



planning, monitoring & evaluation

Department:
Planning, Monitoring and Evaluation
REPUBLIC OF SOUTH AFRICA

**SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)
FINAL IMPACT ASSESSMENT TEMPLATE (PHASE 2)**

**LABOUR RELATIONS ACT AMENDMENTS & CODE OF GOOD PRACTICE ON
COLLECTIVE BARGAINING, INDUSTRIAL ACTION AND PICKETING**

DEPARTMENT OF LABOUR

The Final Impact Assessment: Department of Labour. Amendments to the Labour Relations Act, Code of Good Practice on Collective Bargaining, Industrial Action and Picketing and Picketing Regulations.

The Final Impact Assessment provides a detailed assessment of legislative amendments, including picketing regulations, to the Labour Relations Act (no 95 of 1995) and a Code of Good Practice on Collective Bargaining, Industrial Action and Picketing (the Code). The amendments, Code, as well as an Accord on Collective Bargaining and Industrial Action are key outcomes of a two-year engagement process between government, organised business and organised labour in the National Economic Development and Labour Advisory Council (NEDLAC) to address the challenges of labour market stability and wage inequality as posed by the President in his State of the Nation Address in June 2014.

1. The problem Statement/ Theory of Change

1.1. Give summary of the proposal, identifying the problem to be addressed and the root (causes) of the problem that will be addressed by the new rule.

a) Summary of the proposal (Summary Background of the proposed policy/bill/regulations/ other):

Background

Industrial action had been at a record high in South Africa for almost a decade although there have been important fluctuations over time. The average number of strikes over the five-year period 2012 and 2016 is 106.6 per annum or 8.8 strikes per month. Specifically, there were 99 strikes in 2012, increasing to 114 in 2013 with a slight decrease to 88 and 110 in 2014 and 2015 respectively (Department of Labour, 2014). In 2016 industrial action reached the unprecedented high of 122. While these strikes are caused by a variety of factors across industries, the majority are due to wage disputes.

In 2012 a total of 3.3 million working days were lost due to strikes. This number decreased to 1.8 million in 2013 but rose sharply to more than 10 million work days lost in 2014. Subsequent years have seen a decline of work days lost due to strikes,

but the trend has been uneven with increases and declines in work days lost due to strikes over time. Between 2008 and 2012, the average number of working days lost amounted to 440 days. According to Brand, this is 14 times the average in all EU countries for the period 2005 to 2009.¹

The impact of industrial action and specifically strikes is severe in any economy as it affects production due to loss of working time, strikes affect earnings of workers and hence also consumption in areas surrounding the locality of a strike. The impact of major and protracted strikes on South Africa's economy are considered to contribute to the country's slow economic growth. "The strikes are estimated to have subtracted about 2 percentage points from growth in the first quarter" (OECD, 2015). The impact of industrial action will vary by strike incident, but strikes of long duration inevitably have a higher cost to employers, employees and communities. The 2014 strike on the platinum belt in the North West province lasted for more than 5 months and was reported to have resulted in 440 000 ounces of lost production of platinum. "The three companies, Impala Platinum, Amplats and Lonmin suffered a total revenue loss of about R24.1 billion during the strike and a further loss of R10.6 billion in wages."²

Another example is that of the strike at Ceres Fruit Growers in 2015 that went on for longer than 4 weeks. In this case, approximately R7million was lost in wages and the strike cost growers in the region of R10million.³

Protracted strikes clearly have a higher impact on employers and employees and it would appear that these have become more significant in recent years. In the five years from 2010 to 2014 there were an average of 12.6 strikes per annum that lasted in excess of 30 days. The total number is 63 strikes that can be considered of long duration. Strikes of long duration are also very often associated with violence, intimidation and damage to property. This was the case in the strikes on the platinum belt and in the Ceres Fruit Growers case.

¹ J Brand, *Statistics show SA leads on strikes*. Business Day, 8 November 2013.

² History Online, 2014.

³ L Mketane, *Strike ends after Ceres Fruit signs deal with FAWU*. Farmers Weekly, 14 October 2015.

