



**Labour & Enterprise Policy
Research Group**

**An examination of how the National Minimum Wage can be optimally
accommodated by the existing labour legislative framework**

Report submitted to the Friedrich Ebert Stiftung (FES)

**Shane Godfrey and Mario Jacobs
Labour and Enterprise Policy Research Group
University of Cape Town**

16 August 2017

Acknowledgements

We would like to thank the Friedrich Ebert Stiftung (FES) for funding this research. We would also like to thank a number of anonymous colleagues and associates who made an important contribution to this report through discussion, comments and criticisms. They know who they are. The usual disclaimer applies with regard to the arguments made in the report and any errors.

Table of Contents

1. Introduction	4
2. Research questions and methodology	6
3. Amending the BCEA or a separate statute to introduce the NMW?	7
3.1 Option 1: The NMW as a sectoral determination	8
3.2 Option 2: The NMW with a separate status within the BCEA	14
3.3 Option 3: The NMW in a dedicated statute	15
4. Part A: An examination of relevant legislation	18
4.1 Basic Conditions of Employment Act	18
4.2 Labour Relations Act	36
4.3 Employment Equity Act	40
4.4 Occupational Health and Safety Act	42
4.5 Skills Development Act	42
4.6 Skills Development Levies Act	43
4.7 Compensation for Occupational Injuries and Diseases Act	43
4.8 Unemployment Insurance Act and Unemployment Insurance Contributions Act	44
4.9 Employment Services Act	45
4.10 Employment Tax Incentive Act	46
5. Part B: An examination of selected sectoral determinations and bargaining council agreements as well as a ministerial determination	46
5.1 Sectoral determinations	46
5.2 Ministerial determination	52
5.3 Bargaining council agreements	53
6. Recommendations	57
Annexure A: Customised provisions in selected SDs and a MD	62

1. Introduction

A few years ago the African National Congress (ANC) resolved to introduce a national minimum wage (NMW). The aim of such a measure is primarily to reduce poverty and inequality, two of the three major challenges confronting South Africa. The third challenge, unemployment, has a more complicated and potentially contradictory relationship with the proposed NMW. The impact of the NMW on poverty, inequality and employment (with the last-mentioned getting the most attention) has been an important question within the negotiations in NEDLAC over the last 18 months under the chairpersonship of the Deputy President of South Africa.

Considerable research, mainly by economists, has been done on various aspects of the proposed NMW, in particular the amount or level at which the NMW should be set. The notable exception is *Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa*.¹ That paper examines key policy choices that need to be made with regard to a NMW. These are how the NMW is set (i.e. what forum, who is involved and what process?); the level(s) of the NMW (i.e. should there be tiers, should these be phased out over a period?); who does the NMW cover (i.e. who is included and who is excluded?); what constitutes the wage in the NMW (i.e. the gross wage or net of contributions, performance pay, allowances, in kind benefits, loan repayment, etc.); what is the reference period for the rate (i.e. hourly, weekly, monthly?); what are the implications for hours of work (i.e. minimum and maximum hours?); will there be exemptions (i.e. what types, what process?); methods for incentivising compliance with the NMW; and, how should the NMW be enforced (who by, what process, what penalties?). However, the paper does not deal in any detail with the existing legislative framework and how the NMW would fit into it.

More recently, the expert panel/advisory panel (hereafter ‘the Panel’) appointed by the Deputy President to investigate key aspects of the NMW published its report, *A National Minimum Wage for South Africa*.² While much of the report is concerned with the critical question of the level at which the NMW should be set, it also gives attention to how the NMW could be implemented. Although the NEDLAC constituents are not bound to follow the recommendations of the Panel, the report provides a useful guide as to what the NMW might look like for the purpose of this study.

The Panel recommends that the NMW be set at R20 per hour. It recommends, further, that the NMW become effective from 1 July 2017, but that it should not be enforced via penalties for two years; employers would be encouraged by technical assistance and persuasion to comply in this period. Thereafter, enforcement will be based on financial penalties (but with a further delay of a year for small businesses). The Panel also recommends that adjustment of

¹ Ruth Castel-Branco. 2016. Policy Considerations for the Design and Implementation of a National Minimum Wage for South Africa. National Minimum Wage Research Initiative, Summary Report 2, University of the Witwatersrand.

² National Minimum Wage Panel. 2016. A National Minimum Wage for South Africa: Recommendations on Policy and Implementation. Report to the Deputy President.

the NMW be evidence-based and take place only in 2020, which would allow for an assessment of data regarding its impact over the period since implementation.

The Panel supported the principle that the NMW should have minimal exclusions. Only own-account (or self-employed) workers and paid or unpaid family workers in informal enterprises should be entirely excluded from the NMW, along with Expanded Public Works Programme (EPWP) and learners covered by the Learnership Sectoral Determination (SD). However, certain ‘sectors’ would be phased in to the NMW: small businesses, as noted above, would be excluded from enforcement for an additional year beyond the two-year grace period; and the Panel recommended that the minimum wage for farm workers and forestry workers be set at 90% for a year, and the wage for domestic workers be set at 75% for a year, with subsequent adjustment based on evidence. Furthermore, it recommended that an exemption system be provided for employers to apply for exemption from the NMW.

Finally, the Panel recommended that a new body be established for monitoring and reviewing the NMW, which together with the Employment Conditions Commission (ECC) and the Employment Equity Commission (EEC) would form part of a new institution, the Decent Work Commission (DWC). The DWC would focus on three areas: employment conditions, employment equity and the NMW, with each getting the attention of an expert panel. The NMW expert panel would comprise 10 part-time deputy commissioners, six of which would represent organised business and organised labour, while the remaining four would have expertise in the labour market, macroeconomics, the informal economy, and poverty and inequality.

The Panel’s report was followed in February 2017 by the *Agreement on the Introduction of a National Minimum Wage* (hereafter ‘the NEDLAC Agreement’). The NEDLAC Agreement indicates that the NMW will be introduced in a dedicated statute, that the minimum wage rate will be R20 per hour, and it sets 1 May 2018 as the deadline for the implementation of the NMW. The NEDLAC Agreement, furthermore, proposes the establishment of the NMW Commission, which will adjust the NMW annually (and suggests that the NMW Commission will also be responsible for reviewing the NMW). No businesses (including small firms and start-ups) will be excluded from the application of the NMW Act, but there will be provision for exemptions on application by individual firms. Such exemptions will reduce the minimum wage for a firm via a percentage of the NMW and will be valid for a maximum of 12 months. However, as an interim measure domestic workers will be paid a minimum of 75% of the NMW and farm workers will be paid a minimum of 90%. Both sectors will be phased into 100% within two years, pending research by the NMW Commission on this timeframe.

The NEDLAC Agreement requires that the ‘minima’ in all sectoral determinations, collective agreements, bargaining council agreements and individual contracts of employment must comply with the NMW Act, and that no wages or conditions of work that they prescribe that are more favourable than the NMW can be unilaterally decreased after its introduction. In this regard it is important to note that the NEDLAC Agreement refers not only to wages but also to other minimum conditions of employment. However, the NEDLAC Agreement does not deal in any detail with the need for alignment between the NMW Act and the ‘minima’ in

sectoral determinations and bargaining council agreements (or indeed the BCEA). Subsequent information sharing sessions conducted by the Department of Labour (DoL) added more flesh to the NEDLAC Agreement, but some of the proposals that were made have not yet been agreed to by the social partners in NEDLAC, while others leave many questions unanswered.

Neither the report of the Panel or the NEDLAC Agreement therefore deal in any detail with how the NMW will be introduced into the existing legislative framework. The aim of this study is to fill this lacuna. The existing legislative framework regulates, amongst other things, the setting of wages and working conditions, either through (a) collective bargaining, or (b) administratively through the issue of sectoral determinations (SDs), over and above (c) the ‘floor’ of working conditions provided by the Basic Conditions of Employment Act (BCEA). Our task is therefore to determine how the NMW will best ‘fit’ into the existing legislative framework for labour relations and the labour market, in particular the BCEA (and the SDs it provides for) and the collective bargaining system enabled by the Labour Relations Act (LRA). The objective is to recommend how to optimise the ‘fit’ taking account of the objectives of the NMW as well as the aims of existing labour legislation.

The exercise is therefore located in a space between a consideration of policy options (examined in the paper by Castel-Branco) and the more technical exercise of legal drafting (or, at least, compiling drafting instructions). The study recognises the recommendations of the Panel and the provisions of the NEDLAC Agreement, but its aim is not to directly respond to either; it is primarily concerned with how the NMW, in whatever form it is introduced, will interact with the existing legislative framework. The study is therefore mainly ‘legal’ but it does deal with policy choices, some of which have already been made in the NEDLAC Agreement, while others remain choices that the NEDLAC constituents still need to make. In some cases, the study raises major legal issues that also involve policy choices but often it merely points to existing provisions that could quite easily be amended or accommodated in the drafting of the NMW provisions.

We make, as far as possible, substantiated recommendations with regard to the issues the study raises in line with our aim to identify how the ‘fit’ or alignment of the NMW can be optimised. In some cases, however, we are able to merely point out the implications of different options without taking a definite position on which is optimal.

2. Research questions and methodology

The introduction of a NMW gives rise to two key questions:

- (a) What are the potential points of conflict and synergy between the existing legislative framework and the NMW?
- (b) Having answered the above question, how can those points of conflict be best resolved through the design of the NMW, either in the form of a dedicated NMW Act and/or the amendment of the existing legislative framework?

We answer these questions by, first, examining the existing legislative framework. This focuses primarily on the following statutes:

- Basic Conditions of Employment Act
- Labour Relations Act
- Employment Equity Act
- Occupational Health and Safety Act
- Skills Development Act
- Skills Development Levies Act
- Compensation for Occupational Injuries and Diseases Act
- Unemployment Insurance Act
- Unemployment Insurance Contributions Act
- Employment Services Act
- Employment Tax Incentive Act

As noted above, when examining the legislative framework we will have in mind the various policy considerations identified by Castel-Branco as well as the relevant recommendations of the Panel and the provisions of the NEDLAC Agreement, but the statutes will be the main reference point for the study.

The study also examines existing measures that set minimum wages and other conditions of employment, i.e. SDs and bargaining council (BC) agreements. The above questions apply to this exercise, i.e. what are the potential points of conflict between the NMW and these measures and how can these points of conflict best be addressed. It has not been possible to examine all the SDs and BC agreements in the timeframe available for the project, so we have focused on the following:

- SD for Domestic Work
- SD for Farm Workers
- SD for Wholesale and Retail
- SD for Private Security
- SD for Learnerships

- BC Main Agreement for the Motor Industry (National)
- BC Main Agreement for the Clothing Industry (Non-Metro Areas)
- BC Main Agreement for the Road Freight Industry (National)
- BC Main Agreement for the Hairdressing Industry (National)
- BC Main Agreement for the Contract Cleaning Industry (KZN)
- BC Main Agreement for the Furniture Industry (Semi-national)
- BC Main Agreement for the Building Industry (Cape)

We also examine wages and working conditions prescribed for the Expanded Public Works Programme (EPWP) via a Ministerial Determination (MD).

The above SDs, the MD and BC agreements cover a large number of employees as well as a range of sectors: primary, manufacturing, retail, transport, services, private households, and public works job creation programmes. A number of these sectors comprise extremely vulnerable workers and high levels of non-standard employment.

3. Amending the BCEA or a separate statute to introduce the NMW?

The first question one encounters when considering the introduction of the NMW is whether it can be incorporated into an existing statute or whether it should be in the form of a dedicated statute. If one considers incorporating the NMW into an existing statute, it would have to be the BCEA. This issue, however, goes beyond expediency or the purely legal: it is about (a) whether existing procedures and institutions are adequate (i.e. capacity and expertise); (b) the wide impact of the NMW (i.e. the economic and labour market implications of the NMW); (c) what weight will be given to the recommendation of body of stakeholders and experts in the process to adjust the NMW; and (d) to what extent one wants to elevate the policy ‘status’ of the NMW (i.e. who will make the decision to adjust the NMW and how will coordination with other relevant policies be achieved). Although the NEDLAC Agreement reached by the social partners indicates that there will be a dedicated NMW statute, we have sought to unpack the legal and other arguments for favouring one or other option.

The current BCEA provides that all ‘basic conditions of employment’ are incorporated into an employee’s contract of employment. It therefore sets a floor of minimum conditions across the labour market. In addition, the Act establishes a procedure for the issue of SDs and enables the establishment of the Employment Conditions Commission (ECC), which has an important role in the procedure to arrive at SDs. SDs usually introduce a minimum wage or a schedule of minimum wages for a sector as well as ‘customising’ certain of the BCEA’s conditions for the unique circumstances of sectors. Another procedure empowers the Minister of Labour to introduce ministerial determinations, which also provide for variation of conditions in the BCEA, including variation by application (or exemption). Bargaining councils are regulated by the LRA. In most cases bargaining council agreements will provide better standards than the BCEA but the BCEA gives bargaining councils the authority to “alter, replace or exclude” by agreement a substantial number of its provisions (section 49(1)). In effect, bargaining councils have the power to also ‘customise’ parts of the BCEA for the circumstances of their sectors. Finally, the BCEA establishes a procedure for enforcement and the prosecution of non-compliance with its provisions as well as with SDs and MDs.

If the NMW was to be incorporated into the BCEA one needs to decide if it will be a SD (albeit an all-encompassing determination) or would it have a separate and special status within the Act. The alternative is a dedicated statute for the NMW that establishes, amongst other things, a procedure for reviewing and adjusting the NMW. These options are examined below.

3.1 Option 1: The NMW as a sectoral determination

An amendment to the BCEA in 2013, which changed the definition of ‘sector’ (section 1) and added a new power to the Minister regarding SDs (section 55(8)), paved the way for the NMW to be introduced as a SD that would cut across sectors. Such a SD could therefore apply to all sectors and sub-sectors across the country that are currently not covered by a bargaining council agreement, statutory council agreement, or a SD.³ It could therefore fill all the ‘gaps’ between existing wage measures and would constitute a national minimum wage of sorts.

In strictly legislative terms this option would therefore be a quite easy ‘fit’ for the NMW: all the existing provisions in the BCEA regarding remuneration and wages, the initiation and review of sectoral determinations, and the content of sectoral determinations, as well as variations (exemptions), and enforcement, would apply without any major changes needed. The question is whether introducing the NMW as a sectoral determination that cuts across sectors would be optimal for the NMW? We address this question below after a more detailed examination of this option for the NMW.

Sectoral determinations are produced following an instruction from the Minister of Labour (MoL) to the Director-General (D-G) to conduct an investigation into conditions of employment in the identified sector and area. This can be at the discretion of the Minister or following a written request for an investigation by an employers’ organisation or an organisation representing employees. In the latter case the Minister must either order the investigation or must request the advice of the ECC regarding the need for an investigation. Although section 52(4) is peremptory regarding one or other of these actions on the part of the Minister, it appears that the Minister is not bound to order an investigation if the advice of the ECC is that it is not necessary.⁴

Once the Minister issues the instruction she must publish a notice in the Government Gazette setting out the terms of reference and inviting written representations by members of the public.

The Act provides limited guidelines for the conduct of the investigation by the D-G,⁵ so a great deal is left to the D-G’s discretion. In practice, it seems that there are three main components to an investigation: first, consideration of the written representations by members of the public; second, research is conducted, either by the DoL or commissioned from an

³ If the SD has been in effect for less than 12 months.

⁴ It is unclear what the situation would be if the ECC advised in favour of the investigation but the Minister did not issue an instruction to the D-G.

⁵ The D-G has significant powers in respect of the investigation. The D-G may question any person who may be able to provide relevant information, or request written information (or document, book or object) that is material to the investigation from any employer or employee. A person may not refuse to answer any relevant question posed by the D-G.

outside organisation(s);⁶ and third, public hearings are held for oral input by organisations and individuals.

Once the investigation is done the D-G prepares a report that is submitted to the ECC. The ECC must consider the report and advise the Minister on the publication of a sectoral determination. In providing this advice, the ECC must take into account the following:⁷

- the report by the D-G;
- the ability of employers to carry on their business successfully;
- the operation of small, medium or micro-enterprises, and new enterprises;
- the cost of living;
- the alleviation of poverty;
- conditions of employment;
- wage differentials and inequality;
- the likely impact of any proposed condition of employment on current employment or the creation of employment;
- the possible impact of any proposed conditions of employment on the health, safety or welfare of employees; and,
- any other relevant information made available to the ECC.

It appears that the ECC must consider all of these factors when advising the Minister.

The ECC then prepares a report that it submits to the Minister which contains recommendations on the matters that should be included in the sectoral determination. The wording of the section suggests that the ECC cannot recommend not publishing the determination. The ECC is instead limited to which conditions to include in the SD and the nature (or levels) of those conditions. If the Minister does not accept a recommendation of the Commission she may refer it back for reconsideration, indicating the matters with which she disagrees. Thereafter the Minister may consider the further report of the ECC in respect of the issues where there was disagreement.

The Minister, after considering the ECC's report and recommendations (and possibly a further report if there had been disagreement), may make a sectoral determination for one or more sectors and areas, including one that applies to employers and employees who are not covered by any other sectoral determination (i.e. the cross-sectoral determination enabled by the 2013 amendment). The powers of the Minister in respect of such a sectoral determination include, amongst other things, setting minimum terms and conditions of employment, including minimum rates of remuneration, as well as providing for the adjustment of remuneration by way of minimum rates or minimum increases.

⁶ It appears that substantial research is done only when a sector is being investigated for the first time pursuant to a sectoral determination being introduced. The periodic reviews of sectoral determinations that have taken place to date seem to have involved little or no additional research.

⁷ It should be noted that the *Agreement on the Introduction of a National Minimum Wage* proposes a number of additional factors that will be considered when the NMW is to be adjusted, including GDP growth, productivity, collective bargaining, as well as an aspirational target for the NMW.

If the NMW is to be introduced as a sectoral determination the ECC will play a key role. This raises the issue of the composition and powers of the ECC. The ECC comprises five members (excluding alternate members), three of whom are ‘experts’ with regard to the labour market and conditions of employment. They are appointed after consultation by the Minister with NEDLAC. The remaining two members (and alternates) are appointed following nominations by the voting members of NEDLAC representing organised labour and organised business respectively. The chairperson is designated from amongst the ‘expert’ members.

The ECC is an advisory body only. Its remit is to advise the Minister regarding: sectoral determinations; any matter concerning basic conditions of employment; any matter arising out of the application of the BCEA; the effect of government policies on employment; trends in collective bargaining and whether any trends undermine the purpose of the BCEA; any matter concerning the employment of children (this advice to the Minister of Labour and the Minister of Welfare and Population Development [sic] i.e. Social Development); and any matter concerning basic conditions of employment in the public service (this advice to the Minister of Labour and the Minister for the Public Service and Administration). In performing any of these functions the ECC may hold public hearings at which it may permit members of the public to make oral representations (it is unknown if the ECC has ever held public meetings).⁸

The Minister must provide the ECC with the staff that she considers necessary for the performance of its functions. The Minister, furthermore, must direct the D-G to undertake research that is required to enable the ECC to perform its functions. However, it is questionable whether the ECC has been provided with the necessary staff and data.

A number of questions can be raised about the suitability of the above process and the respective capacities and powers of the D-G/DoL, the ECC and the Minister with regard to the NMW. The first point is with regard to the capacity of the D-G/DoL to conduct the sort of investigation that would be required to review the NMW. If the D-G/DoL relies on outside research, there is a question about who is commissioned to do the research, what would be the nature of the research, who analyses the findings, and what weight its recommendations would carry.

Much the same point can be made about the ECC. The members of the ECC are part-time and therefore have limitations on their capacity. For example, it is unknown to what extent the ECC has performed many of its statutory functions (see above), other than to advise the Minister regarding sectoral determinations. Furthermore, it seems that the secretariat of the ECC is under-staffed and under-resourced. It therefore does not appear to have anywhere near the capacity to engage with something as significant as the review of the NMW.

