COSATU FEDUSA NACTU Joint Submission on:

the National Minimum Wage,

Basic Conditions of Employment Amendment

and Labour Relations Amendment Bills

Submitted to:

Portfolio Committee on Labour

National Assembly

Republic of South Africa

1. Introductory Remarks

COSATU, FEDUSA and NACTU would like to thank the Portfolio Committee on Labour for the opportunity to provide their written and oral submissions on the National Minimum Wage, Basic Conditions of Employment and Labour Relations Amendment Bills to Parliament.

COSATU, FEDUSA and NACTU have more than three million members combined and represent the overwhelming majority of organised workers across all sectors of the economy.

We represent organised labour at Nedlac. We have participated extensively for the past three years in negotiations with government, organised business and community on these critical bills at Nedlac. These engagements have been exhaustive and yielded huge victories for workers and their families and the economy at large.

Whilst we have not achieved all that we wanted, we have scored major victories.

Once these bills are passed, the majority of South African workers will be covered by a national minimum wage. Yes R20 per hour is not a living wage. It is a minimum wage.

47% of workers currently earn less than R20 per hour. This alone means that half the workers will directly benefit for the NMW.

Whilst farm, domestic and public works programmes will be pegged at 90%, 75% and 55% of the NMW for the medium term, they will be fast tracked to join the NMW. Again a victory for the most vulnerable workers.

Organised labour has supported the NMW as means to put money in the pockets of the poorest of the working class and to ensure that no worker is left with slave wages. It will help them feed their families and increase their purchasing power and drive local economic demand and thus stimulate the economy.

Organised labour has welcomed the protection of the right to strike in the LRA Amendment Bill. We have successfully defeated any attempt to undermine workers' right to strike.

We welcome the LRA Amendment Bill's provision granting the Minister of Labour the right to extend collective agreements across sectors where parties are sufficiently representative and thus assisting the most vulnerable and unorganised.

These bills represent huge achievements for workers and show the power of unions when united.

Our submission on the NMW Bill and BCEA Amendment Bill however, points out some gaps in the legislation that, if left unaddressed, will undermine the NMW's ability to eradicate poverty and address inequality. We have made proposed amendments to strengthen the legislation and close the gaps.

We note the many false prophets of doom who have falsely claimed that these are setbacks for workers. How can a national minimum wage be a defeat? How can raising the wages of 47% of workers be a betrayal? How can protecting the right to strike be a failure? How can extending collective bargaining agreements be a setback?

Many of these same self appointed critics have themselves accepted offers less than R20 per hour.

We hear that some unions claim they have not been consulted. Negotiations have taken place at Nedlac for three years. These same critics never once applied to join the engagements at Nedlac. So how were they excluded? Self-exclusion by a few cannot be allowed to delay the progress of the majority.

The Department of Labour held workshops in all provinces with employers and workers. The Department extended the deadline for submissions and allowed for three months for submissions, triple the normal timeframe. The Portfolio Committee allowed for three weeks for submissions. Again longer than the normal timeframes.

The struggle for a NMW has been there for decades. The Freedom Charter called for it in 1955. Workers are tired of consulting. We want a NMW now!

2. National Minimum Wage Bill

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1 Introduction

The Congress of South African Trade Unions (COSATU), the Federation of Unions of South Africa (FEDUSA) and the National Council of Trade Unions (NACTU) welcome the opportunity to make a submission to Parliament's Portfolio Committee on Labour on the National Minimum Wage (NMW) Bill [B31 – 2017] and the Basic Conditions of Employment Amendment (BCEA) Bill [B30 – 2017] ("the Bills").

COSATU, FEDUSA and NACTU have about 3 million members and operate across the entire economy, in the mining, agriculture and other primary sectors, in manufacturing and other secondary sectors and in the services, public sector and other tertiary sectors. These federations and their affiliates have a long history of fighting for higher wages for their members and for workers in general.

In countless previous submissions to the government, Parliament, Nedlac and other institutions and bodies, we have pushed for interventions to help deal with South Africa's gross inequality and systemic poverty. For years, we have agitated for a national minimum wage as one such intervention.

In this submission, we do not enter into the debate about whether a NMW should be introduced and what the benefits thereof would be. This debate has been exhausted and government and social partners have agreed to the introduction of a NMW.

