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Multi-employer collective bargaining in South Africa

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***Multi-employer collective bargaining
in South Africa***

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Abbreviations

BCEA	-	Basic Conditions of Employment Act
CCMA	-	Commission for Conciliation, Mediation and Arbitration
COSATU	-	Congress of South African Trade Unions
FMF	-	Free Market Foundation
LRA	-	Labour Relations Act
NEDLAC	-	National Economic Development and Labour Council
NUM	-	National Union of Mineworkers
NUMSA	-	National Union of Metalworkers of South Africa
QLFS	-	Quarterly Labour Force Survey
SACTWU	-	Southern African Clothing and Textile Workers Union

1. Introduction

In South Africa, collective bargaining operates at multiple levels. The main distinction to draw is between single-employer bargaining and multi-employer bargaining. Single-employer bargaining takes place at the branch, company or corporate levels, while multi-employer bargaining involves a number of employers who are usually represented by an employers' organization. A key feature of most multi-employer bargaining arrangements is that the agreements reached will be extended to non-parties, i.e. to employers and employees who are not members of the organizations that negotiated the agreement. As a result, the scale of multi-employer bargaining generally has geographical and sectoral dimensions, i.e. it will take place at a regional or national level for a sub-sector or sector. The sub-sector or sector is defined mainly by a product market(s), i.e. it will encompass all the employers in an area that produce goods for a certain product market(s). Thus, agreements set the minimum level of labour cost across the product market(s) thereby removing such costs out of the competition.

The legislative framework for collective bargaining provides support for multi-employer bargaining arrangements; this is exemplified through the regulation of the extension of multi-employer collective agreements. A key principle that informs legislative support for multi-employer bargaining structures and the extension of their agreements is that the parties must be 'representative'. The reasoning is that if the parties to multi-employer bargaining arrangements are representative, then it is fair that the agreements they reach are extended to non-party employers and employees. The terminology of industrial self-government is often used to legitimize the extension of agreements reached by representative parties, i.e. it is a democratic right of the majority of employers and employees in a sector to extend their agreements to the minority. The state, however, usually retains some discretion with regard to the establishment of multi-employer bargaining structures and the extension of agreements, so that it can, if necessary, act against sectional interests in the public interest.

1.1. Multi-employer bargaining in a global context

Multi-employer bargaining has its philosophical roots in Europe, which can be traced back to the early part of 20th century. Sinzheimer, for example, argued that collective bargaining was a mechanism through which trade unions and employers' organizations could democratize the economy. In other words, they could jointly regulate or 'govern' sectors of the economy by reaching collective agreements that would be legislated (i.e. extended) for an entire sector (Dukes, 2011). Years later, this vision of industrial self-government was echoed by Hamburger when he stated that the extension of multi-employer collective agreements was "the first chapter of a new legislative technique, that of legislation by accord", which was "democratic" although it was "without recourse to parliamentary procedure" (Hamburger, 1939: 194). A similar concept of industrial self-government found expression during the same time in the United Kingdom in the form of Whitley councils. The concept influenced early labour legislation in a number of Commonwealth countries, one of which was South Africa (Godfrey, Maree, Du Toit and Theron, 2010: 18 (footnote 63); 33 and 43).

The emergence of social democratic political parties after the First World War in many advanced industrialized countries provided a fertile environment for the establishment of multi-employer bargaining arrangements. Such arrangements became prevalent in the period after 1945. However, the economic downturn from the early 1970s, increased competition from industrialising countries, and technological change created a much less favourable environment for multi-employer bargaining. As such, the gains made by organized labour over the years in developed countries began to be rolled back;

this was initially described as ‘deregulation’, but later fell under the guise of ‘flexibility’. The obverse of flexibility was labour market ‘rigidity’. Multi-employer bargaining and the extension of agreements were targeted as major contributors to rigidity. In particular, it was argued that multi-employer bargaining was a ‘one size fits all’ type of approach that did not take account of the circumstances of individual firms. Furthermore, opponents of multi-employer bargaining articulated that if firms had to bargain with a trade union, then decentralized bargaining, i.e. single employer bargaining, would produce agreements that were more responsive to the competitive circumstances faced by individual firms.

Subsequently, during the 1980s, governments and employers alike exerted pressure to shift towards decentralized bargaining arrangements. Such was the pressure that many scholars were predicting the imminent demise of multi-employer bargaining. In practice, however, the process of decentralization has been slow, not least because of strong resistance by organized labour. The opposition to multi-employer bargaining has continued into the 21st century where ‘derogations’ and ‘opening clauses’ are used by enterprises to avoid full coverage of agreements. This strategy has significantly impacted coverage rates as exceptions become normalized. There is a concern that these developments will undermine the foundations of multi-employer bargaining arrangements.

1.2. The historical roots of multi-employer bargaining in South Africa¹

Since early in the 20th century, collective bargaining in South Africa has predominantly taken place in the form of multi-employer bargaining within the legislative framework. The key features of this legislative framework include voluntary participation and representativity requirements for parties to the agreement that wish to extend it to non-members of the relevant employers’ organisation(s). This legislative framework has remained largely intact since it was first introduced in 1924, although amendments have been made. Over the years, however, the system of bargaining institutions that have emerged has undergone considerable change and it is currently under considerable pressure. It is therefore important to outline the history of the system in order to understand current conditions.

The *Industrial Conciliation Act*, 11 of 1924, was the first national regulation of collective bargaining in the country. While many of its features resulted from demands by trade unions, it was also influenced by the notion of industrial self-government that was current in Europe at the time. As noted above, Whitely councils had been introduced in the United Kingdom a few years prior, and to some extent provided a model for the drafters of the Industrial Conciliation Act (Godfrey, Maree, Du Toit and Theron, 2010: 18 (footnote 63); 33 and 43).

The 1924 Act introduced a rather skeletal framework for the voluntary establishment of either conciliation boards or industrial councils. Conciliation boards were *ad hoc* forums established by parties to settle particular disputes, whereas industrial councils were permanent structures for multi-employer collective bargaining that could be established for a defined area and sector. The Act provided mechanisms whereby both industrial council agreements and agreements reached by conciliation boards could be extended. The main criterion for the extension of an agreement was that the parties to the agreement were ‘sufficiently representative’ of all employers and employees within the scope of the council. The term ‘sufficiently representative’ was not defined in the Act. This gave the Minister of Labour considerable latitude with regard to the decision to extend agreements.

Conciliation boards were used occasionally but never played a major part in the collective bargaining system that emerged after 1924. Industrial councils, on the other hand, became the main vehicle for

¹ This historical background draws extensively on Godfrey, 1992; Godfrey et al, 2010; and, Du Toit et al, 2015.

collective bargaining in the country and therefore had a considerable impact on the labour relations system that emerged in South Africa. For 55 years, a key aspect of this impact was the exclusion of pass-bearing African workers from its definition of 'employee'. This meant that most male African workers, under the Act, were prohibited from joining registered trade unions and were excluded from representation in industrial council negotiations.² This led to what Webster has described as "a convergence of employer interests... and the interests of white workers", and it "thus served to establish a 'joint monopoly' of employers and registered trade unions at the expense of African workers, who were excluded from the industrial conciliation negotiating machinery"(Webster, 1978: 68). The principle of industrial self-government that underpinned the Act's collective bargaining model therefore mirrored the policy of racial exclusion that prevailed in the broader body politic.

As industrial development progressed, the collective bargaining system expanded through the proliferation of industrial councils. The number of industrial councils rose steadily after 1924³ and continued to increase after the Second World War: in 1960, there were 94 industrial councils and by 1973 the total had risen to 103. The number of national industrial councils, however, remained low, and some of the national councils covered very narrow sub-sectors and not many employees (e.g. the national industrial councils for the dental mechanician occupation, the diamond cutting industry, and the ophthalmic optical manufacturing industry). Most of the major industrial sectors were covered by relatively small regional or local industrial councils. For example, there were 12 separate industrial councils in the building industry which covered most of the larger cities in the country, and five separate regional industrial councils that covered the concentrations of clothing manufacturers in the major urban centres.

The industrial council system, however, was contributing to the emergence of a deeply segmented labour market. Two 'industrial commissions' were appointed by the government in 1935 and between 1948 to 1951 to investigate the emerging labour relations system.⁴ Their findings revealed a wage disparity between skilled and unskilled workers that had emerged in industrial council agreements. This reflected the power of craft unions in the industrial council system and the predominance of African workers, who were not represented in industrial council negotiations, in unskilled categories. The only way to rectify the matter would have been to include African workers in the definition of 'employee' so that they could participate fully in the labour relations system. However, the government in power at the time did not consider this to be a viable option. In fact, in 1956 a new statute⁵ sought to deepen and extend the racial divisions in the labour relations system.⁶

The first serious challenge to the racially divided labour relations system came in 1973, when spontaneous strikes of African workers broke out in and around the port city of Durban. The state responded to the

² African males were required by law to carry pass book (i.e. a type of permit) to be in most urban areas. Restricting the exclusion to 'pass-bearing African' workers therefore allowed African females to access the collective bargaining system (although African females made up only a small proportion of the labour market at the time). This loophole was closed in 1953 with the passing of the Native Labour (Settlement of Disputes) Act 48 of 1953.

³ In 1935 there were 36 registered industrial councils, but only three were national councils (covering the biscuit manufacturing industry, the leather industry, and the printing and newspaper industry). By 1950 the number of registered industrial councils had risen to 86, of which 11 were national councils (covering such diverse sectors as the iron, steel, engineering and metallurgical industry and the ophthalmic optical manufacturing industry).

⁴ These Commissions are generally referred to as the Van Reenen Commission (1935) and the Botha Commission (1948-51) after their chairpersons.

⁵ Industrial Conciliation Act 28 of 1956.

⁶ For example, no trade union applying for registration could be registered in respect of both White and Coloured/Indian persons, unless the number of members from either group was too small to make a separate union. Existing unions that had a membership of White, Coloured and Indian workers were compelled to establish separate branches for White members and Coloured/Indian members and had to hold separate meetings.

strikes by providing African workers an alternative to collective bargaining in the form of liaison committees and works committees.⁷ The majority of African workers rejected these bodies and instead gravitated to “new” unions that emerged in the wake of the strikes.⁸ Most of these new unions sought to build strong shop floor structures and pioneered the ‘recognition agreement’ with employers as the basis for establishing a collective bargaining relationship at the enterprise or plant level.⁹ Over the next few years, the spread of plant- and enterprise-level bargaining led to the perception that an ‘unofficial’ collective bargaining system was developing that was undermining the statutory system of industrial councils.

The challenge posed by this ‘unofficial’ collective bargaining system led to the government appointed Wiehahn Commission of Enquiry in 1977. One of the main focus areas of the Commission was the contradictions that had emerged between works and liaison committees (for African workers), enterprise-level bargaining (being pioneered by unregistered trade unions representing mainly African workers), and industrial council bargaining (in which white, coloured and Indian workers were represented).

The Wiehahn Commission report in 1979 constituted a watershed for the labour relations system. It recommended *inter alia* that African workers should be included in the definition of ‘employee’. This amendment would permit African workers to form or join registered trade unions and participate directly in industrial council negotiations. Over the next three years, the government accepted many of the recommendations of the Wiehahn Commission, making amendments to legislation that included changing the definition of an ‘employee’ to encompass African workers.

Although trade unions representing mainly African workers initially rejected participation in industrial councils, by the mid-1980s they had grown to such an extent that they had to reconsider their opposition. Over the next ten years several of these unions joined industrial councils, but many did so while continuing to try to bargain at the enterprise level. Unions, however, faced growing resistance from employers to bargaining at two levels. Furthermore, some large employers began to advocate for decentralization of bargaining to the plant or enterprise level. This move was in part a response to the union demand for dual-level bargaining but was also informed by arguments propagated by employers internationally in favour of decentralised bargaining.