One example that points to the limited capacity within the current sectoral determination process is the Farmworker Sectoral Determination (SD). This is discussed briefly below.

⁸ The Department of Labour holds public hearings regarding SDs and other matters, but we are not aware of the ECC ever holding a public hearing.

The 2012 De Doorns strike/protests and the Farmworker Sectoral Determination (SD)

In 2011 a review was done of the Farmworker SD and the minimum wage was raised from the beginning of 2012 to an effective minimum daily rate of R69. Within a year spontaneous strikes and protests erupted in parts of the Western Cape agricultural sector in support of a demand for a daily wage of R150, i.e. more than double the minimum rate set in the SD less than 12 months earlier.

The response of the Minister of Labour and DoL was to review the SD again as soon as possible (despite the fact that the existing wage schedule provided increases for 2012, 2013 and 2014). By all accounts this review process, although done in a rush, was far more inclusive than the previous investigation and allowed for quasi-negotiations to take place between farmworker trade unions and organised agriculture. The Bureau for Food and Agricultural Policy (BFAP) was also asked to conduct research for the purpose of the review. The outcome of the review was the introduction of a new wage schedule at the beginning of 2013 that introduced an effective daily wage of R105, which is the rate recommended by BFAP. This meant that about one year after a review to introduce a minimum daily wage of R69, another review raised the wage by 52%. The increase ended the strike and protests although it did not meet workers' demand for a minimum wage of R150 per day.

There are a number of points that can be made about the shortcomings of the original (2011) review process. First, the ECC report in which the wage increase to R69 per day was recommended states that the DoL investigation had two steps. The first step was that written representations were invited from interested parties regarding the review. Only ten written representations were received, of which only three were from trade unions or worker aligned organisations. The second step was a series of public hearings across the country. A total of 30 public hearings were held and a total of 696 workers attended the hearings (out of approximately 650 000 workers in the sector, i.e. about 0.1%). Some trade unions, however, also attended the hearings, which probably raised the effective level of representation of workers somewhat (trade unions in the sector represent only about 5% of employees in the sector).

Second, the report of the ECC considers certain, very limited, economic data on the agricultural sector, employment trends, and so on. It also takes account of submissions by stakeholders and oral representations by workers at the public hearings. But it appears to place the greatest weight on the recommendations of the DoL investigation. The DoL recommendations were generally slightly above what the employer stakeholders had recommended.

The strike and protests, and the huge increase that workers won for themselves, underline the fact that the process to investigate and review sectoral determinations is not rigorous enough. It also appears that substantial research is only done when the need for a sectoral determination in a sector is investigated for the first time. Subsequent reviews appear to involve no more than a brief overview of some key economic and employment indicators. Furthermore, some of these reviews produce SDs that have a three-year period of effectiveness, with wage increases in the second and third years determined by the CPI plus two or three per cent. This is not adequate, which the research done by BFAP clearly showed.

The third point is with regard to the Minister of Labour. The Minister has significant powers with regard to sectoral determinations, albeit acting on the advice of the ECC. The question is

whether one Minister should be responsible for the adjustment of the NMW? The NMW will have a much wider impact than any SD or bargaining council agreement.⁹ It would arguably have implications for macroeconomic policy, industrial policy, agricultural policy, rural development policy, and social welfare policy (at least to a much greater extent than any SD or bargaining council agreement). If so, the setting and review of the NMW needs to take account of its implications for these other policies. This suggests a much more high-profile and representative body for making the decision about adjusting the NMW. One needs a body that has an appropriate policy status (see further below).¹⁰

The fourth point relates to both the procedure to review the NMW and who decides about adjusting the NMW. The introduction of the NMW has been negotiated by the social partners over a lengthy period in NEDLAC under the chairpersonship of the Deputy President (which negotiations are still on-going at the time of writing). The negotiations have been informed by an expert panel as well as by considerable data generated by independent researchers. The fact that the process has taken place in NEDLAC has ensured relative independence from government. Finally, the negotiations have been behind closed doors but at certain points the process has received considerable publicity (e.g. the release of the Panel's report and the signing of the NEDLAC Agreement). Arguably the process to review and adjust the NMW holds almost equal importance and consequence as the introduction of the NMW. The implication is that the review and adjustment process should be of the same status as the process to introduce the NMW.

However, the process to review and adjust SDs has limited involvement by the social partners, appears to be informed by very little research or empirical evidence, leads to a decision by a single minister, and has little or no visibility outside the DoL.

We believe that it will be a mistake to locate the NMW in a flawed and weakly capacitated procedure that is buried inside the DoL. The importance of the NMW means that a strong, well-resourced body is needed for its review, and more so a body that is adequately representative of the social partners (in terms of number of representatives, time available and expertise). It should also have a certain independence from government, which suggests it should be housed elsewhere than the DoL. And as indicated above, the decision about adjusting the NMW should be by more than one minister. This argument is developed further below with regard to options 2 and 3.

The above points suggest that the problems that will arise from locating the NMW within the BCEA as a SD outweigh the advantages and will detract from its optimal implementation.

⁹ The MoL has the authority in terms of the LRA to extend bargaining council agreements subject to certain conditions. Extension of the agreement applies its provisions to all employers and employees within the jurisdiction of the council.

¹⁰ It should be noted that there is nothing in the BCEA that precludes the DoL and the ECC from adopting more inclusive approaches to their respective tasks, which could include more structured engagement with organised business and labour in sectors. As noted above, the Act leaves a lot of discretion in the hands of the D-G and the ECC as to what they do. The reason they do not engage in more extensive processes is probably their limited capacity.

3.2 Option 2: The NMW with a separate status within the BCEA

If one accepts that the NMW must have a separate status to sectoral determinations, the question remains whether this should be done as an amendment to the BCEA or requires a dedicated statute. The first issue to decide is whether giving the NMW a special status within the BCEA, effectively separating and ‘elevating’ it from sectoral determinations, will avoid the problems identified above.

If one is to give the NMW a special status that distinguishes it from run of the mill sectoral determinations, it would require a dedicated procedure and separate advisory forum. If it relied on the existing procedure and the ECC (i.e. an investigation and report by the D-G, a report by the ECC, and a decision by the Minister), then there would be nothing to differentiate it from a sectoral determination. So, what would be required?

As argued above, the procedure for review and the decision about adjusting the NMW would need to meet a number of requirements. First, the review process would need to be adequately resourced so that the necessary research could be done or commissioned in order to evaluate what the impact of the NMW had been and to estimate what the impact of different increases of the NMW might be on the labour market and economy. Second, a body would need to be established comprising experts, organised business and organised labour as well as civil society organisations. Each group would need to have an adequate number of representatives that would have sufficient time and expertise to consider research findings as well as submissions from other stakeholders and the public. Third, the process of review would need to have greater transparency than the review process for SDs. Fourth, unlike with SDs, the recommendation from the body would go to a cluster of ministers for a decision about the adjustment.

The above proposal, which would require significant amendments to the BCEA, creates three problems. First, there would be duplication of the existing sectoral determination procedure: two processes and two forums to do different but similar things. The way this could be overcome is for the above upgraded procedure to replace the SD procedure. In other words, the introduction and review of SDs would go through the new procedure and be considered by the new body, possibly only differing in that with SDs the MoL could make the final decision on her own.

The second problem is more difficult to deal with. Currently, the ECC is an advisory body only and makes a recommendation to the Minister of Labour about a new SD or a revised SD. The Minister makes the decision about the SD subject only to a limited procedure to address an initial disagreement by the Minister with the recommendation of the ECC. Review and adjustment therefore interact but the authority to adjust lies unquestionably with the Minister. If one follows this precedent for the NMW it means that in Option 1 above the Minister has the sole discretion regarding adjustment and in Option 2 it will be the cluster of ministers.

However, in the process to introduce the NMW the agreement by the social partners appears to take precedence, although the agreement – translated into a Bill - will ultimately be subject to approval by Parliament. Should the review process be any different, particularly since

Option 2 is premised on an upgraded review procedure and with much more substantial engagement by the social partners? Even if one accepts that for the review it will be expedient to have a cluster of ministers make the decision, should they be able to ignore the recommendation of the stakeholder and expert body. In other words, the weight of the recommendation by the stakeholder and expert body arguably needs to be balanced – at least to some extent - with the authority of the ministerial cluster to make the decision about adjustment.

The third problem is that the above process remains largely internal to the DoL. The review procedure will be reliant on DoL staff for administrative and research support as well as funding for commissioned research. The upgraded stakeholder body will be similarly reliant on support from the DoL. Most importantly, its funding will come from the DoL budget. Even if there is agreement by the DoL to undertake the upgrading that will be necessary for the NMW, there is no guarantee that sufficient funding and support will be maintained. Over time the upgrade done for the NMW could be undermined. Certainly, the example of the SD procedure and the ECC does not bode well for Option 2.

On the plus side, Option 2, like Option 1, would mean that no changes must be made to the existing exemption and enforcement procedures in the BCEA. DoL staff can therefore deal with the additional exemption applications that would result from the introduction of the NMW and the inspectorate could be used to effect compliance with the NMW. However, it would remain to be seen whether the DoL has the capacity to take on this additional work in respect of the NMW.

Ultimately, we believe that situating the NMW in the BCEA with an upgraded review procedure and expanded expert and stakeholder body is not the best option. The NMW is simply too ‘big’ in development and economic policy terms and too politically important to be located within the DoL, with all the budgetary, resource and transparency limitations this might entail. Reviewing and adjusting the NMW will arguably have the same implications for the economy and labour market as setting it. But setting it has involved extensive research, the appointment of an expert panel and negotiations in NEDLAC. The review and adjustment of the NMW needs a process and stakeholder engagement of a similar order as well as relatively autonomy from the DoL.

3.3 Option 3: The NMW in a dedicated statute

The last option is a dedicated statute for the NMW. There is a precedent for this option. Under the pre-1994 dispensation the Wage Act,¹¹ provided for a Wage Board and the issue of wage determinations, which were very similar to the current sectoral determinations. In 1983, when the original BCEA was introduced,¹² the two statutes continued in parallel, with the BCEA setting a floor of basic conditions of employment and the Wage Act enabling the setting of minimum wages and other conditions, mainly along sectoral lines. There was no national minimum wage but there was a wage determination for unskilled workers in

¹¹ Act 5 of 1957.

¹² Act 3 of 1983.

specified sectors and sub-sectors. It therefore provided a minimum wage for a range of sectors that were not covered by any existing wage determination or an industrial council.¹³ However, it was by no means comprehensive so at best only approximated a NMW.

One can therefore conceive of a statute that deals with the NMW alongside the BCEA. The main question this option throws up is what one does about sectoral determinations. The ideal would be to limit duplication and maximise coordination. If a new statute deals with the NMW and the BCEA continues to deal with sectoral determinations, one again has the problem of two processes and two forums. There is also the potential for conflict between the NMW and the wages and other conditions that are set in sectoral determinations. ***One could therefore argue that a dedicated NMW statute should deal with the national minimum wage and SDs, thereby eliminating duplication and maximising coordination.*** The BCEA would continue to provide a floor for all other employment conditions as well as providing the mechanisms for enforcement.

The new body that considers wages and sectoral working conditions, let us call it the Wages Commission (WC), would replace the ECC. The location of all wage setting within the ambit of the new statute would justify devoting more resources to the procedure to set and review wages and sectoral conditions of employment than currently go to the ECC. It would have two processes that flow into it: the first would deal with the setting of wages and conditions of employment in sectors, and the second would deal with reviewing the NMW. These would be separate but coordinated processes that have different requirements. For instance, the recommendation of the WC with regard to a SD would go to the MoL, whereas the recommendation with regard to the NMW would go to a cluster of ministers (possibly chaired by the MoL). As with Option 2, the statute will need to establish checks and balances so that the cluster of Ministers cannot easily discount the recommendation of the WC. In other words, the WC should have appropriate weight with regard to the ministerial cluster.

The proposed WC will have a number of coordination benefits: it will coordinate the setting of wages and other conditions of employment within sectors; it will coordinate wages set in SDs with the NMW; and, it will be able to coordinate the ‘rationalisation’ (or compression) of wage differentials in sectors (see further below in the discussion of the EEA). ***Arguably, the ministerial cluster should also be mainly concerned with coordination, i.e. the coordination of different policies with the NMW, rather than with reviewing the recommendation of the WC regarding adjustment of the wage rate.***

Of course, the proposal to move the SD process into a dedicated statute means that the body that reviews SDs will not be dealing only with wages. SDs have two main objectives. First, they introduce minimum wages for sectors. Second, they customise conditions in the BCEA or introduce new conditions to cater for the peculiarities of sectors: the domestic and farming sectors are obvious examples of sectors that present unique conditions that require some dedicated provisions. This latter function of SDs is often ignored or underestimated, but it is

¹³ We believe that this wage determination informed the DoL’s initial preference for the NMW to be introduced as a SD and motivated the amendments to the BCEA in 2013, i.e. see Option 1 above.

important and should be given adequate attention. In fact, *reviews of SDs should give much more attention to whether these non-wage provisions are appropriate and remain effective.*

Two issues need to be decided in light of the above proposal. First, the BCEA uses the terms ‘wages’ and ‘remuneration’. Remuneration is similar to the wage of an employee but is not the same. Remuneration is defined as any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person. On the other hand, a wage is defined as the amount of money paid or payable to an employee in respect of ordinary hours of work. A ‘wage’ therefore generally forms part of remuneration, i.e. remuneration includes the ‘wage’ as well as other payments, including payments in kind.¹⁴ Although the BCEA does not itself set minimum wages or remuneration, it deals with a number of issues related to wages and remuneration. For example, the BCEA provides rules regarding the payment of remuneration; information about remuneration; deductions from remuneration; and the calculation of remuneration and wages. One could move these provisions into the dedicated NMW statute, thereby consolidating all wage and remuneration related provisions in one statute, or one could leave them in the BCEA. It does not appear to make any difference. The question of what constitutes the NMW, i.e. is it a ‘wage’ or ‘remuneration’, is discussed in Section 4.1 below.

Second, if the WC is tasked with reviewing the NMW as well as SDs then it is logical for it to deal with exemption applications in respect of the NMW and SDs. After all, if the WC is expected to develop a coordinated wage system for the labour market, then it should be responsible for granting exemptions. However, this would require a much bigger staff complement for the WC. The intention should be to have a relatively small and efficient secretariat for the WC, together with a few experienced researchers, rather than creating a bureaucracy. *A compromise could be for the DoL to continue to process exemption applications but for it to regularly provide the WC with data on exemptions in a format decided by the WC. The WC should also be authorised to provide guidelines to the DoL regarding exemptions, so that it can correct any problems that it may identify from analysis of the exemption data. It would be useful if the DoL could also supply the WC with enforcement data. It goes without saying that this data should be available to the public.*

The separate statute for the NMW should therefore set the rate and composition of the wage, establish the WC, and prescribe the procedure for reviewing and adjusting the NMW at regular intervals. As argued above, it is essential that adequate financial and human resources are dedicated to the WC so that research can be carried out and analysed and stakeholder representation is effective. The statute would also need to indicate where the WC will be located. *One option would be to house it within NEDLAC, perhaps as a sub-committee or relatively autonomous standing committee. Another option is to locate it within the CCMA. In both cases suitable arrangements would need to be made with regard to staff and the budget allocation.* Alternatively, it could become a body on its own. However, the latter will mean overcoming a number of legal and financial obstacles, which will take time, and will likely be opposed by the Treasury.

¹⁴ The distinction between wage and remuneration is discussed in more detail in Section 4.1.6 below.

We believe that Option 3 will ensure the optimal implementation of the NMW. It responds appropriately to existing problems with regard to capacity and expertise, it avoids duplication, and it will be fit for purpose given the economic and political importance of the NMW. It also has the benefit of promoting policy coordination.

4. Part A: An examination of relevant legislation

4.1 Basic Conditions of Employment Act (BCEA)

In the section that follows we discuss the detailed provisions of the BCEA in respect of the NMW on the basis that the NMW will be introduced in a dedicated statute (as per the NEDLAC Agreement).

4.1.1 Who is covered and not covered by the BCEA?

‘Employees’

The main portal to the protections of the labour statutes is their definitions of an ‘employee’. The definition of ‘employee’ is common to the main labour statutes, including the BCEA, but some of the other labour statutes have a different definition of ‘employee’. The definition in the BCEA should be the starting point for considering the application of the NMW.

There are two issues that need to be given attention. First, the definitions used in the various labour statutes need to be reviewed to ensure that they provide comprehensive coverage and that no gaps exist that will leave some workers only partially protected. Second, should the definition that is used in the NMW statute be broadened beyond that in the BCEA to include independent contractors? In other words, should the definition apply to ‘workers’ rather than ‘employees’?

With regard to the latter question, it must be noted that the BCEA gives the MoL the power to extend its coverage beyond the employment relationship, i.e. beyond the definition of ‘employee’ in the Act. In terms of section 55 the Minister can regulate, via a SD, task-based work, piecework, home work, sub-contracting and contract work. This means that the Minister can prescribe minimum wages for all these types of work. An example of where the MoL used this power is the Domestic Work SD which explicitly includes independent contractors performing domestic work. Furthermore, the MoL may, acting on the advice of the ECC, deem any category of persons to be employees for the purpose of a sectoral determination, the BCEA or any other employment law, including deeming such persons to be contributors for the purpose of the UIA (section 83).¹⁵ These powers have presumably been included in the BCEA to enable the MoL to respond to the changes happening in the world of work that have the effect of shifting people outside the scope of labour regulation.

¹⁵ Section 83 still refers to the old UIA. It should be read as a reference to the new UICA (see below).

We believe that the NMW should follow and consolidate these precedents by applying to ‘workers’ rather than the narrower ‘employee’ category, i.e. the definition used in the NMW statute should not exclude independent contractors.

If the NMW statute adopts a wider definition for its application, such as ‘worker’, consideration needs to be given to whether the workers covered by the wider definition (i.e. those who are ‘workers’ rather than ‘employees’) will be able to access the enforcement mechanisms provided for in the BCEA. It is likely that the relevant sections of the BCEA would need to be amended to include the wider range of workers.

One further aspect of the definition of ‘employee’ in the BCEA is problematic with regard to the NMW, namely the inclusion of people who assist in a business on an unremunerated basis. In practice this generally means family members working in a family business. ***Given that such people are by definition unpaid they should be excluded from the definition used in the NMW.***

Explicit exclusions from the Act

The main labour statutes explicitly exclude certain ‘employees’ from their ambit. The exclusions from the BCEA are dealt with in section 3 of the Act. The excluded categories are:

- Members of the National Intelligence Agency (NIA),¹⁶ the South African Secret Service and the South African National Academy of Intelligence
- Unpaid volunteers working for an organisation serving a charitable purpose
- The directors and staff at Comsec.¹⁷

Also excluded from all provisions, except the one dealing with severance pay (section 41), are persons employed on vessels at sea that are subject to the Merchant Shipping Act.¹⁸

It is unlikely that the NMW will have an impact on the members of the secret service agencies or staff at Comsec, who are all likely to be paid well above R20 per hour. So they can be included in the NMW statute. However, the exclusion of unpaid volunteers working for a charitable organisation should be followed by the NMW statute. As with people assisting a business on an unpaid basis, ***unpaid volunteers should by definition be excluded from the NMW. On the other hand, there does not appear to be any reason why persons employed on vessels at sea that should be excluded from the NMW. One understands that for operational reasons it is difficult to apply many of the BCEA’s conditions to such persons, but a minimum wage rate should be complied with.***

Specific inclusions in the Act

The BCEA specifically includes persons undergoing vocational training, except to the extent that their terms and conditions are regulated by any other law. Vocational training is

¹⁶ The NIA is now the Domestic Branch of the State Security Agency.