Violence associated with strike action was placed in the spotlight by the Marikana tragedy on 16 August 2012 at the Lonmin Platinum mine when police shot and killed 34 striking miners and wounded 70 others. This followed the brutal murder of two policemen and two security officers by strikers. As Alan Rycroft suggests, “while the extent of the tragedy makes it unique, what is not unique is the resort to violence in strike situations in South Africa. In fact, violence has become normative.”⁴

Rycroft cites the SA Institute of Race Relations in reporting that a total of 181 people have been killed in strike violence in the period 2000 to 2013. During the same period, at least 313 persons were injured and more than 3 058 were arrested for public violence. In addition to the economic cost of strikes, violence during strikes has placed a high human cost on workers, families and communities.

The particular burdens of protracted strikes and strike violence are what triggered the Labour Relations Indaba on 4th November 2014. The Indaba adopted the Ekurhuleni Declaration that captured the agreement by government, organised business and organised labour to work together to, inter alia, consider options to address violence and prolonged strikes in the context of Constitutional rights and to find ways of strengthening and promoting collective bargaining in South Africa. A Technical Task Team was established and met at the National Economic Development and Labour Advisory Council (NEDLAC) during 2015 and 2016.

The amendments to the Labour Relations Act and the Code are two key outcomes of this process. An Accord on Collective Bargaining and Industrial Action was also agreed which seeks to obtain commitment and undertakings from employer organisation, trade unions and agencies to expedite processes, build capacity and assign resources to resolve issues and disputes. The NEDLAC process resulted in an agreement being signed in February 2017 by the social partners.

The process of engagement between the NEDLAC constituencies explored a number of options, but reached agreement on the LRA amendments and the Code which will

⁴ Prof A Rycroft, *What can be done about strike-related violence?* Faculty of Law, University of Cape Town. Not dated.

be summarised below. Alternative options are therefore not explored in this socio-economic impact assessment.

Summary of proposal

The **amendments to the LRA** deal with the following areas:

i. Extension and renewal of bargaining council agreements (clause 32)

Amendments to this clause change the representativeness requirements for the extension of collective agreements under section 32 and the manner in which representativeness is to be determined. An amendment also gives the Minister the power to renew and extend a funding agreement for up to 12 months at the request of any of the parties to the bargaining council. These provisions are aimed at strengthening collective bargaining.

ii. Picketing (clause 69)

The amendments to section 69 aim to prohibit a picket unless there are picketing rules in place. A Commissioner conciliating a dispute is also required to determine picketing rules if there is no existing collective agreement regulating picketing or there is no agreement between the parties on picketing rules.

In determining the picketing rules, the commissioner must do so in accordance with the default picketing rules contained in the Code and after taking account of representations made by the parties to a dispute.

iii. Minimum and maintenance services (clause 72 and 75)

Amendments to section 72 provide for the ratification of minimum service agreements by a panel appointed by the Essential Services Committee (ESC) and a definition of minimum services.

Provision is made to permit the panel appointed by the ESC to vary or rescind a designation or part of a service as a maintenance service.

iv. Secret ballot (clauses 95 and 99)

The existing LRA (section 95 (5)(p)) requires trade unions and employer organisations that seek registration to have a provision in their constitutions requiring a ballot of members before embarking on a strike or lockout as the case may be.

To clarify that a ballot means any system of voting that is recorded and secret, a definition of a ballot is inserted in section 95.

Section 99 which deals with records that must be kept, including ballot papers, is amended to allow for other forms of documentary or electronic record of a ballot.

v. Registrar of Labour Relations (clause 108)

Section 108 of the LRA is amended to clarify that the Registrar and Deputy Registrar are independent and subject to the Constitution and the LRA and must be impartial and exercise their powers and perform their functions without fear, favour or prejudice.

vi. Commission for Conciliation, Mediation and Arbitration (clauses 116 and 128)

Several amendments are made to various sections of the Act dealing with the CCMA. The one that has socio-economic consequences is the amendment that clarifies that an accredited bargaining council or private agency may only appoint a person to resolve a dispute if that person is accredited by the Governing Body of the CCMA. This amendment will require bargaining council panelists to meet the requirements of accreditation by the CCMA.

vii. Resolution of disputes through conciliation (clause 135)

The amendments to section 135 are to provide for the extension of the 30-day conciliation period to ensure a meaningful conciliation process. The commissioner conciliating the dispute or a party to the conciliation may apply to the director of the Commission for an extension provided that the period does not exceed 5 days.

