REPUBLIC OF SOUTH AFRICA

LABOUR RELATIONS AMENDMENT BILL

(As introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 35212 of 5 April 2012)
(The English text is the official text of the Bill)

(MINISTER OF LABOUR)

[B 16—2012]

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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 facilitate the granting of organisational rights to trade unions that are sufficiently representative; to require trade unions and employers' organisations to conduct a ballot prior to calling a strike or lock-out; to strengthen the status of picketing rules and agreements; to clarify the powers of the Labour Court; to amend the operation, functions and composition of the essential services committee and to provide for minimum service determinations; to provide for the Labour Court to order that an administrator be appointed to administer a trade union or employers' organisation; to further regulate the remuneration and conditions of appointment of judges of the Labour Court; to enable judges of the Labour Court to serve as a judge on the Labour Appeal Court; to limit the protection of employees earning above the threshold determined by the Minister; to further regulate enquiries by arbitrators; to provide greater protection for workers placed by temporary employment services; to regulate the employment of fixed term contracts and part-time employees earning below the earnings threshold determined by the Minister; to further specify the liability for employer's obligations; and to substitute certain definitions; and to provide for matters connected therewith.

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

Amendment of section 21 of Act 66 of 1995

1. Section 21 of the Labour Relations Act, 1995 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the deletion in subsection (8)*(b)* of the word "and" at the end of subparagraph (iii) and the addition of the following subparagraph:

"(v) the composition of the work-force in the *workplace* taking into account the extent to which there are *employees* assigned to work by temporary employment services, *employees* engaged on fixed term contracts, part-time *employees* or *employees* in other categories of non-standard employment; and;";

(b) by the insertion after subsection (8) of the following subsections:

"(8A) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of section 22(4) grant a registered *trade union* that does not have as members the majority of *employees* employed by an employer in a *workplace*—

(a) the rights referred to in section 14, despite any provision to the contrary in that section, if—

(i) the *trade union* is entitled to all of the rights referred to in sections 12, 13 and 15 in that *workplace*; and

(ii) no other *trade union* has been granted the rights referred to in section 14 in that *workplace*.

(b) the rights referred to in section 16, despite any provision to the contrary in that section, if—

(i) the *trade union* is entitled to all of the rights referred to in sections 12, 13, 14 and 15 in that *workplace*; and

(ii) no other *trade union* has been granted the rights referred to in section 16 in that *workplace.*

(8B) A right granted in terms of subsection (8A) lapses if the *trade union* concerned is no longer the most representative *trade union* in the *workplace*.

(8C) Subject to the provisions of subsection (8), a commissioner may in an arbitration conducted in terms of section 22(4) grant the rights referred to in sections 12, 13 or 15 to a registered *trade union*, or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a *collective agreement* in terms of section 18, if—

(a) all parties to the *collective agreement* have been given an opportunity to participate in the arbitration proceedings; and

(b) the *trade union*, or *trade unions* acting jointly, represent a significant interest, or a substantial number of *employees*, in the *workplace*.

(8D) In determining a *dispute* referred to in subsection (8) the commissioner may, despite any provision to the contrary in sections 14, 16 and 18, but subject to the provisions of subsection (8)—

(a) grant the rights referred to in section 14 to a registered *trade union* that does not have as members the majority of *employees* employed by an employer in a *workplace*, if—

(i) the *trade union* is entitled to all of the rights referred to in sections 12, 13 and 15 in that *workplace*; and

(ii) no other *trade union* has been granted the rights referred to in section 14 in that *workplace*;

(b) grant the rights referred to in section 16 to a registered *trade union* that does not have as members the majority of *employees* employed by an employer in a *workplace*, if—

(i) the *trade union* is entitled to all of the rights referred to in sections 12, 13, 14 and 15 in that *workplace*; and

(ii) no other *trade union* has been granted the rights referred to in section 16 in that *workplace*; or

(c) grant the rights referred to in sections 12, 13, or 15 to a registered *trade union*, or two or more registered *trade unions* acting jointly, that do not meet thresholds of representativeness established by a *collective agreement* in terms of section 18, if—

(i) all parties to the *collective agreement* have been given an opportunity to participate in the arbitration proceedings; and

(ii) the *trade union* or *trade unions* acting jointly seeking the rights represent a significant interest, or a substantial number of *employees*, in the workplace;''; and

(c) by the addition of the following subsection:

''(12) If a *trade union* seeks to exercise the rights conferred by Part A in respect of *employees* of a temporary employment service, it may seek to exercise those rights in a *workplace* of either the temporary employment service or one or more clients of the temporary employment service, and if it exercises rights in a *workplace* of the temporary employment service, any reference in Chapter III to the employer's premises must be read as including the client's premises.''.

Amendment of section 22 of Act 66 of 1995

2. Section 22 of the principal Act is hereby amended by the addition of the following subsection:

"(5) An arbitration award in terms of Part A may be made binding on the employer and in addition to—

(a) the extent that it applies to the *employees* of a temporary employment service, a client of the temporary employment service for whom an *employee* covered by the award is assigned to work; and

(b) any person other than the employer who controls access to the *workplace* to which the award applies, if that person has been given an opportunity to participate in the arbitration proceedings.".

Amendment of section 32 of Act 66 of 1995, as amended by section 7 of Act 42 of 1996, section 2 of Act 127 of 1998 and section 5 of Act 12 of 2002

3. Section 32 of the principal Act is hereby amended—

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

"*(d*A*)* the *bargaining council* has in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the *collective agreement* and is able to decide an application for an exemption within 30 days;";

(b) by the substitution in subsection (3)*(e)* for the words preceding subparagraph (i) of the following words:

"provision is made in the *collective agreement* for an independent body to hear and decide, as soon as possible and not later than 30 days after the appeal is lodged, any appeal brought against—";

(c) by the insertion after subsection (3) of the following subsection:

"(3A) No representative, office-bearer or official of a *trade union* or *employers' organisation* party to the *bargaining council* may be a member of, or participate in the deliberations of, the appeal body established in terms of subsection (3)*(e)*.";

(d) by the deletion in subsection (5) of the word "and" at the end of paragraph *(a)* and the addition of the following paragraphs:

"*(c)* the *Minister* has published a notice in the Government Gazette stating that an application for an extension in terms of this subsection has been received, stating where a copy may be inspected or obtained, and inviting comment within a period of not less than 21 days from the date of the publication of the notice; and

(d) the *Minister* has considered all comments received during the period referred to in paragraph *(c)*;";

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

"(5A) When determining whether the parties to the *bargaining council* are sufficiently representative for the purposes of subsection (5)*(a)*, the *Minister* may take into account the composition of the workforce in the sector, including the extent to which there are *employees* assigned to work by temporary employment services, *employees* engaged on fixed term contracts, part-time *employees* or *employees* in other categories of non-standard employment."; and

(f) by the addition of the following subsection:

"(11) A *bargaining council* that has a *collective agreement* extended in terms of this section must ensure that the independent appeal body is able to determine appeals within the period specified in subsection (3)*(f)*.".

Amendment of section 49 of Act 66 of 1995, as amended by section 11 of Act 12 of 2002

4. Section 49 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for the words preceding paragraph *(a)* of the following words:

"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 information specified in subsection (3) and the number of *employees* who are—'';

(b) by the substitution in subsection (3) for the words preceding paragraph *(a)* of the following words:

''A *bargaining council* other than one contemplated in subsection (2) 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—''; and

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

''(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 for any purpose in terms of *this Act*, including a decision by the *Minister* in terms of sections 32(3)*(b)*, 32(3)*(c)* and 32(5).''.

Amendment of section 51 of Act 66 of 1995, as amended by section 11 of Act 42 of 1996 and section 12 of Act 12 of 2002

5. Section 51 of the principal Act is hereby amended by the substitution for subsection (9) of the following subsection:

''(9) A *bargaining council* may, by *collective agreement*—

(a) establish procedures to resolve any *dispute* contemplated in this section;

(b) provide for payment of a dispute resolution levy; and

(c) provide for the payment of a fee in relation to any conciliation or arbitration proceedings in respect of matters for which the Commission may charge a fee in terms of section 115(2A)*(l)*, which may not exceed the fee provided for in that section.''.

Amendment of section 64 of Act 66 of 1995

6. Section 64 of the principal Act is hereby amended—

(a) by the deletion in subsection (1)*(a)* of the expression ''and after that—'' at the end of subparagraph (ii) and the addition of the following subparagraphs:

''(iii) the *trade union* or *employers' organisation*, as the case may be, has conducted a ballot of its members in good standing who are entitled to *strike* or *lock-out* in terms of this section in respect of the issue in *dispute*; and

(iv) a majority of the members of the *trade union* or *employers' organisation* who voted in that election have voted in favour of the *strike* or lock-out; and after that—;''; and

(b) by the addition of the following subsection:

''(6) A certificate issued by the Commission, a *bargaining council*, any *council* or private agency accredited in terms of section 127(1)*(c)* that a *trade union* or *employers' organisation* has conducted a ballot in compliance with subsection (1)*(a)*(iii) and (iv) is proof that the *trade union* or *employers' organisation* has complied with those provisions.''.

Amendment of section 65 of Act 66 of 1995

7. Section 65 of the principal Act is hereby amended—

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

''*(c)* the *issue in dispute* **[*is*]** is one that a party has the right to refer to arbitration or to the Labour Court in terms of *this Act* or any other *employment law*;''; and

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

''*(b)* any determination made in terms of **[the *Wage Act*]** Chapter Eight of the *Basic Conditions of Employment Act* and that regulates the *issue in dispute*, during the first year of that determination.''.

Amendment of section 67 of Act 66 of 1995

8. Section 67 of the principal Act is hereby amended—

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

"(7) **[The]** Despite the provisions of subsection 64(1)*(a)*(iii) and (iv), the failure by a registered *trade union* or a registered *employers' organisation* to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a *strike* or *lock-out* may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the *strike* or *lock-out*.";

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

"(8) The provisions of subsections (2) and (6) do not apply to any act in contemplation or in furtherance of a *strike* or a *lock-out*, if that act is an offence or is a material breach of a picketing agreement established in terms of section 69(4) or a picketing rule established in terms of section 69(5).''; and

(c) by the deletion of subsection (9).