¹⁷ Comsec is the Electronic Communications Security (Pty) Ltd, which is a company owned by the government through the NIA.

¹⁸ Act 57 of 1951.

regulated primarily by the Skills Development Act and Skills Development Levies Act (which fall under the Department of Higher Education and Training), but the SD for Learnerships remains the main instrument for setting wages (termed allowances) and conditions for those employees undergoing formal vocational training. Whether such workers are excluded from the NMW is a policy decision. We discuss this issue further in the section on the SD for Learnerships in Section 5.1 below.

The BCEA defines ‘employment law’ to include the BCEA itself, any other Act that is administered by the Minister of Labour, and any of the following Acts: the UIA, SDA, EEA, OHS Act, and COIDA. ***If the NMW is to be introduced in a dedicated statute it would need to be listed as an ‘employment law’.***

4.1.2 The legal effect of the BCEA

Section 4 of the Act provides that a basic condition of employment constitutes a term of any contract of employment subject to certain exceptions, including whether any other law provides a term that is more favourable to the employee. The NEDLAC Agreement on the NMW goes further to indicate that all sectoral determinations, collective agreements, bargaining council agreements and individual contracts of employment “must comply with the NMW Act at the time of implementation i.e. their minima must be no lower than the NMW floor unless exempted, or excluded by way of a phase-in arrangement”. This would need to be made explicit in the NMW statute (but, importantly, holds implications for SDs and bargaining councils, which is discussed in Section 5 below).

4.1.3 Hours of work and the NMW

The BCEA uses the term ‘ordinary hours of work’. This means the hours of work permitted in terms of section 9 of the BCEA (the most important limit is maximum ordinary weekly hours of 45 excluding overtime),¹⁹ or in terms of any agreements in terms of sections 11 and 12 (the latter refer to agreements for compressed working weeks and the averaging of working hours).²⁰ The term ‘ordinary hours of work’ is clearly important with respect to the NMW because it constitutes part of the definition of a ‘wage’ in the BCEA (discussed further in below in this section).

¹⁹ Section 9 provides further that the maximum ordinary hours that may be worked on any day is nine hours (if working five days or fewer a week) or eight hours (if working more than five days a week). Ordinary hours may be extended by 15 minutes per day for those employees serving the public but such daily extensions may not total more than 60 minutes a week. Note that the meal interval is generally unremunerated, but tea breaks are counted as part of ordinary hours of work and are therefore paid time.

²⁰ Section 11 deals with the compressed working week and section 12 with arrangements to average hours of work. Both allow for variation of hours to accommodate operational needs: the compressed week allows more ordinary hours to be worked on certain days within a week that are off-set by shorter ordinary hours on other days in the same week (it is aimed at meeting short-term deadlines), and averaging of hours allows for more hours in certain days/weeks to be off-set by fewer hours in other days/weeks within a set period (it is aimed at fluctuating demand for labour in the medium-term, e.g. seasonal peaks). Although the sections are not explicit about wages, the intention is that wages continue unchanged over the relevant period, i.e. actual working hours expand and contract but average out at the ordinary hours over the period, so wages will continue unchanged over the period despite the fluctuation in working hours.

Reducing ordinary weekly hours of work

When the introduction of the BCEA was being negotiated the issue of the maximum number of ordinary hours in a week was a contentious issue. Trade unions pushed strongly for a reduction of maximum weekly hours from 46 hours (as per the 1983 BCEA) to 40 hours. The Act, however, introduced a maximum limit of 45 ordinary weekly hours of work. But Schedule 1 of the Act indicated a commitment by government to pursue the reduction of ordinary weekly hours to 40 per week (and an eight-hour working day). In terms of the schedule the reduction is to be achieved through collective bargaining and sectoral determinations, “having due regard to the impact of a reduction of working hours on existing employment and opportunities for employment creation, economic efficiency and the health, safety and welfare of employees” (Item 1, Schedule 1).

The Schedule provides a number of supports to achieve a reduction. First, the DoL was required to conduct, after consultation with the ECC, an investigation as to how the reduction of weekly working hours to 40 per week could be achieved. This was presumably done, although we are not aware if the results of the investigation have ever been published. The DoL must, furthermore, “monitor and review progress made in reducing working hours” and “prepare and publish a report for the Minister on the progress made in the reduction of working hours.” The DoL must publish reports (presumably the reports referred to immediately above) every two years, which must be tabled at NEDLAC and in Parliament by the Minister. Again, we assume that this has been done but no publicity has ever been given to such reports since the Act was introduced 20 years ago. One can only presume, therefore, that the findings of the various investigations and reports are that a reduction of hours cannot be achieved because there has been no change, or any debate about a possible change, to the BCEA in this regard.

Second, the ECC is authorised to investigate the possibility of reducing working hours in a particular sector and area and make recommendations to the Minister. In other words, the ECC may conduct such an investigation on its own authority rather than responding to investigations ordered by the Minister of Labour and conducted by the Department of Labour. It is unknown if the ECC has ever conducted such an investigation. Third, the Schedule provides that there is a duty on employers to bargain a reduction in working hours if a demand is made by a trade union(s).

Clearly the commitment to reduce working hours to 40 hours per week and eight hours per day has implications for the NMW. The intention is to set the NMW at an hourly rate, which means that when hours of work are lowered the daily or weekly wages of workers will be reduced. So, there will have to be coordination between the reduction of working hours if the wages of workers are to progressively rise. Ideally, these two aims should work in tandem, i.e. hours should continue to be reduced and the NMW should progressively rise. Coordination of the two processes must ensure that, as the bottom-line, a full-time worker paid the minimum wage must never be worse off in monetary terms as a result of a reduction in hours.

The BCEA and NMW statute must include a mechanism to achieve such coordination which ensures that the NMW is increased at a rate that at the very least maintains the daily and weekly wage of workers when hours are reduced.

The Minister of Labour's power to increase ordinary weekly hours of work

It should be noted that in 2002 a contentious amendment was made to the BCEA which allowed the Minister of Labour to make a determination in terms of section 50(1) that varies daily and weekly ordinary hours of work. The indication at the time was that the amendment was to allow the Minister to extend hours of work in certain sectors, which was contrary to the intention in Schedule 1 to progressively reduce working hours. When the amendment was finally passed it had been watered down and hedged in with conditions in order to maintain protection for workers (and appease trade unions and other critics).

The Minister may therefore make a determination to replace or exclude any basic condition of employment (either via a SD or MD, or a variation/exemption in response to an application (see further below)) in respect of ordinary hours of work. But section 50(2A) states that the Minister may make such a determination only if the employees' ordinary hours of work, rest periods and annual leave are on the whole more favourable than the basic conditions of employment in terms of section 9 (ordinary hours of work), section 10 (overtime), section 14 (meal intervals), section 15 (daily and weekly rest period), and section 20 (annual leave). In other words, any extension of ordinary hours of work would need to be more than off-set by improvements in overtime conditions, and/or meal intervals, and/or rest periods, and/or annual leave.

Furthermore, besides meeting the above conditions, the determination must comply with the following:

- It must have been agreed to in a collective agreement; or,
- Is necessitated by the operational requirements of the sector in respect of which the variation is sought and the majority of employees in the sector are not members of a registered trade union; or,
- It applies to the agricultural sector or the private security sector.

The Minister has varied section 9 in SDs for the Taxi Sector and the Private Security Sector (for security officers only), in both cases increasing ordinary weekly hours to 48 and increasing the maximum daily hours of work in cases where a five day week is worked. Section 9 has not been varied in a MD, but it is not known how often it has been varied in terms of variation granted in response to an application in terms of section 50(1)(b).

As with the Schedule to progressively reduce maximum ordinary weekly hours, the increase of weekly hours will impact on the NMW: it will reduce the wage rate where wages are calculated on a weekly or monthly basis. However, the intention is to introduce the NMW as an hourly rate, so this problem should not arise. ***But there should be a mechanism for liaison between the MoL and the WC when the former contemplates varying section 9 in an MD or in response to an application for variation (if the DoL retains this function).***

4.1.4 Does the BCEA indicate a reference period for the NMW?

The NEDLAC Agreement indicates that the NMW will be set as an hourly rate (rather than a daily rate, a weekly rate or a monthly rate, although the hourly rate can be translated into any of the latter in collective agreements or by employers). This is the correct choice and will arguably minimise any disemployment effects of the NMW. If, for example, it was set at a weekly rate it would mean that all employees must be paid that weekly rate. An employer who could not afford the weekly rate would not have the option of reducing the employee's hours to a level that is affordable, i.e. even if the employee works fewer hours they would have to be paid the weekly rate. This would also be the case for setting a daily rate or a monthly rate, although the impact would be limited in the case of a daily rate and greater if it was a monthly rate.²¹ The only option in these cases would be an operational requirements dismissal.

Having an hourly rate means that if an employee is currently being paid on a weekly basis, is earning less than R20 per hour, and the employer cannot pay more, the employer would be able to ensure compliance with the NMW by reducing the hours of the employee and continuing to pay the same weekly amount. For example, an employee works 45 hours per week and is paid R720 per week, i.e. they are getting R16 per hour. The NMW is introduced and the employer cannot pay R900 per week, i.e. R20 per hour. The employer can reduce the hours of the employee to 36 per week and continues to pay a wage of R720, i.e. R20 per hour. The employee will get the same weekly wage but has more time off, while the employer pays a wage he or she can afford but must organise work to accommodate reduced hours on the part of that employee. If the employer continued to pay R720 per week but did not lower the hours to 36, he or she would be non-compliant (i.e. they would be paying R16 per hour for 45 hours per week).

However, a situation could arise where an employer responds in a punitive manner to the NMW. In this case an employer might, without a justifiable reason, lower the above employees weekly hours to below 36 hours per week, let us say to 30 hours, and increase the employee's wage to R20 per hour. The employer would be compliant in terms of the hourly wage rate but the employee's weekly wage has decreased to R600. The BCEA currently does not provide a mechanism to deal with such a situation and a DoL inspector would not have any authority to take action against the employer (and neither would a bargaining council agent). ***These sorts of situations should be brought within the purview of the unfair labour practice jurisdiction (section 186(2)) of the LRA.²² One could even argue that a presumption should be created that such actions have been taken to punish the employee***

²¹ Currently the BCEA defines a 'week', in relation to an employee, as the period of seven days within which the working week of that employee ordinarily falls. A 'day' is defined (in section 8) to mean a period of 24 hours measured from the time when the employee normally commences work, and 'daily' has a corresponding meaning. There should be no conflict between these definitions and the notion of an hourly rate that has been proposed for the NMW.

²² Note that this would apply, with the necessary changes, in cases where the ordinary weekly hours that are less than 45 per week.

in the context of the introduction of the NMW, with the onus shifting to the employer to show that this is not the case.

The introduction of an hourly rate has been done to reduce the potential negative impact on employment. However, it could increase underemployment,²³ but arguably only to the extent that workers benefit from a few more leisure hours. This raises the question of whether there should be a minimum number of daily or weekly hours.

4.1.5 Minimum daily hours and weekly thresholds

Currently many bargaining council agreements and sectoral determinations provide that a full-time employee who reports for duty but is required to work for less than four hours on the particular day, must be paid for at least four hours. In other words, an employee must get a certain minimum pay for the cost and time involved in going to and from work in such an instance. The BCEA does not have an equivalent provision. ***It is recommended that something along these lines be introduced in the NMW statute. Whether one sticks with four hours as the minimum threshold is a subject for negotiation.***²⁴

The above refers to a full-time employee who for some reason is required to work for less than four hours a day. ***The same provision can be applied to a part-time person who works only on certain days.*** In other words, the employee is not full-time but reports for duty on a day they are scheduled to work but works less than four hours, or the employee does not work full days but for some reason is required for less than half of the scheduled hours.

There seems to be no reason why the same provision should not apply to a day (casual) worker, i.e. if somebody employs a person on a casual basis to perform work then the minimum that the person can be paid is four hours at R20 per hour. This raises the question of whether, if the NMW statute is extended to independent contractors, they should be covered by such a provision. This would mean that a self-employed person who goes from house to house offering to wash cars must be paid R80 for washing a car even if it takes just one hour. It might be challenging to draft such a provision but probably the strongest argument against it is that it would be difficult to enforce. Such a case would not be a priority for the DoL inspectorate given the amount involved and difficulty of proof. Consideration should also be given to the disemployment effect of such a provision.

It should be noted that some SDs have a threshold of 27 hours per week. The Wholesale and Retail SD, for example, provides that employees who work for 27 hours or less a week may enter an agreement with their employer that entitles them to a wage premium of 25% (see further below Section 5.1). In other words, part-time work is incentivised by increasing the wage rate. Should the NMW make provision for something similar? The Panel considered this issue. It noted that in terms of section 198C of the LRA a part-time employee must be treated no less favourably than a comparable full-time employee, and must also be provided

²³ Underemployment exists where an employee involuntarily works less than full-time ordinary hours.

²⁴ It should be noted that in terms of section 12(1B) of the UIA, a contributor is entitled to unemployment benefits if their hours and therefore income is reduced (although they are still employed) to a level below the benefit level he or she would have received if they had become wholly unemployed.

with equivalent access to training and skills development. The Panel also noted that the LRA requires ‘equal treatment’ as far as wages are concerned. The latter consideration persuaded the Panel that a premium for part-time work should be rejected, but it was also concerned that a premium might discourage the employment of part-time employees. This is an important question that should be debated further by the social partners.

An equally important question is what will happen to the SDs when the NMW is introduced. The 27-hour threshold and premium is a good example of how SDs can tailor employment conditions to address operational circumstances in sectors. This issue is discussed in more detail in Section 4.1.7 below.

Finally, the BCEA’s chapter on working time does not apply to the following:

- sales staff who travel to the premises of customers and who regulate their own hours of work?
- employees who work less than 24 hours a month for an employer

Given that the NMW will be introduced at an hourly rate there is no reason why such employees should be excluded (and should also be covered by the guarantee regarding minimum payment per day - see further below).

4.1.6 Wage, remuneration and the NMW

The NEDLAC Agreement records a wage rate for the NMW of R20 per hour. It does not further define or describe the wage. One might think that this is not necessary; after all R20 per hour is R20 per hour. Unfortunately, it is more complicated than that. The Panel dealt with this issue in an appendix, identifying what it termed a “gross (or basic) wage” or “gross remuneration”. Although it is not made clear whether these are the same thing, the Panel relied mainly on the BCEA and a list of items published in a 2003 schedule to the BCEA which seeks to clarify what should be included in and excluded from ‘remuneration’²⁵ (we deal with this further below). Ruth Castel-Branco also deals with this issue in her report on the NMW. Drawing on international approaches to the composition of national minimum wages, she identifies three options: the net wage; the basic wage; and, total earnings or compensation.²⁶ We discuss our understanding of these options below:²⁷

Net wage – the wage paid for ordinary hours of work excluding any other types of payment and without any deductions. If the NMW adopts a net wage approach then a worker would take home R20 per hour worked.

Any other payments that are due to the employee would be in addition to the R20 per hour, e.g. overtime, a shift allowance, a productivity incentive pay, and an in-kind payment such as accommodation. No deductions could be made, i.e. the employee’s contribution to the Unemployment Insurance Fund (UIF) or a premium payment to a provident fund could not be

²⁵ National Minimum Wage Panel *op cit* 114-117.

²⁶ Ruth Castel-Branco *op cit* 18-21.

²⁷ Note that we do not deal with deductions for income tax because the NMW is below the earnings threshold for income tax.

deducted from the wage, and the employer would also not be allowed to deduct the employee's union subscription for payment to his or her union. If an employee was to remain a contributor to the UIF and a member of a provident fund, the employer would have to make such payments. In other words, with the net wage approach the NMW would be more than R20 per hour for an employer because disallowed deductions would become additions to the wage.²⁸

Basic wage – the wage paid for ordinary hours of work excluding most additional payments but allowing certain deductions. If the NMW adopts a basic wage approach an employee would take home less than R20 per hour; the actual amount will be determined by the deductions that are permitted in law or a collective agreement.

The basic wage could, for example, include in-kind payments for accommodation and meals as part of the wage. If each were valued at 10% of the wage (as is the case in the Farm Worker SD) the in-kind payment would make up a total of R4 of the R20 per hour, which would mean that the worker would receive R16 per hour. But certain deductions would also be allowed that would come off the R16 per hour. For example, the basic wage approach could allow deductions in terms of a law (e.g. the employee's contribution to the Unemployment Insurance Fund) and a collective agreement (e.g. trade union subscriptions). If these deductions were respectively R0.20 and R1.00 then the take-home pay of the worker would be R14.80 per hour. Further deductions that might be made are discussed below.

In such a case the NMW would be slightly more than R20 per hour for the employer: the employer would be paying the worker R14.80, paying R1.20 on the employee's behalf to the UIF and a trade union, foregoing rent and payment for meals in the amount of R4 per hour, and the employer would be making its own contribution to the UIF of R0.20 per hour, i.e. the total cost of employment would be R20.20 per hour. Added to this would usually be an employer payment to the Compensation Commissioner (in terms of COIDA) and employer contributions to pension/provident funds and medical aid schemes.

Total earnings/compensation (hereafter gross wage) – the wage paid for ordinary hours of work including a wide range of additional payments and allowing most deductions. So, the wage would include all types of allowances, premium payments, and productivity incentive pay, etc. Deductions for employee contributions to the UIF, pension or provident funds, medical aid schemes, in-kind benefits and subscriptions to unions, etc. would be allowed. If the NMW adopts the gross wage approach then the take-home pay of an employee will vary from workplace to workplace, and even employee to employee. It is impossible to calculate

²⁸ Another problem with the net wage approach is that an employer could avoid paying the additional amounts on the NMW by paying at slightly above R20 per hour. A narrow interpretation of the NMW would be that it will regulate contracts only when the rate of pay is R20 per hour. If the wage rate is above R20 per hour the provisions in the NMW statute will not apply. So, an employer can pay a wage of R20.10 per hour and then legitimately make the relevant deductions from the employee's wage. The result is that the employee getting R20.10 per hour will take home less than the employee getting R20 per hour with no additional benefits. This will depend, however, on the wording of the NMW statute with regard to the inclusion of its terms in contracts of employment.

what the take-home pay might be or whether it will be above or below R20 per hour: this would depend on the types of additional payments and deductions made in each workplace.

The question our approach raises is whether the BCEA indicates a preference for one or other of these options. So, let us examine what the BCEA says with regard to wages. Although the BCEA does not set a wage itself, it defines both a 'wage' and 'remuneration'. A 'wage' is defined as the amount of money paid or payable to an employee in respect of ordinary hours of work or, if they are shorter, the hours an employee ordinarily works in a day or week. 'Remuneration' is any payment in money or in kind, or both in money and in kind, made or owing to any person in return for that person working for any other person, including the State. The 'wage' an employee earns is therefore a core component of 'remuneration'.

While these definitions make clear the distinction between a 'wage' and 'remuneration', the BCEA unfortunately confuses the matter somewhat by often using the two terms interchangeably. Most problematically, section 35, refers to the calculation of wages and remuneration, although the meaning of the section is clearly aligned with the definition of 'wage'. In some cases specifying one term is warranted, as with sections 21 (annual leave), 38 (payment in lieu of notice), and 41 (severance pay), which use remuneration rather than wage. But in other cases, remuneration is used when the section arguably deals with wages:

Besides the above problem in the BCEA, the definition of 'remuneration' was soon found to be too limited, leaving too many payments to be disputed. In 2003 a Schedule to the BCEA was published to remedy this problem.²⁹ It listed what is excluded from 'remuneration' for the purposes of calculations in terms of sections 21, 38 and 41:

- Any cash payment or payment in kind provided to enable the employee to work (for example, an equipment, tool or similar allowance or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work);
- A relocation allowance;
- Gratuities (for example, tips received from customers) and gifts from the employer;
- Share incentive schemes;
- Discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme);
- An entertainment allowance;
- An education or schooling allowance.

