

# Bargaining council system

## Problems and challenges

This is part 2 of an article on the state of the bargaining council system. In this part **Shane Godfrey** discusses why the system has weakened and what challenges this poses for government, employers and trade unions.

**T**he first article (*SALB 33.3*) examined some trends in the bargaining council system since the introduction of the new Labour Relations Act (LRA). There were both positive and negative developments, with negative trends showing a weakening of the council system.

The article spoke of how Cosatu (Congress of South African Trade Unions) has not progressed in establishing the comprehensive centralised bargaining system that it demanded in 1994. The council system is still fragmented, although there has been consolidation in some sectors. It is clear that statutory councils are not a suitable vehicle for unions to establish bargaining councils. Also outside the council system, bargaining has weakened.

Let's look more closely at why the council system has weakened and what challenges this poses.

### REPRESENTIVITY CHALLENGE

One of the essential ingredients for a strong bargaining council system is the representivity of the parties to councils – the employers' organisations and the trade unions.

Low representivity is a major

threat to bargaining councils, mainly because it makes it difficult for councils to have their agreements extended to non-parties, meaning firms and employees who are not members of employers' organisations or unions that belong to councils.

It is a strong probability that when a council does not have its agreement extended it will not last for long. Employers who are not members of the party employers' organisation will not be bound by the agreement and will undercut employers that are bound. This puts pressure on employer members, who can simply leave the employers' organisation in order to avoid further wage increases. A vicious cycle follows where representivity drops further, and in the end the council collapses.

In 2004, on average, private sector bargaining council employers hired 63% of employees covered by councils, and 60% of employees covered by councils were members of party trade unions. So it seems that representivity is not a major problem.

But these average figures hide that parties at some councils have much lower levels of representivity.

These councils have been affected by a shift on the part of the Minister of Labour in his discretion to extend agreements when parties are not representative in terms of the LRA.

In terms of the LRA the Minister of Labour must extend bargaining council agreements if the parties are representative, meaning that employers and unions must employ or represent at least 50% of workers in the sector. However, the minister has the discretion to extend agreements if the parties do not meet these thresholds on two conditions:

- If the parties are 'sufficiently representative'; and
- If the minister believes that not extending the agreement will undermine bargaining at sectoral level.

The Act does not define the term 'sufficiently representative', which means that this is something the minister determines, with the help of officials in the Department of Labour.

Similarly, it is for the minister to decide at what point a bargaining council will be undermined by not extending an agreement. But the reason for the minister's discretion is clear from the LRA. It is there for the minister to support bargaining councils by extending their agreements if they are struggling to establish themselves or are battling to maintain representivity.

In the past council agreements were extended almost as a matter of course. This has changed in recent years. Research strongly suggests that the Department of Labour is adopting a stricter approach. If the



*Trade union delegates at the Metal Engineering Industries Bargaining Council.*

employer or union parties have a representivity figure below 40%, the minister will not extend the council's agreement. If one of the parties' representivity is in the low 40% range it is also unlikely that the minister will extend the agreement.

So, it appears that the department and minister are interpreting the term 'sufficiently representative' to mean a level very close to 50%.

Although the LRA gives the minister discretion to extend agreements, in practice the council's request for the extension is first examined by officials of the Department of Labour. If there is a problem such as the representivity, the officials will inform the council that they are not going to recommend extension. It will then interact with the council to try and rectify the situation. The idea is for the council to address the problem and re-submit the agreement for extension.

But low representivity is not something that can be improved overnight. This means that the extension of the agreement is

effectively refused without the request reaching the minister. Some councils have ignored the department's recommendation and insisted that their agreements are referred to the minister for a decision. The likelihood is that the minister will refuse these requests.

Why has the minister become stricter if the intention of the LRA is that he uses his discretion in a supportive way for centralised bargaining? One factor may be the political strength of employers, particularly the small business lobby, in the context of high unemployment.

In other words, small business has put the minister under pressure through the perception that the extension of agreements is causing job losses and preventing the launch of new firms.

The minister's response has been to ensure the 'legitimacy' of extensions by setting a high representivity threshold. The message that parties to councils must raise their representivity, and that they can no longer rely on the 'generosity' of the minister to extend agreements, has been

conveyed to councils by department officials on annual visits.

There are however two interrelated problems with the minister's reasoning.