At this time, the government also began to display ambivalence about the industrial council system. Slow economic growth and rising unemployment caused the government to promote small businesses as a means to create jobs, which translated into pressure for ‘deregulation’, particularly of the labour market. A key target was the extension of industrial council agreements. In the mid-1980s the Department of Labour issued a number of circulars to industrial councils that ‘encouraged’ them to cooperate with the policy to remove regulatory constraints on small businesses. The implication in these circulars was clear: if industrial councils did not cooperate, their agreements would not be extended (Du Toit et al, 1995: 19).

⁷ The amendment was introduced by the Bantu Labour (Settlement of Disputes) Act. In 1977 the Act was again amended (by the Bantu Labour Relations Regulation Amendment Act, 84 of 1977) to grant liaison committees the right to negotiate plant-level agreements on wages and working conditions. The amendment did not have much impact.

⁸ Most of the ‘new’ unions were non-racial but focused mainly on the organization of low-skilled and semi-skilled Black workers. By the mid-1980s, the unions had combined into two large federations: the Congress of South African Trade Unions (COSATU) and the smaller National Council of Trade Unions.

⁹ This was a procedural agreement that set out rights of access for union organizers, procedures for union meetings, the election of shop stewards and their duties, as well as the procedure for collective bargaining. The recognition agreement also generally included a definition of the ‘bargaining unit’, i.e. the occupations and parts of the enterprise that would be covered by the collective agreement (Theron, Godfrey and Fergus, 2015: 853-855).

The industrial council system, therefore, went through a period of instability from the mid-1980s to South Africa's first democratic elections in 1994, although it probably remained the predominant form of collective bargaining. The system, arguably, was still adjusting to the reforms that had opened the way for participation by trade unions representing African workers in industrial councils.

2. The current legislative framework for multi-employer collective bargaining¹⁰

Soon after the 1994 elections, the new government launched a programme to reform the system of labour market regulation inherited from the previous regime. The first major step in this reform process was the new *Labour Relations Act*.¹¹ Its main focus is collective labour relations, including freedom of association, registration of trade unions and employers' organizations, the promotion of sectoral collective bargaining (including bargaining in the public sector), dispute resolution and the right to strike. The Act went through unprecedented tripartite negotiations in the newly-established National Economic Development and Labour Council (NEDLAC).¹² The negotiations were difficult, particularly with regard to the nature of the collective bargaining system.

The task team that drafted the Bill that was negotiated in the National Economic Development and Labour Council identified "the lack of conceptual clarity as to the structure and functions of collective bargaining" as the major problem with the 1956 *Labour Relations Act* (Explanatory Memorandum, 1995: 121). This criticism referred mainly to the "lack of commitment to an orderly system of industry-level bargaining", which had resulted in the development of a "patchwork" system of industrial councils. A related problem was the exercise of the Minister's discretion with regard to the extension of industrial council agreements. Further problems included the vague criterion for the representativeness of industrial councils, the bureaucratic structure of councils, procedures for granting exemptions from industrial council agreements, and the enforcement of council agreements by criminal prosecution (Explanatory Memorandum, 1995: 121).

Organized labour, however, demanded more substantial changes to the existing collective bargaining system. The Congress of South African Trade Unions, the major federation in the country, advocated for a system of about 30 industrial councils to be legislated for the entire economy together with a statutory duty to bargain. This compulsory 'model' was considered by the task team, along with a rights-based model in which the judiciary would determine appropriate levels of bargaining. Ultimately, however, the team went with a third model that more or less continued the status quo, i.e. a voluntarist system in which the parties would determine their own bargaining arrangements through the exercise of power (Explanatory Memorandum, 1995:122). This model was favoured by government and organized business in the negotiations of the National Economic Development and Labour Council (NEDLAC) and was ultimately adopted in the new Act. At the same time, the framework for a new type of multi-employer bargaining structure – the statutory council - was introduced. The statutory council, in response to the demands of organized labour, provides an element of compulsion.

The core of the legislative framework for the industrial council system was, therefore, retained in the new Act, albeit with industrial councils being renamed bargaining councils. There were also a number of innovations made to the legislation. First, the Act introduced statutory organizational rights as a proxy for a duty to bargain. Second, the statute had provisions that regulated collective agreements in general (i.e. not just bargaining council agreements). Third, the Act allowed workplace forums to be established at the instance of representative trade unions at the enterprise level. Workplace forums have the right to be consulted over a wide range of 'non-distributive' issues, so they are intended to be an enterprise-level counterpart for multi-employer bargaining at sectoral level. Fourth, the statutory council was introduced.

¹⁰ This section on the legislative framework draws extensively on Godfrey et al, 2010; Du Toit et al, 2015; and, Godfrey, 2016.

¹¹ Act 66 of 1995.

¹² The National Economic Development and Labour Council (NEDLAC) was established by Act 35 of 1994 through the merger of the National Manpower Commission and the National Economic Forum.

The fifth change was the implementation of a new dispute resolution system, with the Commission for Conciliation, Mediation and Arbitration (CCMA) at its centre. However, the Act provides that bargaining councils may become accredited to perform conciliations only or conciliations and arbitrations for most disputes arising within their jurisdictions. In practice, these are generally individual disputes, mainly alleged unfair dismissals. This adds an important new function to accredited bargaining councils and relieves the workload of the Commission for Conciliation, Mediation and Arbitration. Sixth, the new *Labour Relations Act* decriminalized non-compliance with bargaining council agreements and introduced a new enforcement procedure which involves the issue of undertakings or compliance orders, followed by arbitration.

Existing industrial councils had to apply for registration as bargaining councils in terms of the new Act, which almost all did. The bargaining council system therefore continues to be the central pillar of the collective bargaining system in South Africa. The main features of the legislative framework are set out below.

2.1. Registration of bargaining councils and the extension of agreements

In terms of the new *Labour Relations Act*, an application for the establishment of a bargaining council must be submitted to the registrar of the Department of Labour. The applicant trade union(s) and employers' organization(s) must indicate for which sector(s) and area(s) the council will be established, and must provide the following data to support their claim to be 'sufficiently representative' within the proposed scope of the council:¹³

- The total number of employers and employees within the proposed scope of the council;
- The total number of employees within the proposed scope of the council employed by the members of the party employers' organizations;
- The total number of employers within the proposed scope of the council that belong to the party employers' organizations; and
- The total number of employees within the proposed scope of the council that belong to the party trade unions.

The registrar must publicize the application and invite any objections. The Act lists various grounds for objection, including that the applicants are not 'sufficiently representative' of the proposed jurisdiction of the council.¹⁴ The applicants have an opportunity to respond to the objections that are received, after which the application and related documentation is sent to the NEDLAC.¹⁵ NEDLAC must "consider the appropriateness of the sector and area in respect of which the application is made", and "demarcate the appropriate sector and area in respect of which the bargaining council should be registered".

NEDLAC could interpret its duties in two ways. The first consideration would be to adopt an expansive interpretation which would see it demarcating sectors and areas for councils in order to establish a more coherent set of national, sector-wide bargaining councils. This would see it tackling the 'patchwork' system of industrial councils inherited from the previous dispensation. The second option is that it could interpret its role narrowly, which entails ensuring that there is no overlap between the proposed scope of the applicant council and existing councils, i.e. to anticipate and avoid demarcation disputes between councils. Research indicates that NEDLAC has adopted the latter approach (Godfrey et al, 2010: 104).

¹³ Section 27(1) of the LRA.

¹⁴ Sections 29(3) & 29(4) of the LRA.

¹⁵ Sections 29(6) & 29(7) of the LRA.

When NEDLAC completes its deliberations, it reports in writing to the registrar. The registrar must determine whether, amongst other things, “adequate provision is made in the constitution of the bargaining council for the representation of small and medium enterprises”, and “the parties to the bargaining council are sufficiently representative of the sector and area determined by NEDLAC or the Minister”.¹⁶ The first of the above questions is largely a formality: proof of actual representation is not required, so most bargaining councils have simply amended their constitutions to make explicit provision for representation of small and medium enterprises. The latter consideration is critical. It should be noted that the term ‘sufficiently representative’ is not defined, nor has there been any case law under the new *Labour Relations Act* that has given the term concrete meaning vis-à-vis bargaining councils. If the registrar is satisfied that both of these requirements as well as certain other requirements have been met, he may register the council.

Once registered, the primary function of bargaining councils is to negotiate collective agreements regulating terms and conditions of employment. As noted above, a council can refer such agreements to the Minister of Labour with the request that they are extended to all employers and employees within the jurisdiction of the council. The new *Labour Relations Act* states that if the parties to the agreement vote in favour of extension and the agreement is referred to the Minister by the bargaining council with the request to extend it, the Minister *must* extend it within 60 days of receipt provided certain requirements have been met. The first requirement is that the parties meet a representativity threshold: the Minister must therefore be satisfied that after extension (1) the majority of all employees covered are members of the party trade unions, and (2) the members of the party employers’ organizations employ the majority of all the employees.¹⁷ The section therefore sets clear quantitative thresholds of representativity for the automatic extension of agreements.

An application for the extension of an agreement requires exactly the same data as needed for an application for registration of a council (see above). Furthermore, section 49(2) of the Act requires that a bargaining council that has an extended agreement must inform the registrar annually in writing as to the number of employees who are: covered by the collective agreement; members of the party trade unions; and, employed by members of the party employers’ organizations.

The reference point for the data that bargaining councils should provide to the Department of Labour is problematic. The Act requires representativity to be measured against “all employees” and the “total number” of employers and employees within the scope of the council. Given that there is an unknown number of unregistered employers (and their employees) operating within the scope of almost every bargaining council, such a measurement is impossible. The only way of getting an estimate of the number of such employers and employees is through large-scale surveys. But the main survey of employees, the Quarterly Labour Force Survey, uses the standard classification of economic sectors that does not neatly match the scope of bargaining councils, which means its data cannot be used.

Over the past few years, the data on employment has assumed great importance given a number of legal challenges to the extension of agreements on the grounds that the parties to a council were not seen to be representative (see further below). In 2002, an amendment was accordingly introduced (section 49(4)) which stated that a determination of representativeness in terms of section 49 is “sufficient proof of the representativeness of the council for the year following the determination”. In 2014, the section was

¹⁶ The Minister may demarcate the appropriate sector and area if NEDLAC fails to reach agreement on the demarcation.

¹⁷ The failure to include a third criterion, namely that the party employers’ organization(s) must represent at least 50 per cent of the total number of employers, is a disincentive for employers’ organizations to organize more small firms.

further amended to clarify that such proof of representativeness held for any purpose in respect of the Act, “including a decision by the Minister in terms of sections 32(3)(b), 32(3)(c) and 32(5).” The first two sections refer to the determination of the representativity of the parties (see above) for the extension of an agreement, while the last section refers to the determination as to whether the parties are ‘sufficiently representative’ (see below). The certificate of representativity issued in terms of section 49 is therefore aimed at protecting the Minister’s decision regarding representativity or sufficient representativity from legal challenge.

If the parties to a bargaining council agreement are not representative in terms of section 32(3) (see above), section 32(5) gives the Minister discretion to extend the agreement if the parties are “sufficiently representative” and “the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level”. As previously stated, the criterion for “sufficiently representative” is not defined in the Act, which gives the Minister some latitude to extend agreements.¹⁸ Furthermore, an argument can be made that most council agreements should be extended because the non-extension of an agreement will in theory always be a threat to sectoral collective bargaining. This implicit bias towards extension is bolstered by the purpose of the Act, which is to promote sectoral collective bargaining. Together these factors apply pressure on the Minister to interpret ‘sufficiently representative’ generously.

