**DEPARTMENT OF LABOUR**

**REPORT ON PUBLIC COMMENT ON THE BASIC CONDITIONS OF EMPLOYMENT AMENDMENT ACT, 2017**

**Section 1 - Definitions**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| 1(b) | What is the premise behind substituting the Skills Development Act with the Employment Services Act? | The purpose is to update the section to make reference to the relevant law that now provides for employment services. This is no longer within the purview of the Skills Development Act. | SAIPA |
|  | Definition of worker is by reference to an employee as defined in the BCEA. The incorporation of the definition of worker in clause 5 is unnecessary. | The incorporation of the definition of worker in clause 5 of the BCEA Bill is necessary and the intention is to amend the definition of worker to mean “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.” | Provincial Minister of Economic Opportunities, WC Govt. |

**Section 3: Insertion of Section 9A – Daily wage**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Section 9A: Daily wage payment | This proposal has employers paying twice for the same work to be done. In the agricultural sector, various conditions determine whether an employee could perform work on a particular day, like rain, heat, cold, etc. In most instances, where employees do not reside on the farm, they are transported to the workplace at the employers cost.  In unsuitable circumstances, the employer will probably not fetch the employees on the particular day and have them working on a more suitable day. Either way, the employees will be paid for work performed. This proposal has employers paying twice for the same work to be done. | The responsibility resides with the employer to inform workers if their services will not be required. If there is proper communication and poor weather prevents work to be performed, workers will not be expecting transport and there will be no obligation to pay for work not performed.  If workers that are to be picked-up by the employer are not informed that there will be no work on a particular day and they are not collected, the minimum daily wage payment will apply. | AGRISA |
| Section 9A and section 20 | If 9A is read together with section 20 (transitional provisions), it is noted that a sectoral determination will remain in force. This provision may therefore be in conflict with those of the Farm worker sectoral determination where there is no provision for payment of an employee who works for less than four hours. | The BCEA applies to conditions not prescribed in SDs. The NMW will apply where the SD does not regulate the matter. | AGRISA |
| Section 9A | Insertion of this section objected to. This should only apply to the minimum wage. Employees earning the minimum wage or above should not be covered by the clause. | The guaranteed minimum hours of work only applies to workers earning below the threshold and is intended to protect earning of low paid workers when earnings are lost for reasons beyond their control. The provision already exists in a number of sectoral determinations.  The minimum hours of work was agreed to by the NEDLAC social partners and is intended to remunerate workers fairly where unforeseen circumstances interrupt normal working hours. | CAPES, Corning (Pty) Ltd., Hilton Green Consulting, SA Home Textile Manufacturers’ Employers’ Organisation. |
|  | Section 9(A)(2) refers to section (6)(3) of the BCEA which in turn makes reference to the Commission. Clarity is sought on which Commission will be referred to once the BCEA is amended.  The repeal of Chapter 9 of the BCEA which deals with the establishment of the Employment Conditions Commission will not be sufficient to undo the establishment of the ECC. Clarity is required on whether it is intended to retain or disestablish the Employment Conditions Commission. | This will require a further amendment to ensure that references to the Commission are to the NMW Commission and not the Employment Conditions Commission. This will be done as an amendment to the BCEA definitions by defining Commission to mean the National Minimum Wage Commission established by section 8 of the National Minimum Wage Act.  The intention is to disestablish the Employment Conditions Commission and this will be given effect to in the final amendments to the Bill. | Provincial Minister of Economic Opportunities, WC Govt. |
| Section 9A | The NMW-RI recommends that the provision for minimum hours of work be included not only in the BCEA amendments but also be referenced in the NMW Bill. They also recommend that given the trend towards increased casualization, workers working less than 27 hours should receive one third more than the NMW hourly rate. | Section 5(2) of the NMW Bill must read; “Subject to section 9A of the BCEA a worker is entitled….on any day.” | NMW-RI |
| Section 9A | Minimum guarantee of 4 hours pay has been agreed to, even if less hours are worked. The minimum of 4 hours will apply to those earning up to R40 – R60 per hour to be determined by the Minister (as recommended by the Panel and agreed to in NEDLAC process). | Application of minimum hours to an earnings threshold to be considered and this can be made by regulation as allowed by section 6(3) of the BCEA. | BUSA |

