

Metal Industries Collective Bargaining Summit

Notes: Setting the Scene

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I start from the premise that social justice is what our public international law obligations, our Constitution, our labour laws and now our survival as an economy, indeed as a society, demands and that social dialogue is the only means to meet those demands.

In its latest Update on the Global Coalition for Social Justice, the ILO Governing Body reminds governments that a society is only 'socially just' if -

- 'there is an essential degree of fairness in the distribution of economic outcomes, including in the context of difficult transitions such as those related to crises and longer-term economic transformations'.

It then goes on to remind governments that to 'advance social justice, it is essential to have strong and representative employers' and workers' organizations that are engaged in social dialogue processes' to build trust and foster social cohesion. And in order to do this governments have 'to strengthen their role through an enabling and institutional framework and a broad commitment to dialogue on the renewal of the social contract'.

Having said that, here is the outline of my argument:

I will first deal briefly with the original vision for social dialogue in the 1995 LRA

Then the current state of affairs followed by what I believe to be its causes.

Then the consequences for social dialogue if there is no fundamental change in direction

And finally with a few pointers to what that change of direction may take.

The original vision for social dialogue in the 1995 LRA

- The policy choice was to continue with, strengthen and expand the coverage of sector level collective bargaining and to give bargaining councils the role of regulating bargaining at the level of the workplace. The policy reasons for the retention of sector level bargaining were:

- sector level bargaining is lower on transactional costs for employers and trade unions
 - negotiations are conducted in respect of a sector rather than at individual workplaces
- it shifts negotiations on major issues out of the workplace with the intended effect of permitting more cooperative forms of engagement at the level of the workplace
- bargaining outcomes at sector level set a competitive floor – by setting standards applicable to all employers in a particular market, competition between employers is based on productivity rather than the socially undesirable reduction of wages and extension of working hours
- industrial action occurs less often in a sector level system and because the industrial action takes place across all employers in the sector at the same time and has a less damaging competitive effect on individual employers
- sector level benefit schemes are both more cost effective and foster labour mobility within the sector
- Apart from the collective bargaining purposes of bargaining councils, the LRA envisaged a wider role for bargaining councils including-
 - not only to resolve disputes but *prevent* them
 - developing proposals on policy and legislation for submission to NEDLAC in respect of the sector and generally
 - regulate workplace bargaining and consultation
 - provide industrial support services such as labour relations support, export and localization promotion – a quick glance at the Steel Industry Master Plan opens up a range of opportunities
- Sectoral bargaining was premised on the existence of strong employer associations and strong trade unions
- And to promote and strengthen collective bargaining at sectoral level, it provided for the extension of agreements to non-parties
 - to take competition over wages out of the equation (and that is why collective bargaining is excluded from the Competition Act) and
 - to extend protection to non-party employees
- The system envisaged co-determination at the level of the employer or workplace through workplace forums

The current state of affairs

- sectoral bargaining is under serious threat
 - there has been a reduction of the number of bargaining councils (almost half of the number in 1992, a third of those either defunct or not functioning as collective bargaining institutions)
 - there has been decreasing coverage in the private sector – the apparent increase is a result of the inclusion of the public sector bargaining councils.¹
- employer associations party to bargaining councils are threatened by single issue employer associations intent on undermining sectoral collective bargaining – indeed any form of labour market regulation
- there has been a proliferation and fragmentation of trade unions and declining union membership
- there is growing resistance to the extension of sectoral agreements
 - litigation attacking the representativeness of parties to the Council
 - increasing ministerial and departmental reluctance to extend
- The primary focus is on dispute resolution – arbitration, courts and power play – rather than also focusing on dispute prevention and to the extent that the CCMA has established a unit to do so, it is under resourced²
- There has been no real co-determination to speak of:

Charles Nupen: “The cold hard reality is that workplace relations, and the labour relations culture in South Africa generally, remains largely untransformed. The social partners have been unable, or unwilling, to deliver themselves from deeply adversarial forms of engagement. Leadership styles among employers in the main remain largely hierarchical and autocratic. Unions continue to hold the view that the best way of achieving for their membership is through power driven strategies. Naming, blaming and shaming all too often characterize labour relations discourse. Too many workplaces *remain dispute driven, rather than relationship driven*. There is a reluctance to

¹ Shane Godfrey: ‘Contested terrain: The extension of multi-employer agreements in South Africa’ in Hayter and Visser, *Collective Agreements: Extending Labour Protection*, ILO 2018

² Charles Nupen: ‘CCMA: A time for change’ in Olivier and others, *Liber Americorum Manfred Weiss*, Juta 2021.

experiment with creative alternatives to the barren style of positional collective bargaining. And all of this continues to occur in a country that is in economic crisis, that is shedding jobs at an alarming rate, and that is confronted by investment downgrades and failing state owned enterprises... Adversarialism is deeply embedded in our labour relations culture and will take some dislodging.”

