



Ms MP Themba, MP
Chairperson of the Select Committee on Labour and Public Enterprises

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Dear Honourable Themba

RE: RETAIL ASSOCIATION SUBMISSION ON LABOUR RELATIONS AMENDMENT BILL (B16-2012) AND BASIC CONDITIONS OF EMPLOYMENT AMENDMENT BILL (B15-2012)

1. Introduction

This submission is made by the Retail Association in response to the invitation for comment to the Select Committee on Labour and Public Enterprises.

This submission identifies core issues of importance to retailers on amendments that will fundamentally impact on retail operations, operating costs and employment and job security in the sector:

- provisions that impose equal pay (well above the sectoral minimums) across different types of employee
- provisions that provide for minimum increases being imposed on actual rates of pay rather than on sectoral minimums, and
- provisions that are likely to destabilise the existing collective bargaining environment.

The Retail Association members employ in excess of 240 000 employees within the wholesale and retail trade sector which accounts for approximately 3.1 million jobs and 22.8% of South Africa's employment. Members of the Retail Association consist of a number of large national retailers, specialist retailers and merchandisers.

Within our membership, the breakdown of employment types¹ is as follows:

242 176 employees, of which 99 291 employees are directly employed on a part time basis

8 215 labour broker workers

250 391 total number of employees working directly or through labour brokers within Retail Association

Our members are also contractually linked to many independent franchise operations that operate as small businesses within the sector. The Retail Association is a business association that deals with matters of broad socio-economic interest to retailers and merchandisers and is a member of Business Unity South Africa (BUSA).

2. General Response

The Retail Association welcomes the opportunity to comment on proposals to the Labour Relations Amendment Bill and Basic Conditions of Employment Amendment Bill.

We support the key policy objectives of the Bills of creating and retaining jobs in the labour market within the context of addressing poverty and income inequality through job creation, particularly with the youth. We further support the objective to promote decent and productive work, which includes the promotion of sustainable enterprises. We further acknowledge the policy imperatives to address abusive practices that affect employees in non-standard employment and that exclude these employees from enjoying the full protection of existing labour laws.

It is with great concern that these two Bills were tabled in Parliament with such high levels of disagreement by social partners following the NEDLAC negotiations. The success of the current labour market framework was built on buy-in

¹ A breakdown of the terminology and categories of work are set out below

Full time employees	Directly employed by the retailer on 40 – 45 hour work week as per the sectoral determination	• Monday – Friday and half day Saturday
Part time employees Flexitime / Variable hour	Directly employed by the retailer on a permanent and indefinite basis, on less than 40 - 45 hour work week as per the sectoral determination	• Flexible staffing scheduled for peak daily, weekly, monthly and holiday periods
Limited period contract employees	Directly employed by the retailer for a limited duration as per the sectoral determination	• Short term contracts for matters such as maternity, illness relief, trial projects or store openings
Casual employees	Employees who work less than 24 hours a month (in terms of the BCEA)	• Very limited, sometimes for top up trolley collection or stock take
Labour broker workers	Employed by the TES and deployed to the retailer	• Mainly in distribution centres or for seasonal holiday periods

by the tripartite partners and fundamental principles of basic rights, with collective bargaining providing the opportunity for interests to be addressed at higher levels. The shifts proposed in these Bills, however, despite the laudable policy objectives, lack policy coherence, and indirectly disincentivize employment, union organisation and collective bargaining.

The Retail Association, however, has grave concerns with a number of legislative choices that have been made in relation to some of the proposed amendments which will result in:

- result in a significant increase in the cost of employment
- require considerable reorganisation of work
- create greater uncertainty and instability
- trigger workplace conflict,
- result in increased complexity, administrative burden and legal processes.

We have no doubt that despite the policy objectives, certain amendments will have the unintended consequence of eroding current and prospective employment and economic growth within the retail sector – the economy's biggest employment sector and a significant contributor to GDP. In this regard, we believe much greater attention needs to be given to the follow up Impact Assessment conducted in 2012 by SBP and Professor Rankin on behalf of BUSA. This study assessed the impact new provisions that were not in place when the 2010 RIA was conducted by Professors Benjamin and Bhorat and SBP. It indicates substantial job loss and contraction of employment by approximately 400 000 employees.

The sector is known for the prevalence of small businesses, as a portal to employment for first time job seekers and youth, and for facilitating access to market for local manufacturers, both big and small. The retail sector also provides a critical bridging opportunity between informal into formal employment and business – all of which stands to be compromised if the proposed amendments are enacted in their current form.

