subsection:

"(3) *(a)* (i) An accredited *council* may confer on any person appointed by it to resolve a *dispute*, the powers of a commissioner in terms of section 142, read with the changes required by the context.

(ii) For this purpose, any reference in that section to the *director* must be read as a reference to the secretary of the *bargaining council*.

(b) An accredited private agency may confer on any person appointed by it to resolve a *dispute*, the powers of a commissioner in terms of section 142(1)*(a)* to *(e)*, (2) and (7) to (9), read with the changes required by the context.".

Amendment of section 133 of Act 66 of 1995

25. Section 133 of the principal Act is amended by the substitution for subsection (2) of the following subsection:

"(2) If a *dispute* remains unresolved after conciliation, the Commission must arbitrate the *dispute* if—

(a) *this Act* requires **[that]** the *dispute* to be arbitrated and any party to the *dispute* has requested that the *dispute* be resolved through arbitration; or

(b) all the parties to the *dispute* in respect of which the Labour Court has jurisdiction consent in writing to arbitration under the auspices of the Commission.".

Amendment of section 135 of Act 66 of 1995, as amended by section 36 of Act 42 of 1996 and section 8 of Act 127 of 1998

26. Section 135 of the principal Act is amended by the deletion of subsection (4).

Amendment of section 138 of Act 66 of 1995, as substituted by section 10 of Act 127 of 1998

27. Section 138 of the principal Act is amended by—

(a) the deletion of subsection (4);

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

"(10) The commissioner may make an order for the payment of costs according to the requirements of law and fairness in accordance with rules made by the Commission in terms of section 115(2A)*(j)* and having regard to—

(a) any relevant Code of Good Practice issued by *NEDLAC* in terms of section 203;

(b) any relevant guideline issued by the Commission.

Amendment of section 140 of Act 66 of 1995

28. Section 140 of the principal Act is amended by the deletion of subsection (1).

Amendment of section 141 of Act 66 of 1995, as amended by section 39 of Act 42 of 1996

29 Section 141 of the principal Act is amended by—

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

"(1) If a *dispute* remains unresolved after conciliation, the Commission must arbitrate the *dispute* if a party to the *dispute* would otherwise be entitled to refer the *dispute* to the Labour Court for adjudication and, instead, all the parties agree in writing to arbitration under the auspices of the Commission."; and

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

"(3) The arbitration agreement contemplated in subsection (1) may be terminated only with the written consent of all the parties to that agreement, unless the agreement itself provides otherwise.".

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

30. Section 142 of the principal Act is amended by—

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

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

(b) Any person who requests the Commission to issue a subpoena must pay the *prescribed* witness fee to each person who appears before a commissioner in response to the subpoena and who remains in attendance until excused by the commissioner.

(c) The Commission may on good cause shown waive the requirement in subparagraph *(b)* and pay to the witness the *prescribed* witness fee.";

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

"(9) *(a)* A commissioner may make a finding that a party is in contempt of the Commission for any of the reasons set out in subsection (8).

(b) The commissioner may refer the finding, together with the record of the proceedings, to the Labour Court for its decision in terms of subsection (11).."; and

(c) the addition of the following subsections:

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

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

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

(c) may make any order that it deems appropriate, including an order in the case of a person who is not a legal practitioner that the person's right to represent a party in the Commission and the Labour Court be suspended.

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

(12) If any person fails to appear before the Labour Court pursuant to a subpoena issued in terms of subsection (10)*(a)*, the Court may make any order that it deems appropriate in the absence of that person.".

Insertion of section 142A in Act 66 of 1995

31. The following section is inserted after section 142 of the principal Act:

"Making settlement agreement arbitration award

142A. (1) The Commission may, by agreement between the parties or on application by a party, make any settlement agreement in respect of any *dispute* that has been referred to the Commission, an arbitration award.

(2) For the purposes of subsection (1), a settlement agreement is a written agreement in settlement of a *dispute* that a party has the right to refer to arbitration or to the Labour Court, excluding a *dispute* that a party is entitled to refer to arbitration in terms of either section 74(4) or 75(7).".

Amendment of section 143 of Act 66 of 1995

32. Section 143 of the principal Act is amended by—

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

"(1) An arbitration award issued by a commissioner is final and binding and it may be enforced as if it were an order of the Labour Court, unless it is an advisory arbitration award."; and

(b) the addition of the following subsections:

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

(4) If a party fails to comply with an arbitration award that orders the performance of an act, other than the payment of an amount of money, any other party to the award may enforce it by way of contempt proceedings instituted in the Labour Court.".

Substitution of section 144 of Act 66 of 1995

33. The following section is substituted for section 144 of the principal Act:

"Variation and rescision of arbitration awards and rulings

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

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

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

(c) granted as a result of a mistake common to the parties to the proceedings.".

Amendment of section 145 of Act 66 of 1995

34. Section 145 of the principal Act is amended by the insertion after subsection (1) of the following subsection:

"(1A) The Labour Court may on good cause shown condone the late filing of an application in terms of subsection (1).".

Amendment of section 150 of Act 66 of 1995

35. Section 150 of the principal Act is amended by—

(a) the substitution for subsection (2) of the following subsection:

"(2) The Commission may offer to appoint a commissioner to assist the parties to resolve through further conciliation a *dispute* that has been referred to the Commission or a *council* and in respect of which—

(a) a certificate has been issued in terms of section 135(5)*(a)* stating that the *dispute* remains unresolved; or

(b) the period contemplated in section 135(2) has elapsed;"; and

(b) the addition of the following subsection:

"(3) The Commission may appoint a commissioner in terms of subsection (1) or (2) if all the parties to the *dispute* consent to that appointment.".

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

36. Section 158 of the principal Act is amended by—

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

"*(c)* make any arbitration award or any settlement agreement**[, other than a *collective agreement*,]** an order of the Court;";

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

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

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

"(1A) For the purposes of subsection (1)*(c)*, a settlement agreement is a written agreement in settlement of a *dispute* that a party has the right to refer to arbitration or to the Labour Court, excluding a *dispute* that a party is only entitled to refer to arbitration in terms of section 22(4), 74(4) or 75(7).".

Amendment of section 161 of Act 66 of 1995, as substituted by section 16 of Act 127 of 1998

37. Section 161 of the principal Act is amended by the substitution for paragraph *(d)* of the following paragraph:

"*(d)* a designated agent or official of a *council*; or".

Amendment of section 173 of Act 66 of 1995, as amended by section 22 of Act 127 of 1998

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

Substitution of heading to Chapter VIII of Act 66 of 1995

39. The following heading is substituted for the heading to Chapter VIII of the principal Act:

"UNFAIR DISMISSAL AND UNFAIR LABOUR PRACTICE"

Substitution of section 185 of Act 66 of 1995

40. The following section is substituted for section 185 of the principal Act:

"Right not to be unfairly dismissed or subjected to unfair labour practice

185. Every employee has the right not to be—

(a) unfairly dismissed; and

(b) subjected to unfair labour practice.".