Amendment of section 69 of Act 66 of 1995, as amended by section 20 of Act 42 of 1996

9. Section 69 of the principal Act is hereby amended—

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

"A registered *trade union* may authorise a picket by its members **[and supporters]** for the purposes of peacefully demonstrating—";

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

"(6) The rules established by the Commission may provide for picketing by *employees*—

(a) in a place contemplated in section 69(2)*(a)* which is owned or controlled by a person other than the employer, if that person has had an opportunity to make representations to the Commission before the rules are established; or

(b) on their employer's premises if the Commission is satisfied that the employer's permission has been unreasonably withheld.";

(c) by the substitution in subsection (8) for the words preceding paragraph *(a)* of the following words:

"Any party to a *dispute* about any of the following issues, including a person contemplated in subsection (6)*(a)*, may refer the *dispute* in writing to the Commission—"; and

(d) by the addition of the following subsections:

"(12) If a party has referred a *dispute* in terms of subsection (8) or (11), the Labour Court may grant relief, including urgent interim relief, which is just and equitable in the circumstances and which may include—

(a) an order directing any party, including a person contemplated in subsection (6)*(a)*, to comply with a picketing agreement or rule;

(b) an order varying the terms of a picketing agreement or rule;

(c) in the case of a *trade union*, suspending the picket or strike; or

(d) in the case of an employer, suspending the engagement of replacement labour even in circumstances in which this is not otherwise precluded by section 76 or suspending the *lock-out.*

(13) The Labour Court may not grant an order in terms of subsection (12) unless—

(a) 48 hours' notice of an application seeking relief referred to in subsection (12)*(a)* or *(b)* has been given to the respondent; or

(b) 72 hours' notice of an application seeking relief referred to in subsection (12)*(c)* or *(d)* has been given to the respondent.

(14) The Labour Court may permit a shorter period of notice than required by subsection (13) if the—

(a) applicant has given written notice to the respondent of its intention to apply for the order;

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

(c) applicant has shown good cause why a period shorter than 48 hours should be permitted.".

Substitution of section 70 of Act 66 of 1995, as amended by section 5 of Act 127 of 1998

10. The following section is hereby substituted for section 70 of the principal Act:

"**Essential services committee**

70. The *Minister*, after consulting *NEDLAC*, must establish an essential services committee under the auspices of the Commission in accordance with the provisions of *this Act*.".

Insertion of sections 70A, 70B, 70C, 70D, 70E and 70F in Act 66 of 1995

11. The following sections are hereby inserted in the principal Act after section 70:

"**Composition of essential services committee**

70A. (1) The *Minister* must appoint to the essential services committee on terms that the Minister considers fit—

(a) a chairperson, who is independent from the constituencies contemplated in subsection (3) and who may be a senior commissioner;

(b) a deputy chairperson, who must be a senior commissioner; and

(c) six persons nominated in accordance with the provisions of subsections (3) and (4).

(2) A member of the essential services committee—

(a) must be a citizen of South Africa, who is ordinarily resident in South Africa, or a permanent resident of South Africa;

(b) must have suitable qualifications or experience in labour law, labour relations, commerce, public affairs, the administration of justice, industry or a sector of the economy;

(c) must not be an unrehabilitated insolvent; and

(d) must not be subject to an order of a competent court holding that person to be mentally unfit or disordered.

(3) Organised business, labour and government at *NEDLAC* must each nominate to the *Minister* the names of two persons to be appointed to the essential services committee.

(4) The *Minister* must appoint the persons nominated by organised business, labour and government at *NEDLAC* if these persons meet the requirements set out in subsection (2).

(5) The *Minister* may fill any vacancy that arises in accordance with the provisions of this section.

(6) A member of the essential services committee may not represent any person before a panel of the essential services committee, but may be appointed by the *trade union* and employer parties to serve as an assessor in terms of section 70C.

Powers and functions of essential services committee

70B. (1) The powers and functions of the essential services committee are to—

(a) monitor the implementation and observance of essential services determinations and minimum services agreements and determinations;

(b) promote effective *dispute resolution* in essential services;

(c) develop guidelines for the negotiation of minimum services agreements;

(d) decide, on its own initiative or at the reasonable request of any interested party, whether to institute investigations as to whether or not the whole or a part of any service is an essential service;

(e) manage its caseload; and

(f) appoint the panels contemplated in section 70C to perform one or more of the functions set out in section 70D.

(2) At the request of a *bargaining council*, the essential services committee must establish a panel to perform any function in terms of section 70D(1).

(3) The essential services committee may request the Commission or any other appropriate person to conduct an investigation to assist the essential services committee in an investigation and to submit a report to it.

Appointment of panels

70C. (1) The essential services committee must, taking into account the nature and complexity of the issue, assign each matter before it to a panel consisting of either three or five persons, including the assessors referred to in subsections (3) and (4).

(2) A panel must be presided over by the chairperson or deputy chairperson of the essential services committee or by a senior commissioner referred to in subsection (3).

(3) The Commission must compile a list of suitably trained senior commissioners who may preside at panel hearings.

(4) If the essential services committee constitutes a three-member panel, it must either—

(a) appoint two of its members to serve as assessors; or

(b) invite the employer and *trade union* parties participating in the hearing to each nominate an assessor.

(5) If the essential services committee constitutes a five-member panel, it must—

(a) appoint two of its members to serve as its assessors; and

(b) invite the employer and *trade union* parties participating in the hearing to each nominate an assessor.

(6) If the essential services committee appoints assessors from its members to serve on a panel, it must appoint one who was nominated to the essential services committee by—

(a) organised labour; and

(b) organised business or government, depending on the sector concerned.

(7) A member of the essential services committee may be nominated to serve as an assessor in terms of subsections (4)*(b)* and (5)*(b)*.

(8) The essential services committee may appoint an assessor if the *trade union* or employer parties participating in the hearing fail to nominate an assessor in terms of subsections (4)*(b)* and (5)*(b)* within the prescribed period.

(9) When appointing or nominating an assessor in terms of subsections (4) to (8), the essential services committee, and any party to a matter before it, must take into account the person's skills, experience, expertise and knowledge of the sector concerned.

Powers and functions of panel

70D. (1) The powers and functions of a panel appointed by the essential services committee are to—

(a) conduct investigations as to whether or not the whole or a part of any service is an essential service;

(b) determine whether or not to designate the whole or a part of that service as an essential service;

(c) determine *disputes* as to whether or not the whole or a part of any service falls within the scope of a designated essential service;

(d) determine whether or not the whole or a part of any service is a maintenance service;

(e) ratify a *collective agreement* that provides for the maintenance of minimum services in a service designated as an essential service; and

(f) determine, in accordance with the provisions of *this Act*, the minimum services required to be maintained in the service that is designated as an essential service.

(2) The presiding member of the panel must determine any question of procedure or law, including whether an issue is a question of procedure or law.

(3) The chairperson of the essential services committee or any person contemplated in section 70C(2) presiding at a hearing may, sitting alone, make an order—

(a) extending or reducing any period prescribed by the rules of the essential services committee; and

(b) condoning the late performance of an act contemplated by the rules of the essential services committee.

(4) Subject to subsections (2) and (3), the decision or finding of the majority of the panel is the decision of the essential services committee.

(5) The decision of a panel must be in writing and signed by the person referred to in section 70C(2), and include the reasons for that decision.

(6) A panel appointed by the essential services committee may make any appropriate order relating to its functions.

Jurisdiction and administration of essential services committee

70E. (1) The essential services committee has jurisdiction throughout the Republic.

(2) The seat of the essential services committee is the Commission's head office.

(3) The functions of the essential services committee, including the functions of the panels, may be performed at any place in the Republic.

(4) The Commission must administer the essential services committee.

(5) The *director* is the accounting officer of the essential services committee and must allocate adequate resources to the essential services committee in order for it to perform its functions.

(6) The *director* may appoint staff to the essential services committee after consulting the essential services committee and the governing body, and the governing body must determine their remuneration and other terms and conditions of appointment.

(7) The allowances of members of the essential services committee, assessors and persons appointed to investigate matters are determined by the Minister of Finance.

(8) The essential services committee will be financed and provided with working capital from—

(a) the monies that Parliament may appropriate to the Commission in terms of section 122; and

(b) grants, donations and bequests made to it.

Regulations for essential services committee

70F. (1) The Minister, after consulting the essential services committee, may make regulations concerning the—

(a) functioning of the essential services committee; and

(b) panels appointed by the essential services committee.

(2) The rules made by the Commission in terms of section 115 (2)(*c*A)(ii) remain in force until replaced by regulations made in terms of subsection (1).".

Amendment of section 71 of Act 66 of 1995

12. Section 71 of the principal Act is hereby amended by the substitution for subsections (8) and (9) of the following subsections, respectively:

''(8) If the panel appointed by the essential services committee designates the whole or a part of a service as an *essential service*, the essential services committee must publish a notice to that effect in the Government Gazette.

(9) **[The]** A panel appointed by the essential services committee may vary or cancel the designation of the whole or a part of a service as an *essential service* or any determination of a minimum service or ratification of a minimum services agreement, by following the provisions set out in subsections (1) to (8), read with the changes required by the context.''.

Insertion of section 71A in Act 66 of 1995

13. The following section is hereby inserted in the principal Act after section 71:

''**Public officials exercising authority in name of State**

71A. (1) In this section ''public officials exercising authority in the name of the State'' mean customs officials, immigration officers, judicial officers and officials working in the administration of justice.

(2) In accordance with section 71 a panel appointed by the essential services committee may—

(a) refer to mediation at the Commission or a *bargaining council* the conclusion of a *collective agreement* that provides for the maintenance of minimum services in a service provided by public officials exercising authority in the name of the State;

(b) determine whether or not to ratify a *collective agreement* that provides for the maintenance of minimum services in a service provided by public officials exercising authority in the name of the State; and

(c) determine the minimum services required to be maintained in that service, if a *collective agreement* contemplated in paragraph *(b)* is not ratified within the period or periods determined by the essential services committee.

(3) The services provided by public officials exercising authority in the name of the State will be deemed to be an essential service and to have been designated an essential service in terms of this section when a *collective agreement* contemplated in subsection (2)*(b)* is ratified or minimum services contemplated in subsection (2)*(c)* are determined.

(4) After following the provisions set out in section 71(1) to (8), read with the changes required by the context, a panel appointed by the essential services committee may vary or cancel—

(a) the designation of the whole or a part of a service provided by public officials exercising authority in the name of the State;

(b) the ratification of a *collective agreement* that provides for the maintenance of minimum services in a service provided by public officials exercising authority in the name of the State; or

(c) any determination of a minimum service contemplated in subsection 2*(c)*.''.

Substitution of section 72 of Act 66 of 1995

14. The following section is hereby substituted for section 72 of the principal Act:

''**Minimum services**

72. (1) When making a determination in terms of section 71, a panel of the essential services committee may issue an order—

(a) directing the parties to negotiate a minimum services agreement as contemplated in this section within a period specified in the order;

(b) if an agreement is not negotiated within the specified period, permitting either party to refer the matter to mediation at the Commission or a *bargaining council* having jurisdiction.

(2) If the parties fail to conclude a *collective agreement* providing for the maintenance of minimum services or if a *collective agreement* is not ratified, a panel appointed by the essential services committee may

determine the minimum services that are required to be maintained in an essential service.

(3) If a panel appointed by the essential services committee ratifies a *collective agreement* that provides for the maintenance of minimum services in a service designated as an essential service or if it determines such a minimum service which is binding on the employer and the *employees* involved in that service—

(a) the agreed or determined minimum services are to be regarded as an essential service in respect of the employer and its *employees*; and

(b) the provisions of section 74 do not apply.