In general, the proposals in the Labour Relation Amendment Bill, to require equal work for equal pay for each form of non-standard or atypical employment relationship, is both unnecessary (because the issue is adequately dealt with by the non-discrimination provisions in the Employment Equity Act) and places jobs in jeopardy.² This means that the proposals in their current form are in direct opposition to key Government objectives to tackle unemployment in a decisive way.

² For reasons specifically identified in Government's 2010 Regulatory Impact Assessment, in particular page 18, 19 and 70

The 2010 Regulatory Impact Assessment, conducted at the behest of the Department of Labour, pointed out that an equal pay option may create a disincentive to employment, particularly for young people.

"The provision may create a disincentive to employment. Industry statistics show that a large proportion of atypical employees, particularly temporary and TES employees are young people and a significant number are new entrants to the labour market"³

The Regulatory Impact Assessment also referred to the risk of a "litigation floodgate".⁴ We note in this regard that pay discrimination is already regulated by the provisions of section 6 of the Employment Equity Act, and further specific proposals to amend the Employment Equity Act are currently being discussed in NEDLAC in relation to this issue.

It is our submission that the proposed amendments have already started and will continue to result in concentration of employment among fewer people. There are less onerous ways to address the policy objectives, which can be achieved within the overall framework of the current labour laws and the proposed amendments but without destabilising the labour market and putting jobs and business sustainability at risk. Particular proposals in this regard are set out in our specific responses below.

3. Specific Areas of Concern

Labour Relations Amendment Bill

3.1 Part Time Work

The Labour Relations Amendment Bill proposes similar provisions on equal pay for part time workers as it does for fixed term and labour broker employees. This does not make sense as it does not take into account the vast discrepancy in the level of vulnerability of the part time worker in comparison to TES workers and contract employees who have considerably less security of tenure and no guarantee of indefinite and permanent employment. It also fails to take into account the extensive impact of this provision on employment. There are at a minimum, 1.3 million employees in part time work in South Africa⁵. This provision will, therefore, have widespread impact.⁶

³ Page 18

⁴ Page 19

⁵ According to the 2nd quarter Quarterly Labour Force Survey 2012.

⁶ The BUSA Regulatory Impact Assessment 2012 indicates the extent of the potential job losses as a result of this amendment, amounting to in excess of 200 000 jobs.

There is no international precedent for this provision, which far exceeds any of the ILO standards and recommendations⁷. There is also a marked absence of a policy imperative driving amendments in relation to part time workers.⁸ There appears to be no justification for providing a substantive right for equal pay above sectoral minimums. Regardless, this provision will have a far-reaching impact on the cost of employment and the number of jobs available in the sector.

Currently, within the retail sector, part time workers:

- are employed indefinitely and enjoy the full protection of labour legislation,
- are fully protected by the LRA and BCEA,
- have access and are members of trade unions, and
- are employed on conditions of service that are comprehensively regulated by Wholesale and Retail Sectoral Determination 9, with minimum payment rates, statutory leave, severance pay and contracts of employment. Those employees working under 27 hours a week are also, by consent, provided with an additional premium payment to compensate for the lower hours as an alternative to statutory leave.

The provisions of the Sectoral Determination have already had a profound impact on levels of employment in the retail sector. Prior to the implementation of the Sectoral Determination in February 2003, the sector employed large numbers of casual workers with no security of tenure and very limited minimum standards rights. Since the implementation of the Sectoral Determination in 2003, however, retailers have responded positively to the changes and have formally employed and contracted large numbers of flexible permanent part time workers. This has happened in the context of a variety of different business models and through different economic circumstances. The result has been a substantial increase in the number of people employed and a substantial improvement in the quality of such work. It has also enabled business growth through the ability to adjust rapidly to changing market fluctuations and trading conditions.

Retail Association membership information has repeatedly demonstrated a strong positive relationship between store growth, turnover and employment. As demonstrated below, the current regulatory environment provides a framework for employment and growth and should not be disturbed.

	2003	2006	2009	2012

⁷ ILO Convention 75 on Part Time work deals specifically with gender discrimination only. Gender discrimination is already prohibited in our law through the Employment Equity Act.

⁸ Although the Retail Association does not think that it is necessary to regulate formal equality in other respects for part time workers, since there has been no identifiable policy gap or abuse of part time workers in any recent analysis of the labour market, we have no difficulty with provisions that require equal access for part time workers to training and vacancies within the workplace.