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

41. Section 186 of the principal Act is amended by—

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

"Meaning of dismissal and unfair labour practice";

(b) the addition of the following paragraph:

"*(f)* an *employee* terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the *employee* with conditions or circumstances at work that are substantially less favourable to the *employee* than those provided by the old employer.";

(c) the addition of the following subsection:

"(2) 'Unfair labour practice' means any unfair act or omission that arises between an employer and an *employee* involving—

(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding *disputes* about dismissals for a reason relating to probation) or training of an *employee* or relating to the provision of benefits to an *employee*;

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

(c) a failure or refusal by an employer to reinstate or re-employ a former *employee* in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the *employee* having made a protected disclosure defined in that Act.".

Amendment of section 187 of Act 66 of 1995

42. Section 187 of the principal Act is amended by the addition to subsection (1) of the following paragraphs:

"*(g)* a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or

(h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an *employee* having made a protected disclosure defined in that Act.".

Insertion of section 188A in Act 66 of 1995

43. The following section is inserted after section 188 of the principal Act:

"Agreement for pre-dismissal arbitration

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

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

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

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

(b) the *employee's* written consent to the inquiry.

(4) *(a)* An *employee* may only consent to a pre-dismissal arbitration after the *employee* has been advised of the allegation referred to in subsection (1) and in respect of a specific arbitration.

(b) Despite subparagraph *(a)*, an *employee* earning more than the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*, may consent to the holding of a pre-dismissal arbitration in a contract of employment.

(5) In any arbitration in terms of this section a party to the *dispute* may appear in person or be represented only by—

(a) a co-employee;

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

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

(d) a legal practitioner, on agreement between the parties.

(6) Section 138, read with the changes required by the context, applies to any arbitration in terms of this section.

(7) An arbitrator appointed in terms of this section has all the powers conferred on a commissioner by section 142(1)*(a)* to *(e)*, (2) and (7) to (9), read with the changes required by the context, and any reference in that section to the *director* for the purpose of this section, must be read as a reference to—

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

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

(8) The provisions of sections 143 to 146 apply to any award made by an arbitrator in terms of this section.

(9) An arbitrator conducting an arbitration in terms of this section must, in the light of the evidence presented and by reference to the criteria of fairness in the Act, direct what action, if any, should be taken against the *employee*.

(10) *(a)* A private agency may only conduct an arbitration in terms of this section if it is accredited for this purpose by the Commission.

(b) A council may only conduct an arbitration in terms of this section in respect of which the employer or the employee is not a party to the council, if the council has been accredited for this purpose by the Commission.".

Substitution of section 189 of Act 66 of 1995

44. The following section is substituted for section 189 of the principal Act:

"Dismissals based on operational requirements

189. (1) When an employer contemplates dismissing one or more *employees* for reasons based on the employer's *operational requirements*, the employer must consult—

(a) any person whom the employer is required to consult in terms of a *collective agreement*;

(b) if there is no *collective agreement* that requires consultation—

(i) a *workplace forum*, if the *employees* likely to be affected by the proposed *dismissals* are employed in a *workplace* in respect of which there is a *workplace forum*; and

(ii) any registered *trade union* whose members are likely to be affected by the proposed *dismissals*;

(c) if there is no *workplace forum* in the *workplace* in which the *employees* likely to be affected by the proposed *dismissals* are employed, any registered *trade union* whose members are likely to be affected by the proposed *dismissals*; or

(d) if there is no such *trade union*, the *employees* likely to be affected by the proposed *dismissals* or their representatives nominated for that purpose.

(2) The employer and the other consulting parties must in the consultation envisaged by subsections (1) and (3) engage in a meaningful joint consensus-seeking process and attempt to reach consensus on—

(a) appropriate measures—

(i) to avoid the *dismissals*;

(ii) to minimise the number of *dismissals*;

(iii) to change the timing of the *dismissals*; and

(iv) to mitigate the adverse effects of the *dismissals*;

(b) the method for selecting the *employees* to be dismissed; and

(c) the severance pay for dismissed *employees*.

(3) The employer must **[disclose in writing to]** issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—

(a) the reasons for the proposed *dismissals*;

(b) the alternatives that the employer considered before proposing the *dismissals*, and the reasons for rejecting each of those alternatives;

(c) the number of *employees* likely to be affected and the job categories in which they are employed;

(d) the proposed method for selecting which *employees* to dismiss;

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

(f) the severance pay proposed;

(g) any assistance that the employer proposes to offer to the *employees* likely to be dismissed; **[and]**

(h) the possibility of the future re-employment of the *employees* who are dismissed;

(i) the number of *employees* employed by the employer; and

(j) the number of *employees* that the employer has dismissed for reasons based on its *operational requirements* in the preceding 12 months.

(4) *(a)* The provisions of section 16 apply, read with the changes required by the context, to the disclosure of information in terms of subsection (3).

(b) In any *dispute* in which an arbitrator or the Labour Court is required to decide whether or not any information is relevant, the onus is on the employer to prove that any information that it has refused to disclose is not relevant for the purposes for which it is sought.

(5) The employer must allow the other consulting party an opportunity during consultation to make representations about any matter **[on which they are consulting]** dealt with in subsections (2), (3) and (4) as well as any other matter relating to the proposed *dismissals*.

(6) *(a)* The employer must consider and respond to the representations made by the other consulting party and, if the employer does not agree with them, the employer must state the reasons for disagreeing.

(b) If any representation is made in writing the employer must respond in writing.

(7) The employer must select the *employees* to be dismissed according to selection criteria—

(a) that have been agreed to by the consulting parties; or

(b) if no criteria have been agreed, criteria that are fair and objective.".

Insertion of section 189A in Act 66 of 1995

45. The following section is inserted after section 189 of the principal Act:

"Dismissals based on operational requirements by employers with more than 50 employees

189A. (1) This section applies to employers employing more than 50 *employees* if—

(a) the employer contemplates dismissing by reason of the employer's *operational requirements*, at least—

(i) 10 *employees*, if the employer employs up to 200 *employees*;

(ii) 20 *employees*, if the employer employs more than 200, but not more than 300, *employees*;

(iii) 30 *employees*, if the employer employs more than 300, but not more than 400, *employees*;

(iv) 40 *employees*, if the employer employs more than 400, but not more than 500, *employees*; or

(v) 50 *employees*, if the employer employs more than 500 *employees*; or

(b) the number of *employees* that the employer contemplates dismissing together with the number of *employees* that have been dismissed by reason of the employer's *operational requirements* in the 12 months prior to the employer issuing a notice in terms of section 189(3), is equal to or exceeds the relevant number specified in paragraph *(a)*.

(2) In respect of any dismissal covered by this section—

(a) an employer must give notice of termination of employment in accordance with the provisions of this section;

(b) despite section 65(1)*(c)*, an *employee* may participate in a *strike* and an employer may *lock out* in accordance with the provisions of this section;

(c) the consulting parties may agree to vary the time periods for facilitation or consultation.