The causes

- there have been significant changes in the nature and forms of employment
 - nonstandard forms of employment (temporary fixed term employment) introduced by new business strategies of sub-contracting and labour-broking
 - It is important to note that the purpose of the strategy is to reduce operating costs by transferring responsibility for employees to sub-contractors and limiting to the minimum the number of permanent employees employed by employers
- but it is not just the new forms of work that are changing – the nature and structure of the workplace, the organisation of work, the demands of the global market, the structures of ownership are all in flux, not as a transitional feature but as an end-state.
- All of which is leading to a workforce that is difficult to organise and an increase in number and decrease in the size of employers. For example the Department of Employment and Labour records that in the Building Industry Western Cape, there were 502 employers in 2012 and now 2 406 employers in 2022.
- A lack of ministerial and departmental support for sectoral bargaining: I have previously argued that ‘the retention of the sector collective bargaining system did not mean that the system was not in need of a serious overhaul. But the policy of deepening and expanding the coverage of bargaining councils cannot be achieved by legislative fiat – it required the social partners and particularly the State to drive the implementation of the policy.’ The sorry state of sectoral bargaining after the commencement of the LRA is testimony to the failure to do so.

The first problem that required attention was the fragmentary coverage of bargaining councils with most workplaces not covered by sectoral bargaining. Most councils were not truly sectoral – some covered parts of a sector, some were not national in scope

and others overlapped. The Department had a critical role play in the consolidation process and the establishment of new bargaining councils. So for example the precursor to this MEIBC, namely the National Industrial Council for the Engineering Industry as it was then called, was established in 1940s after the Minister of Labour had convened a meeting of the trade unions and employer organisations in the industry, then in separate provincial industrial councils and encouraged the parties to create a national industrial council. A similar role was envisaged for the Department post 1996 but that it has failed to facilitate a process for the establishment or consolidation of councils.

- Although the 2018 amendments to the LRA have taken new forms of employment into account in determining representativeness of parties to a bargaining council, these new forms of employment and business strategies have had a severe effect on the composition of the sector making it particularly difficult for trade unions and employer associations to recruit and retain members.
- All of which has also led to a declining membership of employer associations and the rise of single-issue employer associations opposing any form of employment regulation

Impact

- Although the ostensible argument against sectoral bargaining advanced by these single issue employer associations is to decentralize collective bargaining, the reality is that the collapse of sectoral bargaining will mean a descent in most cases to no collective bargaining at all.
- the impact on trade unions will be that, while they will be able to bargain collectively in the larger firms, there are only a limited number that can successfully be administered by a single trade union – the transactional time and resources for a trade union to negotiate with one employer is almost as much time spent on a sectoral agreement.
- the impact on employers will be twofold: many if not most employers will not be bound by workplace collective agreements and will accordingly compete on wages and working conditions with those that are bound; and those that are bound, will face the threat of strikes, while their competitors are not.
- the impact on employees will mean that most employees will have no protection other than the national minimum wage, or a sectoral determination

- although provision is made in the LRA for the funds and schemes to continue in the absence of councils fulfilling a collective bargaining function, the requirement for the extension of those funds and schemes is 'sufficient representativeness' and accordingly just as vulnerable to collapse as their role as collective bargaining institutions.

Possible ways to avoid the worst:

Three possible ways: Amend the LRA/focus on dispute prevention to promote codetermination at the workplace and cooperation at sector level for the social partners.

LRA amendments

- NEDLAC is currently engaged in considering amendments to the LRA and it may be important for the unions and employer associations such as SEIFSA to call for the reform of section 32 of the LRA to have sufficient representativeness as the criterion. Prior to 2015, the German extension laws required 50% coverage much as ours do: 50%+ union membership or 50% of the employees employed by the employer parties to the agreement. Because of the difficulties experienced in reaching these levels, the representativeness criterion was replaced the criterion of 'predominant importance', which the labour courts interpreted with reference to representativeness. As a result the German trade unions are pressing for further reform and that the criteria should not be linked only to representativeness but to the provision of 'equitable working conditions' and 'the stability of the bargaining system' particularly in the face of a descent into no or very little collective bargaining at all.
- There is also the possibility of making participation in collective bargaining a requirement for registration of employer organisations in order to prevent the registration of single issue employer associations intent on undermining the fundamental purposes of the LRA.

Dispute prevention

- There should be a focus on prevention of disputes rather than just resolving disputes. In other words for the MEIBC to establish (very much like the CCMA has done) a unit dedicated to dispute prevention with mediators and conciliators to engage in relationship building exercises – and amend its dispute resolution agreement to include such processes.

Promote codetermination and cooperation!