The three federations' commitment to the introduction of a NMW is reflected in our signing of the February 2017 'Agreement on the Introduction of a National Minimum Wage' ("the February 2017 Agreement") and our participation in the subsequent process at Nedlac ("the Nedlac process") on the NMW Bill and the BCEA Bill, both in the task team and the Committee of Principals, led by the then-Deputy President.

Similarly, the commitment of Government, Organised Business and Organised Community to the introduction of a NMW is also reflected in their signing of the February 2017 Agreement. All social partners participated in the Nedlac process, which started in January 2015. It saw all constituencies make numerous inputs on the NMW.

It is important to note that in the February 2017 Agreement, the level of the NMW was already agreed by all the constituencies. This level was arrived at after lengthy and in-depth research, including by the panel set up by the then-Deputy President and others. It was also informed by information and guidance from the International Labour Organisation (ILO) using international examples and from other countries themselves. Most significantly, it was agreed by the constituencies.

The R20 per hour is not Labour's desired level and should not be regarded as such. It is a level that is much lower than the level proposed by Labour, and even much lower than Labour's compromise proposal.

We do not comment on the level here because it was agreed prior to the legislative process but it should be noted that any further watering down of the level agreed will lead to major unhappiness and possible action.

Some of the provisions in the NMW Bill will already undermine the agreed NMW level. For instance, a lack of protection for workers on minimum hours opens the gate for the formal level of the NMW to be undermined in practice.

During the Nedlac process and also during the separate process leading up to the signing of the Agreement, the three federations made multiple joint submissions dealing with the need for a NMW but also the architecture thereof. We did extensive work and commissioned research. We worked closely with the Nedlac Community constituency, and shared similar positions on numerous issues. We also consulted the ILO and several national minimum wage bodies from other countries. (We do not share the details contained in our numerous submissions here but can do so on request.)

Our focus in this submission is the legislation that will introduce a NMW in South Africa, including the architecture of the NMW, the body tasked with administering and monitoring it and other aspects thereof.

In addition to this written submission, the three federations would also like to make an oral presentation to the Committee on these Bills.

2 Background

We believe that the Bills need to be measured against:

- The February 2017 Agreement;
- The principle areas of agreement and dispute registered by the constituencies during the Nedlac process and in bilaterals with the then-Deputy President;
- The in-principle agreements reached in the Committee of Principals meeting of 12 September 2017; and
- The Nedlac Report of the National Minimum Wage Bill And Basic Conditions Of Employment Amendment Bill Task Team.

The importance of ensuring that the February 2017 Agreement is captured in the Bills lies partly in the fact that the agreement itself was a significant compromise by Organised Labour. The Bills cannot chip away at key elements of the agreement, which constitute critical aspects of the package for Organised Labour. Major issues (or aspects of these issues), such as protecting vulnerable workers through Sectoral Determinations, annual adjustments, the medium-term target, wage inequality and others, have not been incorporated, either at all, or adequately.

3 Unresolved issues

During the Nedlac process, we had detailed discussions about the Bills and their clauses but we were under time pressure, taking into account the agreement that the NMW would be introduced by 1 May 2018, at the latest.

The agreements reached during the Nedlac process are captured in a Nedlac report but, as a result of time pressure, some areas of concern in the Bills remain unresolved. In the Nedlac report it is explicitly stated that Constituencies may continue to advocate their views and raise their concerns in the public consultation, Parliamentary and other processes.

This part of the submission focuses on those unresolved areas. We arrange this part of the submission as follows:

- Section 4 deals with the unresolved areas in the NMW Bill; and
- Section 5 deals with the unresolved areas in the BCEA Bill.

In both sections, we highlight the most fundamental issues first.

If these unresolved issues are not addressed, it will undermine the objectives behind the introduction of a NMW and the agreed NMW level and structure.

4 National Minimum Wage Bill, 2017

With regard to the NMW Bill, we have the following comments and propose the following amendments.

4.1 Fundamental issues

4.1.1 Re Section 1, 'Definitions'

During the Nedlac process, an agreement was reached on the definition of 'worker'. This agreement is captured in the Nedlac report as follows

> "The NMW will apply to workers and employees as defined. This will extend the application of the NMW beyond the normal scope of employment to protect vulnerable workers, while not compromising the protection afforded to employees in other legislation. It was agreed that the definition of workers used in the NMW Bill only applies to the NMW."