**Section 4: Repeal of chapters 8 & 9**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Section 4: Repeal of chapters 8 & 9 and Section 20(2) | Do not support repeal of sectoral determinations. Sectoral determinations should remain in force as long as they do not prescribe a minimum wage lower than the NMW. Would require 3 years notice given that conditions of employment have been developed in line with the SD 9.  The NMW Commission should be given the power to advise the Minister on changes to conditions of employment. Business submits that there was a drafting oversight in failing to transfer the functions of the ECC in relation to SD’s to the NMW Commission, thereby enabling a continued review of the SD’s. | Section 20 of the BCEA Bill ensures that sectoral determinations remain in force.  Agree. This can be done by amending the definition of the Commission in the BCEA to refer to the NMW Commission. | New Clicks South Africa (Pty) Ltd, Labour and Enterprise Policy Research Group, CWAO, NMW-RI, BUSA. |
| SD’s, section 20 and repeal of ch.8 | The RA supports the introduction of the NMW.  RA concerned with the placement of sections 56, 57 and 58 into the Transitional Provision sections of the BCEA Bill. This appears to signal the intention to eventually do away with SD’s altogether.  The RA views SD 9 (for Wholesale & Retail) as providing flexibility and security of employment. They view SD’s as having an important role alongside of the NMW Act and should therefore be retained.  RA proposes that only certain sections of Chapter 8 of the BCEA should be repealed. Repeal provision should be limited to Sections 51,52, 53,54 and 55 of chapter 8. Sections 56, 57 and 58 should remain in the BCEA. Section 20(2) of the BCEA Bill should then be deleted. | The transitional provision does provide for SD’s to continue and makes provision for a three year period in which those that prescribe wages that are above the minimum, will be reviewed and their future considered. An amendment to indicate that the Minister can increase the period can be added. | Retail Association |
| Repeal of Chapters 8 and 9 | The SD for farm workers (SDFW) has been in place since 1997 and contains provisions regarding housing rights of farm workers that are not contained in the BCEA.  Doing away with the ability of the Minister of Labour to maintain and update the SDFW will have a seriously negative impact on farm workers. | The SD for Farm Workers continues in terms of section 20 of the BCEA Bill. The housing rights it makes provision for will not be affected.  Not clear why this is the case. Conditions agreed to in the SD are unlikely to be reversed and the BCEA will continue to protect conditions of employment. | Women on Farms Project |
| Repeal of Sectoral Determinations | The CGCSA is of the view that the sectoral determinations should be retained. The diversity of employment standards across sectors does not lend itself to a one size fits all approach and will be detrimental to the proper functioning of businesses across different sectors.  The CGCSA suggests that central bargaining, as an alternative to the SD’s, is not practicable in the Wholesale and Retail sector.  The CGCSA is of the view that the ECC plays an important role in advising the Minister and Chapter 9 should not be repealed. | The transitional provisions allow for a three year period in which to review the continued functioning to increase wages that are in SDs but above the NMW such as SD 9 that applies to the wholesale and retail sector.  Noted.  While SD’s continue to function, the role of advising the Minister on could be transferred to the NMW Commission. Two commissions are not required for this purpose. | Consumer Goods Council of SA |