- Cooperation among social and economic actors has become increasingly important in a world of work that is changing rapidly through the introduction of new technology. Tom Kochan, a leading US labour relations professor, in a presentation to the ILO Governing Body, argued almost two decades ago that the changes that needed to take place in the 21st century are -

“... models of labour-management that are best suited to supporting a knowledge-based strategy and work system are ones that engage workers directly in problem solving, continuous improvement, and cooperation with peers and supervisors, negotiate employment terms that reinforce these workplace practices, and share information and govern the organization in ways that reinforce and sustain trust and use of knowledge throughout the organization over time.”³

- The profound technological and digital advances that have been made since Kochan proffered his view reinforce the need for the changes he describes.
- The 4th industrial revolution and issues such as climate change and transitioning to a green economy, and most recently, the global covid pandemic, carry major implications for traditional patterns of work, and in important instances pose a real challenges to labour market stability. The changes and upheavals that they portend have accelerated and expanded the need for fundamental changes in labour management relations. Much greater emphasis is demanded of the social partners to explore cooperative models of labour relations and in so doing identify and pursue common interests and an agenda more reflective of accommodating each other’s needs and interests. There is much at stake, and much to gain in exploring new modalities of engagement.
- Effective dispute prevention will contribute materially to enabling the kind of seismic shifts in labour management relations required to promote labour market stability and

³ Tom Kochan, “Efficiency and Equity: The ILO’s Role in Building 21st Century Work & Employment Institution”, a presentation to the Governing Body of the International Labour Organization (ILO), Geneva, Switzerland, March 25, 2003.

pave the way for a smooth transition to a knowledge based digitally driven economy. At the same time, they are important in promoting labour rights and a rights culture and in providing access to social justice.

- Professor Webster has a useful distinction in respect of the collective bargaining compacts, agreements and compromises that employer associations and trade unions enter into - negative comprises and positive ones. Negative compromises are those that settle reluctantly and in which the parties see each other as adversaries – labour as a cost to the business v labour’s demands to improve pay to reduce historic inequity and mitigate the increase in the cost of living. Positive compacts are where the parties find common ground for mutual benefit – such as productivity (in both a quantitative and qualitative sense) or ensuring the survival and growth of the metal industry. Let me then deal with both:

Productivity

- Productivity is not a sectoral issue (other than provided for in a framework agreement and promoted) – it is a workplace issue, and it is there that common ground for the mutual beneficial interests for both employer and employee may be established. Whether this engagement is done with the shop stewards or in the form of a workplace forum is not important – it is for both trade unions and employer associations to programmatically shift focus and direction.
- Although the benefits of employee engagement are seriously undervalued in our labour relations system, the unions have for largely for ideological reasons not taken up the initiative offered to them by the LRA particularly as a means of stabilizing not only the industry but sectoral bargaining. As the German example reflects, the two depend on each other to survive: collective bargaining at sectoral level and co-determination at the level of the employer or workplace. This involves not only the trade union’s engagement in decision making at the level of the employer but also the development of what Charles Nupen calls a “more engaging, conducive, people centered style of leadership” on the part of management.
- There has been some shift in thinking on the part of the trade unions as the Partnership Agreement reached between the unions (including NUMSA) and the principal contractors in respect of Medupi and Kusile. It is these kinds of agreements that a dispute prevention

initiative by the MEIBC can work towards. Moreover, the Steel Industry Master Plan records:

“Increasing productivity, reliability and professionalism are essential for the industry to succeed and survive. The maintenance of jobs and of a living wage depend on increasing productivity and reliability for delivery and quality. This will require the unions to lead a culture change in both labour and management, with a special focus on the role and training of junior and middle management. Continuous skill upgrading is essential.”

“Worker involvement models at company level must be explored further and given more prominence as an option for transformation. Options should include both share ownership and participation in strategic decisions on productivity, optimization, skills and training and other relevant matters. These should count towards transformation and localization targets. *The unions have stated that they are open to discussing these options.*”

- In exploring those options, it would do well for the unions to again have a look at section 84 of the LRA which sets out the matters for consultation of workplace forums: restructuring the workplace, introduction of new technology and new work methods, changes in the organisation of work, partial and total plant closures, mergers and transfers of ownership, retrenchments, job grading, product development, export promotion.... .. and disclosure of information in section 89 – all relevant information to engage effectively in consultation

Survival and growth of the industry:

- This is what the Master Plan records:

“Further discussions on the role of the unions in the survival and growth of the industry will take place in the context of the Master Plan. Key issues concern the role of the unions in making the industry competitive, innovative and outwardly-orientated. The professionalization of the industry, the advancement of workers, career paths and the retention and growth of jobs will be focus areas for discussion. NUMSA has proposed that

the Steel Oversight Council discuss various options, including worker participation in company ownership. There are many existing schemes in various industries.

- In the Master Plan reference is made to NUMSA working “with its fellow unions in Europe on the Learning Factory model and should lead this programme”.
- Towards the end of 2019 the German Embassy asked Charles Nupen to facilitate an engagement between the top leadership of the German employer and trade union confederations with their South African counterparts. The agenda focused on the German system of co-determination, a just transition to renewable energy, challenges of the fourth industrial revolution and hours of work and the working week. Plans for further engagements were in the mix when Covid struck. Maybe that programme should be resurrected.