All these payments would, by implication, be excluded from 'wage' as well.

The Schedule also listed payments that are included in 'remuneration' for the purposes of calculations in terms of sections 21, 38 and 41:

- Housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind;

²⁹ Calculation of Employee's Remuneration, Government Notice No. 691 in Government Gazette 24889 of 23 May 2003.

- Car allowance or provision of a car, except to the extent that the car is provided to enable the employee to work;
- Any cash payments made to an employee, except those listed as exclusions in terms of this schedule;
- Any other payment in kind received by an employee, except those listed as exclusions in terms of this schedule;
- An employer's contributions to medical aid, pension, provident fund or similar schemes;
- An employer's contributions to funeral or death benefit schemes.

This list is less helpful for our purpose because, while the payments all form part of 'remuneration' they would not necessarily be part of a 'wage'.

Section 35 of the BCEA, which deals with the calculation of wages and remuneration, does not assist in pinning down the composition of a wage, but section 34 of the BCEA sheds some light on the issue of what constitutes a wage. It regulates deductions, but uses the term 'remuneration' rather than 'wage', which is unfortunate. As noted above, we would argue that the section should be read as referring to the wage. The section provides that deductions by an employer are permitted from an employee's remuneration if the deduction is required or permitted in terms of a law, collective agreement, court order, or arbitration award.³⁰

Section 34A regulates contributions to benefit funds such as pension and provident funds as well as medical aid schemes, but does not explicitly indicate that these may be deducted from an employee's wage. However, the section makes reference to the Pensions Fund Act,³¹ which presumably regulates contributions by members not covered by a collective agreement, thereby bringing the deduction from an employee's wage within the scope of section 34. We assume a similar situation applies with regard to medical aid schemes.

One can also refer to SDs regarding the composition of the wage. Most SDs provide one or more minimum wages. They do not specify what is included in the wage or excluded, but implicitly they adopt a 'basic wage' approach: it seems that the wage is determined in line with the definition of 'wage' in the BCEA and excludes payments that constitute remuneration. Furthermore, most SDs replicate section 34 with regard to deductions, i.e. a deduction is allowed if it is required or permitted in terms of a law, collective agreement, court order, or arbitration award. In practice this is applied to the wage (despite the reference to 'remuneration' in the section). Hence, the minimum wage in SDs excludes any additional payment (such as overtime, a night work allowance and commission) and allows deductions from the minimum wage if they are required or permitted in terms of a law, collective agreement, court order, or arbitration award.

³⁰ Section 34 also provides that deductions can be made from the wage of an employee, subject to written agreement with the employee, for 'loss or damage' and for good purchased from an employer. Total deductions of the latter kind cannot exceed 25% of the wage received by the employee. The 25% limit, however, does not apply to deductions of the first type, i.e. deductions in terms of a law, collective agreement, court order, or arbitration award. In practice, emoluments attachment orders are exceeding the 25% limit. We recommend that the BCEA is amended so that all deductions from the NMW cannot exceed a specified threshold.

³¹ Act 24 of 1956.

The BCEA does not explicitly regulate in-kind payments. Section 35(5)(b)(i) suggests in a rather vague way that the Minister can determine the value of such payments, but it does not specify that it applies to in-kind payments. However, section 55(4)(d) makes things clearer by giving the MoL the power to regulate or prohibit payments in kind in a SD. This has allowed the Minister to introduce in-kind payments in the Farm Worker SD (for accommodation and meals) and the Domestic Work SD (for accommodation). ***This would seem to be the best way of dealing with in-kind payments: to allow for the inclusion of in-kind payments in the NMW only in respect of specific sectors via an SD.***

The 2003 Schedule (referred to above) goes much further with regard to in-kind payments. It provides that the value of in-kind payments must be agreed in a contract of employment or a collective agreement. ***Allowing in-kind payments to be regulated by a contract of employment is arguably providing too wide a scope for such arrangements; the NMW statute should recognise only those in-kind payments regulated in a collective agreement or an SD for inclusion in the NMW.***

What the above suggests is that the BCEA is aligned to a ‘basic wage’ approach. This provides a strong argument for the NMW adopting the same approach. A second, related argument for the NMW to adopt the ‘basic wage’ approach is that one of the principles informing the design of the NMW is that it must be as simple as possible. This makes educating employers and employees about the NMW easier as well as making enforcement more effective. The ‘basic wage’ approach is arguably the simplest of the three options and it has the added attraction of being in alignment with the BCEA and existing practices in SDs. ***In other words, the NMW should be determined with respect to the definition of ‘wage’ rather than ‘remuneration’ in the BCEA, it should include only specified payments, and it should allow deductions as per sections 34 and 34A of the BCEA.***

The NMW statute can list the payments that will be included in the R20 per hour as well as the deductions. For example, various in-kind payments can be listed and employer contributions to benefit funds can be explicitly excluded (as is done in the 2003 Schedule regarding remuneration).

Performance bonuses appear to often be included in the ‘basic wage’ but this seems to be a contradiction in terms: productivity pay or a performance bonus or commission is by definition something that is earned over and above the time-based wage. We would therefore argue that such payments should be excluded from the NMW. This is supported by the approach adopted with regard to piecework in a number of bargaining council agreements. The principle is that if a piecework arrangement is in place a worker cannot receive less than the minimum time-based wage rate. So, a worker who does not produce sufficient pieces must still get the minimum wage. Only when the piecework goes beyond what is necessary to cover the minimum wage is it added to the wage. ***This is the approach the NMW should adopt with regard to such arrangements, i.e. a worker being paid at the NMW rate must get R20 per hour and any productivity or piecework payments are factored in only when they are over and above the R20 per hour.***

The deductions that are allowed from the NMW could also be listed in the statute. However, there is a principle that should inform the choice of deductions by the NMW, viz. the deduction should be in the interests of the employee (leaving aside deductions that result from a court order). These will usually be the medium- to long-term interests. ***So, deductions of an employee's contributions to the UIF, a pension or provident fund, a medical aid scheme, and a trade union subscription should be allowed because they are all intended to benefit the employee at some point in the future.***

4.1.7 What will happen to SDs?

The main purposes of SDs are to introduce wages for employees in certain sectors and to customise the BCEA's provisions to better regulate the 'peculiarities' of sectors (although most SDs for some reason also duplicate many of the provisions in the BCEA in addition to introducing wage schedules and customised provisions). Most of these sectors covered by SDs are characterised by low trade union density, limited or no collective bargaining and have a preponderance of what are termed vulnerable workers. In broad terms the Minister can vary a provision in the BCEA via a SD or include a provision which is not in the BCEA. The details of what the Minister can regulate through an SD are dealt with in section 55 of the Act. As noted above, the section gives the MoL extensive powers in this regard, including the power to regulate homework, sub-contracting and contract work.

The NMW has the potential to 'conflict' with the minimum wage rates set in SDs. Either such a conflict requires that SDs are excluded from the NMW or that the NMW sets an absolute floor with which all SDs must comply. The NEDLAC Agreement has indicated that the NMW statute will adopt the latter approach, subject only to the phase-in for workers covered by the domestic and farming SDs. This means, however, that the NMW will effectively replace the minimum wage in a number of SDs.

The question therefore arises as to whether there is a need for SDs in future. A roadshow on the proposed NMW done by the DoL and dealing with the prospective NMW proposed that there will be a very limited future for SDs, i.e. SDs would become schedules to the BCEA and will comprise only wage rates above the NMW and certain customised conditions. The NEDLAC Agreement, furthermore, indicates that a new body, the NMW Commission will be established to review the NMW. While this suggests that it will replace the ECC, the NEDLAC Agreement does not assign responsibility for SDs to the NMW Commission. This means that as things stand there will be no body to make recommendations to the Minister regarding new SDs or adjustment to existing SDs. The implication is that no new SDs will be introduced and existing SDs will not be reviewed and adjusted. The wages levels and customised provisions in SDs that are translated into schedules to the BCEA will therefore be cast in stone and become increasingly irrelevant within a few years.

We would argue that SDs still have an important role to play alongside the NMW and should be retained. In Option 3 in Section 3 above we accordingly argued that the new WC should be given the responsibility to conduct reviews and make recommendations regarding the adjustment of SD wages and conditions. There are three reasons for retaining

SDs. First, SDs should continue to set minimum wages for the multiple occupational categories in a sector that are paid above the NMW, which should be reviewed and adjusted regularly. In fact, an argument can be made that with the NMW providing an absolute floor for wages, more SDs should introduce minimum wages for occupational ranks above the category(s) that are paid at the NMW rate. Second, SDs should continue to be used to customise provisions for sectors, which provisions should also be reviewed and adjusted regularly. The latter function is important and has probably not received as much attention as it should have. In Annexure A we provide a detailed survey of customised conditions in selected SDs and an MD to illustrate how important this aspect is.

Third, the fact that the NMW sets an absolute floor should not be grounds for discontinuing any consideration of setting minimum wage levels above the NMW rate. Why, for example, should the minimum wage in a sector, for instance the forestry sector or hospitality sector, be pegged at the NMW rate if a higher rate might be warranted? Removing the ability to set higher minimum wages for sectors and placing all one's faith in the NMW is short sighted in the extreme; it opens the way for wage levels to be pulled down to the level of the NMW. The NMW should provide the foundation for a coordinated policy on minimum wage levels across the labour market.

4.1.8 Severance pay

Section 41 of the BCEA deals with severance pay. If retrenchments take place as a result of the implementation of the NMW on the grounds that the employer is unable to pay the NMW, i.e. the retrenchment is due to the (economic) operational requirements of the business, then sections 189 and 189A of the LRA will apply. Employees and trade unions will therefore be entitled to challenge the retrenchments in the CCMA or Labour Court. In the event that retrenchments are not challenged or they are found to be fair, the employer is liable in terms of the BCEA to pay severance pay at the rate of at least one week's pay for each year of continuous service (see section 84 regarding continuous employment). It is not envisaged that anything needs to change with regard to claiming severance pay in such instances.

4.1.9 Exemptions (variation by application)

A key feature of the BCEA is its scheme for variation (or flexibility). At the heart of the scheme is a set of conditions that cannot be varied; these are generally referred to as 'core' conditions. Of the remaining conditions, a few can be varied by individual agreement (i.e. effectively the variation becomes a term of the employment contract), some can be varied by collective agreement, and a longer list of conditions can be varied by a bargaining council agreement. Certain conditions can also be varied by the MoL. This can be in the form of a SD, acting on the advice of the ECC (discussed above). The Minister also has the power to issue a MD. There are two types of MDs. First, the MoL can issue an MD in terms of section 50(1)(a), usually for a sector of some sort (in practice such an MD looks something like a sectoral determination but generally without minimum wage rates). The second type of MD is issued in terms of section 50(1)(b) and is in response to an application for variation from an employer (commonly referred to as an exemption).

It is the latter type of variation that is relevant to the NMW. The BCEA sets out a procedure for variation in terms of section 50(1)(b). It provides the following conditions for such variation:

- The exemption is granted by the Minister;
- The Minister may request the ECC to advise on any application made for an exemption; and,
- The Minister may request the ECC to prepare guidelines for the consideration of applications for exemption;
- The Minister may issue an (exemption) determination if the application has the consent of every registered trade union that represents the employees in respect of whom the determination is to apply;
- Failing consent by every registered trade union (above), the (exemption) determination may be issued by the Minister if the employer or employers' organisation has served a copy of the application, together with a notice stating that representations may be made to the Minister, on any registered trade union that represents employees affected by the application; and,
- In the case where the majority of employees are not represented by a registered trade union, the employer or employers' organisation has taken reasonable steps to bring the application and the fact that representations may be made to the Minister, to the attention of those employees.

Furthermore, the exemption:

- May be issued on any conditions and for a period determined by the Minister;
- May take effect on a date earlier than the date on which the application was made; and,
- Must be published in a notice in the Government Gazette if the application was made by an employers' organisation.

If the NMW was to be introduced as an SD (Option 1 above), or as a determination with a special status within the BCEA (Option 2 above), then the above would apply or could be applied quite easily to the NMW. However, the DoL would probably need to enhance its capacity to process variation applications to deal with the likely increased volume. Furthermore, it would be advisable for the MoL to request the ECC to produce guidelines for the consideration of applications (which to our knowledge has never been done).

However, the NEDLAC Agreement makes clear the intention is to introduce the NMW in a separate statute. This throws up two options. First, the NMW statute could assign the task of considering variation applications to the DoL in terms of the BCEA's procedure (as above). Again, there will be a need to increase the processing capacity of the DoL, and there is a need for the ECC to produce guidelines for considering applications. Second, as we argue in Option 3 above, if the proposed WC is to review the NMW and SDs, and is tasked with developing a coordinated wage policy, it should logically be the body that deals with variation applications. This would allow it to monitor the volume of applications, the types of

applications (i.e. for which conditions are they seeking variation), and how many are being granted. And its recommendations regarding adjustments to the NMW or SDs will be informed by this knowledge and the implications it has for coordination of wage levels.

The latter route, however, will require a much larger staff within the WC to process applications. Arguably it is not the intention to turn the WC into a bureaucracy in parallel with the DoL. At most the WC should have a small secretariat together with three or four experienced researchers.

A compromise position would be for the staff of the DoL to process variation applications as per the BCEA but to do so in terms of guidelines issued by the WC and monitored by the WC. Such guidelines and monitoring would include the DoL providing the WC with data on the volume of applications, the types of applications (i.e. for which conditions are they seeking variation), and how many are being granted.³² Again, there would be a need to ensure that the DoL has the capacity to perform this function.

4.1.10 What happens to section 50(1)(a) ministerial determinations

It was noted above that the MoL can issue an MD in terms of section 50(1)(a) that in practice looks much like a sectoral determination. The main difference is generally that MDs do not include minimum wage rates. However, it is also noted below that the MD for the EPWP includes wage rates (a daily rate as well as a piece rate). This appears to be contrary to the provisions of section 50 which authorises the MoL only to “replace or exclude” a basic condition of employment in the BCEA via a MD; a minimum wage clearly is an addition rather than a replacement or exclusion.

The NEDLAC Agreement and the DoL roadshow on the NMW were both silent on MDs, i.e. MDs issued in terms of section 50(1)(a). ***In light of the recommendation that SDs become the responsibility of the WC, we propose that it is made explicit in section 50 that the Minister does not have the power to introduce minimum wages via a MD.***

4.1.11 Enforcement

The BCEA deals with the enforcement of its own provisions as well as the provisions of sectoral determinations and ministerial determinations. Substantial amendments were made to the enforcement procedure in 2013 in an effort to streamline and speed it up. The enforcement procedure is set out in Chapter 10 of the Act, which provides for the:

- Appointment of labour inspectors, their functions, their powers of entry and to question and inspect, and the obligation of any person to cooperate with an inspector;
- Securing an undertaking – this is generally the first step in the enforcement procedure;
- Issuing a compliance order – this is the second step³³ in the enforcement procedure.

³² The WC would make such data available to the public.

³³ The Act does not require an inspector to first secure an undertaking before he/she may issue a compliance order. However, in practice it appears that an inspector will first get an undertaking from an employer and will thereafter issue a compliance order if the employer fails to adhere to the undertaking.

- An employer may object to a compliance order by written representation to the D-G of the DoL; should the D-G confirm the order (as is or in a modified form) the employer may appeal to the Labour Court;
- The D-G may ask for a compliance order to be made an order of the Labour Court – this is the final step in the enforcement procedure.

It should be noted that an inspector cannot issue a compliance order for an amount payable for non-compliance with any provision of the BCEA if the employee is covered by a collective agreement that provides for resolution through arbitration. Such a collective agreement would include bargaining council agreements.

Section 74 of the Act provides for the consolidation of proceedings. The Labour Court or an arbitrator hearing an unfair dismissal dispute may determine any amount owing to the employee in terms of the Act as long as it has not prescribed, i.e. the amount had not been owed for longer than one year prior to the dismissal.³⁴ In other words, the Labour Court or an arbitrator can include underpayment of wages prescribed in a sectoral determination in its order in respect of an unfair dismissal dispute. The NMW would need to be accommodated in this arrangement.

The above enforcement system, possibly with a few minor changes, can accommodate enforcement of the NMW. Alternatively, a similar enforcement system can be introduced in the NMW statute. However, a major question exists with regard to the capacity of the DoL. This suggests that efforts should be made to further streamline the procedure and to employ more inspectors. Consideration could be given to introducing the CCMA into the procedure in place of the Labour Court, if this would speed up the processing of compliance orders into executable orders. The solution with regard to inspectors is simple but not easy given constraints on the budget. However, this is a critical bottom line: there need to be many more inspectors across the country and they need to get proper training. Poor enforcement will fundamentally undermine the NMW.

Finally, an important aspect of compliance with the NMW will be the publicity it is given. Section 30 of the BCEA requires employers to display at the workplace “a statement in the prescribed form of the employee’s rights under this Act”. This presumably refers to a summarised version of the BCEA in poster form. But the employer is not required to keep a copy of the Act in the workplace. Currently section 204 of the LRA requires that employers keep a copy of relevant collective agreements, arbitration awards and sectoral determinations in the workplace. Sectoral determinations similarly require the employer to keep a copy at the workplace. *It is recommended that the NMW statute have a provision requiring that a copy must be kept by employers and a summary in poster form must be displayed at the workplace.*

³⁴ It does not appear that the recent judgment in *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus and Others* (2017) 38 ILJ 527 (CC) changes this situation.

4.1.12 Jurisdiction

In this section we discuss jurisdiction on the assumption that the NMW will make use of the BCEA's enforcement system, possibly subject to some changes. This raises the issue of jurisdiction as per the BCEA.

The Labour Court has exclusive jurisdiction in respect of all matters in terms of the BCEA, subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where the BCEA provides otherwise (section 77(1)). Further, in terms of section 77(3) the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. The apparent contradiction between exclusive jurisdiction and concurrent jurisdiction has caused confusion and generated considerable case law.³⁵

There are probably just two points that arise from the case law that have relevance to the NMW. First, it has been held that sections of the BCEA dealing with basic conditions of employment do not confer "jurisdiction on the [Labour] court to deal with matters that must be dealt with, in the first instance, by duly appointed functionaries".³⁶ In other words, the BCEA does not confer jurisdiction on the Labour Court to enforce its provisions directly; such enforcement is dealt with by inspectors in terms of the procedure set out in Chapter 10 of the Act (except when it concerns a claim for an amount owing in terms of the Act in the context of an unfair dismissal dispute: section 74). In respect of underpayment in terms of an SD or a claim in respect of non-compliance with another provision in an SD or BCEA, the Labour Court would only be involved at the point of making a compliance order a court order.

It was argued above that one way of streamlining the BCEA's enforcement procedure or an enforcement procedure in the NMW statute, would be to substitute the CCMA for the Labour Court in the procedure. It would probably require an amendment to section 77 if this is to be done, in order to ensure that there is no confusion regarding jurisdiction.

The second point relates to the first point (above) as well as the issue of concurrent jurisdiction. ***Given questions about the ability of the DoL to enforce the NMW effectively, workers should be given the option of approaching a court directly with regard to an underpayment claim. This would need to be a court that was accessible to workers. Hence consideration should be given to explicitly making provision for a worker to approach the CCMA directly regarding an underpayment claim or the Magistrates Court or the Small Claims Court. The necessary amendments need to be made to the BCEA and the statutes governing the latter two courts.***

³⁵ See D Du Toit *et al* Labour Law Through the Cases (Update 30) LexisNexis Butterworths: Durban at BCEA 46(3) to BCEA 54(A4).