(4) A minimum service determination—

(a) is valid until varied or revoked by the essential services committee; and

(b) may not be varied or revoked for a period of 12 months after it has been made.

(5) Despite subsections (3) and (4), section 74 applies to a designated essential service in respect of which the essential services committee has made a determination of minimum services if the majority of *employees* employed in the essential services voted in a ballot in favour of this.

(6) Subsection (5) does not apply to a *dispute* in respect of which a notice of a *strike* or *lock-out* has been issued prior the holding of the ballot.

(7) Despite subsection (4), a panel may vary a determination by ratifying a *collective agreement* concluded between or on behalf of one or more—

(a) *trade unions* representing a majority of the *employees* covered by the determination; and

(b) employers employing the majority of the *employees* covered by the determination.

(8) Any party to negotiations concerning a minimum services agreement may, subject to any applicable *collective agreement*, refer a *dispute* arising from those negotiations to the Commission or a *bargaining council* having jurisdiction for conciliation and, if an agreement is not concluded, to the essential services committee for determination.''.

Amendment of section 73 of Act 66 of 1995

15. Section 73 of the principal Act is hereby amended—

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

''**Disputes about minimum services and about whether a service is an essential service**'';

(b) by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

''Any party to a *dispute* about **[either]** one or more of the following issues may refer the *dispute* in writing to the essential services committee—''; and

(c) by the deletion in subsection (1) of the word ''or'' at the end of paragraph *(a)* and the addition of the following paragraphs:

''*(c)* whether or not the employer and a registered *trade union* or trade unions representing *employees* in the *essential service* should conclude a *collective agreement* that provides for the maintenance of minimum services in that service; and

(d) the terms of such a collective agreement.''.

Amendment of section 74 of Act 66 of 1995, as amended by section 21 of Act 42 of 1996

16. Section 74 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

''**[Any]** Subject to section 73(1), any party to a *dispute* that is precluded from participating in a *strike* or a *lock-out* because that party is engaged in an *essential service* may refer the *dispute* in writing to—''.

Insertion of section 103A in Act 66 of 1995

17. The following section is hereby inserted in the principal Act after section 103:

"**Appointment of administrator**

103A. (1) The Labour Court may order that an administrator be appointed to administer a *trade union* or *employers' organisation* on such conditions as the Court may determine if the—

(a) Court is satisfied that it is just and equitable to do so; and

(b) *trade union* or *employers' organisation* has resolved that an administrator be appointed and has applied to the Court for an order to give effect to that resolution; or

(c) *registrar* has applied to the Court to appoint an administrator.

(2) Without limiting the generality of subsection (1)*(a)*, it may be just and equitable to make an order in terms of subsection (1) if—

(a) the *trade union* or *employers' organisation* fails materially to perform its functions; or

(b) there is serious mismanagement of the finances of the *trade union* or *employers' organisation*.

(3) If there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection (1), the Court must consider their interests before deciding whether or not to grant the order.

(4) *(a)* The registrar of the Labour Court must determine the administrator's fees.

(b) The Labour Court, in chambers, may review the determination of the registrar of the Labour Court.

(c) The administrator's fees are a first charge against the assets of the *trade union* or *employers' organisation*.

(5) The Labour Court may, on the application of the administrator or any person referred to in subsection (1)—

(a) vary or amend any prior order made in terms of this section; or

(b) if it is satisfied that an administrator is no longer required, terminate the appointment of the administrator, on appropriate conditions.".

Amendment of section 111 of Act 66 of 1995

18. Section 111 of the principal Act is hereby amended by the addition of the following subsection:

"(5) An appeal in terms of this section against a decision by the *registrar* in terms of section 106 does not suspend the operation of the *registrar's* decision.".

Amendment of section 115 of Act 66 of 1995, as amended by section 31 of Act 42 of 1996, section 6 of Act 127 of 1998 and section 22 of Act 12 of 2002

19. Section 115 of the principal Act is hereby amended—

(a) by the deletion in subsection (1) of the word "and" at the end of paragraph *(c)*, the insertion of the word "and" at the end of paragraph *(d)* and the addition of the following paragraph:

"*(e)* at least every second year, review any rules made in terms of this section.";

(b) by the insertion in subsection (2) after paragraph *(b)* of the following paragraph:

"*(b*A*)* if requested, provide assistance of an administrative nature to an *employee* earning less than the threshold prescribed by the *Minister* under section 6(3) of the *Basic Conditions of Employment Act* to serve any notice or document in respect of conciliation or arbitration proceedings in terms of *this Act*, provided that the *employee* remains responsible in law for any such service;";

(c) by the deletion in subsection (2)(*c*A) of subparagraph (ii);

(d) by the substitution in subsection (2A) for paragraph (*k*) of the following paragraph:

"*(k)* the right of any **[person or category of persons to represent any]** party to be represented by any person or category of persons in any conciliation or arbitration proceedings, including the regulation or limitation of the right to be represented in those proceedings;";

(e) by the insertion in subsection (2A) of the following paragraph after paragraph (*k*):

"*(k*A*)* the consequences for any party to conciliation or arbitration proceedings for not attending those proceedings;"; and

(f) by the substitution in subsection (3) for the words preceding paragraph *(a)* of the following words:

"**[If asked, the]** The Commission may provide *employees*, employers, registered *trade unions*, registered *employers' organisations*, federations of *trade unions*, federations of *employers' organisations* or *councils* with advice or training relating to the primary objects of *this Act* or any other employment law, including but not limited to—".

Amendment of section 127 of Act 66 of 1995, as amended by section 33 of Act 42 of 1996 and section 23 of Act 12 of 2002

20. Section 127 of the principal Act is hereby amended by the deletion in subsection (1) of the word "and" at the end of paragraph *(a)*, the insertion of the word "and" at the end of paragraph *(b)* and the addition of the following paragraph:

"*(c)* certifying that any ballot conducted by a *trade union* or *employers' organisation* complies with the provisions of this Act or any other law.".

Amendment of section 138 of Act 66 of 1995, as amended by section 10 of Act 127 of 1998 and section 27 of Act 12 of 2002

21. Section 138 of the principal Act is hereby amended by the deletion in subsection (7) of paragraph *(c)*.

Amendment of section 143 of Act 66 of 1995, as amended by section 32 of Act 12 of 2002

22. Section 143 of the principal Act is hereby amended—

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

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

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

"(4) If a party fails to comply with an arbitration award certified in terms of subsection (3) that orders the performance of an act, other than the payment of an amount of money, any other party to the award may, without further order, enforce it by way of contempt proceedings instituted in the Labour Court."; and

(c) by the addition of the following subsection:

"(5) Despite subsection (1), an arbitration award in terms of which a party is required to pay an amount of money must be treated for the purpose of enforcing or executing that award as if it were an order of the Magistrate's Court.".

Amendment of section 144 of Act 66 of 1995, as substituted by section 33 of Act 12 of 2002

23. Section 144 of the principal Act is hereby amended by the deletion of the word "or" at the end of paragraph *(b)*, the insertion of the word "or" at the end of paragraph *(c)* and the addition of the following paragraph:

"*(d)* if there is good cause shown on any other ground for the award or ruling to be varied or rescinded.".

Amendment of section 145 of Act 66 of 1995, as amended by section 34 of Act 12 of 2002 and section 36 of Act 12 of 2004

24. Section 145 of the principal Act is hereby amended by the addition of the following subsections:

''(5) Subject to the rules of the Labour Court, a party who brings an application under subsection (1) must apply for a date for the matter to be heard within six months of delivery of the application, and the Labour Court may, on good cause shown, condone a late application for a date for the matter to be heard.

(6) Judgment in an application brought under subsection (1) must be handed down as soon as reasonably possible.

(7) The institution of review proceedings does not suspend the operation of an arbitration award, unless the applicant furnishes security to the satisfaction of the Court in accordance with subsection (8).

(8) Unless the Labour Court directs otherwise, the security furnished as contemplated in subsection (7) must—

(a) in the case of an order of reinstatement or re-employment, be equivalent to 24 months' remuneration; or

(b) in the case of an order of compensation, be equivalent to the amount of compensation awarded.

(9) An application to set aside an arbitration award in terms of this section interrupts the running of prescription in terms of the Prescription Act, 1969 (Act No. 68 of 1969), in respect of that award.''.

Amendment of section 147 of Act 66 of 1995, as amended by section 41 of Act 42 of 1996

25. Section 147 of the principal Act is hereby amended by insertion after subsection (6) of the following subsection:

''(6A) For the purpose of making a decision in terms of subsection (6), the Commission must appoint a commissioner to resolve the *dispute*—

(a) if an *employee* earning less than four times the threshold prescribed by the *Minister*, in terms of section 6(3) of the *Basic Conditions of Employment Act*, is required to pay any part of the cost of the private *dispute* resolution procedures; or

(b) if the person or body appointed to resolve the *dispute* is not independent of the employer.''.

Substitution of section 150 of Act 66 of 1995, as amended by section 35 of Act 12 of 2002

26. The following section is hereby substituted for section 150 of the principal Act:

''**Commission may appoint commissioner to conciliate in public interest**

150. (1) Despite any provision to the contrary in *this Act*, the *director* may appoint one or more commissioners who must attempt to resolve the *dispute* through conciliation, whether or not that *dispute* has been referred to the Commission or a *bargaining council*—

(a) at the request of the parties; or

(b) if there is no request by the parties, if the *director* believes it is in the public interest to do so.

(2) Before appointing a commissioner in terms of this section, the *director* must consult—

(a) the parties to the *dispute*; and

(b) the secretary of a *bargaining council* with jurisdiction over the parties to the *dispute*.

(3) The *director* may appoint a commissioner who has already conciliated that *dispute*.

(4) In addition, to assist a commissioner appointed in terms of subsection (3), the *director* may appoint—

(a) one person from a list of at least five names submitted by the representatives of organised labour on the governing body of the Commission; and

(b) one person from a list of at least five names submitted by the representatives of organised business on the governing body of the Commission.

(5) Unless the parties to the *dispute* agree otherwise, the appointment of a commissioner in terms of this section does not affect any entitlement, of an *employee* to *strike* or an employer to *lock-out*, that the party to the dispute may have acquired in terms of Chapter IV.''.

Amendment of section 151 of Act 66 of 1995, as amended by section 11 of Act 127 of 1998

27. Section 151 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

''(2) The Labour Court is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a **[provincial division]** Division of the **[Supreme]** High Court of South Africa has in relation to matters under its jurisdiction.''.