(3) The Commission must appoint a facilitator in terms of any regulations made under subsection (6) to assist the parties engaged in consultations if—

(a) the employer has in its notice in terms of section 189(3) requested facilitation; or

(b) consulting parties representing the majority of employees whom the employer contemplates dismissing have requested facilitation and have notified the Commission within 15 days of the notice.

(4) This section does not prevent an agreement to appoint a facilitator in circumstances not contemplated in subsection (3).

(5) If a facilitator is appointed in terms of subsection (3) or (4) the facilitation must be conducted in terms of any regulations made by the *Minister* under subsection (6) for the conduct of such facilitations.

(6) The *Minister*, after consulting *NEDLAC* and the Commission, may make regulations relating to—

(a) the time period, and the variation of time periods, for facilitation;

(b) the powers and duties of facilitators;

(c) the circumstances in which the Commission may charge a fee for appointing a facilitator and the amount of the fee; and

(d) any other matter necessary for the conduct of facilitations.

(7) If a facilitator is appointed in terms of subsection (3) or (4), and 60 days have elapsed from the date on which notice was given in terms of section 189(3)—

(a) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and

(b) a registered *trade union* or the *employees* who have received notice of termination may either—

(i) give notice of a *strike* in terms of section 64(1)*(b)* or *(d)*; or

(ii) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191(11).

(8) If a facilitator is not appointed—

(a) a party may not refer a *dispute* to a *council* or a Commission unless a period of 30 days has lapsed from the date on which notice was given in terms of section 189(3); and

(b) once the periods mentioned in section 64(1)*(a)* have elapsed—

(i) the employer may give notice to terminate the contracts of employment in accordance with section 37(1) of the *Basic Conditions of Employment Act*; and

(ii) a registered trade union or the *employees* who have received notice of termination may—

(aa) give notice of a *strike* in terms of section 64(1)*(b)* or *(d)*; or

(bb) refer a *dispute* concerning whether there is a fair reason for the *dismissal* to the Labour Court in terms of section 191(11).

(9) Notice of the commencement of a *strike* may be given if the employer dismisses or gives notice of *dismissal* before the expiry of the periods referred to in subsections (7)*(a)* or (8)*(b)*(i).

(10) *(a)* A consulting party may not—

(i) give notice of a strike in terms of this section in respect of a dismissal, if it has referred a dispute concerning whether there is a fair reason for that dismissal to the Labour Court;

(ii) refer a dispute about whether there is a fair reason for a dismissal to the Labour Court, if it has given notice of a strike in terms of this section in respect of that dismissal.

(b) If a trade union gives notice of a strike in terms of this section—

(i) no member of that trade union, and no employee to whom a collective agreement concluded by that trade union dealing with consultation or facilitation in respect of dismissals by reason of the employers' operational requirements has been extended in terms of section 23(1)*(d)*, may refer a dispute concerning whether there is a fair reason for dismissal to the Labour Court;

(ii) any referral to the Labour Court contemplated by subparagraph (i) that has been made, is deemed to be withdrawn.

(11) The following provisions of Chapter IV apply to any *strike* or *lock-out* in terms of this section:

(a) Section 64(1) and (3)*(a)* to *(d)*, except that—

(i) section 64(1)*(a)* does not apply if a facilitator is appointed in terms of this section;

(ii) an employer may only *lock out* in respect of a *dispute* in which a *strike* notice has been issued;

(b) subject to subsection (2)*(a)*, section 65(1) and (3);

(c) section 66 except that written notice of any proposed secondary strike must be given at least 14 days prior to the commencement of the *strike*;

(d) sections 67, 68, 69 and 76.

(12) *(a)* During the 14-day period referred to in subsection (11)*(c)*, the *director* must, if requested by an employer who has received notice of any intended secondary strike, appoint a commissioner to attempt to resolve any *dispute*, between the employer and the party who gave the notice, through conciliation.

(b) A request to appoint a commissioner or the appointment of a commissioner in terms of paragraph *(a)* does not affect the right of *employees* to strike on the expiry of the 14-day period.

(13) If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—

(a) compelling the employer to comply with a fair procedure;

(b) interdicting or restraining the employer from dismissing an *employee* prior to complying with a fair procedure;

(c) directing the employer to reinstate an *employee* until it has complied with a fair procedure.

(d) make an award of compensation, if an order in terms of paragraphs *(a)* to *(c)* is not appropriate.

(14) Subject to this section, the Labour Court may make any appropriate order referred to in section 158(1)*(a)*.

(15) An award of compensation made to an *employee* in terms of subsection (14)*(b)* must comply with section 194.

(16) The Labour Court may not make an order in respect of any matter concerning the disclosure of information in terms of section 189(4) that has been the subject of an arbitration award in terms of section 16.

(17) *(a)* An application in terms of subsection (13) must be brought not later than 30 days after the employer has given notice to terminate the *employee's* services or, if notice is not given, the date on which the *employees* are dismissed.

(b) The Labour Court may, on good cause shown condone a failure to comply with the time limit mentioned in paragraph *(a)*.

(18) The Labour Court may not adjudicate a *dispute* about the procedural fairness of a *dismissal* based on the employer's *operational requirements* in any *dispute* referred to it in terms of section 191(5)*(b)*(ii).

(19) In any *dispute* referred to the Labour Court in terms of section 191(5)*(b)*(ii) that concerns the *dismissal* of the number of *employees* specified in subsection (1), the Labour Court must find that the *employee* was dismissed for a fair reason if—

(a) the *dismissal* was to give effect to a *requirement* based on the employer's economic, technological, structural or similar needs;

(b) the *dismissal* was operationally justifiable on rational grounds;

(c) there was a proper consideration of alternatives; and

(d) selection criteria were fair and objective.

(20) For the purposes of this section, an 'employer' in the *public service* is the executing authority of a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994).".

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

46. Section 191 of the principal Act is amended by—

(a) the substitution for the heading of the following heading:
"Disputes about unfair dismissals and unfair labour practices";

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

"(1) *(a)* If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing **[within 30 days of the date of dismissal]** to—

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

[*(b)*](ii) the Commission, if no *council* has jurisdiction.