viii. Advisory arbitration panel in the public interest (clauses 150A to 150E)

To endeavour to resolve strikes or lockout that are intractable, violent or may cause a local or national crisis, amendments provide for the establishment of an advisory arbitration panel to on an expedited basis investigate the cause and circumstances of the strike or lockout and make an advisory award in order assist the parties in dispute to resolve the dispute. The parties to the dispute are required to indicate their acceptance or rejection of the advisory award within 7 days of the award or, if extended, within a maximum of 13 days. If they fail to do so the party is deemed to have accepted the award. Before a party to the dispute rejects an award it must

consult with its members in accordance with its constitution and must motivate its rejection of the award if it does so.

The Code of Good Practice on Collective Bargaining, Industrial Action and Picketing

The Code is intended to provide practical guidance on collective bargaining, the resolution of disputes of mutual interest and the resort to industrial action. It is intended to be a guide to those who engage or want to engage in collective bargaining or who seek to resolve disputes of mutual interest by mediation, conciliation, arbitration or as a means of last resort, industrial action.

Picketing Regulations

The Picketing Regulations give effect to the amendment to section 69 of the Act by setting out the process whereby parties to a dispute may not engage in a picket unless there is a collective agreement regulating picketing or an agreement is reached in the conciliation proceedings or picketing rules are determined by a Commissioner of the CCMA. The Regulations also make provision for the distribution of picketing rules.

b) Problem/s and root causes that the proposal is trying to address

Identified Problem	Root causes
Industrial actions becoming violent and continuing unabated for a long time (protracted strikes)	Misalignment between law on strikes and action taken by parties during industrial action.
Collective bargaining agreements that are: <ul style="list-style-type: none"> • at risk of not being extended due to insufficient representativeness of parties to the collective agreement of a bargaining council • at risk of not being renewed • posing potential threats for bargaining council funds to collapse. 	Declining membership of trade unions and employer organisations. Challenges to the Minister of Labour’s power to extend collective agreements to non-parties Failure to secure agreement between parties to extend or renew funding agreements in bargaining councils

1.2. Describe the intended outcomes of the proposal

At a strategic level, the overall intended outcome of the proposal is to strengthen collective bargaining⁵ and to ensure greater stability in labour relations. This is to be achieved through training of negotiators in accordance with the Code and the use of the new amendments to the LRA to facilitate the extension of collective agreements, including funding agreements and to utilise the section 150 provision for advisory arbitration. The reinvigoration of strike balloting is also intended to contribute to peaceful industrial action.

1.3. Describe the groups that will benefit from the proposal, and the groups that will face the cost. These groups could be described by their role in the economy or in society. As a minimum, consider if there will be specific benefits or costs for the poorest households (earning R 7000 a month or less); for black people, youth or women; for small and emerging enterprise; and /or for rural development. Add more rows if required.

Groups that will benefit	How will they benefit?
Workers	The proposed amendments are intended to provide a stronger environment for collective bargaining and wage negotiations and to ensure that due processes are followed when strikes take place.
Trade Unions	Trade unions will benefit from more flexible ways in which strike ballots may be conducted, the use of advisory arbitration to facilitate settlement of mutual interest disputes and greater stability around collective agreements in bargaining councils.
Employers and employers' associations	Employers and employer associations will benefit from more flexible ways in which ballots prior to a lockout may be conducted, the use of advisory arbitration to facilitate settlement of

⁵ Declining representivity of employer and trade union organisations is one of the important factors that weaken collective bargaining. While there are other factors impacting on collective bargaining, government is aware of the long term risk that declining representivity poses to collective bargaining, especially at sectoral level.

	<p>mutual interest disputes and greater stability around collective agreements in bargaining councils.</p> <p>The provisions for default picketing rules are also intended to facilitate orderly behaviour during pickets.</p>
Bargaining councils	Their funds will be guaranteed existence as the extensions of funding agreements is made easier by the amendments.
The nation/ citizens	Greater labour market stability and reduced violence during strikes will be in the public interest and will benefit local communities affected by industrial action.
Government and institutions within the public sector.	Government is the biggest employer in the country and will benefit from the proposals in public sector labour relations. In addition, less effort and resources will be channelled towards strikes, for example - police - are expected to be at work to monitor strikes and when these are at high numbers it translate to police spending more time on monitoring industrial action.