However, an amendment to the *Labour Relations Act* introduced in 2014 provides a counterweight to any bias in favour of extending agreements. Now, the Minister can only exercise her discretion to extend an agreement if she has published a notice in the government gazette stating that an application for extension of an agreement has been received, where a copy of the agreement may be obtained or inspected, and that comments can be made within 21 days from the date of the notice. The Minister must consider all the comments received within this period. The amendment therefore gives non-parties to an agreement an avenue through which to bring their objections to the attention of the Minister prior to her making the decision to extend it.

Section 32 further states that when determining whether the parties to the bargaining council are “sufficiently representative”, the Minister may take into account the composition of the workforce in the sector, including the number of employees of temporary employment services, and the number of employees engaged on fixed-term or part-time contracts or who are in other forms of non-standard employment. The intention of this amendment is presumably to enable the Minister to exclude non-standard employees, who are generally difficult to organize, from the calculation of the total number of employees in the sector, i.e. it would effectively increase the representativity of the parties. In other words, it seeks to assist in the extension of agreements, which would apply to non-standard employees (despite them being excluded from the representativity calculation. However, given that data on non-standard employment is generally not very reliable, it is difficult to know how the amendment will be implemented. This is perhaps the reason why the amendment gave the Minister discretion in this regard.

Section 32 also requires that before a bargaining council agreement can be extended, the Minister must be satisfied that the council has met certain requirements regarding exemptions from the agreement (see further below), and that the terms of the collective agreement do not discriminate against non-parties.

The admission of new parties is a problematic omission from the legislative framework for bargaining councils. It is left to the parties at bargaining councils to set the admission criteria for new parties to gain membership of a council, which in practice always includes a measure of the representativeness of the

¹⁸ Previous case law has examined the term “sufficiently representative” in respect of organizational rights but not for the registration of a bargaining council or extension of an agreement.

trade union or employers' organization seeking admission. The thresholds differ considerably between councils, but in some cases are set so high that they constitute an insurmountable barrier for any potential new parties. Besides the fact this obstacle to new parties undermines the ability of the council to increase its representativity, it acts as a barrier to the admission of employers' organizations representing small and medium-sized firms, which is contrary to the intention of the Act (Holtzhausen and Mischke, 2004: 43-45). This is likely to become increasingly problematic in future due to the number of trade union splits that have taken place.

2.2. Statutory councils

As noted above, the collective bargaining system was probably the most contentious issue in the negotiations over the new *Labour Relations Act* in NEDLAC. One of the ways in which a compromise was eventually reached was provision for a new bargaining institution: the statutory council. Statutory councils occupy a middle-ground between the voluntarism of the bargaining council system and the compulsion that was demanded by the Congress of South African Trade Unions (COSATU).

A statutory council can be established on application by either a "representative" trade union or employers' organization. A "representative" trade union is a registered union (or two or more acting jointly) that has retained membership equivalent to at least 30 per cent of the employees in the sector and area for which it wants the statutory council established. Similarly, the member firms of a "representative" employers' organization must employ at least 30 per cent of the workers in the relevant sector or area. If an applicant union or employers' organization is representative and complies with certain formalities, the registrar of the Department of Labour must establish the statutory council. A process then follows to get other parties to participate on the council, either through agreement or appointment by the Minister, which then leads to registration of the council. Once the council is functioning and an agreement is produced, it may be extended by way of the Basic Conditions of Employment Act (BCEA)¹⁹, using the procedure through which sectoral determinations are issued (see further below).

Additionally, only one party (e.g. a trade union) needs to apply for a statutory council to be established. So, it can be established without the agreement or cooperation of the other party (e.g. an employers' organization). Furthermore, the threshold for establishing a statutory council (30 per cent) is presumably much lower than the (admittedly undefined) requirement for parties to a bargaining council to be 'sufficiently representative'. The statutory council model therefore introduces an element of compulsion and sets a lower representivity threshold in order to make it easier to be established. The drawback of a statutory council is that the Act gives it a limited bargaining agenda.

The idea behind the statutory council model was that it would provide a starting point for centralized bargaining in a sector, albeit with a limited bargaining agenda, but that over time the representativity of the parties would increase and the bargaining agenda would expand, paving the way for the statutory council to develop into a bargaining council.

2.3. Exemptions

The *Labour Relations Act* requires that a bargaining council constitution must provide a procedure for exemptions from collective agreements. However, as indicated above, the Act introduces additional requirements in respect of exemptions where the extension of an agreement is sought. First, a bargaining council agreement cannot be extended unless the Minister is satisfied that provision is made in the

¹⁹ Act 75 of 1997.

agreement for an independent body to hear appeals against the refusal by the council of a non-party's application for exemption. Second, the Minister must be satisfied that the agreement includes fair criteria that will be applied by the independent body when it considers an appeal, which also promote the primary objects of the Act.

Amendments in 2014 aim at further improving the functioning of bargaining council exemption systems. In order for an agreement to be extended, the bargaining council must have in place an effective procedure to deal with applications by non-parties for exemptions. Also, a decision must be made within 30 days. Furthermore, an appeal against the refusal or withdrawal by a council of a non-party's exemption application to the independent body must take place within 30 days of the appeal being lodged.

2.4. Accommodation of small business

Over the last three decades, small business and its proponents have been vociferous in their opposition to the industrial/bargaining council systems, in particular the extension of agreements. As noted above, the requirement for the constitution of every bargaining council to provide for "the representation of small and medium enterprises" (section 30(b)) has resulted in nothing more than amendments to the constitutions of councils. However, the thinking behind the provision was sound, namely that small businesses should organize themselves and participate in the system to represent their interests, rather than lobbying against the system from the outside. This should, in theory, lead to agreements that better accommodate the concerns of small business and would also improve the representative position of bargaining councils. Instead, the provision has had little or no impact.

Amendments to the Act in 2002, therefore, focussed greater attention on representation of small firms. Section 54(1)(f) and (2)(f) requires bargaining councils to submit data to the registrar regarding small firms that fall within the scope of the council.²⁰ The information includes the number of people employed by small firms, how many are trade union members, and how many small firms are members of the party employers' organization(s), as well as data regarding exemptions for small firms.²¹ Should a bargaining council not provide the above information, section 54(4) gives the registrar extensive powers to deal with defaulters.

It is unclear for what purpose this data is used. There is nothing in the section that indicates that the Minister will use this information in assessing requests for the extension of agreements. However, the Minister presumably takes this information into account when considering a request for the extension of an agreement from a council that does not meet the representativity requirements in section 32.

2.5. Vulnerable workers

Informal employment has been growing steadily in South Africa since 2005.²² The growth has been facilitated by an increase in sub-contracting, outsourcing and homeworking arrangements, the growing use of temporary employment services, and schemes to turn employees into independent contractors.²³

²⁰ The *National Small Business Act*, 102 of 1996, distinguishes between "medium", "small", "very small" and "micro" businesses according to number of employees, total annual turnover and total gross asset value with different values for each sector. However, this serves only as a guide to bargaining councils, which define for themselves what qualifies as a small business.

²¹ The form on which the data must be supplied actually requests much more data than required by section 54(2)(f).

²² Defining and measuring informal employment is fraught with problems. The careful examination of various sources of data by Fourie and Kerr (2017), however, shows that employment in informal firms has been growing since at least 2005.

²³ These schemes were addressed in 2002 via the Labour Relations Amendment Act, 12 of 2002).

Most bargaining councils seek to regulate these arrangements. In fact, research indicates that bargaining councils are probably more effective at regulating these arrangements than legislation.²⁴ Such arrangements have nevertheless led to a growing number of firms, particularly smaller firms, not registering with bargaining councils (although there is no reliable data in this regard). As a result, there is a rising number of vulnerable workers who are not protected by bargaining council agreements.

Bargaining councils have traditionally dealt with informal employment through enforcement. This is done by councils appointing ‘designated agents’, i.e. inspectors. Amendments to the *Labour Relations Act* have given agents increased powers and have sought to streamline the enforcement process, but inspections are essentially a reactive strategy that will never entirely solve the problems of non-registration and non-compliance. Furthermore, given the extremely high level of structural unemployment in South Africa, many workers are reluctant to participate in actively enforcing their rights because this will pose a threat to their jobs. Instead, the practice is often for workers take up underpayment or other contraventions only after they have left employment with the firm.

An amendment to the *Labour Relations Act* in 2002 enabled an alternative approach to getting unregistered firms to register; that is by the council offering value-adding services to firms to incentivise registration. The amendment gave bargaining councils the power “to provide industrial support services within the sector”. A second amendment provides that a council has the power to extend its services and functions “to workers in the informal sector and home workers”. The two new powers should work in tandem: in future councils will extend the support services to informal firms along with its traditional functions, namely minimum standards, benefit funds and dispute resolution. To access the support services the informal firms will need to register and start complying with the council’s agreements.

While the intention of the amendments is admirable, they are also puzzling. If a bargaining council agreement is extended, it applies to all employers and employees who fall within the scope of the council. The Act therefore does not recognize the “informal sector”, and council agreements apply whether the work takes place in a factory or a home. Thus, making provision for a council to extend its services and functions to the informal sector and home workers is unnecessary. At best, it might be a symbolic amendment to jog the thinking of parties to bargaining councils to be creative in finding solutions to non-registration. The problem is that most bargaining councils simply do not have the capacity to consider adding “industrial support services” to their functions, while some councils probably prefer to ignore small unregistered firms because they do not have the capacity to register them and police their compliance with agreements. Either way, it does not appear that the amendments have induced any councils to “provide industrial support services” in their sectors.

Note that in 2014, an amendment to the *Labour Relations Act* provided that the Minister may now take into account the composition of the workforce in a sector when making a decision about extending a bargaining council agreement where one or both parties are not representative (see above). The intention is presumably to exclude such workers from the calculation of “sufficient representativity”, thereby making it easier for parties to achieve the relevant threshold.

²⁴ LEP/NALEDI, 2010: 143.

3. Developments in statutory multi-employer bargaining²⁵

3.1. The bargaining council system: Representativeness and the extension of agreements

Since the introduction of the *Labour Relations Act* in 1995, the bargaining council system has undergone significant changes. The number of bargaining councils has declined steeply, while the total numbers of workers covered has increased. The main reason for the latter development was the inclusion of the public service within the ambit of the Act, which saw the establishment of five new bargaining councils in the public service, and coverage of over a million additional employees.²⁶ However, even if one excludes the public service, there appears to have been an increase in the number of employees covered by the private sector bargaining councils: up from 944,811 in 2004 to 1,207,162 in 2014.

Table 1. Number of bargaining councils and employee coverage (public and private sector)

Year	Number of bargaining councils	Number of employees covered by bargaining council agreements
1992	87	735 533
1998	76	632 992
2004	48	2 358 012
2010	47	2 520 718
2013/4	44	2 505 074

(Source: Du Toit et al, 2015: 51)

However, the figures in Table 1 need further clarification. Of the 44 registered bargaining councils in 2013/14, five are for the public service and 13 councils did not have a published collective agreement at the end of 2014. Furthermore, eight of the latter councils appear to be either defunct or are no longer functioning as collective bargaining institutions.²⁷ Arguably, the total coverage of these councils should be taken out of the data in Table 1, which would mean that the total coverage of multi-employer bargaining councils has declined rather than increased over the last few years.

As noted above, the representativeness of the parties is indicative of a bargaining council's sustainability as well as a critical factor when determining whether its agreements are extended. Table 2 (below) shows the representativeness of all registered private sector bargaining councils in 2014. When compared with similar data for 2004, one finds that there has been very little change in the overall representativeness of employers: in 2004, party employers employed 63 per cent of all registered workers and in 2014 they employed 62.9 per cent of all registered workers.

