

# **Conditions of Employment and Small Business: Coverage, Compliance and Exemptions**

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Development Policy Research Unit  
School of Economics  
University of Cape Town  
Upper Campus

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## Asking whether the Unique Needs of Small Businesses are Adequately Addressed by Labour Market Regulations?

During the 1980s small business began to vociferously oppose labour market regulations, arguing that they threatened the viability of small firms because they did not take into account the circumstances or problems that faced these businesses. Adding weight to their argument was the increasing level of unemployment and the view that small businesses could generate a significant number of new jobs.

Who then was to blame for this apparent sidelining of the needs of small businesses? The finger was pointed at industrial councils, with particular reference to:

- **The extension of industrial council agreements to non-parties.** Registered industrial councils could have the Minister of Labour extend their collective agreements to apply to all employers and employees within the scope of the council, rather than just members of the party organisations. This caused consternation for small businesses who felt that the agreements reached by large businesses were being foisted on them.  
**The exemption system.** If a small business was unhappy with a determination or agreement covering them, they could apply for an exemption. Many small businesses, however, alleged that this system was biased against them.

The 1995 Labour Relations Act (LRA) took cognisance of these concerns, and determined to solve the problem, not by excluding small businesses, but rather by encouraging them to participate in the system, so as to ensure their needs were represented. Consequently the new Act provided that all bargaining councils (the new name for industrial councils) would have to include in their constitutions provision for representation of small and medium enterprises.

Further attempts were made to address the dissatisfaction of small businesses when in 1997 the Basic Conditions of Employment Act (BCEA) made provision for a certain amount of variation and, via a ministerial determination, relaxed certain BCEA conditions for businesses employing less than 10 people.

That said; many small businesses feel that they continue to be negatively impacted by the decisions made by bargaining councils and by the employment conditions set out in the BCEA and sectoral determinations.

## **Laying out the Aims of the Paper**

This paper seeks to establish whether the current statutory and other mechanisms for setting wages and conditions of employment (specifically with regard to bargaining councils and the BCEA) are sufficiently accommodative of small businesses. It does so by focussing on the laws and institutions themselves, to examine:

1. **Coverage and representivity.** This includes:
  - a. Looking at the number of employers and employees covered by such mechanisms and the number that are not covered. This examination is taken further in the case of bargaining councils by splitting their coverage into total coverage and the proportion of employers and employees covered by the extension of agreements.
  - b. Analysing the levels of compliance with the relevant mechanisms, including estimates of the number of unregistered firms.
2. **Provisions for exemptions or variations.** Although changes to the exemption system were introduced in response to the issues raised by small businesses, if these firms still choose to avoid registering with a bargaining council over applying for exemptions then it suggests a substantial problem with the exemption system.
3. **Capacity to enforce agreements.** Information from bargaining councils and the Department of Labour (DoL) provided insight as to how rigorously agreements and determinations are being enforced.

## Understanding the Methodology

To begin with, it is necessary to note that the methodology selected was done so in response to the severe time limitations imposed on the study. This in no way, however, reduces the relevance or accuracy of the research!

Three main research methods were used:

- A questionnaire was sent to the DoL and was followed up telephonically and with meetings with officials to gather data.
- A questionnaire was sent to all private sector bargaining councils, and was followed up telephonically.
- Short telephonic interviews were conducted with 12 bargaining councils with the aim of collecting qualitative evidence.

A word of caution in advance: bargaining councils are diverse institutions, and although data is aggregated in such a way as to generate a broad overview or an indication of trends, the experiences and functions of individual councils may differ greatly from one other.

## **Examining the Workings of Bargaining Councils**

Bargaining councils are voluntary centralised bargaining institutions established within the statutory framework provided by the LRA. They can, therefore, only be established where one or more trade unions or one or more employers' organisations agree to set up a council.

In the sections that follow we (a) examine the functioning of bargaining councils in relation to the Labour Relations Act (LRA) and then (b) go on to analysing research findings with regard to (i) bargaining council coverage and representivity; (ii) enforcement and compliance; and finally (iii) exemptions from bargaining council agreements.

### **The Functioning of Bargaining Councils in Relation to the LRA**

#### **The Issue of Extensions and Representivity**

The primary issue small businesses have with bargaining councils, is that any agreements reached by members of a bargaining council may be extended by the Minister of Labour to include non-parties. In the closing section we deal with changes that could be made to possibly make the system more accommodative of small business interests.