(b) A referral in terms of paragraph *(a)* must be made within—

(i) 30 days of the date of a *dismissal* or, if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the *dismissal*;

(ii) 90 days of the date of the act or omission which allegedly constitutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the *employee* became aware of the act or occurrence.";

(c) the substitution for subsection (2) of the following subsection:

"(2) If the *employee* shows good cause at any time, the *council* or the Commission may permit the *employee* to refer the *dispute* after the **[30-day]** relevant time limit in subsection (1) has expired.";

(d) the insertion after subsection (2) of the following subsection:

"(2A) Subject to subsections (1) and (2), an *employee* whose contract of employment is terminated by notice, may refer the *dispute* to the *council* or the Commission once the *employee* has received that notice.";

(e) the substitution in subsection (5)*(a)* for subparagraph (ii) of the following subparagraph:

"(ii) the *employee* has alleged that the reason for *dismissal* is that the employer made continued employment intolerable or the employer provided the employee with substantially less favourable conditions or circumstances at work after a transfer in terms of section 197 or 197A, unless the *employee* alleges that the contract of employment was terminated for a reason contemplated in section 187;";

(f) the addition in subsection (5)*(a)* of the following subparagraph:

"(iv) the *dispute* concerns an unfair labour practice; or"

(g) the insertion after subsection (5) of the following subsection:

"(5A) Despite any other provision in the Act, the *council* or Commission must commence the arbitration immediately after certifying that the *dispute* remains unresolved if the *dispute* concerns—

(a) the *dismissal* of an *employee* for any reason relating to probation;

(b) any unfair labour practice relating to probation;

(c) any other *dispute* contemplated in subsection (5)*(a)* in respect of which no party has objected to the matter being dealt with in terms of this subsection.";

(h) the substitution for subsection (6) of the following subsection:

"(6) Despite subsection (5)*(a)* or (5A), the *director* must refer the *dispute* to the Labour Court, if the *director* decides, on application by any party to the *dispute*, that to be appropriate after considering—

(a) the reason for *dismissal*;

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

(c) the complexity of the *dispute*;

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

(e) the public interest.";

(i) the addition of the following subsections:

"(12) If an *employee* is dismissed by reason of the employer's *operational requirements* following a consultation procedure in terms of section 189 that applied to that *employee* only, the *employee* may elect to refer the *dispute* either to arbitration or to the Labour Court.

(13) *(a)* An *employee* may refer a *dispute* concerning an alleged unfair labour practice to the Labour Court for adjudication if the *employee* has alleged that the *employee* has been subjected to an occupational detriment by the employer in contravention of section 3 of the Protected Disclosures Act, 2000, for having made a protected disclosure defined in that Act.

(b) A referral in terms of paragraph *(a)* is deemed to be made in terms of subsection (5)*(b)*.".

Amendment of section 193 of Act 66 of 1995

47. Section 193 of the principal Act is amended by—

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

"Remedies for unfair dismissal and unfair labour practice";

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

"(4) An arbitrator appointed in terms of this Act may determine any unfair labour practice *dispute* referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.".

Amendment of section 194 of Act 66 of 1995

48. Section 194 of the principal Act is amended by—

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

"(1) The compensation awarded to an *employee* whose *dismissal* is found to be unfair either because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of *remuneration* on the date of *dismissal*.";

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

(c) the addition of the following subsection:

"(4) The compensation awarded to an *employee* in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months *remuneration*.".

Substitution of section 197 of Act 66 of 1995

49. The following section is substituted for section 197 of the principal Act:

"Transfer of contract of employment

197. (1) In this section and in section 197A—

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

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

(2) If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6)—

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

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

(c) anything done before the transfer by or in relation to the old employer, including the *dismissal* of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

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

(3) *(a)* The new employer complies with subsection (2) if that employer employs transferred *employees* on terms and conditions that are on the whole not less favourable to the *employees* than those on which they were employed by the old employer.

(b) Paragraph *(a)* does not apply to *employees* if any of their conditions of employment are determined by a collective agreement.

(4) Subsection (2) does not prevent an employee from being transferred to a pension, provident, retirement or similar fund other than the fund to which the employee belonged prior to the transfer, if the criteria in section 14(1)*(c)* of the Pension Funds Act,1956 (Act No. 24 of 1956), are satisfied.

(5) *(a)* For the purposes of this subsection, the *collective agreements* and arbitration awards referred to in paragraph *(b)* are agreements and awards that bound the old employer in respect of the *employees* to be transferred, immediately before the date of transfer.

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

(i) any arbitration award made in terms of this Act, the common law or any other law;

(ii) any *collective agreement* binding in terms of section 23; and
(iii) any *collective agreement* binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.

(6) *(a)* An agreement contemplated in subsection (2) must be in writing and concluded between—
(i) either the old employer, the new employer, or the old and new employers acting jointly, on the one hand; and
(ii) the appropriate person or body referred to in section 189(1), on the other.

(b) In any negotiations to conclude an agreement contemplated by paragraph *(a)*, the employer or employers contemplated in subparagraph (i), must disclose to the person or body contemplated in subparagraph (ii), all relevant information that will allow it to engage effectively in the negotiations.

(c) Section 16(4) to (14) applies, read with the changes required by the context, to the disclosure of information in terms of paragraph *(b)*.

(7) The old employer must—
(a) agree with the new employer to a valuation as at the date of transfer of—
(i) the leave pay accrued to the transferred *employees* of the old employer;
(ii) the severance pay that would have been payable to the transferred *employees* of the old employer in the event of a dismissal by reason of the employer's operational requirements; and
(iii) any other payments that have accrued to the transferred *employees* but have not been paid to *employees* of the old employer;
(b) conclude a written agreement that specifies—
(i) which employer is liable for paying any amount referred to in paragraph *(a)*, and in the case of the apportionment of liability between them, the terms of that apportionment; and
(ii) what provision has been made for any payment contemplated in paragraph *(a)* if any *employee* becomes entitled to receive a payment;
(c) disclose the terms of the agreement contemplated in paragraph *(b)* to each *employee* who after the transfer becomes employed by the new employer; and
(d) take any other measure that may be reasonable in the circumstances to ensure that adequate provision is made for any obligation on the new employer that may arise in terms of paragraph *(a)*.

(8) For a period of 12 months after the date of the transfer, the old employer is jointly and severally liable with the new employer to any *employee* who becomes entitled to receive a payment contemplated in subsection (7)*(a)* as a result of the *employee's dismissal* for a reason relating to the employer's *operational requirements* or the employer's liquidation or sequestration, unless the old employer is able to show that it has complied with the provisions of this section.

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

(10) This section does not affect the liability of any person to be prosecuted for, convicted of, and sentenced for, any offence.".

Insertion of sections 197A and 197B in Act 66 of 1995

50. The following sections are inserted in the principal Act after section 197:

"Transfer of contract of employment in circumstances of insolvency

197A. (1) This section applies to a transfer of a business—
(a) if the old employer is insolvent; or
(b) if a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2) Despite the Insolvency Act, 1936 (Act No. 24 of 1936), if a transfer of a business takes place in the circumstances contemplated in subsection (1), unless otherwise agreed in terms of section 197(6)—

(a) the new employer is automatically substituted in the place of the old employer in all contracts of employment in existence immediately before the old employer's provisional winding-up or sequestration;

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

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

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

(3) Section 197(3), (4), (5) and (10) applies to a transfer in terms of this section and any reference to an agreement in that section must be read as a reference to an agreement contemplated in section 197(6).

(4) Section 197(5) applies to a *collective agreement* or arbitration binding on the employer immediately before the employer's provisional winding-up or sequestration.

