16 February 2018

**Portfolio Committee on Labour**

**Parliament of the Republic of South Africa**

**PO Box 15**

**Cape Town**

**8000**

**By email: zsakasa@parliament.gov.za**

Dear Sirs

**Written Submissions: Proposed amendments to the Basic Condition of Employment Act**

# On 21 February 2018 Ms FS Loliwe, Chairperson of the Portfolio Committee on Labour ("the Committee") issued an invitation for written submissions on the Basic Conditions of Employment Amendment Bill ("the BCE Amendment Bill"), the Labour Relations Amendment Bill ("the LR Amendment Bill") and the National Minimum Wage Bill.

# Interested parties have been invited to submit written submissions by 16:30 on Friday, 16 March 2018. We express our sincere thanks to the Committee for the opportunity to submit written representations. We would welcome the opportunity to be able to make a verbal presentation to the Committee.

The Consumer Goods Council of South Africa (CGCSA) is a non-profit organisation representing the interests of more than 12, 000 member companies engaged in the retail and wholesale , and the distribution of consumer goods, with a combined value of approximately R707 billion.

Since 2002 the CGCSA has facilitated stakeholder engagement on risk, safety, compliance and sustainable issues across the consumer goods value chain. It has also championed a number of advocacy projects.

CGCSA has since inception been a notable representative body of the entire consumer industry representing its members interests on industry concerns to the government, regional collaborative platforms and key strategic partners and alliances. We are governed by our Board of Directors, which are drawn from industry captains across the Consumer Goods sector.

These written submissions are made primarily in respect of our members that operate in the Wholesale and Retail Sector.

**The National Minimum Wage**

# The introduction of the National Minimum Wage Act is welcomed by the sector.

# The Consumer Goods sector is a wide and dissimilar sector. This is reflected in the numerous occupational categories within the Sectoral Determinations. It would be impossible to make allowance for minimum wages for each and every occupational category within this sector. Sectoral Determinations currently set minimum wages for a limited number of different occupational categories within a sector. This has led to difficulties in determining appropriate comparators in respect of occupational categories that are not defined. The introduction of a single national minimum wage will alleviate this problem and simplify this process.

# It is also respectfully submitted that section 6(4) of the Employment Equity Act 55 of 1998 and the accompanying Regulations to the Employment Equity Act provide employees with adequate protection in terms of consistency in terms and conditions of employment of employees that perform the same or substantially the same work or work of equal value.

**The BCE Amendment Bill**

# The BCE Amendment Bill proposes a number of far reaching amendments to the Basic Conditions of Employment Act 75 of 1997 ("BCEA"). In terms of the Memorandum to the BCE Amendment Bill the primary amendments are:

## 1 the repeal of the provisions dealing with the making of Sectoral Determinations (Chapter 8 of the BCEA) and the powers and functions of the Employment Conditions Commission (Chapter 9 of the BCEA);

## 2 the extension of the provisions for monitoring and enforcement by labour inspectors to include the National Minimum Wage Act, the Unemployment Insurance Act and Unemployment Insurance Contributions Act; and

## 3 the extension of the jurisdiction of the CCMA to include enforcement procedures in terms of the BCEA and claims for underpayment.

# Our comments relate primarily to the repeal of Sectoral Determinations and the Employment Conditions Commission and the extension of the jurisdiction of the CCMA to include enforcement procedures in terms of the BCEA.

**The Repeal of Sectoral Determinations**

# The BCE Amendment Bill, in its transitional provisions, allows that existing Sectoral Determinations remain in force, *except* to the extent that they prescribe a minimum wage that is less than the national minimum wage as determined in terms of the National Minimum Wage Act.

# The BCE Amendment Bill however goes much further than simply removing the determination of minimum wage levels from the Sectoral Determinations. Section 4 of the BCE Amendment Bill repeals Chapters 8 and 9 of the BCEA. It places the provisions of sections 56, 57 and 58 of the BCEA in the transitional provisions. These sections of the BCEA deal with the period of operation of a Sectoral Determination, the legal effect of Sectoral Determinations and the keeping by the employer of a copy of the Sectoral Determination.