Amendment of section 154 of Act 66 of 1995, as amended by section 43 of Act 42 of 1996 and section 13 of Act 127 of 1998

28. Section 154 of the principal Act is hereby amended—

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

''(1) A judge of the Labour Court **[must be appointed for a period determined by the President at the time of appointment]** holds office until discharged from active service in terms of the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001).'';

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

''(2) A judge of the Labour Court who is also a judge of the High Court may resign as a judge of the Labour Court by giving written notice to the President.'';

(c) by the deletion of subsection (3);

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

''(4) Neither the tenure of office nor the *remuneration* and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, **[1989 (Act No. 88 of 1989)]** 2001 (Act No. 47 of 2001), is affected by that judge's appointment and concurrent tenure of office as a judge of the Labour Court.'';

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

''*(b)* The terms and conditions in the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), which is applicable to a judge of the High Court, apply to a judge of the Labour Court who is not a judge of the High Court, read with the changes required by the context.'';

(f) by the deletion of subsection (7);

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

''(9) The provisions of subsections **[(2) to]** (4), (5), (6) and (8) apply, read with the changes required by the context, to acting judges appointed in terms of section 153(5).''; and

(h) by the addition of the following subsection:

''(10) *(a)* Any judge of the Labour Court who is not a judge of the High Court, and holds office immediately prior to the commencement of the Labour Relations Amendment Act, 2012, must within 90 days after the commencement of the Labour Relations Amendment Act, 2012, inform the Minister of Justice and Constitutional Development in writing that he or she chooses to continue in office in terms of this section as it existed prior to such commencement.

(b) Any judge referred to in paragraph *(a)* who does not choose to continue in office in terms of this section as it existed prior to the commencement of the Labour Relations Amendment Act, 2012, must continue to hold that office in accordance with this section as amended by the Labour Relations Amendment Act, 2012.

(c) The period of service of a judge referred to in paragraph *(b)* as a Labour Court judge prior to the commencement of the Labour Relations Amendment Act, 2012, must, for the purposes of the Judges' Remuneration and Conditions of Employment Act, 2001(Act No. 47 of 2001), be deemed to be active service as contemplated in that Act.''.

Amendment of section 157 of Act 66 of 1995, as amended by section 14 of Act 127 of 1998

29. Section 157 of the principal Act is hereby amended by the substitution for subsection (5) of the following subsection:

''(5) Except as provided for in section 158(2), the Labour Court does not have jurisdiction to adjudicate an unresolved *dispute* if *this Act* or any *employment law* requires the *dispute* to be resolved through arbitration.''.

Amendment of section 158 of Act 66 of 1995, as amended by section 44 of Act 42 of 1996 and section 36 of Act 12 of 2002

30. Section 158 of the principal Act is hereby amended—

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

''*(b)* order compliance with any provision of *this Act* or any *employment law*;''.

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

''(1B) The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any *bargaining council* in terms of the provisions of *this Act* before the issue in *dispute* has been finally determined by the Commission or the *bargaining council,* as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.'';

(c) by the substitution in subsection (2) for paragraph *(b)* of the following paragraph:

''*(b)* **[with the consent of the parties and]** if it is expedient to do so, continue with the proceedings **[with the Court sitting as an arbitrator]**, in which case the Court may only make any order that a commissioner or arbitrator would have been entitled to make: Provided that in relation to the question of costs, the provisions of section 162(2)*(a)* are applicable.''; and

(d) by the addition of the following subsection:

''(5) A judgment of the Labour Court must be handed down as soon as reasonably possible.''.

Amendment of section 159 of Act 66 of 1995, as amended by section 45 of Act 42 of 1996 and section 15 of Act 127 of 1998

31. Section 159 of the principal Act is hereby amended—

(a) by the substitution in subsection (2)*(c)* for the words preceding subparagraph (i) of the following words:

''the following persons, to be appointed for a period of three years by the *Minister* **[of Justice]** acting on the advice of *NEDLAC*—''; and

(b) by the addition of the following subsection:

''(11) The Judge President must ensure that the Rules Board for Labour Courts meet at least once every two years to review the rules of the Labour Court.''.

Amendment of section 161 of Act 66 of 1995, as amended by section 16 of Act 127 of 1998 and section 37 of Act 12 of 2002

32. Section 161 of the principal Act is hereby amended—

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

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

(b) by the addition of the following subsection, the existing section becoming subsection (1):

"(2) No person representing a party in proceedings before the Labour Court in a capacity contemplated in paragraphs *(b)* to *(e)* of subsection (1) may charge a fee or receive a financial benefit in consideration for agreeing to represent that party unless permitted to do so by order of the Labour Court.".

Amendment of section 168 of Act 66 of 1995, as amended by section 46 of Act 42 of 1996 and section 19 of Act 127 of 1998

33. Section 168 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph *(c)* of the following paragraph:

"*(c)* such number of other judges who are judges of the Labour Court or High Court, as may be required for the effective functioning of the Labour Appeal Court.".

Amendment of section 170 of Act 66 of 1995, as amended by section 48 of Act 42 of 1996 and section 21 of Act 127 of 1998

34. Section 170 of the principal Act is hereby amended—

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

"(2) A judge of the Labour Appeal Court may resign from that office by giving written notice to the President.";

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

"(4) Neither the tenure of office nor the *remuneration* and terms and conditions of appointment applicable to a judge of the High Court in terms of the Judges' Remuneration and Conditions of Employment Act, **[1989 (Act No. 88 of 1989)]** 2001 (Act No. 47 of 2001), is affected by that judge's appointment and concurrent tenure of office as a judge of the Labour Appeal Court."; and

(c) by the deletion of subsection (5).

Amendment of section 186 of Act 66 of 1995, as amended by section 95 of Act 75 of 1997 and section 41 of Act 12 of 2002

35. Section 186 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraphs *(a)* and *(b)* of the following paragraphs, respectively:

"*(a)* an employer has terminated **[a contract of]** employment with or without notice;

(b) an *employee* engaged under a fixed term contract of employment reasonably expected the employer—

(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

(ii) to retain the *employee* on an indefinite contract of employment but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the *employee* on less favourable terms, or did not offer to retain the *employee*;"; and

(b) by the substitution in subsection (1) for paragraphs *(e)* and *(f)* of the following paragraphs, respectively:

"*(e)* an *employee* terminated **[a contract of]** employment with or without notice because the employer made continued employment intolerable for the *employee***[.]**; or

(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.''.

Amendment of section 187 of Act 66 of 1995

36. Section 187 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph *(c)* of the following paragraph:

''*(c)* **[to compel the *employee*]** a refusal by *employees* to accept a demand in respect of any matter of mutual interest between **[the]** them and their employer **[and *employee*]**;''.

Amendment of section 188A of Act 66 of 1995

37. Section 188A of the principal Act is hereby amended—

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

''**[Agreement for pre-dismissal arbitration] Inquiry by arbitrator**'';

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

''(1) An employer may, with the consent of the *employee* or in accordance with a collective agreement, request a *council*, an accredited agency or the Commission to appoint an arbitrator to conduct an **[arbitration]** inquiry into allegations about the conduct or capacity of that *employee*.'';

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

''(4) *(a)* An *employee* may only consent to **[a pre-dismissal arbitration]** an inquiry in terms of this section 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)*,]** any other provision in *this Act*, an *employee* earning more than the amount determined by the *Minister* in terms of section 6(3) of the *Basic Conditions of Employment Act* at the time, may **[consent]** agree in a contract of employment to the holding of **[a pre-dismissal arbitration in a contract of employment]** an inquiry in terms of this section.'';

(d) by the substitution in subsection (5) for the words preceding paragraph *(a)* of the following words:

''In any **[arbitration]** inquiry in terms of this section a party to the *dispute* may appear in person or be represented only by—'';

(e) by the substitution in subsection (5) for paragraphs *(c)* and *(d)* of the following paragraphs, respectively:

''*(c)* **[any member,]** an 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 or if permitted by the arbitrator in accordance with the rules regulating representation at an arbitration before the Commission.'';

(f) by the substitution for subsection (6) of the following subsection:

''(6) Section 138, read with the changes required by the context, applies to any **[arbitration]** inquiry in terms of this section.'';

(g) by the substitution in subsection (7) for paragraphs *(a)* and *(b)* of the following paragraphs, respectively:

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

(b) the *director* of the accredited agency, if the **[arbitration]** inquiry is held under the auspices of an accredited agency.'';

(h) by the substitution for subsections (8), (9) and (10) of the following subsections, respectively:

''(8) The ruling of the arbitrator in an inquiry has the same status as an arbitration award, and the provisions of sections 143 to 146 apply with the changes required by the context to any **[award made by an arbitrator in terms of this section]** such ruling.

(9) An arbitrator conducting an **[arbitration]** inquiry 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]** rule as to what action, if any, **[should]** may be taken against the *employee*.

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

(b) A *council* may only appoint an arbitrator to conduct an **[arbitration]** inquiry 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]** arbitration by the Commission.''; and

(i) by the addition of the following subsections:

''(11) Despite subsection (1), if an *employee* alleges in good faith that the holding of an inquiry contravenes the Protected Disclosures Act, 2000 (Act No. 26 of 2000), that *employee* or the employer may require that an inquiry be conducted in terms of this section into allegations by the employer into the conduct or capacity of the *employee.*

(12) The holding of an inquiry by a arbitrator in terms of this section and the suspension of an *employee* on full pay pending the outcome of such an inquiry do not constitute an occupational detriment as contemplated in the Protected Disclosures Act, 2000 (Act No. 26 of 2000).''.

Insertion of section 188B in Act 66 of 1995

38. The following section is hereby inserted in the principal Act after section 188A

"Dismissal of employees earning above threshold

188B. (1) This section applies to *employees* who earn, as at the date of *dismissal,* more than an amount determined by the Minister in accordance with subsection (4).

(2) Despite section 188(1) the *dismissal* of an *employee* to whom this section applies is, if it is not automatically unfair as contemplated in section 187(1)*(a)* to *(f)* or *(h)*, deemed to be for a fair reason and to have been effected in accordance with a fair procedure as contemplated in section 188 if the employer gives the *employee* the notice referred to in subsection (3) or pays the *employee* in lieu of that notice on or before the date of *dismissal.*

(3) The notice referred to in subsection (2) is three months or any longer period specified in the *employee's* contract of *employment*, and must be given in writing.

(4) The *Minister* must, in consultation with *NEDLAC* and by notice in the Government Gazette make a determination of the amount referred to in subsection (1) and must take into account the extent to which *employees*, by reason of their earnings level, level of skill or position, have sufficient bargaining power to ensure that adequate provision may be made in their contracts of *employment* for protection against unfair *dismissal.*

(5) After two years from the date of commencement of this section, this section will apply to contracts of *employment* concluded before the date of commencement of this section.''.

Amendment of section 189A of Act 66 of 1995, as inserted by section 45 of Act 12 of 2002

39. Section 189A of the principal Act is hereby amended—

(a) by the addition to subsection (2) of the following paragraph:

''*(d)* a consulting party may not unreasonably refuse to extend the period for consultation if such an extension is required to ensure meaningful consultation.''; and

(b) by the deletion of subsection (19).