Trade union representativeness, however, has declined significantly: in 2004, trade unions represented 60 per cent of all registered workers in the system, but by 2014 their representativity had dropped to 52.4

²⁵ This section on developments in statutory multi-employer bargaining draws extensively on Godfrey et al, 2007; Du Toit et al, 2015; and, Godfrey, 2016

²⁶ The *report* does not deal with the legislative provisions for bargaining councils in the public service or developments in public service bargaining because the state is the only employer in the councils, i.e. they are not multi-employer bargaining structures. However, given the extent to which public service functions have been outsourced to private service providers it is a contested issue whether the state should continue to be the sole employer on these councils.

²⁷ They continue to exist in order to administer social benefit funds and/or provide dispute resolution services.

per cent. Furthermore, in 2014, there were 9 bargaining councils at which party unions represented less than 50 per cent of workers, in some cases significantly less, which suggests that their agreements might not be extended. At another six bargaining councils the trade union parties were on the borderline, representing 50 per cent to 52 per cent of registered workers. Falling trade union representativity is therefore a serious threat to the bargaining council system.

Table 2. Bargaining council representativity in the private sector

Bargaining councils in the private sector	Year	Total employers	Party Employers	Party employers as % of total employers	Total employees	Employees of party employers	Party employer employees as % of total employees	Party union members	Party union members as % of total employees
Amanzi*	2012	12	10	83%	6529	5750	88%	5074	78%
Building: B/fontein	2014	N/a	38	N/a	1285	723	56%	648	50%
Building: Kimberley	2014	50	20	40%	496	354	71%	254	51%
Building: S&E Cape*	2012	298	178	60%	6433	5359	83%	1827	28%
Building: Cape	2014	625	193	31%	13615	7129	52%	5741	42%
Building: E London*	2012	80	59	74%	1234	925	75%	418	34%
Building: N&W Boland	2014	N/a	151	N/a	2809	1528**	54%	1421**	51%
Canvas Goods*	2012	52	23	44%	734	415	57%	193	26%
Diamond Cutting*	2012	37	32	86%	1327	1213	91%	764	58%
Furniture	2012	1373	199	14%	16055	8773	55%	8133	51%
Furniture: W Cape	2012	234	149	63%	4872	4147	85%	3118	64%
Furniture: KZN***	2013	N/a	1	N/a	4126	3327	81%	2211	54%
Furniture: E Cape*	2011	58	20	34%	827	495	60%	494	60%
Furniture: SW District*	2012	64	33	52%	695	477	69%	409	59%
Hairdressing	2013	2514	1520	60%	9577	5426	57%	7762	81%
Metal & Engineering	2013	N/a	2288	N/a	302796	152486	50%	186663	62%
Laundry: Cape	2013	N/a	48	N/a	1701	946	56%	928	55%
Laundry: Natal	2013	322	92	29%	5156	3241	63%	1411	27%
Leather Industry*	2013	274	119	43%	15533	10338	67%	11184	72%
Meat Trade: Gauteng	2014	N/a	767	N/a	6022	3713	62%	3296	55%
Road Freight & Logistic	2014	N/a	504	N/a	118769	48146	41%	41201	35%
Sugar Manufacturing*	2012	7	7	100%	5723	5723	100%	5199	91%
Restaurant & Catering	2013	5052	4588	91%	35370	22364	63%	20619	58%
Food Retail	2014	N/a	743	N/a	20224	18693	92%	10985	54%
Road Passenger	2014	N/a	46	N/a	23687	19778	83%	10233	43%
Motor Ferry	2013	N/a	5	N/a	2685	2000	74%	1526	57%

Bargaining councils in the private sector	Year	Total employers	Party Employers	Party employers as % of total employers	Total employees	Employees of party employers	Party employer employees as % of total employees	Party union members	Party union members as % of total employees
Motor Industry	2013	14548	6399	44%	246871	153026	62%	97049	39%
New Tyre Manfcting*	2012	4	4	100%	3972	3972	100%	3755	95%
Grain Corporation*	N/a	N/a	N/a	N/a	N/a	N/a	N/a	N/a	N/a
C/tract Cleaning: KZN	2014	N/a	120	N/a	19313	13387	69%	N/a	N/a
Transnet	2012	1	1	100%	59694	59694	100%	45556	76%
Electrical Industry	2014	2003	1116	56%	15601	12059	77%	8004	51%
Chemical Industry*	2009	216	193	89%	72427	68169	94%	41903	58%
Wood & Paper	2013	N/a	24	N/a	32494	19739	61%	12180	37%
Fishing Industry	2014	N/a	8	N/a	2054	1783	87%	1166	57%
Clothing Industry	2014	852	270	32%	51703	26082	50%	42946	83%
Textile Industry	2014	N/a	82	N/a	14753	9677	66%	11112	75%
Civil Engineering	2013	N/a	650	N/a	80000	54453	68%	41713	52%
TOTAL					1 207 162	755 510	62.9%	637096	52.4%****

(Source: Data provided by the Department of Labour)

* These bargaining councils do not currently have a published main collective agreement.

** It appears that some figures have been entered incorrectly in the data set provided by the Department of Labour. These figures entered in the table are what are assumed to be the correct figures.

*** The data is for the coverage of the Metro Areas agreement only.

**** I have estimated a figure of 5 000 for party union members for the Contracting Cleaning (KZN) Bargaining Council to arrive at this percentage (i.e. a slightly lower figure than in 2004).

Second, the data in Table 2 enables one to establish how many workers are covered by the extension of agreements, i.e. how many workers are employed at registered employers who do not belong to the employers' organization(s) that are parties to the council. In 2014, this amounted to 451,652 registered workers (37 per cent) of all workers covered.²⁸ This is over a third of all registered employees in the bargaining council system, but it is a relatively insignificant figure when compared to the total number of employees in the labour market (see below).

In Table 3 (below), data on total employment from the Quarterly Labour Force Survey (QLFS) for 2014 (Statistics SA, QLFS 3rd quarter) is compared with the total coverage of bargaining councils and non-party coverage in the main sectors in the economy. This shows that towards the end of 2014, the 44 registered bargaining councils (including the public service councils) covered 18.6 per cent of all employees in the labour market, and that 3.2 per cent of all employees were covered by extended agreements.

²⁸ One should discount this figure somewhat because a proportion of the workers so covered must be members of the party trade unions.

It must be emphasized that the data is indicative only of what proportion of the labour market is covered by bargaining councils. First, the QLFS data includes employers and the self-employed as well as employees in occupational categories that generally fall outside the scope of bargaining councils, i.e. line managers and higher. This has the effect of under-estimating the coverage of bargaining councils. Second, as noted above, there are a number of registered bargaining councils that do not have published collective agreements, and some of these councils appear to be defunct, but the employment data for these councils was included in Table 3.

Third, probably the most glaring problem with the data regarding extensions is that it includes only employment at non-party firms that are registered with the council, therefore omitting employment at unregistered firms. The last two columns in the table therefore reflect the *de facto* coverage of extended agreements but probably significantly underestimate the *de jure* coverage. Given that unregistered firms are operating ‘under the radar’, there is no reliable data on how many such firms there are or how many employees they have.

Table 3 reveals that bargaining councils are a significant presence in only three sectors: manufacturing; transport and storage; and community, social and personal services. The latter sector is dominated by the five public service bargaining councils and the local government bargaining council, of which only the latter is a multi-employer bargaining council. It is only in the manufacturing sector that more than 10 per cent of employees in a sector are covered by extension of bargaining council agreements. While acknowledging the problems with the data outlined above, it is evident that multi-employer bargaining councils do not cover a significant number of employees, even with the extension of agreements.

Table 3. Coverage of bargaining councils by main sectors: 2013/4

Industry classification	Total employees (QLFS 2014/2)	Bargaining councils	Registered employees	% of all employees	Employees at non-parties	% of all employees
Agriculture, forestry and fishing	742 000	2	9 495	1.3	271	0
Mining and quarrying	427 000	0	0	0	0	0
Manufacturing	1 749 000	17	790 509	45.2	310 397	17.7
Electricity, gas and water supply	104 000	1	6 529	6.3	779	0.7
Construction	1 334 000	7	105 872	7.9	35 401	2.7
Wholesale and retail trade	3 247 000	3	66 616	2.1	16 846	0.5
Transport and storage	952 000	4	204 835	21.5	75 211	7.9
Finance, business services, etc.	2 039 000	1	19 313	0.9	5 926	0.3
Community, social, & personal services (incl. public service)	3 501 000	9	1 415 326	40.4	6 821	0.2
TOTAL	14 095 000	44	2 618 495	18.6	451 652	3.2

(Source: Statistics SA, Quarterly Labour Force Survey, 3rd Quarter, 2014, and data provided by the Department of Labour)

Despite the limited coverage of the labour market by extended bargaining council agreements, certain sections of business continue to vigorously oppose councils. In the last few years, this opposition has been expressed most visibly through a number of legal challenges to the extension of bargaining council agreements (see further below). These legal challenges have cast a spotlight on the issue of representativity and the decision-making process by the Minister of Labour.

Although the *Labour Relations Act* requires the Minister of Labour to make the decision regarding the extension of an agreement, she is largely guided by the recommendation she receives from officials in the Department of Labour. In the event that the officials find that the parties to the agreement are representative in terms of section 32, the Minister must extend the agreement. However, in cases where the parties are not representative the officials will engage with the criteria in section 32, namely whether the parties are “sufficiently representative” and whether failure to extend the agreement would pose a threat to bargaining at the sectoral level. The officials report to the Minister and make a recommendation as to whether to extend the agreement or not.

Two broad policy objectives inform the assessment process. First, the extension mechanism is used to ensure that bargaining councils’ agreements have a wide scope that will cover as many unorganized and vulnerable workers as possible. Second, extending agreements is intended ‘to level the playing field’ for all employers and to take labour costs out of competition, so that employers do not compete by lowering labour costs. These objectives flow out of the purpose of the *Labour Relations Act* to promote sectoral collective bargaining.

The process appears to be rigorous but in practice the recommendation to the Minister is to extend the agreement in the overwhelming majority of cases and she has followed the recommendation.²⁹ The main challenge the Department of Labour officials face is declining trade union representativity. This is reflected in the rising proportion of agreements being referred to the Minister where the parties are “sufficiently representative” rather than representative. In past years, the officials used 45 per cent as a guideline for what constitutes a “sufficiently representative” party, but this is being edged downwards as unions struggle to keep their numbers up.

3.2. Exemptions

The counterweight to the extension of agreements is provided by the exemption system. As noted above, the legislative framework for bargaining councils in the *1995 Labour Relations Act* included a number of new requirements with regard to exemptions that had to be met if an agreement was to be extended. These new requirements were added to in the 2014 amendments (see above). The objective has been to make the exemption system transparent and expeditious, particularly with respect to non-parties. This is intended to counter the criticism of the alleged negative impact of extended bargaining council agreements on non-parties, especially small business.

Research by Holtzhausen and Mischke (2004: 62-64) indicated that the provisions regarding exemptions introduced in the new Labour Relations Act had a positive impact, i.e. bargaining councils have introduced greater clarity regarding the criteria for exemptions and in some cases a more rigorous process to evaluate applications. Similarly, research by Godfrey et al found that the exemption systems of a

²⁹ In the period 2012 to 2014 a total of 58 bargaining council agreements were referred to the Minister, comprising both agreements where the parties were representative and where the parties were not representative. The agreements were of all types (i.e. main agreements, administrative agreements and social benefit fund agreements) and included amendments to existing agreements. All were extended.

sample of bargaining councils were operating effectively and efficiently. In particular, it was found that the number of applications for exemption was rising, success rates for applications were high (i.e. above 70 per cent between 2000 and 2004), the success rate for small businesses was slightly higher than for all businesses, and the number of appeals was low (Godfrey, Maree and Theron, 2006: 65-81).