³⁶ Ephraim v Bull Brand Foods (Pty) Ltd (2010) 31 *ILJ* 951 (LC); endorsed in Indwe Risk Services (Pty) Ltd v Van Zyl: In re Van Zyl v Indwe Risk Services (Pty) Ltd (2010) 31 *ILJ* 956 (LC).

4.2 Labour Relations Act (LRA)

This sections deals in detail with the provisions of the LRA that will need alignment or conflict with the NMW.

4.2.1 Who is covered and not covered by the LRA?

‘Employee’

The LRA defines an ‘employee’ in the same way that the BCEA does. The reference in the first part of the definition is to a person earning ‘remuneration’, but this can be read as earning a wage because remuneration includes a wage. The second part of the definition refers to other persons who assist an employer in carrying on a business, without requiring the payment of remuneration. In practice this usually means unpaid family members who help in a family business. As recommended under the BCEA above, ***given that such persons are unpaid it would be logical to exclude them from the application of the NMW but to retain their inclusion as employees for the purposes of the LRA and BCEA.***

Explicit exclusions from the LRA

The scope of application of the LRA is almost the same as that for the BCEA, but the LRA excludes the South African National Defence Force (SANDF) from its scope.³⁷ This means that the BCEA covers members of the SANDF and the LRA does not. Logically the NMW should therefore apply to the SANDF. ***It should be noted, however, that SANDF members would have to be explicitly included where enforcement includes a route to the provisions of the LRA (e.g. with regard to underpayment being an unfair labour practice).***

The definition of ‘employment law’ in the LRA would need to include the NMW statute.

The definitions of ‘remuneration’ in the LRA and BCEA are the same. It should be noted that the LRA does not define ‘wage’ and reference is still made in the definitions section to the Wage Act rather than the BCEA.³⁸

Note that the BCEA has a different definition of ‘ordinary hours of work’ to the LRA’s definition of ‘working hours’. The latter is defined in section 213 of the LRA as “those hours during which an employee is obliged to work”. However, this arguably has the same meaning as ‘ordinary hours of work’ in the BCEA.

4.2.2 The legal effect of collective agreements

Section 23 of the LRA deals with the legal effect of collective agreements. A collective agreement varies a contract of employment. Similarly, sections 31 and 32 deal with the legal effect of bargaining council agreements, including the extension of bargaining council agreements, while section 44 deals with agreements reached by a statutory council. The

³⁷ The Constitution Court confirmed this exclusion despite finding that members of the SANDF are in a working relationship akin to an employment relationship.)

³⁸ This appears to be simply a case of the Act not being updated. The Wage Act was repealed by the 1997 BCEA.

NEDLAC Agreement in respect of the NMW states that it will take precedence over individual contracts of employment, collective agreements and bargaining council agreements (but does not mention statutory council agreements – see below). ***In other words, the NMW will, where wage rates are prescribed in these instruments that are below the NMW rate, vary individual contracts, collective agreements and bargaining council agreements.***

4.2.3 Statutory council agreements that include wage rates

The NEDLAC Agreement does not mention statutory council agreements in the section dealing with the legal effect of the NMW and neither does it mention ministerial determinations issued by the MoL in terms of the BCEA. The LRA provides that a statutory council agreement referred to the Minister by a council that is sufficiently representative may be extended in the same way a bargaining council agreement is extended. If, however, the statutory council is not sufficiently representative it may refer the agreement to the MoL who may extend it in the form of a ministerial determination under the BCEA.³⁹ In this regard the LRA refers only to statutory council agreements that deal with the topics listed in section 43(3), i.e. the topics that statutory councils are empowered to negotiate.⁴⁰ However, statutory councils may by agreement negotiate collective agreements dealing with wages, although it appears that such agreements can be extended only if the council is sufficiently representative.⁴¹ Only in such a case would there be a need for alignment with the NMW. ***The NMW statute should, to anticipate such an eventuality, include statutory council agreements in the list of instruments that the NMW will take precedence over.***

The issues of exemptions from and enforcement of such agreements are much the same as for bargaining councils and will be dealt with below.

4.2.4 Exemptions

Section 30 of the LRA provides that the constitution of a bargaining council must provide a procedure for exemption from collective agreements, i.e. bargaining council agreements. In order for an agreement to be extended in terms of section 32 the bargaining council must have “in place an effective procedure to deal with applications by non-parties for exemptions from the provisions of the collective agreement and is able to decide an application for an exemption within 30 days.” The council must also have an independent body to expeditiously hear and decide appeals against the refusal of a non-party’s application for exemption, or the withdrawal of a non-party’s exemption by the council. Finally, the agreement to be extended must include the criteria that must be applied by the independent body when it considers an appeal and that those criteria are fair and promote the primary objects of this Act. Section 44 of the LRA provides that a statutory council agreement extended as a MD must have similar

³⁹ The MoL must be satisfied that the statutory council complied with section 54(3) of the BCEA.

⁴⁰ That is, dispute resolution functions, the promotion and establishment of education and training schemes, and the establishment and administration of social benefit funds.

⁴¹ A statutory council agreement dealing with wages should therefore not be extended by the MoL in the form of a MD. However, see the discussion in Section 4.1.10 above regarding MDs.

provisions for exemptions, although strictly speaking such an MD would not include minimum wage rates.

An application for exemption to a wage set in a bargaining council agreement could effectively constitute an amendment to the NMW. This could lead to fragmentation of the NMW. ***The NMW must therefore include an exemption procedure and explicitly exclude the option of applying to a bargaining council or statutory council for a wage exemption that would constitute an exemption to the NMW.***

4.2.5 Enforcement of bargaining council agreements

Sections 33 and 33A deal with the enforcement of bargaining council agreements (and section 33 applies to the enforcement of statutory council agreements; arguably section 33A should also apply to statutory council agreements, unless the agreement itself includes the relevant provisions from section 33A).

As in the case of exemptions, if the NMW becomes the minimum wage for the bottom occupational category(s) of a bargaining council agreement, the question arises as to whether the bargaining council should enforce compliance with the wage for those occupational categories or whether this should be left to the DoL to enforce as the NMW. A related problem is that currently the enforcement procedure is different for bargaining councils and the BCEA (and sectoral determinations). The enforcement procedure for the BCEA and sectoral determinations is dealt with above. The enforcement procedure for a bargaining council agreement is for a bargaining council agent (i.e. inspector) to issue a compliance order, followed by, if the dispute remains unresolved, arbitration under the auspices of the council.

A decision will need to be made about who is responsible for enforcement in such situations. If it is decided to give this responsibility to the bargaining council (which would recognise the autonomy of councils), there will need to be alignment of the two enforcement procedures.

4.2.6 Including the NMW within the scope of an unfair labour practice

The report of the Panel proposes that the NMW be included in the ambit of section 186, i.e. non-payment of the rate or non-compliance with other conditions would constitute an unfair labour practice. ***Explicitly including non-compliance with the NMW in section 186 would give workers the option of pursuing non-compliance via the unfair labour practice procedure rather than being limited to going through the DoL inspectorate.*** The strain that enforcing the NMW will place on the DoL inspectorate is a good argument for employees having the option of going the unfair labour practice route. If this is the case, it will be necessary to be quite specific with regard to the nature of the ‘non-compliance’ to qualify for the unfair labour practice remedy, e.g. all instances of non-compliance or only a punitive reduction in hours.

A punitive reduction of hours would arise when an employer, without a justifiable reason, lowers the employee’s hours in order to reduce the weekly wage below what would allow the

employer to comply with the NMW and maximise the weekly wage for the worker (see the example in Section 4.1.4 above). The BCEA currently does not provide a mechanism to deal with such a situation and a DoL inspector would not have any authority to take action against the employer (and neither would a bargaining council agent). However, an employee would have recourse if such an action was brought within the purview of the unfair labour practice jurisdiction.⁴² One could even argue that a presumption should be created that such actions have been taken to punish the employee in the context of the introduction of the NMW, with the onus shifting to the employer to show that this is not the case.

It should be noted that including the NMW in section 186 raises the problem of the exclusions of certain employees from the scope of the LRA, e.g. employees of the SANDF and independent contractors (if ‘workers’ rather than ‘employees’ is used in the NMW statute). This can be dealt with by specifically allowing such workers to make use of section 186 for the purpose of enforcing the provisions of the NMW.

4.2.7 Striking over failure to implement the NMW

Generally disputes of right that are subject to an enforcement process, which would clearly be the case with regard to non-compliance with the NMW, cannot constitute disputes for the purpose of a strike. ***Section 65 of the LRA specifically excludes the right to strike in respect of issues covered by an arbitration award, a collective agreement (including a bargaining council agreement),⁴³ a statutory council agreement extended in the form of a ministerial determination as well as a sectoral determinations. Technically the NMW should fall within this category as well.***

4.2.8 Workplace forums, the NMW and wage compression

The LRA introduces workplace forums as institutions to facilitate greater participation in decision-making by employees. Very few workplace forums have been established to date. The workplace forum nevertheless brings with it a set of rights for workers. Section 84 lists issues over which the workplace forum must be consulted. ***Given that section 27 of the EEA has had very little impact on the wage structure of firms (see further below), consideration should be given to adding wage compression, i.e. the reduction of vertical wage differentials, to the list of topics in section 84 over which a workplace forum should be consulted.***

Adding wage compression to the list of issues subject to consultation by a workplace forum would allow for employees to discuss the narrowing of differentials across the entire wage

⁴² Note that this would apply, with the necessary changes, in cases where the ordinary weekly hours are less than 45 per week.

⁴³ It should also be noted that section 28(i) of the LRA gives a bargaining council the power to determine what matters may not be an issue for dispute for the purposes of a strike or lock-out. In effect wages are usually excluded for the purposes of a strike but only for the currency of the bargaining council agreement, i.e. usually one or two years.

schedule. In effect this would give workplace forums the power to give effect to the intention of section 27 of the EEA in the context of a NMW (discussed further below under the EEA).

4.2.9 Retrenchments

There is the potential for retrenchments shortly before or after the introduction of the NMW. If retrenchments take place as a result of the implementation of the NMW on the grounds that the employer is unable to pay the NMW, i.e. the retrenchment is due to the (economic) operational requirements of the business, then sections 189 and 189A of the LRA will apply. Employees and trade unions will therefore be entitled to challenge the retrenchments in the CCMA or Labour Court.

4.2.10 Temporary employment services

The NMW must be added to the list of instruments in section 198(4), contravention of which will create joint and several liability on the part of a temporary employment service and the client firm. Similarly, an inspector must be empowered to enforce compliance in terms of section 198(4A)(b) against the temporary employment service or client or both in respect of the BCEA and the NMW statute.

4.2.11 Employer to keep a copy of NMW statute

As noted above, section 204 of the Act provides that an employer must keep a copy of a collective agreement, arbitration award or sectoral determination or ministerial determination. The NMW statute should be explicitly included in this list. It is also recommended that the NMW statute prescribe that an employer must display a summarised version in the workplace.

4.3 Employment Equity Act (EEA)

The most important provision in the EEA with regard to the NMW is section 27, the provision COSATU insisted on including in the Act to address the ‘apartheid wage gap’. The objective of section 27 is to provide a mechanism to identify and address disproportionate income differentials between occupational levels as well as unfair discrimination with regard to income and benefits. Section 27 requires every designated employer to include in its employment equity report a statement, as prescribed (by the form EEA 4), to the Employment Conditions Commission on the remuneration and benefits received in each occupational level of the workforce.

Where disproportionate income or unfair discrimination is reflected in the statement, a designated employer must take measures to progressively reduce such differentials subject to any guidance given by the Minister of Labour. The measures to be taken by an employer to effect such reduction may include collective bargaining, compliance with a sectoral determination, applying norms and benchmarks set by the ECC, and relevant measures in skills development legislation.

The ECC is enjoined to research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportionate differentials. Furthermore, the parties to a collective bargaining process may request the information in the EEA 4 statements submitted by employers for collective bargaining purposes. It does not appear that the ECC has ever conducted such research and no norms and benchmarks have been published by the DoL.

The NMW is likely to have an impact on the bottom occupational level(s) of many firms as well as the bottom end of wage schedules in collective agreements (including bargaining council agreements) and sectoral determinations. This raises the question as to what the NMW will mean for wage differentials across wage schedules. Ideally, given the level of inequality in South Africa, one would want wages and salaries at the top of wage schedules not to move when the NMW is introduced, which should lead to some wage compression, i.e. vertical wage differentials in wage schedules will be narrowed. Section 27 of the EEA, together with the reporting form EEA 4, are critical in this regard. However, unpublished research indicates that the DoL has interpreted section 27 to refer to horizontal wage differentials rather than vertical wage differentials, i.e. the differences in wages paid to employee in the same 'occupational level'.⁴⁴ The influence of this interpretation can be seen in the design and wording of the EEA 4 reporting form.

It is beyond the scope of this report to engage in a critique of the DoL's interpretation of section 27. However, there are some obvious anomalies that need to be addressed:

- Section 27 refers to income, remuneration and benefits with respect to monitoring income differentials, but the EEA 4 form provides a table that makes provision only for remuneration.
- It is unclear how the form should be completed: must total remuneration or average remuneration be listed for each level?
- It is difficult to understand how listing total or average remuneration for such broad occupation levels can be used to determine whether there are disproportionate horizontal differentials.
- The injunction in section 27 that the ECC must investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportionate differentials, make no sense with regard to horizontal income differentials.
- The EEA makes provision for unfair discrimination, which would be the obvious route through which horizontal wage discrimination should be challenged, rather than through reporting via the EEA 4 form.

In light of the imminent introduction of the NMW it is time for an amendment of the EEA to clarify what the true intention of section 27 is, viz. to reduce disproportionate vertical

⁴⁴ The EEA 4 lists the following occupational levels: Top Management; Senior Management; Professionally qualified and experienced specialists and mid-management; Skilled technical and academically qualified workers, junior management, supervisors, foremen and superintendents; Semi-skilled and discretionary decision making; Unskilled and defined decision making; and, Temporary employees.

income differentials. This would allow the NMW to lead to some wage compression when it pushes up wages at the bottom end of wage schedules. However, as noted above, section 27 does not refer to ‘wages’ but to income, remuneration and benefits. Only ‘remuneration’ is defined in the EEA; it uses the same definition as the BCEA, while the EEA 4 form uses the schedule in terms of section 35 of the BCEA that clarifies what is included in and excluded from ‘remuneration’ (see above in Section 4.1.6). Presumably, the term income is envisaged to include remuneration and benefits. However, there are potential complications if one uses the term ‘wage’ for the NMW but income, remuneration and benefits in section 27, and just remuneration in the EEA 4 form. ***There must be an amendment to the EEA and the EEA 4 form to align these terms with ‘wage’ in the NMW statute.***

It is further important to note that the section refers to the ECC rather than the Commission for Employment Equity (CEE). ***Given that the NMW is to be introduced in a dedicated statute and a new forum will be created for reviewing the NMW, the EEA should refer to the new forum rather than the ECC.***

Section 53 of the EEA promotes compliance by restricting contracting by the State to entities that have a certificate of compliance from the MoL. Compliance refers to chapters 2 and 3 of the EEA, which includes section 27. However, it is difficult to see how this can have any effect given the current interpretation of section 27 by the DoL.

Importantly, section 53 raises the possibility of including compliance with the NMW in the compliance certificate referred to in section 53, or introducing a similar provision in the BCEA or NMW statute, as an incentive for greater compliance with the NMW.

4.4 Occupational Health and Safety Act (OHSA)

There will be very little relationship between the NMW and OHSA. The definitions of ‘employee’, ‘employer’, ‘remuneration’, and ‘work’ in section 1 of OHSA should be noted because they differ from the equivalent definitions in other labour statutes. But it is not envisaged that there would be any conflict between the NMW and OHSA.

4.5 Skills Development Act (SDA)

Section 1 of the Act defines ‘employee’ in the same way as the BCEA, but it should be noted that the Act also defines a ‘worker’ to include an ‘employee’, an unemployed person and a work seeker.

Section 18 of the SDA deals with contracts of employment between learners and employers. In terms of the section the MoL can, under the BCEA, determine terms and conditions for an employment contract entered into between a learner who was not in the employment of the employer at the time of entering the learnership agreement. The Minister has used these powers to introduce a SD for learnerships. The SD is discussed in more detail in Section 5.1 and Annexure A below.

A dispute about the interpretation or application of a learnership agreement, a contract of employment between a learner and employer (s 18(2)), and a SD in terms of section 18(3) may be referred to the CCMA for conciliation and arbitration. Section 19 explicitly overrides section 210 of the LRA in regard to such disputes, i.e. the section that gives the LRA precedence over any other statutes should there be a conflict between provisions.

There does not appear to be any provision in the SDA that needs alignment with the NMW statute (or vice versa), other than the fact that many of the minimum allowances (the term used to refer to wages for learners) are well below the NMW rate of R20 per hour. This has raised the question as to whether learners should be included in the scope of the NMW. This issue is discussed in Section 5.1 under the Learnership SD.

4.6 Skills Development Levies Act (SDLA)

It should be noted that the definition of ‘employee’ in the SDLA references the definition of ‘employee’ in the 4th schedule of the Income Tax Act.⁴⁵ This definition goes much wider than the employment relationship, which is the focus of most of the labour statutes. Besides a person who receives remuneration, including remuneration from a labour broker, the definition includes ‘any labour broker’, ‘any personal service provider’, a director of a private company who does not receive remuneration, and any person or category of persons declared an employee(s) by the Minister of Finance.

Although the South African Revenue Service (SARS) collects the skills development levy from employers it is not clear why the SDLA uses the definition of ‘employee’ in the 4th Schedule of the Income Tax Act. The latter statute is complex and does not indicate that the skills levy is based on its wider definition of ‘employee’, although presumably this is the case. In any event, if the NMW is to apply just to ‘employees’ as currently defined in the BCEA and SDA, rather than to ‘workers’, then it would not change the current situation with regard to the skills levy. If the NMW statute uses the wider definition of ‘worker’ it is unclear what the implications would be. It seems unlikely that the DoL would be able to enforce payment of the levy against independent contractors who earn only R20 per hour.⁴⁶

4.7 Compensation for Occupational Injuries and Diseases Act (COIDA)

Section 1 of the Act defines ‘earnings’ as the remuneration of an employee, but COIDA does not define either remuneration or wage. Nevertheless, ‘earnings’ would clearly include the NMW.

The definition of an ‘employee’ differs from the BCEA but is primarily designed to include and exclude particular categories of employee as claimants for compensation. It should be

⁴⁵ Act 58 of 1962.

⁴⁶ Section 19 of the SDLA provides that it is enforced via the procedure set out in sections 68 to 73 of the BCEA. However, given that the levy is collected by SARS it is likely also to have certain powers in respect of enforcing payment of the levy.

noted that members of the Defence Force and Police Service performing certain work are excluded, as is a person who undertakes to do work and then contracts other persons to perform the work. A domestic worker in a private household is also excluded. However, the application of the NMW to any of these categories would not create any conflict with COIDA.

In general terms it might be wise to do an assessment of what the impact of the NMW would be on the Compensation Fund given that compensation is based on earnings.

4.8 Unemployment Insurance Act (UIA) and Unemployment Insurance Contributions Act (UICA)

As the UIA and UICA currently stand only a person who is or was in employment who can prove they made contributions to the UIF can claim benefits. An independent contractor is explicitly excluded from the definition of 'employee'. If the NMW statute applies to 'workers', including independent contractors, the latter will not qualify to make contributions to the UIF or receive benefits.

The amount of an employee's contribution is based on the 'remuneration'. But in Schedules 2 and 3 to the UIA and section 6 of the UICA appear to conflate remuneration with income. Income is not defined in either statute and neither is wage. The definition of 'remuneration' in both statutes refer to the equivalent definition of 'remuneration' in paragraph 1 of Schedule 4 of the Income Tax Act. This would clearly include a wage, i.e. 'employees' earning the NMW.