#### **The Issue of Enforcement and Compliance**

Although the new LRA may have worsened the ability of councils to enforce their agreements by de-criminalising non-compliance; section 33A (introduced by an amendment in 2002) makes it easier for council agents to enter workplaces and gather information regarding compliance, and streamlined the enforcement procedure in an effort to secure compliance.

#### **Dispute Resolution**

Another important change that has occurred is that under the new dispute resolution system introduced by the LRA, councils may be accredited to perform conciliations and arbitrations for their sector. Although at face value this may be of benefit to member firms, it places a significant burden on councils because (a) although they receive a subsidy for performing this

role, it is inadequate and therefore puts a drain on their finances, and (b) if inspectors are conducting conciliations and arbitrations, they have less time in which to conduct the inspections necessary to ensure compliance.

That said, bargaining councils generally regard dispute resolution as an important function, so rather than remove this function, we need to investigate ways to ease the burden such as increasing the subsidy to councils.

## **Exemptions**

A number of changes were introduced to the new LRA to deal with the problems around exemptions that had emerged under the old Act. (1) A bargaining council agreement cannot be extended unless the Minister is satisfied that provision is made in the agreement for an independent body to hear appeals from non-party applicants for exemption. This limits the involvement of councils in the granting of exemptions, making the process more impartial. (2) A bargaining council agreement cannot be extended unless the Minister is satisfied that that agreement contains fair and clear criteria that must be applied by the independent body when it considers an appeal. Although the intention is to introduce greater certainty regarding the standards against which exemptions are judged, these criteria still leave a lot of room for interpretation by the council or its exemptions sub-committee. (3) Finally, section 30(1)(k) requires that a bargaining council constitution must set out the procedure for exemptions from collective agreements.

## **Data Collected by the DoL**

The LRA requires that bargaining councils submit certain data to the DoL. This includes providing information on representivity of the parties when applying for registration and when requesting the Minister to extend a collective agreement. It is interesting to note that certain information requested on the relevant forms (such as the representivity of employers' organisations based on the number of their members) is not included by the LRA in the test to measure representivity, and therefore goes beyond the scope of the information required by the LRA.

The major problem with this data, however, is the fact that it is not made readily available or easily accessible to the public. Since much of this data is important for the debate on bargaining councils and their impact on the

labour market, the DoL should be publishing it on a regular basis.

## Research Findings: Bargaining Council Coverage and Representivity

### Bargaining Council Coverage

Drawing on information received from the DoL as well as data gathered beforehand, we find that bargaining councils do not cover a large portion of the specified labour force and that extended agreements cover only a very small portion:

- **32.6 per cent of all workers in occupational categories** that generally would be covered by collective bargaining (as categorised by the 2004 LFS) are covered by bargaining councils.
- **Only 4.6 per cent of all such workers are employed by non-party employers** and are therefore covered by the extension of agreements.
- **There is no bargaining council** for four of the nine major sectors or councils cover an insignificant number of workers, namely: Agriculture, hunting, fishing and forestry; Mining and Quarrying; Electricity, gas and water; and Financial intermediation etc. In addition, two sectors (Construction, and Wholesale and Retail) have very low coverage by bargaining councils.
- **Bargaining councils have significant coverage** in only three sectors, namely Manufacturing; Transport, storage and communication; and Community Services etc. (which includes the public sector).

### Bargaining Council Representivity

When analysing representivity, we split data into three categories: large national and other councils; regional councils and small national councils; and, small regional and local councils.

When looking at the facts presented below, keep in mind that section 32 of the LRA includes these two measures for measuring representivity: (1) the number of employees at party employers as a proportion of all employees, and (2) the members of party trade unions as a proportion of all employees. In

this report we suggest the inclusion of an additional measure would provide a more accurate overview, and we therefore include (3) party employers as a percentage of all employers.