Amendment of section 190 of Act 66 of 1995

40. Section 190 of the principal Act is hereby amended by the addition to subsection (2) of the following paragraph:

"*(d)* if an employer terminates an *employee's employment* on notice, the date of *dismissal* is the date on which the notice expires or, if it is an earlier date, the date on which the *employee* is paid all outstanding salary.".

Amendment of section 191 of Act 66 of 1995, as amended by section 25 of Act 127 of 1998 and section 46 of Act 12 of 2002

41. Section 191 of the principal Act is hereby amended—

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

"If a *council* or a commissioner has certified that the *dispute* remains unresolved, or if 30 days or any further period as agreed between the parties have expired since the *council* or the Commission received the referral and the *dispute* remains unresolved—"; and

(b) by the substitution for subsection (12) of the following subsection:

"(12) **[If an]** An *employee* who 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 if—

(a) the employer followed a consultation procedure that applied to that *employee* only, irrespective of whether that procedure complied with section 189;

(b) the employer's *operational requirements* lead to the *dismissal* of that *employee* only; or

(c) the employer employs less than ten *employees*.".

Substitution of heading to Chapter IX of Act 66 of 1995

42. The following heading is hereby substituted for the heading to Chapter IX of the principal Act:

"**REGULATION OF NON-STANDARD EMPLOYMENT AND GENERAL PROVISIONS**".

Amendment of section 198 of Act 66 of 1995

43. Section 198 of the principal Act is hereby amended—

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

"*(a)* who **[render services to, or]** perform work for **[,]** the client; and";

(b) by the substitution in subsection (4) for paragraph *(d)* of the following paragraph:

"*(d)* a sectoral determination made in terms of the **[*Wage*]** *Basic Conditions of Employment Act*;"; and

(c) by the insertion after subsection (4) of the following subsections:

"(4A) If the client of a temporary employment service is jointly and severally liable in terms of section 198(4) or is deemed to be the employer of an employee in terms of section 198A(3)*(b)*—

(a) the *employee* may institute proceedings against either the temporary employment service or the client or both the temporary employment service and the client;

(b) a labour inspector acting in terms of the *Basic Conditions of Employment Act* may secure and enforce compliance against the temporary employment service or the client as if it were the employer, or both; and

(c) any order or award made against a temporary employment service or client in terms of this subsection may be enforced against either.

(4B) A temporary employment service must provide an *employee* it assigns to a client with written particulars of *employment* that comply with section 29 of the *Basic Conditions of Employment Act*, when the *employee* commences *employment.*

(4C) An *employee* may not be employed by a temporary employment services on terms and conditions of *employment* which are not permitted by *this Act*, any *employment law*, sectoral determination or *collective agreement* concluded in a *bargaining council* applicable to a client to whom the *employee* renders services.

(4D) The issue of whether an *employee* of a temporary employment service is covered by a *bargaining council* agreement or sectoral determination, must be determined by reference to the sector and area in which the client is engaged.

(4E) In any proceedings brought by an *employee,* the Labour Court or an arbitrator may—

(a) determine whether a provision in an *employment* contract or a contract between a temporary employment service and a client complies with subsection (4D); and

(b) make an appropriate order or award.

(4F) No person must perform the functions of a temporary employment service unless it is registered in terms of any applicable legislation, and a temporary employment service that is not registered will not constitute a defence to any claim instituted in terms of this section or 198A.''.

Insertion of sections 198A to 198D in Act 66 of 1995

44. The following sections are hereby inserted in the principal Act after section 198:

''**Application of section 198 to employees earning below earnings threshold**

198A. (1) In this section, ''temporary services'' means work for a client by an *employee*—

(a) for a period not exceeding six months;

(b) as a substitute for an *employee* of the client who is temporarily absent; or

(c) in a category of work and for any period of time which is determined to be temporary services by a *collective agreement* concluded in a *bargaining council*, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).

(2) This section does not apply to *employees* earning in excess of the threshold prescribed by the *Minister* in terms of section 6(3) of the *Basic Conditions of Employment Act.*

(3) For the purposes of *this Act*, an *employee* referred to in subsection (2)—

(a) performing temporary services for the client is the *employee* of the temporary employment services in terms of section 198(2);

(b) not performing temporary services for the client is deemed to be the *employee* of that client and the client is deemed to be the employer.

(4) The termination by the temporary employment services of an *employee's* assignment with a client for the purpose of avoiding the operation of subsection (3)*(b)* is a *dismissal.*

(5) An *employee* deemed to be an *employee* of the client in terms of subsection (3)*(b)* must be treated on the whole not less favourably than an *employee* of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

(6) At least three months prior to the coming into effect of this section, the *Minister* must by notice in the Government Gazette invite representations from the public on which categories of work should be deemed to be temporary service by notice issued by the *Minister* in terms of subsection (1)*(c)*.

(7) The *Minister* must consult with *NEDLAC* before publishing a notice or a provision in a sectoral determination contemplated in subsection (1)*(c)*.

(8) If there is conflict between a *collective agreement* concluded in a *bargaining council*, a sectoral determination or a notice by the *Minister* contemplated in subsection (1)*(c)*—

(a) the *collective agreement* takes precedence over a sectoral determination or notice; and

(b) the notice takes precedence over the sectoral determination.

Fixed term contracts with employees earning below earnings threshold

198B. (1) For the purposes of this section, a 'fixed term contract' means a contract of employment that terminates on—

(a) the occurrence of a specified event;

(b) the completion of a specified task or project; or

(c) a fixed date, other than an *employee*'s normal or agreed retirement age, subject to subsection (3).

(2) This section does not apply to—

(a) *employees* earning in excess of the threshold prescribed by the *Minister* in terms of section 6(3) of the *Basic Conditions of Employment Act;*

(b) an employer that employs less than 10 *employees*, or that employs less than 50 *employees* and whose business has been in operation for less than two years, unless—

(i) the employer conducts more than one business; or

(ii) the business was formed by the division or dissolution for any reason of an existing business; and

(c) an *employee* engaged in terms of a fixed term contract that is permitted by any statute, sectoral determination or *collective agreement.*

(3) An employer may engage an *employee* on a fixed term contract or successive fixed term contracts for longer than six months of *employment* only if—

(a) the nature of the work for which the *employee* is engaged is of a limited or definite duration; or

(b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

(4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the *employee*—

(a) is replacing another *employee* who is temporarily absent from work;

(b) is engaged on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;

(c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;

(d) is engaged to work exclusively on a specific project that has a limited or defined duration;

(e) has been engaged for a trial period of not longer than six months for the purpose of determining the *employee*'s suitability for *employment*;

(f) is a non-citizen who has been granted a work permit for a defined period;

(g) is engaged to perform seasonal work;

(h) is engaged on an official public works scheme or similar public job creation scheme;

(i) is engaged on a position which is funded by an external source for a limited period; or

(j) has reached the normal or agreed retirement age applicable in the employer's business.

(5) *Employment* in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.

(6) An offer to employ an *employee* on a fixed term contract or to renew or extend a fixed term contract, must—

(a) be in writing; and

(b) state the reasons contemplated in subsection (3)*(a)* or *(b)*.

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

(8) An *employee* employed on a fixed term contract for longer than six months must not be treated less favourably than an *employee* employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.

(9) An employer must provide an *employee* employed on a fixed term contract and an *employee* employed on a permanent basis with equal access to opportunities to apply for vacancies.

(10) An employer who engages an *employee* on a fixed term contract for a reason contemplated in subsection (4)*(d)* for a period exceeding 24 months must, subject to the terms of any applicable *collective agreement*, pay the *employee* on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the *Basic Conditions of Employment Act.*

(11) An *employee* is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the *employee* employment or procures employment for the *employee* with a different employer, which commences at the expiry of the contract and on the same or similar terms.

Part-time employment of employees earning below earnings threshold

198C. (1) For the purposes of this section—

(a) a part-time *employee* is an *employee* who is remunerated wholly or partly by reference to the time that the *employee* works and who works less hours than a comparable full-time *employee*; and

(b) a comparable full-time *employee*—

(i) is an *employee* who is remunerated wholly or partly by reference to the time that the *employee* works and who is identifiable as a full-time *employee* in terms of the custom and practice of the employer of that *employee*; and

(ii) does not include a full-time *employee* whose hours of work are temporarily reduced for *operational requirements* as a result of an agreement.

(2) This section does not apply—

(a) to *employee*s earning in excess of the threshold determined by the *Minister* in terms of section 6(3) of the *Basic Conditions of Employment Act*;

(b) to an employer that employs less than 10 *employee*s or that employs less than 50 *employee*s and whose business has been in operation for less than two years, unless—

(i) the employer conducts more than one business; or

(ii) the business was formed by the division or dissolution, for any reason, of an existing business;

(c) to an *employee* who ordinarily works less than 24 hours a month for an employer; and

(d) during an *employee*'s first six months of continuous *employment* with an employer.

(3) Taking into account the working hours of a part-time *employee*, an employer must—

(a) treat a part-time *employee* on the whole not less favourably than a comparable full-time *employee* doing the same or similar work, unless there is a justifiable reason for different treatment; and

(b) provide a part-time *employee* with access to training and skills development on the whole not less favourable than the access applicable to a comparable full-time *employee*.

(4) An employer must provide a part-time *employee* with the same access to opportunities to apply for vacancies as it provides to full-time *employees.*

(5) For the purposes of identifying a comparable full-time *employee*, regard must be had to a full-time *employee* employed by the employer on

the same type of *employment* relationship who performs the same or similar work—

(a) in the same *workplace* as the part-time *employee*; or

(b) if there is no comparable full-time *employee* who works in the same *workplace*, a comparable full-time *employee* employed by the employer in any other *workplace*.

General provisions applicable to sections 198A to 198C

198D. (1) Any *dispute arising* from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a *bargaining council* with jurisdiction for conciliation and, if not resolved, to arbitration.

(2) For the purposes of sections 198A(5), 198B(3) and 198C(3)*(a)*, a justifiable reason includes that the different treatment is a result of the application of a system that takes into account—

(a) seniority, experience or length of service;

(b) merit;

(c) the quality or quantity of work performed; or

(d) any other criteria of a similar nature not prohibited by section 6(1) of the Employment Equity Act, 1998 (Act No. 55 of 1998).''.

Amendment of section 200A of Act 66 of 1995, as amended by section 51 of Act 12 of 2002

45. Section 200A of the principal Act is hereby amended by the substitution for subsection (1) for the words preceding paragraph *(a)* of the following words:

''Until the contrary is proved, for the purposes of *this Act*, any *employment law* and section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936), 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:''.

Insertion of section 200B in Act 66 of 1995

46. The following section is hereby inserted in the principal Act after section 200A:

''**Liability for employer's obligations**

200B. (1) For the purposes of *this Act* and any other *employment law*, ''employer'' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent or effect of their doing so is or has been to directly or indirectly defeat the purposes of *this Act* or any other *employment law*.