(5) Section 197(7), (8) and (9) does not apply to a transfer in accordance with this section.

Disclosure of information concerning insolvency

197B. (1) An employer that is facing financial difficulties that may reasonably result in the winding-up or sequestration of the employer, must advise a consulting party contemplated in section 189 (1).

(2) *(a)* An employer that applies to be wound up or sequestrated, whether in terms of the Insolvency Act, 1936, or any other law, must at the time of making application, provide a consulting party contemplated in section 189 (1) with a copy of the application.

(b) An employer that receives an application for its winding-up or sequestration must supply a copy of the application to any consulting party contemplated in section 189(1), within two days of receipt, or if the proceedings are urgent, within 12 hours.".

Insertion of section 200A in Act 66 of 1995

51. The following section is inserted after section 200 of the principal Act:

"Presumption as to who is employee

200A. (1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:

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

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

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

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

(e) the person is economically dependent on the other person for whom he or she works or renders services;

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

(g) the person only works for or renders services to one person.

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*.

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3) of the *Basic Conditions of Employment Act*, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are *employees*.

(4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are *employees*.".

Amendment of section 203 of Act 66 of 1995

52. Section 203 of the principal Act is amended by the addition of the following subsection:

"(4) *A code of good practice* issued in terms of this section may provide that the code must be taken into account in applying or interpreting any employment law.".

Amendment of section 204 of Act 66 of 1995

53. Section 204 of the principal Act is amended by the substitution for the words preceding paragraph *(a)* of the following words:

"Unless a *collective agreement*, arbitration award or determination made in terms of the **[Wage Act]** *Basic Conditions of Employment Act* provides otherwise, every employer on whom the *collective agreement*, arbitration award, or determination, is binding must—".

Amendment of section 213 of Act 66 of 1995

54. Section 213 of the principal Act is amended by—

(a) the substitution for the definition of "Basic Conditions of Employment Act" of the following definition:

" 'Basic Conditions of Employment Act' means the Basic Conditions Employment Act, 1997 (Act No. 75 of 1997).";

(b) the insertion of the following definition after the definition of 'employers' organisation'

" 'employment law' includes this Act, any other Act the administration of which has been assigned to the *Minister*, and any of the following Acts:

(a) the Unemployment Insurance Act, 1966 (Act No. 30 of 1966);

(b) the Skills Development Act, 1998 (Act No. 97 of 1998);

(c) the Employment Equity Act, 1998 (Act No. 55 of 1998);

(d) the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993); and

(e) the Compensation for Occupational Injuries and Diseases Act, 1993 (Act No. 130 of 1993);

(c) the substitution for the definition of "public service" of the following definition:

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

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

(b) the National Intelligence Agency; and

(c) the South African Secret Service." ;

(d) the substitution in the definition of 'registered scope' for paragraph *(b)* of the following paragraph:

"*(b)* in the case of *bargaining council*s established for *sector*s in the *public service*, the *sector* designated by the Public Service Co-ordinating Bargaining Council in terms of section 37(1) **[or by the President in terms of section 37(2) or (4)]**;";

(e) the substitution in the definition of 'workplace' for paragraph *(a)* of the following paragraph:

"*(a)* in relation to the *public service*—

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

(ii) for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), or any other part of the *public service* that the Minister for Public Service and Administration, after consultation with the Public Service Co-ordinating Bargaining Council, demarcates as a workplace;";

(f) the deletion in the definition of "workplace" of paragraph *(b)*.

Amendment of Schedule 7 of Act 66 of 1995, as amended by section 56 of Act 42 of 1996, section 64 of Act 55 of 1998 and section 28 of Act 127 of 1998

55. Schedule 7 to the principal Act is amended by—

(a) the deletion of items 2, 3 and 4; and

(b) the addition of the following Part:

"***Part H***— *Transitional Provisions arising out of the Application of the Labour Relations Amendment Act, 2001*

Definitions

26. In this part—

(a) 'Act' means the Labour Relations Act, 1995 (Act No. 66 of 1995); and

(b) 'Amendment Act' means the Labour Relations Amendment Act, 2002.

Representation in conciliation and arbitration

27. (1) Until such time as rules made by the Commission in terms of section 115(2A)*(k)* of the Act come into force—

(a) sections 135(4), 138(4) and 140(1) of the Act remain in force as if they had not been repealed, and any reference in this item to those sections is a reference to those sections prior to amendment by this Amendment Act;

(b) a *bargaining council* may be represented in arbitration proceedings in terms of section 33A of the Act by a person specified in section 138(4) of the Act or by a designated agent or an official of the *council*;

(c) the right of any party to be represented in proceedings in terms of section 191(5B) of the Act must be determined by—

(i) section 138(4) read with section 140(1) of the Act for *disputes* about a *dismissal*; and

(ii) section 138(4) of the Act for *disputes* about an unfair labour practice.

(2) Despite subitem 1*(a)*, section 138(4) of the Act does not apply to an arbitration conducted in terms of section 188A of the Act.

Order for costs in arbitration

28. Section 138(10) of the Act, before amendment by the Amendment Act, remains in effect as if it had not been amended until such time as the rules made by the Commission in terms of section 115(2A)*(j)* of the Act come into effect.

Arbitration in terms of section 33A

29. (1) Until such time as the *Minister* promulgates a notice in terms of section 33A(13) of the Act, an arbitrator conducting an arbitration in terms of section 33A of the Act may impose a fine in terms of section 33A(8)*(b)* of the Act subject to the maximum fines set out in Table One and Two of this item.

(2) The maximum fine that may be imposed by an arbitrator in terms of section 33A(8)*(b)* of the Act—

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

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

TABLE ONE: MAXIMUM PERMISSIBLE FINE NOT INVOLVING AN UNDERPAYMENT

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

TABLE TWO: MAXIMUM PERMISSIBLE FINE INVOLVING AN UNDERPAYMENT

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

Unfair labour practice

30. (1) Any *dispute* about an unfair labour practice referred to a *council* or Commission in accordance with items 3(1) and (2) of this Schedule prior to the commencement of the Amendment Act must be dealt with as if items 2, 3 and 4 of this Schedule had not been repealed.

(2) *(a)* A *dispute* concerning any act or omission constituting an alleged unfair labour practice that occurred prior to the commencement of the Amendment Act that had not been referred to a *council* or Commission in terms of item 3(1) and 3(2) prior to the commencement of the Amendment Act must be dealt with in terms of section 191 of the Act.

(b) If a *dispute* contemplated in paragraph *(a)* is not referred to conciliation in terms of section 191(1)*(a)* of the Act within 90 days of the commencement of the Amendment Act, the *employee* alleging the unfair labour practice must apply for condonation in terms of section 191(2) of the Act.

(c) Subitem *(a)* does not apply to an unfair labour practice in relation to probation.