Like key chapters in the BCEA, which exclude people employed for less than 24 hours a month, the UIA and UICA also exclude such employees. However, given that the NMW will be introduced in the form of an hourly rate (i.e. R20 per hour), it is arguable that the NMW should include people who are employed for less than 24 hour a month. This would not require other statutes to drop their exclusion of such employees.

It should be noted that in terms of section 12(1B) of the UIA a contributor is entitled to benefits if their hours and therefore income is reduced, although they are still employed, to a level below the benefit level he or she would have received if they had become wholly unemployed. Given that the NMW will be introduced at an hourly rate it is possible that a number of workers could have their working hours reduced to the point that they would be able to claim unemployment benefits in terms of this section.

In general terms it might be wise to do some sort of assessment of what the impact of the NMW would be on the Unemployment Insurance Fund given that benefits are based on earnings. At the same time, however, contributions are based on earnings, which will have a positive impact on revenue paid to the Fund.

4.9 Employment Services Act (ESA)

The definition of ‘employee’ in the ESA is the same as that in the BCEA.

In terms of section 6 of the ESA the Minister of Labour may establish schemes to enable youth and vulnerable work seekers to enter employment or remain in employment. The employment of such persons is subject to the minimum terms and conditions of employment prescribed in the BCEA or an applicable collective agreement (including a bargaining council agreement). While most collective agreements would prescribe wages, the BCEA does so only in the form of a sectoral determination.⁴⁷ The ESA goes on to give the Minister the power to determine the remuneration of such employees or “other payments”. This is confusing and suggests that the Minister could set levels of remuneration (note remuneration and not wages – neither of which are defined in ESA) even where there is an applicable sectoral determination or collective agreement. This would effectively enable the Minister to vary wages downwards. Furthermore, it suggests that the Minister would be able to vary the NMW, once it is introduced, in respect of employees in such schemes. ***It is recommended that the social partners negotiate the inclusion of section 6 schemes within the scope of the NMW.***

An alternative interpretation comes from reading section 12(2)(d), which provides for the payment of subsidies to organisations providing work opportunities to vulnerable work seekers. This suggests that the Minister may effectively lower the cost of employing such workers through a subsidy, but without lowering the wage paid to the worker. ***This would be the preferable option to ensure employment creation without undermining the NMW.***

Section 7 continues in the same vein as section 6, but applies to job retention schemes, i.e. schemes that aim to avoid or minimise job loss through retrenchment. The wording of the section suggests that in practice section 6 and section 7 schemes could overlap, i.e. the ‘vulnerable workers’ of section 6 might be the intended retrenchees of section 7. Although section 7 does not explicitly give a power to the Minister to determine wage rates for job retention schemes, the nature of the schemes that she is empowered to introduce could conceivably include variation setting minimum wages. The apparent linking of section 6 and 7 adds weight to such an interpretation. ***Again, it is recommended that the social partners negotiate the inclusion of section 7 schemes within the scope of the NMW.***

Section 8(4) of ESA makes it explicit that a non-South African who is employed without a valid work permit is able to enforce any claim in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law. In other words, labour legislation applies to foreign nationals who are working in South Africa legally or illegally. ***It is recommended that the NMW makes a similarly explicit provision.***

Finally, section 42 of ESA makes provision for ‘Supported Employment Enterprises’ for the employment of people with disabilities. ***It is not clear how wage rates are determined for***

⁴⁷ Although the MoL has – incorrectly we would argue - introduced a minimum wage in the EPWP MD.

such employees, but this category should be acknowledged by the NMW by explicit inclusion.

4.10 Employment Tax Incentive Act (ETIA)

The definition of employee in the ETIA is similar to that in the BCEA and LRA.

In order for an employer to be eligible for the employment tax incentive in respect of an employee, the employee must be receiving the relevant wage required by an applicable wage regulating measure (collective agreements (including bargaining council agreements) and sectoral determinations are wage regulating measures). If there is no applicable wage regulating measure covering the employer, then he or she must pay at least R2 000 for a 160 hour month in order to be eligible for the employment tax incentive. This translates into an hourly rate of R12.50, which is well below the proposed NMW.

The latter amount would need to increase to R20 per hour to be in compliance with the NMW statute. The alternative would be that employees covered by the ETIA must be included within the scope of the NMW in much the same way that domestic and farm workers are to be included, i.e. the employer must pay a prescribed percentage of the NMW in order to be eligible for the employment tax incentive. The percentage will phase into the NMW over a specified period.

5. Part B: An examination of selected sectoral determinations and bargaining council agreements as well as a ministerial determination

5.1 Sectoral determinations

It was noted above that the primary role of SDs is to introduce wages for employees in sectors with low trade union density, and limited or no collective bargaining. SDs are also used to customise certain of the BCEA's provisions to better regulate the 'peculiarities' of certain sectors. This can take the form of variation of a provision in the BCEA or the inclusion of a provision in the SD which is not in the BCEA. Both the minimum wages set in SDs and some provisions need to be aligned with the NMW to ensure there are no conflicts or contradictions. The areas that need alignment must be identified in light of the NEDLAC Agreement stating that the NMW will set an absolute floor with which all SDs must comply. We therefore examine a number of SDs below in much the same way that we have done above with regard to legislation.

Sectoral Determination for Domestic Work (No. 7)

The BCEA applies only to an ‘employee’ as defined. Furthermore, the BCEA defines ‘domestic worker’.⁴⁸ However, the domestic worker SD extends its coverage beyond the definitions of ‘employee’ and ‘domestic worker’ in the Act by regulating conditions of work for domestic workers who are independent contractors. It is not known at this point what the scope will be of the NMW, i.e. whether it will apply to employees only or will be extended to independent contractors. If the NMW applies to employees only, and SDs with minimum wages continue in force, it will mean that effectively domestic workers who are independent contractors must be paid at least R20 per hour, i.e. they will be covered by the SD which will incorporate the NMW rate. If the NMW applies only to ‘employees’ and SDs are made redundant, then arguably domestic workers who are independent contractors will not be entitled to the NMW. The alternative is that the NMW applies to ‘workers’, which would include independent contractors. In such a case the definition in the SD will more or less correspond with that in the NMW.

This issue is important because of the special dispensation for the domestic work sector, i.e. the minimum wage will be set at 75% of the NMW and will be phased in to 100% over two years. There needs to be clarity as to which definition will apply: the definition in the BCEA or the definition in the SD.

There is another contradiction with regard to the definitions used for a labour broker who supplies domestic workers. The SD regulates the employment conditions of workers placed by what it terms an ‘employment service’, which it defines. However, the definition of ‘employment service’ is narrower than the equivalent definitions in the BCEA and LRA for a ‘temporary employment service’, in that the employment service is classified as such only if it pays the worker’s remuneration. But, as with the BCEA and LRA, the employment service and the client are jointly and severally liable in respect of non-compliance with the provisions of the BCEA. It is not clear why the SD uses the term ‘employment service’ and defines such a service differently to a ‘temporary employment service’ as per the BCEA and LRA. Consideration should be given to definition to bring it into line with the LRA and BCEA, especially since the amendment to the LRA to introduce section 198A of the LRA.

As noted above, the NEDLAC Agreement records that the minimum wage for the domestic work sector will be set at 75% of the NMW and will be phased in to 100% over two years. This means that domestic workers will be paid a minimum of R15.00 per hour when the NMW is introduced in 2018 and by May 2020 domestic workers will be covered by the NMW rate prevailing at the time. This process to phase in the minimum wage of domestic workers will need to be made explicit in the NMW Act or alternatively through an

⁴⁸ In terms of the BCEA a ‘domestic worker’ means an employee who performs domestic work in the home of his or her employer and includes – (a) a gardener; (b) a person employed by a household as driver of a motor vehicle; and (c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker. It is not evident why there is a definition for domestic worker in the Act. It appears to be relevant only with regard to the transitional provisions, but in that case the relevant definition is the one used in the 1983 BCEA.

amendment to the Sectoral Determination (SD), which will need to remain in force over the phase-in period.

Currently the SD provides wage rates for domestic workers which are differentiated according to (a) geographical location, and (b) working hours. The geographical split is between 'Area A', comprising major cities and towns, and 'Area B', comprising all other areas in the country. The wage rate differentiation by working hours sees a split between employees who work for 27 hours or less per week and those who work for more than 27 hours per week.

Domestic workers employed for 27 ordinary hours per week or less are paid a higher hourly rate than those working more than 27 hours per week. The current difference in hourly rates within Area A is R13.39 and R11.44 (an hourly difference of R1.95). In Area B the differential hourly rates are R12.07 and R10.23 (an hourly difference of R1.84). The higher hourly rate for those working 27 hours per week or less is a premium to compensate for the lower weekly income they receive.

At current wage rates, the minimum wage of all domestic workers will need to be adjusted upwards with the introduction of the NMW, even if it is introduced at the 75% level. In the process it will likely eliminate both forms of wage differentiation in the SD, i.e. the wage rate will be set at 75% of the NMW irrespective of hours of work or geographical location.⁴⁹

The SD further prescribes guaranteed working hours. In this regard a domestic worker must be paid for a minimum of four hours even if s/he worked for less than four hours on that day. The intention of the guaranteed minimum daily payment is to offset travelling and related cost and applies only when the employee has reported for duty.

Domestic workers often live on the premises of the employer. The deductions clause in the SD recognises this fact by allowing an employer to deduct up to 10% of the wage of a domestic worker for accommodation (subject to the accommodation meeting certain basic standards). Whether such a deduction will continue will depend on how 'wage' is defined in the NMW statute (see Section 4.1 above).

It should be noted that with the increase in wages resulting from the application of the NMW the monetary amount of 10% will increase without the standard of accommodation necessarily increasing.

Sectoral Determination for Farm Work (No. 13)

The BCEA has a specific definition for 'farm worker'.⁵⁰ The SD does not define a farm worker but the scope of application of the SD constitutes something like a definition.

⁴⁹ It should be noted that the Labour Court recently held that discrimination on the grounds of "geographical location" is unfair (see *Duma v Minister of Correctional Services & others* (2016) 37 ILJ 1135 (LC)). The case refers to such discrimination by a single employer rather than differentiation between different employers, which is the case in many SDs and bargaining council agreements.

⁵⁰ A 'farm worker' means an employee who is employed mainly in or in connection with farming activities, and includes an employee who wholly or mainly performs domestic work in a home on a farm.

However, unlike with the Domestic Work SD the two definitions do not contradict one another, so the sorts of problem identified above with regard to domestic workers should not arise in the farming sector.

The SD also regulates the employment relationship of workers placed by a temporary employment service (TES), establishing that the TES is the employer of the placed worker and that the TES and the client are jointly and severally liable in respect of non-compliance with the provisions of the BCEA. The provision in the sectoral determination should be changed to reflect the amended section 198A of the LRA.

As is the case for domestic workers, the minimum wage level of farm workers will be pegged at a percentage of the NMW for two years. For farm workers minimum wage will be set at 90% of the NMW, which means that the minimum hourly wage rate payable to farm workers will be R18 when the NMW is introduced in May 2018. The current minimum wage rate for farm workers in the SD is R15.39. The hourly wage rate for farm workers will therefore have to increase by R2.61 when the NMW is introduced. The process to thereafter raise the minimum wage for farm workers to the level of the NMW will need to be made explicit in the NMW statute or alternatively through an amendment to the SD, which would need to remain in force for the phase-in period.

The SD permits certain deductions from the wages of farm workers. Most importantly, deductions may be made by the employer for accommodation and food subject to certain conditions. The employer may not make a deduction exceeding 10% of the farm worker's wage for either accommodation or food. Whether these deductions will continue will depend on how 'wage' is defined in the NMW statute (see Section 4.1 above).

The increase in the hourly rate for farm workers will mean that the monetary value of the 10% will increase without the standard of accommodation necessarily improving.

Sectoral Determination for Wholesale and Retail (No. 9)

Wage rates in the Wholesale and Retail SD are differentiated by geographical area and hours of work. The geographical differentiation is between Area A and Area B. Area A hourly rates of pay are higher than those of Area B. The differentiation according to hours of work is between workers who work 27 hours or less per week and those who work more than 27 hours per week. Employees who work 27 hours or less per week can by agreement with the employer be paid the relevant hourly rate plus 25%. This premium includes ordinary hours worked on a Sunday. Such employees, however, sacrifice their entitlement to be paid an allowance for night work, to sick leave and family responsibility leave, and they receive only two weeks' paid leave per year and on request one week's unpaid leave. If an employee who works for 27 hours or less a week does not enter such an agreement then they are not entitled to a wage premium but all the other provisions of the SD apply to them, including a night work allowance, sick leave and family responsibility leave, and annual leave.

In terms of current hourly rates, general workers/trolley collectors; security guards; forklift operators; certain drivers, merchandisers/shop assistants/checkers and deli assistants will all

earn an hourly rate below the R20 NMW rate. In the case of Area B, in addition to the above, cashiers and certain other drivers will also be below the NMW. This means that the area and hourly differentiation will disappear after the introduction of the NMW when it pushes up the wages for these categories of employees.

The SD prescribes a minimum payment of four hours per day irrespective if the employee actually worked for four hours. This is to offset travelling and related cost and apply only where the employee reported for duty.

The SD provides for 'Commission Work' for sales staff. Such employees receive additional pay based on the value or volume of sales, or on the value or number of orders submitted to and accepted by an employer. In terms of the provision, the base wage rate for employees earning commission in terms of this clause is two-thirds of the applicable minimum wage. So, payment for commission work is over and above two-thirds of the applicable minimum wage. Currently the two-thirds base rate is lower than the proposed NMW rate of R20 per hour, although if commission is earned it will usually push up total earnings in most weeks to more than the applicable minimum wage. The question is whether the NMW statute will define 'wage' in a way that treats commission payments as part of the wage or excludes such payments. If the latter, the NMW will raise the base wage rate, which might require adjustment to commission arrangements or could eliminate them altogether.

Sectoral Determination for Private Security (No. 6)

In terms of scope of application, the SD regulates wages and employment conditions for employees as well as self-employed security guards in disguised employment relationships who are deemed to be employees. Furthermore, in terms of section 20(2) an employer may not use the services of an independent contractor unless he or she complies with:

- (a) Sectoral Determination 6;
- (b) the Unemployment Insurance Act;
- (c) the Compensation for Occupational Injuries and Diseases Act;
- (d) the South African Revenue Services, and is in possession of an IT30 tax certificate; and
- (e) the rules of the Private Security Sector Provident Fund.

The effect of this provision is that genuine independent contractors, that is, own account workers, are brought under the purview of the SD and certain labour legislation. They could, as such, demand that their hourly rate be no less than the NMW of R20 per hour.

In the SD minimum wage rates are differentiated by geographical area. There is differentiation between three geographical areas: Areas 1 and 2 cover major cities and towns, and Area 3 covers all other areas. The differentiation results in a number of job categories having minimum wage rates below R20 per hour. As with other SDs, it is likely that the introduction of the NMW will eliminate wage differentials for these categories of work.

The SD prescribes a minimum payment of four hours per day for casual workers irrespective if the employee actually worked for four hours.

Sectoral Determination: Learnership (No. 5)

Learners are employed persons who have concluded a learnership agreement in terms of section 17 of the SDA (learners include apprentices). There are two types of learners: a person who is not in employment when they conclude a learnership agreement; and a person who was already in employment when they concluded the agreement. The SD applies only to the former type of learner.

Section 18(2) of the SDA requires that if a person who is not employed enters a learnership agreement with another person, they must thereafter enter a written contract of employment. The SD confirms the need for a written contract of employment in terms of section 18(2) of the SDA. It should be noted that the BCEA does not require there to be a written contract of employment between an employer and an employee, but it does require the employer to give the employee written particulars of employment.

The SD sets wages and working conditions for learners (which includes apprentices), i.e. learners who were not in employment prior to the conclusion of the learnership agreement. The SD takes precedence over any collective agreement, which would include a bargaining council agreement, except insofar as the collective agreement expressly provides for learners to receive an allowance or conditions of employment that are more favourable to an employee than provided for in the SD. This means that learners are either covered by the BCEA, with allowance (wage) rates and certain customised conditions set by the SD, or they are covered by the BCEA and a collective agreement, including a bargaining council agreement, where this sets better allowances or conditions of work than the SD.

Currently the allowances for learners are set according to a number of criteria: the NQF exit level of the learnership; the number of credits earned by the learner in respect of the learnership; and a percentage of what the qualified wage is. In years when the DoL does not update the SD wage schedule via a review, the increase in the allowance is determined by the CPI. The current minimum wage rates for most learners in levels NQF 1 through to NQF 4 are well below the NMW rate. So to, allowances for learners with less than 240 credits in NQF 5 to NQF 8 are below the NMW rate. The allowances for most categories of learners would therefore need to increase considerably to comply with the NMW.

The Panel proposed that learnerships covered by the SD are excluded from the NMW, although neither the NEDLAC Agreement nor the DoL roadshow indicates that this is a possibility. However, the difference between the levels of many allowances and the proposed NMW rate of R20 per hour suggests that this might still be a topic for negotiation.

Skills development is critical for the country's labour market and economy, so it is advisable to make learnerships as attractive as possible for potential learners, but at the same time not make them prohibitively expensive for employers. ***This balancing act suggests that learnerships should be included in the scope of the NMW on the similar basis to the domestic and agricultural sectors, so that the allowances of learners can be phased in to compliance with the NMW over at least two years.***

5.2 Ministerial determination

Ministerial determinations (MDs) are similar to SDs but are established by the MoL via a different procedure in the BCEA (see section 50). Generally, MDs do not provide minimum wages, instead focusing on customising certain provisions of the BCEA for somewhat peculiar ‘sectors’ (e.g. there is an MD for small business and one for the welfare sector).

Expanded Public Works Programme (EPWP) Ministerial Determinations (No. 4)

The NEDLAC Agreement records that the Committee of Principals (COP) will consider whether the NMW will cover the Expanded Public Works Programme (EPWP) and Community Works Programme (CWP). This will be done after examination and review by the NEDLAC Task Team. The roadshow on the NMW conducted by the DoL, however, indicated that the EPWP would be excluded from the NMW statute.

Employees working in an EPWP programme fall within the scope of the BCEA (albeit with a number of conditions excluded) as well as a dedicated MD. The MD lists the programmes that fall under the EPWP and within the scope of the MD. Supplementing the list is a provision for “the Department of Public Works” to deem any other programme to be part of the EPWP. ***If the EPWP is to be excluded from the scope of the NMW statute the latter deeming power will be problematic; it would appear to give any official in the Department of Public Works the power to effectively exempt certain work programmes from the NMW by deeming them to be EPWP programmes.***

The EPWP MD is an exception in that it provides for minimum wages. Furthermore, it is exceptional in that it prescribes a daily wage (for time-based workers) and a task wage (for task-based workers). The wage rates for both are adjusted on the 1st November each year. The current rates (as from 1 November 2016) are R78.86 per day or R83.59 per task. This is well below the proposed NMW of R20 per hour if one assumes an eight-hour day (or a task taking eight hours to complete). The CWP falls under the EPWP but workers on CWP programmes are usually paid a rate slightly above the MD rate.

It is not clear why the EPWP and CWP should not be included within the ambit of the NMW. An arrangement similar to domestic workers and farm workers could be made for the EPWP and CWP, perhaps with a longer phase-in period or even an indefinite phase-in period. In such a case the wage for the EPWP would be set at 75% of the NMW for five years or for the foreseeable future. The EPWP has been identified as flagship job creation and poverty alleviation initiatives that should seek to balance work opportunities with wages that make an impact on poverty. The obvious argument against inclusion is that raising the wages of EPWP workers would place too much strain on the national fiscus. However, this was rebutted by the previous Deputy Director-General of Treasury, who stated that the cost of phasing in the NMW to the EPWP by 2019 would be “modest”. Furthermore, if the wage levels for EPWP workers do not keep in touch with the NMW there is potential for abuse of the scheme to circumvent the NMW.