(2) If more than one person is held to be the employer of an *employee* in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of *this Act* or any other *employment law*.''.

Amendment of section 203 of Act 66 of 1995, as amended by section 52 of Act 12 of 2002

47. Section 203 of the principal Act is hereby amended by the insertion after subsection (2) of the following subsections:

''(2A) The *Minister* may issue a *code of good practice* by publishing it in the Government Gazette in accordance with the provisions of this section, if—

(a) proposals relating to the *code of good practice* have been tabled and considered by *NEDLAC;* and

(b) *NEDLAC* has reported to the Minister that it has been unable to reach agreement on the matter.

(2B) Subsection (2A) applies to the amendment or replacement of an existing *code of good practice.*''.

Amendment of section 213 of Act 66 of 1995, as amended by sections 52 and 53 of Act 42 of 1996, section 54 of Act 12 of 2002 and section 43 of Act 30 of 2007

48. Section 213 of the principal Act is hereby amended—

(a) by the insertion after the definition of "*collective agreement*" of the following definition:

" **'Commission'** mean the Commission for Conciliation, Mediation and Arbitration established by section 112;";

(b) by the substitution for paragraph *(a)* of the definition of "*employment law*" of the following paragraph:

"*(a)* the Unemployment Insurance Act, **[1966 (Act No. 30 of 1966)]** 2001 (Act No. 63 of 2001);";

(c) by the deletion in the definition of "*employment law*" of the word "and" at the end of paragraph *(d)* and the addition of the following paragraph:

"*(f)* the Unemployment Insurance Contributions Act, 2002 (Act No. 4 of 2002);"; and

(d) by the substitution for the definition of "serve" of the following definition:

" **'serve'** means to send by registered post, telegram, telex, telefax or to deliver by hand, and—

(a) in respect of the Labour Courts, any other method of service specified in the rules of the Labour Court;

(b) in respect of the Commission, any other method of service specified in the Rules of the Commission;

(c) in respect of a *bargaining council*, any other method of service specified in a *collective agreement* concluded in the *bargaining council*.".

Amendment of Schedule 7 to Act 66 of 1995

49. Item 27 of Part H of Schedule 7 to the principal Act is hereby amended by the substitution in item 27(1) for the words preceding paragraph *(a)* of the following words:

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

Short title

50. This Act is called the Labour Relations Amendment Act, 2012.

MEMORANDUM OF OBJECTS ON LABOUR RELATIONS AMENDMENT BILL, 2012

1. OBJECTS OF THE BILL

In preparation for the publication of the Labour Relations Amendment Bill (the Bill) the Department of Labour (the Department) and the representatives of organised business and labour undertook a labour law review and have engaged in extensive consultations over a period of almost one year in NEDLAC. The proposed amendments to the Labour Relations Act, 1995 (Act No. 66 of 1995) (the Act), Act can be grouped under the following themes:

(a) Responses to the increased informalisation of labour to ensure that vulnerable categories of workers receive adequate protection and are employed in conditions of decent work;

(b) adjustments to the law to ensure compliance with South Africa's obligations in terms of international labour standards;

(c) ensuring that labour legislation gives effect to fundamental Constitutional rights, including the right to fair labour practices, to engage in collective bargaining and right to equality and protection from unfair discrimination;

(d) enhancing the effectiveness of the primary labour market institutions such as the Labour Court, the CCMA, the essential services committee and the labour inspectorate;

(e) rectifying anomalies and clarifying uncertainties that have arisen from the interpretation and application of the Act and the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997).

2. DISCUSSION OF THE BILL

Clause 1

The proposed amendment to section 21 of the Act seeks to provide for the commissioner to consider the composition of the workforce in the workplace, taking into account the extent to which there are employees assigned to work by temporary employment services, employees engaged on fixed-term contracts, and part-time employees or employees in other categories of non-standard employment, when determining a dispute about organisational rights.

The proposed amendment also seek to empower a commissioner in an arbitration to grant a registered trade union that does not have as members the majority of employees employed by an employer in a workplace the rights referred to in sections 14 and 16 if no other trade union has been granted that right. This right lapses if the trade union concerned is no longer the most representative trade union in the workplace. A commissioner may in an arbitration grant the rights referred to in sections 12 (trade union access to the workplace), 13 (deduction of trade union subscriptions or levies) or 15 (leave for trade union activities) to a registered trade union, or two or more registered trade unions acting jointly, that do not meet thresholds of representativeness established by a collective agreement.

Clause 2

Clause 2 of the Bill provides that if a trade union seeks to exercise rights conferred by Part A in respect of employees of a temporary employment service, it may seek to exercise those rights in a workplace of either the temporary employment service or one or more clients of the temporary employment service, and if it exercises rights in a workplace of the temporary employment service, any reference in Chapter III to the employer's premises must be read as including the client's premises.

This section is amended to ensure that where organisational rights may affect the rights and interests of third parties, such as the client of a temporary employment service or owner of the premises from which the employer operates, an arbitration award may bind those third parties as long as they have been given an opportunity to participate in the arbitration.

Clause 3

Section 32 of the Act is amended to improve the efficiency of the exemption procedures associated with a collective agreement concluded in a bargaining council agreement that is extended to non-parties. The amendments also ensure the independence of an exemptions appeal body from the trade union and employer parties to the council.

The proposed amendments also seek to provide for the Minister to consult with the public when considering whether to extend a bargaining council collective agreement where the parties to the bargaining council are only sufficiently representative (section 32(5)). When considering whether the parties to a bargaining council are sufficiently representative, the Minister may take into account the extent to which there are employees within the sector employed in non-standard forms of employment.

Clause 4

This clause seeks to clarify that a certificate specifying the level of representativeness of a bargaining council may be taken into account for any purpose under the Act, including a decision by the Minister whether or not to extend a collective bargaining agreement in terms of section 32.

Clause 5

Section 51 of the Act is amended to provide for the funding of dispute resolution services of bargaining councils, either by a levy required by collective agreement or by fees imposed on parties to a dispute for matters for which the CCMA is entitled to charge a fee.

Amendments to Chapter IV of the LRA

The key amendments in the Chapter concern procedural requirements for protected industrial action, and changes to the manner in which dispute resolution in essential services is regulated. The changes are intended to respond to the unacceptable levels of unprotected industrial action, including strike action in essential services, and unlawful acts in support of industrial action, including violence and intimidation.

Clause 6

Section 64 of the Act is amended to reintroduce the requirement of a ballot before a protected strike or lock-out may commence. Clause 6 seeks to prevent industrial action being staged if it enjoys only minority support because violence and intimidation is more likely to occur under these circumstances.

Before calling a strike or lock-out, a trade union or employers' organisation must conduct a ballot of its members entitled to participate in the industrial action. The strike or lock-out will be protected if a majority of those who vote in the ballot vote in favour of industrial action.

The Labour Relations Act, 1956 (Act No. 28 of 1956), contained balloting requirements but these were not re-enacted in the current Act. One of the principle reasons for this was that the balloting requirements had given rise to technical disputes over compliance. This issue is dealt with by providing that a certificate of compliance issued by the Commission, a bargaining council or an accredited private agency will serve as proof that a ballot has been staged in compliance with the statutory requirements.

Clause 7

Clause 7 of the Bill seeks to amend section 65 of the Act in order to eliminate the anomalous distinction between disputes that can be adjudicated under the Act in respect of which industrial action is currently restricted and those under other employment laws in respect of which there is no equivalent restriction.

Clause 8

Clause 8 of the Bill seeks to amend section 67 of the Act to clarify that conduct in breach of a picketing agreement or picketing rules does not enjoy protection against civil legal proceedings under this section.

Clause 9

The proposed amendments to section 69 of the Act seek to make picketing rules binding on third parties such as the landlords of employers. This may result in a situation in which picketing is permitted to occur on property that is owned or controlled by such a third party, where this is appropriate, but only where the third party has consented or has had an opportunity to be heard before the rules are established.

The amendments also provide that if a party has referred a employee dispute in terms of subsections (8) or (11), the Labour Court may grant relief, including urgent interim relief, which is just and equitable in the circumstances. The Labour Court may, in appropriate cases, order compliance with picketing rules or vary the terms of a picketing agreement or rules. The Labour Court is further granted the power to suspend a picket or strike in appropriate circumstances. Likewise, the Court may suspend a lock-out or suspend an employer from engaging replacement labour during a strike or lock-out.

Clauses 10 to 16

Under the current dispensation numerous problems have been identified with the system for regulating dispute resolution in essential services. These include the scope of essential service determinations made to date, the small number of minimum service agreements ratified by the essential services committee and the high level of strike action within essential services. Many stakeholders have negative perceptions about the operation and administration of the essential services committee. To address these problems, clauses 10 to 16 of the Bill seek to propose amendments to sections 70 to 74 of the Act.

Clause 10 of the Bill provides for the establishment of the essential services committee. The essential services committee was brought into existence by the Act. The structure and functioning of the essential services committee are to be revised to enhance its legitimacy and efficacy.

Clause 11 of the Bill seeks to insert sections 70A to 70F.

The proposed section 70A of the Bill seeks to provide for the composition of the essential services committee, which consists of eight persons. The chairperson must be independent from the NEDLAC constituencies and may be a senior commissioner of the CCMA, while the deputy chairperson must be a senior commissioner of the CCMA. This is to ensure that the essential services committee has someone who is always available to devote time to the functioning of the essential services committee. The Minister must appoint the remaining six persons from those nominated by organised business, labour and government at NEDLAC. The introduction of government nominees is an innovation to ensure that government is adequately represented on the essential services committee in its capacity as an employer, as a high proportion of essential service matters occur within the public service.

The proposed section 70B provides for the powers and functions of the essential services committee. The proposed section 70C provides for the appointment of panels to preside over each matter that is before it.

The proposed section 70D provides for the powers and functions of a panel appointed by the essential services committee.

The proposed section 70E provides for the essential services committee to have jurisdiction throughout the Republic and for the Commission to administer the essential services committee.

The proposed section 70F empowers the Minister of Labour to make regulations concerning any matter related to the functioning of the essential services committee and its panels.

Clause 13 of the Bill provides for the insertion of section 71A, which provides for public officials exercising authority in the name of the State. The International Labour Organisation recognises that the right to strike of public officials exercising authority in the name of the State may be limited, despite the fact that their work does not fit into the strict definition of an essential service. The proposed section 71A seeks to allow for the negotiation and mediation of a minimum service agreement, and if no agreement can be concluded, the determination of the minimum services for the maintenance of the services provided by these public officials.

Clause 14 of the Bill seeks to amend section 72 of the Act to provide for the negotiation and mediation of minimum service agreements. In order to promote interest arbitration and protect employees from an overly broad minimum service designation, the Bill provides that a minimum service designation will not apply if the majority of employees concerned vote to be covered by the broader essential service designation. This will have the result that there can be no strike or lock-out in the service concerned and all unresolved interest disputes will be subject to compulsory arbitration.