In the final version of the NMW Bill, approved at Nedlac by the social partners, the definition is captured as follows

> "**'worker'** means any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind."

Yet, the version of the NMW Bill published by Parliament on its website ("the NMW Bill") contains the following narrower definition of 'worker':

> "**'worker'** means an employee as defined in section 1 of the Basic Conditions of Employment Act".

This deviation from the agreement during the Nedlac process was not explained or motivated. (The change in the definition was already present in the version of the NMW Bill published in the 17 November 2017 Government Gazette by the Minister of Labour.)

During the Nedlac process, Organised Labour motivated in detail why the definition of 'worker' should be wide and why both workers and employees should be included, as proposed by Government in the negotiations. This motivation was accepted by Government, the Community constituency and, in the end, Organised Business, who withdrew its initial opposition to this provision. By including this narrower definition in the Bill, an enormous loophole has been created for 'independent contractors' to be excluded and for unscrupulous employers to designate workers as 'independent contractors' to circumvent the NMW.

We understand that the Department of Labour has now admitted that the inclusion of this narrower definition was a mistake.

In a media release on 31 January 2018, the Department stated

> "The Department of Labour wishes to reiterate that it stands by the version of the final Bill as agreed by National Economic and Labour Council (NEDLAC) constituencies in relation to the definition of "worker" in the National Minimum Wage (NMW) Bill.
>
> The final draft of the Bill agreed to by the NEDLAC constituencies read as follows: "Worker means any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind."
>
> …
>
> The Department therefore regrets the change of wording in the definition published in the November version of the Bill. The change occurred during the certification process between the Office of the Chief State Law Adviser and the Department's drafters. It was an oversight by the Department and will be corrected. The Department stands by the version of the Bill agreed to in NEDLAC."

The definition in the NMW Bill should reflect the agreement reached at Nedlac.

4.1.2 Re Section 11, 'Functions of Commission'

First, subsection 11(d) should be amended with the deletion of the final part ("within three years") and the addition of the following at the end of the subsection:

> "within one year which will stipulate the level which the national minimum wage must achieve within three to five years of its introduction, . The medium term target should take into account appropriate benchmarks and relevant International Labour Organisation instruments"

This is a reference to paragraph 3 of the February 2017 Agreement, which states

> "The NMW Commission to be established will, as part of its mandate, establish a medium term aspirational target for the NMW and take into account appropriate benchmarks and International Labour Organization (ILO) guidelines."

The NMW Bill stipulates a medium-term target must be set within three years. This is too long, as it could be six years (or 2024) before the medium-term target kicks in (if the medium-term target will only be reached three years after the announcement thereof). For the NMW to make a difference to inequality, poverty and the working poor, a medium-term target needs to be set sooner.

In addition, the February 2017 agreement stipulates that the medium term target will be guided by the ILO guidelines and other benchmarks.

Second, the NMW Bill needs to be improved with the addition of a subsection in this section, probably as subsection 11(f), which gives the function of overseeing the function of the Commission Secretariat, provided for in Section 13, to the Commission, including to do research and administration and to oversee the implementation of the NMW.

Third, section 11 should further be amended to assign functions to the NMW Commission dealing with its oversight of the Sectoral Determinations. We discuss this in paragraph 5.1.3 below.

4.1.3 Re Section 7, 'Conduct of annual review'

First, in subsection 7(a), an additional subsection should be added, possibly as subsection 7(a)(iv): "progressive improvement in the real value of the national minimum wage".

In paragraph 4 of the February 2017 Agreement, it states:

> "It is specifically agreed that the adjustment should not lead to the erosion of the value of the NMW."

The NMW Commission should be tasked to promote a progressive improvement in the real value in the NMW on an annual basis to deal much more decisively with

inequality and poverty. The value of the NMW should not only be maintained but there should be a real increase following inflation to ensure the value of the NMW is not eroded over time. (The only current reference to this is in Section 2, 'Purpose of Act' and in Section 7(b)(i) but these are not sufficient, could see the value of the NMW stagnating and the NMW not dealing with inequality and poverty.)