Bargaining councils in public service

31. Any *bargaining council* that was established or deemed to be established in terms of section 37(3) of the Act prior to the Amendment Act coming into force is deemed to have been established in terms of section 37(2) of the Act.

Expedited applications in terms of section 189A(13)

32. Until such time as rules are made in terms of section 159 of the Act—

(a) the Labour Court may not grant any order in terms of section 189A(13) or (14) of the Act unless the applicant has given at least four days' notice to the respondent of an application for an order in terms of subsection (1). However, the Court may permit a shorter period of notice if—
  (i) the applicant has given written notice to the respondent of the applicant's intention to apply for the granting of an order;
  (ii) the respondent has been given a reasonable opportunity to be heard before a decision concerning that application is taken; and
  (iii) the applicant has shown good cause why a period shorter than four days should be permitted;

(b) an application made in terms of section 189A(13) must be enrolled by the Labour Court on an expedited basis.".

Amendment of Schedule 8 to Act 66 of 1995, as amended by section 57 of Act 42 of 1996

56. Schedule 8 to the principal Act is amended by the substitution in item 8 for subitem (1) of the following subitem:

"Probation

(1) *(a)* An employer may require a newly-hired *employee* to serve a period of probation before the appointment of the *employee* is confirmed.

(b) The purpose of probation is to give the employer an opportunity to evaluate the *employee's* performance before confirming the appointment.

(c) Probation should not be used for purposes not contemplated by this Code to deprive *employees* of the status of permanent employment. For example, a practice of dismissing *employees* who complete their probation periods and replacing them with newly-hired *employees*, is not consistent with the purpose of probation and constitutes an unfair labour practice.

(d) The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the *employee's* suitability for continued employment.

(e) During the probationary period, the *employee's* performance should be assessed. An employer should give an *employee* reasonable evaluation,

instruction, training, guidance or counselling in order to allow the *employee* to render a satisfactory service.

(f) If the employer determines that the *employee's* performance is below standard, the employer should advise the *employee* of any aspects in which the employer considers the *employee* to be failing to meet the required performance standards. If the employer believes that the *employee* is incompetent, the employer should advise the *employee* of the respects in which the *employee* is not competent. The employer may either extend the probationary period or dismiss the *employee* after complying with subitems *(g)* or *(h)*, as the case may be.

(g) The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve.

(h) An employer may only decide to dismiss an *employee* or extend the probationary period after the employer has invited the *employee* to make representations and has considered any representations made. A *trade union* representative or fellow *employee* may make the representations on behalf of the *employee*.

(i) If the employer decides to dismiss the *employee* or to extend the probationary period, the employer should advise the *employee* of his or her rights to refer the matter to a *council* having jurisdiction, or to the Commission.

(j) Any person making a decision about the fairness of a *dismissal* of an *employee* for poor work performance during or on expiry of the probationary period ought to accept reasons for *dismissal* that may be less compelling than would be the case in *dismissals* effected after the completion of the probationary period.".

Substitution of Schedule 10 to Act 66 of 1995

57. The following Schedule is substituted for Schedule 10 to the principal Act:

"Schedule 10

POWERS OF DESIGNATED AGENT OF BARGAINING COUNCIL

(Section 33)

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

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

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

(b) if authorised to do so by the Labour Court in terms of subitem (3);

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

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

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

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

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

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

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

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

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

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

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

(7) A designated agent must—

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

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

(c) return any removed record, document or item within a reasonable time.

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

(9) An answer by any person to a question by a designated agent in terms of this item may not be used against that person in any criminal proceedings, except proceedings in respect of a charge of perjury or making a false statement.

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

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

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

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

(c) hinders the designated agent in the performance of the agent's functions in terms of this item.

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

Short title and commencement

58. (1) This Act is called the Labour Relations Amendment Act, 2002, and comes into operation on a date determined by the President by proclamation in the *Gazette*.

(2) Section 27*(b)* of this Act does not come into operation before the rules made by the Commission in terms of section 115(2A)*(j)* of the principal Act come into effect.

Footnotes:

1. Amend footnote 11 to the principal Act by inserting after "disputes" in the first line of the footnote "contemplated by subsection (3)".
2. Amend footnote 11 to the principal Act by inserting after "disputes" in the second paragraph of the footnote "contemplated by subsection (3)".
3. Insert footnote 53a into the principal Act with the following text:
"Section 14(1)*(c)* of the Pensions Funds Act requires the registrar to be satisfied that any scheme to amalgamate or transfer funds is reasonable and equitable, and accords full recognition to the rights and reasonable benefit expectations of the persons concerned in terms of the fund rules, and to additional benefits which have become established practice."

MEMORANDUM ON THE OBJECTS OF THE LABOUR RELATIONS AMENDMENT BILL

1. PURPOSE OF BILL

The main purpose of the Bill is to amend the Labour Relations Act, 1995 (Act No. 66 of 1995) ('the Act'), improve its application, address unintended consequences and align it into changing labour market realities.

2. OBJECTS OF BILL

2.1 Clause 1 of the Bill amends section 23(4) of the Act to provide that a notice to terminate a collective agreement must be given in writing to prevent disputes as to whether or not a notice was in fact given.

2.2 Clause 2 of the Bill amends section 24 of the Act to clarify its application to collective agreements in settlement of justiciable disputes.

2.3 Clause 3 of the Bill amends section 28 of the Act to extend the powers and functions of bargaining councils to include providing industrial support services within their sector and the extension of the council's services and functions to workers in the informal sector and home workers.

2.4 Clause 4 of the Bill amends section 29(3) of the Act to require the registrar to send to NEDLAC a copy of the notice of an application for the registration of a bargaining council and by inserting a new subsection 29(16) excluding public sector bargaining councils from provisions concerning registration which are not applicable to them.

2.5 Clause 5 of the Bill amends section 32 of the Act to—

* enable the Minister to extend an agreement where the parties to the council are sufficiently representative within the registered scope of the council and not only within the area in respect of which the extension is sought;
* introduce a requirement that where parties to a collective agreement that has been extended by the Minister agree to terminate the agreement, they must notify the Minister.

2.6 Clause 6 of the Bill amends section 33 of the Act to redefine the powers of designated agents of bargaining councils to include securing compliance with council agreements.

2.7 It is further proposed that a new section 33A be inserted to improve bargaining council enforcement procedures and provide a statutory basis for arbitrations dealing with the enforcement of collective agreements and for the powers of arbitrators in such cases to include the power to impose a fine.

2.8 Clause 8 of the Bill amends section 37 of the Act to rationalise the process of designation, variation of scope and amalgamation of public sector bargaining councils. It is further proposed to remove the power accorded to the President to designate these councils.

2.9 Clause 9 of the Bill amends section 38 of the Act to accord the Commission for Conciliation, Mediation and Arbitration (CCMA) jurisdiction to deal with jurisdictional disputes between bargaining councils in the public sector.

2.10 Clause 10 of the Bill amends section 44 of the Act to replace the references to the Wage Act with the relevant references to the Basic Conditions of Employment Act (BCEA).