An analysis of total bargaining council representivity shows:

- **Overall councils are representative** on the two measures in section 32 of the LRA. However, when we include the third measure, **only 41 per cent** of employers are members of party employers' organisations.
- **Party employers employ 63 per cent** of all employees.
- **Trade unions enjoy membership by 60 per cent** of all employees covered by councils.
- **Councils fare by far the worst on the third measure**, i.e. members of party employers' organisations as a proportion of all registered employers. In the latter case 24 bargaining councils are less than 50 per cent representative, and in a number of cases representivity on this measure falls well below 50 per cent. Again, the large national and other large council category features prominently, while the small regional and local council category is also significantly unrepresentative.
- **Trade union membership varies**, with nine councils having less than 50 per cent representivity and a further four having exactly 50 per cent. Large national and other councils fare particularly badly, accounting for five of the nine unrepresentative councils on this measure.
- **All councils fare the worst on the third measure.** Under this measure, bargaining councils are less than 50 per cent representative, again with large national and other councils faring worst.

### **Bargaining Council Representivity and Size of Firms**

When one puts together the results of the two measures of employer representivity mentioned above, the implication is that the party employers organisations on many bargaining councils are made up of larger employers. When analysing this in more detail by looking at the average size of both party and non-party employers for each council, one finds that:

- **The average size of firms covered by bargaining councils is small.** This is an important finding: as it indicates that by and large, the bargaining



council system **comprises small firms.**

- **Overall the size of party firms is larger** than the size of non-party firms
- **The smaller the council the smaller** the average size of firms while the average size of firms at large councils is bigger.

### **DoL Data on Small Business Representation on Councils**

This data provides further insight on the issue of small businesses covered by councils and their representation, and indicates that small firms:

- **Are actually participating** in bargaining councils, as can be seen by the fact that relatively large numbers of small firms covered by bargaining councils are members of party employers' organisations.
- **Have greater representation** at smaller councils.
- **Are generally fairly well organised** by party trade unions.

### **Qualitative Interviews Regarding Small Business Representation**

Interviews with nine bargaining councils give us a qualitative understanding of the representation of small businesses:

- **Only one council** had a member employers' organisation that specifically represented small business. (The Metal and Engineering Bargaining Council.)
- **Employer representatives were nominated** to represent the interests of small businesses at six of the remaining councils.
- **Representation was seen as effective** in most cases, although there were concerns that small business representatives were in the minority and that in all cases they could be outvoted.
- **A number of councils felt much could be done** to improve the representation of small businesses such as lowering the thresholds (employee numbers or percentages) for admitting new employers' organisation parties or the introduction of an annual DoL survey to identify

the needs and problems of small businesses with regard to bargaining councils.

### **Non-Compliance (i.e. Non-Registration)**

When bargaining council officials were asked to estimate the levels of non-compliance by employers, ten out of twenty-nine councils would not even hazard a guess. Of the nineteen councils that did reply, responses indicate that **some councils considered non-registration a problem and some did not**. According to five councils; less than 5 per cent of employers were unregistered. Ten other councils place the figure at 20 per cent or higher, and still others place it as 40 per cent or above.

Although opinions vary, what can be said is that **the levels of non-registration at some bargaining councils is significant and that this poses a threat to those councils**. At the very least, taking account of non-registered firms would lower the representivity of those councils. This, of course, presents a further issue, namely that to a certain extent parties to councils may not wish to identify unregistered firms, as doing so decreases their representivity.

### **Benefit Funds, Services and Wages**

How then can councils make inroads into the levels of non-registration? There are four apparent avenues:

1. **Agreements can be more effectively enforced.**
2. **More accommodating agreements** may be implemented. For example, currently 12 councils (of 29 councils) have some form of wage differentiation, primarily between workers in rural and urban areas. This illustrates that a large minority of councils are attempting to accommodate differing sectoral and regional circumstances in their agreements. It is arguable that more councils could be doing this.
3. **A fair and transparent exemption system** would go a long way towards encouraging membership.
4. **Attractive benefits and service offerings** can be used by councils to attract members.
  - Benefits have long been a key aspect of bargaining councils, with pension funds being the most prevalent benefits currently administered, followed by sick pay and sick benefit funds and finally holiday funds. These are advantageous to employers, as it releases them from the onus

of providing these benefits.

- As regards services, many councils have been lax in this area. That said, the most prevalent services administered by councils to assist firms are: paralegal services followed by staff training, disciplinary hearings, payroll administration and dispute resolution.