New research has provided more recent data on exemptions. Table 4 (below) presents data on exemptions from 21 bargaining councils broken down by the outcomes of the applications split into party and non-party.

Table 4. Exemption applications and success rate by party/non-party: 2009

	Total		Granted		Refused		Still being considered	
Total applications	1850		1309 (71%)		389 (21%)		160 (8%)	
	Party	Non-P	Party	Non-P	Party	Non-P	Party	Non-P
No. of applics.	1017	859	770	539	174	215	81	98
Proportions by party/non-party	55%	46%	59%	41%	45%	55%	51%	61%

(Source: Own calculations from Tridevworx, 2014: 101 (Table 11))

The table shows that party applications exceeded non-party applications. The more important finding, however is that party applications had a higher success rate than non-party applications: 75.7 per cent of party applications were successful as against 62.7 per cent of non-party applications.

The research also obtained data from ten bargaining councils on exemptions for the years 2010 to 2012, and from 13 councils for 2013. The table below provides the main results:

Table 5. Exemption applications, success rate and appeals: 2010-2013

	2010	2011	2012	2013
Total applications	2872	2224	2973	3338
Exemptions granted	2544 (89%)	1932 (87%)	2465 (83%)	2906 (87%)
Exemptions refused	231 (8%)	220 (10%)	479 (16%)	294 (9%)
Exemptions withdrawn	62	59	20	103
Appeals	143	97	186	144

(Source: Own calculations from Tridevworx, 2014: 107-110 (Tables 13 and 14))

Table 5 shows fluctuation in the number of applications made in the four years, albeit with a rising trend at the end of the period. The important finding is that the proportion of exemptions granted was well above 80 per cent across the three years. The number of appeals constitutes a small proportion of the total number of applications submitted.

The research also found that a significant proportion of companies applying for exemptions had not received information and support to assist them, and that some councils took up to 60 days to process applications. However, these problems aside, the data regarding the success rate of applications supports the conclusion of the earlier research (see above) that many of the criticisms of the bargaining council exemption system are unwarranted. However, this has not reduced resistance to bargaining councils from some employers. Three major bargaining councils have over the past few years been destabilised by employer opposition in one form or another, i.e. the Metal and Engineering Bargaining Council (MEIBC), the Motor Industry Bargaining Council (MIBCO), and the National Bargaining Council for the Clothing

Industry (NBCCI).³⁰ In 2013, the data on applications for exemption at these three councils was as follows:

Table 6. Exemption applications and success rates at three major councils: 2013

	Total applications	Exemptions granted	% successful
MEIBC	1419	1324	93.3%
MIBCO	599	595	99.3
NBCCI	377	354	93.9%

(Source: Tridevworx, 2014: 121)

The success rates for exemption applications at the three councils suggest that much of the criticism of bargaining council exemptions systems is misplaced and is not supported by facts.

3.3. Accommodation of small business

The main reason for opposition to the bargaining council system is that the extension of agreements allegedly stifles the creation and growth of small businesses and is therefore to blame for the persistence of high unemployment. Bargaining councils have adopted two main methods to better ‘accommodate’ the interests of small businesses. The first is with regard to representation in bargaining council negotiations. Research done by Godfrey et al at nine major bargaining councils in 2006 found that at six councils the employer representatives had nominated one or two of their number to specifically represent small business interests on the council.³¹ Interviewees at most of these councils indicated that such representation was generally quite effective, but it was also pointed out that the designated small business representatives were a minority and could always be outvoted. Only one interviewee indicated that the small business representation was not effective. Interviewees were generally pessimistic about the ability of small businesses to organize themselves into an effective force on bargaining councils (Godfrey et al, 2006: 40).

The other method that bargaining councils had used was to introduce so-called blanket exemptions, through which small and/or new businesses are automatically exempted from complying with a bargaining council’s agreement(s) based on their employment size (e.g. five or less employees) and/or period in operation (e.g. one year or less). At least one council had provided a variation on the blanket exemption by providing a system that would see a newly established firm with ten or less employees phasing into full compliance through four stages over three years (Godfrey et al, 2006: 41-42).

Not all small firms are opponents of the bargaining council system. As Godfrey et al note, the average size of firms belonging to party employers’ organizations across the system is only 27 employees (as against an average size for all firms of 18 employees and an average size of non-party firms of 11 employees). This means that the vast majority of members of party employers’ organizations are relatively small. Similarly, Department of Labour data shows that at 11 out of 27 bargaining councils more than 40 per cent of small firms were members of the party employers’ organizations, and at nine councils between 21 per cent and 40 per cent of small firms were members.³² (Godfrey et al, 2006: 31-39)

³⁰ Legal challenges to the extension of agreements have been made against the MEIBC and NBCCI, and there are serious tensions between the parties in MIBCO.

³¹ Only one bargaining council (the MEIBC) had an employers’ organization party that represented small businesses.

³² The measures were based on how bargaining councils defined a small firm. In most cases the definitions encompass firms that would generally be classified as ‘micro’.

Interviews conducted by Godfrey et al with the owners of 25 small firms (less than 20 employees) found that although many had criticisms of bargaining councils, particularly the benefit funds, they were in favour of the extension of agreements as long as there was effective enforcement. Small non-party firms registered with bargaining councils were therefore just as concerned as large party firms that their competitors were covered and complied with agreements (Godfrey et al, 2007: 59-61).

3.4. Vulnerable workers

As noted above, bargaining council agreements generally seek to regulate rather than exclude non-standard employees. The agreement for the Building Industry Bargaining Council (Cape of Good Hope), for example, specifically includes within its ambit “temporary employment services, labour-only contractors, working partners, working directors, principals, contractors and working members of close corporations”. Besides casting the net wide, this provision targets schemes that have been used in the past to evade the council’s agreements. The agreement goes on to duplicate section 200A of the *Labour Relations Act*, introduced by an amendment in 2002, which lists seven rebuttable presumptions that an employment relationship exists, e.g. “the manner in which the person works is subject to the control or direction of another person.” Only one of the presumptions needs to apply to prove that a worker is an ‘employee’, and therefore protected by labour legislation and the bargaining council agreement.

In order to regulate the extensive use of sub-contracting in the industry, often used as a way of evading the bargaining council agreement and thereby lowering labour costs, the agreement provides that no employer may sub-contract any work unless both the sub-contracting party and the sub-contractor are at all times registered with the bargaining council. The agreement holds the sub-contracting party and the sub-contractor jointly and severally liable if the sub-contractor contravenes the agreement (or any other council agreement).

The National Bargaining Council for the Road Freight and Logistics Industry provides similar examples of attempts to regulate non-standard employment. Its main agreement specifically regulates owner-drivers and the employees of owner-drivers, and includes a procedure that must be followed by an employer contemplating sub-contracting that will lead to either a reduction of employment or a lowering of terms and conditions of employment. The employer, furthermore, will be jointly and severally liable with the sub-contractor for any contraventions of the agreement.

Some councils, however, have excluded vulnerable categories of employees. The National Leather Bargaining Council, for example, was being undermined by informalization in the footwear sub-sector as a result of cheap imports. In an effort to stabilize the bargaining council the parties divided employers into three categories - formal, semi-formal and informal – using eight criteria. The effect of the categorization is to exclude informal firms from the agreement, while semi-formal firms are obliged to pay only 75 per cent of the minimum wage rate (and enterprise negotiations can reduce the minimum wage rate to 60 per cent). On the face of it, the council has sacrificed vulnerable workers in order to stabilise itself. The council, however, argues that it was in any case unable to enforce its agreements against informal employers (Godfrey et al, 2007: 29-30).

3.5. Statutory councils

The statutory council model, which is intended to stimulate the establishment of enduring multi-employer bargaining arrangements, has not been a success for various reasons (see Du Toit et al, 2015: 53). Only four statutory councils have been registered in 20 years:

- Statutory Council for the Printing, Newspaper and Packaging Industry of South Africa;
- Amanzi Statutory Council (which covers water boards);
- Statutory Council for the Squid and Related Fisheries of South Africa; and
- Statutory Council for the Fast Food, Restaurant, Catering and Allied Trades.

Only the Squid and Related Fisheries Statutory Council has had a collective agreement extended, namely a provident fund agreement. The remaining statutory councils have produced collective agreements dealing with levies and dispute resolution but these have not been extended.

Furthermore, only one of these councils has upgraded to becoming a fully-fledged bargaining council, namely the Amanzi Statutory Council. However, it covers a relatively small number of employees (a total of 6 529 employees in 2014).

4. Multi-employer bargaining outside the statutory system³³

Almost all multi-employer bargaining in South Africa takes place in the form of bargaining councils. There are, however, two important multi-employer bargaining forums in the mining sector (gold and coal) and the automobile assembly sector that are not registered as bargaining councils. The mining sector bargaining forum has a very long history and was established at the instance of employers. The bargaining forum in the automobile assembly sector is more recent and was established at the instance of a strong trade union that is representative at all eight automobile assembly firms in the country. In neither case is the extension of agreements seen as necessary, which is probably the main reason why the forums have not registered as bargaining councils.

4.1. Gold and coal mining

Centralized bargaining in the mining industry dates back to 1915, when the Chamber of Mines was first mandated by its members to negotiate with trade unions. The centralized bargaining arrangement has since then accommodated considerable change, with the biggest change probably being the participation of the National Union of Mineworkers (NUM) in 1983 representing African workers.

It is important to note, first, that not all gold and coal companies are members of the Chamber and are therefore not covered by the centralised bargaining arrangement, and second, that not all the gold and coal members of the Chamber are covered by the collective bargaining (although most are). Finally, the employers in the platinum and diamond sectors bargain at enterprise level.

A host of unions are active in the mining industry and many have recognition agreements with specific mining firms. However, the Chamber engages in centralised bargaining with only a handful of the unions that are representative.

There are three bargaining units, namely “category three to eight employees”, “miners and artisans”, and “officials”. The first category comprises semi-skilled and skilled workers up to a certain grade and is numerically the largest bargaining unit. The second category comprises mainly (1) workers in certificated blasting and ancillary jobs; and (2) artisan and allied jobs, i.e. blue collar workers above a certain grade. The “officials” category comprises supervisory employees above a certain level and white collar employees.

Over time, shifts have occurred with regard to the levels at which bargaining takes place for the different bargaining units. First, in the late 1990s a process of decentralization of bargaining took place with respect to the “officials” category: bargaining shifted from the industry level to mine level, although the change was only formalised in 1999. Second, at about this time the “miners and artisans” category started to drift the same way with some issues being bargained at mine level, particularly in the coal sector. However, in 2003, a process was commenced to consider some form of integration of the three bargaining units. Just prior to the 2005 annual negotiations, it was agreed that bargaining for all three units (which had previously been in separate forums) would take place in a unified forum (but with gold and coal negotiations being split).

Despite this reversion to a much more centralized bargaining arrangement, there has been pressure for decentralization in one form or another. First, not all issues are dealt with centrally: in 1996 two-tier agreements were concluded with all the unions to regulate what matters were to be negotiated at industry

³³ This section on multi-employer bargaining outside the statutory system draws extensively on Godfrey *et al*, 2007; and, Godfrey *et al*, 2010).

level and what matters were to be negotiated at company level. In terms of these agreements, bargaining over basic wages and conditions of employment would take place only with the Chamber at the central level.³⁴ Bargaining over organizational, operational and workplace issues is at mine or company-level.³⁵ At the same time, however, “framework agreements” are often formulated and agreed to at the central level which set parameters for negotiations at mine or company level.

Furthermore, the centralized bargaining forum has more than once simply provided a space in which individual mining houses reach separate or individual deals with union parties, particularly in respect of wage rates. Accordingly, the sector-wide agreements that are reached frequently reflect different provisions for different companies, particularly in respect of wage rates (i.e. actual basic wage rates are negotiated on a company-by-company basis). When it comes to non-wage issues, however, there is usually more uniformity in outcomes at the central level.