Groups that will bear the cost or lose	How will they incur the costs or lose?
Employers and their association	Employers will bear the cost of loss of working time when balloting takes place and time off for union representatives for training on the Code. The exact quantum will vary by workplace, union membership in the workplace and number of union representatives to be trained.
Trade unions	Trade unions will bear operational costs of conducting ballots and training members in terms of the Code. The quantum will vary by trade union, depending on its size, how it chooses to conduct a ballot and whether it has a tradition of balloting or not.
Employees	Employees will bear costs in instances where time off work for balloting and training is not paid for by the employer and/or the trade union.

Groups that will bear the cost or lose	How will they incur the costs or lose?
CCMA	The CCMA will be developing training material and conducting training for employers and trade unions on the Code. The CCMA is also likely to be called on oversee balloting in workplaces and to provide an independent verification of the results of a ballot.
Government	Government may contribute to the development of tools for balloting purposes and will carry the cost of public consultations and communication on the LRA Amendments and the Code.

1.4. Describe the behaviour that must be changed, main mechanisms to achieve the necessary changes. These mechanisms may include modifications in decision making process systems; changes in procedures; educational work; sanctions; and or incentives. Also identify groups inside or outside government whose behaviour will have to change to implement the proposal. Add more rows if required.

Groups inside Government	Behaviour that must be changed (Current Behaviour)	Main mechanism to achieve the necessary changes
CCMA	CCMA approach to assisting parties in resolving strikes or lockouts that are intractable, violent or may cause a local or national crisis.	Director of CCMA able to establish an advisory arbitration panel if directed to do so.
Department of Labour	Approach to determination of representativeness of parties to a collective agreement concluded in a bargaining council. Change in approach to processing renewal and extension of funding agreements.	Amendment to section 32 of the LRA and reliable information on coverage of collective agreements. Amendment to section 32 of the LRA and revision of forms containing information relevant to request by bargaining council.
SAPS	Public order policing to be allocated sufficient capacity to monitor strikes, lockouts, pickets and protest action and to refrain from acting in a manner that escalates conflict.	Adherence to Code of Good Practice and training of police in public order policing.

Groups outside Government	Behaviour that must be changed (Current Behaviour)	Main mechanism to achieve the necessary changes
Bargaining councils	<p>Failure to reach agreement on extension of funding agreements.</p> <p>Lack of programs and services to trade unions and employers as contemplated in the Accord on Collective Bargaining and Industrial Action and the Code.</p>	<p>Minister of Labour given the power to extend funding agreements at the request of one party to a bargaining council.</p> <p>Bargaining Councils to become signatories to the Accord in terms of which they undertake to provide services to parties.</p>
Employers and Employer associations	Failure to secure agreement to extend or renew collective agreements that relate to funding of bargaining councils and their pension, medical aid and other funds.	Any of the parties to the bargaining council may request the Minister to extend a funding agreement for up to 12 months.
Employees	Violent behaviour during strikes, intimidation of other workers, damage to property during marches and industrial action.	<p>To ensure that registered trade unions make provision for secret ballots in their constitutions and that they abide by their constitutions.</p> <p>Establishment of an advisory arbitration panel on an expedited basis to investigate the cause and circumstances of the strike or lockout and make an advisory award in order assist the parties to resolve the dispute.</p>
Trade Unions	<p>Not conducting secret ballots prior to embarking on strike action.</p> <p>Lack of effective marshalling of members participating in pickets and industrial action.</p>	<p>Ability of the CCMA to determine picketing rules in the absence of any rules or agreement thereto.</p> <p>Establishment of an advisory arbitration panel to expedited the resolution of the dispute.</p>

1.5. Report on consultations on the proposal with the affected government agencies, business and other groupings. What do they see as the main benefits, costs and risks? Do they support or oppose the proposal? What amendments do they propose? And have these amendments been incorporated in your proposal?