## Research Findings: Enforcement and Compliance

### Bargaining council agents (inspectors) and inspections

When councils were asked how many agents each had in 2000, 2002 and 2004 and if they were employed full or part time:

- **Numbers of agents differ greatly** from nil to thirty-nine.
- **The biggest number of agents** is employed at large councils and the least at regional and small councils.
- **There was a substantial increase** in the number of agents in the large national council category.
- **The ratio of agents to employees varies** across councils, from 1:23 000 in the Textile bargaining council to 1:8799 in the Metal and Engineering bargaining council. At regional councils the ratio seems to be more favourable, with one agent to less than two thousand employees.
- **Numbers of inspections conducted per year differ greatly** from nil to 1 560. It appeared that smaller, regional or local councils conducted more inspections per agent.
- **Not much time was spent tracking unregistered firms.** Eleven out of 27 councils stated that agents spent 10 per cent or less of their time on this activity. On the other hand this figure rose to over 50 per cent at four smaller, regional councils.

## Compliance Orders

When asked how many compliance orders were issued in 2000, 2002 and 2004, most councils only presented figures for 2004, and these indicated:

- **The number of compliance orders issued varies greatly** from nil to 3 500, with the largest numbers issued by three national councils.
- **A high number of these resulted in compliance** and a relatively small portion was referred to arbitration.

## Research Findings: Exemptions from Bargaining Council Agreements

When looking at exemptions, we find that:

- **The approach to processing applications varies**, with some councils submitting applications to a sub-committee, some councils handling the matter themselves and others referring it to an independent body.
- **Criteria for exemptions are usually published** in a collective agreement and/or the council's constitution. Criteria range from the nature and size of the business to whether a refusal to grant the exemption will result in undue financial hardship.
- **The procedure for applying for exemption** is fairly standard. In general an applicant submits a written application which may be accompanied by an appearance in person. This application is then submitted to the parties who may present their views on it. The majority of councils then reported they would submit an answer within two weeks, and where the application was refused, also a written reason of refusal.
- **Certain councils reported granting conditional exemption** in certain instances (eighteen councils in all) while ten stated that they did not do so.
- **A total of 2 783 applications for exemption were made** in 2004. Of these, small businesses had a slightly higher success rate.

- **The number of applications rose sharply between 2000 and 2002** and then dropped slightly in 2004. When one disaggregates this into the three categories of councils we see that for:
  - Large national councils, applications increased sharply by 67 per cent in 2002 and then dipped in 2004. The success rate, however, shows a steady decline.
  - In the regional and small national council category the number of applications increases slightly between 2000 and 2002, and then rises sharply in 2004 (up 58 per cent on the 2000 figure). The success rate of applications granted in full was much lower than overall rate: 40 per cent in 2000, 32 per cent in 2002, and 16 per cent in 2004 (but this increases dramatically when one includes partially granted exemptions and conditional exemptions).
  - The small regional and local council category shows an increase in the number of exemption applications, ending 74 per cent up on the 2000 total. In this case the success rate of applications is high and almost constant, both for the exemptions granted in full and when one includes the partially granted exemptions and conditional exemptions.
- **Only a small portion of exemptions were taken on appeal** although this number increased overall between 2000 and 2004.
- **Applications from medium-sized and large firms** declined over the five years.
- **Small firms submitted the largest portion of exemptions** and these increased over the period.
- **The refusal rate for exemption applications dropped overall** from 27 per cent in 2000 to 26 per cent in 2002 to 22 per cent in 2004.
- **The vast majority of applications are from non-parties.** This is significant in that much of the controversy about exemptions is essentially about non-party applications.
- **Generally exemptions are applied for only once**, with repeat applications being very low.

- **Very few applicants want total exemption** with the largest proportion of applicants seeking exemption from council benefit funds.
- **There is a slightly higher refusal rate for non-party firms.**
- **Blanket exemptions were granted** by ten out of twenty-seven councils:
  - Of these, six based them on the size of the business while four based it on the type of business.
  - In the majority of cases a business first had to register before applying for the blanket exemption.
  - Blanket exemptions do not cover a large number of employees, but cover a quite large number of firms.

## Examining the BCEA and Sectoral Determinations

The BCEA applies to all employees in South Africa, excluding only employees of the SANDF and the two secret service agencies, and provides a floor of minimum employment conditions with which all employment contracts must comply, covering approximately 7.15 million employees.