**Section 6: Section 64 – Referral to the CCMA**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Section 64 of BCEA | Section 191, 193, 194(4) and 195 of the LRA provide that bargaining councils may hear disputes within their jurisdiction. This jurisdiction also applies to section 64(4) disputes. This is at odds with the amended section 64(1)(dA) which grants the CCMA exclusive jurisdiction to hear disputes regarding non-compliance with the NMW Act. | The amendment grants inspectors the right to refer disputes in relation to the NMW and UI Acts to the CCMA. Bargaining Councils have a responsibility to enforce their agreements and deal with disputes in relation to non-compliance with agreements. The CCMA’s jurisdiction is granted in relation to a national statute to ensure that disputes are dealt with expeditiously and with consistency. | Labour & Enterprise Policy Research Group, UCT |
| Section 64(dA) | Non-compliance with bargaining council minimum wages will also constitute non-compliance with the NMW. This creates an anomaly in that BC agents will identify non-compliance but only the DOL inspectors may institute proceedings against non-compliant employers.  The same will also apply in respect of contraventions of section 4(6) of the NMW Bill. | This does not necessarily follow. BC minima are expected to be above the NMW.  LRA makes provision for BCs to enforce their agreements. The inspectors enforce the NMW outside of the jurisdiction of BC’s on the assumption that agreements must specify wages above the national minimum, as required by the NMW Bill. | Labour & Enterprise Policy Research Group, UCT |

**Section 8: Section 68 – Inclusion of NMW & UIA**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Section 68 | What if the agreement referred to in s2(a) is not written? Clarity is required whether a verbal undertaking will be sufficient? | The section should be read in the context of section 68 (1) and (1A) which refer to a written undertaking. The agreement, which may be verbal, precedes the written undertaking which confirms the agreement in writing. | SAIPA |
| Section 68 | The CCMA supports the amendment that allows inspectors to secure written undertakings to comply with provisions of the BCEA, the NMWA and the UI Act. The power to enforce written undertakings is to be transferred from the Labour Court to the CCMA. | Noted. | CCMA |
| Section 68(3) | There is no provision for employers to dispute the process of making an undertaking an arbitration award in terms of s68(3). Section 69(5) and (6) read with section 7 allows an employer to challenges a compliance order. It is unclear why the distinction is made between the process to enforce an undertaking and a compliance order. The Memorandum of Objects also does not explain this difference. | Undertaking is an agreement. If an employee does not agree then an employer can just refuse to sign the undertaking. If the employer signs the Undertaking then the employer cannot dispute what they have agreed to. Therefore there is no provision for an appeal. A compliance order is one issued by an inspector and in relation to which an employer may refer a dispute to the CCMA. | Labour & Enterprise Policy Research Group, UCT |
| Sections 8 & 9 (s 68 & 69) | The amendment to sections 68 and 69 allows the CCMA to make a compliance order an arbitration award and to hear disputes by employers arising from compliance orders issued by inspectors.  Clicks proposes that the current system of referring compliance and enforcement disputes to the labour court be retained. | The CCMA is anticipating an increase of its workload of approximately 15%. It is preparing for dealing with these cases and it is anticipated that it will have the necessary resources to deal with these disputes in a more expeditious manner than the Labour Court. | New Clicks South Africa (Pty) Ltd |

**Section 9: Section 69 – Inclusion of NMWA & UIA – Referral to CCMA**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Section 69 | The CCMA supports the new approach whereby inspectors can issue compliance orders in relation to the NMWA and UI legislation and employers can lodge an objection to a compliance order with the CCMA.  The CCMA is supportive of an appropriately worded condonation provision providing that an employer seeking condonation for a late referral is required to furnish security to the satisfaction of the CCMA in respect of the amount that must be paid in terms of the compliance order.  It is noted that the cross reference to section 73 in the proposed new 73(6) is incorrect and should be omitted.  The CCMA proposes that the amendments should make provision for a Commissioner who hears an objection in terms of section 69 to have the power to issue arbitration awards that confirm, vary or set aside the compliance order. Such an award may be reviewed under the relevant provisions of the LRA. | An amendment will be made to section 73A by inserting the following:  “An employee who has a claim arising from any failure to pay any amount in terms of this Act, the National Minimum Wage Act, a contract of employment, a sectoral determination or a collective agreement may-   1. refer a dispute in respect of that to the CCMA, if the employee’s earnings do not exceed the threshold prescribed by the Minister of section 6(3); or 2. institute that claim in either the Labour Court, the High Court, the Magistrates’ Court or the small claims court subject to their respective jurisdictions. | CCMA |
| Section 68 and 69 | It is unclear whether a hearing will take place prior to the making of an arbitration award.  There should be a right to appeal the final award. | CCMA process will apply as governed by its Rules. In the case of an arbitration relating to an undertaking, there is no hearing because as indicated this is an agreement. In arbitration to enforce a compliance order there will be a hearing only if the employer dispute the compliance order  An amendment to section 69 is proposed to make provision for the right to review. | Labour & Enterprise Policy Research Group, UCT  BUSA |
| Section 9 (c) Compliance Order | Deletion of 2A should be reconsidered as compliance orders should set time by which employer should make representations. Employers should be given this opportunity. | An amendment will be made to enable an employer to refer a dispute if a compliance order is not complied with (section 69(5)). | New Clicks South Africa (Pty) Ltd. |