Second, in subsection 7(b), two additional subsections should be added, possibly as subsection 7(b)(ii) and (iii):

- "minimum living levels which quantify the basic needs of workers and their families"; and
- "the health and safety and welfare of workers".

The Commission should be tasked to consider the minimum living levels of workers and their families including inflation for low-paid workers and their families, not average inflation, when reviewing the NMW. Likewise, the health and safety and welfare of workers need to be considered.

4.1.4 Re Section 15, 'Exemptions'

First, delete, from subsection 15(1), the following:

> "or an employers' organization registered in terms of section 96 of the Labour Relations Act, or any other law, acting on behalf of its members"

Labour does not support the opening up of exemptions to mass groups of employers (or employers' organizations as described in the NMW Bill), believing that this will undermine the facility of exemptions and the NMW as a whole and are, in fact, disguised exclusions from the NMW.

Instead, Labour proposes the creation of a provision in the NMW Bill to allow for low-wage bargaining councils to apply for a phase-in to the NMW level ("phase-in provision"). (The inclusion of such a clause may mean that the heading of Section 15 would need to be amended to refer to 'Phase-ins' as well.)

This phase-in provision should allow low-wage sectors that may have difficulties to immediately make the leap to the NMW to phase-in to it. However, it needs to be controlled and regulated, cannot be open-ended, and cannot happen after the introduction of the NMW.

We propose that only bargaining councils in low-wage sectors should be allowed to apply for this phase-in provision and then it should only be for those wage categories in collective bargaining agreements below the NMW level. Using bargaining councils as the vehicle will help to provide safeguards against abuse (see below) and will see workers, through their trade unions, being part of any process to apply for a phase-in.

Any application for a phase-in should be to Nedlac before the introduction of the NMW for the social partners to reach agreement (or alternatively, if this is legally not possible, to the Minister of Labour).

The phase-in provision should stipulate the following:

- Only a bargaining council with agreed wages below the NMW level on 1 May 2018 could apply and then only for those wage categories in its collective bargaining agreements below the NMW level on 1 May 2018.

- Any application for phase-in would need to be made before the NMW is introduced as all phase-ins would take effect at the commencement of the NMW. (A phase-in cannot start after the commencement of the NMW.) This will prevent wages being varied downward after the introduction of the NMW.

- A bargaining council would need to indicate what the period for phase-in to the NMW would be, i.e. when the NMW level will be reached. It cannot be unreasonably long.

- Any application would need to be supported by the employer association and trade union parties to a bargaining council.

- Only companies that are registered with the bargaining council and compliant with its agreements would be allowed to phase-in to the NMW.

Such a phase-in facility would also promote strengthening of bargaining council collective bargaining processes, procedures, rights and enforcement.

The above is not a new proposal. During the Nedlac negotiations on the NMW, agreement was reached by May 2015 amongst the social partners in the Wage Inequality Technical Task Team:

> "That NMW legislation will be law of general application, applicable to all employees in the Republic of South Africa, both in the public and private sector, unless provided for otherwise by an exclusion, phase-in or phase-out in an upfront agreement."

At a Nedlac task team meeting on 13 March 2018 to consider the NMW Exemption Regulations, Organised Business supported the introduction of a phase-in provision in the form set out above.

Second, we propose a further amendment to this section: a review of the exemption system. (While the Bill, in section 7, 'Conduct of annual review', provides for a review of the NMW system, there is no provision dealing with a specific review of the exemption system, which we believe is a major oversight.)

We motivate this proposed amendment as follows: the exemption system that will be introduced is unique and innovative. An exemption system, by its nature, cannot be too lenient or it will see many companies that are not in distress being exempted

from paying the NMW. We therefore need to tread carefully and ensure the system achieves what was intended.

We propose that the exemption system be reviewed every twelve months by the NMW Commission and that would include the exemption regulations and the decision process whether to grant an exemption or not. It should also include a detailed review of companies who have received exemptions to ensure that they were deserving and to ensure they were not exempted because they changed their business structures and processes to avoid paying the NMW – much like with tax avoidance.

The results of this may be amendments to the exemption regulations, including the decision process to grant an exemption, or possibly even the Act itself. Such amendments could close unanticipated gaps in the Act or regulations.