2.11 Clause 11 of the Bill amends section 49 of the Act to enable a more efficient process of checking the representivity of parties to bargaining councils.

2.12 Clause 12 of the Bill amends section 51 of the Act to—

* ensure that councils do not agree to refer disputes to the CCMA without prior consultation with the Director;
* ensure consistency in reviews and related matters between arbitrations conducted by the CCMA and those done by bargaining councils; and
* clarify that bargaining councils can establish dispute resolution procedures by collective agreement.

2.13 Clause 13 of the Bill amends section 53 of the Act to clarify that the obligations on councils to submit financial reports to the registrar apply to benefit funds administered by them. This does not apply to funds that fall under the oversight of the respective registrars of pension funds and medical aid schemes.

2.14 Clause 14 of the Bill amends section 54 of the Act to—

* place an obligation on bargaining councils to provide a report to the Registrar of Labour Relations on the extent to which the bargaining councils cover small employers and take small business interests into account; and
* empower the Registrar to investigate the affairs of bargaining councils that do not comply with its statutory obligations and to submit a report to the Labour Court.

2.15 Clause 15 of the Bill amends section 58 of the Act to allow the Registrar of Labour Relations to vary the registered scope of councils if no objection has been received, without referring the matter to NEDLAC.

2.16 Clause 16 of the Bill amends section 61 of the Act to simplify the process of deregistering public service bargaining councils.

2.17 Clause 17 of the Bill amends section 68 of the Act to extend the power of the Labour Court to make an order for compensation in the event of an unprocedural strike or lock-out to include conduct in contemplation or in furtherance of the strike or lock-out.

2.18 Clause 18 of the Bill amends section 95 of the Act to require the Registrar of Labour Relations to be satisfied that a trade union or employer organisation applying for registration is genuine. The Minister will have the power to issue guidelines to be applied by the Registrar in this regard.

2.19 Clause 19 of the Bill amends section 103 of the Act to simplify the process of winding up trade unions or employers' organisations.

2.20 Clause 20 of the Bill amends section 105 of the Act by revising the chapter heading.

2.21 Clause 21 of the Bill amends section 106 of the Act to simplify the cancellation of registration of trade unions or employers' organisations.

2.22 Clause 22 of the Bill amends section 115 of the Act to give the CCMA the power to draft rules on a range of procedural issues and to give the Minister the power to make regulations in respect of representation and the basis upon which a commissioner may make an award as to costs in an arbitration.

2.23 Clause 23 of the Bill amends section 127 of the Act to require the CCMA to annually publish in the *Gazette* a list of accredited councils and agencies instead of publishing copies of each and every accreditation certificate.

2.24 Clause 24 of the Bill amends section 128 of the Act to give certain powers conferred on a commissioner in terms of section 142 to arbitrators appointed by an accredited agency or council.

2.25 Clause 25 of the Bill amends section 133 of the Act to provide that consent to arbitration must be in writing.

2.26 Clause 26 of the Bill amends section 135 of the Act by removing the provisions concerning representation at conciliation hearings (consequential to amendment to section 115).

2.27 Clause 27 of the Bill amends section 138 of the Act to provide that a commissioner can make an order for the payment of costs according to the requirements of law and fairness and in accordance with any rules made by the CCMA and any guidelines or a Code of Good Practice. Further, consequential to the amendment to section 115, the provisions concerning representation in arbitrations are to be removed.

2.28 Clause 28 of the Bill amends section 140 of the Act to remove the provisions concerning representation in dismissal arbitrations.

2.29 Clause 29 of the Bill amends section 141 of the Act to provide that an agreement to refer a matter to the Labour Court must be in writing and that an arbitration agreement can only be terminated with the written consent of the parties.

2.30 Clause 30 of the Bill amends section 142(7) of the Act to make a party who requests the CCMA to subpoena a witness liable for the payment of witness fees, although the CCMA may waive this on good cause shown and further amends section 142(9) of the Act to give the CCMA the power to deal with contemptuous conduct, subject to the oversight of the Labour Court.

2.31 Clause 31 of the Bill amends the Act by inserting a new section 142A to enable the commission to make an agreement in settlement of a justiciable dispute, an arbitration award.

2.32 Clause 32 of the Bill amends section 143 of the Act to accord arbitration awards the same status as orders of a civil court (such as the Labour Court, the High Court or the Magistrate's Court). If the award is for payment of an amount of money, a successful party will be able to issue a warrant of execution through the Deputy-Sheriff. Other awards, such as an award of reinstatement or specific performance, will be enforced through the Labour Court on the basis of contempt proceedings.

2.33 Clause 33 of the Bill amends section 144 of the Act to allow commissioners other than the one who gave an award the power to vary or rescind the award.

2.34 Clause 34 of the Bill amends section 145 of the Act to give the Labour Court an explicit power to condone late review applications if good cause is shown.

2.35 Clause 35 of the Bill amends section 150 of the Act to give the CCMA the power to offer conciliation even after a dispute has been conciliated or the period for conciliation has elapsed (for example, during industrial action).

2.36 Clause 36 of the Bill amends section 158 of the Act to—

* clarify the powers of the Labour Court to review arbitrations; and
* allow collective agreements in settlement of justiciable disputes to be made orders of the Labour Court.

2.37 Clause 37 of the Bill amends section 161 of the Act to allow not only designated agents of bargaining councils, but also other council officials, to represent councils in the Labour Court.

2.38 Clause 38 of the Bill amends section 173(3) of the Act by the deletion of that section to resolve an anomaly in respect of the time period for noting an appeal to the Labour Appeal Court.

2.39 Clause 39 of the Bill amends the Act by amending the heading of Chapter VIII so that it reads: "Unfair dismissal and unfair labour practices".

2.40 Clause 40 of the Bill amends section 185 of the Act to include reference to both unfair dismissals and unfair labour practices.

2.41 Clause 41 of the Bill amends section 186 of the Act to provide—

* that a situation in which the new employer after a transfer in terms of section 197 or 197A provides employees with substantially less favourable conditions of work is a species of constructive dismissal; and
* for the definition of an unfair labour practice.

2.42 Clause 42 of the Bill amends section 187 of the Act so that a dismissal for a reason related to a transfer covered by sections 197 or 197A is automatically unfair, as well as the dismissal of an employee on account of the employee having made protected disclosures in terms of the Protected Disclosures Act.

2.43 Clause 43 of the Bill amends the Act by inserting a new section 188A to allow employers and employees to agree that an arbitrator will conduct an inquiry concerning an employee's conduct or capacity. The decision of the arbitrator will be final and binding, subject to review by the Labour Court.

2.44 Clause 44(1) of the Bill amends section 189 of the Act to—

* require employers contemplating a dismissal for operational requirements to engage in a joint consensus-seeking process with representatives of the affected employees;
* clarify that the onus in disputes over the disclosure of information lies on the employer.