**Section 11: Section 73 – Order to be made an arbitration awards**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
|  | Enforcement | Instead of increasing the workload of the CCMA, the powers of labour inspectors of the DOL to enforce compliance from employers must rather be strengthened. The proposed amendments will render the NMW unenforceable. Enforcement to remain the responsibility of a completely overhauled Labour Inspectorate with extended powers. | OXFAM |
| Section 73 | The CCMA is of the view that section 73(1) is appropriately drafted but section 73(2) should reflect the understanding that a limited inquiry as to whether or not a compliance order that has not been complied with should be given the status of an arbitration award so that it can be enforced.  There is no need for “representations” as currently referred to in section 73(2) as this is permitted through section 69. | An amendment will be made to section 73(2) as follows:  (2) **[After considering any representations to it, the]** The CCMA may issue an arbitration award in terms of subsection (1) requiring the employer to comply with the compliance order if it is satisfied that:  (a) the compliance order was served on the employer; and  (b) the employer has not referred a dispute in terms of section 69(5). **[delete in square brackets the rest of section 73(2)].** | CCMA |
| Section 11 Order may be made order of Labour Court | Amendments should make provision for appeal and review proceedings against arbitration awards. An appeal by an employer should be based on the substantive correctness of a decision and procedural fairness. Such rights of appeal and review should be dealt with via s11 of the BCEA or in amendments to the LRA. | The LRA does make provision for review proceedings. See sections 145 and 158.  Decisions of the CCMA will be open for review by the Labour Court. | New Clicks South Africa (Pty) Ltd. |
| Enforcement and monitoring | The extension of powers of the inspectorate to issue a written undertaking in relation to the NMW Act and the UI Act will require proper training of inspectors. | Training of the inspectorate is envisaged. | Consumer Goods Council of SA |
| Extension of the CCMA’s jurisdiction | The extension of the CCMA’s jurisdiction will place increased pressure on “an already under-resourced and under-funded CCMA.”  The CGCSA calls for an appeal procedure in relation to CCMA awards issued in relation to non-compliance with the NMW.  The current system of referring compliance and enforcement disputes to the Labour Court is appropriate and there is no need to change it. | Noted. The CCMA is preparing to deal with the anticipated additional case load.  Provision for a review process will be made in the Bill.  The use of the Labour Court for compliance and enforcement matters will be too cumbersome for NMW related matters. The advantages of extending the CCMA’s jurisdiction is likely to far outweigh the disadvantages. It is also important to note that for Bargaining Councils the current law requires that enforcement is done through arbitration. | Consumer Goods Council of SA |