4.1.5 Re Section 17, 'Short title and commencement'

Either in Section 17 or as a new Section 18, certain transitional provisions or arrangements need to be included. These should include the following

"The Commission must:

1. investigate the feasibility of increasing the minimum daily wage payment in terms of section 9A of the Basic Conditions of Employment Act from four to five hours;
2. investigate the feasibility of introducing a premium payment for workers working for less than 8 hours on a particular day"

During the Nedlac process, captured in the Nedlac report, agreement was reached on point 1 above. We suggest capturing this in the legislation to give more credence to it and ensure its implementation. The Nedlac report states the following

> "Four (4) hours has been agreed as the guaranteed minimum daily wage payment even if the hours of work are less than this. The NMW Commission will investigate the feasibility and impact of increasing this to five hours. The investigation is to be done within two years of implementation of the NMW."

On point 2 above, no agreement was reached at Nedlac. However, Labour has argued that a premium payment should be introduced to ensure employers do not cut workers' hours of work. Such an addition is supported by provisions in a number of Sectoral Determinations.

4.1.6 Re Schedule 1, 'National Minimum Wage'

During the Nedlac process, captured in the Nedlac report, the social partners agreed the following with regard to farm and domestic workers' and the NMW:

> "Farm (including forestry) and Domestic Workers will be brought to 100% of the NMW in 2 years, unless the evidence shows a different timeframe."

We propose this be captured in the NMW as a subsection in this Schedule, probably subsection 4. This should be done using the following wording:

> "The Commission will propose a schedule of increases for items 2(a) and 2(b) of Schedule 1 to phase farm workers and domestic workers into the hourly rate for the National Minimum Wage by May 2020. Any proposal for a longer phase in period for these sectors will have to be based on compelling evidence as to why this is necessary."

4.2 Other important issues

4.2.1 Re Section 5, 'Calculation of wage'

First, according to subsection 5(1)(b), 'any payment in kind including board or accommodation' is excluded from the calculation of the NMW.

However, certain Sectoral Determinations allow for a part of the wage to be paid in kind, circumscribed by strict conditions. While this is not ideal, the historical reality needs to be faced. Many domestic and farm workers receive payment in kind.

Also, the exclusion of deductions for food and accommodation may conflict with the provisions in certain Sectoral Determinations. By excluding all payment in kind, it could lead to problems, for instance exclusion from previous benefits, or separate charging for food or accommodation by employers to claw back the improvements resulting from the NMW.

This section needs to be amended to cater for such exceptions with the insertion of the following at the end of subsection: "with the exception of the deductions allowed in terms of the domestic, farm worker and forestry sectoral determinations".

This addition will also limit abuse by limiting the value that can be paid in kind, as stipulated in those Sectoral Determinations.

Second, we propose a new subsection, possible numbered as 5(1)(d) that will explicitly make it clear that employer contributions to UIF, medical aid schemes or retirement funds are excluded from the calculation of the NMW.

While it is agreed that employer contributions to these benefits and statutory contributions cannot be included in the calculation of the NMW, including it here will mean it is unambiguous and will act as a reference for workers.

Third, we propose the insertion of a new subsection in section 5, possibly as subsection 5(5):

> "Deductions which are allowed in terms of a law, collective agreement, court order or arbitration award, may not comprise in total more than 25% of the wage. No deductions may be introduced or made with the intention to avoid paying the National Minimum Wage."

The intention is to ensure that no worker, despite any deductions, will receive less than 75% of the NMW. It will also act as a disincentive to those employers who may want to compel workers to be part of a retirement fund or medical aid, which could consume a large portion of the NMW.

4.2.2 Re Section 8, 'Establishment of Commission'

Section 8 establishes the NMW Commission but must be strengthened by the addition of the following at the end of the subsection "and takes over the functions of the Employment Conditions Commission (ECC)".

While there is an agreement that the EEC will be replaced by the NMW Commission, the insertion of these words will make it explicit that the NMW Commission will take over the work of the EEC including the function of dealing with Sectoral Determinations and with wage inequality.

4.2.3 Re Section 16, 'Regulations'

Labour proposes the addition of a further subsection in subsection 16(1)(a): "requirements for employers to submit financial statements in support of their application".

This cannot be left to the Minister to decide whether to include this requirement. It needs to be stipulated in the legislation as a requirement for which regulations must be made.