Number of Stores	3 575	4 303	5 713	6 528
Turnover (bn)	63, 965	88, 576	139, 699	182, 955
Number of People in Employed	139 266	157 282	183 138	223 819

The proposed equal pay provisions in the Bill, however, will undermine this positive employment trend. It will require retailers to equalise their pay and benefit packages between full time and part time workers. This will impact most on those retailers that have enhanced their full time employment offer to include non-statutory social security benefits such as medical aid, pension, disability and additional leave benefits.⁹

Our members have considered the impact of this provision on their businesses, and the results are extremely concerning. Many retailers historically, in many instances through collective bargaining, used to employ full time workers with many non-statutory benefits such as additional paid leave, retirement and health care. Over time, employment of a greater number of part time flexible workers has become more prevalent. This has had the result of the sector employing much greater numbers of people, mostly new entrants and youth into the labour market, with relatively low skills. While it is acknowledged that the conditions of employment are not as advantageous as those applicable to full time employees, there has been a significant increase in the number of people employed and a significant improvement in conditions of employment for part time workers who now enjoy security of tenure, and statutory as well as more limited non-statutory benefits.

Among the 242 186 employees employed by our members, 99 291 are part time employees. The cost of the part time equal pay provision, on its own, will result in between 5% and 102% increase in the overall cost of employment for our members. Due to the significant impact of these amendments, retailers will have no option but to reconsider their employment models. Unfortunately, the employment options will not be favourable for employees as retailers will have little choice but to restructure, reduce non-statutory benefits or retrench comparable full time employees in order to absorb the impact of these provisions on their businesses.¹⁰ This will directly contradict the policy objective of promoting employment and will have a negative impact on levels of pay and the existing level of jobs in the sector. This is obviously undesirable for both workers and retailers.

Part time work provisions were never proposed to be addressed in the 2010 Bills. The policy objectives and policy choices require careful consideration for unintended impact, particularly given the employment contribution and profile of this category of employee.

⁹ While for some retailers, who pay at the minimum rate of pay and do not provide non-statutory benefits, this provision will have less impact, the majority of retailers that pay full time employees considerably above the minimum and provide non-statutory benefits such as medical aid, pension, disability and additional leave benefits will be penalised with significant additional costs, making them less competitive and making employment less attractive.

¹⁰ This impact is dealt with in detail at page 70, 2010 Regulatory Impact Assessment conducted under the auspices of the Department of Labour.

As an alternative option, the current Retail Sectoral Determination caters for part time workers in a different manner to that contemplated in the Bills. The Sectoral Determination has a requirement for an additional premium to be paid to part time workers who work less than 27 hours a week. The payment of a premium is a far better solution that should be generally considered as it promotes certainty, does not require protracted litigation, will not have a negative impact on collective bargaining, yet will ensure that part time workers are compensated in a manner that takes into account the lesser hours worked. It is our submission that a premium payment would be a far better way of addressing the policy objective for workers, employers and the State.

A final input in relation to the part time work provisions, should they remain, relates to the lack of transitional periods when the amendments would come into operation. Unlike more vulnerable forms of non-standard employment, such as those pertaining to labour broking employees, there are no transitional provisions on part time work. We have been advised that these have been left out in error. It is submitted that time must be provided for transition – a 6 month transitional period is recommended in order to allow for the significant contractual, scheduling revisions, alterations and consultations with workers that will be required.

3.2 Fixed Term Contracts

The proposed fixed term contract provisions will result in a significantly increased administrative burden for businesses as they are more complex and onerous to manage. Equal treatment provisions will operate to make employment more costly and complex, operating as an indirect disincentive to employment. The combined impact of the new proposals will result in a significant number of disputes before the CCMA and the Labour Courts and will negatively impact on workplace stability, certainty and productivity.

Particular anomalies arise as a result of the 3 month provision, after which equal treatment applies. Three months is far too short a period for most forms of operational requirements requiring limited duration contracts. The most clear example of this is a temporary worker who replaces another employee on statutory maternity leave of 4 months. For the last month, equal treatment will apply. This will result in impractical implications as employers are compelled to enrol employees on pension and medical aid funds and other benefits for a period of just one month. It is submitted that practically, the reason for many forms of short term contracts require a period of up to 6 months – be this for work experience, maternity or illness relief, a temporary increase in the volume of sales, project initiation and the like. It is not rational to implement equal treatment provisions under 6 months as the administrative costs and complexities far exceed the potential benefits.

Given that fixed term contract employees are directly employed, it is submitted that they are less vulnerable than employees of temporary employment services. The regulatory interventions should be less severe than those to address the TES concerns. We submit that a gradual increase in protection, with additional rights for longer periods of employment on a fixed term contract, would be a preferable formulation and as one of a number of preferable options that could be considered.¹¹ Better options could stimulate employment, acquisition of skills and still provide for improvement of conditions of work and security of tenure.