5.3 Bargaining council agreements

Bargaining councils are collective bargaining institutions established voluntarily by employers' organisations and trade unions within a framework provided by the LRA. The agreements reached by the parties to bargaining councils are generally referred to the Minister of Labour with the request that she extend the agreement to all employers and employees within the jurisdiction of the council. Such extended agreements thus become 'subordinate legislation' similar to an SD. Most if not all bargaining councils produce what is termed a Main Agreement, which provides a wage schedule(s) and minimum working conditions (similar to an SD), but many councils also produce separate agreements for setting up and regulating social benefit funds and the like.

The principle underlying the bargaining council system is self-governance, i.e. representative employers' organisations and trade unions in sectors can establish a bargaining council and thereafter regulate the wages and working conditions for all employers and employees within the scope of the council. The bargaining council employs its own staff to enforce its agreements and to administer any benefit funds that are established. It also sets up its own exemption system (within basic legislative parameters) to consider exemptions from its agreements. Bargaining councils may also become accredited by the CCMA to perform dispute resolution functions within its jurisdiction.

In spite of the principle of self-governance bargaining councils are subject to the BCEA, i.e. the BCEA sets a floor of standards with which bargaining council agreements must comply. However, in acknowledgement of the autonomy of councils, the BCEA provides that a bargaining council agreement can "alter, replace or exclude" a range of provisions of the BCEA. The implication of such variation is that the bargaining council agreement can have certain provisions that are below the standard set by the BCEA. In effect this means that the bargaining council agreement prevails over the BCEA in respect of these provisions.

Given that bargaining council agreements are the result of collective bargaining by well-organised trade unions, the wages and conditions of employment are generally better than one finds in the BCEA (or in SDs – although the scopes of SDs and BCs are mutually exclusive). One would therefore expect that the NMW will not impact on the main agreements of bargaining council, but this is not necessarily the case. The NEDLAC Agreement records that the NMW will take precedence over bargaining council agreements, and will therefore automatically amend any wage levels below the NMW level? The question is how this – as well as other alignment issues - will be managed legislatively?

In the section below we examine a number of bargaining council main agreements to identify if there are any potentially problematic provisions.

Bargaining Council Main Agreement for the Motor Industry (National)

The Motor Industry Bargaining Council (MIBCO) collective agreement is complex, covering different areas, divisions, chapters and sectors.

The agreement defines ‘wage’ in much the same way as the BCEA and ‘earnings’ in a way that encompasses ‘remuneration’ as per the BCEA. There are a number of job categories where the current hourly wage rate is lower than the NMW and will have to be adjusted upwards in accordance with the NMW.

The agreement provides for stand-by and call-out allowances as well as a travelling allowance, but it is clear that these are in addition to the wage. It also has a clause dealing with deductions. This goes beyond the deductions allowed by the BCEA, but we recommend that deductions in terms of a collective agreement should be permitted from the NMW.

The agreement regulates piecework and commission work but in both cases the bottom line is compliance with the relevant minimum wage rates. In other words, piecework and commission payments can only add on to the minimum time-based wage. This is unlikely to conflict with the NMW unless that time-based wage rate is below the NMW rate.

In the clause dealing with short-time a guarantee of a minimum daily payment for four hours is included where an employee reports for duty. The agreement also provides for a guarantee of two hours’ pay for casual employees. However, the provision is somewhat confusing because it states that when a casual employee is contracted and works for less than two hours, they must be paid an amount not less than two and two-thirds the applicable hourly wages.

Bargaining Council Main Agreement for the Clothing Industry (Non-Metro Areas)

Terms and conditions in the clothing industry are governed by more than one agreement. For the purpose of this report we focus only on the agreement for so-called Non-Metro Areas.

The agreement defines ‘wage’ (as well as hourly, daily, weekly and monthly wage) and ‘remuneration’. Both are in alignment with the equivalent definitions in the BCEA and will not conflict with the NMW.

Most of the wage rates in the wage schedule for the Non-Metro Areas agreement currently fall below the proposed rate of R20 per hour for the NMW. The same is the case with employees falling under the incentivised wage scheme for new employees. Under that scheme, new employees are guaranteed a wage of not less than 80% of the relevant minimum wage, which they can increase to 100% via an incentive bonus. The scheme will have to comply with the NMW which will probably mean its elimination.

The agreement regulates deductions. The clause prohibits certain deductions and also goes beyond the deductions allowed by the BCEA. A separate clause deals with deductions for trade union subscriptions as well as the payment of agency fees. However, we recommend that deductions in terms of a collective agreement should be permitted from the NMW.

The agreement makes provision for piecework and commission work. However, in both cases an employee is guaranteed the minimum time-based wage for their category of work. This is unlikely to conflict with the NMW unless that time-based wage rate is below the NMW rate.

Bargaining Council Main Agreement for the Road Freight Industry (NBCRFI)

The main agreement of the NBCRFI is relatively complex in there are certain conditions that are unique to transport sub-sectors (e.g. the transport of sugar) and certain employees are covered by specified conditions but not the minimum wage rates. However, there do not appear to have any provisions that would need to be aligned in any way with the NMW. Wage rates are above R20 per hour, certain allowances are paid over and above the wage, and deductions are regulated in some detail in three clauses, with deductions for trade union subscriptions dealt with separately.

Bargaining Council Main Agreement for the Hairdressing Industry (National)

This is a new bargaining council that was established through the amalgamation of a number of regional councils. The agreement still bears this regional imprint: there are separate wage schedules for the different regions within the council and wage rates and conditions differ widely between the areas (e.g. a junior barber earns between R12.62 and R26.51 per hour according to area and maximum ordinary hours vary between 40 to 45 hours per week.

There is a dedicated remuneration arrangement for “Afro Salon stylist”. The agreement provides that “all stylists employed in an Afro Salon shall be paid a commission of not less than 30% of the turn over without a minimum salary, payable with stock deductions not exceeding 5% of turnover”. Stock deductions would be for the hair and beauty treatment products which are the property of the employer but are used by the stylist in performing the work. After the implementation of the NMW such an arrangement will only be permissible if the “Afro Salon stylist” is guaranteed the NMW excluding stock deductions.

Deductions are dealt with in a dedicated clause of the agreement. Permissible deductions include deductions for stock used by the employee or a percentage of the gross takings of the employee, whichever is agreed between employer and employee. Deductions for specific funds, e.g. the Pension Fund, the Medical Aid, trade union subscriptions and agency fees are each dealt with in the clauses in respect of these items. We recommend that deductions in terms of a collective agreement should be permitted from the NMW.

Bargaining Council Main Agreement for the Contract Cleaning Industry (KZN)

The main agreement only applies to contract cleaning operations in the province of KwaZulu-Natal. The agreement covers employees employed via fixed-term or fixed-project contracts.

The agreement defines ‘wage’, with definitions of weekly and monthly wage derived from the definition of wage. ‘Ordinary wage’ refers to a wage above the minimum rate that is ordinarily paid to an employee. The current minimum wage rate is R15.95 per hour for all categories of employment. The NMW will therefore push wages up for employees within the jurisdiction of the council.

The agreement prohibits the employment of an employee for less than six hours per day. If an employee is employed or works for less than six hours they must be paid for six hours.

Deductions that are allowed are dealt with in a dedicated clause. The permissible deductions include a deduction for unauthorised absence from work. Deductions for specific funds, e.g. the Provident Fund, the Family Medical Crisis Plan, the bargaining council levy and trade union subscriptions are each dealt with in the clauses in respect of these items. We recommend that deductions in terms of a collective agreement should be permitted from the NMW.

Bargaining Council Main Agreement for the Furniture Industry (Semi-national)

The bargaining council agreement applies to the provinces of Gauteng, North West, Mpumalanga, Limpopo and Free State. There is a single wage schedule for the provinces of Gauteng, North West, Mpumalanga and Limpopo, and there is separate wage schedule for the Free State.

The current minimum wage rate for a general worker is R12.95 per hour in all the areas, including the Free State. A semi-skilled employee is paid a minimum hourly wage of R14.20 in the Free State and R18.20 in the other areas, and a skilled employee is paid R18.59 in the Free State and 19.47 in the other areas. The maximum ordinary hours of work are 44 hours per week. By the time the NMW is introduced the minimum wages for skilled employees will probably be just above R20 per hour but all other wage rates will have to be increased to comply with the NMW.

Furthermore, the agreement provides for two ‘concession schemes’ that impact on the minimum wages that may be paid. The first of these schemes covers newly-established (6 months and less) small employers (employing up to a maximum of ten employees). It allows employers, subject to their employees agreeing, a blanket exemption from the prescribed minimum wages for two years (phases one and two of the scheme). In the third year the employer must pay at least 75% of the relevant wages and in the 4th year there must be 100% compliance with the minimum wage rates.

The second concession scheme applies to new employees. In terms of the scheme, apart from general workers who qualify for 100% of the prescribed wage rates, all other categories of employees must be paid at least 85% of the prescribed wage rate in the first year of employment and 90% of the prescribed wage rate in the second year of employment. From the third year of employment the employee must be remunerated at the prescribed minimum rate.

Given the low level of ‘standard’ minimum wage rates, the rates provided in the two schemes are likely to be below the NMW. This is likely to eliminate the schemes.

The agreement has a clause dealing with short-time that provides a guarantee of a minimum daily payment for four hours is included where an employee reports for duty.

The agreement does not have a dedicated clause dealing with deductions. Instead, deductions are dealt with at relevant clauses in the agreement that deal with contributions to funds, trade

union subscriptions, and so on. We recommend that deductions in terms of a collective agreement should be permitted from the NMW.

Bargaining Council Main Agreement for the Building Industry (Cape)

The collective agreement covers four areas, all located within the Western Cape. Area A covers greater Cape Town, Area B covers the Boland, Area C covers the Mmagisterial District of Malmesbury, and Area D the Municipal Area of Overstrand.

The current minimum rates in the agreement are above R20 per hour. The minimum rates of pay include what is referred to as an “inclement weather allowance”. Strictly speaking this is not an ‘allowance’ as it is a part of the employee’s hourly wage rate and cannot be deducted even during good weather conditions. There is also an overnight allowance which is paid over and above the wage.

The agreement further provides for a guaranteed two-hour payment per day should weather conditions not permit work to be performed and the employee is ready and able to work.

A clause deals with deductions permitted in respect of various benefits funds administered by the bargaining council as well as the council levy and trade union subscriptions. However, we recommend that deductions in terms of a collective agreement should be permitted from the NMW.

7. Recommendations

Based on our above analysis we make the following recommendations for an optimal fit or alignment of the NMW with the current legislative framework, given the objectives of the NMW.

Amending the BCEA or a separate statute to introduce the NMW?

- The NMW should be introduced via a dedicated statute.
- The statute should deal with the NMW and SDs, thereby maximising coordination of wage setting.
- A new body, the Wages Commission (WC), should be established by the NMW Act. It would replace the ECC, thereby eliminating duplication.
- The WC should preferably be quadripartite with the addition of experts; its mode of engagement should be to produce and analyse evidence and make recommendations regarding adjustments to SDs and the NMW; and it must be adequately resourced and staffed. A wider responsibility will be to develop a wage policy for the labour market that is coordinated with industrial and development policies.

- One option would be to house it within NEDLAC, while another is to locate it within the CCMA. Suitable arrangements would need to be made with regard to staff and the budget allocation.
- The WC would play an important role in two processes: the first would deal with the setting of wages and conditions of employment via SDs, and the second would deal with the adjustment of the NMW. These would be separate but coordinated processes.
- The recommendation of the WC with regard to the NMW would go to a cluster of ministers (possibly chaired by the MoL). The statute will need to establish checks and balances so that the cluster of Ministers cannot easily discount the recommendation of the WC. The ministerial cluster should be primarily concerned with policy coordination.
- Reviews of SDs should give much more attention to whether the non-wage provisions are appropriate and remain effective or relevant.

Alignment with the Basic Conditions of Employment Act

- The NMW should follow and consolidate the precedent set by sections 55, 83 and 83A of the BCEA by applying to ‘workers’ rather than the narrower ‘employee’ category, i.e. it should include independent contractors. This would also align the NMW with the objectives of the ILO’s Recommendation 204.⁵¹
- People who assist in a business on an unpaid basis should be excluded from the definition of ‘worker’ used in the NMW statute, as should unpaid volunteers.
- Persons employed on vessels at sea should be included in the NMW statute.
- The NMW statute must explicitly apply to all workers employed in South Africa including foreign nationals.
- The NMW statute must be listed in the BCEA as an ‘employment law’.
- The BCEA and NMW statute must include a mechanism to achieve coordination between increases in the NMW and the progressive lowering of maximum weekly hours of work in terms of the BCEA. At the very least, the NMW must increase at a rate that maintains the daily and weekly wage of full-time workers when hours are reduced.
- There should be a mechanism for liaison between the MoL and the WC when the MoL contemplates varying hours of work in terms of section 9 in an MD or in response to an application for variation (if the DoL retains this function).

⁵¹ The Recommendation deals with the transition from the informal to the formal economy.

- There must be a minimum daily payment for an employee who reports for work but is needed by the employer for only a limited period. Whether it is payment for a minimum of four hours, as many SDs and bargaining council agreements provide, is a subject for negotiation. The same provision can be applied to a part-time person who works only on certain days.
- There seems to be no reason why a minimum payment should not apply to a day (casual) worker, i.e. a person employed on a casual basis should be paid a minimum of R80 (four hours at R20 per hour).
- Given that the NMW will be set at an hourly rate there is no reason why sales staff who travel to the premises of customers and regulate their own hours of work, and employees who are employed for less than 24 hours a month, should be excluded from coverage.
- In-kind payments should be included in the R20 but only where this is regulated in an SD or a collective agreement.
- The NMW should adopt a ‘basic wage’ approach: it should be determined with respect to the definition of ‘wage’ rather than ‘remuneration’ in the BCEA, it should include only specified payments and should allow deductions as per sections 34 and 34A. The principle for deductions should be that they are allowed if they are intended to benefit the employee in future.
- Productivity and piece work payments are permitted but an employee working according to such systems cannot be paid less than R20 per hour.
- SDs still have an important role to play alongside the NMW and must be retained. The new WC should be given the responsibility to conduct reviews and make recommendations regarding the adjustment of SD wages and conditions.
- There are three options with regard to exemptions. The third might be the most suitable. It proposes that the DoL will process exemption applications but it must regularly provide the WC with data on exemptions in a format decided by the WC and must consider applications within the terms of guidelines provided by the WC. There is a need to ensure that the DoL has the capacity to perform this function effectively.
- It must be made explicit in section 50 that the Minister does not have the power to introduce minimum wages via a MD.
- The existing enforcement system set out in the BCEA, possibly with a few minor changes, should be used to enforce the NMW. But, given questions regarding the capacity of the DoL, efforts should be made to streamline the procedure and to employ more inspectors. Poor enforcement will fundamentally undermine the NMW.

- Consideration could be given to introducing the CCMA into the enforcement procedure in place of the Labour Court, if this would speed up the processing of compliance orders into executable orders.
- Workers should also be given the option of approaching a court directly with regard to an underpayment claim. This would need to be a court that was accessible to workers. Hence consideration should be given to explicitly making provision for a worker to approach the CCMA directly regarding an underpayment claim or the Magistrates Court or the Small Claims Court.

Alignment with the Labour Relations Act

- Employees who assist in a business on an unpaid basis should be excluded from the application of the NMW but should remain ‘employees’ in terms of the LRA and BCEA.
- SANDF members must be explicitly included in an enforcement procedure that incorporates provisions of the LRA (e.g. with regard to underpayment being an unfair labour practice).
- The definition of ‘employment law’ in the LRA would need to include the NMW statute.
- The NMW must vary individual contracts, collective agreements and bargaining council agreements.
- The NMW statute should include statutory council agreements in the list of instruments over which the NMW will take precedence.
- The NMW must explicitly exclude the option of applying to a bargaining council or statutory council for a wage exemption in cases where such an exemption would constitute an exemption to the NMW.
- Non-compliance with the NMW and punitive reductions in hours of work in response to the introduction of the NMW, should be brought within the purview of the unfair labour practice jurisdiction (section 186(2)) of the LRA.
- Technically this will place the NMW in the category in section 65 that is excluded from the right to strike.
- Given that section 27 of the EEA has had very little impact on the wage structure of firms, the reduction of vertical wage differentials should be added to the list of topics in section 84 over which a workplace forum should be consulted.

- The NMW must be added to the list of instruments in section 198(4), contravention of which will create joint and several liability on the part of a temporary employment service and the client firm.
- An inspector must be empowered to enforce compliance in terms of section 198(4A)(b) against the temporary employment service or client or both in respect of the BCEA and the NMW statute.

Alignment with the Employment Equity Act

- The EEA must be amended to clarify that the true intention of section 27 is, to reduce disproportionate vertical income differentials.
- There must be an amendment to the EEA and the EEA 4 form to align these terms with ‘wage’ in the NMW statute.
- Given the WC will be established for reviewing the NMW, the EEA should refer to the new forum rather than the ECC.

Alignment with the Employment Services Act

- It is recommended that the social partners negotiate the inclusion of section 6 and section 7 schemes within the scope of the NMW. Alternatively, employing organisations should be subsidised so that jobs are created while ensuring compliance with the NMW.
- It is not clear how wage rates are determined for employees in ‘Supported Employment Enterprises’, but such employees should be explicitly included in the scope of the NMW.

Alignment with the Employment Tax Incentive Act

- The minimum wage stipulated in the ETIA must be increased to R20 per hour.

Alignment with the Learnership SD

- Learnerships should be included in the scope of the NMW through an arrangement similar to that proposed for domestic workers and farm workers, so that the allowances of learners can be phased in to compliance with the NMW over at least two years.

Alignment with the EPWP MD

- The EPWP and CWP should be included within the ambit of the NMW through an arrangement similar to that proposed for domestic workers and farm workers, perhaps with a longer phase-in period or even an indefinite phase-in period.

Annexure A: Customised provisions in selected SDs and a MD

This annexure examines selected SDs to identify customised provisions. Most of the other provisions in SDs duplicate provisions in the BCEA.

Domestic Work Sectoral Determination (No. 7)

The SD applies to domestic workers, but the definition of ‘domestic workers’ includes independent contractors doing domestic work. This extension of the BCEA’s definition to independent contractors is confirmed in the application clause of the SD.

The application clause also provides that the SD includes domestic workers supplied by employment services. The definition of ‘employment service’ is wider than the equivalent definitions in the BCEA and LRA for temporary employment services, in that the employment service is classified as such even though it does not pay the worker, i.e. the client pays the worker his or her remuneration. However, the employment service is not the employer of the worker if the client pays the remuneration. The employment service and the client are nevertheless jointly and severally liable for any breach of the SD or BCEA if the employment service paid the worker, i.e. it was the employer of the worker.

The application clause also provides that domestic workers and employers covered by the SD, which would include independent contractors, are covered by any provisions of the BCEA that are not dealt with in the SD. This effectively extends the coverage of the BCEA to independent contractors who do domestic work. The practical effect is however quite limited in this case.

The wage clause in the SD provides for regional differentiation (i.e. Area A and Area B) as well as temporal differentiation (employees who work for more than 27 hours per week and employees who work for 27 hours or less per week). The wage schedules provide hourly, weekly and monthly minimum wage rates, but it should be noted that the employer is obliged to pay the weekly or monthly rates (whichever applies) unless it has been explicitly agreed with the worker that they will be paid on an hourly basis.