4.2.4 Re Schedule 2, 'Learnership Allowances"

We propose the inclusion of the following, in the definition of 'learner' in section 1 of Schedule 2, possibly as subsection 1(c)

> "who was not in the employment of the employer party to the learnership agreement when the agreement was concluded"

Sectoral Determination 5 applies only to learners, according to section 2(1)(a)(ii), who were not previously employed. Employed learners receive the wage they were on before being placed on a learnership. This needs to be stipulated in the legislation to ensure employers do not abuse this section of the law to pay employed learners less.

5 Basic Conditions of Employment Amendment Bill, 2017

With regard to the BCEA Bill, we have the following comments and propose the following amendments.

5.1 Fundamental issues

5.1.1 Re Chapter 8: Sectoral Determinations and Chapter 9: Employment Conditions Commission

We believe it is a mistake to repeal the entire chapter 8 and chapter 9. Aspects thereof will need to be retained and amended to give powers to the NMW Commission to amend Sectoral Determinations. We deal with this in paragraph 5.1.3 below.

5.1.2 Re Section 76A, 'Fine for not complying with the national minimum wage'

First, the penalty provisions introduced with regard to the NMW in this section is not sufficient to help promote compliance with the NMW or to disincentivise cheating.

During the Nedlac process, as reflected in the Nedlac report, it was agreed that additional measures are required to deal with the enforcement of the NMW. The report states as follows, and already agrees on one such measure:

> "Additional mechanisms are required to ensure enforcement of the NMW. Government's tender process will be amended to ensure that compliance with the NMW is a condition for applying companies to qualify."

Labour believes several other mechanisms are necessary to ensure compliance. We therefore propose the insertion of several new subsections in section 76A. These are:

> "(c) A schedule of escalating fines will be published in regulations which will apply to an employer who fails to pay the National Minimum Wage more than once
>
> (d) In addition to the fines in (c) above, it will be a criminal offence for an employer to contravene this section four or more times within a specified time period. A schedule of penalties for such offences and the specific time period will be published in terms of Section 93 of this Act
>
> (e) An employer who fails to pay the National Minimum Wage on more than one occasion will not be eligible to apply for state contracts or incentives, and it will be a condition of all state incentives and contracts that the state will be entitled to cancel such arrangements in the event of such violations

(f) Only employers that comply with the National Minimum Wage will be eligible to

(i) supply government, government institutions or state-owned companies with goods or services and

(ii) receive incentives, loans and other support measures from government or development finance institutions

(g) A register of repeat offenders will be published."

Second, this section also needs to cover companies that obtained an exemption (or an exemption notice) in terms of the exemption regulations by providing false or incorrect information.

Such companies cannot only be penalised by the cancellation of their exemption notice. They need to pay a fine but, importantly, also refund their workers for the underpayment that took place during the period for which the company had the exemption notice.

Third, the legislation should include a formal review of the system of enforcement to be undertaken by the NMW Commission after the first year.

5.1.3 Re Transitional provisions and sectoral determinations

First, we propose an additional transitional provision to deal with the relationship with Sectoral Determinations.

> "The minimum wages and conditions in a sectoral determination and the remuneration and associated benefits based on those wages will be reviewed annually by the National Minimum Wage Commission, which will recommend to the Minister the alteration, deletion, or inclusion of conditions of work and an increase in respect of minimum wages"

This will result in the NMW Commission taking over the duties of the ECC. Without this arrangement, workers covered by sectoral determinations currently will suffer from a vacuum left by the repeal of the ECC and the sections of the BCEA dealing with Sectoral Determinations. It means those workers will not be protected adequately and their conditions and wages not improved, except for the equivalent NMW increase provided for in the BCEA Bill, in transitional provision section 3. This is a blunt instrument, which will not capture the nuance, and detailed adjustments required to the various Sectoral Determinations.

The Bill gives no role to the NMW Commission in reviewing or adjusting Sectoral Determinations. But Sectoral Determinations need to be dynamically adjusted and the NMW Commission could holistically look at a strategy to improve the conditions of vulnerable workers using both the NMW and Sectoral Determinations. The NMW Commission must also be given the explicit mandate to protect and adjust all non-wage conditions in the Sectoral Determinations, including after the three-year transitional phase, if bargaining councils have not been set up in this period.