3.3 Temporary Employment Services

Our members make limited use of temporary employment services (TES) with less than 3% of people being employed in retail being secured via TES providers. Where employees are secured via labour brokers this is particularly in Distribution Centres, and for seasonal peak periods or for new store projects or trials. This provides retailers with access to trained staff, without the disadvantages of having to recruit, train and administer employment for employees that are either specifically skilled or employed for only a short period of time. It should be noted that our members contract with established and law abiding TES providers.

We have grave concerns with the deeming provisions and equal treatment provisions in relation to this category of employee and work. The effect of the provisions is legally complex, impractical and in certain respects unclear and impossible to apply. If these provisions are enacted in their present form, we believe they will result in uncertainty, risk and industrial conflict as employees and employers struggle to understand what is required. Some retailers have indicated that they may choose, as a result of the proposed amendments, to employ TES employees directly – they have indicated that this will result in fewer people being employed for longer hours. Others have indicated that they will continue to employ as before, but that they may need to retrench comparable directly employed people. Neither of these options is desirable from a labour market policy perspective.

¹¹ An option that could, for example be considered, would be:

- from day 1 of employment, basic conditions of employment should apply together with any applicable minimum rates of payment as determined by Sectoral Determinations or bargained agreements. In addition, from day 1, the employee should have access to training and development and employment opportunities with the employer and protection from automatically unfair dismissal.
- From 12 months onwards, the employee would also have protection in relation to unfair dismissals.
- from 18 months onwards, there should be access to retirement and medical aid funding, if applicable to employees indefinitely employed in this category.

This type of approach would create for far greater levels of flexibility, adaptability and access to employment. It would also provide employees on fixed term contracts with a longer period of time within which to acquire skills and seek indefinite employment. This would promote employment, skills development and access to employment on the basis of longer service and higher skills giving rise to improved access to benefits.

While we recognise that there have been significant levels of circumvention of employment law through the use of TES in the past, the regulatory intervention in this regard should not be so onerous as to discourage this type of employment, which has been shown to provide an entry into the job market for a significant number of employees, and which serves an important role in providing an element of flexibility in the labour market that encourages enterprise and the creation of employment. These attributes of temporary employment services have been recognised in the Government's regulatory impact assessment conducted in 2010, and by the International Labour Organisation in the and are well documented there. In ILO Convention 181, which was unanimously adopted by the tripartite parties in the ILO, TES are specifically identified as labour market facilitators.

In line with our proposal in relation to fixed term workers, above, we would suggest a gradual increase in employment rights for workers in this category, depending on the length of time in employment, with provisions on payment being addressed by means of a premium on the minimum rate of pay. The equal treatment provisions should only apply from 6 months and should be in the form of joint and several liability (as with the current BCEA provision) rather than the complex legal construct of 'deeming'. This proposal should be accompanied by strong enforcement mechanisms and will have the impact of maintaining existing employment and providing for greater protection for employees of TES, particularly those employed for longer than 12 months.

3.4 Changes to Collective Bargaining, Strike Violence and Picket Access

Representative, well-organised and capable trade unions are an essential part of successful collective bargaining in order to realise the rights enshrined in s23 of our Constitution. The Labour Relations Amendment Bill proposes a number of provisions that extend majority union rights to minority trade unions and provide for enlarged powers to extend minority agreements and powers to less representative structures, particularly where non-standard employment is prevalent. The amendments, rather than promoting worker rights and collective bargaining, will with time erode the incentive to organise workers in non-standard employment and the cumulative impact, together with the equal pay provisions and increases on actual pay provisions referred to above will result in a weakening of collective bargaining. This will undermine workplace democracy, certainty and industrial peace and will, over time, result in the erosion of existing union relationships and collective bargaining. We submit in this regard that taken as a whole, there is the possibility that a number of amendments on equal treatment as contained in the Labour Relations Amendment Bill could be unconstitutional.

It will also result in an escalation in violence as union membership becomes increasingly fragmented. We note in this regard the recent tabling at NEDLAC the intention by the Department of Labour to re-engage on

the majoritarian principle in our labour laws. This call is supported. It would be reckless, however, for these amendments to be introduced where current labour market forces are so unstable and the matter is still to be considered.

We previously welcomed the enhanced provisions dealing with strike related violence that has severely affected many employees in the retail sector. Unfortunately these provisions have subsequently been withdrawn. Measures to restore stability, protect employees from violence, victimisation and allow workers the freedom to decide whether to support strike action are desperately required in our labour market.

The Bill, also provides for expanded rights to picket on the property of a 3rd party. It is submitted that this provision will increase the prospects of violence, injury and damage on the property of the third party, rather than limit strike violence, which was the policy objective.