Consultation took place during 2015-2016 under the auspices of NEDLAC and via a Committee of Principals chaired by the Deputy President. Government was represented in the Committee of Principals by the Ministers of Labour, Finance, Economic Development, Trade and Industry and Small Business. The NEDLAC consultations were facilitated by a Senior Commissioner of the CCMA who provided regular reports to the Committee of Principals on the work of the task team. These reports recorded areas of agreement and disagreement between the constituencies represented in the task team. The process culminated in the adoption of a Declaration on Wage Inequality and Labour Market Stability (attached as **Annexure A**) which documents the agreement reached. All parties to the NEDLAC engagements have agreed to the outcomes, that is, the amendments to the LRA, the Accord and the Code of Good Practice.

In addition to the NEDLAC process, the Department of Labour consulted with the SAPS and the NPA on the Accord on Collective Bargaining and Industrial Action and the Code of Good Practice on Collective Bargaining, Industrial Action and Picketing. The CCMA has also been briefed on the outcomes of the NEDLAC process.

Table on consultations:

Affected Stakeholders	What do they see as main <u>benefits, costs and risks?</u>	Do they <u>support</u> or <u>oppose</u> the proposal?	What <u>amendments</u> do they propose?	Have these amendments been <u>incorporated</u> in your proposal?
<p>1. Government Departments and Agencies (See above)</p>	<p>Economic growth, investment, improved productivity and faster job creation require a stable labour market in which the rights and responsibilities of all stakeholders are respected and promoted.</p> <p>Right to strike a constitutional right and a legitimate exercise of power.</p> <p>Prolonged and violent strike action has potential to cause serious harm, to employers, employees and those outside the workplace.</p> <p>Collective bargaining should be promoted as an instrument through which to</p>	<p>Support</p>	<p>All amendments incorporated in final outcomes.</p>	<p>Yes</p>

	mediate needs and interests of employers and employees.			
2. Business- Business Unity South Africa, Black Business Council.	As above. Other businesses not represented in the NEDLAC process will be consulted when legislation is published for public comment.	Support.	All amendments incorporated in final outcomes.	Yes.
3. Organised Labour- COSATU, NACTU, FEDUSA.	As above. Independent trade unions will be consulted when legislation is published for public comment.	Support.	All amendments incorporated in final outcomes.	Yes.
4. Civil Society- Community constituency as represented at NEDLAC.	As above.	Support.	All amendments incorporated in final outcomes	Yes.

1.6. Describe possible disputes arising out of the implementation of the proposal, and system for settling and appealing them. How onerous will it likely be for members of the public to lodge a complaint and how burdensome and expeditious is the proposed dispute-settlement procedure?

Labour relations disputes will be dealt with in accordance with the Labour Relations Act as amended. Disputes relating to the Accord on Collective Bargaining and Industrial Action will be dealt with through engagement and negotiation between the affected parties.

2. Impact Assessment

2.1. Describe the costs and benefits of implementing the proposal to the groups identified in point 1.5 above, using the following chart. Add more rows if required

Group	Implementation Costs	Costs of changing behaviour	Costs/Benefits from achieving desired outcome	Comments
Trade Unions	Disseminating picketing rules to workers. Conducting secret ballots prior to strike action. Support for training of union representatives.	Training and awareness campaigns among trade union members.	Continuation of funding agreements due to extension ensures social protection for trade union members. Strike action that enjoys majority support and is peaceful will benefit union members.	Specific costing will depend on size of unions and their capacity to implement the Accord, Code and LRA amendments.
Employers' association	Conducting secret ballots prior to lockouts. Disseminating picketing rules to employers.	Training and awareness campaigns among employer members.	Continuation of funding agreements due to extension ensures social protection for employees. Strike action that enjoys majority support and is	

	Support for training of employer representatives.		peaceful will benefit employers by minimising the risk of damage to property.	
Government	<p>Publication costs of LRA amendments and Code.</p> <p>Cost of public and stakeholder consultation and advocacy process (R450 000.00).</p> <p>Cost of communication plan (budget of R5m).</p>	<p>Awareness campaigns.</p> <p>Monitoring and implementation of LRA amendments (especially transitional provisions) , Accord and Code.</p>	Improved labour market stability.	
CCMA	<p>Establishing Advisory Arbitration panels.</p> <p>Conducting secret ballot's and verifying results.</p> <p>Stakeholder workshops on Code.</p> <p>Commissioner training.</p> <p>Material development.</p>	Awareness campaigns.	Improved labour market stability and possible reduction in case load.	