# From the repeal of Chapter 8, the placement of these provisions in the Transitional Provisions, and in the absence of any alternative provisions in respect of Sectoral Determinations, it is apparent that the proposed legislation intends that Sectoral Determinations will eventually be repealed in their entirety.

# This view is strengthened by the Department of Labour's Socio-Economic Impact Assessment System ("the Impact Assessment") which clearly records, in response to organised labour's call for the retention of Sectoral Determinations that its response is that "*SD's retained for 3 year period*" (at page 226 of the Gazette No. 41257 of 17 November 2017).

# In the Impact Assessment, under paragraph 1.5 (Report on Consultations), a table is provided which records proposals by the various stakeholders under the heading "What amendments do they propose?" (at page 226 of the Gazette No. 41257 of 17 November 2017). Organised labour – COSATU, NACTU and FEDUSA motivate for the retention of sectoral determinations. The CGCSA shares the view of organised labour that Sectoral Determinations must be retained. It is respectfully submitted that the repeal of Sectoral Determinations will not serve any good purpose and would disrupt the current stability within the various sectors that is provided by the Sectoral Determinations and inhibit job creation.

# The South African economy is made up of a number of distinct sectors, each with their own unique needs. There can be no "one size fits all" for the regulation of employment standards across these different sectors. A "one size fits all" approach would be detrimental to the proper functioning of businesses across these different sectors.

# Sectoral Determinations replaced the old Wage Determinations as the vehicle for setting sector specific conditions of employment. They carry out a vital function as they regulate and set minimum standards that are appropriate and sensitive to the needs of a specific sector. Amongst other things, Sectoral Determinations cater for differences in standards brought about by sector specific needs, such as the regulation of differences in ordinary hours of work and night work to provide workplace flexibility, and the setting of wages and alternative means of payment such as for employees that earn commission.

# To simply illustrate this point I use the provisions of Sectoral Determination 9: Wholesale and Retail (SD9) relating to hours of work.

# The Wholesale and Retail Sector is an evolving sector. Trading hours have changed dramatically over the past 20 years. Increasingly there is a demand for retail trading hours to be extended to 24 hours a day, 7 days a week and 365 days a year. The Retail Sector also experiences strong seasonal patterns with increased activity around the Easter and Christmas periods. Over these periods retailers may require additional staff to deal with increased customer volumes and may also be required to operate for longer hours in the day. As an example, for the month of December 2017 the increase in working hours and extra positions required for that month was the equivalent of 24 000 full-time jobs.

# It goes without saying that the sector cannot operate on the traditional BCEA ordinary work week of 45 hours a week, Monday to Friday and 9am to 5pm. The BCEA does not allow the required flexibility in terms of hours worked, and where employees work beyond the ordinary work week, such as work on Sundays (which has become an ordinary work day in the Retail Sector), the employer must pay a premium.

# SD9 allows alternatives in respect of working hours that allow for the flexibility needed in terms of, inter alia, trading hours. Clause 10 of SD9 allows that in terms of a written agreement, employees that are employed for 27 hours or less hours a week, in addition to other criteria, work Sundays as an ordinary day and are paid their ordinary hourly wage plus 25%. Clause 11(3) of SD9 allows that in terms of a written agreement, employees that are employed for 40 ordinary hours or less hours a week, including a Sunday, receive two days off a week and one Sunday off during every four consecutive Sundays.

# These provisions allow the Wholesale and Retail Sector the flexibility to employ employees outside of the core 45 hour per week worker to supplement its workforce and to allow for staffing over an extended trading day. Similarly, the night work provisions of SD9 are different to those of the BCEA (7pm to 7am, rather than 6pm to 6am) to better accommodate the trading times in the sector.