**Section 12: Section 73A – Claim for failure to pay any amount**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Section 73A: Claims for failure to pay any amount | The way the clauses are worded may result in forum shopping and could be time consuming and costly for employers. A simplified process under the CCMA with revision (review?) by the Labour Court, is preferable. | Section 73 A (1) makes provision for any person to refer a dispute to the CCMA and not any other forum.  Employees who earn in excess of the BCEA threshold (R205 433.30 may proceed with a claim about failure to pay to the Labour Court, the High Court or the Magistrates or Small Claims Court subject to their jurisdiction (section 73A(2) and (3)).  This arrangement gives clarity and provides an avenue for certain employees to seek a remedy and is straight forward. | AGRISA, SAIPA |
| Section 73A | The section requires re-drafting to clarify its terms. Provision should also be made for a claim to be resolved in a single event involving conciliation and/or arbitration.  It will also be undesirable if matters that have already been dealt with in terms of section 64, 69 and 73 are raised again in terms of section 73A and proposes that a provision to that effect be included in 73A. | Amendments to take account of these comments are as follows:  “An employee who has a claim arising from any failure to pay any amount in terms of this Act, the National Minimum Wage Act, a contract of employment, a sectoral determination or a collective agreement may-   1. refer a dispute in respect of that to the CCMA, if the employee’s earnings do not exceed the threshold prescribed by the Minister of section 6(3); or 2. institute that claim in either the Labour Court, the High Court, the Magistrates’ Court or the small claims court subject to their respective jurisdictions. 3. The CCMA must appoint a Commissioner in terms of section 135 of the Labour Relations Act to attempt to resolve by conciliation any dispute that is referred to the commission in terms of subsection 1 (a). 4. The Commission must commence the arbitration of a dispute contemplated by subsection (1)(a) immediately after certifying that the dispute remains unresolved in terms of section 135(5). | CCMA |
| Section 64dA & 73A | CWAO is of the view that the CCMA as the primary enforcer of the NMW will be burdened with legal and practical challenges which will make the whole process unworkable and will not make it easier for workers to pursue compliance. CWAO also raised the issue that the CCMA will be overburdened by a increased workload.  CWAO propose that the powers of labour inspectors of the Department of Labour to enforce compliance must rather be strengthened. CWAO propose that compliance orders of the labour inspector must take the form of a court order and writ of execution when the employer fails to comply within stipulated time-frames, without further legal processes.  CWAO is of the view that the proposed amendments will render the MW unenforceable. | The Department does not agree. The CCMA has been allocated additional resources and will be able to prepare itself for the anticipated increase in its work load.  The amendments to the BCEA provide for a compliance order to be made an arbitration award by the CCMA. The process cannot be streamlined further without jeopardising due process in relation to enforcing legal obligations. | CWAO |
|  |  |  |  |

**Section 15: Section 76 – Proof of compliance**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Section 76: Proof of compliance | Chapter 8 of the BCEA is deleted but this section still refers to contravention of sectoral determinations. The section should be appropriately amended. | The Transitional Provisions in Section 20 apply and make provision for sector determinations to still be enforced. | AGRISA |
|  |  |  |  |

**Section 16: Section 76A – Fine for not complying with NMW**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Section 76A: Fine for not complying with national minimum wage | Agri Western Cape understands that government has a duty to ensure that employees receive the correct wage, but a penalty of twice the wage is severe and unrealistic and cannot be agreed to.  An alternative proposal by EOHCB is that a non-compliant employer be required to pay interest on an outstanding payment **or** that section 76A be amended to read the “lesser” of twice the value of the underpayment or twice the employee’s monthly wage  In case of frivolous and vexatious referrals rule 39 of the CCMA must apply equally to both parties. | The most appropriate remedy will be to comply with the law or apply for an exemption if the employer cannot afford to pay the NMW.  Rule 39 of the CCMA is clear with regard to frivolous and vexatious conduct by either party. It should apply equally to both parties. | AGRISA, EOHCB |