First, even if the minister wants to protect bargaining councils by being stricter it is questionable whether this is the correct interpretation of the LRA in respect of discretion to extend agreements.

Second, with the changes taking place in the organisation of work and the increasing informalisation of the labour market, the minister's concern with 'legitimacy' seems out of date. Centralised collective bargaining is under threat and unless the state takes a more proactive approach there will soon be little left of the bargaining council system.

Low party representivity, together with the minister's approach to extensions, is therefore the first major challenge facing the bargaining council system.

#### **NON-COMPLIANCE CHALLENGE**

The second critical challenge facing the bargaining council system is the growth of informal employment. For councils this growth translates into an increase in the number of employers that are not registering with councils and not complying with standards set in their agreements.

Informal employment happens in two ways.

First, there is a process in which formal employees shift to unregulated employment. This is driven mainly by registered and compliant firms outsourcing functions to smaller sub-contractors that do not register with the bargaining council or comply with its agreement.

For example, there has been a huge increase over the last decade in the number of labour sub-contractors in the building industry,

few of which register with the building councils. It is no surprise that a number of bargaining councils in the building sector have collapsed, while others are in a precarious position.

Another example is in the clothing industry, where companies use unregistered homeworkers to produce huge quantities of clothing. This is causing considerable instability for the national clothing bargaining council.

Second, the growth in informal employment is fuelled by many new small firms starting up. They hire unemployed workers or new entrants to the labour market. These firms struggle to make a profit and many cannot comply with bargaining council agreements, or are unaware of the agreement, or simply refuse to comply with it.

At the same time their workers are unaware of their rights or are so desperate for work that they choose to work for lower wages. No one knows how many of these firms exist, least of all the parties to councils and its officials. At best they can make informed guesses of the size of the unregistered sector within the council's jurisdiction.

The problem is that this informal sector is more likely to become bigger than smaller. And as more firms operate outside the system, they begin to undercut those within the system. This creates a strong incentive for party employers to opt out, or to hive off operations to small, non-compliant firms. The result is that councils become less relevant as regulators of the labour market and eventually collapse.

#### WHAT CAN BE DONE?

What can be done to strengthen the bargaining council system?

First, unions need to develop strategies to organise workers in smaller firms and to organise non-

standard employees. Stable collective bargaining structures rest on strong organisation. Cosatu should be reviving its campaign for centralised bargaining. It should focus attention and resources on sectors where no centralised bargaining exists or where bargaining is weak or under threat.

Second, councils need to be creative addressing these problems. There are some good examples for councils to copy.

The Cape Building Industry Bargaining Council has pioneered innovative campaigns to compel major housing agencies to make registration with a council a requirement in tenders for building work or only to deal with registered building firms.

The council has also introduced programmes that make registration with the council more attractive for small sub-contractors, such as providing a payroll service for registered firms at a small fee. The result has been a steady increase in the number of employers, particularly small employers and sub-contractors, that have registered with the council.

Another example is the Leather Industry Bargaining Council. It introduced an innovative agreement in the footwear sector to help the industry to survive as it was threatened by the importation of cheap shoes. There was an upsurge in informal shoe-making operations after the retrenchment of footwear workers which undermined labour standards set by the council. The footwear agreement now provides that all firms are categorised as formal, semi-formal or informal.

Firms categorised as formal pay 100% of the set wage rate and comply with the rest of the agreement. Semi-formal firms comply with the agreement but

pay only 75% of the set wage rates. In both cases negotiations at enterprise level can further reduce wages within certain parameters. Informal firms are excluded from the agreement but must still register with the council.

Unions may criticise the agreement for abandoning workers at informal firms, but few of these workers are union members and the council does not have the capacity to enforce agreements at these firms. The agreement has however stabilised centralised bargaining in the footwear sector.

So there are things that unions and councils can do. But can the LRA be amended to give greater support to bargaining councils?

It is unlikely that the law will make the bargaining council system compulsory, as Cosatu originally demanded, but there are two amendments to the LRA that might help.

First, the LRA could spell out the criteria for the minister's discretion to extend agreements in more detail to ensure that it is used in a supportive way for strengthening bargaining councils.

Second, the provision for statutory councils has failed. The LRA should spell out a different mechanism for bringing unions and employer organisations together to negotiate centrally in preparation for establishing councils.

These amendments could go some way to consolidating the council system and to expanding it into sectors where there is no centralised bargaining. LB

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