# The further difficulty with repealing Sectoral Determinations is that there is no immediately viable alternative to Sectoral Determinations. The only options available in respect of sectoral regulations are either applying the provisions of the BCEA or the establishment of a Bargaining Council.

# Insofar as these two options are concerned, the BCEA is not sensitive to the needs of sectors as it applies a "one size fits all" approach. Bargaining Councils in turn, are an inappropriate means of regulating employment standards in especially the Retail sector. Our members drawn from the Wholesale and Retail Sector are of the view that Bargaining Councils reflect only the limited needs of the more dominant trade union and business interests represented at that Council. The agreements are almost without fail extended to non-parties. This has seen a raft of litigation in the past few years by non-parties seeking to resist the extension of terms which do not take into account the needs of often smaller and more vulnerable employers.

# This would be especially acute in the Wholesale and Retail Sector which is made up of many varied and dissimilar operations. The sector is large and immensely diverse. It includes everything from large national chains through to smaller regional, local and individual outlets. Employers within the sector engage in retail activities involving a wide range of products and activities. They are involved in everything from food, clothing, furniture and household goods, to hardware and other retail areas. Retail businesses differ widely in terms of operation, size, scale and footprint.

# It would be particularly unfair to extend the terms negotiated in Bargaining Councils, such as increases, pension and medical aid benefits and the like, to smaller players that may not be able to pay the benefits that larger players can.

# Sectoral Determinations set national minimum standards of employment. If the intention is that this function should in future be carried out by a Bargaining Council, then it would have to be on a national basis. This would require bargaining at a central level amongst the members of the Bargaining Council. There is no tradition or practice of central or sectoral bargaining in the Wholesale and Retail Sector.

# In this regard the Wholesale and Retail Sector is to be distinguished from other sectors where collective bargaining at central level takes place. There is no history of such bargaining in the Wholesale and Retail Sector, nor will it work in this sector because of the diverse nature of the sector.

# Collective bargaining in the Wholesale and Retail Sector is on a single employer basis. Bargaining outcomes have developed in a manner that is at odds with a central forum. Employment conditions, benefits, policies and practices are negotiated or determined separately and differ between employers. This in itself, within the parameters of a minimum wage, allows for competition in the sector to the advantage of consumers. Sectoral bargaining will only serve to encourage anti-competitive behavior in the Wholesale and Retail Sector to the detriment of the consumer.

# Employees are well represented within the Wholesale and Retail Sector. Most of our members have strong collective bargaining structures in place. The dominant unions in the sector include the South African Commercial Catering and Allied Workers Union ("SACCAWU") and the Food and Allied Workers Union (FAWU) . These are large, long established union and representative unions.

# In addition to diversity by way of product range, retail operations are as immensely diverse in terms of operation, commercial and financial and Human Resources strategies. They have different financial year-ends, different wage adjustment dates and widely varied means of reward philosophies. Some businesses are strictly in cash, others are bedded on credit arrangements. For these reasons, and due to the intensely competitive nature of the sector, margins are generally thin. The competitive nature of the industry also results in a very high premium being placed on the confidentially of information, especially that which is proprietary to an individual entity. Central bargaining is simply not practicablewithin the Wholesale and Retail Sector.

# To repeal the Sectoral Determinations without a viable alternative being proposed would be immensely disruptive of a stable sector and would have disastrous knock-on effects in respect of critical aspects to the economy such as job creation and the sustainability of especially the smaller operators in the Retail Sector.

# It is important that Parliament consider the stability that Sectoral Determinations bring to sectors and that it protect this stability. The Department's Socio-Economic Impact Assessment System records that the impact of the amendments on economic growth is "N/A" (at page 229 of the Gazette No. 41257 of 17 November 2017). It appears that the Department may not have established the impact of the amendments on economic growth.

# Simply put Sectoral Determinations achieve the purpose for which they were introduced. There is no need to repeal the provisions relating to Sectoral Determinations. There is no need to fix that which is not broken. This is a view, it seems, that is shared by organised labour.