2.2. Describe the changes required in budgets and staffing in government in order to implement the proposal. Identify where additional resources would be required for implementation. It is assumed that existing staff are fully employed and cannot simply absorb extra work without relinquishing other tasks.

No envisaged change in staffing in government departments, however there is a likely increase in the workload of the CCMA associated with implementation of the legal amendments and the Code of Good Practice over the next two years of the medium term expenditure framework. Costs associated with the increased functions relate to support for balloting and picketing rules, advisory arbitration processes, support for negotiations and facilitation, advocacy and capacity building. Initial cost estimates are being developed and will be refined during the period in which the legislative amendments are finalised and published for comment. A costing exercise will be completed by the time of the next budget cycle.

2.3. Describe how the proposal minimises implementation and compliance costs:

The proposal does carry cost implications for CCMA Commissioners who may be required to verify strike ballot results. These costs could be reduced by the involvement of private agencies in verification of strike ballots and the costs being borne by the parties to a dispute. Similarly, bargaining councils have the ability to cover costs through the levy income obtained from parties within their sectors.

Government stakeholders consulted include the Department of Higher Education and Training which will be asked to ensure that Sector Education and Training Authorities support the training aspect of the implementation process. Some costs of training will however be borne by trade unions and employers' associations.

3. Managing Risk

3.1. Describe the main risks to the achievement of the desired ends of the policy/bill/regulations/other and/ or to the national priorities (aims) that could arise from adoption of the proposal. Also describe the measures taken to manage the identified risks. Add more rows if necessary.

Identified Risk	Mitigation Measures
Non-adherence to the Declaration on Wage Inequality and Labour Market Stability	Pressure to be exerted on parties through the Committee of Principals
Lack of adherence to constitutional provisions relating to strike balloting	Publication of notices of intention to cancel the registration of trade unions
Legal challenges to extension of collective agreements in terms of amendments to LRA.	Effective advocacy of legal amendments and adherence to due administrative process in extension of collective agreements to non-parties
Higher than expected costs of implementation of legal amendments and Code of Good Practice.	Effective monitoring of implementation, revised costing estimates and consideration of fee for service as provided for in section 123 of LRA.

3.2. Describe the mechanisms included in your proposal for monitoring implementation, evaluating the outcomes, and modifying the implementation process if required. Estimate the minimum amount of time it would take from the start of the implementation process to identify a major problem and remedy it.

Mechanisms:

The proposal will be monitored through CCMA operational reporting as well as through the activities of the office of the Registrar of Labour Relations who monitors compliance by trade union and employer organisations with the LRA.

The LRA make provision for employers to report to the Department of Labour any strike taking place in their firms, using form 9.2 of the LRA. All these mechanisms will generate information that will be monitored and modifications made to the implementation process, if necessary.

4. Summary

4.1. Summarise the impact of the proposal on the main national priorities

National Priority	Impact
1. Social Cohesion	N/A
2. Security (Safety, Financial, Food, Energy and etc.)	The proposed amendments are intended to contribute to enhanced labour market stability and reduced conflict during strikes.
3. Economic Growth	Enhanced labour market stability will be supportive of greater economic growth and investment.
4. Economic Inclusion (Job Creation and Equality)	N/A
5. Environmental Sustainability	N/A

4.2. Identify the social and economic groups that would **benefit most** and that would **bear the most cost**. Add more rows if required.

Main Beneficiaries	Main Cost bearers
Employees and trade unions	Employers
Employers and their associations	
Government	Government

4.3. In conclusion, summarise what should be done to reduce the costs, maximise the benefits, and mitigate the risks associated with the policy/bill/regulations/other. Note supplementary measures (such as educational campaigns or provision of

financing) as well as amendments to the draft itself, if appropriate. Add more bullets if required.

- a) Training of shop-stewards/worker representatives to communicate the intentions of the amendments and the Code.
- b) Awareness campaigns.
- c) Implementation of the transitional provisions to the LRA amendments to work with trade unions to make provision for secret ballots in the constitutions and to abide by their constitutions.

4.4. Please identify areas where additional research would improve understanding of the costs, benefits and/ or risks of the policy/bill/regulations/other:

N/A

For the purpose of building SEIAS body of knowledge please complete the following:

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