The criticism has been levelled that the above approach to negotiations has resulted in fragmentation and in a complex and protracted process that is often confrontational. These developments were one of the reasons for launching an investigation of future bargaining options (see below). However, according to the Chamber, “the countervailing view is that a ‘one size fits all’ approach is not appropriate in accommodating business circumstances and imperatives that are often vastly different. The flexibility that the system permits is, by that view, an advantageous feature. Certainly, the Chamber system has achieved a remarkable degree of labour peace over a lengthy period.”³⁶

The National Union of Mineworkers, however, were not in accord with the above defence of the existing bargaining arrangement. From the early 1990s, it began raising the issue of a bargaining council for the entire mining sector. In 2003, it tabled the establishment of a bargaining council as a demand in annual negotiations. This led to a “joint investigation” by the union and the Chamber into bargaining options, which was subsequently analysed by two legal experts.³⁷ The latter recommended that there were only two options: either the existing non-statutory arrangement should be retained or that a bargaining council should be established.³⁸

Thereafter, negotiations began about the possible structure of a bargaining council. Very slow progress was made over a number of years. In 2006, the Chamber was tasked with identifying the critical issues around which agreement would need to be reached for the establishment of the council. The Chamber identified, amongst others, the following: the scope of a council; recognition criteria for membership of the council for unions and for employers’ organizations; levels of bargaining and what topics would be negotiated at which level; the definitions of small and medium employers and how their interests would be protected; how contractors will be covered; the extension of council agreements to non-parties; and, the exemption body and the procedure for exemptions from council agreements.

Henceforth, very slow progress was made. In the meantime the Association of Mineworkers and Construction Union (AMCU) emerged in the sector and began to make inroads into NUM membership, particularly in the major platinum mines but also in the gold and coal sectors. The rivalry led to violence and a strike in the platinum sector that culminated in the shooting of striking mine workers at Marikana

³⁴ The agreements allow parties, if special circumstances are present, to agree that negotiations on certain issues take place at mine or company level.

³⁵ The setting up of company and mine level structures for bargaining and consultation on workplace issues at those levels is not a matter that has been regulated at the central forum. Each company has its own agreements with the unions on the type of structures and forums that are established.

³⁶ Godfrey et al, 2007: 66.

³⁷ See Chamber of Mines/National Union of Mineworkers, 2004.

³⁸ This section draws on articles in the Labour Policy Digest (March, 2005; July, 2006; November, 2006; and, March, 2007) as well as the Chamber of Mines website.

in August 2012. This was followed in early 2014 by AMCU leading the biggest strike in South Africa's history in the platinum sector. These developments appear to have put an end to the initiative to establish a bargaining council. In fact, at the time of writing, the Chamber was in the process of trying to force negotiations in the coal mining sector down to the mine-level. This was being opposed by trade unions.³⁹ It is unknown whether the Chamber intends doing the same in the gold mining sector, although this is less likely because the Chamber has much better representation amongst the gold mines.

4.2. Automobile assembly

The starting point for multi-employer bargaining in the automobile assembly sector can be dated back to the formation in 1987 of the National Union of Metal Workers of South Africa (NUMSA) through a series of union mergers. With worker organization consolidated, the new union began a push for a centralized bargaining forum for the industry. At that point, various collective bargaining arrangements existed in the industry. Ford, VW and General Motors participated in a regional industrial council, whereas Toyota, BMW and Nissan negotiated at enterprise level. (Anstey, 2006: 14).

In 1989, NUMSA issued a demand to the Automobile Manufacturers Employers' Organization (AMEO) to form a national centralized bargaining forum for the industry, but it appears that employers were not entirely unified on the issue. A year later, after a lot of tactical manoeuvring, negotiations, protest action and a court case, the National Bargaining Forum (NBF) was established. It has just two parties: NUMSA and AMEO. AMEO represents the eight automobile assembly firms in the country. This means that all the employers in the sector are represented on the NBF and agreements emanating from the NBF will bind the whole sector. NUMSA represents a large majority of the approximately 30,000 employees in the sector (Anstey, 2006: 14).

The NBF had a rocky first few years. Some automobile assemblers were reluctant participants, while NUMSA battled to convince its members at Mercedes Benz, which had the highest wage rates, to abandon plant level bargaining in favour of the negotiations in the NBF. Furthermore, in the first few years the annual negotiations ended in strikes. Despite this instability, the parties began to fashion some sophisticated collective agreements with joint commitments with regard to the long-term growth and viability of the industry; the establishment of an industry training board; multi-skilling, career pathing, "portable" skills development; adult literacy; affirmative action; a retirement scheme; a medical fund; and the elimination of "apartheid" wage discrepancies (Anstey, 2006: 15-16).

In 1995, the NBF reached its first three year agreement. It was designed to put an end to the "apartheid wage gap", i.e. the wide gap between skilled workers (who had mainly been White) and semi- and low-skilled workers (who had mainly been Black). In many respects, it was a ground-breaking agreement. Subsequent agreements reached in the NBF were matched by new initiatives and processes at the plant level to build better relationships and produce better performance at firms.

The NBF currently has a single agreement that focuses on wages and conditions of employment, but includes many other issues. According to NUMSA, the NBF has been used to bring the wages of the lower grades up to "acceptable" levels, although not as high as the union would like. Furthermore, the agreement makes provision for payment for skills acquired (rather than skills used). This is encapsulated in a complex training and wage system in the agreement. What this means is that workers can acquire

³⁹ CoM confirms dispute over move to decentralised coal wage negotiations
(<http://www.miningweekly.com/article/confirm-dispute-over-move-to-decentralised-coal-wage-negotiations-2017-02-01>)

additional skills, move up job grades and be paid at the rate for the higher grade, but without changing their job.

Importantly, the agreement effectively prohibits dual-level bargaining, but does provide for the negotiation of incentive schemes at plant-level, gives guidance as to how such negotiations should take place, and also provides for the negotiation of a range of variations within parameters set by the NBF agreement. This reflects the aim to raise productivity and quality levels to internationally competitive levels.

The NBF is currently relatively stable and continues to produce what are generally seen as cutting-edge collective agreements. However, tensions remain about the level of bargaining. Some employers appear to favour a return to plant-level bargaining, whereas NUMSA has advocated the creation of a mega-bargaining council that would incorporate the metal and engineering bargaining council, the tyre manufacturing bargaining council, the motor sector bargaining council, and the automobile sector (i.e. NBF). Each sector would be accommodated in a chamber within the mega-council. More recently, NUMSA has framed this objective in value chain terms, i.e. they are seeking to establish bargaining structure(s) that will bring together a number of sectors in a value chain. This would mean that the NBF and the automobile components manufacturing sector (currently falling within the motor sector bargaining council) would become a bargaining council, or would become a chamber of a much bigger bargaining council. Automobile assembly employers appear to be ambivalent about the idea while most automobile component manufacturers seem to be strongly opposed to it.

4.3. A new hybrid model emerges: the extension of multi-employer agreements via sectoral determinations

In 1997, a new *Basic Conditions of Employment Act* (BCEA) was introduced as part of the post-apartheid reform of labour legislation. The Act is not directly concerned with collective bargaining: it provides a set of minimum standards (but not a legislated national minimum wage) for all employees as well as enabling the issue of sectoral determinations that prescribe wages and minimum standards for a specified sector. The sectoral determinations are drawn up via an administrative process that involves the Department of Labour and the Employment Conditions Commission, with the Minister of Labour taking the final step of issuing the sectoral determination. The intention is that sectoral determinations will set wages and minimum conditions in sectors where there are low levels of union organization, there is little or no collective bargaining taking place, and there is no bargaining council.

The BCEA interconnects with the *Labour Relations Act* by providing that the agreements produced by statutory councils that are not sufficiently representative may be submitted to the Minister of Labour, who may promulgate the agreement as a sectoral determination.⁴⁰ This effectively extends the agreement to all employers and employees within the registered scope of the statutory council. The determination must include criteria for exemptions that are fair and promote the objects of the *Labour Relations Act*. It must also provide for exemptions to be considered by an independent body appointed by the Minister.

In the period 2003 to 2005 the Minister of Labour introduced an innovation in three sectors that elaborated on this hybrid model. Three multi-employer bargaining forums had been established in the contract cleaning, private security, and civil engineering sectors. In all three cases, trade union representivity was too low to establish a bargaining council or a statutory council, but the relevant employers' organizations

⁴⁰ Statutory councils that are sufficiently representative will use the procedure in the LRA for applying for the extension of their agreements, i.e. the same procedure used by bargaining councils.

and trade unions involved in the forums wanted their agreements to be extended. In all three sectors, there were also sectoral determinations that set wages and minimum standards of employment, which are reviewed every few years. As part of the periodic review of sectoral determinations, the Minister incorporated the collective agreements that were reached in the forums into the revised sectoral determinations in the three sectors.

This step effectively extended agreements reached by unrepresentative and non-statutory multi-employer bargaining forums to entire sectors. In the case of the civil engineering sector, this practice had the effect of encouraging the establishment of a bargaining council, while there are also moves afoot to establish a national bargaining council in the contract cleaning sector.⁴¹

This was an unexpected innovation on the part of the Minister of Labour. However, no changes were made to either the *Labour Relations Act* or the BCEA to provide a legislative underpinning for the arrangement. Such extensions, therefore, take place entirely at the discretion of the Minister and can be discontinued at any point.

⁴¹ There is currently a bargaining council for the contract cleaning sector but its scope is limited to one province.

5. Statutory multi-employer bargaining under pressure: a case study of the National Bargaining Council for the Clothing Industry⁴²

5.1. Background

Collective bargaining in the clothing industry was historically conducted in five regional industrial councils in which regional trade unions and employers' organizations participated. The regional unions were numerically strong but had become bureaucratic and disconnected from members on the shop floor. The sector remained relatively untouched by the "new" union movement that emerged after the 1973 Durban strikes (see above) until well into the 1980s. Thereafter, a series of union mergers began that culminated in the formation of the Southern African Clothing and Textile Workers Union (SACTWU) in 1989. It became the only union in the clothing sector and introduced the much more militant approach of the "new" unions to collective bargaining in the sector. SACTWU immediately set about addressing the historically low wages in the sector and also demanded the formation of a national industrial council, which would mean the amalgamation of the five regional clothing industrial councils, plus a knitting council and two small millinery councils. SACTWU intended to use the national industrial council to extend collective bargaining to cover the whole country and as a vehicle to reduce the regional wage differentials in the sector.

A protracted struggle by SACTWU against employer opposition eventually saw a national bargaining council established and registered for the clothing sector in 2002 (Anstey, 2004). This led to reorganization by employers. Previously, employers had associated in business associations that focused on trade and industrial policy issues, and through employers' organizations that were concerned primarily with collective bargaining. In the former case, there was a national federation of regional business associations and on the collective bargaining side there were regional employers' organizations. With the formation of the national bargaining council in 2002, the National Employer Caucus was formed to represent the regional organizations at the council, and the South African Clothing Employers Federation was formed to represent employers on labour market policy issues as well as trade and industrial policy issues. However, the establishment of the Apparel Manufacturers of South Africa in 2009 brought together all the functions in one body.

The unification of functions was, however, short-lived. Although the Apparel Manufacturers of South Africa still exists, it now focuses on policy issues. With regard to collective bargaining, it has split into five bodies, most of which are organized along regional lines or have regional concentrations of members (although with national aspirations). The legacy of regionalism, therefore, largely continues to define how employers associate.

Since the establishment of the national bargaining council, SACTWU has pushed up minimum wages in the sector (see below), although it has had less success in reducing the regional wage differences in the industry. The custom is to negotiate a single labour cost increase (with the National Employer Caucus), but for the regions to separately agree how this would be apportioned between an increase in minimum wage rates, increases in benefit fund contributions, and so on. The result has been some narrowing of regional wage differentials but less than one would have expected.