Clause 17

Clause 17 of the Bill seeks to insert section 103A in order to permit the Labour Court to make an order placing a trade union or employers' organisation under administration in specific circumstances, such as where the trade union is unable to perform its functions. The application may be made by the trade union or employers' organisation concerned or by the Registrar of Labour Relations. The section provides an alternative to the winding-up procedure in section 103 of the Act and provides for a more appropriate process if the circumstances facing the trade union or employers' organisation are capable of being remedied.

Clause 18

Clause 18 of the Bill seeks to amend section 111 of the Act to provide that a trade union or employers' organisation whose registration has been cancelled by a decision of the Registrar of Labour Relations is not entitled to continue to function pending the outcome of an appeal against the decision of the Registrar.

Clause 19

Clause 19 of the Bill seeks to amend section 115 of the Act which empowers the Commission to provide administrative assistance to lower paid employees in the delivery of notices or documents relating to proceedings in the Commission. Often such employees are unable to serve referral documents on their employer. Another change empowers the Commission to make rules to regulate the consequences of a party's failure to attend conciliation or arbitration proceedings. This change has been necessitated by the Labour Appeal Court's interpretation of the CCMA's rule-making powers. Section 115 is also amended to clarify the powers of the Commission to make rules regulating the rights of parties to be represented in proceedings before the Commission.

Clause 21

Clause 21 of the Bill seeks to amend section 138 of the Act by seeking to remove the requirement that original arbitration awards must be lodged with the Registrar of the Labour Court. This has proved to be unnecessary and administratively burdensome.

Clause 22

Clause 22 of the Bill seeks to amend section 143 of the Act to streamline the mechanisms for enforcing arbitration awards of the Commission and to make these mechanisms more effective and accessible. Firstly, an award which has been certified by the Commission can be presented to the Deputy Sheriff for execution if payment is not made. This removes the need for the current practice in terms of which parties have a writ issued by the Labour Court. This has proved to be time-consuming and expensive, particularly for applicants in a centre where there is no Labour Court. Secondly, in the case of awards such as reinstatement which are enforced by contempt proceedings in the Labour Court, the need to have an arbitration award made an order of the Labour Court before contempt proceedings can be commenced is removed. Finally, the enforcement of awards to pay money will occur in terms of the Rules and Tariffs applicable to the Magistrate's Court, thus simplifying and reducing the costs of these proceedings. These amendments are anticipated to simplify and expedite the enforcement of arbitration awards by the Commission and bargaining councils.

Clause 23

Clause 23 of the Bill seeks to amend section 144 of the Act to provide for the variation and rescission of arbitration awards and rulings on good cause shown.

Clause 24

Clause 24 of the Bill seeks to amend section 145 of the Act by introducing certain measures intended to reduce the number of review applications that are brought to frustrate or delay compliance with arbitration awards, and to expedite the finalisation of applications brought to the Labour Court to review arbitration awards. Currently, a review application does not suspend the operation of an arbitration award. This often results in separate or interlocutory applications to stay enforcement of awards pending review proceedings. It is proposed that the operation of an arbitration award would be suspended if security is provided by the applicant in an amount specified, or any lesser amount permitted by the Labour Court.

To prevent delay by applicants, the amended provisions require that an applicant must apply for a date for the hearing of a review application within six months of commencing proceedings. Judgment in review matters must be handed down within a reasonable time. The proposed amendment also seeks to provide that a review application interrupts the running of prescription in respect of an arbitration award.

Clause 25

Clause 25 of the Bill seeks to amend section 147 of the Act by requiring the Commission to resolve disputes even where the parties have agreed to private dispute resolution if, in the case of lower paid employees, the employee is required to pay any part of the cost of private dispute resolution, or, in the case of all employees, the person appointed to resolve the dispute is not independent of the employer.

Clause 26

Clause 26 of the Bill seeks to substitute section 150 of the Act to extend and regulate the circumstances in which the Commission may intervene to attempt to resolve disputes by conciliation at the request of the parties or where this is in the public interest, even if conciliation has already been attempted. The purpose of the provision is to empower the Commission to intervene when appropriate in protracted disputes in an effort to secure their resolution in the public interest. The Commission's intervention does not affect the parties' entitlement to strike or lock-out.

Clause 27

Clause 27 seeks to align section 151 of the Act with other laws.

Clause 28

Clause 28 of the Bill seeks to align the Act with the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No. 47 of 2001), by providing that the remuneration, terms and conditions of employment of judges to the Labour Court is subject to that Act.

Clause 29

Clause 29 of the Bill seeks to amend section 157 of the Act by excluding the jurisdiction of the Labour Court to adjudicate disputes that are required, not only by the Act, but by any other employment law, to be determined by arbitration.

Clause 30

Clause 30 of the Bill seeks to amend section 158 of the Act to provide that only in exceptional circumstances the Labour Court may deal with review applications against decisions or rulings of the Commission before a matter has been finalised by the Commission. This seeks to limit the use of piece-meal review applications during arbitration proceedings as a mechanism to delay a matter that is with the Labour Court in terms of subsection 158(2). This means that any challenge to the Court's decision will be by way of appeal to the Labour Appeal Court, and not on review to the Labour Court. Finally, the amendment provides a period within which judgments of the Labour Court must be handed down.

Clause 31

Clause 31 of the Bill seeks to amend section 159 of the Act to ensure that a Rules Board for the Labour Court meet at least once every two years to review the rules of the Labour Court.

Clause 32

Clause 32 of the Bill seeks to amend section 161 of the Act to deal with the problem of labour consultants appearing in proceedings before the Labour Court under the guise of membership of, or being an official of, a trade union or employer's organisation, or of another permitted category, when in fact they appear in a professional capacity and seek to charge fees for that appearance.

Clause 33

Clause 33 of the Bill seeks to amend section 168 of the Act to allow Labour Court judges to be appointed to act in the Labour Appeal Court. This is intended to ensure that the Labour Appeal Court functions as a specialist institution.

Clause 35

Clause 35 of the Bill seeks to amend section 186 of the Act to remove an anomaly in the definition of dismissal which meant that employees engaged for a fixed term could claim dismissal on expiry of the term only if they could show that they reasonably expected the employer to renew the fixed term, but not if they could show that they reasonably expected to be retained in indefinite employment. The proposed amendments also seek to clarify that the termination of employment is a dismissal, whether or not there is a formal or written contract of employment.

Clause 36

Clause 36 of the Bill seeks to amend section 187 of the Act to remove an anomaly arising from the interpretation of section 187(1)*(c)*. In the case of the **National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd (2005) 26 ILJ 689 (SCA)**, the court held that the clause had been intended to remedy the so-called ''lock-out'' dismissal which was a feature of pre-1995 labour relations practice. The effect of this decision when read with decisions of **Chemical Workers Industrial Union and oth-**

ers v Algorax (Pty) Ltd (2003) 24 ILJ 1917 (LAC) is to discourage employers from offering re-employment to employees who have been retrenched after refusing to accept changes in working conditions.

The proposed amendment seeks to give effect to the intention of the provision as enacted in 1995 which is to preclude the dismissal of employees where the reason for the dismissal is their refusal to accept a demand by the employer over a matter of mutual interest. This is intended to protect the integrity of the process of collective bargaining under the Act and is consistent with the purposes of the Act.

Clause 37

Clause 37 of the Bill seeks to amend section 188A of the Act to facilitate the use of CCMA commissioners to conduct disciplinary enquiries (currently referred to as pre-dismissal enquiries). The amendment seeks to promote the enquiries by arbitrators, which avoid the need to have both an enquiry and an arbitration hearing, by allowing their introduction through collective agreement. In addition, the section is amended to avoid disputes where an employee claims that the holding of an enquiry into allegations of misconduct, and suspension pending such an enquiry, breaches the provisions of the Protected Disclosures Act, 2000 (Act No. 26 of 2000). By permitting either party to insist on an enquiry under this section the amended provision reduces the risk of collateral litigation, including High Court litigation, which has been common in these circumstances.

Clause 38

Clause 38 of the Bill seeks to insert section 188B to create more flexibility for employers in dealing with the dismissal of high earning employees. It does so without detracting from the rights of these employees not to be dismissed for reasons that would be automatically unfair under section 187, or their rights to seek redress for unfair labour practices defined in section 186.

At the heart of the change is the disproportionate cost, complexity, and impact on an employer's operations of procedures to terminate the employment of high earning employees in circumstances where the reason for doing so may not fall clearly within the fair reasons for dismissal specified in section 188(1)*(a)*(i) and (ii) of the Act. By way of example, an employer may reasonably and fairly wish to replace a senior executive to secure a change in tone and culture within the leadership team, because the executive does not fit or no longer fits within the leadership team, because internal or external circumstances have changed, or because the employer wants to embark on a new direction for the business or enterprise. These reasons do not comfortably fall within the reasons for dismissal specified in section 188, but are widely recognised as legitimate reasons to replace senior employees. In addition, senior executives in practice exercise the role of employer in many respects, and usually occupy a special position of trust in relation to the employer.

The uncertainty created by the application of section 188 in these situations leads to significant inflexibility and inefficiency at the top levels of a business or state enterprise. At the same time, the cost of asserting discipline and performance standards at senior levels is notoriously difficult to manage, and conflict at this senior executive level that results from efforts to terminate employment imposes significant constraints, measured in cost and efficiency, on both public and private sector employers.

The primary rationale for providing statutory protection against unfair dismissal, and for providing remedies for unfair dismissal as a species of unfair labour practice, is the inequality of bargaining power between employer and employee. Providing uniform protection against unfair dismissal to lower skilled or lower paid employees, on the one hand, and highly skilled or highly paid executives, on the other, fails to recognise the significant difference in bargaining power that employees in these categories have in negotiating employment contracts and in dealing with their employers during employment.

Senior executives and highly paid employees are generally able to influence to a material extent the terms on which they are engaged, and to make decisions about whether and on what terms to take up employment with a particular employer.

A number of comparable foreign jurisdictions exclude the application of dismissal protection to senior executive or highly paid employees. The amended section opts to apply the new provisions to employees earning above a specified remuneration threshold rather than by reference to their status or role within the employer's enterprise. This approach will avoid the need for disputes about whether employees fall inside or outside an identified class of employee that may give rise to costly collateral litigation.

It is intended that the remuneration threshold will be a relatively high threshold, in excess of R1 million per annum, with the actual threshold to be determined by the Minister from time to time taking into account the considerations set out in the proposed subsection (4). These amendments do not preclude the termination of employment of high earning employees summarily or on shorter notice where this is justified, applying the provisions of section 188. In that event these employees, like all others, will be entitled to exercise the remedies provided by the Act. Where employers elect, however, to give the minimum period of notice or any longer period provided for in the contract of employment, this will be deemed to be fair for the purposes of section 188, though it would not affect any claim brought under section 187.