**Section 20: Transitional Provision**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Sectoral Determinations | Phasing out will prejudice the rights of workers. Include rights tailored to specific needs i.e. Farm Worker sectoral determination has important provisions regarding housing – repeal without safeguarding protections will severely impact their rights.  The right to make sectoral determinations must be retained. | Despite the deletion of chapter 8 any sector determination in effect at the commencement of the National Minimum Wage Act, 2017 remains in force except to the extent that it prescribes a wage that is less than the national minimum wage (see Transitional Provisions, section 20 of the BCEA). | OXFAM |
| Enforcement - General | The NMW-RI express concern at the capacity of the inspectorate to enforce the NMW and are further concerned at a reference only to education regarding the NMW.  They refer to literature (including by the DPRU) that shows serious systemic problems in the functioning of the inspectorate.  They recommend research to assess what level of fines would deter non-compliance and whether currently stipulated levels are sufficient. | This is not a legal issue. An enforcement strategy for the NMW will be presented to NEDLAC for discussion with social partners.  The appropriateness of the penalties provided for in legislation are reviewed from time to time and consultation on these does take place through the NEDLAC process. | NMW-RI |
| Enforcement | Instead of increasing the workload of the CCMA, the powers of labour inspectors of the DOL to enforce compliance from employers must rather be strengthened. The proposed amendments will render the NMW unenforceable. Enforcement to remain the responsibility of a completely overhauled Labour Inspectorate with extended powers. | Referral to the CCMA will provide a cheaper and more expeditious method of resolving disputes and will avoid claims being split into proceedings before different forums. | OXFAM |

**Short title – Section 21**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
|  | It is submitted that it will be prudent to bring the BCEA Bill into operation on the same date as the NMW Bill rather than on a date immediately thereafter. | This agreed | Provincial Minister ofEconomic Opportunities, WC Govt. |

**Memorandum**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| Clause 9 of the Memorandum of Objects | The Memorandum indicates that amendments to the LRA Bill will be made deal with section 68 and 69 referrals, but there are no amendments to the LRA to this effect. | This will be amended in the Memorandum because there is no need for such amendments.  The amendment has been affected in the BCEA. Clause 9 of the memorandum of objects of BCEA memorandum will be amended by deleting the last sentence of 2.9(b) | Labour & Enterprise Policy Research Group, UCT |

**General**

|  |  |  |  |
| --- | --- | --- | --- |
| **Section** | **Comment** | **Response** | **Comment by** |
| General | Employees who work in hazardous conditions should be paid a danger allowance. | Danger pay is a matter for collective bargaining and hazardous conditions are regulated by the Occupational Health and Safety Act, not the Basic Conditions of Employment Act. | ZS Ntshudu |
| General remarks | The adverse economic conditions facing the agricultural sector and the introduction of a NMW is likely to result in further mechanisation and a decline in employment. | See comment above in relation to ‘Purpose of Act’ for NMW Bill. | AGRISA |
| General | It is proposed that the BCEA Bill be scrutinised and all consequential amendments affected. | This process has been embarked on. | Provincial Minister of Economic Opportunities, WC Govt. |
| General | BCEA does not apply to squid fisherman’s employment, excepting in respect of severance pay. Terms and conditions of employment are regulated by the Merchant Shipping Act (no 57 of 1951).  Squid fisherman is defined as a seafarer.  The Statutory Council for the Squid and Related Fisheries of SA, registered in 2007, protects and regulates conditions for the sector. | The intention is to amend the definition of employee and that the NMW Bill should apply to seafarers. While the Merchant Shipping Act regulates conditions of employment, it does not regulate minimum wages.  An amendment should be made to section 3(3) of the BCEA to include the National Minimum Wage Act after the reference to sectoral determination and we propose that part three, four, five and six should also apply to seafarers. | SEASI |
| Enforcement - General | The NMW-RI express concern at the capacity of the inspectorate to enforce the NMW and are further concerned at a reference only to education regarding the NMW.  They refer to literature (including by the DPRU) that shows serious systemic problems in the functioning of the inspectorate.  They recommend research to assess what level of fines would deter non-compliance and whether currently stipulated levels are sufficient. | This is not a legal issue. An enforcement strategy for the NMW will be presented to NEDLAC for discussion with social partners.  The appropriateness of the penalties provided for in legislation are reviewed from time to time and consultation on these does take place through the NEDLAC process. | NMW-RI |
| Sick leave | That unused sick leave days of 36 in a cycle not be forfeited but be carried over to the next cycle. Days to be used in the next cycle should employee fall terminally in the next cycle. | This matter was discussed by social partners and we believe it is not necessary. | N Matjenjwa,  Nehawu Shopsteward |