Basic Conditions of Employment Amendment Bill

3.5 Increases on Actual Rates of Pay

The current provisions of the Basic Conditions of Employment Act enable the Minister to set, through the Sectoral Determination, minimum rates of pay and to provide for increases on those minimum rates of pay.

The Basic Conditions of Employment Amendment Bill now also provides for an increase in remuneration on actual rates of pay. This means that employees earning in excess of the minimum, with no upper earnings threshold, will be entitled to an increase in pay, regardless of factors which may ordinarily result in wage restraint. For example an employer who generally and voluntarily pays at rates above the minimums:

- facing adverse economic conditions will not be able to exercise wage restraint and save jobs, even with the union's consent in order to avoid retrenchment;
- will not be able to accommodate new, inexperienced people into employment at the minimum rate of pay if others in similar jobs are earning in excess of the minimum;
- will not be in a position to manage performance and productivity through remuneration; and
- will also not be able to decrease income differentials between high earning employees and employees paid at the minimum as there would be compulsory increases in pay across the board.

This provision, if enacted will be a deterrent to employment and will also result in employers being engaged in a 'race to the bottom'. If employers who pay above the minimum are forced to pay an increase, this will result in a perverse incentive for them to reduce pay to the minimum required and will necessitate restructuring in payment systems and policies. The provision will exacerbate above-inflationary wage

pressures, and simultaneously put strain on collective bargaining. This provision will undermine the very employees it is intending to protect.

This provision will also be extremely problematic for retailers that have established collective bargaining arrangements with trade unions. A prescribed increase on actual pay, rather than the minimum as is currently applicable, will result in the undermining of union bargaining and union organisation. If employees are able to gain pay increases through the Sectoral Determination, rather than through bargaining, there will be no incentive to bargain and join a union.

It is submitted that the potential harm caused by this provision to employment and collective bargaining will outweigh any potential benefits. This amendment was originally motivated for domestic workers only, as there are very limited collective bargaining opportunities in that sector. It is submitted that this provision, if preserved at all, should not apply to any sectors other than domestic workers.

3.6 Compliance and Enforcement

We support the proposed streamlining of enforcement into a shorter and more effective process. This will support speedier and more effective consequences for those employers who circumvent the law. We do, however, submit that in streamlining the process there has been inadequate consideration of the current capacity of enforcement services, which require a slightly more nuanced process to be effective.

The proposed amendments to the BCEA make it voluntary for an inspector to seek an undertaking (previously it was mandatory) and in relation to compliance orders, the amendments remove the ability of employers to object or appeal against compliance orders. Instead, on the issue of a Compliance order, a matter can now be referred directly to Court. Our members have experienced many instances where the interpretation of matters is not clear, or where the inspector is misdirected due to lack of capacity, experience or training. It is the experience of our members that in many instances these matters are resolved by escalating and engaging on the matter higher within the Department of Labour. The amendment forecloses on such an opportunity to resolve the matter before resorting to expensive legal processes. The unfortunate consequence of these amendments is to discourage compliance and enforcement as envisaged by ILO Convention 81 (which South Africa ratified in 2013). Article 3 of Convention 81 requires that the functions of labour inspection should be to secure enforcement of legal provisions, supply technical information and advice and bring to the notice of authorities defects or abuses. It is our submission in this regard that there should be some form of pre-legal process, be it within the Department of Labour, or through providing for a voluntary, speedy conciliation at the CCMA. This would build capacity of employers and the inspectorate, limit the burden on the Courts, the legal expenses to both employers and the Department and enhance the possibility of early resolution of issues.

4. Concluding Statement

The Retail Association is extremely concerned about the impact of the provisions requiring equal pay particularly for part time work; providing for the setting by sectoral determination of minimum increases on actual rates of pay above the minimum; limiting the role of the inspectorate and undermining collective bargaining arrangements in the sector or provisions that have the potential to increase strike related violence.

It is our considered view that the impact of these provisions will result in increased uncertainty, litigation, administrative burden and a significant increase in the cost of employment for our members. This will overall result in the reduction in the number of jobs in the sector, and have a negative impact on growth and employment in the sector. Given the jobs imperative in our country, we submit that further engagement in NEDLAC is required, to find more effective solutions.

The Retail Association would welcome the opportunity to address the Select Committee on Labour and Public Enterprises on the basis of this submission, to be heard on the issues and to engage further on possible options to address policy concerns in the best interests of the labour market and each of its stakeholders. We have constructive, policy aligned input and alternative options that should be heard if the policy objectives of the amendments are to be achieved within the current labour market structure and prevailing economic climate.

Yours sincerely



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