Second, we propose a further transitional provision to give effect to an agreement reached during the Nedlac process and captured in the Nedlac report:

> "During this three-year period, bargaining councils will be established to protect vulnerable workers in [Sectoral Determination] sectors."

We propose the insertion of the following additional transitional provision:

> "The Department of Labour will implement a three-year programme to establish bargaining councils in all sectors currently covered by Sectoral Determinations. Collective agreements regulating minimum wages and conditions of employment agreed by the Bargaining Councils will supersede the Sectoral Determinations. The National Minimum Wage Commission will investigate those sectors in which Bargaining Councils are not established within the three year period and will make a recommendation to the Minister whether the Sectoral Determinations should be extended for a further three-year period."

These transitional mechanisms are necessary to ensure vulnerable workers continue to be protected. During the Nedlac process, it was agreed that there needs to be a provision that ensures vulnerable workers continue to be protected if bargaining councils have not been set up in those sectors.

In the Bills, there are no provisions which require the setting up of bargaining councils in those sectors, nor a provision protecting vulnerable workers after the three-year period if councils are not set up. This implies Sectoral Determinations will fall away, even if councils are not set up. Labour had strongly objected to this in the negotiations.

5.2 Other important issues

5.2.1 Re Section 9A, 'Daily wage payment'

In paragraph 4.1.5 above in the section on the proposed amendments to the National Minimum Wage Bill, we address the matter of increasing the minimum daily wage payment from four to five hours and the agreement on this reached during the Nedlac process.

To ensure there is reference to this in the BCEA Bill, we propose the insertion of a new subsection 9A (3), as follows:

> "The minimum daily payment for hours worked will be subject to the investigation to be conducted by the National Minimum Wage Commission, as set out in Section 17 of the National Minimum Wage Act."

5.2.2 Re Section 68, 'Securing an undertaking'

This section and other sections of the BCEA Bill give additional responsibilities to the CCMA, which will require additional resources and capacity to perform these well.

The memorandum of agreement accompanying the Bill needs to specify a commitment to release the necessary resources in this regard.

5.2.3 Re Section 69, 'Compliance order'

The draft BCEA Bill introduces a new subsection 69(6) on disputes referred to the CCMA.

During the Nedlac process, specifically in the Committee of Principals, Labour indicated that it is concerned with abuses by some employers who use reviews as a way of 'appealing' decisions of the CCMA, and drawing out matters in a way that was not intended by the legislation. This needs to be addressed, by pursuing one of the following options:

- Amending the LRA to exclude appeal or review in respect of arbitration awards that deal with non-compliance regarding the NMW. This means the CCMA arbitration is final and binding. This will also require an amendment to section 77 of the BCEA to exclude disputes about payment of the NMW from the jurisdiction of the Labour Court

- In the BCEA, review as an option could be ruled out with regard to CCMA arbitration awards about non-compliance with the NMW and provide for an appeal to the Labour Court (which would also require an amendment to the LRA).

6 Conclusion

The introduction of a NMW in South Africa is a major policy advancement that can help to address poverty and inequality, two of the three major crises facing the country.

It can only do so if the legislation is sound and comprehensive.

Labour believes that the proposals contained in this submission will help to strengthen the legislation significantly and address the gaps that still exist within it.

We call on the Portfolio Committee to close these gaps and to do what is necessary to strengthen the legislation, even with the tight deadlines it is working under. If the legislation is rushed through with the defects we have identified, the impact of the NMW will be diluted significantly.

3. Labour Relations Amendment Bill, 2017

1. Introduction

COSATU, FEDUSA and NACTU participated for two and a half years in detailed negations at Nedlac on the Labour Relations Amendment Bill.

As organised labour we are proud that we defeated attempts by business to undermine workers' hard won constitutional right to strike.

We are also proud of the major victories that we have won as organised labour with the bill's provision for the Minister of Labour to extend collective bargaining agreements.

In short the LRA Amendment Bill represents the power or a united organised labour and a victory in defense of workers' rights to strike and collective bargaining.

2. Extending Collective Bargaining

The bill enables the Minister to extend collective bargaining agreements where it is deemed that unions and/ or employers are sufficiently representative of their sectors.