⁴² This section on the clothing industry bargaining council draws extensively on LEP/NALEDI, 2010; and, Godfrey et al, 2016.

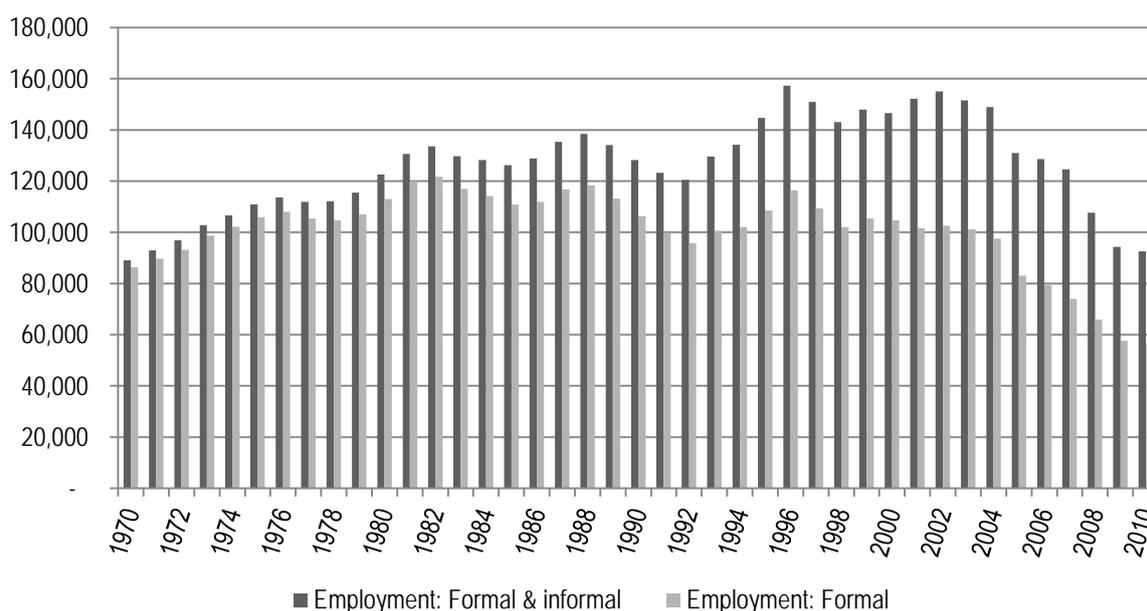
5.2. Declining employment and informalization

The bargaining council has produced a set of collective agreements that covers the clothing sector nationally: one agreement covers specified “metropolitan areas” (mostly the areas covered by the old regional industrial councils); one agreement covers certain non-metropolitan areas;⁴³ and one agreement covers certain “country” areas. The agreements, which set minimum wage levels and other conditions of work as well as provide for a sick benefit fund and a provident fund in certain regions, are extended so that together they cover the entire country.

The establishment of SACTWU and the national bargaining council, and the rise in wages in the clothing sector, ran parallel with changes to trade policy. First, import tariffs on clothing were reduced steeply over a seven year period starting in the mid-1990s, ending at 40 per cent. By the early 2000s, very large quantities of cheap clothing were being imported, mainly from China. The impact of the rise in cheap imported clothing was compounded by illegal imports. South African clothing manufacturers were, therefore, faced with a shrinking share of the local market at the same time that their labour costs were rising rapidly (Hirschsohn et al, 2000: 118-120; Gibbon, 2002: 16).

The result of the intersecting processes outlined above was rapid informalization of employment, i.e. a decline in employment in formal clothing firms and a rise in informal employment, particularly at small cut, make and trim operations.⁴⁴

Graph 1. Formal and informal employment: Wearing apparel: 1970-2010



(Source: Productivity SA/Quantec; reproduced from Godfrey et al, 2016)

⁴³ The agreement for non-metropolitan areas covers the areas that were previously outside the scope of the regional industrial councils (mainly rural areas and small towns).

⁴⁴ We define formal employment as workers who are employed at a firm that is registered with the bargaining council (and the workers are therefore also registered).

Graph 1 (above) displays the steady rise in informal employment from the late 1980s, when SACTWU was established, through to 1996, when tariffs began to decline. Formal employment decreased slowly from 1996 until 2004, after which it dropped sharply, while informal employment increased and then remained high across this period through to 2010.

It is important to emphasize that although firms that are not registered at the bargaining council are classified as “informal”, this does not mean that they are producing clothes for “informal” outlets. In fact, through intermediaries such as design houses, many of these small informal firms are supplying the formal retail sector, even some of the major South African retailers. Informalization was, therefore, a low wage option for the industry in the face of rising bargaining council wages and a shrinking share of the local clothing market.

5.3. Representativity, the extension of agreements and non-compliance

Unlike many bargaining councils, where it is usually the trade union party that has low representativity (see above), in the clothing sector it is employers that are struggling with representativity. The union is comfortably representative but as at 2014 the employer parties employed only 50 per cent of the registered employees in the industry. The employer parties are, therefore, on the threshold for representativeness in the Act and the council’s agreements have continued to be extended.

The extension of agreements is however being undermined by extremely high levels of non-compliance by registered firms (as opposed to the non-registration of firms discussed above, i.e. informalization) – see Table 7 below. Under the previous collective bargaining system (i.e. when there were regional industrial councils), most of the rural areas of the country were regulated by a wage determination (i.e. the predecessor of sectoral determinations – see above). Minimum wages rates set by the wage determination were much lower than the rates being set by collective bargaining in the regional industrial councils. Relocation to rural areas outside the scope of the regional industrial councils was, therefore, an option for firms that were struggling to comply with industrial council wage rates.⁴⁵

This option was closed off by the establishment of the national bargaining council because its agreements are extended to cover the entire country (which led to the sectoral determination that had replaced the wage determination being withdrawn). All clothing manufacturers in the country are therefore covered by collective bargaining, and wage rates in the so-called “non-metropolitan areas” have risen steeply. Consequently, there has been an increase in the number of registered clothing manufacturers in “non-metropolitan areas” not complying with the bargaining council agreement, in particular the prescribed minimum wage rates.⁴⁶

⁴⁵ Godfrey, 2013: 169-173.

⁴⁶ LEP/NALEDI, 2010: 155.

Table 7. National Clothing Industry Bargaining Council: Registration and non-compliance (August 2009)

		Registered employers	Known unregistered employers	Total employers	Non-compliant employers	% non-compliant employers
Western Cape:	Metro	269	22	291	150	51.55
	Non-Metro	14	1	15	5	33.33
	Sub-total	283	23	306	155	50.65
Northern Areas:	Metro	229	15	244	47	19.26
	Non-Metro	118	21	139	68	48.92
	Sub-total	347	36	383	115	30.03
KZN:	Metro	201	163	364	287	78.85
	Non-Metro	156	30	186	99	53.23
	Sub-total	357	193	550	386	70.18
Eastern Cape:	Metro	12	12	24	12	50.00
	Non-Metro	1	3	4	3	75.00
	Sub-total	13	15	28	15	53.57
TOTAL EMPLOYERS		1 000	267	1 267	671	52.96
TOTAL EMPLOYEES		59 609	9 654	69 263	18 248	26.35
September 2004						
Total employers		1 092	321	1 413	1 010	71.48
Total employees		99 373	30 549	129 922	67 110	51.65

Source: Documentation for the Seventh Annual General Meeting of the National Bargaining Council for the Clothing Industry (15 October 2009).

Table 7 displays data on employers and employees in the clothing industry as at August 2009, with comparator total figures for September 2004 at the bottom of the table. The figures in the table are remarkable. Non-compliant employers (including some unregistered non-compliant employers) make up just more than half of all known employers in the industry. It is likely that this figure would be much higher if all unregistered firms were included (i.e. known and unknown). The non-compliant firms employ just over a quarter of all known workers in the industry, which indicates that the non-compliant firms are predominantly small.

The comparison with figures for September 2004 is also noteworthy. First, the comparison shows that compliance has actually improved over the five year period, dropping from 71 per cent of employers being non-compliant to 53 per cent, with an even larger decline for workers employed at these firms. However, the improvement in compliance has to be assessed against a massive shrinking of the industry: the number of known firms dropped by 146 (10.3 per cent) and all known employment dropped by 60,686 (46.7 per cent).

The high level of non-compliance poses two threats to the national bargaining council. First, non-compliance (together with significant non-registration of firms) undermines the main function of a bargaining council, namely to provide a floor of labour costs for all firms in a sector. Once this floor is eroded it places pressure on the ability of compliant firms to remain compliant. Over time, compliant firms will start cutting corners or increasingly outsource operations to non-compliant firms to cut costs. The bargaining council will, therefore, slowly disintegrate. The second threat is that registered non-compliant firms are, almost by definition, not members of the party employers' organizations. As the number of registered non-compliant firms increases, so does the unrepresentativeness of the employers' organizations on the council. This will threaten the ability of the council to get its agreements extended by the Minister. At the moment, this does not appear to be a major concern of the clothing bargaining council but the situation is not healthy.

The solution to the problem is obviously for the employers' organizations that are party to the national bargaining council to recruit more members, in particular more small firms. But there is resistance to increasing the number of small members. It is argued by employers' organizations that the demands by small firms for services from the employers' organization would far outweigh the income from the subscriptions they would pay. Such firms have little or no management infrastructure and expertise to deal with labour relations matters, so they would make demands on employers' organizations, which are not well staffed to deal with a range of very basic matters (in particular, representation at conciliation and arbitration hearings in respect of disputes with individual workers). Furthermore, the employers' organizations believe their focus should be on issues such as trade policy, quotas and customs fraud. These are matters that the majority of their current members are concerned with but do not really interest small firms. It is, therefore, suggested that it would be better for very small firms to form their own association that is geared to deal with the types of problems that they face.

5.4. Responding to non-compliance and informalization

Late in the 2000s the very high level of non-compliance at the national bargaining council persuaded the parties to take extraordinary steps with regard to enforcement. The council appointed a dedicated National Compliance Manager and began to rigorously pursue non-compliant firms: of the 671 non-compliant employers in Table 7 above, compliance orders were issued against 661, and the council proceeded to get arbitration awards against 633 of these firms. The awards would have included orders for repayment of any amounts owing to workers for underpayment of wages, etc. as well as amounts owing to the bargaining council for levies and benefit fund contributions. Most of these awards were then submitted

to the Commission for Conciliation, Mediation and Arbitration (CCMA), which subsequently issued 419 warrants of execution for outstanding monies. The next step was to hand over the warrants to the sheriffs of the court for execution. Execution of these warrants was launched by the national bargaining council in the latter half of 2010 as a “compliance campaign”.

The compliance campaign was heavily resisted when it arrived in Newcastle, a town with a large number of clothing firms run by Taiwanese and Chinese immigrants in the middle of the KwaZulu-Natal province. Although the press reports were often unreliable, it appears that the Newcastle Chinese Chamber of Commerce, which represents many of the Taiwanese and Chinese-owned clothing factories, coordinated a lock-out by about 100 of its members in protest against the bargaining council campaign. It was reported that up to 7,500 employees in Newcastle were locked out and could lose their jobs. The campaign, it was also alleged, would threaten between 20,000 to 25,000 jobs nationally. Provincial and national government ministers rushed in to try to broker a settlement. The clothing industry in Newcastle was in the national spotlight for three or four months while negotiations continued. In 2011 a settlement was reached that would allow for a phasing in of compliance with the bargaining council wage rates over about 18 months.