There is no clear or good reason for the repeal of Sectoral Determinations in circumstances when two of the main stakeholders in the economy, organised labour and business, are in favour of the retention of Sectoral Determinations. The Sectoral Determinations have been in effect for decades. The different terms and conditions across different sectors have, in effect, become codified through the Sectoral Determinations. In the absence of any clear plan from the proposed legislation as to a properly considered and organised transition from the Sectoral Determinations to whatever next is contemplated, there will only be uncertainty and frustration. This will have a negative effect on further investment in the sector and may well negatively affect job creation.

For the Department to simply hope that organised labour and business will come to some arrangement through collective bargaining is extremely short-sighted. It ignores the adversarial nature of collective bargaining in South Africa and ignores the investment of all stakeholders in the application of the Sectoral Determinations.

# **The Repeal of the Employment Conditions Commission**

# The BCE Amendment Bill seeks to repeal the provisions dealing with the Employment Conditions Commission ("the Commission").

# In terms of section 59(2) of the BCEA the Commission's function is to advise the Minister on a range of issues including: Sectoral Determinations; on any matter concerning basic conditions of employment; on any matter arising out of the application of the BCEA; on the effect of the policies of the government on employment and on trends in collective bargaining; and whether any of those trends undermine the purpose of the BCEA.

# It appears that the intention is that the broader function of the Commission be taken over by the National Minimum Wage Commission, in terms of section 11 of the National Minimum Wage Bill. That section however limits the National Minimum Wage Commission's function to issues related to the National Minimum Wage and investigating income differentials and recommending benchmarks.

# As is apparent from section 59(2) of the BCEA, the Commission plays a critical role in advising the Minister on a wide range of issues related to the BCEA and not only Sectoral Determinations. It seems that in its haste to do away with Sectoral Determinations the proposed legislation has failed to properly acknowledge the role played by the Commission and that it will leave a vacuum in respect of proper independent and considered advice to the Minister.

# The Commission was obviously key to the proper implementation of the Sectoral Determinations. Before a Sectoral Determination can be made the Commission must consider the conditions in the sector and area in which the Determination will apply and other relevant factors and make recommendations to the Minister.

# As a consequence of this process Sectoral Determinations are sensitive to the needs of a particular sector. They make provision for the specific needs of different sectors, after careful consideration by an impartial Commission, and take into account the interests of all role players in a sector.

# This is in stark contrast to the minimum standards set in Bargaining Councils which cater only for the limited needs of the more dominant trade union and business interests that are represented at that Council.

# The CGCSA believes that the Commission plays an important role in advising the Minister and that Chapter 9 should not be repealed.

**Enforcement and monitoring**

# The BCE Amendment Bill proposes the extension of an inspector's power to issue a written undertaking or a compliance order to include the National Minimum Wage Act, the Unemployment Insurance Act and Unemployment Insurance Contributions Act.

# The extension of monitoring and enforcement by labour inspectors is not contentious. This would provide a necessary mechanism for the policing of those Acts and is supported by the CGCSA.

# This extension does however come with its difficulties and the Department would have to ensure that its officials are properly trained in respect of the provisions of the Acts included by the extension. In the experience of our members many inspectors are ill-trained and do not understand the provisions they are required to monitor and enforce.

**The extension of the CCMA's jurisdiction**

# In terms of the proposed amendments to sections 68 and 69 of the BCEA, disputes arising from an employer's non-compliance with the BCEA after a written undertaking or a compliance order have been issued by an inspector (which are currently referred to the Labour Court) may be referred to the CCMA.

# These amendments purport to provide a cheaper and more expeditious method of resolving these disputes by vesting that jurisdiction in the CCMA.

# In terms of the amendments the CCMA will have the power to make an arbitration award to enforce an undertaking or compliance order. Employers who dispute the terms of a compliance order will also be able to refer a dispute to the CCMA for arbitration.