2.45 Clause 45(2) of the Bill amends the Act by inserting a new section 189A to—

* allow parties to consultations to agree to request a facilitator from the CCMA;
* enable the Minister to make regulations concerning the conduct of facilitations;

* prevent employers from dismissing employees until after the conclusion of facilitation or conciliation;
* allow workers or their trade unions after the completion of facilitation or conciliation, to give notice of the commencement of strike action or refer a dispute about whether there is a fair reason for the retrenchment to the Labour Court;
* require employers to give notice of termination in terms of section 37(1) of the BCEA after the conclusion of facilitation or conciliation;
* permit employers to lock out after notice of strike has been given;
* preclude any dispute in respect of which a strike notice has been issued from being referred to the Labour Court for adjudication on substantive fairness;
* require workers to give 14 days notice in respect of a secondary strike;
* enable workers to refer a complaint about the procedural fairness of an operational requirements dismissal to the Labour Court on an expedited basis and allow the Labour Court to compel an employer to comply with a fair procedure;
* circumscribe the grounds which the Labour Court can consider when determining the substantive fairness of the retrenchment.

Section 189A is only applicable to employers who employ more than 50 employees in respect of dismissals in excess of a defined number, depending on the number of employees employed by that employer. The employer within the public service is the relevant executing authority in terms of section 7(2) of the Public Service Act.

2.46 Clause 46 of the Bill amends section 191 of the Act to—

* make the section refer not only to unfair dismissals, but also to unfair labour practices;
* allow an employee to refer dismissal disputes for conciliation within 30 days from when the employer makes its final decision to dismiss or uphold the dismissal;
* require an employee to refer an unfair labour practice dispute within 90 days of the date of the commission of the unfair labour practice or 90 days of the date on which the employee became aware of the unfair labour practice;
* consequentially amend subsection (2) in respect of condonation;
* allow an employee whose contract is terminated with notice to refer a dispute for conciliation during the period of notice;
* consequentially amend subsection (5)*(a)*(ii);
* provide for unfair labour practices disputes to be referred to arbitration;
* provide for the CCMA to resolve disputes by a single "con-arb" process if the dispute involves a dismissal or unfair labour practice for a reason related to probation or, if the dispute relates to an unfair labour practice or dismissal in respect of which the CCMA and neither party objects;
* consequentially amend subsection (6);
* provide that if only one employee is dismissed for operational requirements the employee is able to refer the dispute after conciliation to the Labour Court or to arbitration at the CCMA or the appropriate council and to provide that disputes involving a contravention of the Protected Disclosure Act are referred to the Labour Court after conciliation.

2.47 Clause 47 of the Bill amends section 193 of the Act to specify the powers of an arbitrator to determine an unfair labour practice.

2.48 Clause 48 of the Bill amends section 194 of the Act to introduce a greater degree of discretion for arbitrators, in the awarding of compensation for procedurally unfair dismissals. The amendment also clarifies rights to compensation by setting the maximum compensation at 12 months in the case of both substantively and procedurally unfair dismissals.

2.49 Clause 49 of the Bill amends section 197 of the Act and inserts a new section 197A and 197B. Section 197 deals with transfers of businesses as going concerns and section 197A with transfers of businesses in the context of insolvency. Section 197B deals with disclosure of information concerning insolvency.

Amendments to section 197 provide that in the case of a transfer of a business, undertaking, trade or service as a going concern—

* the automatic substitution of the new employer for the old employer in contracts of employment of transferred employees;
* all rights and obligations between the old employer and employee become rights and obligations between the new employer and the transferred

employee. However, the new employer may change employee's terms and conditions of employment by agreement or if the new terms are not on the whole less favourable than those that existed before the transfer. The latter provision does not apply where employee's terms and conditions of employment are regulated by collective agreement;

* the transfer of employees' pension, provident, retirement or similar funds upon the transfer of the business provided that the benefits of the new funds are reasonable and equitable;
* the new employer is bound by the collective agreements and arbitration awards that bound the old employer;
* the old employer must take reasonable steps to ensure that the new employer can meet the obligations of leave pay, severance pay and other monies owing to employees.

2.50 Clause 50 inserts section 197A which provides that—

* the new employer is automatically substituted for the old employer in all contracts of employment if the old employer is insolvent, and a scheme of arrangement or compromise is entered into in order to avoid the old employer from being wound up or sequestrated;
* rights and obligations incurred prior to insolvency are not transferred to the new employer.

Section 197B requires an employer—

* that is facing the prospect of insolvency to notify a registered trade union representing its employees;
* that applies to be wound up or sequestrated to provide the trade union or employees with a copy of the application;
* that receives such an application to provide a copy to the trade union or employees within two days of receipt or if the proceedings are urgent within 12 hours of receipt.

2.51 Clause 51 of the Bill amends the Act by inserting a new section 200A providing for—

* a series of rebuttable presumptions concerning proof of whether an employment relationship exists;
* NEDLAC to issue a Code of Good Practice in this regard; and
* the CCMA to make an advisory award about whether persons involved in particular work arrangements are employees or not.

2.52 Clause 52 of the Bill amends section 203 of the Act to allow a Code of Good Practice to be taken into account in interpreting or applying any employment law.

2.53 Clause 53 of the Bill amends section 204 of the Act to replace the references to the Wage Act with the relevant references to the BCEA.

2.54 Clause 54 of the Bill amends the Act by revising the definitions of 'public service', 'registered scope', 'workplace' and 'Basic Conditions of Employment Act' through amendments to section 213.

2.55 Clause 55 of the Bill amends Schedule 7 to the Act to delete transitional provisions which are no longer needed and add new transitional provisions in respect of—

* representation in conciliation and arbitration;
* cost orders in arbitration;
* arbitrations in terms of section 33A;
* unfair labour practice disputes;
* bargaining councils in the public service;
* Labour Court judges who are not High Court judges;
* expedited applications in terms of section 189A.

2.56 Clause 56 of the Bill amends the section in Schedule 8 of the Act dealing with probation to inter alia clarify the purpose of probation, specify the obligations of an employer in respect of a probationary employee and indicate that an adjudicator, when evaluating a decision about the fairness of a dismissal of an employee for poor work performance during or at the end of the probationary period, ought to accept less compelling reasons than ordinarily would be the case.

2.57 Clause 57 of the Bill amends the Act by inserting a new Schedule 11 to spell out the powers of designated agents of bargaining councils.

2.58 Clause 58 provides for the short title and the date of commencement of the Bill.

Departments and bodies consulted:

Department of Public Service and Administration
Department of Minerals and Energy
National Treasury
Department of Justice and Constitutional Development
Department of Trade and Industry
Organised Business and Labour at NEDLAC
Members of the public through invitations for public comments.

Financial implications for State

None.

Parliamentary procedure

The State Law Advisers and the Department of Labour are of the opinion that the Bill should be dealt with in terms of the procedure set out in section 75 of the Constitution since it contains no provision to which section 74 or 76 of the Constitution applies.