It is beyond the scope of this report to critique sectoral determinations but the wage schedule for domestic workers is remarkably confusing. It comprises two tables, one for employees working more than 27 hours a week and one for employees working 27 hours or less per week. Within each table there is a breakdown into Area A and Area B. Within each there are monthly, weekly and hourly minimum rates. However, the tables provide minimum rates for three years. A numerical wage rate is set only for the first year, i.e. 2014/15. Thereafter the minimum wage rate is established by a formula. In 2015/16 the rate is the rate for 2014/15 plus CPI plus 2.5% in Area A or plus 4.5% in Area B). The rate for 2016/17 is the previous rate plus CPI plus 2.5% in Area A or 3.5% in Area B). The CPI referred to is the figure produced by Statistics South Africa six weeks prior to coming into effect of the wage increase.

If this is not sufficiently confusing, the clause that precedes the wage tables states that if the CPI is 10% or higher, the worker will receive an increase equal to the CPI. Presumably this means that if the CPI is 10% or higher the additional 2.5% or 4.5%, etc. falls away and only the CPI increase applies; but this is our interpretation, the section is not at all clear.

Domestic workers, like farm workers, often live on the premises of the employer. The deductions clause in the SD recognises this fact by allowing an employer to deduct up to 10% of the wage of a domestic worker for accommodation, subject to the accommodation meeting certain basic standards.

The SD also recognises the close personal relationship between a domestic worker and the employer by making provision for an employer to make deductions from and payments on behalf of a domestic worker to social benefit funds and insurance schemes, to banks and financial institutions to repay loans for the purchase of a dwelling, and for rent for accommodation or a dwelling. The employer may also deduct up to 10% of the wage for repayment of a loan to the domestic worker. Finally, an employer may make a deduction from a domestic worker's wage equal to the time the worker was absent from work, other than for paid leave or where the absence is at the instance of the employer.

The SD has a 'stand-by' clause which regulates a situation where the domestic worker, between 20.00 and 06.00, is required to be at the workplace, can rest or sleep, but must be available to work if necessary. The domestic worker must agree to be on stand-by and must receive an allowance of at least R30 per stand-by shift. The domestic worker can only be required to perform work that must be done without delay and must be paid at the overtime rate for any time actually worked during the stand-by shift. Such shifts can be worked at most 5 times per month or 50 times per year.

The daily rest period of a domestic worker who lives at the workplace and has a meal period of at least three hours, can be reduced to 10 hours by agreement.

The BCEA provides that an employer is not required to pay for sick leave if the employee fails to provide a medical certificate signed by a medical practitioner or any other person certified to diagnose and treat patients, and who is registered with a professional council established by an act of Parliament.⁵² The Domestic Work SD extends the authority to issue and sign a medical certificate for the purpose of sick leave to a traditional healer and a professional nurse who is authorised to issue medical certificates. This provision is presumably intended to make medical certificates more accessible to sick domestic workers. Furthermore, the SD provides that if it is not possible for a domestic worker who resides on the employer's premises to obtain a medical certificate, the employer cannot withhold payment for sick leave if he or she did not give reasonable assistance to the sick worker to get the certificate.

The SD has different notice periods than the BCEA. The BCEA provides for notice of one week in the first month of service, two weeks for employees with more than six months

⁵² This applies only when the employee has been absent for more than two consecutive days or on more than two occasions during an eight-week period.

service but less than a year, and four weeks only where the employee has more than one year's service. The SD grants domestic workers' one week's notice if they have six months or less service and four weeks if they have more than six months' service.

In the case of a domestic worker who resides on the premises of the employer and whose contract of employment is terminated "before the date on which the employer was entitled to do so in terms of this clause", the employer is required to provide the domestic worker with accommodation for a period of one month (i.e. in effect the employer must give one month's notice) or "until the contract of employment could lawfully have been terminated", whichever is the longer. The clause goes on to allow the employer to deduct "10% of the amount that the employer is required to pay in terms of this clause as the value of the accommodation". The clause is intended to give a domestic worker who is residing on the employer's premises and who has been dismissed, some time to find alternative accommodation. However, it is very confusing and makes reference to sub-clauses that seem to have been deleted.

The Domestic Work SD has a set of annexures that include pro forma Written Particulars of Employment, Job Description, Pay Slip, and Certificate of Service. The annexures also include a set of Guidelines. The Guidelines, effectively a code of good practice, deal with notice of termination; the procedure to be followed for termination; hours of work; transport allowances, bonuses and increases; meal intervals; Sunday work and work on public holidays, and the various forms of leave.

Farm Worker Sectoral Determination (No. 13)

The sectoral determination has only one wage rate with no area differentiation.

There is a provision dealing with deductions for food and accommodation provided by the employer. The deduction in respect of each may not be more than 10% of the wage, i.e. a total of 20%. The deductions for food and accommodation are hedged in with conditions, e.g. there cannot be additional deductions in respect of these items; where there is a deduction for accommodation there cannot be deductions for electricity, water, or other services; and the deduction cannot exceed the cost of supplying the food or accommodation. Furthermore, in respect of accommodation the basic requirements (or standards) for the house are spelled out, including the availability of water and the minimum size of the house.

The BCEA provides for a collective agreement to be reached for averaging of hours arrangements. The SD, however, in a section headed 'Extension of ordinary hours of work for farm workers', allows such arrangements to be introduced through agreement between the farmer and individual workers. This presumably accommodates that fact that very little collective bargaining takes place in the farming sector.

Clause 13 of the SD sets a maximum limit for overtime at 15 hours per week, whereas the BCEA provides a maximum limit of 10 hours per week.

The SD makes provision for emergency work, which it refers to as work which is "required to be done without delay owing to circumstances for which the employer could not

reasonably have been expected to make provision and which cannot be performed by farm workers during their ordinary hours of work". Employees receive pay for such work but a number of provisions in respect of hours of work do not apply to emergency work.

The SD has quite intricate provisions in respect of Sunday work. An employee who works one hour or less on a Sunday must be paid double the hourly rate; an employee who works between one to two hours must be paid double the rate for the actual time worked; an employee who works between two and five hours must be paid the usual daily wage rate; and an employee who works for more than five hours must be paid double the ordinary daily wage or double the rate for the time worked, whichever is the greater. Furthermore, if an employee who is not resident on the farm works on a Sunday for less than two hours they must be regarded as having worked for a minimum of two hours.

The BCEA defines 'night work' as work performed between 18.00 and 06.00. The SD, however, is more generous to the farmer by limiting night work to the period from 20.00 to 04.00. The SD prescribes a minimum night work allowance of 10%.

Given that many farm workers live on farms that are some distance from medical practitioners and medical facilities, it is not surprising that the SD makes a number of specific rules in respect of sick leave. First, the clause on sick leave allows that the farmer may pay for the employee's hospital or medical treatment, which amount can be set off by the farmer against the employee's pay. Furthermore, the BCEA provides that an employer is not required to pay for sick leave if the employee fails to provide a medical certificate signed by a medical practitioner or any other person certified to diagnose and treat patients, and who is registered with a professional council established by an act of Parliament.⁵³ The SD, however, extends the authority to issue and sign a medical certificate for the purpose of sick leave to a clinic nurse practitioner, a traditional healer and a community health worker. This presumably makes medical certificates more accessible to sick farm workers.

The SD provides a notice period of at least four weeks if the employee has worked for the employer for six months or longer. The BCEA is less generous, limiting the notice period to two weeks for employees with more than six months service but less than a year, and providing four weeks only where the employee has more than one year's service. The more generous notice period in the SD accords with the minimum period of notice a farmer is required to provide to a resident farm worker, who has had his or her employment terminated, to vacate the house. This is aimed at accommodating, at least to some extent, the difficulties farm workers will face in finding other employment and alternative accommodation. In the same vein the SD also provides rules as to how to deal with a worker's livestock and crops on a farm when the worker has been dismissed.

The clause dealing with temporary employment services in the SD corresponds to a large extent with section 82 of the BCEA and does not appear to conflict with the expanded regulation of temporary employment services in sections 198 and 198A of the LRA.

⁵³ This applies only when the employee has been absent for more than two consecutive days or on more than two occasions during an eight-week period.

However, the SD appears to make recovery of money owed to workers a bit easier. It provides, like the BCEA and LRA, that the temporary employment services and the client are jointly and severally liable to comply with the SD, but it also provides that if the temporary employment service is in default of its obligation to make payment to a farm worker in terms of the SD for a period of 30 days, then the client (i.e. the farmer) automatically becomes liable.

It should be noted that the SD has two additional provisions, effectively addendums. The first provides a pro forma Written Particulars of Employment, which can be completed by a farmer. The second is a set of Guidelines that covers the main provisions of the SD, including the notice periods and termination, the procedure for termination (incorporating aspects of the LRA), hours of work (including 'normal' hours of work, extension of ordinary hours of work, overtime, daily and weekly rest periods, and night work), Sunday work, and all the forms of leave. It is in effect a sectoral code of good practice.

Wholesale and Retail Sectoral Determination (No. 9)

The SD has a wage schedule that prescribes minimum wages for 15 occupational categories ranging from General Assistant/Trolley Collector (the lowest wage category) to Manager (the highest wage category).

There are some important provisions in respect of hours of work of employees in the SD. These were presumably included in the SD to provide flexibility for employment of workers on a part-time basis to cover peak shopping periods in the week.

Employees who work less than 24 hours a month must be paid at least the hourly rate for their occupational category but no other provisions of the SD apply to them (clause 1).

There is an important distinction between employees who work 27 hours or less a week and employees who work for more than 27 hours a week. Employees who work for 27 hours or less a week may enter an agreement with their employer that entitles them to a wage premium of 25%. Such employees, however, sacrifice their entitlement to be paid an allowance for night work, entitlement to sick leave and family responsibility leave, and they receive only two weeks' paid leave per year and on request one week's unpaid leave. If an employee who works for 27 hours or less a week does not enter such an agreement then they are not entitled to a wage premium but all the other provisions of the SD apply to them.

Clause 11 of the SD provides another temporal threshold. It distinguishes between employees who work for more than 40 hours per week up to a maximum of 45 hours, and employees who work for 40 hours or less a week including a Sunday. The latter employees may enter an agreement which must give them two days off per week and one Sunday off in every four.

The provisions in respect of the weekly rest period and payment for Sunday work do not apply to them.⁵⁴

It should be noted that any employee who works for less than 4 hours a day is entitled to be paid for 4 hours (clause 2).

The SD makes provision for commission work, which is defined as “any system under which an employee receives additional pay calculated on the value or volume of sales, margin, profit, or on the value or number of orders submitted to and accepted by an employer” (clause 36). The clause in respect of commission work applies only to ‘sales persons’ and if there is an agreement. Such an employee must receive at least two-thirds of their prescribed minimum rate (whatever additional commission they might earn). Should the employee not earn an amount equivalent to the prescribed minimum rate because of an act or omission by or on behalf of the employer, he or she must be paid the prescribed minimum rate. The hours of work clause (clause 9) does not apply to sales staff who travel to customers and who regulate their own hours of work. It is presumed that ‘sales staff’ is the same as ‘sales persons’, which indicates that where there is an agreement with regard to commission work the hours of work clause does not apply.

Emergency work is not regulated in the BCEA (or defined in the BCEA). The SD defines ‘emergency work’ as “work which is required to be done without delay owing to circumstances for which the employer could not reasonably have been expected to make provision and which cannot be performed by employees during their ordinary hours of work” (clause 9). Provisions in respect of ordinary hours of work, the limits on overtime, the requirement for a meal interval after five hours’ work, the prescriptions in respect of daily and weekly rest periods, conditions with regard to night work, and regulation of public holidays, do not apply when emergency work is performed.

The SD makes provision for night work and prescribes a minimum night work allowance of 10% of the hourly wage.

The BCEA does not regulate the supply of protective clothing to employees. However, clause 31 of the SD prescribes that an employer shall provide overalls and protective clothing to employees who perform certain work, i.e. two overalls or washing coats per year for employees who handle unpackaged foodstuffs, etc.; rain gear to employees whose work exposes them to wet weather; knee pads to employees who scrub or wash floors by hand. The employer must maintain the clothing in a clean and serviceable condition at no cost to the employee, although the employer may pay the employee at least R2.60 per week to maintain the clothing himself or herself. The clause also deals with ‘outfits’ supplied by an employer which must be paid for by the employee.

⁵⁴ It is unclear why this further threshold was created and the SD is confusing in that it does not differentiate between the 27 hour threshold and the 40 hour threshold for employees. For example, which provision applies to someone who works for 30 hours a week including a Sunday?

Private Security Sectoral Determination (No. 6)

The SD has a wage schedule that has ten occupational categories, ranging from General Worker (the lowest paid) to Artisan (the highest paid). The key occupational category, i.e. security officers, is further divided into four sub-categories: Grade A; B; C; and D and E). There are also sub-categories for some of the other occupations, e.g. a clerical assistant is divided into minimum wage rates for those with less than one year's experience, those in their second year of experience, and those with more than two years' experience.

The wage schedule, furthermore, differentiates wage rates between three areas. Minimum wages are stipulated for the three areas as well as monthly premiums: R150 per month in Area 2 rising to R300 per month, and R60 per month in Area 3. There are also special allowances for mobile supervisor, armed security officer, armed response officer, national key points officer, and control centre operator, which increase each year for three years.

The SD applies explicitly to workers in "disguised employment relationships", it defines a 'casual employee' (an employee without a "fixed contract of employment" who works 24 hours or less per week), and it defines 'employee' differently to the BCEA and also defines an 'employer' (which the BCEA does not do).

The explicit inclusion of workers in disguised employment relationships mirrors section 83A of the BCEA. However, the opening sub-clause refers to security officers and other categories "on contract". Such workers, should one of the seven rebuttable presumptions apply, are deemed to be employees. This suggests that independent contractors would be deemed to be employees. This intention to include independent contractors within the scope of the SD is supported by the definition of 'employee', which does not exclude independent contractors and explicitly includes workers deemed to be employees in terms of the provision on disguised employment relationships. The definition of 'employer' tends to support this interpretation.

The BCEA does not make provision for 'casual employees'. In fact, when the BCEA was introduced it appeared that its intention was to eliminate the 'casual employee' category (defined as an employee who works for three days or less per week or 24 hours or less per week in the 1983 BCEA and many wage determinations). The inclusion of this category in the SD therefore must be a response to specific needs in the private security sector.

A casual employee must be paid the minimum hourly rate for the work he is she is doing plus 15% or must be paid the actual rate an employed worker doing the same work earns, whichever is the higher. Furthermore, if such an employee works for less than four hours on any day they must be paid for a minimum of four hours.

The SD makes provision for an employee in a certain occupational category who does the work of another occupational category that has a higher rate of pay for one hour or more on a day, to be paid for the full day at the higher rate.

There is a night work allowance of R5.50 for a stipulated period, after which the allowance will increase to R6.00.

Importantly, the SD departs from the maximum weekly hours of work prescribed in the BCEA. The maximum hours for security officers is set at 48. This also applies to the averaging of hours and compressed working week provisions in the SD. However, it should be noted that whereas the BCEA provides that an agreement to average hours must have a limit of five hours overtime per week over the agree period, the SD increases this limit to ten hours.

The SD defines ‘emergency work’ as work that is required to be done without delay owing to circumstances for which the employer could not reasonably have been expected to make provision and which cannot be performed by employees during their ordinary hours of work. The provisions in respect of meal intervals, rest intervals, consecutive hours of work and limits on overtime do not apply to an employee performing emergency work.

The provision in respect of meal intervals does not apply to employees who are wholly or mainly engaged in tending, feeding or cleaning animals.

Sectoral Determination: Learnership (No. 5)

Learners are employed persons who have concluded a learnership agreement in terms of section 17 of the SDA (learners include apprentices). There are two types of learners: a person who is not in employment when they conclude a learnership agreement; and a person who was already in employment when they concluded the agreement. The SD applies only to the former type of learner.

Section 18(2) of the SDA requires that if a person who is not employed enters a learnership agreement with another person, they must thereafter enter a written contract of employment. The SD confirms the need for a written contract of employment in terms of section 18(2) of the SDA. It should be noted that the BCEA does not require there to be a written contract of employment between an employer and an employee, but it does require the employer to give the employee written particulars of employment.

The SD sets wages and working conditions for learners (which includes apprentices), i.e. learners who were not in employment prior to the conclusion of the learnership agreement. The SD takes precedence over any collective agreement, which would include a bargaining council agreement, except insofar as the collective agreement expressly provides for learners to receive an allowance or conditions of employment that are more favourable to an employee than provided for in the SD. This means that learners are either covered by the BCEA, with allowance (wage) rates and certain customised conditions set by the SD, or they are covered by the BCEA and a collective agreement, including a bargaining council agreement, where this sets better allowances or conditions of work than the SD.

Currently the allowances for learners are set according to a number of criteria: the NQF exit level of the learnership; the number of credits earned by the learner in respect of the learnership; and a percentage of what the qualified wage is. In years when the DoL does not update the SD wage schedule, the increase in the allowance is determined by the CPI.

There are a number of customised conditions in the SD for learners. First, there is provision for emergency work. This follows much the same format as other SDs (see above). Second, a learner in a learnership requiring more than 120 credits either earns annual leave by accumulating credits (one week's leave for every 40 credits) or according to time worked (one week's leave for every four months worked), whichever is the lesser. This should amount to three weeks' annual leave per year. It appears that a learner who is enrolled in a learnership requiring less than 120 credits is not entitled to annual leave. Alternatively, they could qualify for annual leave in terms of the BCEA.

Expanded Public Works Programme Ministerial Determination (No. 4)

The Expanded Public Works Programme (EPWP) Ministerial Determination covers an extensive range of public works schemes, including: listed environment and cultural sector programmes (e.g. Working for Water); infrastructure sector programmes and projects; social sector programmes (e.g. Early Childhood Development); and all projects and programmes accessing the EPWP wage incentive, including those implemented by non-governmental organisations, community based organisations and the Community Works Programme. Supplementing the extensive list is a provision for "the Department of Public Works" to deem any other programme to be part of the EPWP. If the EPWP is to be excluded from the scope of the NMW statute the latter deeming power will be problematic; it would appear to give any official in the Department of Public Works the power to effectively exempt certain work programmes from the NMW by deeming them to be EPWP programmes.

As noted in the discussion on the MD above, the EPWP MD is exceptional in that it provides for wages. Furthermore, it provides for task-based payment.

The MD is exceptional in other ways. First, it covers 'workers' rather than 'employees'; but it defines a 'worker' as any person working in an elementary occupation on an EPWP. Second, it defines 'task-based work' and a 'task-rated worker', which it distinguishes from a 'time rated worker'. As noted above, it also provides a rate for a 'task'. It sets a maximum number of hours a week for a task-based worker of 55 hours.

A security guard employed in an EPWP may work up to 55 hours per week and a maximum of 11 hours per day.

Sick leave accrues at a rate of one day for every month worked. However, sick leave may not be transferred from one contract to another. A medical certificate is required before a worker will be paid (subject to certain conditions). The medical certificate must be issued and signed by a medical practitioner, a qualified nurse or a clinic staff member authorised to issue medical certificates. This expands the range of people who can issue and sign medical certificates beyond the limits set in the BCEA.

A worker qualifies for three days family responsibility leave if they work for at least four days a week. The MD does not have a requirement that a worker must have worked for four months to qualify for family responsibility leave as in the BCEA. This is in line with the short-term nature of many EPWP employment contracts.

EPWP workers do not qualify for notice pay if the termination is for good cause and a fair procedure has been followed. Similarly, EPWP workers do not receive severance pay. Furthermore, there is an irrebuttable presumption that a worker who is absent for three consecutive days without informing the employer of an intention to return to work has terminated the contract. This is also the case if a worker does not attend required training events without good reason.

The requirements in the BCEA with regard to written particulars of employment, the keeping of records, and certificates of services are simplified in the MD. The provision regarding deductions from pay is also more limited than the BCEA.