# This particular amendment, laudable though its intentions may be, will place increased pressure on an already under-resourced and under-funded CCMA. The Socio-Economic Impact Assessment System gazetted with the Bill estimates that R20.8 million will be required by the CCMA to deal with training, advocacy and the increased workload that will be brought about by this amendment. This estimate is most likely understated.

# The CCMA annual report for 2016/2017 records that a total of 188 449 cases were referred to the CCMA in the last financial year. The Situational Analysis in the report records that "*This ever increasing case referral exerts pressure on CCMA business processes and poses a risk to the efficiency and effectiveness of the organisation*".

# The effect of this amendment will significantly increase the number of referrals to the CCMA. The CCMA, has very limited jurisdiction in respect of disputes arising from the BCEA. These are disputes related to severance payment in terms of section 41 and disputes referred in terms of section 80. Given the already massive financial constraints on the national treasury it is highly unlikely that the CCMA will receive the funding it requires. This will lead to further strain on an already overburdened CCMA. This will lead to poor service delivery and frustration amongst all stakeholders, including employers, employees and the Department, which will negatively affect the confidence of stakeholders in the CCMA.

# The result of this proposed amendment is that the CCMA awards, issued in respect of these types of disputes, will inevitably be referred to the Labour Court. This will defeat the purpose of expeditious resolution and further delay the finalisation of the dispute.

# It is also respectfully submitted that if this amendment is to be retained that an appeal procedure, as is found in section 10(8) of the Employment Equity Act, should be introduced into the BCE Amendment Bill. The review procedure that would be available is not adequate where the basis for challenging a CCMA award, in these circumstances, would be whether the award is correct or not, rather than whether the award is reasonable.

# What is also of fundamental concern is the proposed deletion of section 69(2A) of the BCEA. This section allows an inspector to set a date by which the employer may serve any representations it may wish to make with the Department and the Labour Court. In the experience of our members inspections at local operations often do not meet their purpose. Local managers are not required to be experts in labour law. Often they do not understand what information is required by inspectors or they do not have relevant information immediately at hand. Many of our members, through their HR Departments have often been able to clarify issues with the Department after an inspection and thus avoid unnecessary referrals to the Labour Court.

# The deletion of this section will exacerbate the situation and result in unnecessary CCMA litigation (if the amendments extending the CCMA's jurisdiction are implemented). If this amendment is implemented it is respectfully submitted that the section should be retained but amended to delete the reference to the Labour Court only.

# Nonetheless the CGCSA believes that the current system of referring compliance and enforcement disputes to the Labour Court is appropriate. The current system works and there is no need to change it.

**Conclusion**

# The CGCSA supports the introduction of a national minimum wage. It agrees that there should be one national minimum wage and that minimum wage setting be removed from Sectoral Determinations.

# It however submits that the repeal of Chapters 8 and 9 of the BCEA would be short-sighted and damaging in the long run. In circumstances where both organised labour and business support the continuation of Sectoral Determinations there does not appear to be any sound reason to repeal these chapters.

# The extension of the CCMA's jurisdiction to include monitoring and enforcement of the BCEA in terms of sections 68 and 69 is not workable. This proposed amendment will not serve the purpose of providing a cheaper and more expeditious method of resolving these disputes. Instead it will lead to applications to the Labour Court (where these disputes are currently heard) to set aside the arbitration awards and lead to further delays and legal costs.

# If the amendments extending the CCMA's jurisdiction are to be retained then the provision in section 69(2A) must be retained to allow an employer to make representations to the Department prior to the matter being referred to litigation. Furthermore, an appeal process, as contained in the Employment Equity Act, should be introduced to properly deal with incorrect CCMA awards issued in terms of the amended sections.

As one of the associations representing the largest employers in the Retail sector, we are in a position to address the adverse effects of the Bills on business in specifically this sector.

Yours faithfully

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Consumer Goods Council of South Africa