At the same time, five of the Newcastle clothing manufacturers and a newly-formed employers’ organization (the United Clothing and Textile Association) initiated litigation against the Minister of Labour to challenge the extension of the bargaining council agreement to so-called non-parties. Ultimately, the plaintiffs won the case, although on a technicality, but it was largely a symbolic victory because by the time judgment was given a new agreement had been gazetted and extended (see further below).⁴⁷

The opposition that occurred in Newcastle highlighted the conundrum South Africa was in, with the allegation that improved wages and conditions are coming at the expense of rising unemployment. The issue was sharpened in the case of Newcastle because clothing manufacture is labour intensive and employs mainly African women (in an area where the unemployment rate for African women is extremely high). It came in the context of evidence that South Africa is de-industrializing, particularly at the labour intensive end of the manufacturing sector. Ultimately, the solution of an agreement to phase in compliance with the bargaining council wage rates was insufficient. While it might have looked good on paper, subsequent inspections found that many non-compliant clothing manufactures had not kept to the schedule for phasing in compliance. At present, there are still very high levels of non-compliance in areas like Newcastle.

Another avenue that the bargaining council has pursued to deal with the problem of non-compliance is to issue compliance certificate to firms after annual inspections. The intention has been to incentivize compliance by giving employers with a compliance certificate access to certain benefits or potential benefits. The most important potential benefits that hinge on having a compliance certificate were introduced by the Department of Trade and Industry in terms of the Industrial Policy Action Plan (Phase 2). Phase 1 of the plan had targeted the clothing and textile sector for support. In the second phase, this support was scaled up and broadened, which included the introduction in 2010 of the Clothing and Textile Competitiveness Programme (administered by the Industrial Development Corporation), an illegal import programme, and an innovation and technology programme (DTI, 2010: 35, 65-68). Accessing the substantial grants available in terms of the Production Incentive and Competitiveness Improvement Programme was dependent on a firm having a bargaining council compliance certificate.

⁴⁷ Valuline CC and others v Minister of Labour and others [2013] 6 BLLR 614 (KZP). The judgement was handed down in 2011.

In principle, the linking of compliance to certain services and benefits is a good idea, particularly those which offer the opportunity for firms to become internationally competitive. However, it is a double-edged sword for those firms that are unable to comply because it could effectively condemn them to ongoing non-compliance or certain liquidation. In the context of high unemployment and de-industrialization, labour market and industrial policy should be coordinated to assist all firms to meet bargaining council wage rates. Though this is a difficult balancing act that would require some flexibility, the government, trade unions and manufacturers should be exploring options to facilitate this process. A national bargaining council provides a forum in which this can be done.

5.5. Exemptions

The other standard way of dealing with firms that find it difficult to comply with the standards set in a bargaining council agreement is the exemption system. It is interesting to note that the council's exemption system is being used and most firms that apply receive exemption. For the year ending 15 October 2009, at the time the compliance campaign was gaining momentum, the council received 457 applications for exemption, granted 374 of them (81.8 per cent) and refused 35 (7.7 per cent); the balance was still being processed.⁴⁸ Only one refused application was taken on appeal to the independent exemptions board and it was granted. It, therefore, appears that the exemption system is working efficiently and has legitimacy in the eyes of many employers.

The above raises the obvious question of why more non-compliant firms are not applying for exemptions. In particular, it is puzzling why there were only 73 applications in the KwaZulu-Natal province, which houses a large part of the clothing industry and where non-compliance is particularly high. The logical inference is that some clothing manufacturers simply prefer to risk non-compliance rather than engage with the bargaining council via the exemption system, which would require them to disclose financial information.

5.6. Accommodating small firms

Most of the non-compliant and informal firms are small. The bargaining council has tried to accommodate the sorts of problems that small firms face in the sector, particularly the problems faced by small cut, make and trim firms, which are essentially sub-contractors to manufacturers or to intermediaries (such as design houses). However, there are still some regional differences in this regard. For example, in the Western Cape firms with five or less employees are exempt from all provisions of the agreement. This provision is not replicated in any of the other metropolitan agreements or in the non-metropolitan agreement.

The second provision is also applicable only in the Western Cape, and although it is not specific to small firms, it is mainly used by small firms, where the relationship between employer and employees is generally quite close. Clause 19(b) of the agreement states that if there is consensus at a firm regarding flexible arrangements (e.g. flexibility around working time or weekend work), then the firm does not need to apply for an exemption to depart from the council's agreement. Instead, the firm can simply register the firm-level agreement with the bargaining council and then implement the relevant arrangement. As noted, this is particularly useful for small firms at which it is usually easy to get agreement on such issues.⁴⁹ Importantly, the provision is applicable to members of the Western Cape employers'

⁴⁸ The success rate for exemption applications compares favourably with the rates Godfrey et al (2006: 70-71) found at 17 councils in 2000, 2002 and 2004.

⁴⁹ This does not mean that it is not used by large firms. In fact, one of the reasons behind the introduction of the clause was that the union were reluctant to grant exemptions to large firms on certain issues because this would be seen as setting a

organization only: the aim is therefore to incentivise firms to join the employers' organization, and thereby raise representativity and strengthen the bargaining council, by allowing certain flexible work arrangements to be negotiated at the level of the firm.

The clause, however, seems to have created something of a division between employers who have invested time and effort in improving the relationship at their enterprises and those that have a poor relationship. The former are much more likely to secure agreements in terms of clause 19(b) than those firms where there is a bad relationship between management and shop stewards. The latter employers have exerted pressure to remove the requirement that there needs to be an agreement to obtain flexibility. The trade union is unsympathetic even though it has acknowledged that higher productivity and greater efficiency are essential if the industry is to survive. The trade union has also asserted that high absenteeism must be addressed, but in doing so will not allow management complete freedom to introduce working arrangements that might undermine the standards in the bargaining council agreement.

precedent in the industry. Clause 19(b) was a way of providing firms with flexibility and avoiding the problem of setting precedents.

6. Conclusion: On-going challenges to multi-employer bargaining

The post-1994 ANC led government is strongly committed to multi-employer bargaining at the sectoral level, both as a vehicle for the management of labour relations and as a key part of the system of labour market regulation. The government, however, faces serious structural pressures, primarily in the form of slow economic growth and persistently high unemployment. It must also contend with continual lobbying and litigation from small business groupings and free market adherents. Furthermore, it has to take account of how changes in employment arrangements and the labour market are impacting on trade union organization and representativity. A further factor the government is grappling with is the impact that the national minimum wage, due to be introduced in May 2018, will have on the bargaining council system.

The most visible threat to bargaining councils is the spate of litigation in recent years challenging the extension of bargaining council agreements. One such challenge was to the extension of the main agreement of the National Bargaining Council for the Clothing Industry;⁵⁰ it came from five small clothing firms and a newly-established employers' organization representing mainly non-compliant firms. Although the challenge was successful, the judgment was based on a technicality and therefore did not set a legal precedent that would undermine the extension of agreements. It also had little practical effect because by the time the judgment was delivered, a new collective agreement had been negotiated and extended.

The Metal and Engineering Industry Bargaining Council's (MEIBC), which is the largest multi-employer bargaining structure in the country, has been a site of on-going contestation. Two cases have challenged the extension of the MEIBC's agreements. The plaintiff in both cases was the National Employers' Association of South Africa (NEASA), which represents mainly small businesses across a number of sectors. NEASA is a party to the MEIBC but appears to be opposed in principle to multi-employer bargaining and has arguably joined the MEIBC in order to cause its collapse. The first case was directed against the Minister's decision to extend an agreement on the grounds that certain procedural grounds in section 32 of the *Labour Relations Act* had not been complied with, and that the meeting at which the MEIBC resolved to request the Minister to extend the agreement was not properly constituted.⁵¹ NEASA was unsuccessful but launched a second case against the MEIBC's request to the Minister to extend a subsequent agreement.⁵² The grounds again related to the validity of the meeting at which the decision was taken to request the Minister to extend the agreement. NEASA was again unsuccessful but it is likely that it will continue to try to oppose the extension of the MEIBC's agreements.

The fourth case was the most important.⁵³ The plaintiff, the Free Market Foundation (FMF), claimed on a number of grounds that certain parts of section 32 of the Labour Relations Act be declared unconstitutional. One objective of the FMF was to remove Minister's discretion to extend a bargaining council agreement if the parties are not representative, i.e. they are only 'sufficiently representative'. A related objective was to remove the provision for the automatic extension of bargaining council agreements reached by representative parties and allow the Minister a discretion in this regard (Du Toit, 2014: 2642-2644). The High Court, however, decided against the FMF.⁵⁴

⁵⁰ Valuline CC v Minister of Labour [2013] 6 BLLR 614 (KZP).

⁵¹ NEASA v Minister of Labour [2012] 2 BLLR 198 (LC).

⁵² NEASA v MEIBC [2015] 2 BLLR 157 (LC).

⁵³ Free Market Foundation v Minister of Labour and others [2016] 8 BLLR 805 (HC).

⁵⁴ Free Market Foundation v Minister of Labour and Others (2016) 37 ILJ 1638 (GP).

It does not appear that the litigation is part of a groundswell of opposition by employers to the bargaining council system, which was to some extent the case in the early 1980s. Instead, it seems to be a strategy spearheaded by relatively small but active groups of employers opposed to all forms of labour market regulation. As Table 2 (above) shows, overall employer representativity in the bargaining council system remains relatively healthy: in 2004, party firms employed 63 per cent of all registered workers and in 2014 they employed 62.9 per cent of all registered workers. Most of these employers are relatively small, which contradicts the allegations made that the bargaining council system is stifling small businesses. A large number of employers therefore remain supportive of the bargaining council system, not least because the extension of agreements applies minimum wages and a floor of conditions of employment to their competitors.

The free market adherents that are leading the attack on the extension of bargaining council agreements have provided very little empirical data to support their claims that the bargaining council system has a negative impact on the labour market. This is unfortunate: the high unemployment rate in South Africa demands a vigorous debate about the relationship between labour rights, industrial development and employment, but to date it has been strong on rhetoric and weak on evidence. The research that has been done on the impact of the extension of bargaining council agreements on employment is inconclusive. While some researchers have made claims that the extension of bargaining council agreements has a major negative impact on employment, they do not provide a measure to support their claims. Other researchers, who have factored in the number of workers covered by extended bargaining council agreements, find that there is an extremely small negative impact, i.e. 0.4 per cent.⁵⁵

It is the structural factors, therefore, that pose the most serious threat to multi-employer bargaining at the sector level, as one sees in the case study of the national bargaining council in the clothing industry. Continuing high unemployment, the growing number of small informal firms that do not register with bargaining councils, and declining trade union representativeness in the private sector, are putting constant pressure on the bargaining council system, in particular the extension of bargaining council agreements. These structural factors arguably create the pressures within the system that have emboldened free market adherents and motivated the spate of legal challenges. Furthermore, they point to a wider range of challenges facing industrial relations in South Africa, which have bearing on multi-employer bargaining, including the increase in the number of workers who are not protected by labour legislation or represented by trade unions (i.e. informal workers), the disarray in the labour movement and the representational gap that has grown between trade union leadership and members, the rise in strike violence, and the symbiosis between labour demands and wider anger with inequality and poverty.

Many of these challenges arguably came to a head in 2012 when 34 striking mine workers were shot by police at Marikana. This signalled a watershed in contemporary South African labour relations that compelled a re-evaluation of the current legal framework and traditional industrial relations institutions. This has prompted some scholars to ask whether the framework and institutions are capable of containing the pressures currently being generated in and around the arena of work (Webster, 2015; and Chinguno 2013). What is needed in this context are new forms of organization and innovative institutions that go beyond the traditional. Multi-employer bargaining still has a role to play, but will be subject to immense pressures in the years to come. Thus, multi-employer bargaining will need to adapt if it is to survive.

⁵⁵ See Godfrey et al, 2010: 165-187 for an overview of the research.

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