Taking into account that labour realities vary between industries, geographical areas, size of businesses and so on, the Act makes provision for certain conditions of employment to vary, while still maintaining a set of core conditions that cannot be varied.

In the sections below we examine (a) the BCEA, determinations and enforcement and follow on with (b) research findings on the BCEA and sectoral determinations.

### The BCEA, Determinations and Enforcement

**Sectoral determinations** can deal with a wide range of minimum terms and conditions, including minimum wages.

**Ministerial determinations** also deal with a wide range of minimum terms and conditions, but these determinations do not set minimum wages.

**The responsibility for policing the enforcement of the BCEA** falls on the shoulders of the DoL inspectorate. Having decriminalised non-compliance, the new procedure to ensure compliance is as follows:

1. The inspector attempts to secure a written undertaking from a non-complying employer in which the employer undertakes to comply with the Act and make any payments owing to employees as a result of the non-compliance.
2. A compliance order is then issued and served by the inspector on the relevant employer(s). The compliance order must set out the provisions that have not been complied with, any amounts the employer is required to pay, the steps the employer must take to rectify the non-compliance, and the fine that may be imposed if the employer fails to comply.

3. The employer can object to the compliance order to the Director-General (DG) who can confirm, modify or cancel a compliance order or any part of an order.
4. The employer can then appeal to the Labour Court from the decision of the DG.
5. The order may then be suspended pending the final determination of the appeal by the Labour Court. The DG may also apply to the Labour Court for a compliance order to be made an order of the Labour Court.

### Research Findings: The BCEA and Sectoral Determinations

When looking more closely at the coverage and enforcement of determinations, and at the application for exemption, one finds that:

- **Sectoral determinations cover 3 445 726 employees** in total, and 1 006 500 employers in total.
- **It is not known how employers and employees are covered by ministerial determinations.**
- **706 inspectors are employed by the DoL** to ensure compliance with the BCEA. They conducted a total of 180 070 inspections between April and December 2004, which would give a total of 245 000 inspections a year.
- **A total of 2 008 compliance orders were issued** by inspectors during 2003 and 2 241 in 2004.
- **A compliance level of 70 per cent is achieved** within 60 days of cases being reported.
- **According to the DoL applications for variation (exemption) are generally finalised within 30 days** and written reasons are given when they are refused.
- **25 per cent of applications were granted** in 2002/2003 while 72 per cent were not finalised. The approval figure dropped to 16 per cent in 2003/2004 while 81 per cent were not finalised. A far higher proportion



(46 per cent) were granted in 2005/2006 with only 31 applications not being finalised.

## Drawing Conclusions and Making Policy Recommendations

Several changes to legislation and operating procedures could ensure that small businesses feel less sidelined as concerns the extension of council agreements to non-parties:

- **An additional criterion could be added** with regard to determining whether a bargaining council agreement can be extended; namely that the party employers' organisation(s) must represent a certain proportion (this does not need to be as high as 50 per cent) of the total number of employers. This would combat the current bias against representation by small firms and encourage employers' organisations to recruit smaller firms as members, thereby forcing them to be more accommodating of small firms' interests.

When it comes to making councils more representative of the needs of small businesses:

- **It is the efficacy and not the size** of representation that should be questioned. One of the most surprising findings of this survey is the fact that 40 percent of small businesses were members of party employers' organisations at 11 of 27 councils, meaning it is not the numerical representation one needs to improve, but how effective that representation is.
- **There should be greater pressure on parties** to recruit small businesses.
- **If more small businesses participated in councils**, they would have an opportunity to air concerns and have their interests addressed while improving their representivity.

When 9 councils were asked how small businesses could be more effectively represented one submitted that:

- **There must be a compulsory minimum** of one employer and one employee representative on councils to present small businesses.
- **The DoL needs to conduct an annual survey** to identify their needs and problems.
- **Recognition needs to be given to the number of small businesses represented** by employers' organisations rather than how many employees the members employ.
- **The thresholds for admission** (based on employee numbers or percentages) of new employers' organisation parties should be lowered as these are barriers to small business representation.
- **There needs to be a review of the definition** of small, medium and micro businesses.
- **Bargaining councils must report annually** on the steps taken to accommodate small businesses.

If you would like more information on the information contained in this document, on the specific statistical data, or if you have any queries or questions; please feel free to contact the DPRU.