It further states that collective bargaining covers not just salaries but the entire conditions of service of workers e.g. pensions, medical aid, bonuses, leave etc.

These are huge victories for organised labour. Unions across economic sectors struggle to organise workers especially as increasing levels of workers are being outsourced to labour brokers. As casual labour rises, it becomes more difficult to reach majority thresholds. Casual work is precarious and casual workers who join unions are routinely dismissed by employers. This extension of collective agreements to sectors where parties are sufficiently representative is a huge victory for the extension of collective bargaining.

Organised labour strongly supports these progressive provisions.

3. Picketing Rules

The bill provides for the CCMA to provide picketing rules in the absence of picketing rules that have been agreed to by employees and employers. These would be based upon a code of good practise negotiated with unions and employers.

This would protect workers in precarious places of work and where unions are weak or not present or employers are abusive and attempt to intimidate and undermine workers' rights to picket.

Organised labour welcomes this as a further protection of workers' rights.

However we want to warn employers that the absence of picketing rules cannot be used to delay or interdict pickets and strikes. Unions will not allow that to happen.

4. Essential Services

Organised labour notes that there are no major changes to the conditions and rules applying to essential services and that the provisions in the bill are largely matters of administrative and procedural clarification for existing policies and practises.

Organised labour is satisfied that the labour rights, including the right to strike of essential service workers are protected within their minimum service level agreements as negotiated and approved by the Essential Services Commission.

5. Ballots

A great deal of hysterical commentary has been unleashed in the media about the balloting provisions in the bill by persons who have not been part of the intensive negotiations and have simply not bothered to read the various drafts of the bill.

The 1995 Labour Relations Act requires any union or employer's organisation seeking registration by the Department of Labour to have a provision in their constitution requiring the balloting of their members (employees and employers as relevant) to decide upon embarking on a strike or a lock out. In other words unions and employers' organisations have been required for the past 23 years to have the mandatory requirement to ballot their members when they want to strike or lockout.

The sole change to the balloting provision in this bill is to insert the word secret before ballot. The majority of unions, political parties and other organisations elect their leadership through secret ballots. South Africans vote in elections through secret ballot. The National Assembly elects and unelects the President through secret ballots. This insertion is a simply clarification as to what a ballot constitutes. It is in line with common law, practise and the Constitution.

The majority of unions elect their leaders through secret ballots and vote on strikes through secret ballots. Union belong to their members. They exist to serve workers. So why is it a problem to say workers must vote on big matters such as embarking upon a strike? Since when have we been opposed to workers' control and democracy?

Some of the chattering classes have made false claims that the bill states that employers must be present during secret balloting. This is simply false. There is no such provision. The 1995 Act requires employers to avail their premises e.g. workers' place of work when workers want to hold union meetings etc. including when they want to ballot etc.

A previous draft of the bill required workers to ballot on offers made by employers. This was rejected by organised labour as it could disrupt workers on strike and that it is sufficient for unions to simply consult their members on offers as has been the practise.

Organised labour is comfortable that it has protected workers' hard won constitutional right to strike. However we want to warn employers not to attempt to interdict and delay strikes over matters of secret ballots. They are not the IEC.

Lastly we are satisfied with the bill's transitional provisions providing processes and timeframes for the Department and unions whose constitutions do not include balloting provisions to be amended in a reasonable time frame at their next congresses. This has been the process for several years and is acceptable.

6. Advisory Arbitration

The bill allows space for the CCMA to provide advisory arbitration in the event of negotiations collapsing during a strike, the public interest being at serious risk or constitutional rights threatened.

Organised labour is comfortable with this. The criterion when the CCMA can come in is sufficiently clear. It does not affect workers' rights to continue striking during the advisory arbitration. The CCMA is workers' preferred facilitator as it is free and accessible and neutral.

Organised labour is also comfortable that advisory arbitration awards are not binding and that workers can reject them or renegotiate the settlements if needs be.

The provision to consult members on the settlement offers are in line with long standing democratic union practise.

7. Conclusion

COSATU, FEDUSA and NACTU accept the Labour Relations Amendment Bill. It has not undermined a single worker's right. It has not touched upon workers' constitutional right to strike.

It provides huge victories for unions, organised and unorganised workers by allowing the Minister to extend collective bargaining agreements where parties are sufficiently representative.