These proposed amendments seek to draw a fair balance between the rights and economic interests of employers, enabling employers to achieve efficiency and flexibility at senior levels, and the rights and interests of highly paid employees, who remain protected against arbitrary or summary action.

A transitional provision will make the new regime applicable to existing contracts of employment of employees earning above the threshold after two years. After two years from the date of commencement of this section, this section will apply to contracts of employment concluded before the date of commencement of this section. This will provide all parties with an opportunity to reconsider and, where necessary, to renegotiate the terms of the employment relationship during that period.

Clause 39

Clause 39 of the Bill seeks to amend section 189A of the Act to preclude a party from unreasonably refusing to agree to extend the period for consultation over a proposed retrenchment. Section 189A is also amended by deleting subsection (19), which set out the test for determining the substantive fairness of a dismissal under section 189A. Specifying the test to be applied in section 189A retrenchments has lead to uncertainty about whether and to what extent this should apply to cases of retrenchment where section 189 applies. The courts should retain their discretion to develop the jurisprudence in this area in the light of the circumstances and facts of each case and to articulate general principles applicable to all retrenchment cases.

Clause 40

Clause 40 of the Bill seeks to amend section 190 of the Act to create certainty about the date of dismissal if an employee is dismissed on notice but paid all outstanding salary due to him or her before expiry of the notice period.

Clause 41

Clause 41 of the Bill seeks to amend section 191 of the Act to cater for any agreed extension of the conciliation period. The jurisdiction of the CCMA to arbitrate disputes about dismissals for operational requirements involving only one employee is clarified. In addition, the CCMA will have jurisdiction to arbitrate disputes about dismissals for operational requirements involving small employers, namely, those employing less than 10 employees. This is aimed at providing cheaper and less formal adjudication in these circumstances.

Clause 42

Clause 42 of the Bill seeks to substitute the heading to Chapter IX of the Act with the heading, REGULATION OF NON-STANDARD EMPLOYMENT AND GENERAL PROVISIONS. Substantive amendments are made to Chapter IX to protect three categories of non-standard employees: employees placed by temporary employment services, employees engaged on fixed term contracts and part-time employees. Sections 198A, 198B and 198C extend significant protection to employees earning under the earnings threshold as provided for in section 6(3) of the Basic Conditions of Employment Act. The majority of these protections are only extended to employees after they have been in employment for six months. This creates an appropriate balance between the need to protect vulnerable employees against the potential for abuse and the need to permit short-term flexibility.

Clause 43

Clause 43 of the Bill seeks to amend section 198 of the Act in order to effectively address certain problems and abusive practices associated with temporary employment services or commonly referred to as ''labour brokers''. The main thrust of the amendments is to restrict the employment of more vulnerable, lower-paid workers by a temporary employment service to situations of genuine and relevant ''temporary work'', and to introduce other measures to protect workers employed by temporary employment services.

Section 198 of the Act continues to apply to all employees. It retains the general provisions that a temporary employment service is the employer of persons whom it employs and pays to work for a client, and that a temporary employment service and its client are jointly and severally liable for specified contraventions of employment laws.

The proposed amendment seeks to clarify provisions relating to temporary employment services by providing for the following:

(a) An employee bringing a claim for which a temporary employment services and client are jointly and severally liable may institute proceedings against either the temporary employment services or the client or both and may enforce any order or award made against the temporary employment services or client against either of them.

(b) A labour inspector acting in terms of the Basic Conditions of Employment Act may secure and enforce compliance against the temporary employment services or the client, as if it were the employer, or both.

(c) A temporary employment services may not employ an employee on terms and conditions of employment not permitted by the Act, a sectoral determination or a collective agreement concluded at a bargaining council that is applicable to a client for whom the employee works.

(d) The Labour Court or an arbitrator may now rule on whether a contract between a temporary employment service and a client complies with the Act, and make an appropriate award.

(e) A temporary employment service must be registered to conduct business, but the fact that it is not registered is no defence to any claim instituted in terms of the section 198A.

(f) A temporary employment service must provide an employee it assigns to a client with written particulars of employment that comply with section 29 of the Basic Conditions of Employment Act, when the employee commences employment.

Clause 44

Clause 44 of the Bill seeks to insert sections 198A to 198D. The proposed section 198A seeks to introduce additional protection for employees who earn on or below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act. For the purposes of the Act, employees are treated as the employees of the client if they work for a period in excess of six months. The only exception to this is employees who work as a substitute for an employee of the client who is temporarily

absent. Temporary services may also be regulated by a collective agreement concluded in a bargaining council, a sectoral determination, or a Ministerial notice.

To prevent abuse of the six-month period that constitutes temporary work, the section provides that a termination by temporary employment services of an employee's assignment with a client for the purpose of avoiding deemed employment by the client constitutes a dismissal. This means that the fairness of the termination of an assignment may be challenged in terms of the Act. Employees deemed under this provision to be employees of the client must be treated on the whole not less favourably than employees of the client who perform the same or similar work, unless there is a justifiable reason for different treatment. This means, for example, that if an employeeis procured by a temporary employment service for a client for six months, but is kept on after the expiry of the six-month period, then that employee must, unless there is a justifiable reason for different treatment, be paid the same wages and benefits as the client's other employees who are performing the same or similar work.

Like section 198A, the proposed section 198B introduces additional protection for employees who earn on or below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act. This section does not apply to employees who are employed in terms of a statute, sectoral determination or collective agreement that permits the conclusion of a fixed term contract. In addition, and in order to accommodate new and small businesses, the section does not apply to:

(a) an employer that employs less than 10 employees; or
(b) an employer that employs less than 50 employees and whose business has been in operation for less than two years.

These exclusions do not apply if the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

An employer is permitted to employ an employee to whom this proposed amendment applies on a fixed term contract or successive fixed term contracts for up to six months. An employee may be employed on a fixed term contract for a longer period if the nature of the work for which the employee is engaged is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract. The period of six months may be varied by a sectoral determination or a collective agreement concluded at a bargaining council.

The proposed amendment provides a non-exhaustive list of justifiable reasons for fixing the term of a contract, which include the following:

(a) An employee to whom the section applies who is employed for a period longer than six months is deemed to be employed for an indefinite period unless the nature of the work is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract.
(b) An employer who employs an employee to whom the section applies on a fixed term contract or who renews or extends a fixed term contract, must do so in writing and must state the reason that justifies the fixed term nature of the employment contract.
(c) An employer bears an onus to prove in any relevant proceedings that there is a justifiable reason for fixing the term of the contract and that the term was agreed.

The proposed amendments provide the following additional protection for certain specified employees:

(a) An employee employed on a fixed term contract for more than six months (or any other period determined by a sectoral determination or collective agreement concluded at a bargaining council) must be treated on the whole not less favourably than an employee on an indefinite contract performing the same or similar work, unless there is a justifiable reason for treating the employee differently. What may constitute a justifiable reason for this purpose is dealt with in section 198D.

(b) An employer must provide an employee employed on a fixed term contract with the same access to opportunities to apply for vacancies as it provides to an employee employed on an indefinite contract of employment.

(c) If a fixed term of longer than 24 months can be justified under the section, the employer must, on expiry of the contract and subject to the terms of any collective agreement regulating the issue, pay the employee one week's remuneration for each completed year of the contract. An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed-term contract, the employer offers the employeeemployment or procures employment for the employee with a different employer which commences no later than 30 days after expiry of the contract and on the same or similar terms.

The proposed section 198C seeks to regulate the work of vulnerable part-time employees by reflecting the provisions regulating part-time employees in the European Union, and the ILO Convention on Part-time Work (Convention 175, 1994).

Similar to the proposed sections 198A and 198B, section 198C applies only to employees who earn on or below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act. This provision does not apply to employees who ordinarily work less than 24 hours a month, or during the first six months of employment. In order to accommodate new and small businesses this section does not apply to:

(a) an employer that employs less than 10 employees; and

(b) an employer that employs less than 50 employees and whose business has been in operation for less than two years, unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.

The proposed amendment seeks to define part-time and comparable full-time employees, and requires employers to:

(a) Treat part-time employees on the whole not less favourably than comparable full-time employees doing the same or similar work, unless there is a justifiable reason for different treatment. What constitutes a justifiable reason for differentiation is dealt with in section 198D.

(b) Provide part-time employees with access to training and skills development that is on the whole not less favourable than the access applicable to comparable full-time employees.

(c) Provide part-time employees with the same access to opportunities to apply for vacancies as full-time employees.

The proposed section 198D provides that disputes about the interpretation or application of sections 198A to 198C may be referred to the CCMA or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration. A justifiable reason for different treatment (referred to in the proposed sections 198A, 198B and 198C) includes different treatment which is a result of the application of a system that takes into account—

(a) seniority, experience or length of service;

(b) merit;

(c) the quality or quantity of work performed; and

(d) any other criteria of a similar nature not prohibited by section 6(1) of the Employment Equity Act, 1998 (Act No. 55 of 1998).

Clause 45

Clause 45 of the Bill seek to amend section 200A of the Act by extending the application of the presumption in the section, as to who is an employee, to other employment laws and to section 98A of the Insolvency Act, 1936 (Act No. 24 of 1936).

Clause 46

Clause 46 of the Bill seeks to provide for the liability of employer's obligations in order to prevent simulated arrangements or corporate structures that are intended to

defeat the purposes of the Act or any other employment law, and to provide for joint and several liability on the part of persons found to be employers under this section for any failures to comply with an employer's obligations under the Act or any employment law. This is particularly important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuge to disguise the identity of the true employer.

Clause 47

Clause 47 of the Bill seeks to amend section 203 of the Act to permit the Minister of Labour to issue a code of good practice to be published in the *Gazette* where parties to NEDLAC have not been able to reach agreement on the code. The Minister can only do this if proposals relating to the code have been tabled at NEDLAC and NEDLAC has reported to the Minister that it has been unable to reach agreement on the code.

Clause 48

Clause 48 of the Bill seeks to amend section 213 of the Act by updating the reference to the Unemployment Insurance Act, and by amending the definition of what constitutes ''service'' of documents that are delivered in terms of the Act by incorporating reference to rules made for the Labour Court, the Commission and bargaining councils.

Clause 49

Clause 49 of the Bill seeks to amend Item 27 of Part H of Schedule 7 to correct a typographical error.

Clause 50

Clause 50 provides for the short title.

4. CONSULTATION

NEDLAC was consulted. The National Economic, Development and Labour Council Act, 1994 (Act No. 35 of 1994), provides for the objects, powers and functions of NEDLAC. NEDLAC must consider all proposed labour legislation before it is introduced in Parliament and must also consider significant changes to the social and economic policy before it is implemented and introduced in Parliament.

5. FINANCIAL IMPLICATIONS

The amendments that deal with changes to dispute resolution and the functioning of the CCMA are estimated to lead to increased operating costs of the CCMA and an increase in its baseline budget.

6. PARLIAMENTARY PROCEDURE

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

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)*(a)* of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.